Indian Evidence Act, 1872

[Third Correction]

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INDIAN EVIDENCE ACT, 1872

Introduction

Indian Evidence Act is adjective/procedural law[1]. It can be enforced with retrospective effect. It is 'Lex Fori'[2]. Lex Fori means the law of place where the question arises. For the example if the question arises whether person is competent witness or particular fact is admissible, it shall be decided according to the law of the country where Forum (Court) exist. Mainly it is procedural law. But section 115 of the Act is substantive law. In 1868 Mr. Henry Maine drafted but that was not suitable. In 1871 Sir James Fitzjames Stephen drafted[3] Indian Evidence which converted into Indian Evidence Act, 1872 (1 of 1872). So Sir James Fitzjames Stephen is called father[4] of 'Father of Indian Evidence Act, 1872'. He had written 'A Digest of the Law of Evidence'. Originally Indian Evidence Act contained 167 Sections, 11 Chapters and one Schedule. But in 1938 Schedule was repealed. Now, Indian Evidence Act contained 167 Sections, 11 Chapters.[5]

Preamble

WHEREAS it is expedient to ***consolidate, define*** and ***amend*** the law of Evidence; it is hereby enacted as follows…

Comment

Three purpose (CDA) -Purpose of the Act is to consolidate, define and amend the law of Evidence.[6]

Section 1

Short title -This Act may be called the Indian Evidence Act, 1872.

Extent - It extends to the whole of India and applies to all judicial proceedings in or before any Court, including Courts-martial, other than Courts-martial convened under the Army Act (44 & 45 Vict., c. 58) the Naval Discipline Act [29 & 30 Vict., 109]; or the Indian Navy (Discipline) Act, 1934 (34 of 1934), or the Air Force Act (7 Geo. 5, c. 51) but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator;

Commencement of Act.—And it shall come into force on the first day of September, 1872.

Comment

Extent of Indian Evidence Act, 1872'

According to section 1 of the Indian Evidence Act, 1872' it extends to the whole of India. Before the commencement of Jammu and Kashmir Reorganisation Act, 2019[7] IEA was not applicable to the Jammu and Kashmir. But after the Act IEA is applicable to the whole of India including Union Territory Ladakh and Jammu & Kashmir.

The Fifth Schedule, Table 1S.No. 44 of Jammu and Kashmir Reorganisation Act, 2019 provides – 'In sub-section 2 of section 1, word "except the State of Jammu and Kashmir" shall be omitted. This Act came on 31st Oct.2019. It is birth anniversary of Hon'ble Sardar Vallabhbhai Patel.

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[1] In ancient and medieval time several jurist using 'Adjective law' instead of 'Procedural law'.
[2] Raj. APO, 2011. UP (J), Pre. 2016.
[3] UK (J) 2005
[4] UPSC Assistant Professor, 2016,Interview.
[5] UK APO 2010.
[6] UP APO 2005 & 2007.
[7] It is available on http://egazette.nic.in/WriteReadData/2019/210407.pdf. Last visited January 7, 2020.

Application of Indian Evidence Act, 1872

Indian Evidence Act applies to all judicial proceedings in or before any Court, including Courts-martial, other than Courts-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act, 1934 or the Air Force Act but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator.

Applicable –

(i) Judicial proceedings in or before any Court

(ii) Judicial proceedings in or before any Court including Courts-martial,

Not applicable

(i) Administrative Proceeding

(ii) Tribunal – In the case of *Union of India* v. *T.R. Verma* (1957) Supreme Court observed, "The Indian Evidence Act has no application to enquiries conducted by tribunals. The law only requires that tribunals should observe rules of natural justice.

(iii) Courts-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act, 1934 or the Air Force Act

(iv) Affidavits. Although IEA is not applicable to affidavits but proving facts by affidavit is not barred. In practice facts are proved by affidavit.

(v) Proceedings before an arbitrator[8].

Enforcement of Indian Evidence Act, 1872'

According to section 1 of the Indian Evidence Act, 1872' it came into force on the first day of September, 1872. This is also date of enforcement of Indian Contract Act,1872.[9] It can be make enforceable with retrospective effect[10].

Section 2. Repeal of Enactment - *Rep. by the Repealing Act,* **1938** *, s.* 2 *and Schedule.*

Hira H. Advani Etc.* v. *State of Maharashtra (13 August, 1969)

In the case of *Hira H. Advani Etc.* v. *State of Maharashtra* Supreme Court said, "Section 2 of the Indian Evidence Act before its repeal by the Repealing Act, [(1) of 1938)] provided as follows:

"***Section 2****- On and from that day (1st September 1872) the following laws shall be repealed;*

(1) *- All rules of evidence not contained in any statute, Act or Regulation in force in any part of British India;*

(2) *All such rules, laws and regulations as have acquired the force of law under the 25th section of the 'Indian Councils Act'1861 in so far as they relate to any matter herein provided for; and* ***(3)*** *The enactments mentioned in the schedule hereto, to the extent specified in the third column in the said schedule. But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."*

Privy Council in *Sri Chandra Nandi* v. *Rakhalananda* (1940) Justice Atkin observed, "It is to be noticed in this connection that Section 2(1) of the Indian Evidence Act repeals the whole of the English common law on evidence so far as it was in force in British India before the passing of the Indian Evidence Act, and that provision of the law in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself."

[8] Bihar (J) 1999

[9] MP APO, 1997. Uttarakhand APO 2010.

[10] MP APO, 1993.

Before the passing of Section 2 of the Indian Evidence Act, 1872, the rules of evidence were governed by the

- English Law
- Hindu Laws
- Muslim Laws
- Rules of justice, equity & good conscience
- Rules and regulations under section 25 of the Indian Councils Act
- Certain enactments mentioned Schedule

Section 2 had already repealed these laws. So once section 2 was repealed in 1938 there was no effect on legal point because repealed Acts were not enacted later on.
Provision of section 2 was unnecessary[11].

UP APO 2019

Question -Section 2 of the Indian Evidence Act, 1872 was repealed by –

A. Repealing Act, 1948
B. Repealing Act, 1945
C. Repealing Act, 1883
D. Repealing Act, 1938

Answer – D. Repealing Act, 1938.

Jharkhand (J) (Mains) 2019

Question 8(b) (i) – Explain – "Falsus in uno falsus in omnibus" –
Answer – In *Bur case*, this maxim was explained by Supreme Court. This is following -

Bur Singh v. State of Punjab[12] (Oct. 13, 2008)

"Falsus in uno falsus in omnibus" means false in one thing, false in everything.
The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liars.
Falsity of particular material witness or material particular would not ruin it from the beginning to end.
Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained.

[11] Batuk Lal, 'Law of Evidence' 5 (Central Law Agency, Allahabad, 19th Edn. 2010).
M. Monir, 'Textbook on the Law of Evidence' 15 (Universal Law Publishing Co., New Delhi 9th Edn., 2013).
[11] AIR2010SC 2914.
[12] AIR 2009 SC 157

It is the duty of Court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons.

The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'.

***Prem Singh & Ors.* v. *State of Haryana*[13]**, (2009)

Supreme Court clearly held as under: "It is now a well-settled principle of law that the doctrine "falsus in uno, falsus in omnibus" has no application in India."

Ranjit Singh* v. *State of Madhya Pradesh (2010) (SC)

It is well settled in law that the maxim falsus in uno, falsus in omnibus (false in one false in all) does not apply in criminal cases in India, as a witness may be partly truthful and partly false in the evidence he gives to the Court.

UP (J) Mains, 1986, Question 7 (a) &
UP (J) Mains, 2003, Question 6 (a)

Distinguish between direct and circumstantial evidence. Can a person be convicted on circumstantial evidence alone?

UP (J) Mains, 1986, Question 7 (b) &
UP (J) Mains, 2003, Question 6 (b)

Distinguish between rebuttable and irrefutable presumption of law. Discuss

UP (J) Mains, 1986, Question 7 (c)

Distinguish between relevancy and admissibility of evidence.

UP (J) Mains, 1992, Question 5 (a) &
UP (J) Mains, 2003, Question 5 (a)

"All admissible evidence is relevant, but all relevant evidence is not necessarily admissible." Comment.

UP (J) Mains, 1999, Question 5

What do you understand by conclusive and rebuttable presumption. Explain.

UP (J) Mains, 2000, Question 6(a)

"Relevancy and admissibility are neither synonymous nor is the one included in other." Elucidate this statement.

UP (J) Mains, 1992, Question 5 (a) &
UP (J) Mains, 2003, Question 5 (a)

"All admissible evidence is relevant, but all relevant evidence is not necessarily admissible." Comment.

UP (J) Mains, 2003, Question 6 (a) &
UP (J) Mains, 1986, Question 7 (a)

[13] (2009) 14 SCC 494

Distinguish between direct and circumstantial evidence. Can a person be convicted on circumstantial evidence alone?

UP (J) Mains, 1986, Question 7 (b) &
UP (J) Mains, 2003, Question 6 (b)

Distinguish between rebuttable and irrefutable presumption of law. Discuss.

UP (J) Mains, 2006, Question 5 (a)

What do you understand by relevancy of facts? Are all the relevant facts admissible in Court? Explain.

UK (J) 2011, UP APO(Pre) 2019

Question – Which one of the following is not defined under section 3 of the evidence act?

A. Court
B. Document
C. Evidence
D. Confession

Answer- D.

UP (J) (Mains) 2019

Question 7(c) – What do you understand by the word 'Court' used in the Indian Evidence Act, 1872? Discuss with the help of decided cases.

Answer- According to Stephen, "In every Court, there must be at least three constituent parts-the actor, reus and judex; the actor or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact, and to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy".

According to Section 3 of the Indian Evidence Act, 1872**,** "Court" includes all Judges and Magistrates, and all persons, except arbitrators[14], legally authorised to take evidence[15].

Name of the authority or institution is not important. Substance of the institution is important.

Brijnandan Sinha v. Jyoti Narain

Definition of Court under Indian Evidence Act is not exahaustive.

AIR 1956 SC 66 it has been held that any Tribunal or authority whose decision is final and binding between the parties is a court. In the said decision, the Supreme Court, while deciding a case under Court of Enquiry Act held that a court of enquiry is not a court as its decision is neither final nor binding upon the parties.

Difference between Court and Quasi Judicial Tribunal

Shri Virindar Kumar Satyawadi v. *The State of Punjab* (24 November, 1955SC) – In this case Supreme Court observed,

[14] UP9J) 2003.
[15] Raj. APO 2011.

- "In may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment.
- To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law.
- When a question therefore arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court".

***State of Madhya Pradesh* v. *Anshuman Shukla* (2008)**

The very fact that the authorities under the Act are empowered to examine witnesses after administering oath to them clearly shows that they are 'Court' within the meaning of the Evidence Act.

In this case Hon'ble Supreme Court observed, "The Arbitral Tribunal under Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 is Court.The Arbitral Tribunal is constituted in terms of Section 3 of the Act. Section 17 gives finality to the award made thereunder. Such awards made, in terms of Section 18 would be deemed to be a decree within the meaning of Section 2 of the Code of Civil Procedure, 1908. Section 19 confers a power of revision on the High Court. The Tribunal has been confirmed various powers.

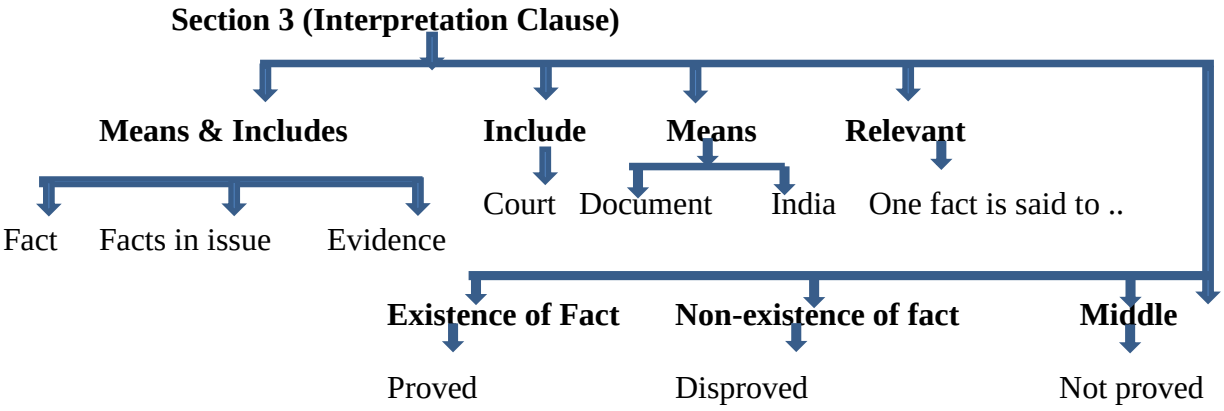
There, therefore, in our opinion, cannot be any doubt whatsoever that the authorities under the Act are also 'courts' within the meaning of the provisions of the Indian Evidence Act.

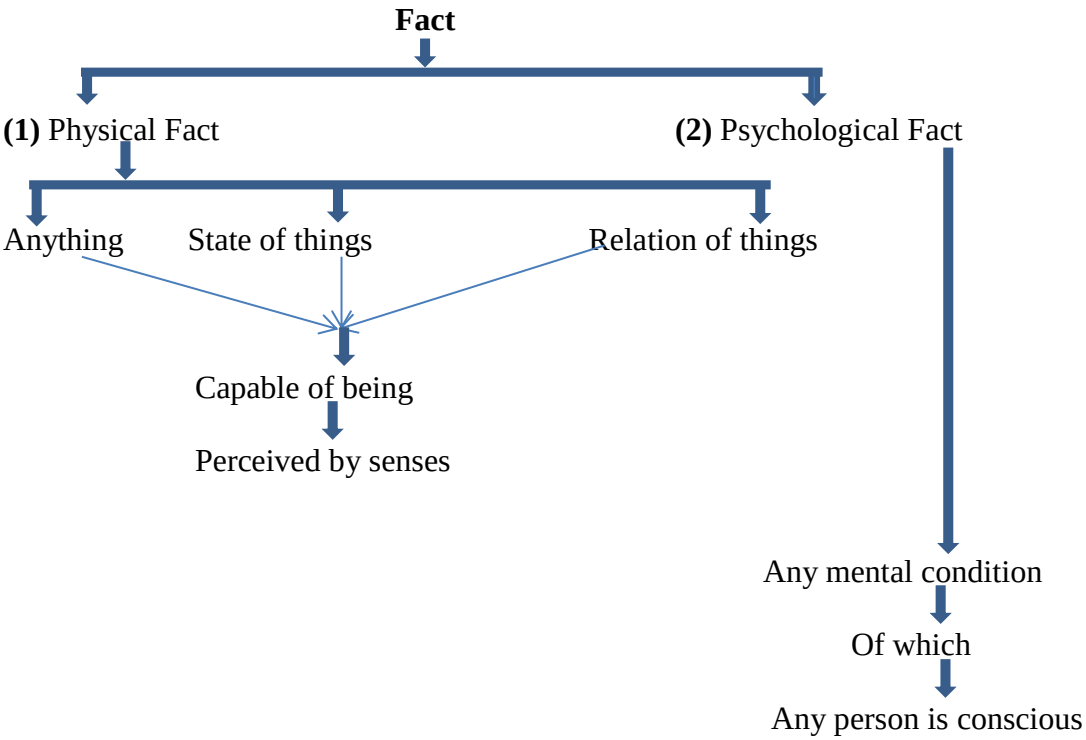
Jagadguru Annadanishwara Maha Swami Ji* .v. *V.C. Allipur 20 March, 2009

It is now well settled principle of law and having regard to the definition of the Court contained in various statutes like Code of Civil Procedure or the Evidence Act would mean a Tribunal, whose decision shall be final and/or would be entitled to take evidence in terms of the provisions of the Evidence Act. It is also well settled that although a Tribunal may exercise some of its powers in terms of the Code of Civil Procedure or Code of Criminal procedure and have all the trappings of a Court but still would not be treated as a Court.

The Director, Pre-University, Education was not functioning as a Court.

Conclusion – Meaning of Court is decided according to particular statute.





There are two types of 'Fact' namely; **(1)** Physical Fact **(2)** Psychological Fact

"Fact"[16] means and includes-
(1) Physical Fact- anything, state of things, or relation of things, capable of being perceived by the senses;
Illustrations
(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact.
(*b*) That a man heard or saw something, is a fact.
(*c*) That a man said certain words, is a fact.

(2) Psychological Fact - any mental condition of which any person is conscious.

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

UP (J) Mains 2000 Question 5(a)

What is facts in issue? Illustrate your answer?

UP (J) Mains 2012 Question 7(a) (iv)

Write short note on Facts in issue.

[16] MP HJS2011, UK(J) 2008

Section 3- Facts in issue[17]

"Facts in issue".— The expression "facts in issue" means and includes - any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

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

Illustrations

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

There are two ingredients of facts in issue
(1) There must be fact.
(2) That fact must be disputed between parties.

The expression "facts in issue"
(a) means and includes -
(b) any fact from which, *either by itself or in connection with other facts*,
(c) Four Points -the existence, non-existence, nature or extent of
(d) Three Points (**RLD** Party) -any right, liability, or disability,
(e) Two Points (Dispute/Opposite Claim) - asserted or denied
(f) Suit means Civil Matter and Proceeding means Criminal Matter - in any suit or proceeding,
(g) Main constituent -necessarily follows.

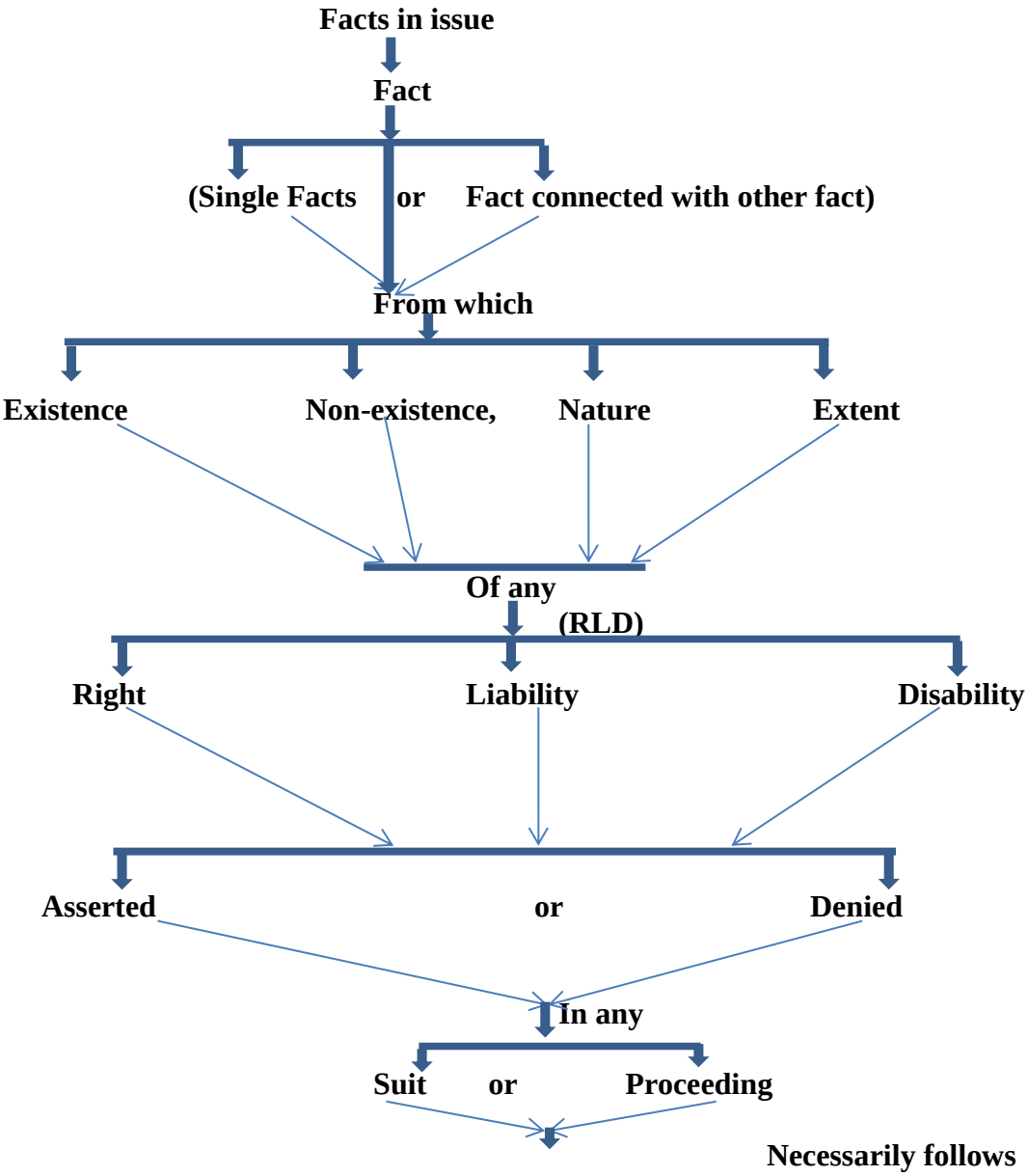
Illustrations

A is accused of the murder of B.
At his trial the following facts may be in issue:—
(i) Whether A caused B's death; (Causing death – Physical Fact)

(ii) Whether A intended to cause B's death; (*Intention –Psychological Fact. Whether death was caused with intention. Intention (Fact) converts facts in issue. So all facts in issue are fact but all facts are not facts in issue.*
(iii) Whether A had received grave and sudden provocation from B;

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

[17] UP (J) Mains 2012.



"Proved"

A fact is said to be proved when, ***after considering the matters before it***, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

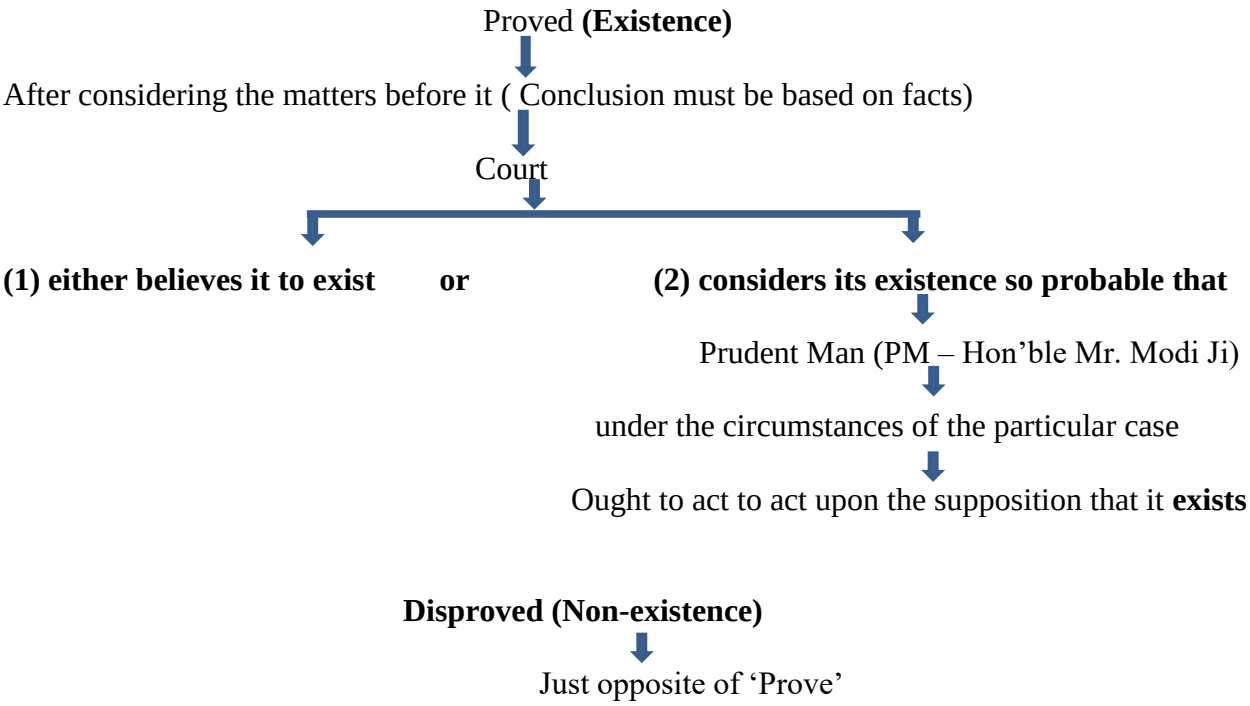
"Disproved"

A fact is said to be disproved when, ***after considering the matters before it,*** the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved".

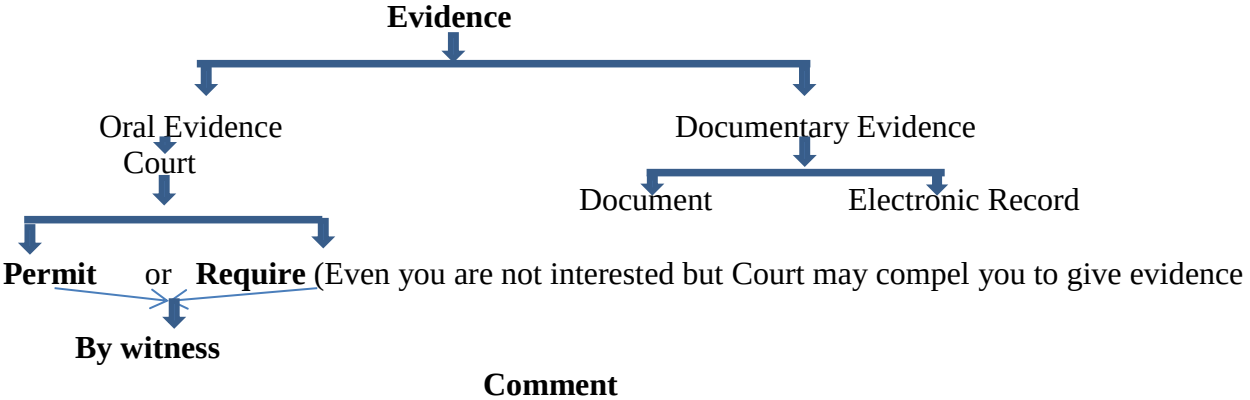
A fact is said not to be proved when it is neither proved nor disproved[18].

Remarks – *after considering the matters before it* …It is mandatory for the Court first of all to consider (Perusal) the matters before it, then come to the conclusion regarding existence or non-existence of fact *after considering the matters before it*….this compels judges to take rational decision. It controls capricious mind of judges.



"Evidence" "Evidence" means and includes -
(1) Oral Evidence - all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
such statements are called oral evidence;

(2) Documentary Evidence - all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.



Comment

[18] UK (J)2002, UK APO 2011 & UP (J) 2006.

Only witness can give evidence. So this definition in rigid term is defective. It does not cover confession or admission made by accused. Tape recorded evidence is documentary evidence rather that oral evidence.[19]. Discovery of fact with the help of tracker dog is a scientific evidence.

Question- Is evidence includes 'Video Conferencing'?
Answer- Yes.
Question- Is evidence in criminal cases be taken through 'Video conferencing'?
Answer- Yes.

State of Maharashtra v. *Dr. Praful B. Desai*[20] (April 1, 2003)

In this case court held that electronic evidence includes evidence through 'Video Conferencing'. For the purpose of presence under section 273, Cr.P.C. includes constructive presence.

Facts -

Wife of Mr. P. C. Singhi (Complainant) was suffering from cancer. Spouse consulted Dr. Greenberg in USA. He suggested that surgery of this was not solution and she should be treated only by medicine. They returned form USA and consulted Dr. Praful B.Desai. He suggested that operation was solution and he can cure. Mr. P. C. Singhi and his wife became ready for operation subject to condition that operation would be conducted only by Dr. Praful B.Desai.

But operation was conducted by Dr. A. K. Mukherjee on 22-12-1987. There was negligence and wife of complainant died. Maharashtra Medical Council conducted conducted inquiry and found negligence. FIR was registered against Dr. A. K. Mukherjeem and Dr. Praful B.Desai for under section 338 read with section 109 & 114 of IPC.

Trial was going on. On 29-06-1998 the prosecution made an application to examine Dr. Greenberg through video-conferencing who was ready to give evidence but he was not ready to come to India.

Issue - Whether in a criminal trial, evidence can be recorded by video conferencing.

Metropolitan Magistrate (Yes) – In a criminal trial, evidence can be recorded by video conferencing. In this case evidence of Greenberg is relevant.

It was challenged in High Court.UK APO 2010.

High Court (No) **-** In a criminal trial, evidence cannot be recorded by video conferencing. It was challenged by State in Supreme Court. In this case evidence of Greenberg is not relevant.

Supreme Court (Yes) - In a criminal trial, evidence can be recorded by video conferencing. In this case evidence of Greenberg is relevant. Guidelines were issued for recording of evidence through video conferencing.

Arguments of P.B.Desai – Cr.P.C. deals procedure established by law. Article 21 talks about just, fair and reasonable procedure. So departure from procedure established by Cr.P.C. would be violation of Article 21. There are following arguments-

(1) According to section 273, evidence must be recorded in *physical presence* of accused. So recording of evidence of Greenberg who is sitting in USA shall be violation of section 273, Cr.P.C.

(2) Section 273 talks about evidence. Evidence does not include video conferencing.

(3) Video conferencing is virtual reality.

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[19]

[20] (2003) 4 SCC 601

Section 273 Evidence to be taken in presence of accused –

- ***Except as otherwise expressly provided***,
- all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or,
- when his personal attendance is dispensed with, ***in the presence of his pleader***.

Issue 1

Whether taking evidence of Greenberg though video conferencing amounts to be in presence of accused.

Answer – Yes. Presence includes constructive presence. Section 273 itself creates two exceptions. These are –

- ***Except as otherwise expressly provided***,
- ***when his personal attendance is dispensed with, in the presence of his pleader***.

Thus Section 273 provides for dispensation from personal attendance. In such cases evidence can be recorded in the presence of the pleader. The presence of the pleader is thus deemed to be presence of the Accused. Thus Section 273 contemplates constructive presence. This shows that actual physical presence is not a must. This indicates that the term "presence", as used in this Section, is not used in the sense of actual physical presence. A plain reading of Section 273 does not support the restrictive meaning sought to be placed by the Respondent on the word "presence".

Principle of Updating construction – Hon'ble Justice Bhagwati observed observed, "Law must constantly be on the move adapting itself to the fast-changing society and not lag behind."[21] Court must endeavour to find out truth. There would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce available evidence.[22]

According to this principle law must be interpreted according to changing society. Several provisions were interpreted with this doctrine. These are -

S.No.	***Statutory Provision***	***Words interpreted***	***Word included***
1	Section 45, Evidence Act	**Handwriting** includes	Typewriting
2	138, Negotiable Instrument Act	**Notice in writing** includes	Notice by Fax.
	Section 313, Cr.P.C.	**Personally** includes	Need not physical presence
3		**Telegraph** includes	Telephone
4		**Documents** includes	Computer databases
5	Section 273 Cr.P.C.	**Presence** includes	Constructive presence

Issue 2

Whether 'Evidence' includes video conferencing.

Answer- Yes.

"Evidence" "Evidence" means and includes -

[21] National Textile Workers' Union v. P.R. Ramakrishnan (1983) 1 SCC 228, 255.

[22] Nageshwar Shri Krishna Ghobe v. State of Maharashtra (1973) 4 SCC 23.

(1) Oral Evidence - all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
such statements are called oral evidence;
(2) Documentary Evidence - ***all documents including electronic records*** produced for the inspection of the Court; such documents are called documentary evidence.
After the amendment in the definition of 'Evidence' in 2000 *document includes electronic records. So Evidence includes 'Video Conferencing'.*

Issue 3

Whether video conferencing is virtual reality.

Answer- No.
Meaning of virtual reality – Virtual reality is a state where one is made to feel, hear or imagine what does not really exist.
In virtual reality,

- one can be made to feel cold when one is sitting in a hot room,
- one can be made to hear the sound of the ocean when one is sitting in the mountains,
- one can be made to imagine that he is taking part in a Grand Prix race whilst one is relaxing on one's sofa etc.

S.No.	Virtual Reality[23]	Actual reality
1	Feeling cold	Sitting in a hot room
2	Hearing the sound of the ocean[24]	Sitting in the mountains
3	Taking part in a Grand Prix race	Relaxing on one's sofa

Actual reality –
Advances in science and technology have shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place.
Example - Today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV.

- ***If a person is sitting in the stadium*** and watching the match, the match is being played in his sight/presence and he/she is in the presence of the players.
- ***When a person is sitting in his drawing room*** and watching the match on TV, it cannot be said that he is in the presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence.
- Both, the person sitting in the stadium and the person in the drawing room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening.

[23] It is like… 'Bhakt ka Chashma'. Once you use this spectacles, you will see development and prosperous everywhere. But reality is different.
[24] Actually you are sitting alone on mountain. But you are taking feeling of beach of Goa. This is virtual reality.

World cup match in South Africa	***person in stadium***	***person in drawing room***
Both will enjoy the match at the same time. *Suppose Mr. Sachin hit six.*	*Both will same how he hit six.*	*Both will same how he hit six.*

Video Conferencing is actual reality - Video-conferencing has nothing to do with virtual reality. It is actual reality. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you, i.e., in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video-conferencing both parties are in the presence of each other.[25]

Conclusion - So long as the accused and/or his pleader are present when evidence is recorded by video-conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273 of the Criminal Procedure Code.

Guidelines for recording of evidence through video conferencing

There are following guidelines were laid down before recording of evidence through video conferencing -

- **(1)** Fixing of time by officer deputed to record evidence.
- **(2)** Fixing of time by officer after consultation with VSNL[26]
- **(3)** He must be expert.
- **(4)** Opposite Party and his advocate must be present.
- **(5)** The officer must have authority to administer oath.
- **(6)** In case of perjury (False evidence) Court can ignore evidence of such person.
- **(7)** Opposite party (In this case respondent) must be allowed with documents.
- **(8)** Video Conferencing should be conducted without adjournment.
- **(9)**An officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded
- **(10)** The officer would remain present when the evidence is being recorded
- **(11)** The officer will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded.
- **(12)** That officer will ensure that the witness is not coached/tutored/prompted.

Conclusion – With above observation, it was directed to trial court to dispose of the case as early as possible and in any case within one year from today.

Remarks- It is pathetic condition of justice delivery system that a case which started 1987 could not be decided till 2003. It was again sent to trail court to decide acquittal or conviction of Dr. P.B.Desai.

[25] You are in Delhi. Your girlfriend/boyfriend is in other city. With video calling you can enjoy your life except touching body of your girlfriend/boyfriend. This is the actual reality rather than virtual reality.

[26] Videsh Sanchar Nigam Ltd. (VSNL).

Question DU. LL.B -2003–A tape recorded statement is a document. Discuss. What should be kept in mind while relying upon tape recorded evidence?
Question DU. LL.B -2005 - Discuss the relevancy and admissibility of the evidence obtained through 'Video Conferencing'.
Question DU. LL.B - Is evidence collected illegal manner admissible?
Rajasthan (J) (Mains) 2016 – Discuss the admissibility of 'Electronic Records' in evidence as per provisions of Indian Evidence Act.
Rajasthan (J) (Mains) 2015- What are special provisions in the Indian Evidence Act regarding admissibility of 'Electronic Records'? In what circumstances information contained in electronic record can be accepted in evidence in proceeding before Court? Discuss with reference to relevant provisions.

***R.M. Malkani* v. *State of Maharashtra* (22/09/1972)**

- Admissibility of 'Tape Recorded' Evidence.
- Admissibility of 'Evidence' in illegal manner.

Facts- Facts of case can be divided into five parts –
First Part -Jagdish Prasad Ramnarayan Khandelwal was admitted to the hospital of Dr Adatia on May 3, 1964. Operation was performed by Aditya. But his condition became serious. He was removed to the Bombay Hospital on 10.05.1984. Treatment was done by Dr. Motwani. He died on 13.05.1964.
Second Part - Coroner[27]'s Court conducted inquest on 13.05.1964. R.M. Malkani was on leave. So there was delay in inquest.
Third Part- R. M. Malkani issued notice to Dr.Aditya. After some time he started to demand bribe. He threatened that otherwise he would charge for medical negligence even though you are innocent. He demanded 20000 rs. from Aditya through Motwani. When Aditya refused to pay money, Malkani reduced the money.
Fourth Part -Dr. Aditya and Motwani lodged complaint to Anti -Corruption Bureau on 05.10.1964. Mugwe was directior of ACB. He suggested them to be in contact with Malkani.
Fifth Part - Mugwe arranged his staff at residence of Motwani with tape recording equipment to record telephonic conversation. Conversation was recorded. According to Malakani there was some share of other public officer. When they went to give money, Malkani did not take money due to delay in payment of money.
Charge- He was charged under sections 161, 385, 420 and 511 of IPC.
Contention of Malkani –There were following contention of Malkani –

1. Evidence was illegally obtained.
2. It was violation of Article 20(3) and Article 21.
3. It was during investigation. So hit by section 162 of Cr.P.C.
4. There was no attempt to obtain gratification.
5. Sentence should be modified.

Reply -

[27] Coroner means public official who conduct inquest in unnatural death.

❖ **(1)** It was not violation of section 25 of Indian Telegraph Act.

Reason –It was recorded after consent of Motwani.

(2) Admission of evidence collected in illegal manner- Evidence is admissible even though it was collected through illegal manner.
Reason- Indian Evidence Act does not say that Evidence must be collected in legal manner. This Act is silent regarding manner of collection of Evidence. It concentrate on relevancy of facts

English Case

Kwruma, Son of Kanju* v. *R.[28]
The Judicial Committee in *Kwruma, Son of Kanju* v. *R.* dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The defendant appealed against his conviction for unlawful possession of ammunition, saying that the evidence had been obtained by unlawful means, and should not have been admitted against him.
Lord Goddard held, "The test to be applied both in civil and in criminal cases, in considering whether evidence is admissible, is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how it was obtained."

***R.* v. *Maqsud Ali*[29]**

The admissibility of evidence procured in consequence of illegal searches and other unlawful acts was applied in a recent English decision in ***R.* v. *Maqsud Ali.*** In that case two persons suspected of murder went voluntarily with the police officers to a room in which, unknown to them, there was a microphone connected with a tape-recorder in another room. They were left alone in the room. They proceeded to have a conversation in which incriminating remarks were made. The conversation was recorded on the tape. The Court of Criminal Appeal held that the Trial Judge had correctly admitted the tape-recording of the incriminating conversation in evidence. It was said "that the method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper". The Courts often say that detention by deception is a form of police procedure to be directed and used sparingly and with circumspection.

Indian Case

Not Part of Malkani Case

Barindra Kumar Ghose and Ors. v. Emperor (23 November, 1909)
Indian Revolutionary Mr. Barindra Kumar Ghose along with other was prosecuted under section 121, 122 etc. Calcutta High Court decided this case. In this case Sir Lawrence Jenkins, "I hold that ***what would otherwise be relevant does not become irrelevant*** because it was discovered in the course of a search in which those provisions were disregarded". In this case there was violation of procedure relating to search and seizure mentioned in Cr.P.C.

[28] 1955 AC 197
[29] (1963) 2 All ER 464.

***Magraj Patodia* v. *R. K. Birta*[30]**
The witness who produced the file could give satisfactory answer how he got document. Supreme Court said that a document which was procured by improper or even by illegal means could not bar its admissibility provided its relevance and genuineness were proved.
R.M. Malkani Case – Although evidence was collected secretly, but it was relevant so it was accepted.

Not Part of Malkani Case

***Yashwant Sinha & Ors.* v. *CBI Through Its Director & Anr*[31] (April 10, 2019)**
In this case 'Review Petition' was filed on the grounds of discloser of new facts related to 'Rafale Deal' which were collected by members of The Hindu News Paper. These facts were also published in the News Paper. Maintainability of Review Petition was challenged on the ground of lack of bona fide. Attorney General claimed that these copies have been taken illegally. Attorney General contended that documents were unauthorisely removed from the Ministry in violation of several laws.
But Supreme Court did not accept this contention and accepted 'Review Petition'. Hon'ble Justice K.M. Joseph observed, "Under the common law both in England and in India the context for material being considered by the court is relevancy. There can be no dispute that the manner in which evidence is got namely that it was procured in an illegal manner would not ordinarily be very significant in itself in regard to the Courts decision to act upon the same".

(3) Tape recording conversation is admissible - Tape recorded conversation is admissible provided:

- **Firstly,** the conversation is relevant to the matters in issue;
- **Secondly,** there is identification of the voice; and,
- **Thirdly,** the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record.

A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under **Section 8** of the Evidence Act. It is ***res gestae*.** It is also **comparable to a photograph** of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under **Section 7** of the Evidence Act.
The conversation between Dr Motwani and the appellant in the present case is relevant to the matter in issue. There *is* no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence.
Shri N. Sri Rama Reddy Etc* v. *Shri V. V. Giri (27 April, 1970)

[30] AIR 1971 SC 1295.
[31] Available at : https://www.thehindu.com/news/resources/article26793859.ece/BINARY/Rafale-Review-Judgement_10-Apr-2019.pdf (Last visited on February 19, 2020).

This case is known as 'Presidential Election Case'. A tape recorded conversation between the witness and the petitioner was sought to be given in evidence by playing the tape-record to impeach the credit of the witness.
Supreme Court said, "Tape itself is primary and direct evidence admissible as to what has been said and picked up by the recorder". Supreme Court observed, "a previous statement, made by a person and recorded on tape, can be used not only to ***corroborate*** the evidence given by the witness in Court but also to ***contradict (Section 153, Exception 2)*** the evidence given before the Court, as well as to ***test the veracity(Section 146)*** of the witness and also to ***impeach his impartiality [Section 155(3)]***".

Conclusion of *Shri N. Sri Rama Reddy Etc* v. *Shri V. V. Giri* **&** R.M. Malkani Case are 'Tape Recorded Conversation' is relevant under….	1. Section 6- Res Gestae 2. Section 7 3. Section 8 4. Section 146 5. Section 153 6. Section 155 7. **Comparable to a photograph**

(4) No violation of Article 21- The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by tapping the conversation. *The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants*. In the present case there is no unlawful or even irregular method in obtaining the tape-recording of the conversation.

(5) **No violation of section 162-** He did not make statement to police.

Conclusion –*R.M. Malkani could not get remedy.*
Question **-** Is 'Confession of co-accused' evidence under definition of 'Evidence' under Evidence Act, 1872?
Answer- In the strict sense confession is not evidence. According to definition of 'Evidence' under Evidence Act, 1872 oral evidence can be given only by witness. In the case of *Mohd. Khalid* v. *State of West Bengal (*2002) Supreme Court observed, "The confession of a co-accused does not come within the definition of evidence contained in Section 3 of the Evidence Act. These are following reasons -

- It is not required to be given on oath,
- nor in the presence of the accused, and
- it cannot be tested by cross-examination".

UP (J) Mains, 1986, Question 7 (a) &
UP (J) Mains, 2003, Question 6 (a)

Distinguish between direct and circumstantial evidence. Can a person be convicted on circumstantial evidence alone?

Answer- In the case of *C.Parshwanath* v. *State of Karnataka* (August 18, 2010 S.C.) Supreme Court observed, "The evidence tendered in a court of law is either direct or circumstantial"[32]. Evidence can be classified into two parts-

1. Direct or positive evidence
2. Indirect or circumstantial evidence

(1) Meaning of direct evidence- According to Mr. Monir, "Direct evidence is that which goes expressly to the very point in question and proves it, if believed, without aid from inference or deductive reasoning[33].
In the case of *C. Parshwanath* v. *State of Karnataka*[34] Supreme Court observed, "Evidence is said to be direct if it consists of an eye-witness account of the facts in issue in a criminal case".
Example- Eye witness to the murder is direct evidence.
(2) Indirect or circumstantial evidence – Circumstantial evidence does not prove the point in question directly but establishes it only by inference.[35]
In the case of *C. Parshwanath* v. *State of Karnataka* Supreme Court observed, "On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum".
Example- A was seen running away with blood stained knife from B's room where B was found dead immediately after B's cries were heard would be circumstantial evidence as against A.
Importance of circumstantial evidence - In the case of *C. Parshwanath* v. *State of Karnataka*[36] Supreme Court observed, "Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many times it is aptly said that ***"men may tell lies, but circumstances do not".***

Question - Can a person be convicted on circumstantial evidence alone?
Answer- In the case of *Bodh Raj* v. *State of Jammu and Kashmir*[37] Supreme Court observed that a person be convicted on circumstantial evidence alone. But circumstantial evidence must be proved. What should be proved for conviction on the basis of circumstantial evidence has been discussed in following case –
***Sahoo* v. *State of U.P.*[38] (February 16, 1965)**
Fact –Sahoo killed his daughter in law (Wife of son). Sahoo was residing with younger son (8 yrs.) and daughter in law whose husband was doing service in Lucknow. He had developed illicit relationship. But there was continue quarrel between both. One day in the early morning he killed her. P. Ws. 9, 11, 13 and 15 saw the accused going out of the house at about 6 a.m. on that day soliloquying that he had finished Sunderpatti and thereby finished the daily quarrels.
Issues1 –Is communication necessary to constitute confession?
Answer –No.
Issue – Is circumstantial evidence sufficient for conviction?

[32] C. Parshwanath v. State of Karnataka (Date of judgment -August 18, 2010 S.C.) AIR2010SC 2914.

[33]M. Monir, 'Textbook on the Law of Evidence' 15 (Universal Law Publishing Co., New Delhi 9th Edn., 2013).
[34] AIR2010SC 2914.
[35] M. Monir, 'Textbook on the Law of Evidence' 15 (Universal Law Publishing Co., New Delhi 9th Edn., 2013).
[36] AIR2010SC 2914.
[37] (2002) 8 SCC 45.
[38] AIR **1966 SC 40,**

Answer- Yes.
Supreme Court observed, "This Court in a series of decisions has reaffirmed well-settled rule of 'circumstantial evidence'. The circumstances from which the conclusion of guilt is to be drawn should be in the first instance fully established. All the facts so established should be consistent only with the hypothesis of the guilt of the accused and the circumstances should be of a conclusive nature and tendency that they should be such as to exclude other hypotheses but the one proposed to be proved."
Accused was convicted.

***Gambhir* v. *State of Maharashtra* (1982)**

In the case of *Gambhir* v. *State of Maharashtra* (1982) Supreme Court said that the circumstantial evidence should not only be *consistent* with the guilt of the accused but also should be *inconsistent* with his innocence.
Conclusive and Exclusive- Circumstantial evidence must be conclusive and exclusive.
Conclusive -It must conclusively establish his guilt.
Exclusive- It must exclude hypothesis of innocence of the accused.

***Sharad Birdhichand Sarda* v. *State of Maharashtra*[39] (July 17, 1984)**
(Golden Principles / Panchsheel)
In this case Supreme Court observed that five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence. These are-

- **(1) Establish -** the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
- **(2) Inclusive -** 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) Conclusive -**the circumstances should be of a conclusive nature and tendency;
- **(4) Exclusive-** they should exclude every possible hypothesis except the one to be proved; and
- **(5) Chain -** 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.

***Padala Veera Reddy* v. *State of A.P.*[40](1990)**

In ***Padala Veera Reddy* v. *State of A.P.***, it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: "
(*1*) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

[39] AIR 1984 SC 1622.
[40] AIR 1990 SC 79

(*2*) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
(*3*) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
(*4*) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

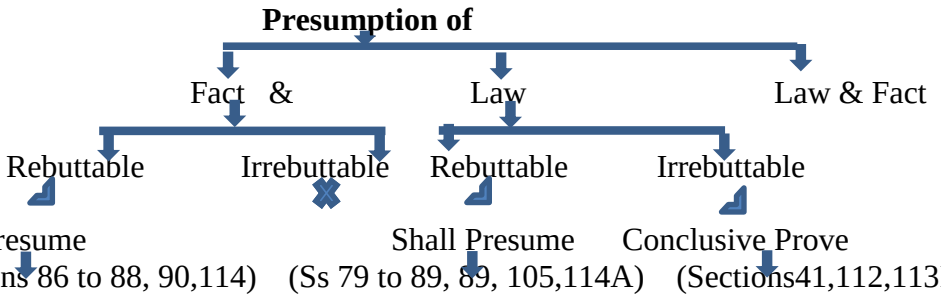
***Bodh Raj* v. *State of Jammu & Kashmir* (2000)**

Facts -
In this case Swaran Singh @ Pappi ('the deceased') was running a finance company. Accused 2 (Ashok Kumar) and Accused 1 (Ravinder Kumar) had taken huge amounts as loan from the deceased. They made plan to kill him. They hired goons and with the help of them he was killed. Murder was committed in evening time at a highly populated place. Deceased had also fired and two accused were injured. With plan they instigated to deceased to visit site for purchasing of land. Total ten persons were charge sheeted.
Recoveries of various weapons used by the assailants were made pursuant to the disclosures made by the accused Bodhraj, Bhupinder, Subash Kumar, Rajesh Kumar and Rakesh Kumar. Recoveries were witnessed by several witnesses.
They were prosecuted under section 302 r/w Section 120B. On the basis of circumstantial evidence they were convicted.
In this case Supreme Court discussed ratio of several judgment including *Sharad Birdhichand Sarda* v. *State of Maharashtra*[41] & *Padala Veera Reddy* v. *State of A.P.*[42] Supreme Court also observed other important points. Ratio of some other judgments have been discussed earlier so there in no need to discuss again. Some other important points are following –
(1) Fact may be proved by circumstantial evidence- It may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also.
(2) *Factum Probandum and factum Probans* - Principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.
(3) "so much of such information" under section 27- The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.
(4) Doctrine of confirmation - The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events.

[41] AIR 1984 SC 1622.
[42] AIR 1990 SC 79

The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true.
The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. There is difference between recovery and discovery.
(5) Last seen theory - The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists.
Conclusion – They were convicted on circumstantial evidence.

Section 4



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

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[43].

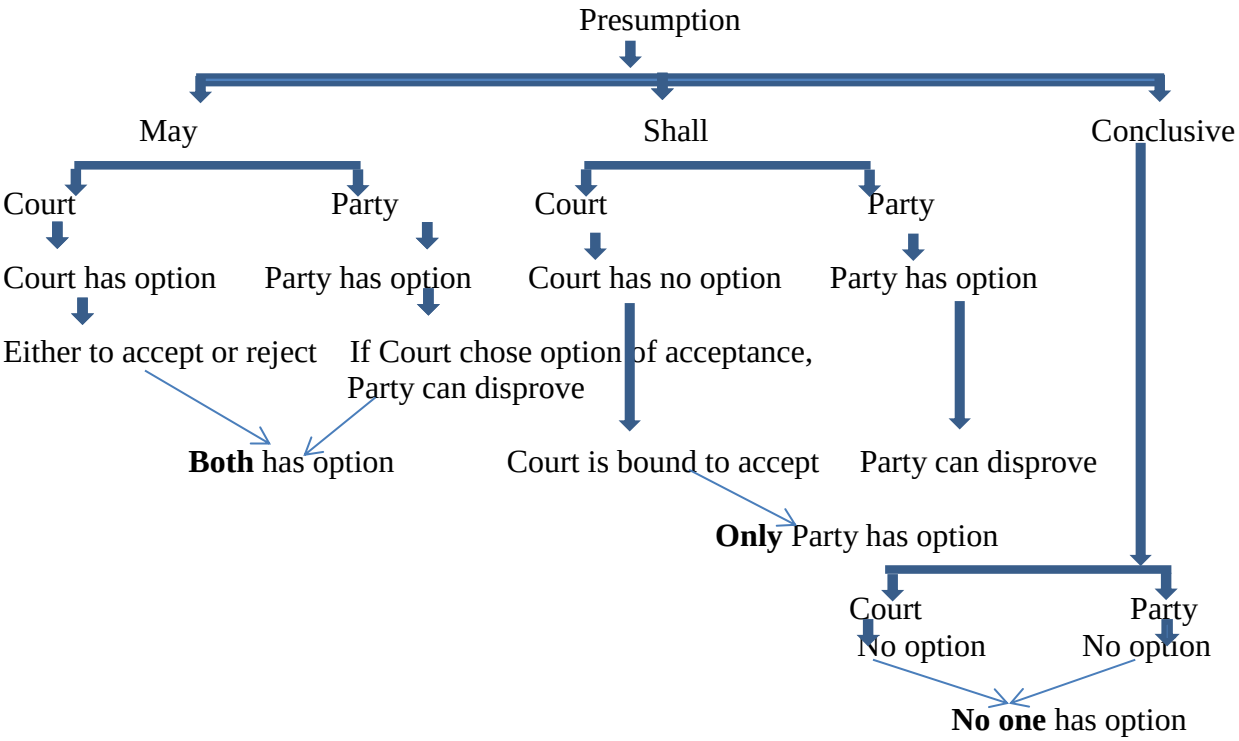
Conclusive proof-When one fact is **declared** by this Act to be conclusive proof of another, the ***Court*** shall, on proof of the one *fact*, *regard* the other as **proved,** and shall not allow evidence to be given for the purpose of disproving it.
Common in all-
(1)..Court
(2) Regard such fact
(3) prove

May	**..provided..**
Shall	**..directed..**
Conclusive	**..declared..**

Jharkhand (Pre) (J) 2019

[43] Bihar J (Interview) 2019

Question -Presumption under section 114A, IEA, is a/an **(a)** Rebuttable presumption **(b)** Presumption of fact **(c)** Mixed presumption of law and fact **(d)** Irrebuttable presumption of law.
Answer -(a) Rebuttable presumption. Section 114A- Presumption as to absence of consent in certain prosecution for rape…….the court **shall** presume that she did not consent.



UP (J) (M) 2012 Question 5(a)

What do you mean by presumption? Discuss the kind of presumption.

UP (J) (M) 2018 -2019 Question 5(c)

Discuss the meaning and utility of presumptions. Draw distinction between rebuttable presumption of law and irrebuttable presumption of law.

Answer-
Meaning of Presumption – 'Presumption' word has not been defined under Indian Evidence Act, 1872. With the help of dictionary and case law, it can be defined. These are following -

Stephen[44]

[44] James Fitzjames Stephen, 'A Digest on Law of Evidence' 2 (Article 1, Available on https://books.google.co.in/books?id=1g8-AAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false). Last visited February 26, 2020.

"A presumption" means a rule of law that Courts and judges shall draw a particular inference from particular fact, or from particular evidence, unless and until the truth of such inference is disproved.

P. Ramanatha Aiyar's Advanced Law Lexicon

P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition, at page 3697, the term 'presumption' has been defined as under:

"A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known".

M.S. Narayana Menon @ Mani* v. *State of Kerala & Anr. (4 July, 2006) (SC)

In this case Hon'ble Justice S.B. Sinha said, "A presumption is a legal or factual assumption drawn from the existence of certain facts".

M/S Kumar Exports* v. *M/S Sharma Carpets (December 16, 2008)
In this case Hon'ble Supreme Court said, "Presumption literally means "taking as true without examination or proof".

Effect of presumption –

M/S Kumar Exports* v. *M/S Sharma Carpets
In this case Hon'ble Supreme Court said, "Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists".
Kinds of presumption – The word 'Presumption' inherently imports an act of reasoning. A presumption is a legal or factual assumption drawn from the existence of certain facts.

M/S Kumar Exports* v. *M/S Sharma Carpets
In this case Hon'ble Supreme Court said, "Under Indian Evidence Act, all presumptions must come under one or the other class of the three classes mentioned in the Act, namely,

1. 'May presume' (rebuttable),
2. 'Shall presume' (rebuttable) and
3. 'Conclusive presumptions' (irrebuttable)".

'May presume' denotes the presumption of fact and 'Shall Presume' and 'Conclusive Proof' denotes the presumption of law.
There are two types of presumption namely;
(1) Presumption of fact
(2) Presumption of law and

Difference between 'May Presume' and 'Shall Presume'

In the case of *M/S Kumar Exports* v. *M/S Sharma Carpets* Supreme Court discussed difference between may presume and shall presume.
In this case Hon'ble Supreme Court said,

May Presume- In this case the Court has an option to raise the presumption or not,

Shall Presume- In this case the Court must necessarily raise the presumption.
If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved.

Definitions of 'may presume' and 'shall presume' as given in Section 4 of the Evidence Act, makes it at clear that presumptions to be raised under both the provisions are rebuttable.

Comparison between 'May Presume' & 'Shall Presume'

There are following comparisons –

Ground	**'May Presume'**	**Shall Presume'**
	Differences	
Provided/ Directed	It provided under this Act	It directed under this Act
Discretion/ Mandatory	Court has option either to accept or reject	Court has no option.
Fact/Law	It is presumption regarding fact.	It is presumption regarding law.
	Similarity	**Similarity**
Party	Party can disprove it part	Party can disprove it.
Rebuttable	It is rebuttable	It is rebuttable.
Example	Sections 86 to 88, 90,114	Sections 79 to 89, 89, 105

Comparison between 'Shall Presume' & 'Conclusive Proof

There are following comparisons –

Ground	**Shall Presume** (*Rebuttable presumption of law)*	**Conclusive Proof** *(Irrebuttable presumption of law)*
	Differences	
Directed/ Declared	It directed under this Act	It declared under this Act
Party	Party can disprove it.	Party can not disprove it.
Rebuttable	It is rebuttable presumption of law.	It is irrebuttable presumption of law.
Example	Sections 79 to 89, 89, 105	Sections41,112,113IEA,Sec.82 IPC
	Similarity	**Similarity**
Mandatory	Court has no option.	Court has no option.
Law	It is presumption regarding law.	It is presumption regarding law

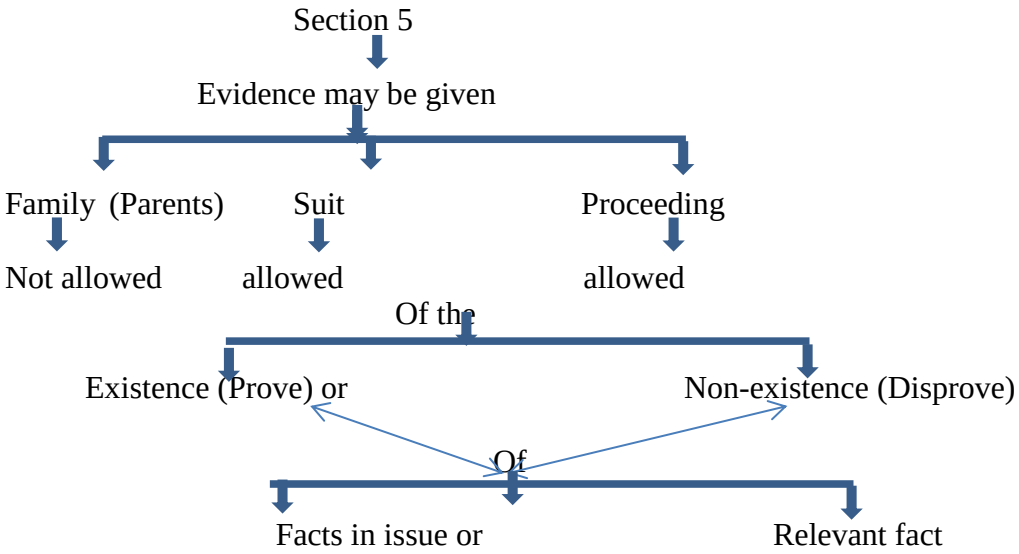
Presumption under Evidence Act and Presumption of Innocence

In the case of *M.S. Narayana Menon @ Mani* v. *State of Kerala & Anr*. Supreme Court observed, *"*Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.
The burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact".

Section 5 (What evidence are allowed)

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

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



Explanation – Disentitled person shall be allowed to give evidence merely with the help of this section.

UP (J) Mains, 1986, Question 7 (c)
Distinguish between relevancy and admissibility of evidence.

UP (J) Mains, 1992, Question 5 (a) &
UP (J) Mains, 2003, Question 5 (a)

"All admissible evidence is relevant, but all relevant evidence is not necessarily admissible." Comment.

UP (J) Mains, 2000, Question 6(a)

"Relevancy and admissibility are neither synonymous nor is the one included in other." Elucidate this statement.

UP (J) Mains, 1992, Question 5 (a) &
UP (J) Mains, 2003, Question 5 (a)

"All admissible evidence is relevant, but all relevant evidence is not necessarily admissible." Comment.

UP (J) Mains, 2006, Question 5 (a)

What do you understand by relevancy of facts? Are all the relevant facts admissible in Court? Explain.

Question DU. LL.B -2005 -

Discuss the relevancy and admissibility of the evidence obtained through 'Video Conferencing'.

Answer
Section 3

"Relevant" - One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

CHAPTER II - OF THE RELEVANCY OF FACTS **(Sections 5 -55)**

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

***Ram Bihari Yadav* v. *State of Bihar & Ors.*[45]** (21 April, 1998)

Hon'ble Justice Syed Shah Quadri said, "More often the expressions 'relevancy and admissibility' are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible".

Relevant/ Relevancy –Relevancy is decided according to sections 5 to 55. But all relevant facts are not admissible.

Example- For the example privileged communication. Some of them are communication between husband and wife, communication between advocate and his clients etc. might be relevant but these are protected under section 122 & 126 respectively.

Conclusion- Generally all relevant facts are admissible. All relevant facts are not admissible.

Admission –Admissibility is decided by judge. Generally relevant fact is admissible. But there are certain situation when irrelevant fact (Here irrelevant fact means which is not declared relevant according to sections 5 to 55 of the Act.) may be admissible.

Example- For example,

- questions permitted to be put in cross-examination to test the veracity – Section 146(1) or
- impeach the credit of witnesses, though not relevant are admissible – Section 155.

[45] AIR 1998 SC 1850.

Conclusion - Generally all admissible facts are relevant. But all admissible facts are not relevant.
Question -Who will decide relevancy and admissibility of fact?
Answer- Judge. According to section 136[46] judge will decide admissibility of fact.

Difference between Relevancy and Admissibility

S.No.	**Relevancy**	**Admissibility**
	***Ram Bihari Yadav* v. *State of Bihar & Ors.*[47]**	
1	Relevancy is decided according to Chapter II, Sections 5 to 55	***My opinion*** - Admissibility is decided by judge under section 136.
2	**Rule –** All relevant facts are admissible.	All admissible facts are relevant
	Exception –There are certain relevant facts are not relevant. For example –privileged communication.	All admissible facts are not relevant. For example –Sections 146 and 155.
	Batuk Lal, '*Law of Evidence'* 41 (Central Law Agency, Allahabad, 19th Edn. 2010).	
3	Relevancy is based on *logic and probability.*	Admissibility is not based on logic but on *strict rule of law*
4	Relevancy is described according to Chapter II, Sections 5 to 55	Rule of admissibility is described after section 55.
5	Rule of relevancy declares what is relevant.	Rule of admissibility declares whether certain type of relevant evidence are admissible or to be excluded.

[46] **Section 136- Judge to decide as to admissibility of evidence -** When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.
[47] AIR 1998 SC 1850.

Kinds of Relevancy

Relevancy is based on logic. Some of them have been declared by law to be admissible in court. So there are two types of relevancy –

(1) Logical relevancy,

(2) Legal Relevancy.

Comparisons

	Logical Relevancy	**Legal Relevancy**
Similarity		
	Both are based on logic and probability.	
Differences		
1	'Logical Relevancy' is genus.	'Legal Relevancy' is species.
2	Logical relevancy has no place in law.	Sections 5 to 55
3	All 'Logical Relevancy' is not 'Legal Relevancy'.	All 'Legal Relevancy' is 'Logical Relevancy'.
Example (i)	Shyam made confession to Police, "I have kept in the field the knife with which I killed Ram".	
	Logically whole statement is relevant.	Legally only half part is relevant. According to section 27"I have kept in the field the knife" is relevant. I killed Ram is not relevant.
Example (ii)	Confession made to police.	
	Logically relevant. His statement might be true and making confession voluntarily might be true.	Legally it is not relevant. It will be hit be section 25 of the evidence Act.

Question [UK (J) 2009] –Which of the following is **not** correct?
Option –

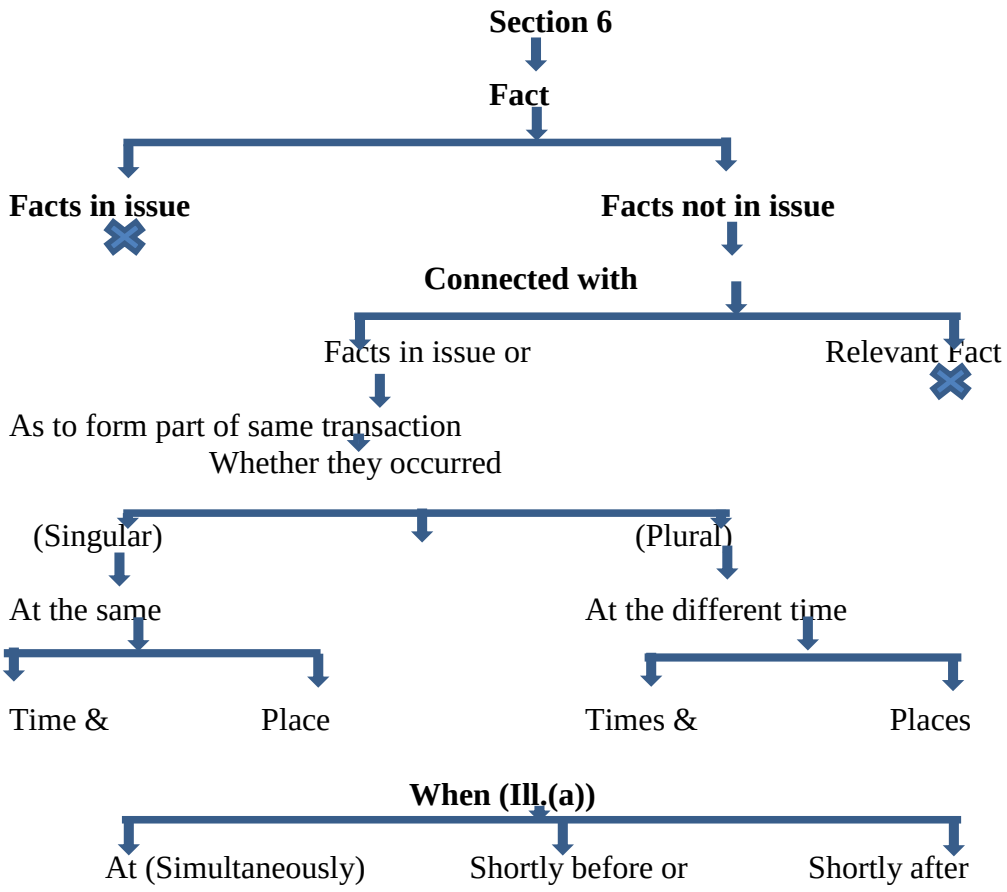
A. Some facts are relevant, but not admissible
B. Some facts are admissible, but not relevant.
C. All relevant facts are admissible.
D. All admissible facts are not relevant.

Answer – C. All relevant facts are admissible.
Explanation - ***Ram Bihari Yadav* v. *State of Bihar & Ors.***

Section 6 & Res Gestae

UP (J) (Mains) 2015 Question 6
Explain the doctrine of Res Gestae.
UP (J) (Mains) 2018 Question 5(a)
Discuss the limits within which the rule of Res Gestae operates. How for ambiguities involved in this rule have been removed under the Indian Law? Explain.
Jharkhand (J) (M) 2019 Question 7
Write detailed note on: The Doctrine of Res Gestae.

Answer –



Section6. Relevancy of facts forming part of same transaction -Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

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

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

(*c*) Defamation -A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

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

(1) Meaning

Res Gestae is Latin Phrase. Its literal meaning is "Things done". When it is translated into English means "Things said and done in the course of transaction"[48].

Statutory provisions – Application of 'Res Gestae' was very controversial. So this word was not used in Indian Evidence Act. Several authors says that sections 6,7,8 & 9 contents this principle. But now it is settled that only section 6 of the Indian Evidence Act deals res gestae.

Bhairon Singh* v. *State of Madhya Pradesh (May 29, 2009)

Supreme Court observed, "What it means is that a fact which, though not in issue, is so connected with the fact in issue "*as to form part of the same transaction"* becomes relevant by itself. To form particular statement as part of the same transaction utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence".

(2) Res gestae is exception of 'Hearsay Evidence'

Rule is that hearsay evidence is not acceptable. Oral evidence must be direct. But Res gestae is exception of 'Hearsay Evidence'.

***Sukhar* vs. *State of U.P.*[49]**(1999)

In the case of, *Sukhar* vs. *State of U.P.*, Supreme Court said that *Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible.*

Javed Alam v. State of Chhattisgarh and Anr. (8 May, 2009)

Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible.

Bhairon Singh* v. *State of Madhya Pradesh (May 29, 2009)

[48] Dr. Avtar Singh, 'Principles of the law of Evidence', 42 (Central Law Publications, Allahabad 18th Edn., 2010).

[49] (1999) 9 SCC 507.

Supreme Court observed, "The rule embodied in Section 6 is usually known as the rule of r*es gestae*.

(3) Condition for application of Section 6-

***Sukhar* v. *State of U.P.*[50]**(1999) -For bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that

- **(a)** it must be almost *contemporaneous* with the acts and
- **(b)** there should not be an interval which would allow *fabrication.*

The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter".

Javed Alam* v. *State of Chhattisgarh and Anr. (8 May, 2009)
The test for applying the rule of res gastae is that the statement should be *spontaneous* and should form part of the same transaction ruling out any possibility of *concoction*.

S.No.	*Sukhar* v. *State of U.P.*	*Javed Alam* v. *State of Chhattisgarh and Anr.*
	Two conditions for application of section 6	*Two conditions for application of section 6*
1	*contemporaneous*	*Spontaneous*
2	*Fabrication*	*Concoction*

(4) Whose statement is relevant under section 6(Res Gestae)

Facts related to

- Accused
- Victim
- Third person (e.g. by standers)

are relevant if they form part of same transaction.

Section 6 Illustration (*a*) - A is accused of the murder of B by beating him. Whatever was **said** or **done** by

- **A (Accused)** or
- **B (Victim)** or the
- **by-standers (Third Party)** at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(5)Timing

Section 6 Illustration (*a*) - A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers

- ***at*** the beating, or so *shortly*
- ***before*** or
- ***after*** it as to form part of the transaction, is a relevant fact.

English Case

[50] (1999) 9 SCC 507.

	English Case	
1695 ***(First Case)***	*Thompson* v. *Trevanion*	Justice Holt
1879	*Regina* v. *Bedingfield*	Chief Justice Cockburn
1971	*Rattan* v. *The Queen*	Lord Wilberforce

***Thompson* v. *Trevanion* (1695)**

In this case Chief Justice Holt said, "What the wife said immediately upon hurt being received and before that she had time to devise or contrive anything for her own advantage, might be given in evidence".[51]

***Regina* v. *Bedingfield* (1879)**

A woman with her throat cut came suddenly out of a room, in which she had been injured and shortly before she died, said: "Oh dear Aunt, see what Bedingfield has done to me."

Chief Justice Cockburn said that this statement was not admissible. She stated this thing after completion of all acts.

This judgment was criticized.

Rattan* v. *The Queen (1971)

***Fact* -** Few minutes before a woman was shot dead, she made a telephone call and hysterically asked the operator to get her the police. Before the operator could do anything, the sobbing woman gave her address and the call was dead. Within five minutes the police reached there and found the dead body of woman.

Lord Wilberforce said: "Evidence would have been admissible as part of the Res Gestae because not only was there a close association in place and time between the statement and the shooting, but also the way in which the statement came to be made, in a call for the police and the tone of voice used showed intrinsically that the statement was being forced from the wife by an overwhelming pressure of contemporary events".

It was held that the telephone call and the words spoken were parts of the same transaction. Argument of husband that fire was accidental was rejected.

(7) Indian Law

R.M.Malkani* v. *State of Maharashtra (September 22, 1972)

Hon'ble Justice Ajit Nath Ray said, "A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under section 6 of the Evidence Act. It is res gestae".

Sawal Das* v. *State of Bihar (9 January, 1974)

Sawal Das (Husband), his stepmother and father killed deceased.

The appellant took or pushed Chanda Devi inside her room followed by the appellant's father and his stepmother. Immediately after that, cries of at least ***"Bachao" "Bachao",*** were heard from inside the room. No body heard the voice of Smt. Chanda Devi after that. Immediately after these cries, the children of Chanda Devi were heard crying and uttering words indicating that their mother was either being killed or had been killed.

[51] Dr. Avtar Singh, 'Principles of the law of Evidence', 44 (Central Law Publications, Allahabad 18th Edn., 2010).

Supreme Court accepted it as same transaction.

Shayam Nandan Singh and Ors.* v. *The State Of Bihar (9 May, 1991 S.C.)
(FIR as Res Gestae)

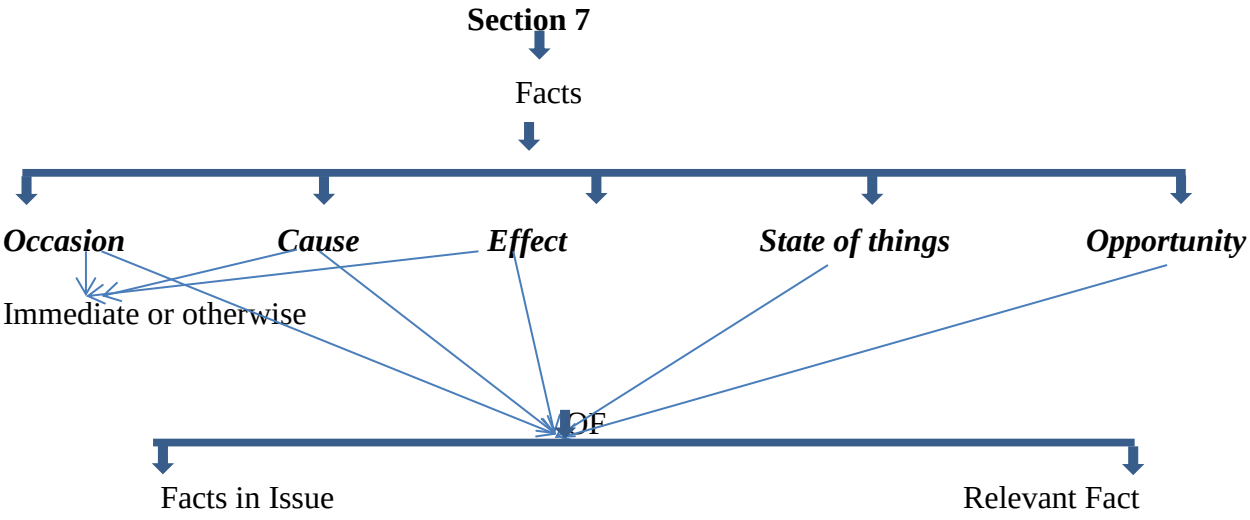
On 11-3-1986 Mungeshwari Devi along with her daughter Surji Devi (the deceased) had gone to her land in Bagicha Baghar for harvesting Masuri crop. At about 5.30 p.m. Surji Devi began to make bundles of the harvested Masuri crop. Three accused tried to rape and cut her throat. Mother tried to save her. On hearing alarm P.Ws. Suba Yadav, Ram Lakhan Yadav, Karu Yadav, Kameshwar Yadav and Birja Yadav ran towards the place of occurrence. On reaching to the place of occurrence P.Ws. found the dead body of Surji Devi the deceased, lying on the ground with injury, her neck in pool of blood. Mother narrated about the occurrence to these P.Ws. and thereafter mother went to the Police Station along with these P.Ws. and Chaukidar Brij Kishore Paswan (not examined) to lodge information. On the statement of mother, FIR was recorded on the same night, i.e., on 12-3-1986 at 1.30 a.m.

Supreme Court –Mother narrated about the occurrence and disclosed the names of the accused persons and immediately thereafter she went to the police station with them situated at the distance of 12 kms. from the place of occurrence and lodged F.I.R. Thus, whatever was said by her to the P.Ws. or in the F.I.R. after the occurrence forms part of the same transaction and thus is relevant fact under Section 6 of the Act.
FIR was treated relevant under section 6.

Section 7
Facts which are the occasion, cause or effect of facts in issue. –

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

Illustrations
(*a*) Robbery- The question is, whether A robbed B.
The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.
(*b*) Murder-The question is, whether A murdered B.
Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.
(*c*) Administration of poison -The question is, whether A poisoned B.
The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.



DU LL.B. 2019

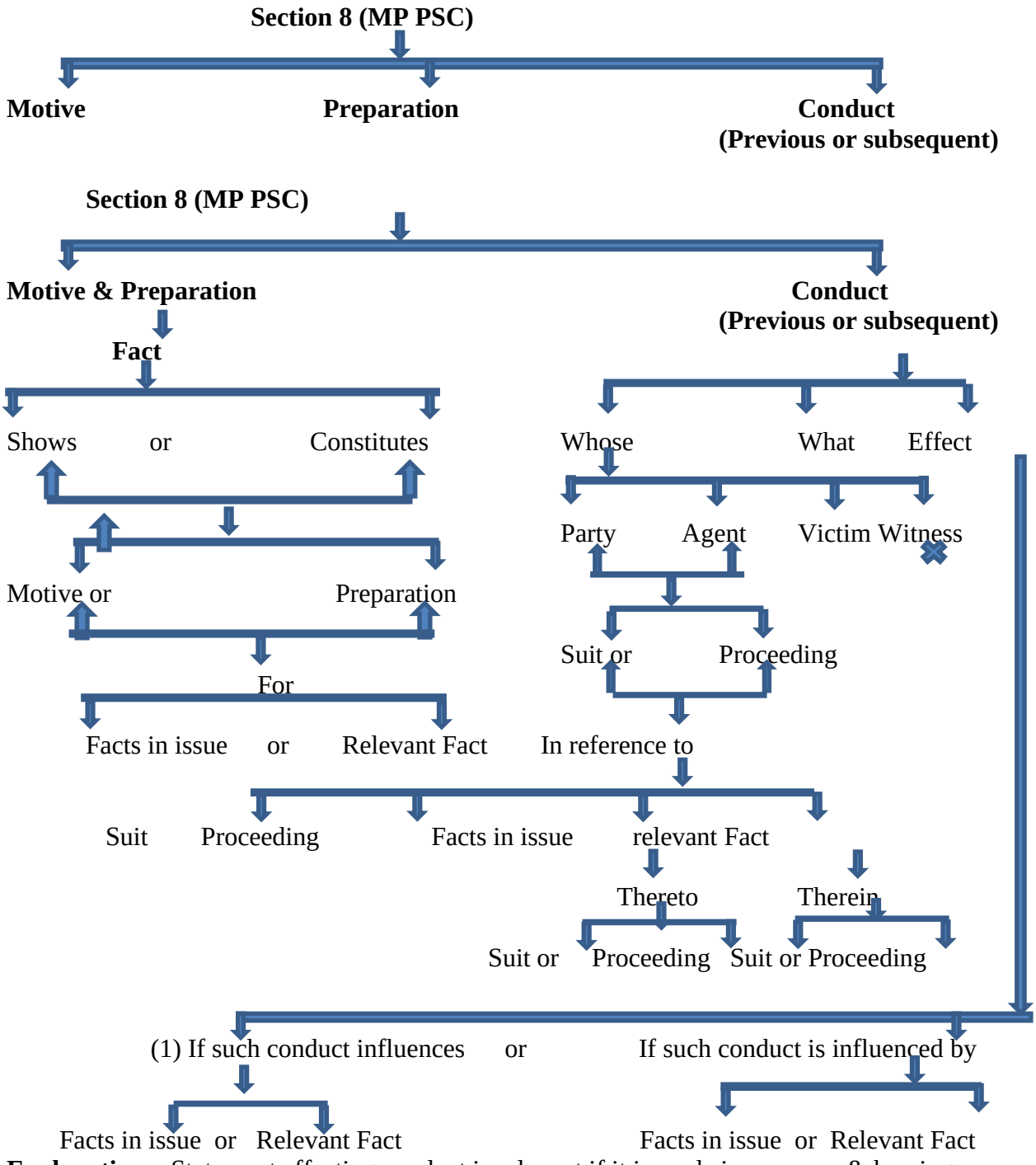
Question 1(a) –State the provisions of law and give reasons as to the relevancy of the facts:
In charge of murder by the domestic help by an elderly couple, evidence is given by prosecution that they received money sent their son from the USA on the same day.

Answer- Problem of this question is based on section 7.
Opportunity – They were elderly.
Cause – Robbing the money which was sent from USA.

Section 8 - Motive, preparation and previous or subsequent conduct –
Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

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

***Explanation* 2.—**When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.



Explanation – Statement affecting conduct is relevant if it is made in presence & hearing.

Illustrations

DU LL.B. 2019& UP (J) (M) Question 6(a)

Illustration (*a*) A is tried for the murder of B.
The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.
DU LL.B. 2019 – Question 1 (C) - State the provisions of law and give as to the relevancy of the following facts:
In a trial for murder of B by A, evidence is given by the prosecution that A murdered C and B knew this fact and was extorting money from A by threatening to make his knowledge public.

Answer- This problem is similar to section 8, illustration (a).
Illustration (a) - A is tried for the murder of B. The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant. (b) A sues B upon a bond for the payment of money, B denies the making of the bond. 1. Subs. by the A.O. 1950, for "Queen". 13 The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

Conclusion – This fact will be relevant under section 8 of the Indian Evidence Act.

Illustration (*b*) - A sues B upon a bond for the payment of money, B denies the making of the bond. The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.
Illustration (*c*) A is tried for the murder of B by poison.
The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.
Illustration (*d*) The question is, whether a certain document is the will of A.
The facts that, not long before, the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate; that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.
Illustration (*e*) A is accused of a crime.
The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.
Illustration (*f*) The question is, whether A robbed B.
The facts that, after B was robbed, C said in A's presence — "the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant.

UP APO (M) 1982

Illustration (*g*) The question is, whether A owes B rupees 10,000.
The facts that A asked C to lend him money, and that D said to C in A's presence and hearing— "I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts.
Illustration (*h*) The question is, whether A committed a crime.
The fact that A absconded, after receiving a letter, warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.
Illustration (*i*) A is accused of a crime.

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

UP APO (M) 1982

Illustration (*j*) The question is, whether A was ravished.

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

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

Illustration (*k*) The question is, whether A was robbed.

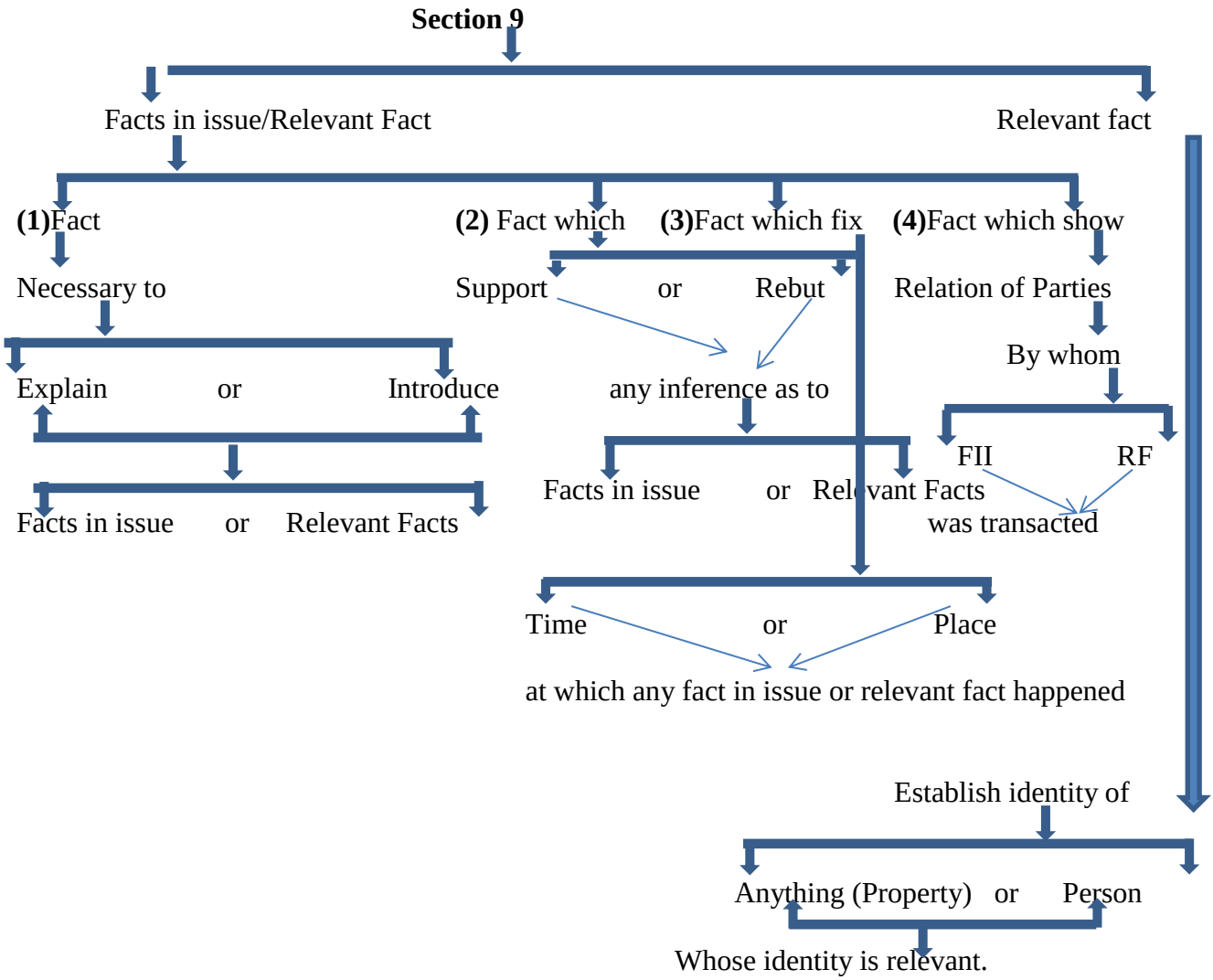
The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed, without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (*1*), or as corroborative evidence under section 157.

Section 9

Facts necessary to explain or introduce relevant facts

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



Illustrations

Illustration (*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.

Illustration (*b*) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true. The position and relations of the parties at the time when the libel was published may be relevant facts as **introductory** to the facts in issue. The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

UP APO (M), 1988, UP (J)(M) 2013

Illustration (*c*) A is accused of a crime. The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue. The fact that, at the time when he left home, he had **sudden and urgent business** at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

UP (J)(M) 2012& DU LL.B. 2019

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

DU LL.B. 2019 – Question 1(b) and UP J (Mains) 2012 Question 6(b)

Question 1(b) – State the provisions of law and give as to the relevancy of the following facts:
In a dispute between X &Y for inducing A to break his contract of service, made by him with X, following statement of A as been produced as evidence by X:
"I am leaving you because B has made me a better offer."

Question 6(b)- A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A — "I am leaving you because B has made me a better offer."
Whether the statement of C is relevant?

Answer – Problem of this question is based on section 9, Illustration (d).

According to section 9, ***Facts necessary to explain or introduce a fact in issue or relevant fact*** are relevant.

Section 9 Illustration (d) –

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

UP (J)(M) 2006 Question 5(b) (i)

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

UP (J) Mains, 1992, Question 5 (b)(ii)
UP (J) Mains, 1992, Question 5 (b)(ii)
Raj.(J) Pre. 2011

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

Jharkhand (J) (Pre) 2019

Question – Test Identification Parade is
(a) Substantive evidence **(b)** Corroborative evidence **(c)** No evidence **(d)** Hearsay Evidence.
Answer- (b) Corroborative evidence

Matru Alias Girish Chandra* v. *State of Utttar Pradesh[52] (3 March, 1971)

Supreme Court observed, "Identification tests do not constitute substantive evidence. Such tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines".

***Santokh Singh* v. *Izhar Hussain and Anr.*[53]** (25 April, 1973)
The identification can only be used as corroborative of the statement in Court.

Ram Nath Mahto* v. *State of Bihar **[**Justice Punchhi, M.M.] (April 10, 1996).
In this case there was dacoity with murder in running train. Accused was put to identification parade conducted by Judicial Magistrate. Victim accepted but later on due to fear denied to identify in Court. Judicial Magistrate came as a witness. Only on the basis of identification parade accused was convicted. In this case Supreme Court did not clearly said that TIP is substantive evidence. But he rejected the argument that TIP is not substantive evidence.

Mulla & Another vs State Of U.P. *(*8 February, 2010) (Division Bench)
Unfortunately in this case ratio of ***Ram Nath Mahto* v. *State of Bihar*** was not discussed. Regarding corroborative evidence several cases were discussed. In this case Supreme Court discussed following points-
"The identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two -fold.

- **First** is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime.
- **Second** is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence.

Therefore, the following principles regarding identification parade emerge:
(1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses;
(2) this condition can be revoked if proper explanation justifying the delay is provided; and, **(3)** the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses.

Raju Majhi* v. *State of Bihar, (February 2, 2018)

The identification parade belongs to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in Court. The weight to be attached to such identification should be a matter for the Courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

[52] (1971) 2 SCC 75
[53] (1973) 2 SCC 406).

Chhattisgarh (J) (Pre) 2011 or 2012
Question- Test Identification Parade is permissible under section 9 of the Indian Evidence Act of following fact/s-
(a) Person (b) Anything (c) Both (d) Neither person nor anything.
Answer- C. Both

Conspiracy

DU LL.B. 2019 Question 2
On the 9th Oct. 1930 a police officer and his wife were wounded by revolver shots near the police station at Lamington Road in Bombay. These shots were fired by some persons who were in Motor Car which was standing on the opposite side of the road. As a result of investigation into incident several persons were arrested and placed on trial.
Evidence was sought to be given of a statement of an absconding accused, to the approver that the conspirators had shot a police officer, that a pamphlet should be written and distributed to start a propaganda in furtherance of the objects of the conspiracy.
Decide the relevance of the statement with the help of judicial pronouncements.

Section10

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

Section 10 **Principle of Agency**	Section 10 is based on 'Principle of Agency'. It is exception of the rule that one cannot be criminally liable for others.

Ingredients of section 10

In the cases of *Sardar Sardul Singh Caveeshar* v. *State Of Maharashtra* (SC 18 March, 1963), *Bhagwan Swarup Lal Bishan and Others* v. *State of Maharashtra* (AIR 1965 SC 682) & *CBI* v.*V.C.Shukla* following ingredients of section 10 can be concluded-
In short, section 10 can be analyzed as follows:
(i) Prima facie evidence - There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy;
(ii) Reference to their common intention - if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other;

(iii) Said, done or written after common intention- anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them ;
(iv) Relevant for proving conspiracy and member- it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it ; and
(v) Use- it can only be used against a co-conspirator and not in his favour.

In Kehar Singh & ors. vs. State (Delhi Administration) [1988 (3) SCC 609], Jagannatha Shetty, J., has analysed the section as follows: "From an analysis of the section, it will be seen that Section 10 will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a ***prima facie evidence*** that the person was a party to the conspiracy before his acts can be used against his co- conspirator. Once such prima facie evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others.
It is relevant not only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a party to it."

State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru on 4 August, 2005
Fact- The genesis of this case lies in a macabre incident that took place close to the noon time on 13th December, 2001 in which five heavily armed persons practically stormed the Parliament House complex and inflicted heavy casualties on the security men on duty.

Section 10 of Evidence act is based on the principle of agency operating between the parties to the conspiracy inter se and ***it is an exception to the rule against hearsay testimony***. If the conditions laid down therein are satisfied, the act done or statement made by one is admissible against the co-conspirators.

UP (J) (Mains) 2018

A, B and C are prosecuted for the murder and conspiracy to murder of D. As the principle evidence of conspiracy, certain letters written by the accused to each other during the conspiracy are submitted. A statement made to the examining Magistrate by B, giving an account of the conspiracy, after arrest, is also put in evidence. What is relevant –the letters or the statement or both?
Answer –

You have to discuss ingredients of section 10 and *Mirza Akbar* v. *Emperor.* ***(1)*** Letters are relevant. ***Reason*** – These were written during conspiracy. ***(2)*** A statement made to the examining Magistrate by 'B' is not relevant. ***Reason*** – It was made after ceasing of conspiracy.

Mirza Akbar* v. *Emperor
This case is related to killing of husband with lover by making conspiracy. There was exchange of love letters and those letters were also containing plan to kill. Husband (Ali Askar) was killed by Umar Sher (Hired goon) on August 23, 1938 in pursuance of conspiracy between Mehr Taja (wife)

and Mirza Akbar (Lover). Umar Sher was caught red handed by public Mirza Akbar was requesting public to release Umar Sher.
Mehr Taja (wife) made confession before Magistrate and revealed about conspiracy.

Additional Session Judge — *(Conviction Section 302r/w 120B)*
Judicial Commissioner — *Appeal dismissed*
Privy Council — *Appeal should be dismissed*

Argument of appellant-
The appellant's contention was that this conclusion was vitiated by the admission as against him of a statement made by Mst. Mehr Taja before the Examining Magistrate after she had been arrested on the charge of conspiracy. That statement which was made in the appellant's absence was admitted in evidence both by the trial judge and by the Judicial Commissioner on appeal as relevant against the appellant under Section 10 of the Evidence Act.

Letters — Statement to Magistrate

Privy Council considered and advised following important points -

(1) *Queen* v. *Blake*[54] – In this case ratio of *Queen* v. *Blake* case was considered.
This case illustrates the two aspects of conspiracy namely; what is admissible and what is inadmissible.

- **Admissible-**What in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used for carrying out the fraud.
- **Inadmissible-** A document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other.

Queen v. Blake is related to conspiracy. In this case there was carrying away goods without payment of full custom duty. A mere statement made by one conspirator to a third party or any act not done in pursuance of the conspiracy is not evidence for or against another conspirator.

(2) Three letters -The three documents taken as a whole show that the two writers of the documents desired to get rid of Ali Askar so that they should marry each other. There was a question of finding money for hired assassin to get rid of him.

[54] (1844) 6 Q.B. 126.

(3) Statement to Magistrate **–**It was observed that statement to Magistrate was not part of conspiracy. It was made after ceasing conspiracy. After murder common intention had fulfilled.
The Court observed,
The words "a common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them.

- **Admissible-** Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence.
- **Inadmissible-** Any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is inadmissible against the other party.

Conclusion-

- **Admissible -** It was concluded that contents of letters were admissible as showing conspiracy.
- **Inadmissible -** Statement made to Magistrate was not relevant under section 10 of the IEA because it was made after ceasing conspiracy.

With this conclusion it was advised that keeping these observations appeal should be dismissed.
On the material before the Court, after the statement made to Magistrate is excluded, there was evidence sufficient to justify the conviction. The terms of the letters are only consistent with a conspiracy between the prisoners to procure the death of Ali Askar.

***Badri Rai and Another* v. *State of Bihar*[55]** (18 August 1958)

Introduction -*This case is related conspiracy to give bribe to police office to hush up case. Case is related to section 165A r/w120B of IPC and section 10 of the IEA. This is related to section 10 of the Evidence Act. It was concluded that at the time of giving bribe in police station saying of Badri Rai, "Ramji, had sent the money through him in pursuance of the talk that they had with him, in the evening of August 24, as a consideration for hushing up the case that was pending against Ramji" clearly denote that money was given in pursuance of conspiracy.*

Fact-
First Appellant- Badri Rai
Second appellant- Ramji Sonar

- **Ramji Sonar**, is a gold smith by profession, and runs a shop on the main road in the Village Naogachia. In that village, there is a police station, and the shop in question is situated in between the police station building and the residential quarters of the Inspector of police.
- **Badri,** runs a school for small boys in the same village, about 50 yards away from the shop aforesaid, of the second appellant.

August 22, 1953 - On August 22, 1953, the First Informant, who, holding the position of an Inspector of Police, was in charge of the police station, made a seizure of certain ornaments and molten silver from a vacant building in front of the house of Ramji. Those ornaments were being

[55] AIR 1958 SC 953

melted by six strangers coming from distant places, with implements for melting, said to have been supplied by Ramji. The seizure was made on the suspicion that the ornaments and the molten silver were stolen property, which were to be sold to Ramji in a shape which could not be identified with any stolen property.
Ram Ji was arrested and released on bail**.**
August 24, 1953 -Both appellants met with police officer and offered for bribe to hush up the case on August 24, 1953. The Inspector told them to come to the police station. Thereafter, the Inspector reported the matter to his superior officer, the DSP and to the Sub-Inspector, attached to the same police station.
August 31, 1953- On August 31, the same year, the first appellant, Badri, came to the police station, saw the Inspector in the central room of the *thana*, and offered to him a packet wrapped in a piece of old newspaper, containing Rs 500 in currency notes. He told the Inspector, that Ramji, had sent the money through him in pursuance of the talk that they had with him, in the evening of August 24, as a consideration for hushing up the case that was pending against Ramji. At the time the offer was made, a number of police officers, besides a local merchant, were present there. The Inspector at once drew up the first information report of the offer of the bribe on his own statement, and prepared a seizure-list of the money, thus offered, and at once arrested Badri, and put him in the *thana* lock-up.
One serious issue was raised on behalf of Ram Ji, Second Appellant.
Issue - Whether the statement made by Badri, on August 31, 1953, that he had been sent by the Ram Ji with the money to be offered by way of bribe to the police officer, was admissible against Ram Ji.
Answer – Yes. It was made in reference to common intention in pursuance of conspiracy. Conspiracy was to give the bribe to hush up the case.
In this case Supreme Court also considered ratio of *Marza Akbar case* and *Blake case.*
Conclusion-Appeal was dismissed.

Central Bureau of Investigation **v.** *V.C. Shukla*[56] **(SC 1998)**

Indian Evidence Act, 1872
Section 10
Sections 17 to 21
Section 34

Facts-
On May, 3, 1991 the Central Bureau of Investigation (CBI), searched the premises of J.K. Jain at G-36, Saket, New Delhi.
According to charge of CBI -

- **J.K.Jain** was employee of Jain Brothers (Three Brothers) was maintain books of account.
- **Jain brothers -**S.K. Jain, B. R. Jain, and N.K. Jain, who were three brothers carrying on different businesses. They were working as middleman.

[56]AIR 1998 SC 1406

- **L.K.Adwani** was M.P. He received some bribe to help in allotting tender in illegal manner.
- **V.C. Shukla** was M.P. He received some bribe to help in allotting tender in illegal manner.

In course of the search they recovered, besides other articles and documents, ***two diaries, two small note books*** and ***two files*** containing details of receipts of various amounts from different sources.

- It talks about Rs. 65.47 crores, out of which 53.5 crores had been illegally transferred from abroad through hawala channels, during the years 1988 to 1991 to 115 persons including **L.K.Adwani** & **V.C. Shukla.**
- the Jain brothers and J.K. Jain, who is their employee, had acted as middlemen in the award of certain big projects in the power sector of the Government of India to different bidders; that they had official dealings with politicians and public servants whose names were recorded in the diaries and the files.

Court of the Special Judge - On such revelation the CBI registered a case on March 4, 1995 under Prevention of Corruption Act, 1988 and Foreign Exchange Regulation Act, 1973. Charge-sheets (challans) in the Court of the Special Judge, New Delhi were submitted. Charges were framed against accused.

High Court-It was challenged in High Court under section 482 which deals inherent power of High Court. High Court quashed the proceeding and discharged accused.

Supreme Court – Decision of High Court was challenged by CBI in Supreme Court. The entire edifice of the prosecution case is built on the diaries and files - and for that matter the entries made therein which was recovered from J. K. Jain. While the appellant claimed that the entries in the documents would be admissible under Sections 10, 17 and 34 of the Evidence Act, 1872.

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

Illustration

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

Arguments of CBI –Arguments of CBI was based on three sections –

- **(1) Section 34 -** The documents unmistakably showed that accounts of business regarding receipt and payment of money during the period 1988 to 1991 were regularly maintained those documents would be admissible under Section 34 of the Act. Relying upon the statements of some of the witnesses recorded during investigation and report of the handwriting expert that the entries in the documents were in the handwriting of J.K. Jain, and that the three Jain brothers had signed those documents in token of their authenticity,
- **(2) Section 10 -**it was contended that entries therein would be admissible also under Section 10 of the Act to prove that pursuant to a conspiracy hatched up by the Jains to obtain favours from politicians and other public servants payments were made to them from moneys received through hawala transactions.

- **(3) Sections 21 -** Section 17 and 21 were also pressed into service to contend that the entries would be 'admission' of the Jains of such payments.

Reply of V.C. Shukla and Others.
In refuting the above contentions it was submitted on behalf of the respondents that
(1) Section 10 –

- Since those documents were *not books of accounts*
- *nor were they maintained in regular course of business* they would not be relevant under Section 34.
- It was next submitted that even it was assumed that those documents were relevant and admissible under Section 34 they could be, in view of the plain language of that Section, used *only as corroborative evidence*, but in absence of any independent evidence to prove the payments alleged therein the documents were of no avail to the prosecution.

(2) Section 10 - There was not an iota of material to show even, *prima facie*, that there was a conspiracy.
(3) Section 21- Absence of any material to prove 'admission' of Jains.

Decision of Supreme Court
(a) Meaning of book –'Book' ordinarily means a collection of sheets of paper or other material, blank, written, or printed, fastened or bound together so as to form a material whole. Loose sheets or scraps of paper cannot be termed as 'book' for they can be easily detached and replaced.
(2) Principles of agency - Ordinarily, a person cannot be made responsible for the acts of other unless they have been instigated by him or done with his knowledge or consent. This section provides an exception to that rule, by laying down that an overt act committed by any one of the conspirators is sufficient, (on the general principles of agency) to make it the act of all.
(3) **Acceptance of ratio** of *Sardar Sardul Singh Caveeshar* v. *State Of Maharashtra* (SC 18 March, 1963)*and Bhagwan Swarup Lal Bishan and Others* v. *State of Maharashtra* (AIR 1965 SC 682)
In short, section 10 can be analysed as follows:
(i) Prima facie evidence - There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy;
(ii) Reference to their common intention - if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other;
(iii) Said, done or written after common intention- anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them ;
(iv) Relevant for proving conspiracy and member- it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it ; and
(v) Use- it can only be used against a co-conspirator and not in his favour.

Shri Shukla was known to the Jain brothers and had gone to their residence on formal occasions was not sufficient to show existence of conspiracy. So far as Shri Advani is concerned, no one has even spoke about him in their statements. Two constitutes the conspiracy there must be two parties. One person cannot constitute conspiracy.

Since the first requirement of Section 10 is not fulfilled the entries in the documents cannot be pressed into service under its latter part.

(4) Communication for admission – In this case Supreme Court with the help of *Bhogilal* v. *State of Maharashtra*[57] and Section 21, Illustration (b) concluded that communication of admission is not necessary.

(5) Meaning of statement- In this case Supreme Court with the help of *Bhogilal* v. *State of Maharashtra* said that word 'statement' used in section 17 (An admission is a statement…) has been used in its primary meaning namely, 'something that is stated' and communication is not necessary in order that it may be a statement. Entries in book without any communication may be an admission.

(6) Difference between admission and confession –In this case Supreme Court accepted difference between admission and confession as discussed in *Monir's Law of Evidence*. Difference was made on the basis of section 30 of the Evidence Act. It was concluded that confession made by co-accused can be used against other accused but admission made by co-accused cannot be used against other accused.

Decision- There was no prima facie case of existence of conspiracy. Admission cannot be used against other co-accused. So appeal of CBI was dismissed.

Mohd. Khalid* v. *State of West Bengal (Sept. 3, 2002 SC)

There was demolition of Babari on December 6, 1992. Terrorist attacked in Calcutta on March 16 & 18, 1993. Several people were killed and injured. Several persons were arrested and Challan was submitted for commission of offences under sections 120B, 436, 302, 307, 326 of IPC. Section 10 of the Indian Evidence Act was discussed to establish conspiracy.

Arguments of Mohd. Khalid –

(1)Purpose of collection of weapons was to protect ourselves

(2) Confession was not voluntarily. It was retracted confession.

(3) There was delay in examination of witness.

Reply of State –

(1) Purpose of collection of weapons was not to protect themselves. There was collection of large quantity of explosive. Real motive was to destroy harmony.

(2) Confession was voluntarily. Retraction was overthought.

(3) First priority of State was to save lives. So there was some delay in examination of witnesses.

Supreme Court – In this case Supreme Court discussed following important points –

(1) Section 24 of IEA- The principle therein is that confession must be voluntary. It must be the outcome of his own free will inspired by the sound of his own conscience to speak nothing but the truth.

'Voluntary' means a statement made of the free will and accord of accused, without coercion, whether from fear of any threat of harm, promise, or inducement or any hope of reward.

(2) Section 30 – There are following important points-

- **Firstly (Confession)-**There should be a *confession* proper and not a mere circumstance or an information which could be an incriminating one.
- **Secondly (No evidence u/s 3) -** it being the confession of the maker, it is not to be treated as evidence within the meaning of Section 3 of the Evidence Act against the non-maker co-accused and

[57] (1959) Supp. 1 SCR 310.

- **Thirdly *(Corroborative*) -** Its use depends on finding other evidence so as to connect the co-accused with the crime and that too as a *corroborative piece*.

(3) Definition of confession - Confession is statement containing an admission of guilt and not merely a statement raising the inference with regard to such a guilt.
(4) Confession is not admission under section 3- The confession of a co-accused does not come within the definition of 'Evidence' contained in Section 3 of the Evidence Act. These are following reasons -

- It is not required to be given on oath,
- nor in the presence of the accused, and
- it cannot be tested by cross-examination".

(5) Ratio of *Bhuboni Sahu*[58] & *Kashmira Singh*[59] *Cases*- In this case ratio of these cases were followed.
(6) Double Test - Ratio of *Shankaria* v. *State of Rajasthan*[60] was accepted**. In Shankaria Case** the court applied double test for deciding the acceptability of a confession, i.e.,

- (***i***) whether the confession was perfectly voluntary, and
- (***ii***) if so, whether it is true and trustworthy.

Satisfaction of the first test is a *sine qua non* for its admissibility in evidence.
(7) Post arrest statement does not come u/conspiracy -The post-arrest statement made to a police officer, whether it is a confession or otherwise touching his involvement in the conspiracy, would not fall within the ambit of Section 10 of the Evidence Act.
(8) Prima facie is opening lock of Section 10 -The first condition which is almost the opening lock of that provision is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy.
(9) Substantive evidence- If prima facie condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement "in reference to their common intention".
(10) Difference between English and Indian Law -Under the corresponding provision in the English law the expression used is "in furtherance of the common object". No doubt, the words "in reference to their common intention" are wider than the words used in English law.

S. No.	English Law	Indian Law
1	"in *furtherance* of the common *object*".	"in *reference* to their *common intention*"
2	Narrower	Wider

(11) Theory of Agency- Section 10 contains theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted.

[58] **Bhuboni Sahu v. The King** (DOJ -February 17, 1949)

[59]**Kashmira Singh v. State of Madhya Pradesh(4 March, 1952)**
[60] (1978) 3 SCC 435

(11) Acceptance of ratio of *Mirza Akbar Case* -
In this case Supreme Court accepted the ratio of *Mirza case* regarding scope of section 10.
Privy Council observed in *Mirza Akbar case*, "The words 'common intention' signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party."
Conclusion – Appeal was dismissed.

Section 11. When facts not otherwise relevant become relevant.—Facts not otherwise relevant are relevant—
(*1*) if they are inconsistent with any fact in issue or relevant fact;
(*2*) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations
(*a*) The question is, whether A committed a crime at Calcutta on a certain day.
The fact that, on that day, A was at Lahore is relevant.
The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

Comment

Section 11 contains two principles namely;
(1) Principle of 'Inconsistency' – Section 11(1)
(2) Principle of 'Probability' - Section 11(2)-
There are following example of 'Principle of Inconsistency' –

1. Alibi [Section 11(Illustration (a)]
2. Absence of husband (Non-access – Section 112)
3. Survival of deceased
4. Self-infliction of the alleged harm.

There are following example of 'Principle of Probability'-

- [Section 11(Illustration (a) third part & Illustration (b)]

Plea of alibi
UP J (M) 2006 Question 5(b)(ii)

(*b*) The question is, whether A committed a crime.
The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.
UP (J) Pre. 2018 Series C Question 70
The case of *Dudh Nath Pandey* v. *State of Uttar Pradesh* is related to:
(a) Res gestae
(b) Plea of alibi

(c) Admission
(d) Accomplice
Answer - (b) Plea of alibi

There are two leading cases-

1. *Dudh Nath Pandey* v. *The State of U.P*. (February 11, 1981)
2. *Jayantibhai Bhenkarbhai* v. *State of Gujarat* (September 11, 2002).

***Dudh Nath Pandey* v. *The State of U.P.*[61] (1981)**

In this case Hon'ble Supreme Court observed, "The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed".

***Jayantibhai Bhenkarbhai* v. *State of Gujarat*[62]**

In this case 'Sarkar on Evidence' was quoted.

- **Origin & Meaning -** The word "*alibi*" is of Latin origin and means "elsewhere".
- **Provision -**The plea of *alibi* flows from Section 11 and is demonstrated by Illustration (*a*).
- It is a convenient term used for the defence taken by an accused that when the occurrence took place he was so far away from the place of occurrence that it is highly improbable that he would have participated in the crime.
- **Not exception -** *Alibi* is not an exception (special or general) envisaged in the Indian Penal Code or any other law.
- **Rule of Evidence -** It is only a rule of evidence recognized in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant.
- **Burden of prove-**The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of *alibi*.
- **Timing of consideration of this evidence-** The plea of *alibi* taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of *alibi*.
- But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of *alibi* to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the court to weigh in scales the evidence adduced by the prosecution in proving the guilt of the accused and the evidence adduced by the accused in proving his defence of *alibi*.

[61] Date of decision - February 11, 1981.
[62] Date of decision - September 11,2002

- If the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of *alibi*. The burden of the accused is undoubtedly heavy.
- **Section 103-** This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to the benefit of that reasonable doubt which would emerge in the mind of the court.

Burden of prove

Section 103. Burden of proof as to particular fact -The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

***Illustrations* (*b*) -** B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

DU LL.B. Semester Exam. 2019

Question 1- State the provisions of law and give reasons as to the relevancy of the facts:

(d) A is accused of kidnapping a child from Agra on 31/08/2018. A produces a certificate that he was admitted in PGI, Chandigarh form 25/08/2018 -05/09/2018 for treatment of liver infection.

UP (J) Pre. 2018 Series C Question 70

The case of *Dudh Nath Pandey* v. *State of Uttar Pradesh* is related to:
(a) Res gestae
(b) Plea of alibi
(c) Admission
(d) Accomplice
Answer - (b) Plea of alibi

Section 12. In suits for damages, facts tending to enable Court to determine amount are relevant. – In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

Section 13. Facts relevant when right or custom is in question.—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 question 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, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

Illustrations

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.

UP (J) Mains, 1999, Question 6 (b) - What facts are relevant when the question is as to the existence of right or custom? Answer with example.

Answer – Section 13.

Section 14. Facts showing existence of state of mind, or of body of bodily feeling -Facts showing the existence of any state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

***Explanation* 1 -** A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

***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

***Illustration* (*a*) -** A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

UP (J) (Mains), 2012 Question 7(b)

***Illustration* (*b*) -** A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

UP (J) (M) 2006 Question 7(b)(ii)

***Illustration* (*c*)** A sues B for damage done by a dog of B's, which B knew to be ferocious.

The fact that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

***Illustration* (*d*) -** The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

UP APO (M), 1988 1996, UP (J) (Mains), 2012 Question 5(c)

***Illustration* (*e*) -** A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

***Illustration* (*f*)** - A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.
The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.
***Illustration* (*g*) -** A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.
A's defence is that B's contract was with C.
The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.
***Illustration* (*h*) -** A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.
The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.
The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

***Illustration* (*i*)** - A is charged with shooting at B with intent to kill him. In order to show A's intent the fact of A's having previously shot at B may be proved.
***Illustration* (*j*)** - A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.
***Illustration* (*k*)** - The question is, whether A has been guilty of cruelty towards B, his wife.
Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.
***Illustration* (*l*) -** The question is whether A's death was caused by poison.
Statements made by A during his illness as to his symptoms are relevant facts.
***Illustration* (*m*)** -The question is, what was the state of A's health at the time when an assurance on his life was effected.
Statements made by A as to the state of his health at or near the time in question are relevant facts.
***Illustration* (*n*) -** A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.
The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant.
The fact that B was habitually negligent about the carriages which he let to hire is irrelevant.

UP (J) Mains, 1992, Question 5 (b)(i)
UP (J) Mains, 2003, Question 5 (b)(i)
UP (J) Pre. 2018 Series C Question 113 (Same question in 2016 also).

A is tried for the murder of B by intentionally shooting him dead. The fact that A was in the habit of shooting at people with intent to murder them –

A. Relevant Fact
B. Irrelevant

C. Neither relevant nor irrelevany
D. Fact in issue
Answer - Irrelevant. Section 14 Illustration (o)

***Illustration* (*o*)-** *A is tried for the murder of B by intentionally shooting him dead.*

- The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. *(Particular – Relevant – Explanation 1).*
- The fact that A was in the habit of shooting at people with intent to murder them is irrelevant. *(General – Irrelevant – Explanation 1).*

***Illustration* (*p*) -** A is tried for a crime.
The fact that he said something indicating an intention to commit that particular crime is relevant.
The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

Section 15. Facts bearing on question whether act was accidental or intentional.—When there is a question whether 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

***Illustration* (*a*)** A is accused of burning down his house in order to obtain money for which it is insured.
The facts that A lived in several houses successively each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.
***Illustration* (*b*)** A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.
The question is, whether this false entry was accidental or intentional.
The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.
***Illustration* (*c*)** A is accused of fraudulently delivering to B a counterfeit rupee.
The question is, whether the delivery of the rupee was accidental.
The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental

Section 16. Existence of course of business when relevant.—When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations

***Illustration* (*a*)** The question is, whether a particular letter was dispatched.
The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place are relevant.
***Illustration* (*b*)** The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

Admission

Chapter –IV, Sections 17 to 31 of the Indian Evidence Act, 1872

UP (J) Mains, 1992, Question 6 (a)

What do you understand by "admission" and "confession"? Distinguish between the two and explain their evidentiary values.

UP (J) Mains 2006 Question 6(a)

Explain admission and confession and distinguish between them and discuss also to what extent they are admissible in the Court?

Introduction –'Admission' has been defined under sections 17 to 20. Definition of admission does not complete unless and until all sections i.e. 17 to 20 are discussed. Section 21 talks about relevancy, use, non-use and its exceptions. Section 22 deals about relevancy of oral admission as to contents of document. Section 22A deals about relevancy of oral admission as to contents of electronic records. Section 23 deals when admission is not relevant in civil cases. According to section 31 says that admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

***Sahoo* v. *State of U.P.*[63] (February 16, 1965)**

A scrutiny of the provisions of Section 17 to 31 of the Evidence Act discloses that statement is a genus, admission is the species and confession is the sub-species.

In the case of ***Aghanoo Nagesia* v. *State of Bihar***[64] (SC 4 May, 1965) Supreme Court said that confession is a species of admission.

Opinion of author[65]

Fact ➡ Statement ➡Admission➡ Confession

Fact ⬅ Statement ⬅Admission⬅ Confession

Meaning of 'Statement' – *Bhogilal* v. *State of Maharashtra*[66] *(1959)*

In this case Supreme Court said that word 'statement' used in section 17 (An admission is a statement…) has been used in its primary meaning namely, *'something that is stated'* and communication is not necessary in order that it may be a statement.

***Sahoo* v. *State of U.P.*[67] (February 16, 1965)**

The dictionary meaning of the word 'statement' is 'the act of stating, reciting or presenting verbally or on paper.' The term 'statement' therefore, includes both oral and written statements.

Question -Is Communication of admission or confession to third person necessary?

Answer- Communication of admission or confession is not necessary. There are following cases-

Bhogilal Chunilal Pandya* v. *The State of Bombay[68] (DOD 4 November, 1958)

[63] AIR 1966 SC 40
[64] AIR 1966 SC 119
[65] Krishna Murari Yadav, Assistant Professor, Faculty of Law, University of Delhi, Delhi.
[66] (1959) Supp. 1 SCR 310.
[67] AIR 1966 SC 40
[68] (1959) Supp. 1 SCR 310, AIR 1959 SC 356.

In this case Hon'ble Justice of Supreme Court Mr. K.N. Wanchoo, with help Section 21, Illustration (b) concluded that communication of admission is not necessary.

***Sahoo* v. *State of U.P.*[69]**

The dictionary meaning of the term 'Statement' does not demand communication; nor the reason of the rule underlying the doctrine of admission or confession demands it.

Central Bureau of India* v. *V.C.Shukla[70] (1988)

In this case Supreme Court with the help of *Bhogilal* v. *State of Maharashtra*[71] and Section 21, Illustration (b) concluded that communication of admission is not necessary. Entries in book without any communication may be an admission.

UP (J) Pre. 2018 Series C Question 113

"A confession even consists of conversation to oneself, for it is not necessary for relevancy of a confession that it should be communicated to some other person", was held in the case of

A. Shankaria v. State of Rajasthan
B. Boota Singh v. State of Punjab
C. Sahoo v. State of U.P.
D. Nishikant Jha v. State of Bihar

Answer- C. Sahoo v. State of U.P.

Question –Is admission and confession exception of 'Hearsay Evidence'?

Answer- Yes. ***Sahoo* v. *State of U.P.*[72]**

In this case Supreme Court said that Admissions and confessions are exceptions to the hearsay rule

Question- What is justification declaration of confession and admission as relevant facts?

Answer-

***Sahoo* v. *State of U.P.*[73]**

Evidence Act places them in the category of relevant evidence, presumably on the ground that, as they are declarations against the interest of the person making them, they are probably true.

Question – How to prove admission and confession?

Answer-

***Sahoo* v. *State of U.P.*[74]**

The probative value of an admission or a confession does not depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission or confession, as the case may be. The following illustration pertaining to a written confession brings out the said idea: A kills B; enters in his diary that he had killed him, puts it in his drawer and absconds. When he places his act on record, he does not communicate to another; indeed, he does not have any intention of communicating it to a third party. Even so, at the trial the said statement of the accused can certainly be proved as a confession made by him. If that be so in

[69] AIR 1966 SC 40
[70] AIR 1998 SC 1406.
[71] (1959) Supp. 1 SCR 310.
[72] AIR 1966 SC 40
[73] AIR 1966 SC 40
[74] AIR 1966 SC 40

the case of a statement in writing, there cannot be any difference in principle in the case of an oral statement. Both must stand on the same footing.

ADMISSIONS

Section 17. Admission defined.—An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Section 18. Admission by party to proceeding or his agent.—Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly 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*) by 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*) by 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 19. Admissions by persons whose position must be proved as against party to suit. Statements made by persons whose position or liability, it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

UP (J) (M) 2006 Question 6(b)(i)
Jharkhand (J) (M) 2014 Question 8(b)(i)

Illustration

A undertakes to collect rents for B.
B sues A for not collecting rent due from C to B.
A denies that rent was due from C to B.
A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Section 20. Admissions by persons expressly referred to by party to suit. —Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

UP (J) (M) 2006 Question 7(b) (i)
Jharkhand (J) (M) 2014 Question 8(b)(ii)

Illustration

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

UP (J) (M) 1991Question 2(a)

Whether an admission can be used by the maker of the admission in his own favour? If so, in what circumstances? Explain and illustrate.

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

(*1*) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(*2*) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

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

	Three parts of section 21	
(i) Admissions are relevant	**(ii) Rule-** It may be proved against maker	**(iii) Three Exceptions** – It can be used in favour of maker. These three exceptions are – **(a) Clause 1-** Statement relevant under section 32.(Ills. b & c) **(b) Clause 2-** Statement as to existence of state of mind or body. **(b) Clause 3-** Statement relevant otherwise than as admission. .(Ills. d & e)

Illustrations

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

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

UP (J) Mains, 2013Question 5(c)

Illustration (*b*) - A, the captain of a ship, is ***tried for casting her away.***

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

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

Section 21 Ill.(b)	***Casting her away.***
Section 32 Ill. (h)	**Cause of ship**
Section 32 Ill. (d)	whether a ship sailed from Bombay harbour on a given day

Illustration (*c*) A is accused of a crime committed by him at Calcutta.
He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.
The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (*2*).
Illustration (*d*) A is accused of receiving stolen goods knowing them to be stolen.
He offers to prove that he refused to sell them below their value.
A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.
Illustration (*e*) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.
He offers to prove that he asked a skillful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.
A may prove these facts for the reasons stated in the last preceding *illustration*.

Section 22. When oral admissions as to contents of documents are relevant.—Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

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

Ground	**Section 22**	**Section 22A**
Rule	Oral admissions as to contents of documents are not relevant.	Oral admissions as to contents of electronic records are not relevant.
Exceptions	There are two exceptions	There is one exception
1	The genuineness of a document produced is in question	The genuineness of the electronic record produced is in question.
2	The party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under section 65 of the Evidence Act.	

Section 23

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

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

Rule is that in civil case admissions are relevant. But there are two exceptions of it. These are –

- 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.

Section 23	**Section 23**
Rule	Rule is that in civil case admissions are relevant
Exceptions	There are two exceptions
1	Expressly prohibited by Parties
2	Impliedly prohibited by Parties

Section 31. Admissions not conclusive proof, but may estop.—Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

Admission is Substantive Evidence

In the case of ***Bharat Singh and Anr.* v. *Bhagirathi***[75] (26 August, 1965) Supreme Court observed, " Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof[76] of the matters admitted."

In the case of ***Bishwanath Prasad* v. *Dwarka Prasad***[77] (October 30, 1973) Supreme Court observed, "Admission by a party is substantive evidence if it fulfills the requirements of Section 21 of the Evidence Act".

Burden of prove

Section 103. Burden of proof as to particular fact - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

***Illustrations* (*a*) -** A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

Admission & Confession

[75] AIR 1966SC 405

[76] Indian Evidence Act, 1872, Section 31 - Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

[77] AIR 1974 SC 117

Ground	Admission	Confession
Definition Under IEA	This word has been defined under Indian Evidence Act. Sections 17 to 20 deal definition of admission.	This word has not been defined under Indian Evidence Act. There is two popular definition of confession given by Stephen and Atkin.
Definition	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.	Atkin, "Confession must ❖ either admit ***in terms*** *the offence*, ❖ or at any rate ***substantially*** all the facts which constitute *the offence*"
By whom	Admission is made by any of the persons, and under the circumstances, as mentioned under ss. 18 to 20. There are total **seven persons** who can make admission. These are -Five person under section 18, one person under section 19 and one person section 20. *Admission can also be made by accused which come under the category of party under section 18*. Here proceeding means civil or criminal.	Here two persons can make confession namely; ❖ Accused ❖ Co-accused.
Genus/ Species	Admission is genus.	In the case of *Aghanoo Nagesia* v. *State of Bihar* Supreme Court said that confession is a species of admission.
Relevant	Admission is relevant under section 21.	Confession is relevant under sections 27 to 30.
Section 30 *(CBI* v. *V.C. Shukla, 1998)*	**Admission by Co-accused** - Admission is admissible only against its maker as an admission and not against those who are being jointly tried with him.	**Confession by Co-accused-** A statement made by an accused person is admissible against others who are being jointly tried with him only if the statement amounts to a confession.
Use	In exceptional cases admission can be used ***in his favour***. There are three exceptions mentioned under section 21.	Confession cannot be used in his favour.
Proceeding	Admission is used in both civil and criminal proceeding.	Generally confession is used in criminal proceeding.
Classification	There is no kind of admission.	There are two kinds of confession namely; **(1)** Judicial Confession & **(2)** Extra-judicial confession

Nature of evidence	In the case of *Bharat Singh and Anr*. v. *Bhagirathi*[78] (26 August, 1965) and Bishwanath Prasad v. Dwarka Prasad (1974) Supreme Court observed, " Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof[79] of the matters admitted."	***Judicial confession*** *is substantive evidence.* **Extra judicial confession** -Evidence of extra judicial confession is generally of a weak nature. No conviction ordinarily can be based solely thereupon unless the same is corroborated in material particulars[80]. But in exceptional cases it can be sole basis of conviction.[81]

Confession and Extra-judicial Confession

State of Rajasthan* v. *Raja Ram (13 August, 2003)
In this case following important points were laid down –

(1) Classification of confessions - Confessions may be divided into two classes, i.e. judicial and extra-judicial.

(2) Meaning –

- **Judicial confessions** are those which are made before Magistrate or Court in the course of judicial proceedings.
- **Extra- judicial confessions** are those which are made by the party elsewhere than before a Magistrate or Court. Extra judicial confessions are generally those made by a party to or before a private individual *which includes even a judicial officer in his private capacity.* It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply.

(3) Kind of confession-There are two types of confession. These are -

- **Voluntary confessions** of guilt, if clearly proved, are among the most effectual proofs in law.
- **An involuntary confession** is one which is not the result of the free will of the maker of it. So where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary.

[78] AIR 1966SC 405
[79] Indian Evidence Act, 1872, Section 31 - Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.
[80] Baldev Singh v. State of Punjab (May 6, 2009)
[81] State of Rajasthan v. Raja Ram (13 August, 2003)

(4) When extra-judicial confession is sole basis of conviction-

The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. *It is not open to any Court to start with a presumption that extra-judicial confession is a weak type of evidence*. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.
If the evidence relating to extra judicial confession is found credible after being tested on the touchstone of credibility and acceptability, ***it can solely form the basis of conviction.***

Sansar Chand **v.** ***State Of Rajasthan*** (October 20, 2010) Justice Markandey Katju
There is no absolute rule that an extra judicial confession can never be the basis of a conviction, although ordinarily an extra judicial confession should be corroborated by some other material.

Difference between Confession and Extra-judicial Confession

Meaning	**Judicial confessions** are those which are made before Magistrate under section 164 or Court in the course of judicial proceedings.	**Extra- judicial confessions** are those which are made by the party elsewhere than before a Magistrate or Court.
Value	**It is substantive evidence**	**It is not substantive evidence**
Conviction	**Conviction is safe without corroboration**	Legally conviction can be done without corroboration. But it is not safe without corroboration
Method of proof	To prove judicial confession, the person to whom judicial confession is made need not be called as witness[82].	Extra-Judicial confession is proved by the calling the person as a witness before whom it was made.

[82] Batuk Lal, 'Law of Evidence' 151 (Central Law Agency, Allahabad, 19th Edn. 2010).

Confession

UP (J) Mains, 1985, Question 7 (a)
Discuss fully evidentiary value of retracted confession. Illustrate your answer.
UP (J) Mains, 1986, Question 8
(a) What is confession? Distinguish between judicial and extra-judicial confession.
(b) State the exception to the rule that confession by accused in police custody is not admissible in evidence.
UP (J) Mains, 1988, Question 3(a)
When does a confession become irrelevant?
UP (J) Mains, 1988, Question 8 (a)
What do you understand by "Inculpatory Statement" and "Exculpatory Statement" of confession? What is the law relating to admissibility of such statement?

Introduction

In the case of *Aghanoo Nagesia* v. *State of Bihar* Supreme Court said that confession is a species of admission. It has been discussed under sections 24 to 30 of Indian Evidence Act and section 164 of Cr.P.C.
Confession has not been defined under Indian Evidence Act. For a long time, the courts in India adopted the definition of "confession" given by Stephen. Confession was defined under Article 21[83] rather than Article 22 of 'A DIGEST OF THE LAW OF EVIDENCE' (1876) written by Sir Stephen. According to this Article "A confession is an admission made at any time by a person charged with a crime and suggesting the inference that he committed that crime. Confessions if voluntary are relevant facts as against the persons who make them only".

Definition of Stephen was discarded by Justice Atkin. In the case of *Pakala Narayanaswami* v. *King-Emperor*[84] [(1939) Justice Atkin observed, "confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence"
Justice Atkin also observed what did not come under definition of confession and said, "No statement that contains self-exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed.
In the Palvinder Kaur v. *State of Punjab*[85] Justice M C Mahajan accepted the definition given by Justice Atkin in *Pakala narayanswami Case.*

In *State of U.P.* v. *Deoman Upadhyaya* [(1961) 1 SCR 14], Shah, J. referred to a confession as a statement made by a person stating or suggesting the inference that he has committed a crime.

In the case of *Aghanoo Nagesia* v. *State of Bihar,* Justice Bachawat observed, " confession may be defined as an admission of the offence by a person charged with the offence".

[83] https://books.google.co.in/books?id=1g8-AAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false
[84] [(1939) LR 66 IA 66, 81].
[85] Supreme Court Oct. 22, 1952 -Palvinder Kaur,was tried for offences under sections 302 and 201, Indian Penal Code, in connection with the murder of her husband, Jaspal Singh.

UP (J) Mains, 1986, Question 8

(a) What is confession? Distinguish between judicial and extra-judicial confession.

Answer- meaning of confession – In this case Supreme Court analyzed earlier definition of confession and concluded that confession may be defined as an admission of the offence by a person charged with the offence.

S.	Jurist	Name of Book/Case	Definition
1	**Stephen.**	A Digest of the Law of Evidence	A confession is an admission made at any time by a person charged with a crime and suggesting the inference that he committed that crime.
2	**Atkin**	*Pakala Narayanaswami* v. *King-Emperor*	**Positive Definition-** "confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence"
			Negative Definition- No statement that contains self-exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed.
3	**Justice M C Mahajan**	*Palvinder Kaur* v. *State of Punjab*	*accepted the definition given by Justice Atkin in Pakala narayanswami Case*
4	**Justice Shah**	*State of U.P.* v. *Deoman Upadhyaya*	Confession is statement made by a person stating or suggesting the inference that he has committed a crime.
5	**Justice R. Bachawat**	*Aghanoo Nagesia* v. *State of Bihar,*	confession may be defined as an admission of the offence by a person charged with the offence

Difference between Confession and Extra-judicial Confession

S.No.	Ground	Judicial Confession	Extra-judicial Confession
1	**Meaning**	**Judicial confessions** are those which are made before Magistrate under section 164 or Court in the course of judicial proceedings.	**Extra- judicial confessions** are those which are made by the party elsewhere than before a Magistrate or Court.
2	**Value**	**It is substantive evidence**	**It is not substantive evidence**
3	**Conviction**	**Conviction is safe without corroboration**	Legally conviction can be done without corroboration. But it is not safe without corroboration
4	**Method of proof**	To prove judicial confession, the person to whom judicial confession is made need not be called as witness[86].	Extra-Judicial confession is proved by the calling the person as a witness before whom it was made.

[86] Batuk Lal, 'Law of Evidence' 151 (Central Law Agency, Allahabad, 19th Edn. 2010).

Question –What is retracted confession? What is evidentiary value of retracted confession?
Answer-

Meaning

When accused or co-accused makes confession and at later stage he denies from making of confession that is called retracted confession.

Evidentiary value of Retracted Confession

***Pyare Lal Bhargava* v. *State Of Rajasthan*[87]** (22 October, 1962)

Fact- Ram Pyare was prosecuted under section 379, IPC for removing of documents from office and handing over his friend. Although, he returned the file on next day. He made confession when the Chief Engineer threatened that if he did not disclose the truth that matter would be send to police. Ram Pyare made confession. But later on he retracted from his confession and said that he had never made confession. Court said that in this circumstances warning of Chief Engineer did not amount to threat.

Supreme Court observed,

- **"***A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made.*
- But it has been held that a court shall not base a conviction on such a confession without corroboration. *It is not a rule of law, but is only rule of prudence.*
- It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars"

UP (J) Mains, 1988, Question 8 (a)

What do you understand by "Inculpatory Statement" and "Exculpatory Statement" of confession? What is the law relating to admissibility of such statement?

Answer- Use of Admission and Confession

Inculpatory statement -Inculpatory statement is that statement by which accused admits that he had committed crime.

Exculpatory statement -Exculpatory statement is that statement by which accused admits that he had not committed crime.

Emperor v. Balmakund

Reference in this connection may be made to the observations of the Full Bench of the Allahabad High Court in *Emperor* v. *Balmakund*[88]. The confession there comprised of two elements,

- **(a)** an account of how the accused killed the women, and

[87] AIR 1963 SC 1094.
[88] (193o) I.L.R. 52 All. 101.

- **(b)** an account of his reasons for doing so,

the former element being inculpatory and the latter exculpatory and the question referred to the Full Bench was:
Question- *Can the court if it is of opinion that the inculpatory part commends belief and the exculpatory part is inherently incredible, act upon the former and refuse to act upon the latter?*
Answer -The answer to the reference was that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible.

In the case of ***Pakala Narayanaswami* v. *King-Emperor***[89] (1939) Justice Atkin also observed what did not come under definition of confession and said, "No statement that contains self-exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed.

Palvinder Kaur* v. *State of Punjab (Oct. 22, 1952)
In this case Supreme Court observed, **"**The well accepted rule regarding the use of *confession* and *admission* that these must either be accepted as a whole or rejected as a whole and that the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible".
Fact-
Palvinder Kaur was accused of causing murder of her husband (Sardar Jaspal) by administering potassium cyanide with help of another person. After 13 days of murder body was thrown.
Confession made by *Palvinder Kaur* -
"My husband Jaspal Singh was fond of hunting as well as of photography….*One day I placed his medicine bottle in the almirah where medicine, for washing photos had been placed*. *I was sitting outside and Jaspal Singh enquired from me where his medicine, was. I told him that it was in the almirah. By mistake he took that medicine which was meant for washing photos*…."
High Court –
(1) High Court accepted inculpatory part i.e. *One day I placed his medicine bottle in the almirah where medicine, for washing photos had been placed*.
(2) High Court rejected exculpatory part i.e. *I was sitting outside and Jaspal Singh enquired from me where his medicine, was. I told him that it was in the almirah. By mistake he took that medicine which was meant for washing photos.*
Supreme Court -The statement read as a whole is of an exculpatory character. It does not suggest or prove the commission of any offence. It states that the death of Jaspal was accidental. This was exculpatory statement. In *Pakala Case*[90] Justice Atkin said that exculpatory statement cannot amount confession. Supreme Court clearly said that it was concur with ratio of *Emperor* v. *Balmakund*[91].
She was acquitted by Supreme Court.

[89] [(1939) LR 66 IA 66, 81].
[90] A statement that contains self-exculpatory matter 'cannot amount to a confession, if the exculpatory statement is of some fact, which if true, would negative the offence alleged to be confessed.
[91] (193o) I.L.R. 52 All. 101.

Aghanoo Nagesia* v. *State of Bihar (1965) -Supreme Court said that confession must be accepted as whole. It cannot be divided into parts.

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

Section 24

Veera Ibrahim* v. *State of Maharashtra

In the case of *Veera Ibrahim* v. *State of Maharashtra*[92] Supreme Court observed, **"**To attract the prohibition enacted in Section 24, Evidence Act, these facts must be established:

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

Facts – There are two accused namely;

- **(1)** Abdul Umrao Rauf – Accused no.1
- **(2)** Veera Ibrahim – Accused no. 2. (Now appellant)

They were prosecuted for attempt to supply of contraband goods by truck. These goods were loaded in the truck under cover of darkness at Reti Bunder (seashore) from the side of seaside wall, in the presence of the appellant, and thereafter the first accused took the wheel, while the appellant sat by his side in the truck, and drove towards Sandhurst railway station. Unfortunately, the truck skidded near the Dongri police station and came to a stop. On hearing the impact of the accident, the police came out, took both the accused into the police station and seized the truck and the goods. In short, the appellant had clearly admitted that these packages containing the contraband goods were

[92] AIR 1976 SC 1167

imported surreptitiously from Reti Bunder under cover of darkness. It was further established *de hors* the statement of the appellant that these packages, on opening by the customs officer, were found to contain contraband goods of foreign make. His statement was recorded under section 108 of Customs Act, 1962.
They were brand new articles packed in bulk. No duty on these goods had been paid.
There were prosecuted under –

- Section 5, Import & Export (Control) Act, 1947
- Section 135(a), Custom Act, 1962
- Section 135(b), Custom Act, 1962

Disputed sentence – Veera Ibrahim claimed to be an innocent traveller in the truck when he said:
"I did not ask Mullaji (driver) what goods were being loaded in his lorry … Mullaji was only my friend and I was not aware of any of his mala fide activities".
Issue *-Whether this is confession.*
Trial Court – Trial Court convicted both for all three charges.
High Court – In High Court there were separate two appeals. High Court acquitted for some charges and convicted for some. These are –

- **Acquittal –**They were acquitted for charge under Section 5, Import & Export (Control) Act, 1947 and Section 135(b), Custom Act, 1962.
- **Convicted –**They were convicted under for charge under Section 5, Import & Export (Control) Act, 1947.

Supreme Court – High Court issued certificate for appeal. Appeal was filed before Supreme Court. The appellant contended before this Court that his statement taken under Section 108 Custom Act, could not be used against him;

- **firstly,** as it was hit by Article 20(3) of the Constitution on account of its having been taken while he was already an 'accused' and
- **secondly,** it was barred under Section 24 of the Evidence Act, the same being a confession obtained under compulsion of law.

Disputed sentence – Veera Ibrahim claimed to be an innocent traveller in the truck when he said:
"I did not ask Mullaji (driver) what goods were being loaded in his lorry … Mullaji was only my friend and I was not aware of any of his mala fide activities".

Supreme Court	**Confession**	**Admission**
Decision of Supreme Court	This was not confession. It was not hit by section 24 of IEA.	It was admission which was relevant under section 21 of IEA.

Issue 1- Whether his statement was his by Article 20(3) of the Constitution.

Issue 2- Whether disputed sentence is confession. If yes, whether this sentence shall be irrelevant under section 24 of the Indian Evidence Act.
Issue 3- Whether evidence is sufficient for conviction of Veera Ibrahim.

Answer of Issue 1

Clause (3) of Article 20 provides: "

- No person ***accused*** of any offence
- shall be ***compelled***
- to be a **witness**
- ***against himself***."

Meaning of accused –
(1) Only a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in his prosecution, would be called accused.
(2) Accused is that person against whome either FIR has been lodged or complaint has been made.
Conclusion-

- In this case appellant was not accused. FIR was recorded by Police. It is clear that when the statement of the appellant was recorded by the Customs Officer under Section 108, the appellant was not a person "accused of any offence" under the Customs Act, 1962.
- An accusation which would stamp him with the character of such a person was levelled only when the complaint was filed against him, by the Assistant Collector of Customs ***complaining*** of the commission of offences under Section 135(*a*) and Section 135(b) of the Customs Act.

Supreme Court said that the High Court was right in holding that the statement recorded by the Inspector of Customs was not hit by Article 20(3) of the Constitution.

Answer of Issue 2

Meaning of Confession –
Firstly, the statement in question is not a "confession" within the contemplation of Section 24. It is now well-settled that

- a statement in order to amount to a "confession" must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.
- An admission of an incriminating fact, howsoever grave, is not by itself a confession.
- A statement which contains an exculpatory assertion of some fact, which if true, would negative the offence alleged cannot amount to a confession.

In this case there was no confession. His statement was exculpatory nature.
Person in authority – Custom Officer was person in authority.
Warning about perjury – warning about perjury was not in reference to charge. It did not created in mind of accused that he will get any types of temporal advantages.

So section 24 is not applicable in this case. His statement was admission of incriminating fact which is relevant under section 21 of the Indian Evidence Act.

Answer of Issue 3

Conviction- Conviction of Veera Ibrahim was upheld by Supreme Court for fraudulent attempt at evasion of duty chargeable on those contraband goods.

. Court held that there were sufficient evidences for his conviction. These are -

- the appellant had clearly admitted that these packages containing the contraband goods were imported surreptitiously from Reti Bunder under cover of darkness.
- contraband goods of foreign make were seized.
- The circumstances of the arrest of the appellant while escaping from the truck,
- the seizure of the truck and the goods,
- the contraband nature of the goods,
- the fact that at the time of the seizure the goods were in the charge of the appellant, the fact that no duty on these goods had been paid,
- the seizure of Rs 2,000 as cash from the appellant etc.

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

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

Purpose of Section 25

In the case of *Raj Kumar Karwal* v. *Union of India* (21 March, 1990) Supreme Court said that purpose of the restriction under Section 25 of the Evidence Act, is broadly speaking, two-fold, namely,

- **(i) to protect the person accused of a crime from third degree** treatment and,
- **(ii)** ***to ensure a proper and scientific investigation*** of the crime with a view to bringing the real culprit to book.

Meaning of Confession

I have already discussed.

Meaning of Police Officer

On the basis of Badku Joti Savant v. State of Mysore and Raj Kumar Karwal v. *Union of India it can be concluded that to be Police officer two conditions must be fulfilled namely,*

- *Power to investigate*
- *Power to submit police report i.e. power to prosecute.*

Badku Joti Savant* v. *State of Mysore (March 1, 1966)
Constitutional Bench (Five Judges)

Facts of Case - The appellant who lived in a village near Goa was found in possession of contraband gold when his house was raided and searched in the presence of panches on November 27, 1960. The appellant was arrested on November 30, 1960. He made confession. He was prosecuted under Section 167 of the Sea Customs Act.
Issue- Whether confession made to **Central Excise Officer** shall be hit by section 25 of the Evidence Act.
Answer-The Central Excise Officer was not a police officer under Section 25 of the Evidence Act. Supreme Court while dealing with the submission based on Section 21(2) of the Central Excise & Salt Act, 1944, observed that even though this sub-section confers on the Central Excise Officer the same powers as an officer-in-charge of a police station investigating a cognizable case "It does not, however, appear that a Central Excise Officer under the Act has power to submit a charge- sheet under Section 173 of the Code .....".
Conclusion- Thus the ratio of the decision appears to be that even if an officer is invested under any special law with powers analogous to those exercised by police officer in charge of a police station investigating a cognizable offence, *he does not thereby become a police officer under Section 25 of Evidence Act unless he has the power to lodge a report under Section 173 of the Code.*

Raj Kumar Karwal* v. *Union of India (21 March, 1990)

Facts of Case- The officers of the Department of Revenue Intelligence (DRI) intercepted one truck. On search, a large quantity of hashish was recovered. Both of them made confessional statements to the DRI officials. Case was registered under Narcotic Drugs & Psychotropic Substances Act, 1985 (NDPS Act) and the Custom Act, 1962. Confession was used against them. They claimed that the confession was hit by section 25 because officers of DRI were police officers under section 25 of the Act. They have power to investigate under section 53 of the NDPS Act.
Even if an officer is invested under any special law with powers analogous to those exercised by a police officer in charge of a police station investigating a cognizable offence, he does not thereby become a police officer under Section 25of the Evidence Act, unless he has the power to lodge a report under Section 173 of the Code.

Appeal was dismissed. In this case officers of DRI had no power to submit police report under section 173. So they were not police officer for the purpose of section 25 of the Evidence Act.
'Police officer' is decided not according to his designation. He is decided according to actual power. Police Officer is that person has power to investigate and submit 'Police Report. It means he has power to prosecute.

Confession made to police officer

Sita Ram* v. *State Of Uttar Pradesh (25 April, 1965)

There was confession but not made to police officer.

Sita Ram and his wife Sindura Rani were living apart and that this was because Sita Ram suspected that his wife was a woman of loose character. He murdered his wife and wrote a letter addressed to the 'Sub-Inspector' and bears the signature of the appellant in Urdu. It reads thus:
"My Dear Darogaji,
I have myself committed the murder of my wife Smt. Sindura Rani. Nobody else perpetrated this crime. I would appear myself after 20 or 25 days and then will state everything. One day the law will extend its hands and will get me arrested. I would surrender myself.

(Sd. in Urdu).Sita Ram Naroola,
14th September, 1962."

On the back of this letter is written the following:
"It is the first and the last offence of my life. I have not done any illegal act nor I had the courage to do that, but this woman compelled me to do so and I bad to break the law".
This letter was found on a table near the dead body of Sindura Rani. It was noticed by the Sub-Inspector Jagbir Singh, and seized in the presence of three persons who attested the seize memo and were later examined as witnesses in the case.
Supreme Court held that it was not hit by section 25because letter was not made to police officer. The police officer was not nearby when the letter was written or knew that it was being written. Punishment was upheld by Supreme Court.

UP J (Mains) 2015

Question 5(c) 'A' is accused of murder of 'B'. 'A' wrote a letter addressed to his friend 'C' stating that he had committed that crime. The letter fell into the hands of a police officer. Are the contents of this letter relevant as evidence against 'A'?
Answer- Yes. There was confession. But that confession was neither made to person in authority (section 24) nor police officer (Section 25). At the time of making confession he was not in police custody (Section 26). So this confession can be used against accused.

Section 26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate4, shall be proved as against such person.
Explanation **-** In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, (10 of 1882).

UP (J) Mains, 1987, Question 2

Write short note –
Confession made in police custody

UP (J) (M) 1997 Question 9(b)

A while in police custody, makes statement of admission of a fact. During trial, Public Prosecutor produces evidences of his admission. 'A' objects the admissibility of evidence on the ground of rule laid down in section 26 of the Indian Evidence Act. Decide

Section 27. How much of information received from accused may be proved.—Provided that, when any fact is deposed to as discovered inconsequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

UP (J) Mains, 1991, Question 2 (b)

- 'A' lodged FIR alleging that in morning he had killed his aunt by an axe and the dead body was lying at his house. Dead body and blood stained axe were lying at his house. The dead body and blood stained axe were recovered therefrom by the police.
- 'A' is prosecuted for murder. There is no eye witness or any other evidence against him.
- Prosecution seeks 'A's conviction for murder on the basis of his version contained in the FIR.

Examine the validity of this contention and admissibility of the FIR as substantive piece of evidence. Decide**.**

Answer - Problem of this question is similar to *Aghanoo Nagesia* v. *State of Bihar*.

***Aghanoo Nagesia* v. *State of Bihar*[93]** (SC 4 May, 1965)

***Facts*-** Aghanoo Nagesia committed four murders. He committed murder of his aunt, her daughter, her son-in –law and son of son-in –law by tangi (axe). His aunt had not any son. She had only daughter. He quarreled several times with aunt. His intention was to get whole property of his aunt after her death. But she was interest to transfer that property to her daughter rather than Aghanoo Nagesia.

So Aghanoo Nagesia decided to kill all four persons so that he can get her property. He killed all these persons during 7 to 8 a.m. on August, 1963. He narrated about this matter to his uncle. He went to police station at 3.15 and narrated all things. FIR was registered against him. That was confessional FIR. On his information four dead bodies, axe, blood stain cloths were recovered.

No one was eye witness of murder.

Decision of the case is solely based on evidentiary value of FIR and relevancy of confession under section 27 of the Indian Evidence Act.

FIR was divided into 18 parts.

Argument of accused – Statement cannot be divided into parts. Whole FIR is confessional. So whole should be rejected.

[93] AIR 1966 SC 119

Argument of Prosecutor- FIR can be divided into parts. Only that part can be rejected which are confessional and those parts which talks about motive, occasion, intention, opportunity etc. must be accepted.

Issue –Whether entire statement is confession.

Some other important points

These are following –

- **(1)** What is meaning of accused?
- **(2)** What is meaning of confession?
- **(3)** What is evidentiary value of FIR?
- **(4)** Is section 27 exceptions of sections 24, 25, and 26?
- **(5)** Is confession species of admission?
- **(6)** What is jurisprudence of non-acceptance of confession either made to police officer or made to any other person when he is in the custody of police officer?
- **(7)** Whether custody included constructive custody?
- **(8)** Was Aghanoo Nagesia acquitted for commission of four murder?

(1) What is meaning of accused?

The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession.

(2) What is meaning of confession? In this case Supreme Court analyzed earlier definition of confession and concluded that confession may be defined as an admission of the offence by a person charged with the offence.

S.	Jurist	Name of Book/Case	Definition
1	**Stephen.**	A Digest of the Law of Evidence	A confession is an admission made at any time by a person charged with a crime and suggesting the inference that he committed that crime.
2	**Atkin**	*Pakala Narayanaswami* v. *King-Emperor*	**Positive Definition-** "confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence"
			Negative Definition- No statement that contains self-exculpatory matter can amount to confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed.
3	**M.C. Mahajan**	*Palvinder Kaur* v. *State of Punjab*	*accepted the definition given by Justice Atkin in Pakala narayanswami Case*
4	**Justice Shah**	*State of U.P.* v. *Deoman Upadhyaya*	Confession is statement made by a person stating or suggesting the inference that he has committed a crime.
5	**Justice R. Bachawat**	*Aghanoo Nagesia* v. *State of Bihar,*	confession may be defined as an admission of the offence by a person charged with the offence

(3) What is evidentiary value of FIR?

Section 154 of the Code of Criminal Procedure provides for the recording of the first information.

- The information report as such is **not substantive evidence**.
- It may be used to *corroborate* the informant under **Section 157** of the Evidence Act or
- to *contradict* him under **Section 145** of the Act, if the informant is called as a witness.
- If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his *conduct* under **Section 8** of the Evidence Act.
- If the information is a non-confessional statement, it is admissible against the accused as an admission under **Section 21** of the Evidence Act and is relevant.
- But a confessional first information report to a police officer cannot be used against the accused in view of **Section 25** of the Evidence Act.

(4) Is section 27 exceptions of sections 24, 25, and 26?

Yes. Section 27 partially lifts the ban imposed by Sections 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied.

(5) Is confession species of admission?

Yes. Confession is species of admission.

Fact ➡ Statement ➡Admission➡ Confession

Fact ⬅ Statement ⬅Admission⬅ Confession

(6) What is jurisprudence of non-acceptance of confession either made to police officer or made to any other person when he is in the custody of police officer?

Police officers are not to be trusted. So confession made to police officer during investigation (section 161 Cr.P.C.) or confession due to inducement, threat or promise (section 24), confession made to police (Section 25) or confession made to third person while in the custody of police (section 26) is not relevant. They are based upon grounds of public policy, and the fullest effect should be given to them.

(7) Whether custody included constructive custody?

Yes. Custody included constructive custody.

- Section 27 applies only to information received from a person accused of an offence in the custody of a police officer.
- Now, the Sub-Inspector stated he arrested the appellant after he gave the first information report leading to the discovery. *Prima facie therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was then in constructive custody.*
- On the question whether a person directly giving to police officer information which may be used as evidence against him may be deemed to have submitted himself to the custody of the police officer within the meaning of Section 27, there is conflict of opinion.

- *For the purposes of the case, we shall assume that the appellant was constructively in police custody and therefore the information contained in the first information report leading to the discovery of the dead bodies and the tangi is admissible in evidence.*

- **(8)** Was Aghanoo Nagesia acquitted for commission of four murders?

Yes. Aghanoo Nagesia was acquitted for commission of four murders.
Reason – Reason was that court held that entire statement except his identification was part of confession. So statement cannot be divided into parts. Discovery of tangi (axe), dead bodies, blood stained chadar are relevant under section 27 of Indian Evidence Act. But it were not sufficient for conviction.

Issue –Whether entire statement is confession.
In this case FIR was divided into 18 parts. According to public prosecutor there are following parts of statement –

Statement →
1, 15 & 18 – About appellant and he went to PS for making lodge FIR
2& 16 Motive
8….Intention
3, 5,8,10Movement and Opportunity
4,6,9,11 ..He killed
12 - Motive
7,13,17 – Concealment of body & tangi
14 - Extra- judicial confession

``

Trial Convicted – Trial Court convicted for murder.

High Court- High Court partially accepted and partially rejected. High Court rejected parts 6,9,11,12 &14. High Court convicted him.

Supreme Court – Supreme Court observed, "Save and except Parts 1, 15 and 18 identifying the appellant as the maker of the first information report and save and except the portions coming within the purview of Section 27, the entire first information report must be excluded from evidence". Courts said that recovery of bodies, axe and blood-stained chadar which are relevant under section 27of the Act. But these evidence are not sufficient to for conviction of Aghanoo Nagesia.
So he was acquitted.

Example given by Supreme Court-

Example 1-

- **Section 304A -**Sometimes, a single sentence in a statement may not amount to a confession at all. Take a case of a person charged under Section 304-A of the Indian Penal Code and a statement made by him to a police officer that "I was drunk; I was driving a car at a speed of 80 miles per hour; I could see A on the road at a distance of 80 yards; I did not blow the horn; I made no attempt to stop the car; the car knocked down *A*."

- No single sentence in this statement amounts to a confession, but the statement read as a whole amounts to a confession of an offence under Section 304-A of the Indian Penal Code, and it would not be permissible to admit in evidence each sentence separately as a non-confessional statement.

Example 2-

Again, take a case where a single sentence in a statement amounts to an admission of an offence. '*A*' states "I struck 'B' with a *tangi* and hurt him." In consequence of the injury '*B*' died. '*A*' committed an offence and is chargeable under various sections of the Indian Penal Code. Unless he brings his case within one of the recognised exceptions, his statement amounts to an admission of an offence, but the other parts of the statement such as the motive, the preparation, the absence of provocation, concealment of the weapon and the subsequent conduct, all throw light upon the gravity of the offence and the intention and knowledge of the accused, and negatives the right of private defence, accident and other possible defences. ***Each and every admission of an incriminating fact contained in the confessional statement is part of the confession.***

UP (J) Mains 2000
Haryana (J) Mains -2012 –
When FIR becomes substantive piece of evidence?
Jharakhand (J) (Mains) 2019)
Write detailed note on: FIR is not substantive piece of evidence.

Answer -

EVIDENTIARY VALUE OF FIR

There are following leading cases on this point -

(1) Aghnoo Nagesia* v. *State of Bihar (SC, 4 May, 1965)

Facts –Aghnoo Nagesia was tried for murder for his aunty and her relatives. He reached to the police station and make registration of FIR. FIR was confessional FIR. He pointed places from where dead bodies and arms were recovered. Under section 25 confessions to police cannot be proved against accused. But section 27 is exception of sections 24, 25 and 26 of Indian Evidence Act.

Issue – Whether the whole confessional statement in the FIR was banned by section 25 of the Evidence Act or only those portions of it were barred which related to the actual commission of the crime.

Answer – Confession cannot be divided into parts. Whole confession is irrelevant except those parts which come under section 27 and identifying the maker of FIR.

Ratio of Judgment - In the case of *Aghnoo Nagesia* v. *State of Bihar* Supreme Court observed, "Section 154 of the Code of Criminal Procedure provides for the recording of the first information. **(1)** The information report as such is ***not substantive evidence.*** **(2)** It may be used to corroborate the informant under ***Section 157*** of the Evidence Act or to contradict him under ***Section 145*** of the Act, if the informant is called as a witness. **(3)** If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under ***Section 8*** (MP PSC) of the Evidence Act. **(4)** If the information is a non-confessional statement, it is admissible against the accused as an admission under ***Section 21*** of the Evidence Act and is relevant. **(5)** A confessional first information report to a police officer ***cannot be used*** against the accused in view of Section 25 of the Evidence Act."

(2) Ravi Kumar vs. State of Punjab *(SC, March 4, 2005) Division Bench*

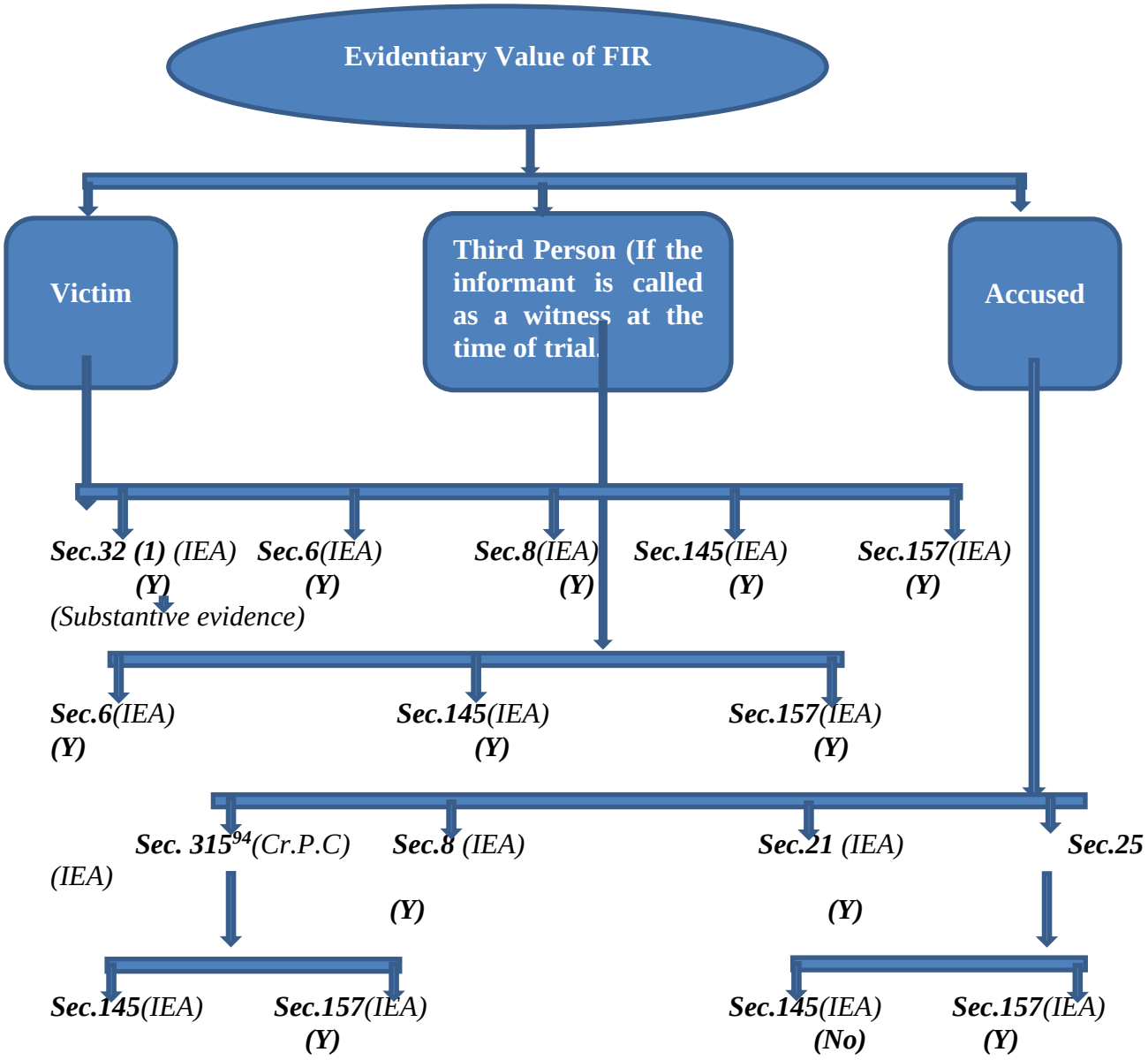
Hon'ble Justice Arijit Pasayat said "It has been held time and again that the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157 of the Indian Evidence Act, 1872 or to contradict him under Section 145 of that Act. *It can neither be used as evidence against the maker at the trial if he himself becomes an accused nor to corroborate or contradict other witnesses*."

(3) Pancham Yadav* v. *State of U.P. (All. H.C. 1993)

Information of victim was recorded as FIR. Later on he died. This FIR was also treated as a dying declaration under section 32(1) of Indian Evidence Act, 1872. This is the only circumstances when FIR becomes substantive piece of evidence.

(4) Shayam Nandan Singh and Ors. v. The State Of Bihar (Pat.H.C. 9 May, 1991)

FIR was also treated as res gestae and it was also relevant under section 6 of IEA.



*****Failure in lodging of FIR by public servants in certain cases is punishable under section 166A (c) of IPC. For this failure minimum punishment is 6 months rigorous imprisonment and maximum punishment is 2 yrs. Section 166A was inserted in 2009.

[94] **Haryana Judicial Service (Pre) 2018. Question 108.** As per the provision of Section 315 of the Cr.P.C. an accused (a) can be compelled to give his own evidence generally, (b) Cannot be a witness (c) can be called as a witness only on his own request in writing, (d) None of these.

DU LL.B. 2019

Question 3(a) (i) -A was tried for murder of B whose dead body was recovered from well. B was wearing certain ornaments which were not found on his dead body.
A made following statements to the police:
(i) I killed B, removed ornaments from body and pushed B into the well.
(ii) The ornaments are pledged with X. I can take you there.
On the basis of above statements the police recovered ornaments from X. Whether the statements made by A are relevant as confession or not? Give reasons.

Answer – Problem of this question is similar to *Pulukuri Kottaya* v. *Emperor*.[95] In this case there was murder caused by nine accused. There were prosecuted and convicted by lower court and decision of lower court was upheld by High Court. Admission of evidence under section 27 of the Evidence Act was challenged.
Privy Council observed following important points-

(1) Section 27, which is not artistically worded – In this case the Court observed that it was not properly drafted.

(2) Section 27 is exception of section 25 and 26-Section 27 provides an exception to the prohibition imposed by section 25& 26 and enables certain statements made by a person in Police custody to be proved.

(3) Condition of section 27- In this case The condition necessary to bring section 27 into operation is that

- the ***discovery*** of a fact
- ***in consequence*** of information
- received from a person ***accused*** of any offence
- in the ***custody*** of a Police Officer must be
- ***deposed to***, and
- thereupon **so much of the information**
- as relates ***distinctly*** to the fact thereby discovered
- may be proved.

(4) Jurisprudence behind admission of statement/ confession u/s 27 -The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some ***guarantee*** is afforded thereby that the information was true, and accordingly, can be safely allowed to be given in evidence.

(5) Extent of the information admissible - The extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.

(6) Difference between facts discovered & produced –

[95] AIR 1947 PC 67

The fact discovered embraces the ***place*** from which the object is produced and the ***knowledge*** of the accused as to this.
The information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered.
Example - Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago.
It leads to the discovery of the fact that a knife is concealed in ***the house*** of the informant to his **knowledge**, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant.
But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

(7) Application of 27- Normally the section is brought into operation when a person in Police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused.

(8) Acceptance of confession / statement– Whole confession / statement is not relevant. Only that part of the confession or statement is relevant which is distinctly related to discovery of facts.
In this case Privy Council said that only that part of statement or confession can be proved in consequence of which fact has been discovered and other part shall be excluded. In this case there were two confessions by which there were discovery of fact. One example was also quoted in that case. These are -
There are following

Confession 1 – "*I stabbed Sivayya with a spear.* I hid the spear in a yard in my village. I will show you the place". There was discovery of spear.
The first sentence must be omitted.
Confession 2 - "About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Boddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. ***I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come.*** We did all this at the instigation of Pulukuri Kotayya.
Admissible - *I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come.*
Inadmissible - The whole of that statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible.

Example 1 – "I will produce a knife concealed in the roof of my house ***with which I stabbed A.***" Knife was recovered. There are two parts of this sentence. Second part i.e. *with which I stabbed A* is not relevant.
Decision – Privy Council did not decide conviction or acquittal. Privy Council said that only some part of confessions were admissible and remaining part was inadmissible. The Court observed that High Court was wrong After observation regarding admissibility of evidence under section 27 matter was remitted (sent back) to High Court.

Solution of problems

(i) Inadmissible - "I killed B, removed ornaments from body and pushed B into the well". This is not admissible. This is confession made to police officer. Confession to police was hit by section 25. Body was not recovered in consequence of his information. On what information body was recovered this problem is silent. This problem says only about ornaments that ornaments were recovered on his information.
(ii) Admission -The ornaments are pledged with X. I can take you there.
On the basis of above statements the police recovered ornaments from X. So this is relevant.

UP (J) Pre. 2018 Series C Question 110

In which of the following case constitutional validity of section 27 of the Indian Evidence was challenged on the basis of violation of Article 20(3) of the Indian Constitution?

A. *State of U.P.* v. *Deoman Upadhaya*
B. *State of Bombay* v. *Kathi Kalu*
C. *Inayatullah* v. *State of Maharashtra*
D. *Nandini Satpathi* v. *P.L.Dani*

Answer- State of Bombay v. *Kathi Kalu*

1	*State of U.P.* v. *Deoman Upadhaya (1960*	Article 14 & Section 27
2	*State of Bombay* v. *Kathi Kalu Oghad (1961)*	*Article 20(3)*& Section 27
3	*State of Rajasthan* v. *Teja Ram (2000)*	*Section 162(1), Cr.P.C & 27 IEA. Taking signature wrongfully shall not affect section 27. Reason - Section 162(2).*

Inayatullah* v. *State of Maharashtra (09.09.1975)

The appellant was tried in the court of the Presidency Magistrate 5th Court, Dadar on the charge of committing theft of three drums containing phosphorous pentaoxide, valued at Rs. 300/- from the premises of the Bombay Port Trust on 1-8-1968 at 8.40 a.m. There was confession. Confession was "I will tell the place of deposit of the three Chemical drums which I took out from the Haji Bunder on 1st August."
The accused then led the Police officer and the Panchas the drums were recovered.
In this case Supreme Court observed following important points-
(1) On what grounds section 27 creates exception- The expression "Provided that" together with phrase "whether it amounts to a confession or not" shows that the section is in the nature of an exception to the preceding provisions particularly Secs. 25 and 26.

On what grounds section 27 creates exception	*There are following words which creates exceptions of section 27 –* ❖ "Provided that" ❖ "whether it amounts to a confession or not"

(2) Four condition of section 27 –There are four conditions which are following-
First condition – First condition is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence.
Second Condition- Second Condition is discovery of such fact must be deposed to.
Third Condition- Third Condition is that at the time of the receipt of the information the accused must be in police custody.
Fourth Condition- Fourth condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded.
(3) Meaning of 'distinctly' - The word 'distinctly' means 'directly', 'indubitably', 'strictly, 'unmistakably'.
The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates to the fact thereby "discovered" is the **linchpin** of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery.
(4) Discovery of fact is guarantee of truth -The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery.
No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.
(5) Meaning of 'facts discovered' - At one time it was held that the expression 'fact discovered' in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact.
Now it is fairly settled that the expression 'fact discovered' includes not only the **physical object** produced, but also the **place** from which it is produced and the **knowledge** of the accused as to this.
Section 28. Confession made after removal of impression caused by inducement, threat or promise, relevant.—If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.
Section 29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc. - If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practiced on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

UP (J) Mains, 2012 Question 7(a)(iii)
Write short note on –
(iii) Evidence of Co-accused
UP (J) Mains, 1999 Question 7(b)
Who is said to be co-accused under Indian Evidence Act? Under which circumstances a conviction can be made on the basis of evidence of a co-accused?

Section 30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.—When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
Explanation.—"Offence," as used in this section, includes the abetment of, or attempt to commit, the offence.

Illustrations

UPAPO (M) 1988
UP (J) Mains, 1988, Question 3(b)
UP J (M) 1992 Question 6(b)

(*a*) Joint Trial- A and B are jointly tried for the murder of C. It is proved that A said - "B and I murdered C". The Court may consider the effect of this confession as against B**.**

UPAPO (M) 1988, 2002, 2006
2006
, 2013
UP (J) Mains, 2000, Question 6 (b) -

Illustration (*b*) No joint trial -A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said - "A and I murdered C".
This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Bhuboni Sahu* v. *The King (February 17, 1949)

Justice John Beaumont decided this case. Following important points regarding section 30 of the IEA were observed in this case -
(1) Reason of admissibility of confession of co-accused - An admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself.
(2) Nature of evidence - A confession of a co-accused is obviously evidence of a very weak type.
(3) Confession of co-accused is not evidence u/s 3 -It does not indeed come within the definition of 'evidence' contained in Section 3 of the Evidence Act. There are following reasons-

- **(i)** It is not required to be given on oath,
- **(ii)** It is not given in the presence of the accused, and
- **(iii)** It cannot be tested by cross-examination.

(4) Comparison between approver and co-accused -It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities.
(5) The tendency to include the innocent - The tendency to include the innocent with the guilty is peculiarly prevalent in India. The only real safeguard against the risk of condemning the innocent

with the guilty lies in insisting upon independent evidence which in some measure implicates each accused.

***Kashmira Singh* v. *State of Madhya Pradesh*[96] (4 March, 1952) Justice Vivian Bose**

Kashmira Singh was an Assistant Food Procurement Inspector there. Father of deceased was senior officer. On report of father of deceased Kashmira Singh was terminated from service. Kashmira Singh along with other accused killed small boy of five year of his senior officer. Gurubachan who was co-accused made confession.

***Conclusion – Ratio of Bhuboni Sahu* v. *The King*[97]** was followed.

Mohd. Khalid* v. *State of West Bengal - Ratio of *Bhuboni Sahu and Kashmira Singh Cases* were followed regarding section 30 of the evidence Act.

UP(J) Pre. 2018

Question - *Palvinder Kaur* v. *State of Punjab* relates to which of the following?

A. Dying declaration
B. Confession
C. Relevancy of Judgment
D. Entries in the books of account

Answer – Confession

[96] AIR 1952 SC 159.
[97] Date of decision- February 17, 1949

Section 32

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

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

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

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

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

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

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

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

(*6*) or is made in will or deed relating to family affairs.—When the statement relates to the existence of any relationship 1[by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

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

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

Illustrations

***Illustration* (*a*)** The question is, whether A was murdered by B; or
A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or
The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.
Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration, are relevant facts.

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

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

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

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

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

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

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

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

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

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

UP (J)(M) 2012 Question 7(C)

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

***Illustration* (*m*)** The question is, whether, and when, A and B were married.
An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.
***Illustration* (*n*)** A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

Substantive Evidence

1	**FIR**	*Aghanoo Nagesia* v. *State of Bihar* and *Pancham Yadav* v. *State of U.P.*
2	**Conspiracy**	*Mohd. Khalid* v. *State of West Bengal*
3	**Admission**	*Bharat Singh and Anr.* v. *Bhagirathi*[98] *and Bishwanath Prasad* v. *Dwarka Prasad*[99]
4	**Judicial Confession**	R.V.Kelkar's Criminal Procedure
5	**Dying Declaration**	*Ram Bihari Yadav* v. *State of Bihar* (1998)

Raju Majhi* v. *State of Bihar, (February 2, 2018)
Test Identification Parade under section 9 is not substantive evidence.
Mohd. Khalid* v. *State of West Bengal (Sept. 3, 2002 SC)
Conspiracy is substantive evidence

Admission is Substantive Evidence

In the case of ***Bharat Singh and Anr.* v. *Bhagirathi*[100]** (26 August, 1965) Supreme Court observed, " Admissions are substantive evidence by themselves, in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof[101] of the matters admitted."
In the case of ***Bishwanath Prasad* v. *Dwarka Prasad*[102]** (October 30, 1973) Supreme Court observed, "Admission by a party is substantive evidence if it fulfills the requirements of Section 21 of the Evidence Act".
Judicial confession is substantive evidence.
Aghanoo Nagesia* v. *State of Bihar
FIR is not substantive evidence
Pancham Yadav* v. *State of U.P. (All. H.C. 1993)
Information of victim was recorded as FIR. Later on he died. This FIR was also treated as a dying declaration under section 32(1) of Indian Evidence Act, 1872. This is the only circumstances when FIR becomes substantive piece of evidence.
***Ram Bihari Yadav* v. *State of Bihar* (1998)**

Hon'ble Justice Syed Shah Quadri said, "Dying declaration is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused".

[98] AIR 1966SC 405
[99] AIR 1974 SC 117
[100] AIR 1966SC 405
[101] Indian Evidence Act, 1872, Section 31 - Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.
[102] AIR 1974 SC 117

Dying declaration [Section 32(1)]

UP (J) Mains, 1985, Question 9 (a)
UP (J) Mains, 2003, Question 7 (b)

What is dying declaration? Discuss fully its evidentiary value. Can accused be convicted on the basis of dying declaration alone?

UP (J) Mains, 1986, Question 8 (c)

'A', an woman, whose throat had been cut by some sharp edged weapon, indicated by gestures before her death that 'B' was the person who had cut her throat. Is this statement of 'A' made by gesture admissible as an evidence against 'B'?

UP (J) Mains, 1986, Question 9 (b)
UP (J) Mains, 2000, Question 7 (b)

'A' who was hit by 'bullet' stated in the hospital in the presence of Magistrate that 'B' had fired at him. But 'A' did not die of this injury. Is the statement of 'A' made in the presence of Magistrate admissible in evidence against 'B'? Can be it of any other use?

UP (J) Mains, 1991, Question 3 (a)

'A' was severely beaten. His dying declaration was recorded by a Magistrate, in which he implicated 'X' and 'Y'.
'A' survived due to medical treatment. 'X' and 'Y' were prosecuted for attempt to commit murder of 'A'.
During the trial, the aforesaid dying declaration was sought to be given in evidence by the prosecution in support of its case.
The defence opposed on the ground that the declarant was not dead and the alleged dying declaration did not point towards any cause for assault or the declarant therefore it was irrelevant. Decide.

UP (J) Mains, 1997, Question 10 (c)

A comes to the police station and lodge FIR that B has beaten him and has threatened to kill him. After two days A is murdered. B is arrested and prosecuted for the offence of murdering A. Decide whether the FIR may be admitted as dying declaration.

UP (J) Mains, 2000, Question 7 (b)

'A' who was hit by 'bullet' stated in the hospital in the presence of Magistrate that 'B' had fired at him. But 'A' did not die of this injury. Is the statement of 'A' made in the presence of Magistrate admissible in evidence against 'B'? Can be it of any other use?

UP (J) Mains, 1985, Question 9 (a)
UP (J) Mains, 2003, Question 7 (b)

What is dying declaration? Discuss fully its evidentiary value. Can accused be convicted on the basis of dying declaration alone? Cite Case law.

UP (J) Mains, 2013, Question 5(a)

In what circumstances statements made by person who are dead or who otherwise cannot be called as a witness, may be proved in a case?

UP (J) Mains, 2015, Question 7 (a)

Discuss the essential elements of 'dying declaration'. When is dying declaration relevant? Can the dying declaration form the sole basis of conviction?

UP (J) Pre. 2018 Series C Question 102

UP APO (Pre.) 2019

The case of *Pakala Narayan Swami* v. *Emperor* relates to –

(a) Doctrine of estoppel
(b) Accomplice
(c) Dying Declaration
(d) Cross- examination

Answer- (c) Dying Declaration

Dying Declaration

'Nemo moriturus proesumitur mentiri'

Shakuntala v. State of Haryana[103] (27/07/07)[104]

In this case Supreme Court observed, "The principle on which dying declaration is admitted in evidence is indicated in legal maxim *'nemo moriturus proesumitur mentiri'* (a man will not meet his maker with a lie in his mouth)".

Sudhakar & Anr. v. *State of Maharashtra* (July 17, 2000)

(1) Principle of necessity - Such statements are admitted in evidence on the principle of necessity.
(2) NM PM (Narendra Modi Prime Minister)[105] Dying declaration is based on the legal maxim "Nemo moriturus praesumitur mentire" i.e. a man will not meet his Maker with a lie in his mouth.

Section 32(1) -Statements, written or verbal, of relevant facts made by a person **who is dead**... are themselves relevant facts in the following case:
When the statement is made by a person

- *as to the cause of his death*, or
- *as to any of the circumstances of the transaction which resulted in his death*,

in cases in which the cause of that person's death comes into question.
Such statements are relevant

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

***Illustration* (*a*)**

- **Criminal Case -***The question is, whether A was murdered by B*; or
- **Criminal Case -**A dies of injuries received in a transaction in the course of which she was ravished. *The question is whether she was ravished by B*; or
- **Civil Case -***The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow*.

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

Sudhakar & Anr. v. *State of Maharashtra* (July 17, 2000)

Statement of the victim who is dead is admissible in so far as it refers to

- cause of his death or
- as to any circumstances of the transaction which resulted in his death.

[103] AIR 2007 SC 2709.
[104] Judgment is available: https://main.sci.gov.in/jonew/judis/29258.pdf (Last visited February 27, 2020).
[105] It is nothing merely clue to remember Latin Maxim.

In case of homicidal deaths, statements made by the deceased is admissible only to the extent of proving the cause and circumstances of his death.

Statement

Statement may be written or verbal.

Question – Whether statement used under section 32 includes sign?

Answer –Yes. In the case of *Queen Empress* v. *Abdullah*[106] (27 February, 1885) Hon'ble Chief Justice of Allahabad W C Petheram said that statement includes sign.

UP (J) Mains, 1986, Question 8 (c)

'A', a woman, whose throat had been cut by some sharp edged weapon, indicated by gestures before her death that 'B' was the person who had cut her throat. Is this statement of 'A' made by gesture admissible as evidence against 'B'?

Queen Empress* v. *Abdullah (27 February, 1885)

Facts- Dulari was prostitute. *Abdullah cut her throat by razor on Sep.27,1884. She was admitted to hospital. She was in fit mental condition but unable to speak. She questioned by mother, Sub-inspector, Deputy Magistrate and surgeon. Magistrate mentioned several name. She was replying by waving her hands. She waved her hands backwards and forwards and thus making negative sign. When she was questioned about Abdulla, she moved her hands up and down. Regarding other questions she replied by waving her hands.*
She died on Sep.29,1884.

Question - Did Abdullah kill the deceased by cutting her throat?

Reference to Allahabad High Court-– *Trial Court referred a question to High Court through 'reference'.*
Question 1-- The next question is, whether mere signs can be regarded as "conduct" within the meaning of Section 8.
Question 2-When a witness is called who deposes to having put certain questions to a person, the cause of whose death is the subject-matter of the trial, which questions have been responded to by certain signs, *can such questions and signs, taken together, be properly regarded as 'verbal statements' under Section 32 of the Evidence Act, or are they admissible under any other sections of the same Act?*
Response of Allahabad High Court

Answer 1- The signs made by the deceased cannot be admitted by way of 'conduct' under Section 8 of the Evidence Act.
Answer 2. *Such questions and signs, taken together, can be properly regarded as 'verbal statements' under Section 32 of the Evidence Act.*
Question 3-Is the statement a "verbal" one?
Answer- 'Verbal' means by words. It is not necessary that the words should be spoken. If the term used in the section were 'oral', it might be that the statement must be confined to words spoken by the mouth. But the meaning of "verbal" is something wider.

[106] (1885) ILR 7 All 385

Verbal [Section 32(1)]	Oral
It is wider.	It is narrower
Verbal includes words spoken by the mouth and sign also.	Words spoken by the mouth

Meaning of Dying Declaration

Sudhakar & Anr. v. *State of Maharashtra* (July 17, 2000)

Sub-section (1) of Section 32 which provides that when the statement is made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, being relevant fact, is admissible in evidence. Such statements are commonly known as dying declarations.

Difference between English law and Indian Law

Sudhakar & Anr. v. *State of Maharashtra* (July 17, 2000)

As distinguished from the English Law section 32 does not require that such a statement should have been made in expectation of death.

S. No.	Ground	English law	Indian Law
1	Expectation of death.	Declaration must be made during ***expectation of death.***	Here expectation of death is immaterial.
2	Nature of proceeding	Dying Declaration (DD) is admissible only in ***criminal proceeding*** especially in case of charge of homicide or manslaughter.	DD is admissible in all proceeding i.e**. *Criminal*** and ***Civil*** Both.
3	Death/ Circumstances	As to cause of his death	**(i)** cause of his death or **(ii)** as to any circumstances of the transaction which resulted in his death.
4	Homicide/ Suicide	English law does not include suicide.	It includes both i.e. homicide & suicide.

Ram Bihari Yadav v. State of Bihar (1998)

Hon'ble Justice Syed Shah Quadri said,

- **Meaning -**"A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section 32 of the Evidence Act and is also admissible in evidence.

- **Exception of admissibility of 'Hearsay Evidence' -**Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence.
- **Substantive evidence -** Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused.
- But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case".

Sudhakar & Anr.* v. *State Of Maharashtra

Dying declaration is substantive evidence.

Pakala Narayan Swami* v. *Emperor (January 19, 1939)

In 1936, ultimately an independent state Odisha was constituted as a separate province by carving out certain portions from the provinces of Bihar, Odisha and Madras.

Fact- The accused, his wife, his wife's brother, and his clerk living at his house were charged with the murder before the Sub-divisional Magistrate, Chatrapur, in May and June, 1937. They were charged under Sections 120B, 201 & 302.

Kuree Nukaraju (Deceased)	He had been a peon in the service of the Dewan whose daughter was the wife of the accused. Earlier she had had an intrigue with the deceased.	During 1936 the accused's wife borrowed from the deceased
March 20, 1937	The deceased man received a letter he was invited to come that day or next day to Berhampur.	The widow said that on that day her husband showed her a letter and said that he was going to Berhampur as the appellant's wife had written to him and told him to go and receive payment of his due.
March 21, 1937	The deceased left his house on March 21, in time to catch the train for Berhampur.	
22 March	Trunk was purchased.	
March 23, 1937	Body of the deceased man was found in a steel trunk in a third class compartment at Puri	The body had been cut into seven portions. Widow identified this body.
April 4	The accused and the other three members of his household were arrested on the 4th April. On this date the police visited the house, examined the inhabitants and ***obtained a statement from the accused.***	The alleged statement was that the deceased had come to his house on the evening of March 21, slept in one of the outhouse rooms for the night and left on the evening of the 22nd by the passenger train; that on the morning of March 23 the accused went to the station.

Patna High Court –Patna High Court convicted him.
Privy Council -This is an appeal by special leave from a judgment of the High Court of Patna who affirmed the decision of the Sessions Judge at Berhampur who had convicted the appellant of the murder of one Kuree Nukaraju and sentenced him to death.
Bench: Atkin, G Rankin, Porter, Thankerton, Wright.
Author: Atkin
Issue - *Whether the statement of the widow, that on March 20 the deceased had told her that he was going to Berhampur as the accused's wife had written and told him to go and receive payment of his dues, was admissible under section 32(1) of the Indian Evidence Act, 1872.*
Answer – Yes.

The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed.
(1) Question in this case -In the present case the cause of the deceased's death comes into question.
(2) Meaning of 'Circumstances of the transaction' – 'Circumstances of the transaction' is a phrase that conveys some limitations.

- ❖ It is not as broad as the analogous use in 'circumstantial evidence which includes evidence of all relevant facts.
- ❖ It is narrower than 'res gest'.

Circumstances must have some *proximate relation to the actual occurrence:* though as for instance in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose.
(3) Meaning of confession –

- ❖ No statement that contains sell exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed.
- ❖ Moreover 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 of itself a confession e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession.

(4) Rejection of definition given by Stephen - The definition is not contained in the Indian Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed' the crime.
Conclusion – Conviction of accused was upheld.

***Sharad Birdhichand Sarda* v. *State of Maharashtra* (17 July, 1984)**

This is leading case on following two points -

Circumstantial Evidence	**Dying Declaration**
Golden Rule/Panchsheel	Five rule

Fact –Manju and Sharad Birdhichand Sarda got marriage on February 11, 1982. Soon after the marriage, Manju left for her new marital home and started residing with the appellant in Takshila apartments at Pune.
She was introduced with mistress and directed to obey her command. She was very good girl. She started to live with peacefully. But her husband and his family members started to torture her. when she narrated her woeful tale to her sister Anju in the letters written to her, she took the abundant care and caution of requesting Anju not to reveal her sad plight to her parents lest they may get extremely upset, worried and distressed.
Decision -Both the High Court and the trial court rejected the theory of suicide and found that Manju was murdered by her husband by administering her a strong dose of potassium cyanide.
Supreme Court – Sharad Birdhichand Sarda was acquitted. Offence could not be proved beyond reasonable doubt. Supreme Court said that if there are two possible view, court must lean toward acquittal rather than conviction.

There are following propositions regarding section 32(1) :-

(1) ***Exception to the rule of hearsay*** -Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, *whether the death is a homicide or a suicide*, provided the statement relates to the cause of death, or exhibits circumstances leading to death.
(2) The test of proximity - The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket.
Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an ***organic*** whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under s.32.
(3) Acceptance without cross-examination -The second part of cl.1 of s.32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross- examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.
(4) Homicide & suicide - It may be important to note that s.32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Distance of time -Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of s.32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.

Rattan Singh* v. *The State of Himachal Pradesh (11 December, 1996)

Fact - Kanta Devi(deceased) had uttered immediately before she was fired. She cried that Rattan Singh was standing nearby with a gun. Her mother-in-law heard this. In a split second the sound of firearm shot was heard and in a trice the life of Kanta Devi was snuffed off.

Comparison between both

Section 32(1)	
'Circumstances of the *transaction* which resulted in his death'	'Circumstances which caused his death'.
Wider	Narrower

- **Comparison between both-**The collocation of the words in Section 32(1) 'Circumstances of the transaction which resulted in his death' is apparently of wider amplitude than saying 'circumstances which caused his death'.
- *There need not necessarily be a direct nexus between 'circumstances' and death*. It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. *In other words it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section*, provided it has nexus with the transaction which resulted in the death.

Conclusion – Accused was convicted.

***Sudhakar & Anr.* v. *State of Maharashtra* (July 17, 2000)**

(Rape & Suicide of school teacher)

Facts- Ms. Rakhi was school teacher whose age was 20 years. *Sudhakar Bhujbal (Princiipal) and Bhaskar (Teacher) committed rape on July 07, 1994. FIR was lodged on July 20, 1994. She lost her equilibrium of mind. She committed suicide on December 22, 1994.*

Chronology

S. No.	***Date***	***Remarks***
1	*July 07, 1994*	*Rape was committed by two collogue teachers.*
2	*July 20, 1994*	*FIR was lodged.*
3	*December 22, 1994*	*Ms. Rakhi committed suicide.*

Charge – They were charged for committing offence under sections 376 & 306 of IPC.

Issue –Whether contents of FIR lodged on July 20, 1994 shall amount to 'Dying Declaration'.
Answer – No. In this case it was not accepted.

Conclusion –No. Prosecutor could not prove rape and other facts beyond reasonable doubt. Appeal was decided in favour of teachers and they were released.

Reason of decision –

(1) Cross- examination- In the cross examination some important matters came out-

- She came to school on *July 09, 1994* & *July 10, 1994.*
- She informed her mother on *July 12, 1994.*
- Father said that she was not interested to lodge FIR on *July 17, 1994 to July 19, 1994.*

(2) Failure of prosecution –Prosecutor failed to prove rape by using force.

(3) No connection between death and contents of FIR – There was no proximate relation between rape and suicide. In this case prosecutor was failed to prove proximate relationship between suicide and rape.

Legal points in this case

There are several legal points were discussed in this case –

(1) Principle of necessity - Such statements is admitted in evidence on the principle of necessity.
(2) NM PM (Narendra Modi Prime Minister)[107] Dying declaration is based on the legal maxim "Nemo moriturus praesumitur mentire" i.e. a man will not meet his Maker with a lie in his mouth.
(3) Meaning of Dying Declaration - Sub-section (1) of Section 32 which provides that when the statement is made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, being relevant fact, is admissible in evidence. Such statements are commonly known as dying declarations.
(4) Dying Declaration is admissible only in two circumstances- Statement of the victim who is dead is admissible in so far as it refers to

- cause of his death or
- as to any circumstances of the transaction which resulted in his death.

In case of homicidal deaths, statements made by the deceased is admissible only to the extent of proving the cause and circumstances of his death.
(5) Difference between English law and Indian Law –

i. In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death.

ii. The Indian law on the question of the nature and scope of dying declaration has made a distinct departure from the English Law where only the statements which directly relate to the cause of death are admissible. The second part of clause (1) of section 32, viz., "the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question" is not to be found in the English Law.

[107] It is nothing merely clue to remember Latin Maxim.

S. No.	Ground	English law	Indian Law
1	Expectation of death.	Declaration must be made during ***expectation of death.***	Here expectation of death is immaterial.
			DD may be related to homicide
2	Death/ Circumstances	As to cause of his death	**(i)** cause of his death or **(ii)** as to any circumstances of the transaction which resulted in his death.

(6) Proximity Test – The words "as to any of the circumstances of the transaction which resulted in his death" appearing in Section 32 must have some proximate relation to the actual occurrence. In the case of Pakala Case Justice Atkin also observed, "The circumstances must have some proximate relation to the actual occurrence".

Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(7) Nexus Theory – ***Ratan Singh* v. *State of Himachal Pradesh***[108]

In *Ratan Singh* v. *State of Himachal Pradesh* Supreme Court held that the expression 'circumstances of transaction which resulted in his death' mean that there need not necessarily be a direct nexus between the circumstances and death. Even distant circumstance can become admissible if it has nexus with the transaction which resulted in death.

(8) Exception of hearsay evidence - Section 32 is an exception of the rule of hearsay and

(9) DD may be as to homicide or suicide - Dying declaration *whether the death is a homicide or a suicide is admissible,* provided the statement relates to the cause of death, or exhibits circumstances leading to the death.

(10) Substantive evidence - Dying declaration is substantive evidence.

[108] AIR 1997 SC 768.

Patel Hiralal Joitaram* v. *State of Gujarat (October 18, 2001)

Fact- Patel Hiralal Joitaram developed some affair with the sister (Sharada Ben) of Asha Ben. Asha Ben opposed. He had illicit relationship. She scolded Hiralal and hence he would annoyed with her. Patel Hiralal Joitaram decided to take revenge.
On -21.10.1988 at about 10 A.M., Asha Ben wan proceeding to the school for collecting her child back home. On the way appellant who was on a scooter met her. appellant took out a can and doused combustible liquid contained therein on Asha Ben. He then whipped out a lighter and after lighting it hurled its flame on her.
She reached the water column situated near the railway station and at beneath it, and the water followed therefrom eventually extinguished the flames and embers which enwrapped her. Among the pedestrians there was a lady who flanked Asha Ben with some clothes to cover up her nudity and a rickshaw was procured for rushing the charred victim to the hospital.
Three Dying Declaration - On 21.10.1988, FIR was registered on the basis of the statement made by Asha Ben to the police officer. In the meanwhile, the Executive Magistrate on being informed by the doctor who examined the lady, visited the hospital and recorded her statement around 11.15 A.M. She also narrated to her husband.

In that statement she mentioned the name of 'Hiralal Patel' as the culprit. She succumbed to her burn injuries on 15.11.1988.

Mistake regarding description of name of accused –

FIR	'Hiralal Lalchand'
Clarification during investigation	'Hiralal Joitaram'

In the FIR name of the accused was 'Hiralal Lalchand'. But during investigation she clarified and said that his name was 'Hiralal Joitaram'. This mistake occurred due to mistake of name of father.
Patel Hiralal Joitaram was charged under section 302, IPC.

Session Court – Session Court acquitted accused.
High Court – High Court convicted.
Supreme Court- Supreme Court said that there was some more information in the dying declaration which was sufficient to identify accused. Section 32 of the Indian Evidence Act is exception of section 162 of the Code of Criminal Procedure.

Legal Points-
(1) Two categories - Two categories of statement are made admissible in evidence [Section 32(1)] and further made them as substantive evidence. They are:

i. His statement as to the cause of his death;
ii. His statement as to any of the circumstances of the transaction which resulted in his death.

(2) Compare between First and Second Category -

- The second category can envelope a far wider amplitude than the first category. When the word 'circumstances' is linked to 'transaction which resulted in his death' the sub-section casts the net in a very wide dimension.
- Anything which has a **nexus with his death,** ***proximate*** or ***distant, direct*** or ***indirect***, can also fall within the purview of the sub-section. As the possibility of getting the maker of the statement in flesh and blood has been closed once and for all the endeavour should be how to include the statement of a dead person within the sweep of the sub-section and not how to exclude it therefrom.
- ***Admissibility*** is the first step and once it is admitted the court has to consider how far it is ***reliable.*** Once that test of reliability is found positive the court has to consider the ***utility*** of that statement in the particular case.

(3) ***Sharad Birdhichand Sarda*** **v.** ***State of Maharashtra* –** Second proposition of *Sharada case* regarding timing was accepted.
(4) ***Rattan Singh*** **v.** ***The State of Himachal Pradesh* –** This case was also cited.

Conclusion – Dying declaration was accepted. He was convicted for causing murder**.**

Laxman **v.** ***State of Maharashtra*** (February 27, 2002)

The conviction of the Laxman is based upon the dying declaration of the deceased (Chandrakala) which was recorded by the judicial magistrate (P.W.4). Chandrakala was physically and mentally fit. The magistrate in his evidence had stated that he had contacted the patient through the medical officer on duty and after putting some questions to the patient to find out whether she was able to make the statement; whether she was set on fire; whether she was conscious and able to make the statement and on being satisfied he recorded the statement of the deceased. There was a certificate of the doctor which indicates that the patient was conscious.
Sessions Judge & High Court - Sessions Judge as well as the High Court held the dying declaration made by the deceased to be truthful, voluntary and trustworthy.
Supreme Court -There was contradictory decision of Supreme Court decided by three Judges Bench. So matter was referred to Constitutional Bench for legal opinion. Constitutional Bench propounded following important points –
(1) Juristic Theory - The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth.
Notwithstanding the same, great caution must be exercised in considering the ***weight*** to be given to this species of evidence on account of the existence of many circumstances which may affect their truth.
(2) No oath & No cross-examination -The situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. ***It is for this reason the requirements of oath and cross-examination are dispensed with.*** Since the accused has no power of cross-examination, the court insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness.

(3)Duty of Court -The court has to always be on guard to see that the statement of the deceased was not as a result of either ***tutoring*** or ***prompting*** or ***a product of imagination***. The court also must further decide that the deceased was in a ***fit state of mind*** and *had the opportunity to observe and identify the assailant.*

(4) Eye-witness will prevail over medical opinion- Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable.

(5) Mode of making of 'Dying Declaration' - A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite.

(6) Who can record dying declaration - In most cases dying declarations are made orally before death ensues and is reduced to writing by someone like a *magistrate* or *a doctor* or *a police officer*.

(6) Form of recording of confession - When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording.

(7) Evidentiary value of 'Dying Declaration' - What evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case.

What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

Conclusion – With above observation matter was sent back to decide case in the light of these observations.

Question – What would be used if 'Dying Declaration' is made to police officer or investigating officer?

Answer- Use of such 'Dying Declaration' shall not be hit by section 162 of Cr.P.C. Section 162 (2) makes two exceptions of section 162(1). These exceptions are –

- **i.** Section 27 of the Indian Evidence Act, 1872.
- **ii.** Section 32 of the Indian Evidence Act, 1872.

Dying declaration is substantive evidence.

Dying declaration [Section 31(1)]

UP (J) Mains, 1985, Question 9 (a)
UP (J) Mains, 2003, Question 7 (b)

What is dying declaration? Discuss fully its evidentiary value. Can accused be convicted on the basis of dying declaration alone?

UP (J) Mains, 1985, Question 9 (a)
UP (J) Mains, 2003, Question 7 (b)
What is dying declaration? Discuss fully its evidentiary value. Can accused be convicted on the basis of dying declaration alone? Cite Case law.

UP (J) Mains, 2015, Question 7 (a)
Can the dying declaration form the sole basis of conviction?

Question – Is sole dying declaration is sufficient for conviction of accused?
Answer –It was laid down in case of *Khushal Rao v. State of Bombay* that true and voluntarily 'Dying Declaration' can be sole basis of conviction.

On 1 May 1960, Bombay State was dissolved and split on linguistic lines into the two states of Gujarat, with Gujarati speaking population and Maharashtra, with Marathi speaking population

Khushal Rao v. State of Bombay (25 September, 1957)

Facts -There are two rival factions in what has been called the Mill area in Nagpur. Khushal Rao and Tukaram are the leaders of one of the factions, and Ramgopal, Inayatullah, and Tantu are said to be the leaders of the opposite faction. There were several criminal cases against each other.
Being infuriated by the conduct of Baboolal in associating with the enemies of the party of the accused, Sampat, Mahadeo, Khushal and Tukaram suddenly attacked Baboolal with swords and spears and inflicted injuries on different parts of his body. The occurrence took place in a narrow lane of Nagpur at about 9 p.m. Baboolal was taken by his father and other persons to the Mayo hospital where he reached at about 9.25 p.m. February 12, 1956. Baboolal died the next morning at about 10 a.m. in hospital.
More than Three Dying Declaration – Dying declaration was recorded by Doctor, Sub-Inspector and Judicial Magistrate First Class. He was in fit mental condition. Deceased also narrated with several other persons also. Baboolal died the next morning at about 10 a.m. in hospital.
Acquittal of Tuka Ram by High Court -
In a very well-considered judgment, the High Court, by its judgment and orders dated October 13, 1956, acquitted Tukaram, giving him the benefit of the doubt caused chiefly by the fact that in the dying declaration recorded by the magistrate as aforesaid, he has been described as a **Teli,** whereas Tukaram before the Court is a **Kolhi**, as stated in the charge-sheet. The doubt was further

accentuated by the fact that *there were three or four persons of the name of Tukaram*, residing in the neighborhood and some of them are Telis.

Conviction of Khushal Rao by High Court-

High Court upheld the conviction and sentence of the appellant on the ground that the dying declarations were corroborated by the fact that the appellant had been absconding and keeping out of the way of the police, and had been arrested under very suspicious circumstances.

Supreme Court –

Issue -Whether it is settled law that a dying declaration by itself can, in no circumstances, be the basis of a conviction.

(1) Section32 is exception hearsay -This provision has been made by the Legislature, advisedly, as a matter of sheer necessity -by way of an exception to the general rule that hearsay is no evidence and that evidence, which has not been tested by cross-examination, is not admissible. Here there is neither cross-eaxamination nor oath.

(2) Unreliable Dying Declaration - It may also be shown by evidence that a dying declaration is not reliable because

i. **it was not made at the earliest opportunity,** and, thus, there was a reasonable ground to believe its having been put into the mouth of the dying man, when his power of resistance against telling a falsehood was ebbing away; or
ii. **because the statement has not been properly recorded**, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement.

These may be some of the circumstances which can be said to detract from the value of a dying declaration.

(3) Dying Declaration without corroboration is sufficient- There is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction.

Conclusion – Supreme Court concluded following conclusion regarding section 32(1) -

(1) Dying declaration and Corroboration -it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(2) Dying declaration depends upon fact of each case -Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) No general proposition regarding weight of Dying declaration -that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

(4) Dying declaration is equal to other evidence- that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) Dying declaration in question- answer form - that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions -

and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and

(6) Test for reliability of a dying declaration - In order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Dying Declaration without corroboration	**Dying Declaration with corroboration**
Once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.	If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction.
	Whether corroboration is necessary or not depends upon particular facts of the case.

Conclusion – Three successive dying declarations was made in the course of about two hours, by the deceased and he consistently named Khushal and Tukaram as the persons who had assaulted him with sword and spear. No part of his dying declarations has been shown to be false. He was fit state of mind. So conviction without corroboration was justified.

Conviction of Khaushal Rao was upheld by Supreme Court.

Evidentiary value of Dying Declaration if victim survived

UP (J) Mains, 1986, Question 9 (b)
UP (J) Mains, 2000, Question 7 (b)

'A' who was hit by 'bullet' stated in the hospital in the presence of Magistrate that 'B' had fired at him. But 'A' did not die of this injury. Is the statement of 'A' made in the presence of Magistrate admissible in evidence against 'B'? Can be it of any other use?

UP (J) Mains, 1991, Question 3 (a)

'A' was severely beaten. His dying declaration was recorded by a Magistrate, in which he implicated 'X' and 'Y'. 'A' survived due to medical treatment. 'X' and 'Y' were prosecuted for attempt to commit murder of 'A'.
During the trial, the aforesaid dying declaration was sought to be given in evidence by the prosecution in support of its case. The defence opposed on the ground that the declarant was not dead and the alleged dying declaration did not point towards any cause for assault or the declarant therefore it was irrelevant. Decide.

Answer – Condition of application of section 32(1) is that victim must die. If he survived that his/her statement shall not be relevant under section 32(1) as dying declaration.

No death, No dying declaration, No application of Section 32(1)

Maqsoodan & Others* v. *State of Uttar Pradesh (15/12/1982)

On 8 6.1972 at about 5.45 or 6.00 a.m. when Sulley along with his brother, Jadon, his son, Rajendra and his nephew Vijay Kumar were going from their house in Neem Gali, Mathura, to their Dharamshala in Mohalla Bengali Ghat, via Vishram Ghat and reached the area called Shyam Ghat, they were waylaid by the twelve persons accused in the case and were assaulted. After the assault, the miscreants left. The injured persons were sent to the District Hospital. Dying declaration was recorded. But victim survived.
Supreme Court observed, "When a person who has made a Statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of the Evidence Act. Maker of the statement are alive. Their statements, therefore, are not admissible under Section 32; but their statements however are admissible under **Section 157** of the Evidence Act as former statements made by them in order to corroborate their testimony in the Court".
Conclusion of Maqsoodan Case – Such statement can be used under section 157 rather than section 32.

Ram Prasad v. State of Maharashtra[109] (12 May, 1999)
There was political vendetta. Victim survived.

Supreme Court observed,

- "We are in full agreement with the contention of the learned counsel that Ext.52 (Dying declaration of person who survived) cannot be used as evidence under Section 32 of the Evidence Act though it was recorded as a dying declaration.
- As long as the maker of the statement is alive *it would remain only in the realm of a statement recorded during investigation[110]*.
- Be that as it may, the question is whether the court could treat it as an item of evidence for any purpose. ***Section 157*** of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before any authority legally competent to investigate the fact but its use is limited to corroboration of the testimony of such witness.
- Though a police officer is legally competent to investigate, any statement made to him during such investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in ***Section 162*** of the Code.
- But a statement made to a magistrate is not affected by the prohibition contained in Section 162. A magistrate can record the statement of a person as provided in Section 164 of the Code and such statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or if not die it would remain within the realm of what it was originally. A statement recorded by a magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof".

Section 162 (1) Cr.P.C. (If he comes as a prosecutor witness)	He can be contradicted by his previous statement.
Section 162 (2) Cr.P.C.	If victim died his statement will come under section 32(1) which is exception of section 162(1).
Section 164 Cr.P.C.	Recording of statement
Section 155 (3) Indian Evidence Act	Impeaching of credit of witness by his former statement.
Section 157 Indian Evidence Act	Corroboration with former statement.

Conclusion – If victim survived, his statement will not come under section 32(1). His statement will be relevant subject to condition of Sections 162 & 164 Cr.P.C. It will be relevant under sections 145, 155and 157 of the Indian Evidence Act. Such statement shall be treated as made during investigation.

Burden of prove

Section 104. Burden of proving fact to be proved to make evidence admissible - The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustration -

(*a*) A wishes to prove a dying declaration by B. A must prove B's death.

[109] AIR 1999 SC 1969.
[110] Sections 161, 162 and 164 of Cr.P.C.

Section 40 to 44

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT

Previous Year Question Papers

Bihar (J) 1978Question- Write short note on Relevancy of judgments of Court of Justice.
Answer- Sections 40 to 44.
DJS 1973 & Bihar (J) 1979 Question – Write brief explanatory note on Judgment in rem.
Answer- Section 41.
Question – Discuss "Ordinarily judgments bind only parties to it"

UP (J) 1988 & 2012 Question –

Question 3(c) A prosecutes B for adultery with C, A's wife.
B denies that C is A's wife, but the Court convicts B of adultery.
Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime.
C says that she never was A's wife.
Is the judgment against B irrelevant as against C?
Answer- Section 43 Illustration (b)

UP (J) 1999 Question –

Question 7(a) Whether a judgment in previous case is admissible as an evidence in a subsequent case? If so, for what purpose?

UP (J) 2012 Question

Question 5(b) A prosecutes B for adultery with C, A's wife.
B denies that C is A's wife, but the Court convicts B of adultery.
Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime.
C says that she never was A's wife.
Is the judgment against B irrelevant as against C?

UP (J) 2018

Question 7(a) Discuss the relevancy of judgment with the help of the provisions of the Indian Evidence Act, 1872 and reasonable illustrations.

Introduction

Rajan Rai* v. *State of Bihar (Supreme Court 10 November, 2005) – In this case Supreme Court summarized following important points -

- **Section 40** states the circumstances in which a previous judgment may be relevant to bar a second suit or trial.
- **Section 41** deals with the relevancy of certain judgments in probate, matrimonial, admiralty or insolvency jurisdiction.
- **Section 42** refers to the relevancy and effect of judgments, orders or decrees other than those mentioned in Section 41 in so far as they relate to matters of a public nature.
- **Section 43** which clearly lays down that judgments, order or decrees, other than those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provisions of the Evidence Act.

- **Section 44** deals with fraud or collusion in obtaining a judgment, or incompetency of a court which delivered it.

Section 40. Previous judgments relevant to bar a second suit or trial –

The existence of any
- judgment,
- order or
- decree

which **by law *prevents*** any Court from
- taking cognizance of a suit or
- holding a trial,

is a relevant fact
- *when the question is whether such Court ought to take cognizance of such suit or to hold such trial*.

Comment

Section 40 is applicable to Civil and Criminal case both. It deals certain situations in which previous judgment, order or decree become relevant. There are three essential ingredients of this section. These are –

1. There must be a question regarding cognizance of suit or holding of trial.
2. There must be existence of any judgment, order or decree
3. Such judgment, order or decree **by law *prevents*** any Court from taking cognizance of a suit or holding a trial

Law must prevent..

Civil Cases -Section 11 of the Code of Civil Procedure, 1908 prevents Civil Court to try any suit or issue which has been decided by competent Court. This Section deals *'Res Judicata'*.

Criminal Cases-Section 300 of Cr.P.C. and Article 20(2) of the Constitution of India prohibit double jeopardy. According to section 300 Cr.P.C. person once convicted or acquitted not to be tried for same offence.

Section 300 of the Code of Criminal Procedure, 1973 deals the rule *autrefois acquit and autrefois convict* (Once acquitted or convicted cannot be tried for same offence or for different offence on the basis of same facts) or 'Rule against Double Jeopardy'.

Section 300 and Article 20(2) (Principle of Double Jeopardy)

Section 300 provides wider protection. It is applicable either person is acquitted or convicted while Article 20(2) gives protection only in case of person who is prosecuted and punished.

S.N.	Section 300	Article 20(2)
1	Tried	Prosecuted
2	Convicted	Punished
3	Acquitted	It is not applicable.

Admissibility of Judgment of Civil Court and Criminal Court and vice-versa

***(Padmanabhini) Ramanamma* v. *Golusu Appalanarasayya*[111]** (20 November, 1931)

- **The petitioner** charged the respondent, his wife and others with the offences of robbery and defamation.
- **Criminal Case -** Ultimately the respondent alone was convicted of offence of defamation and his conviction was upheld by the Sessions Judge in appeal.
- **Civil Case-** The petitioner then filed a suit for damages for defamation against the respondent and another person. ***A copy of the judgment confirming the conviction*** (Judgment of Criminal Case) was produced, but the District Munsif held, quite rightly, that he was not bound to follow it and that he had to arrive at a decision independently on the evidence before him***.*** *In the result, he dismissed the suit.*
- **Criminal Case -** The next thing that happened was that this Court, in revision, set aside the conviction and ordered a retrial. The case was retried and ended again in the conviction of the respondent. Accused tried to get admitted in evidence a ***copy of the judgment of the civil Court,*** but *the Magistrate rejected it, being of opinion that it was irrelevant for the purpose of criminal trial.*
- **Appeal -** An appeal was again preferred, which was on this occasion successful. The Sessions Judge set aside the conviction, holding that the Munsif's judgment was not merely relevant, but also conclusive proof of the respondent's innocence.
- **Both parties presented judgment of civil case and criminal case vice-***versa.*

The judgment of neither is binding on the other and each must decide the cause on the evidence before it. The order of the Sessions Judge was set aside.

***Ram Lal* v. *Tula Ram* (August 15, 1981)**

Suit by Hindu father for compensation for the loss of his daughter's services in consequence of her abduction by defendant. Defendant had been convicted for kidnapping. Judgment of Criminal Court that an accused did or not commit an offence does not operate as res judicata to prevent Civil Court from determining such questions for the purpose of suit.

Objective Questions

MP APO Question -Under which section of the Indian Evidence Act 'Res Judicata' is relevant?

A. Section 40
B. Section 41
C. Section 42
D. Irrelevant

Answer – Section 40

[111] AIR 1932 Mad 254

Section 41. Relevancy of certain judgments in probate, etc., jurisdiction –

A final

i. judgment,
ii. order or
iii. decree of a competent Court,

in the exercise of

1. probate,
2. matrimonial,
3. admiralty or
4. 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
- *(***declares** any person**)** *to be entitled to any specific thing, not as against any specified person but absolutely,*

is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof -

1) that any legal character which it **confers** ***accrued at the time*** when such judgment, order or decree came into operation;
2) that any legal character, to which it **declares** any such person to be entitled, ***accrued to that person at the time*** when such judgment order or decree declares it to have accrued to that person;
3) that any legal character which it **takes away** from any such person ***ceased at the time*** from which such judgment, order or decree declared that it had ceased or should cease; and
4) that anything to which it **declares** any person to be so *entitled was the property* of that person ***at the time*** from which such judgment, order or decree declares that it had been or should be his property.

Comment

Exercise of Four Types of Jurisdiction

	PM AI	
1	Probate Jurisdiction	
2	Matrimonial Jurisdiction	
3	Admiralty Jurisdiction	
4	Insolvency Jurisdiction	

Final

Final	**Judgment**	**At the time**
Final	**Order**	**At the time**
Final	**Decree**	**At the time**

Final –There must be final order rather than interlocutory order.

Conclusive Prove. - Section 41 deals 'Conclusive Prove'. Conclusive Prove has been defined under section 4 of the Indian Evidence Act, 1872. It declares that final judgment, decree or order passed in the exercise of Probate Jurisdiction, Matrimonial Jurisdiction, Admiralty Jurisdiction and Insolvency Jurisdiction shall be conclusive prove regarding legal character or entitlement of specific thing.

Judgment in rem – Section 41 deals judgment in rem. judgment in rem means it is judgments which is binding not only to the parties or his privies but also to all persons. It is binding only about status rather than grounds of decision.

Judgment in rem and Judgments in personam

In the case of *State of Bihar* v. *Radha Krishna Singh & Ors* (20 April, 1983) Supreme Court made differences between judgment in rem and judgments in personam which are following-

(1) A judgment in rem e. g., judgments or orders passed in admiralty, probate proceedings, etc., would always be admissible ***irrespective of whether they are inter parties or not,***

(2) Judgments in personam ***not inter parties are not at all admissible in evidence*** except for the limited purpose of proving as to

- who the parties were and
- what was the decree passed and
- the properties which were the subject matter of the suit.

Judgment in rem is conclusive prove only for showing –

S. No.	***CTDD***	***Legal Character & Specific Thing.***
1	**confers** upon any person	any *legal character*
2	**takes away** from any person	any *legal character*
3	**declares** any person *to be entitled to*	*any legal character*
4	**declares** any person *to be entitled to*	*any specific thing,* not as against any specified person but absolutely.

Decree of divorce – Divorce takes away legal character of person as husband and wife. Decree of divorce, though conclusive upon all persons that the parties have been divorced and that the parties are no longer husband and wife is *not relevant to prove the cause* for which the decree was pronounced.

Objective Questions

UPAPO APO Question – Which of the following is 'Judgment in personam' –

A. Final judgment regarding 'Restitution of Conjugal Rights'
B. Final judgment regarding suit of defamation
C. Final judgment regarding divorce
D. Final judgment regarding breach of Contract

Answer –C. Final judgment regarding divorce

Section 42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41 - Judgments, orders or decrees other than those mentioned in section 41 are relevant ***if they relate to matters of a public nature relevant to the enquiry***; but such judgments, orders or decrees ***are not conclusive proof*** of that which they state.

Illustration
A sues B for **trespass** on his land. B alleges the existence of a ***public right*** of way over the land, which A denies.
The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Objective Question

UP APO 2005, 2007

Question - A sues B for **trespass** on his land. B alleges the existence of a ***public right*** of way over the land, which A denies. The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way is

A. Relevant but it cannot be enforced as estoppel.
B. Irrelevant and it is not suitable for consideration
C. Conclusive prove
D. is relevant, but it is not conclusive proof that the right of way exists.

Answer- D. Relevant, but it is not conclusive proof that the right of way exists.

Section 43. Judgments, etc., other than those mentioned in sections 40, 41 and 42, when relevant -
Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

Illustrations

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

MP (Pre.) (J) 1996

***Illustration* (*b*)** A prosecutes B for adultery with C, A's wife.
B denies that C is A's wife, but the Court convicts B of adultery.
Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime.
C says that she never was A's wife.

The judgment against B is irrelevant as against C.

MP (Pre.) (J) 1996

***Illustration* (*c*)** 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.

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

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

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

Comment

***Res inter alias judicata mullum inter, Alias prejudicium facit* –**It means matter adjudicated upon between one set of persons does not in any way prejudice another set of persons.[112]

Section 43 deals relevancy of judgment between parties. It is not relevant for third party. Sections 41 & 42 is exception of this maxim under sections 41 and 42 judgment is not relevant only party of the proceeding but also for those persons who were not party to the proceeding.

Relevancy of Judgment/Order/Decree

1	**Section 40**	**Relevant**	Prevent Court
2	**Section 41**	**Relevant**	Conclusive
3	**Section 42** (JOD other than section 41)	**Relevant**	***matters of a public nature***
4	**Section 43**(JOD other than sections 40, 41 & 42)	Rule – **Irrelevant.** Exception - Relevant	**Exception** –JOD is **(i)** fact in issue, or **(ii)** is relevant under some other provision of this Act.

Section 44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved - Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections **40, 41 or 42**, and which has been proved by the adverse party, was delivered by a Court ***not competent to deliver it***, or ***was obtained by fraud or collusion.***

Comment

Any judgment, order or decree relevant under sections 40, 41, and 42 may be rejected if such judgment, order or decree has

1. been passed by Court which was **not competent to** deliver it.
2. been obtained by **fraud**
3. been obtained by **collusion**

[112] M. Monir, 'Textbook on the Law of Evidence' 212 (Universal Law Publishing Co., New Delhi 9th Edn., 2013).

OPINIONS OF THIRD PERSONS WHEN RELEVANT
(Sections 45 to 51)

Previous Year Question Papers

UP (J) 1982 & 2018

Question 7(a) – When the evidence of an expert is to be admitted? What are the differences between an expert and an ordinary witness? Discuss fully and illustrate your answer.

Question 7(b) – Will the following expert evidence be admitted? If so, give reasons and cite case:

1. Evidence of an architect as to the depreciation of property by nuisance.
2. Evidence of an expert to give his opinion upon the construction of a document.
3. Evidence of medical man as to the loss of earning capacity in a claim under the Workmen's Compensation Act.

UP (J) 1985

Question 10(a) - When are the opinions of experts relevant? What is their evidentiary value? Discuss.

UP (J) 1987

Question 4(a) - How is the disputed handwriting of a person proved? Examine admissibility of the evidence of a handwriting expert.

UP (J) 1997 & Har.JS 2010

Question 9(a) What is expert opinion? Explain the evidentiary value of expert opinion.

UP (J) 2006, 2016(DJS 2005 Bihar 1984 & 1986)

Question 7(a) (iv) Write note on 'Expert Evidence'.

UP (J) 2016

Question 7(c) – What is the relevance of DNA Test evidence in India? After Sheena Bora Murder Case, analyze the relevancy of DNA evidence as corroborative evidence and circumstantial evidence.

UP (J) 2018 & 1982

Question 7(a) – When the evidence of an expert is to be admitted? What are the differences between an expert and an ordinary witness? Discuss fully and illustrate your answer.

Handwriting

UP (J) 1987

Question 4(a) - How is the disputed handwriting of a person proved? Examine admissibility of the evidence of a handwriting expert.

DJS 1984 & HJS 2010

Discuss the evidentiary value of opinion of an 'Handwriting Expert'.

RJS 1994

How handwriting of a person can be proved.

RJS 2015 & 2016

When the opinion as to electronic signature is relevant?

DJS 1999

Comment briefly on following: "Handwriting of person can also be proved by a person who is qualified to express an opinion".

Finger print

DJS 2011
Admissibility of finger print evidence

Radiologist

RJS 1999
In a case, the date of birth of the accused is in question. Whether this matter may be referred to a radiologist as an expert under section 45 of the Indian Evidence Act, 1872.

DNA

UP (J) 2016
What is the relevance of DNA Test evidence in India? After Sheena Bora Murder Case, analyze the relevancy of DNA evidence as corroborative evidence and circumstantial evidence.

Introduction

Sections 45 to 51 deal when opinion of third person is relevant. Rule is that witnesses must confine to that facts rather than their opinion. But sections 45 to 51 create exceptions of this rule. Here opinion of person is relevant in certain circumstances.

Meaning of opinion

What a person thinks in respect to the existence or non-existence on a fact is opinion.
Whatever is presented to the senses of witness and of which he receives direct knowledge without any process of any thinking and reasoning is not opinion[113].

Section 45. Opinions of experts - When the Court has to form an opinion upon a point of foreign law or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.
Such persons are called experts.

Illustrations

***Illustration* (*a*)** The question is, whether the death of A was caused by poison.
The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.
***Illustration* (*b*)** The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.
The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.
***Illustration* (*c*)** The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

[113] Batuk Lal, 'Law of Evidence' 295 (Central Law Agency, Allahabad, 19th Edn. 2010).

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

Section 45A. Opinion of Examiner of Electronic Evidence -When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000, is a relevant fact.

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

Comment

(1) Meaning of Expert

With the help of section 45 & Section 45A Explanation meaning of expert can be inferred.

According to section 45 'A person who is specially skilled in foreign law, science or art, or in questions as to identity of handwriting or finger impressions is called expert'.

According to section 45A 'Examiner of Electronic Evidence is also expert as to any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form'.

Meaning of Expert

	Section 45	
Specially Skilled	Foreign law	
	Science	
	Art	
	Handwriting	
	Finger impressions	
	Section 45A Explanation	
Examiner of Electronic Evidence	Computer resource or any other electronic or digital form	Information Technology Act, 2000, Section 79A

(2) …the court has to form an opinion…

Section 45	***…the court has to form an opinion…***	FSAHF
Section 45A	***…the court has to form an opinion…***	Transmission of information through electronic form
Section 46	**……..**	**……..**
Section 47	***…the court has to form an opinion…***	Handwriting
Section 47A	***…the court has to form an opinion…***	Electronic signature
Section 48	***…the court has to form an opinion…***	Right or custom
Section 49	***…the court has to form an opinion…***	Usages, tenets, meaning of terms or words
Section 50	***…the court has to form an opinion…***	Relationship
Section 51	**……..**	**……..**

Most important condition for application of these sections is that Court has to form an opinion. Every person has not specialization in each and every subject. Sometimes happen that student of Art Stream become a judge and he has not good command over science. With the help of opinion of expert he can decide the matter smoothly.

(3) Essential ingredients of section 45

There are three essential ingredients of section 45 which are following –

1. **Court has to** form an opinion.
2. Forming of opinion must be upon **five points.** These are foreign law or of science, or art, or as to identity of handwriting or finger impressions.
3. Opinion of person **especially skilled** on these five points is relevant.

Finger Impressions

In the case of ***State of Bombay* v. *Kathi Kalu Oghad & Ors***.[114]Supreme Court concluded that giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not violation of Article 20(3).

DNA

Importance of DNA - Discovery of DNA is considered as one of the most significant biological discoveries during the 20th century owing to its tremendous impact on science and medicine. Of late, it is acting as a very useful tool of forensic science that not only provides guidance in criminal investigation and civil disputes, but also supplies the courts with accurate information about all the relevant features of identification of criminals[115].

Meaning -DNA means Deoxyribonucleic acid. Every person has different DNA receive from their ancestors. When the Indian Evidence Act was enacted it was not well known. At present time it is scientific and provides accurate information. According to 'Principle of Updating Construction' DNA was accepted to prove or disprove fact.

Sections 9 and 45 -DNA Test is also relevant under section 9 of the Indian Evidence Act to explain or introduce facts in issue or relevant facts. Court may take opinion of 'Expert' on DNA which comes under 'Science' as mentioned under Section 45 of The Indian Evidence Act, 1872.

Law Commission of India - 271st Report of Law Commission of India discussed thoroughly about this.

Shri Banarsi Dass* v. *Mrs. Teeku Dutta and Anr. (27 April, 2005)

In this case Supreme Court observed, "We may remember that Section 112 of the Evidence Act was enacted at a time when the modem scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate".

At the initial stage forcefully taking DNA was challenged on the basis of violation of Article 20(3).

Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik & Anr. (6 January, 2014)

This case is mainly related to section 112 of the Indian Evidence Act. Supreme Court observed, "The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the husband to bear the fatherhood

[114] AIR 1961 SC 1808

[115] http://lawcommissionofindia.nic.in/reports/Report271.pdf (Visited on April 29, 2020).

of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice".

Radiologist

RJS 1999

In a case, the date of birth of the accused is in question. Whether this matter may be referred to a radiologist as an expert under section 45 of the Indian Evidence Act, 1872.

Answer – Yes.

UP (J) 2018 & 1982

Question 7(a) –What are the differences between an expert and an ordinary witness?

Answer -

Difference between 'Expert' and 'Ordinary Witness'[116]

S. No.	***Expert Witness***	***Ordinary Witness***
1	Expert witness gives evidence of his opinion	Ordinary Witness gives witness which he has perceived by senses.
2	The expert supports his by the experiments which has been performed by him in absence of opposite party.	Ordinary Witness is witness of fact and is available to opposite party for testing veracity.
3	Expert witness is allowed only in limited cases as mentioned under section 45 and section 45A.	Ordinary Witness can give evidence on any fact.
4	Party cannot be expert witness.	Party to suit or proceeding may be ordinary witness.
5	It requires special skill.	It does not require special skill.
6	Court has option either to take help of expert or not.	Here Court has no option. He is bound to accept the evidence of fact if that fact is relevant.

Section 46. Facts bearing upon opinions of experts.—Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations

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

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

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

[116] Batuk Lal, 'Law of Evidence' 308 (Central Law Agency, Allahabad, 19th Edn. 2010).

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

Section 47. Opinion as to hand-writing, when relevant –

1. When the **Court** has to form an opinion
2. as to the person by whom any document was ***written or signed***,
3. the opinion of any person ***acquainted with the handwriting of the person*** by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation -A person is said to be acquainted with the hand-writing of another person

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

Illustration

The question is, whether a given letter is in the **hand-writing of A**, a merchant in London.

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

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write.

Section 47A. Opinion as to digital signature, when relevant -When the Court has to form an opinion as to the electronic signature of any person, the opinion of the Certifying Authority which has issued the electronic Signature Certificate is a relevant fact.

Handwriting

UP (J) 1987

Question 4(a) - How is the disputed handwriting of a person proved? Examine admissibility of the evidence of a handwriting expert.

DJS 1984 & HJS 2010

Discuss the evidentiary value of opinion of a 'Handwriting Expert'.

RJS 1994

How handwriting of a person can be proved.

Answer- Sections 45, 47 & 73.

RJS 2015 & 2016

When the opinion as to electronic signature is relevant?

Answer –Section 47A.

DJS 1999

Comment briefly on following: "Handwriting of person can also be proved by a person who is qualified to express an opinion".

Comment

Introduction – Handwriting of person can be proved according to Section 45, Section 47 and 73 of the Indian Evidence Act**.**

Difference between Section 45 & Section 47

Section 45	***Specially skilled***	**Expert**
Section 47	***acquainted with the handwriting of the person***	**Ordinary Person**
Section 73	*Comparison of signature, writing or seal*	

Section 73 - Comparison of signature, writing or seal with others admitted or proved.- In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

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

This section applies also, with any necessary modifications, to finger-impressions.

Question UK(J) Pre. In which of the following case section 73 and 27 of the Indian Evidence Act were challenged on the ground of violation of Article 20(3) of the Constitution of India?

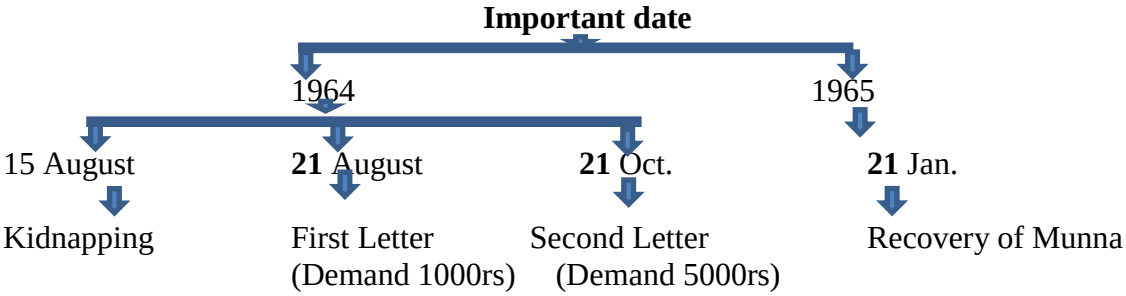
- **A.** *The State of Bombay* v. *Kathi Kalu Oghad and Others*
- ***B.*** *Kashmira Singh* v. *State of Madhya Pradesh*
- ***C.*** *Ratan Singh* v. *State of Himachal Pradesh*
- **D.** None of the above

Answer- A. In case of *The State of Bombay* v. *Kathi Kalu Oghad and Others* (4 August, 1961), Supreme Court said that there is no infringement of Art.20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature; or impressions of his fingers, palm or foot to the investigating officer or under orders of a court for the purpose of comparison under the provisions of s.73 of the Indian Evidence Act.

***Ram Narayan* v. *State of Uttar Pradesh*[117]** (SC 1973)
(Kidnapping of Child & Two Letters demanding ransom)

Fact –

- **Kidnapping -** On August 15,1964 Mannu (5 yrs) s/o Shri Gajendra Natth, an Excise Inspector was kidnapped. FIR was registered. 501 rs. reward was also announced for giving information.
- **Demand of ransom through two letters -**A post-card (Ext. Ka-1) bearing post office seals dated 21- 8-1964 and later an inland letter (Ext. Ka-2) bearing the date October 21, 1964 were received by Gajendra Nath demanding, in the first letter a ransom of Rs. 1,000/-, and in the second a ransom of Rs. 5,000/- for the return of the boy in December, 1964.
- **Recovery of child -** A trainee of the local I.T.I., Kanpur, Yashpal Singh Having found a clue, gave the necessary information to the, father of the, child regarding his whereabouts. Thereupon, on January 11, 1965 the child was recovered from the house of ***Ganga Bux Singh*** and ***Chandrabushan Singh*** in village Pandeypur District Kanpur.



- **Ram Narain -** The investigation of the case revealed that Ram Narain, was also responsible for kidnapping and wrongfully confining the said child and that *it was he who had sent the two anonymous letters (Exts. Ka-1 and K-2) demanding ransom.*
- **Charge -** All the three persons were prosecuted under ss. 363, 468 and 384/511, I.P.C.
- **Trial Court (Three Convicted) -**The trial court convicted Ganga Bux Singh and Chandrabushan Singh under s. 368, I.P.C. and Ram Narain appellant under ss. 384/511, I.P.C.
- **Appeal to Sessions Judge (One Convicted) -** On appeals by the convicted persons, Sessions Judge, Kanpur, came to the conclusion that the offence under s. 368, I.P.C. had not been established beyond reasonable doubt with the result that Ganga Bux Singh and Chandrabushan were acquitted. The appellant, Ram Narain's conviction for an offence under ss. 384/511, I.P.C. was upheld. ***This conviction was solely based on the conclusion that the two anonymous letters had been written by him.***
- **Hand-writing expert** - The appellant having categorically denied his authorship of those letters, Shri R. A. Gregory, a hand-writing expert was produced in support of the prosecution case.
- **All. High Court –** High Court also convicted.
- **Decision of Three Courts -**Believing his testimony that Ram Narain was the writer of those two letters, *all the three courts below have agreed in convicting the appellant.*

Appeal to Supreme Court

[117] AIR 1973 SC 2200

Issue -The short question raised before Supreme Court relates to the legality and propriety of the appellant's *conviction on the uncorroborated testimony of the hand-writing expert.*
Question **-** *Whether person can be convicted solely on the basis expert opinion?*
Answer **-** *Yes*
In this case Supreme Court observed following important points -

(1) Difference between section 45 & 47 – "Both under Section 45 and Section 47 the evidence is an opinion, in the former by a **scientific comparison** and ***in the latter on the basis of familiarity resulting from frequent observations and experience.***
In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in the one case an to appraise the value of the opinion in the other case".
(2) Role of Court -Where an expert's opinion is given, the Court must see for itself and with the assistance of the expert come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the Court must play the role of an expert but to say that the Court may accept the fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witness.
(3) ***State Of Gujarat*** **v.** ***Chhotalal Pitambardas*** **(20 Nov., 1964Guj. H.C.)** -The opinion of a handwriting expert is also relevant in view of s. 45 of the Evidence Act, but that too is not conclusive. It has also been held that the sole evidence of a handwriting expert is *not normally sufficient* for recording a definite finding about the writing being of a certain person or not.
(4) Fallible- the opinion of a hand-writing expert given in evidence is no less fallible than any other expert opinion adduced in evidence with the result that such evidence has to be received with great caution. But this opinion evidence, which is relevant, may be worthy of acceptance *if there is internal or external evidence relating to the document in question supporting the view expressed by the expert*.
(5) Magistrate, Session Court & High Court – All these Courts themselves made a comparison of the specimen writing of the applicant with the writing contained in the two letters along with the opinion of Expert and came to the same conclusion.

Conclusion

Solely on the ground of expert opinion conviction of accused was upheld by Supreme Court. All the Court themselves ensures authenticity of hand writing. There was common opinion of all courts. So Supreme Court did not personally examine.

Section 48. Opinion as to existence of right or custom, when relevant.—When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of *persons who would be likely to know of its existence if it existed*, are relevant.
Explanation **-** The expression "general custom or right" includes customs or rights common to any considerable class of persons.
Illustration
The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Section 13 and Section 48

Both sections are related to right and custom. But under section 13 facts are relevant while under section 48 opinion is relevant.

Section 49. Opinion as to usages, tenets, etc., when relevant. — When the Court has to form an opinion as to-
the usages and tenets of any body of men or family,
the constitution and government of any religious or charitable foundation, or
the meaning of words or terms used in particular districts or by particular classes of people,
the opinions of persons having special means of knowledge thereon are, relevant facts.

Section 48and Section 49

J.J. Starke "Usage represents the twilight stage of custom, custom therefore begins where usage ends."

Section 50. Opinion on relationship, when relevant. —When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has ***special means of knowledge*** on the subject, is a relevant fact.

Exceptions -

Provided that such opinion shall not be sufficient to prove

- a marriage in proceedings under the Indian Divorce Act, 1869 or
- in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code, 1860.

Illustrations

***Illustration* (*a*)** The question is, whether A and B, were married.
The fact that they were usually received and treated by their friends as husband and wife, is relevant.
***Illustration* (*b*)** The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family is relevant.

Comment –(1) There are two exceptions. First exception is confined only to marriage and divorce under Indian Divorce Act, 1869 which is applicable to persons professing the Christian religion. It does not related to marriage and divorce of Hindu or Muslim. Britishers were interested to rule the country rather than to serve the country. They knew that once they will interfere in personal law again problem may be aroused. So this exceptions is confined only to Christianity.
(2) This section is confined to relation of one human being with another human being. It does not cover relation of objects and human being.
(3) If section will be applicable in case of NRC, several numbers of persons may be included very easily.
(4) It is also relevant to prove live in relationship.
(5) Here relationship may be legitimate or illegitimate.

Section 51. Grounds of opinion, when relevant -Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

***Illustration* -** An expert may give an account of experiments performed by him for the purpose of forming his opinion.

Whose opinion is relevant?

Section	Opinion	Matters
Section 45	**Opinions of experts** (persons specially skilled)	Foreign law, science or art, or handwriting or finger impressions
Section 45A	**Opinion of Examiner of Electronic Evidence**	Any information transmitted or stored in any computer resource or any other electronic or digital form
Section 47	**Opinion as to hand-writing**	Person acquainted with the handwriting of the person
Section 47A	**Opinion as to digital signature,**	Certifying Authority which has issued the electronic Signature Certificate
Section 48	**Opinion as to existence of right or custom**	Persons who would be likely to know of its existence if it existed
Section 49	**Opinion as to usages, tenets, etc.**	Opinions of persons having special means of knowledge
Section 50	**Opinion on relationship**	Special means of knowledge

…the court has to form an opinion…

Section 45	***…the court has to form an opinion…***	FSAHF
Section 45A	***…the court has to form an opinion…***	Transmission of information through electronic form
Section 46	**……..**	**……..**
Section 47	***…the court has to form an opinion…***	Handwriting
Section 47A	***…the court has to form an opinion…***	Electronic signature
Section 48	***…the court has to form an opinion…***	Right or custom
Section 49	***…the court has to form an opinion…***	Usages, tenets, meaning of terms or words
Section 50	***…the court has to form an opinion…***	Relationship
Section 51	**……..**	**……..**

Difference between 'Expert' and 'Ordinary Witness'

S	***Expert Witness (Opinion)***	***Ordinary Witness (Opinion and Other facts)***
1	Expert witness gives evidence of his opinion	Ordinary Witness gives witness which he has perceived by senses.
2	The expert supports his opinion by the experiments which has been performed by him in absence of opposite party.	Ordinary Witness is witness of fact and is available to opposite party for testing veracity.
3	Expert witness is allowed only in limited cases as mentioned under section 45 and section 45A.	Ordinary Witness can give evidence on any fact.
4	Party cannot be expert witness.	Party to suit or proceeding may be ordinary witness.
5	It requires special skill.	It does not require special skill.
6	Court has option either to take help of expert or not.	Here Court has no option. It is bound to accept the evidence of fact if that fact is relevant.

Difference between 'Opinion of Expert' and 'Opinion of Ordinary Witness'

	'Opinion of Expert'	***Opinion of Ordinary Witness'***
Section	*Sections 45, 45A& 46*	*Sections 47 to 51*
Who	*Specially skilled*	*Any person*
Subject	*It is narrower- Total Six- Five (Sec. 45) + One (Sec. 45A)*	*It is wider.*

Question [UK (J) (Pre.) 2011] –Under which section of the Indian Evidence Act DNA Test is relevant?

A. Section 47
B. Section 45
C. Section 48
D. Section 49

Answer- B. Section 45. It is scientific evidence.

Question [UK (J) (Pre.) 2011] - Which of the following is expert under the Indian Evidence Act?

A. Handwriting expert
B. Finger Impression expert
C. Ballistic Expert
D. All of the above.

Answer – D.

In the case of *Vineet Kumar Chauhan* v. *State of* UP (14 Dec., 2007 SC) The appellant went to his house, brought out the licensed revolver of his father and opened indiscriminate firing and killed. On such matter opinion of Ballistic Expert is relevant.

***Mukesh & Anr.* v. *State for NCT of Delhi & Ors.*[118]**
(Delhi Gang Rape Case)
(Supreme Court -05.05.2017)

Full Bench - Hon'ble JJ.Dipak Misra, R. Banumathi, Ashok Bhushan

Fact –

The cold evening of Delhi on 16th December, 2012 could not have even remotely planted the feeling in the twenty-three year old lady, a para-medical student, who had gone with her friend to watch a film. When she, along with her friend, would get into a bus at Munirka bus stand to be dropped at a particular place; and possibly could not have imagined that she would be a prey to the savage lust of a gang of six, face brutal assault and become a playful thing that could be tossed around at their wild whim and her private p arts would be ruptured to give vent to their pervert sexual appetite, unthinkable. She died on December 29, 2012. Before death, she made three dying declarations. All the courts awarded death sentence. Death sentence was confirmed by Supreme Court on May 5, 2017. Supreme Court said that it created Tsunami of shocking in the mind of public. In this case later on four accused hanged till death on March 20, 2020. In this case several laws were involved but our discussion will be confined up to laws related to evidence. In this case mainly four points were discussed which are following -

Summary –

1. ***Three Dying Declarations***
2. ***Plea of alibi***
3. ***DNA Test***
4. ***Section 65-B***

(1) *Three Dying Declaration*

- **DD is sole basis for conviction**- A dying declaration is an important piece of evidence which, if found veracious and voluntary by the court, could be the sole basis for conviction. If a dying declaration is found to be voluntary and made in fit mental condition, it can be relied upon *even without any corroboration.* However, the court, while admitting a dying declaration, must be vigilant towards the need for *'Compos Mentis Certificate'* from a doctor as well as the absence of any kind of tutoring.
- **Guidelines** – Supreme Court accepted the guidelines laid down in earlier cases. Earlier cases are-
  (1) *Paniben* v. *State of Gujarat*[119] (1992).
  (2) *Panneerselvam* v. *State of Tamil Nadu*[120] (2008).
  (3) *Atbir* v. *Government of NCT of Delhi*[121] (2010).

[118] Mukesh & Anr. v. State for NCT of Delhi & Ors. is available on: https://main.sci.gov.in/jonew/judis/44879.pdf (Last visited on April 10, 2020).

[119] (1992) 2 SCC 474
[120] (2008) 17 SCC 190.
[121] (2010) 9 SCC 1

These ten guidelines are following –

(i) Sole basis of conviction -Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
(ii) Fit mental condition & no tutoring- The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
(iii) Conviction without corroboration -Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
(iv) Corroboration is rule of prudence - It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.
(v) Suspicious Dying Declaration -Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
(vi) Infirmity- A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
(vii) Whole detail is not necessary - Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.
(viii) Brief statement- Even if it is a brief statement, it is not to be discarded.
(ix) Eyewitness v. Medical opinion - When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.
(x) True dying declaration - If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."
These ten guidelines can be divided into three parts –

(1) Positive	When DD does become sole basis of conviction?	Points -1, 2, 3 & 10.
(2) Negative	When DD cannot be sole basis of conviction?	Points -5 & 6
(3) Directory	It is like suggestion.	Points- 4, 7, 8 & 9.

(2)*Plea of alibi*

1	*Dudh Nath Pandey* v. *The State of U.P.*	February 11, 1981.	***SC***
2	*Binay Kumar Singh* v. *State of Bihar*	October 31, 1996	***SC***
3	*Jayantibhai Bhenkarbhai* v. *State of Gujarat*	September 11, 2002.	***SC***
4	*Mukesh & Anr.* v. *State for NCT of Delhi & Ors.*	May 5, 2017	***SC***

According to section 103 of the Indian Evidence Act, it is settled in law that while raising a plea of 'alibi', the burden squarely lies upon the accused person to establish the plea convincingly by adducing cogent evidence.

Supreme Court relied on the judgment of *Binay Kumar Singh* v. *State of Bihar*[122] and reproduce a few paragraphs from this case,

- "We must bear in mind that an alibi is not an exception (special or general) envisaged in the Penal Code, 1860 or any other law.
- It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (a) given under the provision is worth reproducing in this context: 'The question is whether A committed a crime at Calcutta on a certain date. The fact that, on that date, A was at Lahore is relevant."
- The Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime.
- It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi.
- The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.
- When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened".

(3) DNA

The accused were subjected to medical examination and samples were taken from their person which were sent for DNA analysis. DNA analysis was done by Dr. B.K. Mohapatra, Sr. Scientific Officer, Biology, CFSL, CBI.

(1) What is DNA- DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person's DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule.

(2) Importance of DNA- DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals.

(3) Statutory provisions - Section 53A (2) (iv) of Cr.P.C. relates to the examination of a person accused of rape by a medical practitioner. Similarly, under Section 164A (2) (iii) for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must. These provisions were inserted in 2005.

[122] (1997) 1 SCC 283. It is also available at: https://main.sci.gov.in/jonew/judis/14855.pdf (Last visited on April 9, 2020).

(4) Ratio of cases accepted by Supreme Court – In this case Supreme Court accepted ratio of following cases -
In ***Surendra Koli* v. *State of Uttar Pradesh and others*** (DOJ- February 15, 2011) -[123] , the appellant, a serial killer, was awarded death sentence which was confirmed by the High Court. While confirming the death sentence, this Court relied on the result of the DNA test conducted on the part of the body of the deceased girl.

In ***Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid* v. *State of Maharashtra***[124] , the accused was awarded death sentence on charges of killing large number of innocent persons on 26th November, 2008 at Bombay. The accused with others had come from Pakistan using a boat 'Kuber' and several articles were recovered from 'Kuber'. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA test and the DNA test matched with several accused. Mohammed Ajmal was hanged till death on Nov.21, 2012.

In ***Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik and another*[125]**, the appellant, father of the child born to his wife, questioned the paternity of the child on the ground that she did not stay with him for the last two years. The Court directed for DNA test. The DNA result opined that the appellant was not the biological father of the child. 95 (2014) 5 SCC 353 96 (2014) 2 SCC 576 Page 184 184 The Court also had the occasion to consider Section 112 of the Evidence Act which raises a presumption that birth during marriage is conclusive proof of legitimacy. The Court relied on the DNA test holding the DNA test to be scientifically accurate.

Conclusion

DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses.
DNA test was accepted.

Section 65B.

The mobile phones of the accused persons were seized and call details records with requisite certificates under Section 65B of Indian Evidence Act were obtained by the police.
The certificate under Section 65B of the Indian Evidence Act, 1872 (for short, "Evidence Act") with respect to the said footage is proved.
The computer generated electronic record in evidence, admissible at a trial is proved in the manner specified in Section 65B of the Evidence Act.

[123] (2011) 4 SCC 80
[124] (2012) 9 SCC 1
[125] (2014) 2 SCC 576.

PART II (Sections 56, 57 & 58)
ON PROOF

CHAPTER III.—FACTS WHICH NEED NOT BE PROVED

Sections 56 & 57
(Judicial Notice)

Section 58
(Admission)

Previous Years Question Papers

Delhi Judicial Service

1982

- What is 'Judicial Notice'?
- Of what facts a Court shall take judicial notice?
- Is 'Railway strike' such fact as that a court is enjoyed to take judicial notice of it?

1982

How will you prove a municipal by-law?

2011

If a fact is admitted by person is still required to be proved? Can a court require an admitted fact to be proved?

Bihar Judicial Service

1975, 1987, 1988, 1996, 2006

Write brief explanatory note on judicial notice.

1979

What are the facts which need not to be proved in Court of Law?

Madhya Pradesh Judicial Service

2013

Write brief explanatory note on judicial notice.

Uttar Pradesh Judicial Service

1988 &2000

What facts need not be proved?

Rajasthan Judicial Service

1986

What facts need not be proved?

INTRODUCTION

There are total three parts in Indian Evidence Act. Part II (Sections 56 to 100) of the Indian Evidence Act deals about 'Proof'. It deals what facts to be proved and what facts need not to be proved. It also deals manner and method to prove.

Chapter III (Sections 56 to 58) deals facts need not to be proved.

Chapter III

Judicial notice **(Sections 56 & 57)** | Admission **(Section 58)**

Rule – Rule is that fact must be proved through evidence (either by oral evidence or documentary evidence) by party.

Exception – There are three exceptions of the rule that fact must be proved by party. These are –

1. **Facts judicially noticeable –** Sections 56 & 57.
2. **Facts admitted by party –** Section 58 rather than sections 17 to 23 & 31.
3. **Presumption of law-** In case of shall and conclusive it is mandatory for court while in case of may presume, it is discretionary.

Meaning of Judicial Notice-According to Taylor judicial notice is the cognizance taken by the Court itself of certain matters which clearly established that evidence of their existence is deemed unnecessary. A judge may take help of books or documents. He may also take help of parties. In such cases party is not bound to prove facts.

Facts judicially noticeable – Sections 56 & 57.

Combined effect of sections 56 and 57 is that facts judicially noticeable need not be proved. Section 56 is declaratory nature. Section 57 contains certain facts regarding which it is mandatory for court to take judicial notice. Section 57 is not exhaustive.

Section 57 is not exhaustive

Onkar Nath & Ors.* v. *The Delhi Administration (15 Feb., 1977 S.C.)

Issue - Whether the courts below were justified in taking judicial notice of the fact that on the date when the appellants delivered their speeches a railway strike was imminent and that such a strike was in fact launched on May 8, 1974.

Answer- Yes. Section 57 is illustrative rather than exhaustive.

Lower Court- Lower Court took 'Judicial Notice' of this fact.

Supreme Court – Hon'ble Justice Y.V. Chandrachud observed that the courts below were justified in assuming without formal evidence that the railway strike was imminent on May 5, 1974 and that a strike intended to paralyse the civic life of the nation was undertaken by a section of workers on May 8, 1974.

Supreme Court observed some other points also which are following –
(1) Sections 56 & 57- Section 56 of the Evidence Act provides that no fact of which the Court will take judicial notice need be proved. Section 57 enumerates facts of which the Court **'shall'** take judicial notice and states that on all matters of public history, literature, science or art the Court may resort for its aid to appropriate books or documents of reference.
(2) Section 57 is not exhaustive -The list of facts mentioned in section 57 of which the Court can take judicial notice is not exhaustive and indeed the purpose of the section is to provide that the Court shall take judicial notice of certain facts rather than exhaust the category of facts of which the Court may in appropriate cases take judicial notice.

(3) Importance of judicial notice-

- Recognition of facts without formal proof is a matter of expediency and no one has ever questioned the need and wisdom of accepting the existence of matters which are unquestionably within public knowledge.
- Shutting the judicial eye to the existence of such facts and matters is in a sense an insult to commonsense and would tend to reduce the judicial process to a meaningless and wasteful ritual.
- **Examples** -No Court therefore insists on formal proof, by evidence, of notorious facts of history, past or present.
    1. The date of poll,
    2. the passing away of a man of eminence and
    3. events that have rocked the nation need no proof and are judicially noticed[126].

Judicial notice, in such matters, takes the place of proof and is of equal force. In fact, as a means of establishing notorious and widely known facts ***it is superior to formal means of proof.***
Conclusion- Accordingly, the Courts below were justified in assuming, without formal evidence, that the Railway strike was imminent on May 5, 1974 and that a strike intended to paralyse the civic life of the Nation was undertaken by a section of workers on May 8, 1974.

Delhi Judicial Service (1982)
Question - Is 'Railway strike' such fact as that a court is enjoyed to take judicial notice of it?
Answer-Yes. In the case of *Onkar Nath & Ors.* v. *The Delhi Administration* (15 Feb., 1977 S.C.) it was observed that section 57 is illustrative rather than exhaustive.
Conclusion – On the basis of ratio of this case it can be concluded that Court can take judicial notice of 'Railway strike'.

Section 56. Fact judicially noticeable need not be proved.—No fact of which the Court will take judicial notice need be proved.
Section 57. Facts of which Court must take judicial notice.—The Court ***shall*** take judicial notice of the following facts: -

1. Indian Law –

All laws in force in the territory of India.

[126] For example Covid 19 (CORONA).

Ignorantia facit excusat, Ignorantia juris non excusat means ignorance of fact is excused, but ignorance of law is not excused. This maxim is applicable to everyone including judges.

Section 3 (29) General Clause Act, 1897 -"Indian law" shall mean any *Act, Ordinance, Regulation, rule, order, **bye-law** or other instrument* which before the commencement of the Constitution, had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or Part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act.

Delhi Judicial Service (1982) - Question- How will you prove a municipal by-law?

Answer- Court will take judicial notice.

2.British Law –

All public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;

3. Articles of War –

Articles of War for the Indian Army Navy or Air Force. 'Article of war' is a phrase which was used in seventeenth century. It means laws and regulations made to regulate forces during war.

4.Course of proceeding of Parliament/ Constituent Assembly/ legislatures –

The course of proceeding

- of Parliament of the ***United Kingdom***,
- of the Constituent Assembly of **India**,
- of Parliament and of the legislatures established under any laws for the time being in force in a **Province** or in the **States**

5. The accession and the sign –

The accession and the sign manual of the Sovereign for the time being of the ***United Kingdom of Great Britain and Ireland;***

6. Seals-

- All seals of which **English Courts** take judicial notice:
- the seals of all the **Courts in India** and of all Courts out of India established by the authority of the Central Government or the Crown Representative;
- the **seals of Courts of Admiralty** and Maritime Jurisdiction and of Notaries Public, and
- **(Authorised person)** all seals which any person is authorised to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India;

7. Gazetted Officer-

The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette;

8.National Flag of Countries-

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

9.Time, world & Festival-

The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

10. Indian Territory –

The territories under the dominion of the Government of India;

11. Hostilities –

The commencement, continuance and termination of hostilities between the Government of India and any other State or body of persons;

12. Court & Advocate-

The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorised by law to appear or act before it;

13. Traffic Rule-

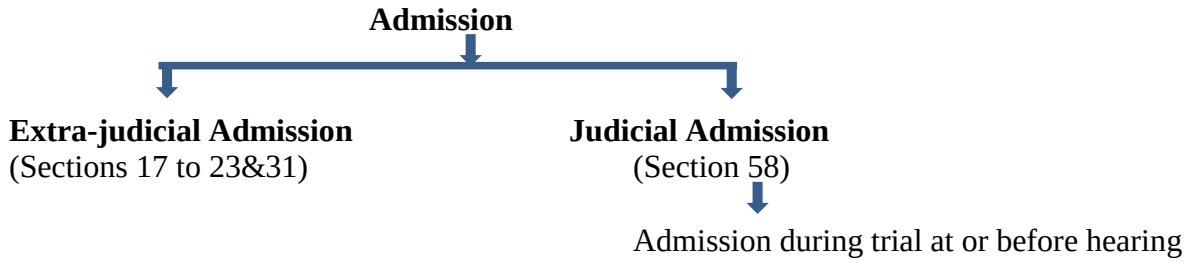
The rule of the road on land or at sea.

- In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.
- If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Judicial Notice about Government

Tamil Nadu Cauvery Neerppasana* v. *Union Of India And Others
(Supreme Court 4 May, 1990)

Judicial notice can be taken of the fact that the Government at the center is by one political party while the respective Governments in the two States are run by different political parties.



Section 58. Facts admitted need not be proved.—No fact need be proved in any proceeding which

- the parties thereto or
- their agents agree to admit

i. **at** the hearing, or

ii. which, **before** the hearing,

they agree to admit

- by any writing under their hands, or which
- by any rule of pleading[127] in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Ingredients of Section 58

[127] Pleading means plaint and written statement. It is governed by Code of Civil Procedure especially Orders VI,VII & VIII. According to this non replying of specific para is deemed to be admission of contents in that par.

- **Admission by whom? -** Admission may be made by party or his agents.
- **During trial-** Admission during trial at or before hearing
- **Kinds of admission** – Admission may be express or implied.

In such case there is no need to prove such admission.

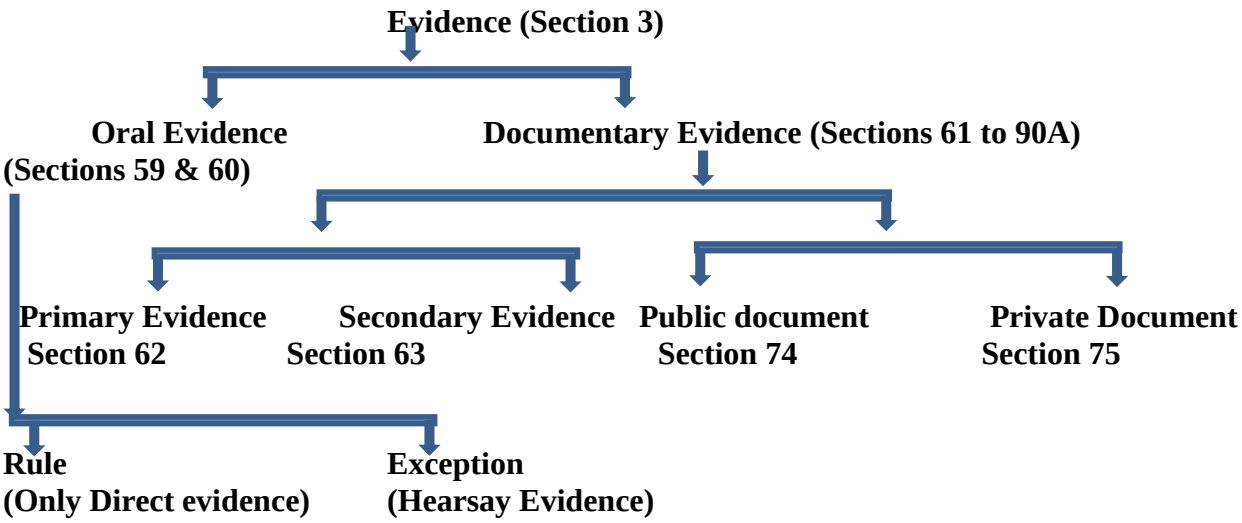
Question – Which of the following must be proved?

A. Facts judicially noticeable.
B. Facts admitted by party.
C. Previous judgment of Court
D. None of the above.

Answer-D.

Oral and Documentary evidence

Section 3 "Evidence" - "Evidence" means and includes -
(1) Oral Evidence - all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
(2) Documentary Evidence- all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.



***Kalyan Kumar Gogoi* v. *Ashutosh Agnihotri & Anr.*[128] (S.C., 18 January, 2011)**
Hon'ble Justice Panchal observed, "

- **Meaning of Evidence-** The word 'evidence' is used in common parlance in three different senses: **(a)** as equivalent to relevant **(b)** as equivalent to proof and **(c)** as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence'

[128] https://main.sci.gov.in/jonew/judis/37388.pdf

- **Evidence in phrase -** Word is also used in phrases such as: best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.
- **Best Evidence-**The idea of best evidence is implicit in the Evidence Act. Evidence under the Act, consists of statements made by a witness or contained in a document. If it is a case of oral evidence, the Act requires that only that person who has actually perceived something by that sense, by which it is capable of perception, should make the statement about it and no one else. If it is documentary evidence, the Evidence Act requires that ordinarily the original should be produced, because a copy may contain omissions or mistakes of a deliberate or accidental nature. These principles are expressed in Sections 60 and 64 of the Evidence Act".

CHAPTER IV - OF ORAL EVIDENCE

Previous Year Question Paper

Uttar Pradesh (Judiciary)

Question 7(c) 1983

"Oral Evidence must in all cases be direct". Explain & illustrate.

Question 10(b) 1984

"Oral Evidence must in all cases be direct". Discuss fully and illustrate your answer.

Question 9(a) 1986

'Hearsay evidence is no evidence'. Explain and state its exception.

Question 2(b) (i) 1987

Write short note on hearsay evidence.

Question 7(a) 1992

"Oral Evidence must in all cases be direct". Explain this rule with illustrations and exceptions.

Question 5(c) 2000

Explain the reasons for exclusion of hearsay evidence. TO what extent has the principle of exclusion of hearsay evidence been adopted in the Indian Evidence Act.

Question 6(c) 2003

'Hearsay evidence is no evidence'. Explain and state its exception.

Question 7(c) 2015

All facts, except the contents of documents may be proved by oral evidence, which in all cases be direct.

2016 & 2018
No question

Chapter IV deals oral evidence. There are two sections in this chapter namely sections 59 & 60. Both sections contain two rules respectively namely; –

1. All facts, except the contents of documents or electronic records, may be proved by oral evidence (Section 59).
2. Oral evidence must be direct rather than hearsay evidence (Section 60).

Sections 60 - Sections 60 deals what is direct. For example in case of seeing, hearing, perceiving and making opinion and grounds of opinion, evidence must be given only by that person who has seen, heard, perceived or made opinion. Section 60 itself contents one exception.

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

Section 59. Proof of facts by oral evidence - All facts, except the contents of documents or electronic records, may be proved by oral evidence.

Comment

According to section 3 there are two types of evidence namely 'Oral Evidence' and 'Documentary Evidence'. Oral Evidence means all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. 'Oral' means by word of mouth. But according to section 119, '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, evidence so given shall be deemed to be oral evidence'. Section 119 is extension of 'Oral Evidence'. It is fiction of law.
Oral is different from the word 'Verbal'. In the case of *Queen Empress* v. *Abdullah*[129] (27 February, 1885) Hon'ble Chief Justice of Allahabad W C Petheram discussed difference between 'Verbal' and 'Oral'
'Verbal' means by words. It is not necessary that the words should be spoken. If the term used in the section were 'oral', it might be that the statement must be confined to words spoken by the mouth. But the meaning of 'Verbal' is something wider.

Verbal [Section 32(1)]	**Oral [Section 3, 59& 60**
It is wider.	It is narrower
Verbal includes words spoken by the mouth and sign also.	Words spoken by the mouth

Section 60. Oral evidence must be direct - Oral evidence must, in all cases whatever, be direct; that is to say -
if it refers to a fact which could be **seen,** it must be the evidence of a witness who says he saw it;
if it refers to a fact which could be **heard**, it must be the evidence of a witness who says he heard it;
if it refers to a fact which could be **perceived** by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
if it refers to an **opinion** or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:
Provided that the ***opinions of experts*** expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:
Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Comments

There are two parts of section 60 namely;

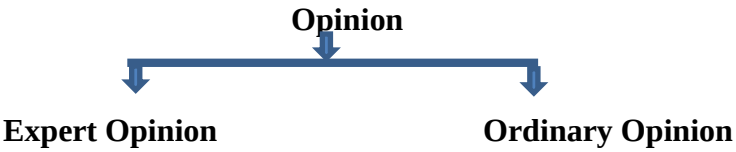
1. **Rule**- Oral evidence must be direct
2. **Exception –** Expert opinion in certain cases

(1) Rule

Section 60 enumerates four types of circumstances in which it can be said that oral evidence is direct oral evidence.
These are -

- ❖ Seeing
- ❖ Hearing
- ❖ Perceiving
- ❖ Grounds of opinion and opinion whether expert opinion or opinion of ordinary person.

[129] (1885) ILR 7 All 385



Remarks	Facts	Direct Evidence
Seen	*if it refers to a fact which could be* **seen**	***it must be the evidence of a witness who says he*** saw it
Heard	*if it refers to a fact which could be* **heard**	***it must be the evidence of a witness who says he*** heard it
Perceived	*if it refers to a fact which could be* **perceived**	***it must be the evidence of a witness who says he*** perceived it
Opinion	*if it refers to an* **opinion or grounds**	it must be the evidence of the person

1	***it must be the evidence of a witness who says he*** saw it	Witness
2	***it must be the evidence of a witness who says he*** heard it	Witness
3	***it must be the evidence of a witness who says he*** perceived it	Witness
4	***it must be the evidence of*** the person who holds that opinion on those grounds	Person

(2) Exception

It covers only expert opinion and ground on the basis of which such opinion has been formed.. It does not cover opinion of ordinary person. In case of expert opinion indirect evidence can be given if following conditions are being fulfilled-

1. There must be expert opinion under sections 45 or 45A.
2. That opinion must be expressed in any treatise. Here treatise means renowned book. For 'A Digest of the Law of Evidence' written by Sir James Fitzjames Stephen.
3. That treatise must be commonly offered for sale.
4. Feasibility of presence of expert is not possible. There are four types of circumstances. These are –

author

- ❖ is dead or
- ❖ cannot be found, or
- ❖ has become incapable of giving evidence, or
- ❖ cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable[130]:

In such circumstances opinion or grounds of opinion may be proved by the production of such treatises.

[130] These four grounds are same as mentioned under section 32.

Hearsay Evidence

According to Taylor, "Hearsay is used to indicate that evidence which does not derive its value from the credit given to the witness himself, but which rests also on the veracity and competence of some other person". It is used in contradiction to 'Direct Evidence'[131].

***Kalyan Kumar Gogoi* v. *Ashutosh Agnihotri & Anr.*[132]** (S.C., 18 January, 2011)

Hon'ble Justice Panchal observed, "

- **Meaning of Hearsay** -The term 'hearsay' is used with reference to what is done or written as well as to what is spoken and ***in its legal sense***, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person.
- **'hearsay evidence' under IEA-** The phrase 'hearsay evidence' is not used in the Evidence Act because it is inaccurate and vague.
- **Hearsay in different sense -**The word 'hearsay' is used in various senses.
  - **A.** Sometimes it means whatever a person is heard to say.
  - **B.** Sometimes it means whatever a person declares on information given by someone else and
  - **C.** sometimes it is treated as nearly synonymous with irrelevant.

The sayings and doings of third person are, as a rule, irrelevant, so that no proof of them can be admitted. Every act done or spoken which is relevant on any ground must be proved by someone who saw it with his own eyes and heard it with his own ears".

- **Reason of exclusion of Hearsay Evidence** - Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross- examination.
- **Fundamental rule regarding 'Hearsay Evidence' -** It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than a witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated.
- **Reason of exclusion of Hearsay Evidence[133]-**The reasons why hearsay evidence is not received as relevant evidence are:
- **(a)** the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility, i.e., every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying "I do not know, but so and so told me",
- **(b)** truth is diluted and diminished with each repetition and
- **(c)** if permitted, gives ample scope for playing fraud by saying "someone told me that.....".

It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible".

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[131] M. Monir, 'Textbook on the Law of Evidence' 257 (Universal Law Publishing Co., New Delhi 9th Edn., 2013).

[132] https://main.sci.gov.in/jonew/judis/37388.pdf (Visited on April 29, 2020).

[133] Bihar Judiciary (Mains) 1986 and UP (J) (Mains) 2000.

Exceptions of Hearsay Evidence

According to section 60 'Oral Evidence' must be direct. Hearsay evidence is not direct evidence. So rule is that 'Hearsay Evidence' is not acceptable. There are certain exceptions of this rule. There are following exceptions of this –

1. **Res gestae**
2. **Conspiracy**
3. **Admission & Confession**
4. **Dying Declaration**
5. **Evidence in former proceeding**
6. **Opinion published in treatises**
7. **Sections 32, 33, 34 & 35**[134]

(1) Res gestae is exception of 'Hearsay Evidence'

Rule is that hearsay evidence is not acceptable. Oral evidence must be direct. But Res gestae is exception of 'Hearsay Evidence'.

Sukhar* v. *State of U.P.[135](1999)
In the case of, *Sukhar* v. *State of U.P.*, Supreme Court said that *Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible.*

Javed Alam* v. *State of Chhattisgarh and Anr. (8 May, 2009)
Section 6 of the Evidence Act is an exception to the rule of evidence that hearsay evidence is not admissible.
Bhairon Singh* v. *State of Madhya Pradesh (May 29, 2009)

Supreme Court observed, "The rule embodied in Section 6 is usually known as the rule of r*es gestae*.

(2) Section 10 (Conspiracy)

State (N.C.T. Of Delhi)* v. *Navjot Sandhu @ Afsan Guru (August 4, 2005)

Section 10 of Evidence act is based on the principle of agency operating between the parties to the conspiracy inter se and ***it is an exception to the rule against hearsay testimony***. If the conditions laid down therein are satisfied, the act done or statement made by one is admissible against the co-conspirators.

(3) Admission and confession are exceptions of 'Hearsay Evidence'

In ***Sahoo* v. *State of U.P.***[136] Supreme Court said that Admissions and confessions are exceptions to the hearsay rule

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[134] M. Monir, 'Textbook on the Law of Evidence' 258 (Universal Law Publishing Co., New Delhi 9th Edn., 2013).
[135] (1999) 9 SCC 507.
[136] AIR 1966 SC 40.

(4) Dying Declaration

Khushal Rao* v. *State of Bombay (25 September, 1957)
Section 32 has been made by the Legislature, advisedly, as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that evidence, which has not been tested by cross-examination, is not admissible. Here there is neither cross-examination nor oath.

***Ram Bihari Yadav* v. *State of Bihar* (1998)**

Hon'ble Justice Syed Shah Quadri said, "Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence".

***Sharad Birdhichand Sarda* v. *State of Maharashtra* (17 July, 1984)**

Section 32 is an exception to the rule of hearsay

***Sudhakar & Anr.* v. *State of Maharashtra* (July 17, 2000)**
Section 32 is an exception of the rule of hearsay

(5) Evidence in former proceeding

Section 33- Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

(6) Opinion published in treatises

Opinion published in treaties may be exception of hearsay evidence if all the conditions are being fulfilled.
The ***opinions of experts*** expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable

(7) Sections 32, 33, 34 & 35[137]

[137] M. Monir, 'Textbook on the Law of Evidence' 258 (Universal Law Publishing Co., New Delhi 9th Edn., 2013).

Difference between Direct Evidence and Hearsay Evidence

There are following differences between both -

S.	Ground	Direct Evidence	Hearsay Evidence
1	**Meaning**	Direct evidence is that which the witness is giving on basis of his own perception.[138]	Hearsay evidence is that which has been derived from other person.
2	**Rule / Exception**	Admissibility of Direct evidence is rule.	Admissibility of Hearsay evidence is exception.
3	**Best Evidence**	It is best oral evidence.	It is not part of 'Best Oral Evidence'.
4	**Liability of veracity**	Liability of veracity of direct evidence is on the person who is giving its evidence.	A person who is giving secondary evidence does not take responsibility of veracity of evidence.
5	**Cross-examination/ oath.**	Here there is cross-examination of the person who gives direct evidence. Evidence is given on oath.	Here there is neither cross-examination nor oath. *Khushal Rao* v. *State of Bombay* (25 September, 1957)
6	**Reason of Admissibility**	Direct evidence is admissible because it is best oral evidence.	Exceptions of admissibility of hearsay evidence is based on as a matter of sheer necessity.
7	**Scope of admissibility**	Direct evidence is admissible in all cases.	Hearsay evidence is admissible only in limited cases. For example admission. Confession, dying declaration etc.

[138] Batuk Lal, 'Law of Evidence' 338 (Central Law Agency, Allahabad, 19th Edn. 2010).

CHAPTER V. - OF DOCUMENTARY EVIDENCE

D.U.LL.B.2019
Question 8 (a) Write short notes 'Oral and Documentary Evidence'.

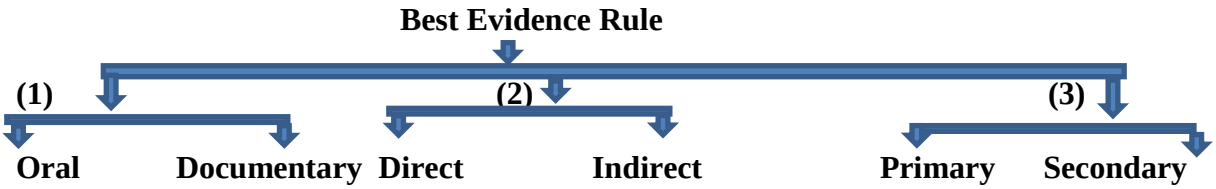
RJS&HJS 1984, MP J 1996 DJS 2006, Bihar (J) 1977
Question –Define 'Primary Evidence' & 'Secondary Evidence'.
MP J 2001
What is primary & secondary evidence? Explain. When may secondary evidence relating to documents be given?
HJS 2006
Explain the difference between primary and secondary evidence.
RJS 1970
With the help of at least two illustrations of each, explain the distinction between primary and secondary evidence.
RJS 1992
What is primary evidence?
RJS 1992
How is sale deed of immovable property proved in Court?

UP (J) 1987 Question 3(b)
Explain secondary evidence. Discuss the circumstances in which it is admissible.
UP (J) 1997 Question 10(b)
To prove his title the complainant produces an unattested Photostat copy of a document on the ground that the original document is lost. Decide whether the document produced by the complainant may be admitted as a secondary evidence.
UP (J) 2000 Question 7(c)
'A' sues 'B' on an agreement and gives B notice to produce it. At the trial 'A' calls for the document and B refuses to produces it.
A gives secondary evidence of its contents. Can B, in order to contradict secondary, produce original document as evidence before the court?
UP (J) 2018 Question 5(b)
Whether a photograph of an original is a secondary evidence even though the two have not been compared, if so when? Discuss the provisions of law.

CHAPTER V. OF DOCUMENTARY EVIDENCE

Introduction - 'Document'[139] and 'Evidence'[140] both have been defined under section 3 of the Indian Evidence Act. In the case of *R.M. Malkani* v. *State of Maharashtra*[141] Supreme Court held that 'Tape Recorded Conversation' is documentary evidence.

According to section 61, the contents of documents may be proved either by primary or by secondary evidence. According to section 64, proving of contents of document by primary evidence is rule and secondary evidence is exception. Primary evidence is original document. It is part of 'Rule of Best Evidence'. 'Best Evidence Rule' is to produce original.



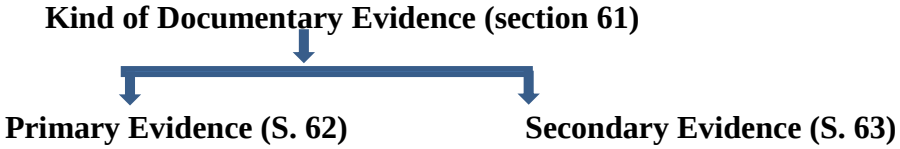
(1) Oral & Documentary – In compare between both, documentary evidence is best evidence. This conclusion is based on combined reading of Sections 59, 91 and 92 of Indian Evidence Act, 1872.

(2) Direct oral evidence & Indirect Evidence oral evidence - In compare between both, Direct oral evidence is best oral evidence. This conclusion is based on Sections 60 of Indian Evidence Act, 1872.

(3) Primary Documentary Evidence and Secondary Documentary Evidence- In compare between both, Primary Documentary Evidence is best evidence. This conclusion is based on Sections 64 of Indian Evidence Act, 1872.

Section 61. Proof of contents of documents - The contents of documents may be proved either by primary evidence *(Section 62)* or by secondary evidence *(Section 63)*.

Section 64. Proof of documents by primary evidence - Documents must be proved by primary evidence except in the cases mentioned in section 65. Section 64 establishes 'Best Evidence Rule'.



- Section 64- Primary evidence has priority over secondary evidence.

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[139] Section 3, Indian Evidence Act, 1872- "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

[140] Section 3, Indian Evidence Act, 1872- **"Evidence".** —"Evidence" means and includes -

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

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

[141] AIR 1973 S.C. 157.

Section 62. Primary evidence. - Primary evidence means the document **itself** produced for the inspection of the Court.

***Explanation* 1.** –Where a document is **executed in several parts,** each part is primary evidence of the document.

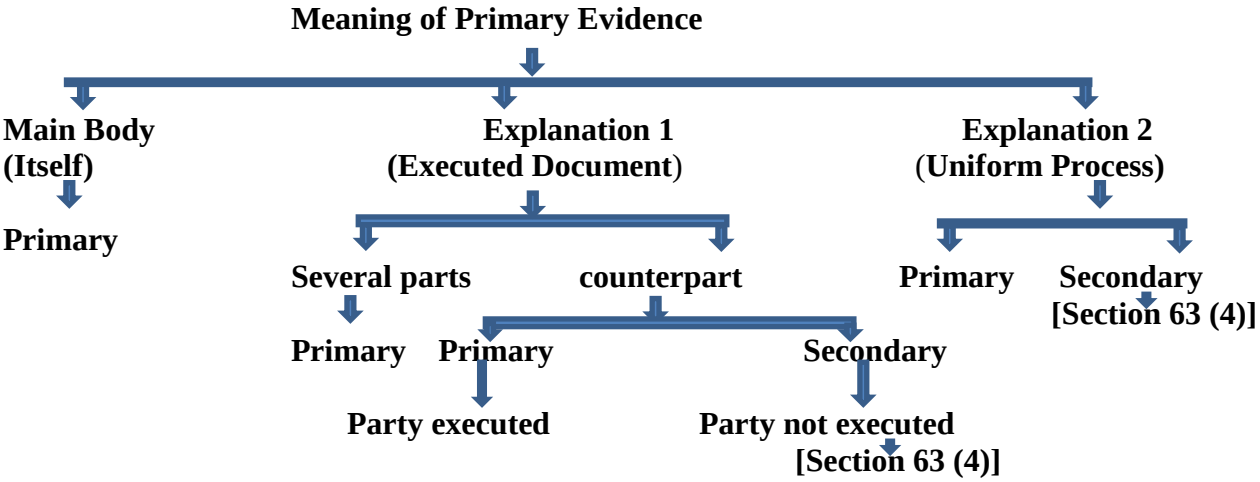
Where a document is **executed in counterpart**, *each counterpart being executed by one or some of the parties only*[142], each counterpart is primary evidence as against the parties executing it.

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

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Comments



There are three parts of meaning of 'Primary Evidence'. These are contents in

i. **Main Body** *(Itself).*
ii. **Explanation 1** *(Several Parts and Counter Parts).*
iii. **Explanation 2** *(Documents prepared in 'Uniform Process').*

(i) Main Body

Primary evidence means the document **itself** produced for the inspection of the Court. Here 'itself' means original document produced by party before Court. Purpose of production is that Court can inspect its originality and contents.

(ii) Explanation 1.

Where a document is executed in **several parts,** each part is primary evidence of the document.

Where a document is executed in **counterpart,** each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

[142] This italic sentence denotes philosophy of why document executed in counterpart is accepted.

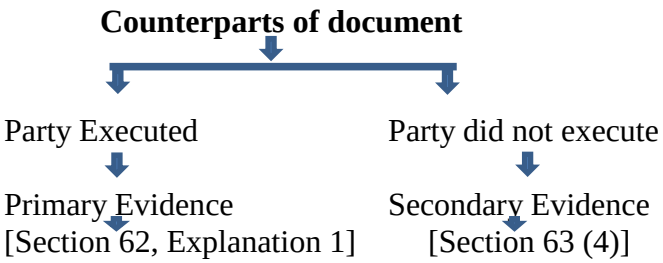
- Executed means document signed or sealed by parties and witnesses.
- **Document is executed in several parts** - For example sale deed was prepared in three copies and all copies were signed and sealed by seller, purchaser and witnesses. All three copies are original and when it is produced before Court it is called primary evidence.
- Another example – Ram, Shyam & Ghanshyam made partition of joint family property. Everyone got one third share. Everyone is claiming original document of partition deed. So three partition deed i.e. 'A' Partition Deed , 'B' Partition Deed & 'C' Partition Deed were prepared.
  - **I. 'A' Partition Deed** was executed by Ram, Shyam & Ghanshyam.
  - **II. 'B' Partition Deed** was executed by Ram, Shyam & Ghanshyam.
  - **III. 'C' Partition Deed** was executed by Ram, Shyam & Ghanshyam.

All the three copies are primary evidence.

- **Document is executed in counterpart –** At least there are two parties and two instruments of same contents. One instrument is executed only by one party. Other instrument is executed by other party. Both instruments are executed but both carries sign and seal of one party. Documents are exchanged**.** ***Patta*** and ***Quabuliat*** or ***Muchilika*** is best example of this[143]. For example instrument signed by A is given to B and instrument signed by B is given to A.

  (i) Primary Evidence -Instrument signed by A is primary evidence against A[144].
  Secondary Evidence -Instrument signed by A is secondary evidence against B[145].

  (ii) Primary Evidence -Instrument signed by B is primary evidence against B[146].
  Secondary Evidence -Instrument signed by B is secondary evidence against A[147].



(iii) Explanation 2.

There are two parts of Explanation 2. First part says what primary evidence is. Second part says what primary evidence is not. Which is not primary evidence may come under the category of secondary evidence.

Primary Evidence- Where a number of documents are all made by **one uniform process**, as in the case of

- printing,

[143] Batuk Lal, 'Law of Evidence' 341 (Central Law Agency, Allahabad, 19th Edn. 2010).
[144] Section 62, Explanation 1, Indian Evidence Act, 1872.
[145] Section 63(4), Indian Evidence Act, 1872.
[146] Section 62, Explanation 1, Indian Evidence Act, 1872.
[147] Section 63(4), Indian Evidence Act, 1872.

- lithography or
- photography,

each is primary evidence of the contents of the rest; but,

Secondary Evidence- where they are all copies of a common original, *they are not primary evidence of the contents of the original.*

Example- *I prepared notes of Indian Evidence Act. I got print out. I provided it to students. They, from original, got hundred prints out form printing machine. Total was 1+100= 101.*

Primary Evidence -

One Copy - One copy is primary.

Hundred Copies - Hundred Copies are primary for each other (All students are at equal footing for each other)..

Secondary Evidence –

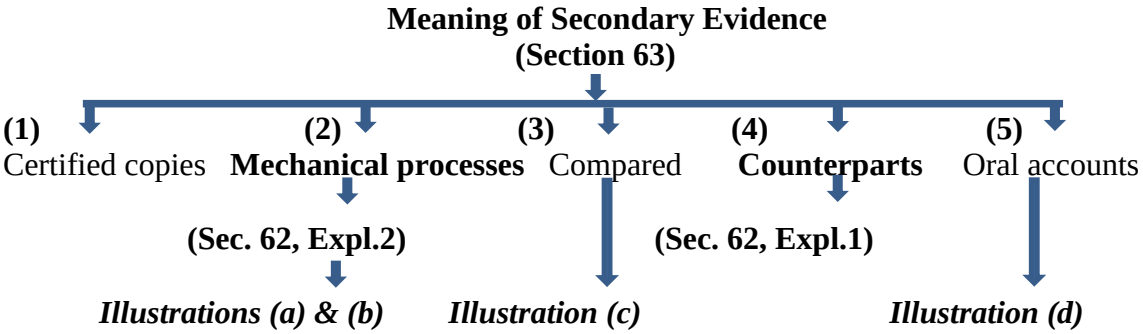
Hundred copies (Students) are secondary for one copy (Teacher's)[148].

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original.

- Any one of the placards is primary evidence of the contents of any other,
- but no one of them is primary evidence of the contents of the original.

Section 63. Secondary Evidence



Remark – Part 1 and Part 4 have no illustration.

Section 63. Secondary evidence - Secondary evidence means and includes

(*1*) certified copies given under the provisions hereinafter contained;

(*2*) copies made from the original by **mechanical processes** which in themselves insure the accuracy of the copy, and copies compared with such copies;

(*3*) copies made from or compared with the original;

(*4*) counterparts of documents as against the parties who did not execute them;

(*5*) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

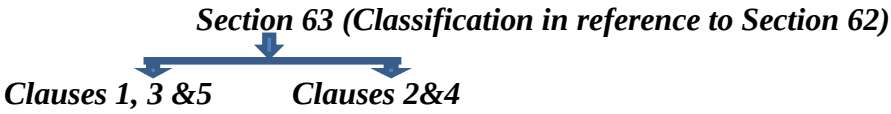
***Illustration* (*a*)** A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

[148] Section 63(2), Indian Evidence Act, 1872.

***Illustration* (*b*)** A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.
***Illustration* (*c*)** A copy *transcribed*[149] from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.
***Illustration* (*d*)** Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

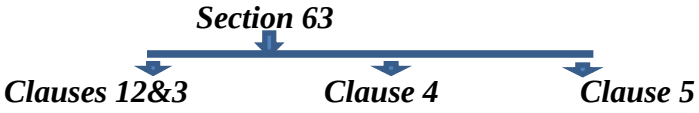
Comments

Section 63 provides meaning of secondary evidence. There are five parts of meaning of secondary evidence. Parts 2 (mechanical processes) and 4 (counterparts of documents) must be read in the light of meaning of primary evidence as provided in section 62 of the Indian Evidence Act. Section 62 provides what primary evidence is and is not. So after dividing section 63 in two parts in the light of section 62, it becomes very easy to understand and remember meaning of secondary evidence. All five categories of section 63 are of equal value. None of them has priority over other.



***Kalyan Singh, London Trained, Cutter, Johri Bazar, Jaipur* v. *Smt. Chhoti and Ors.*[150]**
(S.C. 01/12/1989)

Hon'ble Justice K.J. Shetty observed, "Section 63 of the Evidence Act mentions five kinds of secondary evidences. Clause (1), (2) and (3) refer to copies of documents; clause (4) refers to counterparts of documents and clause (5) refers to oral accounts of the contents of documents."
Same view was reiterated in 185th Report of Law Commission of India.



185th Report of Law Commission of India.
(Review of Indian Evidence Act, 1872)

1. Section 63 of the Evidence Act refers five types of evidence. Clause (1), (2) and (3) refer three types of copies of documents; clause (4) refers to counterparts of documents and clause (5) refers to oral accounts of the contents of documents.
2. Illustration **(a)** refers photograph – **First Part of (2).**
3. Illustration **(b)** refers copy compared with copy – **Second Part of (2).**
4. Illustration **(c)** refers copy transcribed and compared with the original - **Part (3).**
5. Illustration **(d)** refers oral account –**Part (5)**
6. **Recommendation was for substituting the word 'seen' by 'read'**

[149] Transcribe means to make conversion from live or recorded speech to text.
[150] It is available: https://main.sci.gov.in/jonew/judis/7725.pdf (Last visited on March 25, 2020).

Remark – Part 1 and Part 4 have no illustration.

Secondary evidence means and includes – Term 'includes' used in section 63 denotes that five list of secondary evidence is not exhaustive.

(1) Certified copies

Secondary evidence means and includes certified copies which has been given according to section 76 of the Indian Evidence Act, 1872. Section 76 deals method for giving certified copies. Under section 76 certified copies is given only by that public officer who has custody of the public documents.

There are following ingredients of section 76 of the Indian Evidence Act –

i. There must be **public officer**
ii. That public officer must have **custody** of a public document.
iii. Copy shall be given on demand of person who has **right to inspect.**
iv. Certified copy shall be given on **payment of the legal fees**.
v. Certified copy will be given with a **certificate** written **at the foot of such copy** that

- it is a *true copy* of such document or part thereof, as the case may be, and
- such certificate shall be *dated* and
- subscribed by such officer with *his name and his official title*, and
- shall be *sealed*, whenever such officer is authorized by law to make use of a seal;

and such copies so certified shall be called certified copies.

Rebuttable presumption of law

Section 79. Presumption as to genuineness of certified copies - The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact.

Kalyan Singh, London Trained, Cutter, Johri Bazar, Jaipur* v. *Smt. Chhoti and Ors.
(S.C. 01/12/1989)

In this case Supreme Court observed, "Correctness of certified copies referred to in clause (1) is presumed under Section 79; but that of other copies must be proved by proper evidence".
In this case Supreme Court also observed that a certified copy of a ***registered sale deed*** may be produced as secondary evidence in the absence of the original.

(2) Copies made from the original by mechanical processes
[Section 63(2), Illustrations (a) & (b)]
[Section 62, Explanation 2]

Secondary evidence means and includes copies

- made from the original by **mechanical processes** which in themselves insure the accuracy of the copy, and
- copies compared with such copies;

***Illustration* (*a*)** A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.
***Illustration* (*b*)** A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

Comments – Mechanical reproduction is the secondary copy of original. This must be read in the light of Section 62, Explanation 2.

S. No.	*Section 62Explanation* 2	Section 63 (2)
1	**Uniform process**	**Mechanical processes**
2	Where a number of documents are all made by one **uniform process**, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, *where they are all copies of a common original, they are not primary evidence of the contents of the original.*	Secondary evidence means and includes copies made from the original by **mechanical processes** which in themselves insure the accuracy of the copy, and copies compared with such copies
3	Printing, lithography or photography	Printing, lithography or photography are machine. Copies made from such machine will ensure accuracy of copy.

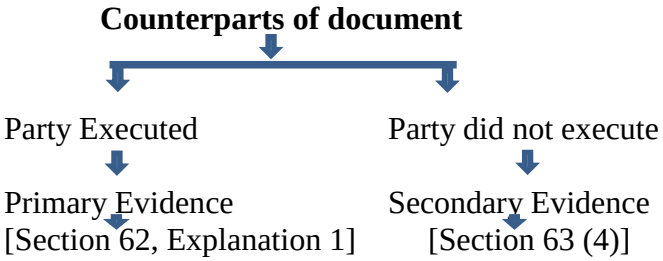
Photostat copy – In *Ashok Dulichand* v. *Madahav Lal Dube & Another* (05/08/1975S.C) Supreme held that the appellant failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Another reason of rejection of appeal was that appellant failed to prove that he was entitled to give secondary evidence under section 65 of the Indian Evidence Act.

(*3*) Copies made from or compared with the original.

Secondary evidence means and includes copies made from or compared with the original.
***Section 63, Illustration* (*c*)** A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(4) Counterparts of documents as against the parties who did not execute them [see also Section 62 Explanation 1]

Secondary evidence means and includes counterparts of documents as against the parties who did not execute them. I have already discussed above at the time of discussing secondary evidence.



(*5*) Oral accounts of the contents of a document

Secondary evidence means and includes oral accounts of the contents of a document given by some person who has himself seen it.

Meaning of 'seen'- Here seen means 'read'. Merely by seeing of document no one can know contents of document. Literal construction of this word is not justiciable in context[151] of document. Law Commission of India in its 185th Report recommended for substituting the word 'seen' by 'read'**.**

Section 65. Cases in which secondary evidence relating to documents may be given.— Secondary evidence may be given of the existence, condition, or contents of a document in the following cases: —

(*a*) Document in possession of opposite party or of other- when the original is shown or appears to be in the possession or power of

- the person against whom the document is sought to be proved, or
- of any person out of reach of, or not subject to, the process of the Court, or
- of any person legally bound to produce it, and

when, after the notice mentioned in section 66, such person does not produce it;

(*b*) Written admission - when the existence, condition or contents of the original *have been proved to be admitted* in writing by the person against whom it is proved or by his representative in interest;

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

(*d*) Not easily movable - when the original is of such a nature as not to be easily movable.

For examples writing of libel on the wall of jail or Inscription on the old pucca well for showing ownership.

(*e*) Public document - when the original is a public document within the meaning of section 74;

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

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

In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

[151] Context means in reference to. Contest means fighting or participation on competition. Content is noun while contain is verb.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.
In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Combined reading of sections 64 & 104 [Illustration (b)]

Combined reading of sections 64 and 104 illustration (b) denote that in case of presence of primary evidence secondary evidence is not allowed.

Section 64. Proof of documents by primary evidence - Documents must be proved by primary evidence except in the cases mentioned in section 65.
Section 104. Burden of proving fact to be proved to make evidence admissible -The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.
Illustration (b) - A wishes to prove, by secondary evidence, the contents of a lost document.
A must prove that the document has been lost.

UP (J) 1997

Question 10(b)-

- To prove his title
- the complainant produces an ***unattested Photostat copy of an document***
- on the ground that the ***original document is lost.***

Decide whether the document produced by the complainant may be admitted as a secondary evidence.

Answer- According to **section 61** of the Indian Evidence Act, contents of document may be proved either by primary evidence or secondary evidence.
According to **section 64** documents must be proved by primary evidence except in the cases mentioned in section 65. According to **section 65 (c)** secondary evidence may be given of the existence, condition, or contents of a document when the original has been destroyed or **lost,** or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. According to **section 104 illustration (b) if** A wishes to prove by secondary evidence, A must prove that the document has been lost. According to **section 63(2)** Photostat copy prepared through mechanical process is secondary evidence.
Conclusion – Yes. From the above discussion it becomes clear that Photostat of document is admissible.

Difference between primary and secondary evidence

S.no.	Ground	Primary Evidence	Secondary Evidence
1	**Meaning [Sections 62 & 63]**	**Section 62 -** Primary evidence means the document **itself** produced for the inspection of the Court.	**Section 63 –**Secondary evidence means and includes **(*1*) *certified copies* (*2*)** copies made from the original by ***mechanical processes* (*3*) copies** made from or compared with the original; **(*4*) *counterparts of documents*** as against the parties who did not execute them **(*5*) *oral accounts*** of the contents of a document.
2	**Primacy Section 64 [Rule/Exception]**	Documents must be proved by primary evidence except in the cases mentioned in section 65. Primary evidence is **rule.**	Secondary evidence is **exception.**
3	**'Best Evidence Rule'.**	Primary evidence **is part** of 'Best Evidence Rule'.	Secondary evidence **is not part** of 'Best Evidence Rule'.
4	**Notice**	Before producing primary evidence, there is no need to give notice to other party.	**Section 65(a)** - Before producing secondary evidence, there is need to give notice to other party
5	**Evidentiary value**	It has highest evidentiary value.	Comparatively it has lesser value.

UPSC (March 8, 2020)

In which one of the following judgments did the Supreme Court of India recognize the applicability of Section 63 and Section 65 of the Indian Evidence Act, 1872 on admissibility of secondary electronic evidences and overruled the proposition that in cases of admissibility of secondary electronic evidences certificate under Section 65B (4) is NOT always mandatory?

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

(b) Anvar P.V. v. P.K. Basheer and Ors 2014 10 SCC 473

(c) State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru SC, 2005

(d) Mohd. Zahid v. State of Tamil Nadu, 1999 Cr LJ 3699 (SC).

Answer –A. *Shafhi Mohammad* v. *The State of Himachal Pradesh* (January 30, 2018 Supreme Court observed, "The applicability of requirement of certificate under section 65B (4) being procedural can be relaxed by Court wherever interest of justice so justifies".

In this recent case, the Two-Judge Bench of the Supreme Court has clarified the legal position in context of admissibility of electronic evidence to hold that furnishing of certificate under Section 65B(4) of the Evidence Act was not a mandatory provision and its requirement could be waived off in view of facts and circumstances and if interest of justice required the same.

Anvar P.V.* v. *P.K. Basheer and Others [152] was decided by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed.

Jharkhand (J) Question 7(d) Write short note on Public Document and Private Document.

Public Document and Private Document

Section 74. Public documents -The following documents are public documents: -

(*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.

i. There must be private document,
ii. That document has been handed over to State (Officer of State),
iii. That Document has been kept in the category of 'Public Record'.

In such circumstances private document converts into public document.

Section 75. Private documents - All other documents are private.

Comment

Combined reading of Sections 74 and 75

Effect of combined reading of Sections 74 and 75 is that there are only two types of documents namely;

1. Public Document, and
2. Private Document.

Benefit of 'Public Document'

There are three main benefit of 'Public Document'. These are –

1. Public document does not require any formal proof.
2. The certified copy of a public document is admissible in evidence under Section 77[153] of the Evidence Act.
3. ***Under section 79 Court shall presume to be genuine such certified copy.***

[152] (2014) 10 SCC 473,

[153] Section 77. Proof of documents by production of certified copies - Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Section 74(1)

Electoral roll is 'Public Document'

Naladhar Mahapatra and Anr. **v.** ***Seva Dibya And Ors.*** (21 August, 1990, Orissa H.C.)

Electoral roll is a public document and does not require any formal proof. The certified copy of a public document is admissible in evidence under Section 77 of the Evidence Act.

School Leaving Certificate is 'Public Document'

Shyam Lal @ Kuldeep **v.** ***Sanjeev Kumar & Ors.*** (15 April, 2009)

School leaving certificate issued by Head Master, Government Primary School falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof.

Records of Nationalized Bank is 'Public Document'

Gorantla Venkateswarlu **v.** ***B. Demudu*** (DOJ 26 July, 2002) AIR 2003 AP 251.

Since Central Bank of India is one of the Nationalised Banks, it is an official body' within the meaning of Section 74 of Evidence Act and so records of its acts would be 'public documents' within the meaning of Section 74 of Evidence Act.

Judgment/Decree is 'Public Document'

The Collector of Gorakhpur **v.** ***Ram Sundar Mal*** (Bombay High Court 11 June, 1934)

In India judgments have to be in writing and signed by the Judge and the original judgments and decrees are records of the Court and retained in the record room, the parties being supplied with certified copies only.

Charge sheet

Tola Ram **v.** ***Dist. Judge and Anr.*** (Raj.H.C. 19 March, 2008)

Hon'ble Justice Vineet Kothari observed, 'Charge sheet is public document'.

FIR

FIR is public document.

Section 74(2)

A private document would be a 'Public Document' within the meaning of Section 74(2) if the private document is filed and the public official is required to keep it for a memorial or permanent evidence of something written, said or done.

Such types of documents is prepared by private person but it is kept in record in public offices of State Government.

Wakf Deed is public document

Fazal Sheikh v. Abdur Rahman

On 16-10-1943. Maulana created a Wakf of about 732 bighas of land . After partition of the country, around the year 1950, Maulana and his family left for Pakistan.

In this case Gujarat High Court held, "Section 74(2) evidently refers to records kept under the Registration Act. Public record of a Wakf deed which is a private document kept in the office of the Sub-Registrar is a public document as defined in clause (2) of Section 74 of, the Evidence Act and certified copy thereof is admissible in evidence".

Certified copy of 'Annual Return' is 'Public Document'

***Anita Malhotra* v. *Apparel Export Promotion Council* (S.C.8 November, 2011)**
Sub-section (1) of Section 74 refers to public documents and sub-section (2) provides that public documents include 'public records kept in any State of private documents'. Certified copy of annual return is a public document

Plaint/Written/ Affidavit is not public document
These are not public documents. It is written in Private capacity. It is not registered under Registration Act.

Insurance

United insurance Company Ltd.* v. *Kamla Rani	***New India Assurance Co. Ltd.* v. *Smt. Krishna Sharma and Ors.***
1997 (P. & H. High Court)	***1998*** (Delhi High Court)
Insurance **is** 'Public Document'	Insurance **is not** 'Public Document'

***United insurance Company Ltd.* v. *Kamla Rani* (1997)** (P. & H. High Court) – Insurance is public document.
Reason -According to *Kamla Rani Case* since the certificate of insurance was issued by the governmental company in performance of its statutory duties hence such a certificate has to be classified as a public document. It was presumed by the Bench that issuance of an insurance policy is an act of an official body and of a public officer hence the policy of insurance issued under the provisions contained in the Act would cover such a document to be a public document under Section 74 of the Evidence Act.

- Ratio of *Kamla Rani Case* was rejected in *Smt. Krishna Sharma Case* by Delhi High Court and held the insurance is private document.

New India Assurance Co. Ltd.* v. *Smt. Krishna Sharma and Ors.
(Delhi High Court, February 19, 1998)
Insurance is private document.

Facts- New India Assurance Company Ltd., has assailed the order of the Motor Accidents Claims Tribunal primarily on the ground of its limited liability. According to the appellant, the Tribunal erroneously awarded the amount in excess of the statutory liability. The Tribunal also ignored the certificate of insurance produced by the appellant which fully proved that the liability of the insurance company was limited.
Decision - Insurance is private document.
Reason of decision-

1. **Meaning of Public document-** A public document is such a document the contents of which are of public interest and the statements are made by authorised and competent agents of the public in the course of their official duty. Public are interested in such a document and entitled to see it, so that if there is anything wrong in it they would be entitled to object.
2. Public document consists of the acts of public functionaries, in the Executive, Legislative and Judicial Departments of Government.

3. **Right to inspect and Right to take copy-** The right to inspect the records of the proceedings of a company given by its articles of association is not conterminous with the right to take copies.
4. In that sense it becomes a statement that would be open to the public to challenge or dispute and, therefore, it has a certain amount of authority.
5. To be admissible as a public document it should not only be available for public inspection but should also have been brought into existence for that purpose.
6. A **contractual right** of inspection does not itself imply a right to take copies any more than a **statutory right** would do. Therefore, there is a vast difference between a contractual right and a statutory right.

S. No.	Contractual right	Statutory right
1	Private Document is part of contractual right	Public document is part of statutory right.
2	Insurance policy creates a contractual right	Insurance policy does not create a statutory right.

7. **Insurance policy creates a contractual right.** There is no statutory right implied in favour of the public to inspect the policy at any time. Nor the insurance policy which is a contract between the insured and the insurance company can by any stretch of imagination be called a public document to be admissible in evidence without any proof. To be a public document it should not only be available for public inspection but should also have been brought into existence for that purpose. *The insurance cover taken out by the insured is not for public purpose, it is for his protection.*
8. Simply because the insurance companies were nationalised and are under the control of the Government by itself would not make their employees Government servants. They stand on the same footing as the employees of nationalised banks.
9. The insurance company by issuing insurance cover and policy, performed a contractual obligation. The insurer enters into a contract of insurance with the insured.
10. Insurance is private document.

Remarks- In such cases there is invitation to offer, offer and acceptance.

Objective Question –

Question MP APO 2008 - Which of the following is public documents

A. records of the acts of the sovereign authority,
B. records of the acts of official bodies
C. Public records kept in any State of private documents.
D. All of the above.

Answer – D.

Question MP APO 2008 – Which of the following is public document?

A. Plaint
B. Written Statement
C. FIR under section 154
D. None of the above.

Answer-C.FIR.

Explanation – Plaint & Written Statement is written by Plaintiff and Defendant respectively. While FIR is written by Officer in Charge of Police Station.

Question UK(J) 2011- Which of the following is not public document?

A. Judgment of Court
B. Arrest Warrant
C. Will
D. Affidavit

Answer- D. Affidavit. Will is registered under Registration Act.

Question UP Lower 2004 – Which of the following is not 'Public Document'?

A. Records of Nationalized Bank.
B. Post Mortem Report
C. Private Wakf Deed
D. Entry made by the police on the map of inspection of accident

Answer-D. See. ***Fazal Sheikh* v. *Abdur Rahman***

Question UP APO 2007 – Which of the following is not 'Public Document'?

A. Records of Nationalized Bank.
B. Post Mortem Report
C. Private Wakf Deed kept in the office of Sub-Registrar.
D. Entry made by the police on the map of inspection of accident

Answer D.

Fazal Sheikh* v. *Abdur Rahman.

Question UP APO 2007 – Which of the following is 'Public Document'?

A. Electoral roll
B. Police Diary
C. FIR
D. All of the above.

Answer- D.

(Electoral roll -*Naladhar Mahapatra and Anr*. v. *Seva Dibya And Ors.)*

Question - According to which section 'Certified Copy' is given?

A. Section 78
B. Section 70
C. Section 79
D. Section 76

Answer- D.

Question MP APO 2002 & 2009– Public Documents can be proved by –

A. Certified Copy
B. Oral Evidence
C. Person who has written 'Certified Copy'
D. Any of them above mentioned

Answer- A. Certified Copy. Explanation - According to Section 77 certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Question MP APO 2008–Which of the following section deals 'Presumption as to genuineness of certified copies'?

A. Section 78
B. Section 70

C. Section 79
D. Section 80

Answer –C.79. Irrebuttable Presumption of law.

Examples of Public Documents and Private Documents

S. No.	***Public Documents***	***Private Documents***
1	*FIR*	*Insurance*
2	*Charge sheet*	Entry made by the police on the map of inspection of accident
3	*Judgment/Decree / Order*	*Plaint/Written Statement*
4	*Electoral Roll*	*Affidavit*
5	*Records of Nationalized Bank.*	
6	*Post Mortem Report*	
7	*Private 'Wakf Deed' kept in the office of Sub-Registrar.*	
8	School Leaving Certificate	
9	Certified copy of 'Annual Return'	

Difference between Public Document & Private Document

Ground	***Public Documents***	***Private Documents***
Provision	***Section 74***	***Section 75***
Meaning By Whom?	Either it is prepared by 'Public Officer' or by 'Private Person'. If it is prepared by private person and submitted to State (Public Officer) and such record is maintained as public document, private document converts into public document. Only certain private document may convert into public document. **Public Officer** | **Private Person**	It is prepared by private person. **Only by Private person.**
Access	Public can access such documents subject to certain conditions.	Public cannot access such documents.
Mode of proof	It is proved by 'Certified copy'. *Section 77*	It is proved by other method other than 'Certified copy'.
Kind of evidence	Public Documents are proved by 'Certified Copy'. 'Certified Copy' is secondary evidence [Section 63(1)].	As a general rule it is proved by original (Best) evidence rather than by secondary evidence.
Presumption	Section 79 raises irrebuttable presumption of law regarding 'Public Document'. *This presumption as to genuineness of certified copies.*	No presumption is made about genuineness of original document from secondary evidence of private document except in some exceptional cases[154].
Witness	Certifying authority is not called into witness box.	Here person giving evidence of private document is called into witness box.

[154] Batuk Lal, 'Law of Evidence' 375 (Central Law Agency, Allahabad, 19th Edn. 2010).

CHAPTER VI – [Sections 91 - 100]

OF THE EXCLUSION OF ORAL OR DOCUMENTARY EVIDENCE

Syllabus - Faculty of Law, D.U. Exclusion of oral by documentary evidence – Sections 91-92

Sections 91 & 92

Bihar (J) 1975 – How far is oral evidence admissible to prove the terms of any contact reduced to writing?

Bihar (J) 1979 –'In determining the admissibility of evidence, the production of best evidence should be exacted'. Discuss.

Jharkhand (J) Service 2014 HJS 1986 –

"Oral evidence is excluded by documentary evidence." Explain this rule and state its exceptions, if any, to this rule.

HJS 1996

"Oral evidence cannot be substituted for the written evidence of any contract, which the parties have put into writing". Discuss and illustrate.

HJS 2000

'What is in writing shall only be proved by the writing'. Explain and illustrate this.

HJS 2006

Oral evidence as to contents of documents is not relevant'. Comments.

MP(J) 2015

Discuss the rule of 'exclusion of oral evidence by documentary evidence'.

UP (J) 1983

What is in writing shall only be proved by the writing?

UP (J) 1984

A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse of Rs. 500".

Can B prove the verbal warranty? Give reasons of your answer. [Section 92, Proviso 5, Ill. (g)].

UP (J) 1986

Can evidence of the intention of the parties to a document be given contradict the express terms of that document?

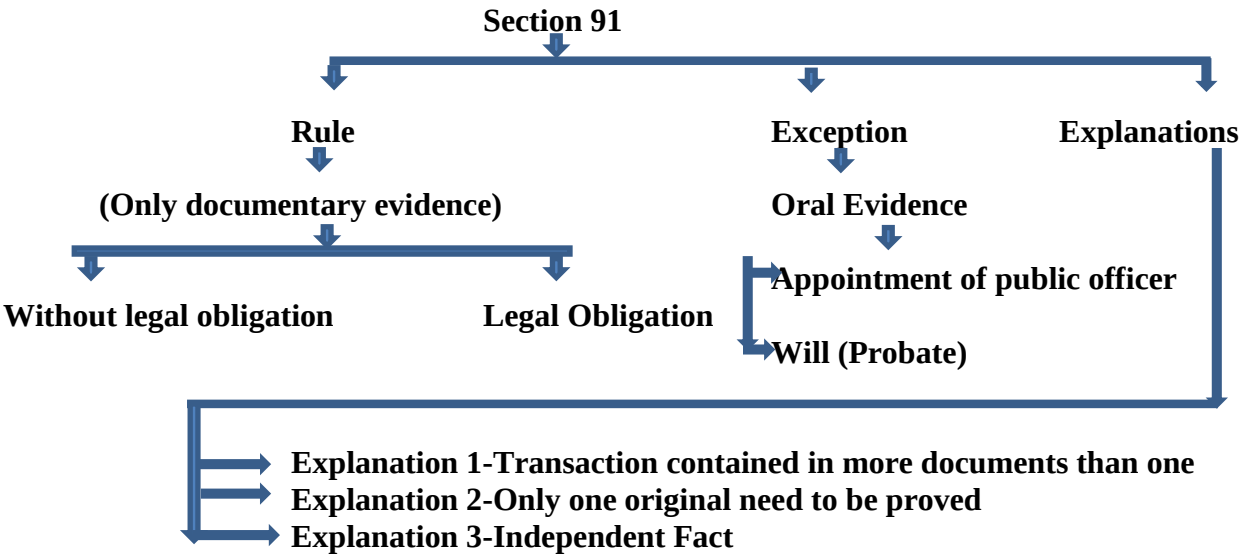
UP (J) 2013

A hires lodgings of B, and gives B a card on which is written - "Rooms, Rs. 200 a month."

Whether A may prove a verbal agreement that these terms were to include partial board?

[Section 92, Illustration (h)].

DU Syllabus -Sections 91 & 92



Section 91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document. –
(1) When the terms
- ❖ of a contract, or
- ❖ of a grant, or
- ❖ of any other disposition of property,

have been reduced to the form of a document, and
(2) in all cases in which any matter is required by law to be reduced to the form of a document,

Rule *(Only Documentary Evidence itself, no oral evidence or stranger documentary evidence)* **–**

no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter**, except** the document itself (Primary Evidence) , or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exceptions

***Exception* 1 -**When a public officer is required by law to be appointed in writing, **and** when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
***Exception* 2-** Wills[155] admitted to probate in India may be proved by the probate[156].

***Explanation* 1** – (One and several are equal) - This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

[155] Indian Succession Act, 1925. This Act is available on: https://indiacode.nic.in/bitstream/123456789/2385/1/a1925-39.pdf (Visited on April 22, 2020). Section 2 (h) defines 'Will'. According to this "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.
[156] Indian Succession Act, 1925. Section 2 (f) defines 'Probate'. According to this "probate" means the copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator.

***Illustration* (*a*)** If a contract be contained in several letters, all the letters in which it is contained must be proved.
***Explanation* 2-** (One original sufficient) -Where there are more originals than one, one original only need be proved.
***Illustration* (*c*)** If a bill of exchange is drawn in a set of three, one only need be proved.

***Explanation* 3-** (It affects only terms of contract…)- **The statement*, in any document whatever,* of a fact** *other than the facts referred to in this section*, **shall not preclude the admission of oral evidence as to the same fact.**
***Illustration* (*d*)** A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.
Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.
***Illustration* (*e*)** A gives B a receipt for money paid by B.
Oral evidence is offered of the payment.
The evidence is admissible.
Reason- Section 91 is confined to terms of contract, or grant, or any other disposition of property. In other cases oral evidence is admissible. Receipt is **'Acknowledge'** of receiving of money rather than contract, or grant, or any other disposition of property. So 'Oral evidence' is allowed.

Essential ingredients of section 91

There are three essential ingredients of section 91. These are –

1. There must be **terms.**
2. That term must be related to **contract, grants or other disposition of property**
3. Such contract, grants or other disposition of property must be in
   i. **voluntarily writing** or
   ii. **law demands it should be in writing.**

(1) Terms

Section 91 is applicable only regarding 'terms'. If any other fact apart from its terms happen to be mentioned in the contract, the same can be proved by any other evidence than by producing the document.[157] This is based on 'Explanation 3'[158].

Explanation 3 - The statement, in any document whatever, of a fact ***other than the facts referred to in this section,*** shall not preclude the admission of oral evidence as to the same fact.
Example-
A pronote for rs. 500 was executed in favour of C by A & B. Evidence to the effect that it was agreed between the lender and the borrowers that A will be liable to pay rs. 400 and B rs. 100 is admissible because it is not a term of the contract.

[157] Dr. Avtar Singh, 'Principles of the law of Evidence', 374 (Central Law Publications, Allahabad 18th Edn., 2010).
[158] Section 91, Indian Evidence Act. This Act is available: https://indiacode.nic.in/bitstream/123456789/2188/1/A1872-1.pdf (Visited April 22, 2020).

(2) Contract, Grant & any other disposition of property

S. No.	Words	Meaning
1	Contract	Section 2(h), The Indian Contract Act, 1872.
2	Grant	A transfer of property by deed or writing *especially*, an appropriation or conveyance made by the **Government.** Example – Grant of land or of money.
3	Any other disposition of property.	Will & Gift. These are not contract. It does not come under definition of grant.

Jahuri Sah & Ors.* v. *Dwarka Prasad Jhunjhunwala & Ors.[159] (S.C. April 27, 1966)
(Adoption)

Issue- Whether existence of deed of adoption will exclude 'Oral evidence'.

Answer –No. Adoption is neither contract, grant nor any other disposition of property. Oral evidence of the fact of adoption did not become inadmissible merely because the existence of a deed of adoption was admitted. *A deed of adoption merely records the fact that an adoption had taken place and nothing more.* Such a deed cannot be likened to a document which by its sheer force brings a transaction into existence. It is no more than a piece of evidence and the failure of a party to produce such a document in a suit does not render oral evidence in proof of adoption inadmissible.

***Illustration* (*e*)** A gives B a receipt for money paid by B.
Oral evidence is offered of the payment.
The evidence is admissible.
Reason- Section 91 is confined to terms of contract, or grant, or any other disposition of property. In other cases oral evidence is admissible. Receipt is **'Acknowledge'** of receiving of money rather than contract, or grant, or any other disposition of property. So 'Oral evidence' is allowed.

(3) Writing

There are two parts of rule of section 91 namely Part 1 and Part 2.
Part 1 (Voluntarily)
In part 1 Parties have option either to reduce into writing or not. If they don't reduce terms of contract or grant any other disposition of property, they can give oral evidence. But once they reduce such terms they cannot give oral evidence. Only documentary evidence (Primary or secondary evidence) is allowed. For example if value of immovable property is less than hundred (100rs) registration of sale is optional ***[Section 18(a), Registration Act, 1908].***

If such sale is not registered- In case of any types of dispute regarding this sale, oral and documentary evidence are allowed.
If such sale is registered- In case of any types of dispute regarding this sale, only documentary evidence is allowed. Oral evidence is not allowed.

[159] https://main.sci.gov.in/jonew/judis/2652.pdf

Part 2. (Mandatory)

In Part 2 party has no option. Law requires that the terms of a contract, or grant, or any other disposition of property must be reduced into writing. For example sale of immovable property which value is more than 100 rs. law requires that registration of such transaction is mandatory [Section 17(a), Registration Act, 1908]. Another example instruments of gift of immovable property which registration is compulsory ***[Section 17(1), Registration Act, 1908].***

In such case whether sale deed was registered or not oral evidence is not allowed to prove terms of sale deed. Only documentary evidence is allowed.

Part 1	**Part 2**
Without legal obligation (Optional)	**Legal Obligation (Mandatory)**
(1) When the terms ❖ of a contract, or ❖ of a grant, or ❖ of any other disposition of property,	**(1)** When the terms ❖ of a contract, or ❖ of a grant, or ❖ of any other disposition of property,
have been reduced to the form of a document	***in all cases in which any matter is required by law to be reduced to the form of a document,***
Example-[Section 18(a), Registration Act, 1908].	***Example-[Section 17(1), Registration Act, 1908].***
Sale in case of immovable property which value is ***less than 100 rs.***	Sale in case of immovable property which value is ***more than 100 rs.***

Section 92. Exclusion of evidence of oral agreement –

(i) Section 91- When the terms of any ***such*** contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the ***last section***,
(ii) After section 91- no evidence of any oral agreement or statement shall be admitted, as *between* **the parties** to any such instrument or their ***representatives in interest***, for the purpose of

- ❖ contradicting,
- ❖ varying,
- ❖ adding to, or
- ❖ subtracting from,

its terms.

Six Exceptions

***Proviso* (*1*) No valid contract in legal sense -** Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as

- fraud,
- intimidation,
- illegality,
- want of due execution,
- want of capacity in any contracting party,
- want or failure of consideration, or
- mistake in fact or law.

***Proviso* (*2*) Separate oral agreement & document is silent** –

i. The existence of any *separate oral agreement* as to any matter on which
ii. a *document is silent*, and
iii. which is *not inconsistent* with its terms,

may be proved.

In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

***Proviso* (*3*) - Separate oral agreement constituting a condition precedent –**

i. The existence of any separate oral agreement,
ii. constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property,

may be proved.

***Proviso* (*4*). Distinct subsequent oral agreement to rescind or modify –**

i. The existence of any distinct subsequent oral agreement
ii. to rescind or modify any such contract, grant or disposition of property,

may be proved,

- except
- **(i)** in cases in which such contract, grant or disposition of property is by law required to be in writing, or
- **(ii)** has been registered according to the law in force for the time being as to the registration of documents.

***Proviso* (*2*)**	***Separate oral agreement*** & document is *silent*
***Proviso* (*3*)**	***Separate oral agreement*** constituting a *condition precedent*
***Proviso* (*4*)**	***Distinct subsequent oral agreement*** to *rescind or modify*

***Proviso* (*5*). Usage or custom-**

i. Any usage or custom by which
ii. incidents not expressly mentioned in any contract are

usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be

- repugnant to, or

- ❖ inconsistent with,

the express terms of the contract.

***Proviso* (*6*) Language** –

- ❖ Any fact may be proved which
- ❖ shows in what manner the language of a document is related to existing facts.

Illustrations

MP APO 1995

***Illustration* (*a*)** A **policy of insurance** is effected on goods "in ships from Calcutta to London". The goods are shipped in a particular ship which is lost. *The fact that particular ship was orally excepted from the policy, cannot be proved.*

Reason- It will vary and add something for which oral evidence is not allowed. Everyone will escape from his liability

UP (J) 1992

***Illustration* (*b*)** A agrees absolutely in writing to pay B Rs. 1,000 on the first March 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

***Illustration* (*c*)** An estate called "the Rampore tea estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

***Illustration* (*d*)** A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

Illustration (*e*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

***Illustration* (*f*)** A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

UP (J) 1984 (Mains) Chhattisgarh J. (Pre. (2003)

Illustration* (*g*)** A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse of Rs. 500". ***B may prove the verbal warranty.

Reason-

***Section 92 Proviso* (*5*). Usage or custom-**

I. Any usage or custom by which

II. incidents not expressly mentioned in any contract are

usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be

- ❖ repugnant to, or
- ❖ inconsistent with,

the express terms of the contract.

Generally it is custom or usage in which it is presumed that seller is saying true about quality of goods. If he is telling lie it is fraud. So oral evidence is allowed.

UP (J) 2013

***Illustration* (*h*)** A hires lodgings of B, and gives B a card on which is written —"Rooms, Rs. 200 a month." **A may prove** a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. **A may not prove** that board was included in the term verbally.

***Illustration* (*i*)** A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

***Illustration* (*j*)** A and B make a contract in writing to take effect upon the happening of a certain contingency.

The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

Relation between Sections 91 & 92

In ***Roop Kumar* v. *Mohan Thedani***[160]***&161 (2003) Supreme Court discussed several important points including differences between section 91 & 92. In this case Supreme Court observed following important points -***

- **Supplement to each other -**Sections 91 and 92 in effect supplement each other. *Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.*
- **Prima facie -** Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract.
- **Best evidence rule -** Both these provisions are based on "best evidence rule".
- **Grounds of exclusion of extrinsic evidence –**The grounds of exclusion of extrinsic evidence (oral evidence) are

  (i) to admit *inferior evidence* when law requires superior would amount to nullifying the law,

  (ii) *when parties have deliberately put their agreement into writing*, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.
- **Differences between Section 91 & Section 92-** The two sections are differ in some material particulars. These are –

[160]Roop Kumar v. Mohan Thedani is available: https://main.sci.gov.in/jonew/judis/19105.pdf (Visited on March 28, 2020).

[161] Date of judgment -02/04/2003.This case was decided by Supreme Court.

S.N.	Section 91	Section 92
1	Section 91 applies to all documents, whether they purport to dispose of rights or not	Section 92 applies to documents which can be described as dispositive.
2	Section 91 applies to documents which are both ***bilateral*** and ***unilateral.***	Section 92 the application of which is confined to only to ***bilateral documents.***
3	Section 91 is concerned solely with the mode of proof of a document	Limitation on section 91 is improved by Section 92 which relate only to the parties to the document.
4	**First Stage- Section 91** If after the document has been produced to prove its terms under Section 91, section 92 comes into force.	**Second Stage- Section 92** After section 91 provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms.
5	**It is silent about *the parties*** to instrument or their ***representatives in interest.*** *It prohibits to all persons including parties, representative in interest and strangers*	It prohibits only ***the parties*** to instrument or their ***representatives in interest*** **rather than stranger.**

- In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract

Gurubasappa And Ors. **v.** ***Gurulingappa*** **(Karnataka H.C.24 July, 1961)**
AIR 1962 Kant 246

1. **Section 91-** The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original.

- **Best evidence rule** - Section 91 is based on what is described as best evidence rule. The best evidence about the contents of a document is the document itself and it is the production of the document that is required by section 91 in proof of its contents.
- **Exclusive rule** - In a sense the rule enumerated by section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of a document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act.

2. after the document had been produced to prove its terms under section 91, the provisions of section 92 of the Act come into operation for the purposes of excluding the evidence of any oral agreement or the statement for the purpose of contradicting, varying, adding to or subtracting from its terms.
3. **Sections 91 and 92 are supplementary to each other-** It would be noticed that sections 91 and 92 are in effect supplementary to each other. Section 91 would be frustrated without the aid of section 92 and section 92 would be inoperative without the aid of section 91.
4. **Exclusion of oral evidence-** Since section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the

document properly proved under section 91, it may be said that it makes the proof of the document conclusive of its contents.

5. **Best Evidence Rule-** section 91 & 92 is based on best evidence rule.

Question Raj. APO - Which section is known as backbone of civil matters in India?

A. Section 105 of Indian Evidence Act, 1872
B. Section 91 of Indian Evidence Act, 1872
C. Section 92 of Indian Evidence Act, 1872
D. Section 104 of Indian Evidence Act, 1872

Answer- B. Section 105 of Indian Evidence Act, 1872.
Question UP APO (Spl.) 2007 –
Statement (A)- Section 91 & Section 92 should be read together.
Reason (R) -Section 91 & Section 92 is supplementary of each other.

A. A & R are true and R is correct explanation of A.
B. A & R are true and but R is not correct explanation of A.
C. A is true but R is false.
D. R is true but A is false.

Answer- A. A & R are true and R is correct explanation of A.
Question (Jharkhand Civil Judge, 2008).
Statement (A) - A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.
Reason – Receipt is not contract or grant regarding which oral evidence is prohibited.

A. A & R are true and R is correct explanation of A.
B. A & R are true and but R is not correct explanation of A.
C. A is true but R is false.
D. R is true but A is false.

Answer- A.

Chattisgarh J(Pre. (2003)

A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse of Rs. 500". ***May B prove the verbal warranty?***

A. *Yes*
B. *No*
C. *It is prohibited under section 92*
D. *Under section 91documentary evidence can be given.*

Answer *- B may prove the verbal warranty.* Section 92, Illustration (g).

Your syllabus is only sections 91 & 92. Further I am going to discus for competitive exams. You can also read

Competitive Exams

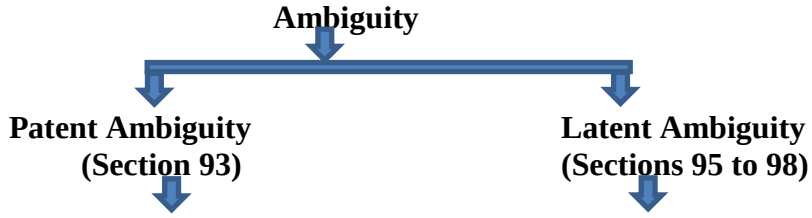
Sections 93 to 98

Difference between Patent Ambiguity (S. 93) and Latent Ambiguity (Ss. 94-98)

HJS 1996
What is meant by 'Patent Ambiguity and Latent Ambiguity'? How far oral evidence is admissible to explain or amend each of such ambiguities in documents. Illustrate.
HJS 2000 & 2006 & **RJS 1970 & 1988**
With the help of at least two illustrations of each explain the distinction between Patent Ambiguity and Latent Ambiguity.
RJS 1994
What are Patent Ambiguities and Latent Ambiguities? Can evidence be led to explain them?
UP (J) 1986 & 2000
A agrees to sell to B, for Rs. 1,000, "my white horse". A has two white horses. Can evidence be given of facts which show which of them was meant.[**Section 96, *Illustration* (*a*)]**

UP (J) 1986 & 2003
Distinguish between patent and latent ambiguities. Give examples of such ambiguities.

UP (J) 2013
Write short note on Patent Ambiguity and Latent Ambiguity.



Remarks – Section 94 does not talk any types of ambiguity. Its language is clear and it applies accurately.

Section 93. Exclusion of evidence to explain or amend ambiguous document - When the language used in a document is,

- ❖ on its face,
- ❖ ambiguous or defective,

evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations

MP APO (Pre) 1995, MP(J) (Pre.)1999 (Ill.a)

Illustration (*a*) A agrees, in writing, to sell a horse to B for "Rs. 1,000 or Rs. 1,500". Evidence cannot be given to
show which price was to be given.

Illustration (*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Section 94. Exclusion of evidence against application of document to existing facts- When language used in a document is

- plain in itself, and
- when it applies accurately to existing facts,

evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to B, by deed, "my estate at Rampur containing 100 bighas". A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Section 95. Evidence as to document unmeaning reference to existing facts. –

When language used in a document is

- plain in itself,
- but is unmeaning in reference to existing facts,

evidence may be given to show that it was used in a peculiar sense.

Illustration

MPAPO (Pre) 1997 (Illustration)

A sells to B, by deed, "my house in Calcutta".

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

S.	*Common in all*	*Prima facie*	*May/ May not*
Section **93**	***When language used in a document is***	on its face	***Evidence may not be given***
Section **94**	***When language used in a document is***	***plain in itself***	***Evidence may not be given***
Section **95**	***When language used in a document is***	***plain in itself***	Evidence may be given to

Section 96. Evidence as to application of language which can apply to one only of several persons. –

- When the facts are such that the language used might have been meant to apply to any one, and
- could not have been meant to apply to more than one, of several persons or things,

evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations

Chh.(J) 2003(Pre) Illustration (a)

***Illustration* (*a*)** A agrees to sell to B, for Rs. 1,000, "my white horse". A has two white horses. Evidence may be give of facts which show which of them was meant.

***Illustration* (*b*)** A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haiderabad in Sind was meant.

Section 97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies. –
When the language used applies

- ❖ partly to one set of existing facts, and
- ❖ partly to another set of existing facts,
- ❖ but the whole of it does not apply correctly to either,

evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell to B "my land at X in the occupation of Y". A has land at X, but not in the occupation of Y, and he has land in the occupation of Y but it is not at X. Evidence may be given of facts showing which he meant to sell.

Section 98. Evidence as to meaning of illegible characters, etc. –
Evidence may be given to show

- ❖ the meaning of illegible or
- ❖ not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

A, sculptor, agrees to sell to B, "all my mods". A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Sections 93 to 98

Evidence may not be given (Sections 93 & 94) | **Evidence may be given (Sections 95 & 98)**

Patent ambiguity –Patent ambiguity means that ambiguity which can be identified even by ordinary person. For example if cheque is blank or price of horse is either 1000 rs. or 1,500rs.
Section 93 deals patent ambiguity.

Latent Ambiguity (Problem in application)- Latent ambiguity means that ambiguity which meaning is plain and clear. Prima facie there is no ambiguity but once it is applied on facts it has no sense or meaning.
Sections 95 to 98 deal latent ambiguity.

Ambiguity	**Provisions**	**Evidence may or may not given**
Patent Ambiguity	**Section 93**	Evidence may not be given
No Ambiguity	Section 94	Evidence may not be given
Latent Ambiguity	**Section 95**	*Evidence may be given*
Latent Ambiguity	**Section 96**	*Evidence may be given*
Latent Ambiguity	**Section 97**	*Evidence may be given*
Latent Ambiguity	**Section 98**	*Evidence may be given*

Difference between Patent Ambiguity & Latent Ambiguity

Ground	Patent Ambiguity	Latent Ambiguity
Provision	Section 93	Sections 95 to 98
Meaning	It is on its face ambiguous or defective. Ordinary person can easily say that it is defective.	It is not on its face ambiguous or defective. Meaning is clear but its application to existing facts is not possible.
Oral Evidence	Oral Evidence is not allowed.	Oral Evidence is allowed.
Subjective/ objective test	Subjective Test -Patent ambiguity is personal and it is related to the person who executes the document.	Objective test - Latent Ambiguity is objective in nature and it is related to subject matter and object of document.[162]
Useless	It makes the document useless.	It does not make the document useless.

[162] Batuk Lal, 'Law of Evidence' 414 (Central Law Agency, Allahabad, 19th Edn. 2010).

Evidence to decide paternity

Summary of Provisions

1. Section 112
2. Section 4
3. Section 11
4. Section 114, Illustration (h)

Summary of cases

5. *Goutam Kundu* v. *State of West Bengal*[163]
6. *Kamti Devi and Another* v. *Poshi Rani*[164]
7. *Sharda* v. *Dharmpal*[165]
8. *Sham Lal @ Kuldeep* v. *Sanjeev Kumar & Others*[166]
9. *Bhabani Prasad Jena* v. *Convener Secretary , Orissa State Commission for Women and Another*[167]
10. *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik and Another*[168]
11. *Dipanwita Roy* v. *Ronobroto Roy*[169]

Constitutional Right

12. *Right to Privacy*

Best Judgment

13. *Dipanwita Roy* v. *Ronobroto Roy*[170]

Some landmark Judgments

S. no.	***Case***	***Name of justice***	***Date of judgment***
1	*Goutam Kundu* v. *State of West Bengal*	*Justice Mohan (Division Bench)*	***May 14, 1993***
2	*Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik and Another*	Justice Chandramauli Kr. Prasad *(Division Bench)*	***January 6, 2014***
3	*Dipanwita Roy* v. *Ronobroto Roy*	Hon'ble Justice Jagdish Singh Khehar *(Division Bench)*	***October 15, 2014***

[163] AIR 1993 SC 2295.
[164] AIR 2001 SC 2226.
[165] (2003) 4 SCC 493.
[166] (2009) 12 SCC 454.
[167] (2010) 8 SCC 633.
[168] (2014) 2SCC 576.
[169] AIR 2015 SC 418.
[170] AIR 2015 SC 418.

DU LL.B. 2019 Question 7 (20 Marks)
Proof based on DNA Test would be sufficient to dislodge a presumption under section 112 of the Indian Evidence Act. Critically analyse the above statement with the help of judicial pronouncement.
Bihar (J) 2014
Explain the law as to the proof of legitimacy of a child. Is it enough to prove that the child was born during a valid marriage?
HJS 1998
P was wife of X. Two months after the death of X she marries Y. Five months after the marriage a son Z is born. Who is legally the father of Z?
HJS 2011
A wife becomes pregnant through artificial insemination using the husband's sperm without his permission. Husband and wife have not met in two years. The child is born with severe disabilities. Husband denies the child to be his. Decide.
RJS 1986
State the rule regarding presumption of legitimacy during marriage.
RJS 1988
How would you prove the legitimacy of a child?

Comment

Section 112. Birth during marriage, conclusive proof of legitimacy - The fact that any person was born

i. during the continuance of a valid marriage between his mother and any man, or
ii. within two hundred and eighty days after its dissolution, the mother remaining unmarried,

shall be conclusive proof that he is the legitimate son of that man,

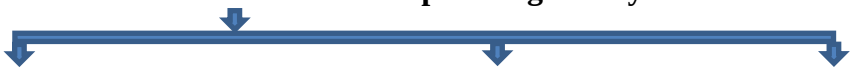
- unless it can be shown that the parties to the marriage had **no access** to each other at any time when he could have been begotten.

There are two conditions to proof legitimacy

Birth during marriage or within 280 days — There was access

After *Nandlal Wasudeo Badwaik Case, there are three ingredients of section 112*

There are three conditions to proof legitimacy



Birth during marriage or within 280 days — There was access — DNA matching

Section 4 -"Conclusive proof" - When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Question – When paternity becomes conclusive prove under section 112?
Answer- If two conditions are fulfilled. These are –

1. **Birth** -Either birth during marriage or within 280 days from the date of dissolution and mother did not marry.
2. **Access -** There was opportunity for access.

Section 11. When facts not otherwise relevant become relevant. - Facts not otherwise relevant are relevant–
(1) if they are inconsistent with any fact in issue or relevant fact;
(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.
Question – Under which section 'no-access' used under section 112 is relevant?
Answer – Section 11, Part 1[Principle of inconsistency]
Question - What is meaning of access?
Answer – In *Goutam Kundu case* Supreme Court said that "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation.
Question – On what maxim section 112 is based?
Answer- *Pater est quem nuptioe demonstrant* - In *Goutam Kundu case* Supreme Court said, "Section 112 is based on the well- known maxim *pater est quem nuptioe demonstrant* which means he is the father whom the marriage indicates".
Question – In case of conflict between be legal presumption and Scientific evidence which will prevail?
Answer – In the case of *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik & Anr.* Supreme Court observed, *"*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".
Question – Can DNA test be done to determine paternity?
Answer – In the case of *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik & Anr.* the Supreme Court held that the DNA test can be done to determine paternity.
Question – Is DNA Test is violation of 'Right to privacy'?
Answer- DNA Test is not violation of right to privacy. Although in case of *Dipanwita Roy* v. *Ronobroto Roy* Supreme Court provided two options namely;
First Option (DNA Test) –In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively dispute regarding paternity.
Second Option (Presumption u/s. 114)- In second option, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof.
This will protect right to privacy without sacrifice cause of justice.
Question – Is DNA Test is beneficial to husband only?
Answer – No. If husband has option to disprove paternity then other party has also option to prove paternity of other. For example in case of Narayan Datt Tewari son claimed for DNA Test.

UPSC (March 8, 2020

In which one of the following cases did the Supreme Court hold that the DNA test can be done to determine paternity?
(a) *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik & Anr.* (2014) 2 SCC 576
(b) *Devesh Pratap Singh* v. *Sunita,* AIR 1999 MP 174
(c) *Kailash* v. *State of Madhaya Pradesh,* AIR 2007 SC 107
(d) *B.L. Sreedhar &Ors* v. *K.M. Munireddy & Ors* , AIR 2003 SC 578.
Answer – A.

Goutam Kundu* v. *State of West Bengal & Another [171]
(Supreme Court, May 14, 1993)
(Hon'ble JJ. S. Mohan, & A.M. Ahmadi)
Judgment was written by Hon'ble Justice S. Mohan.

Summary

Provisions –

1. Section 125, Cr.P.C (Maintenance).
2. Section 112, Indian Evidence Act, 1872
3. Section 4, Indian Evidence Act, 1872. (Unfortunately this section was not discussed in detail).
4. The Family Reforms Act, 1969 [English Law]

Maxim –
Pater est quem nuptioe demonstrant
Earlier Judgment –
Bhartiraj v. *Sumesh Sachdeo & Ors.*
Guideline for 'Blood Group Test'.

***Issue* –** Whether 'Blood Group Test' should be allowed to prove or disprove paternity? If yes, in what circumstances?

Party	***Name***	**Relation**
Appellant	Goutam Kundu	Husband
Respondent 1	State of West Bengal	
Respondent 2	Name of wife has not been mentioned in this judgment of Supreme Court	Wife
Respondent 3	Name of baby has not been mentioned in this judgment of Supreme Court	Baby (Daughter)

[171]This judgment is available at: https://main.sci.gov.in/jonew/judis/11970.pdf (Last visited on March 30, 2020).

Goutam Kundu married to second respondent on 16th January, 1990. They lived together for some time until his wife left the matrimonial home to reside with her parents in order to prepare for Higher Secondary Examination which commenced on 5.4.1990

In month of April she shared that she was pregnant. Husband and his family members started to force for abortion. But she denied. She came back to the matrimonial home during Durga Pooja in the month of October, 1990. A female child was born on 3.1.91. She was meted out cruel treatment both physically and mentally. She filed a petition under section 125 Cr. P.C. for her and her child. She got maintenance order.
Husband filed petition for blood group test of his wife and the child. He challenged paternity of daughter.
According to him if that could be established he would not be liable to pay maintenance. Petition was dismissed. Appeal was filed before Supreme Court.

Event	**Date**	**Remarks**
Marriage	January 16, 1990	Goutam & Respondent got marriage.
Higher Secondary Examination (12^{th} Exam)	April 5, 1990	She was at the house of her father
Cruelty	October 1990	She was ill-treated.
Baby born	January 3, 1991.	At that time respondent was at the matrimonial house.

Courts

Maintenance Application **by wife**	**Judicial Magistrate**	She got judgment in her and her daughter's favour.
Petition for 'Blood Group Test' **by husband**	**Calcutta High Court** (22.04.1992)	High Court rejected this petition.
Appeal **by husband**	**Supreme Court** (14.05.1993)	Supreme Court also rejected this petition.

Reason -
The English law permitting blood test for determining the paternity of legitimacy could not be applied in view of section 112 of the Evidence Act. Therefore it must be concluded that section 112 read with section 4 of the said Act debars evidence except in cases of non-access for disproving the presumption of legitimacy and paternity.
Supreme Court – In this case Supreme Court observed following important points –

- **English Law-** The Family Reforms Act, 1969 conferred powers on the court to direct taking blood test in civil proceedings in paternity cases. Courts were able to give directions for the use of the blood test and taking blood samples from the child, the mother and any person alleged to be the father.
- Since the passing of 1969 Act the general practice has been to use blood tests when paternity is in issue. However, it is to be stated the court cannot order a person to submit to tests but can draw adverse inferences from a refusal to do so.

- **Indian Law –** In India there is no special statute governing this. Neither the Criminal Procedure Code nor the Evidence Act empowers the court to direct such a test to be made.
- **Blood Test -** Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by courts as a ***circumstantial evidence*** which ultimately excludes a certain individual as a father of the child.
- However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her will and no adverse inference can be drawn against her for this refusal.
- **Purpose of petition** - Purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test.
- **Maxim- Pater est quem nuptioe demonstrant –** Section 112 is based on the well- known maxim *pater est quem nuptioe demonstrant* which means he is the father whom the marriage indicates.
- **Burden of prove-** The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, any that every person is legitimate.
- **Rebuttable presumption of law -** It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. *This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.*
- ***Bhartiraj* v. *Sumesh Sachdeo & Ors.***[172] - Section 112 read with s.4 of the Evidence Act debars evidence except in cases of non-access for disproving the presumption of legitimacy and paternity. It is a rebuttable presumption of law, that a child born during the lawful wedlock is legitimate, and that access occurred between the parties. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities
- **Meaning of "access" and "non-access"** - Section 112 requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation.
- Conclusive proof under Section 4 - Conclusive proof means as laid down under section 4 of the Evidence Act.

  Unfortunately conclusive proof under Section 4 was not discussed.

- **Conclusion regarding blood test to decide paternity-**

From the above discussion it emerges:-

(1) Blood Test should not be in routine- that courts in India cannot order blood test as matter of course;

(2) Roving inquiry[173] -wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) Prima facie case - There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.

[172] AIR 1986 Allahabad 259

[173] Roving inquiry is a phrase. It means inquiry not related to subject matter.

(4) Consequences - The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
(5) No compulsion -No one can be compelled to give sample of blood for analysis.

Conclusion

Supreme Court observed, "Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Addl. Chief Judicial Magistrate, Alipore in rejecting the application for blood test. She was entitled to withdraw money of maintenance".

***Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik and Another*[174]**

(Date of Judgment - January 6, 2014)

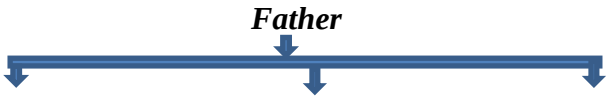
[Hon'ble JJ. Chandramauli Kr. Prasad & Jagdish Singh Khehar]

Judgment was written by Hon'ble Justice Chandramauli Kr. Prasad**.**

Issue 1 –Is DNA Test should be allowed?

Issue 2 – If yes, whether it will prevail over 'Legal Presumption' as contained in section 112, I.E.A.?

Issue 3 - Whether the DNA test would be sufficient to hold that ***Nandlal Wasudeo Badwaik*** is not the legal father of ***Neha Nandlal Badwaik.***



Biological Father [DNA] (Wasudeo was not father) | **Legal Father [Section 112] (Wasudeo was father)** | **Legal & Biological Father (Combination of DNA and Section 112**

Conclusion – DNA will prevail over presumption and Wasudeo is not father.

Facts -

Nandlal Wasudeo Badwaik happens to be the husband of respondent no. 1, Lata Nandlal Badwaik and alleged to be the father of girl child Neha Nandlal Badwaik, respondent no. 2.

Petitioner	*Nandlal **Wasudeo** Badwaik*	Husband
Respondent no.1	***Lata** Nandlal Badwaik*	Wife
Respondent no.2	***Neha** Nandlal Badwaik*	Daughter
Common in all name	***Nandlal Badwaik***	H, W & D
Marriage	***June 30, 1990***	
Claim of wife	She was living since June 20, 1996	
Claim of husband	Since 1991 he had not made physical relationship	
Neha	Husband and wife accepted that Neha was born during valid marriage.	

[174] (2014) 2SCC 576. It is also available at: https://main.sci.gov.in/jonew/judis/41129.pdf (last visited on March 30,2020)

The marriage between them was solemnized on 30th of June, 1990 at Chandrapur. Wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure.

Claim of Wife- She alleged that she started living with her husband from 20th of June, 1996 and stayed with him for about two years and during that period got pregnant. She was sent for delivery at her parents' place where she gave birth to a girl child.

Claim of husband- Husband resisted the claim and alleged that the assertion of the wife that she stayed with him since 20th of June, 1996 is false. He denied that ***Neha Nandlal Badwaik*** is his daughter. After 1991, according to the husband, he had no physical relationship with his wife.

Magistrate -

The learned Magistrate accepted the plea of the wife and granted maintenance to the wife and to the daughter.

High Court- It was unsuccessfully challenged by husband before High Court.

Supreme Court- Finally through SLP matter reached to Supreme Court. Supreme Court directed for DNA. In first DNA test was conducted in laboratory of Nagpur. According to report Nandlal Wasudeo Badwaik was not biological father. For second DNA Test was requested by wife and her daughter. Second DNA Test was conducted in Laboratory of Hyyderabad. Same result came.

Two DNA Test

Test	**Laboratory**	**Result**
First DNA Test (Request of Husband).	Regional Forensic Science Laboratory, Nagpur.	It has submitted the result of DNA testing and opined that "Nandlal Vasudev Badwaik is excluded to be the biological father of Neha Nandlal Badwaik".
Second DNA Test (Request of wife).	Central Forensic Laboratory, Hyderabad.	"Nandlal Wasudeo Badwaik can be excluded from being the biological father of Miss Neha Nandlal Badwaik".
Two DNA Test	Nagpur & Hyderabad.	Conclusion of both was same.

Argument of Respondent –

1. **In the Gauatam Kndu case blood test was not allowed.** Goutam Kundu v. State of W.B., (1993) 3 SCC 418.
2. ***Kamti Devi* v. *Poshi Ram*[175] *(May 11, 2001)*[176], Para 10,".** ……***The result of a genuine DNA test is said to be scientifically accurate.***

- ❖ But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable.
- ❖ This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent.

[175] (2001) 5 SCC 311

[176] Kamti Devi v. Poshi Ram is available at: https://main.sci.gov.in/jonew/judis/17818.pdf (Last visited March 30, 2020)

- But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception……."

3. ***Banarsi Dass* v. *Teeku Dutta*[177] (2005) Para 13** - Yet another decision on which reliance has been placed is the decision of Supreme Court in the case of *Banarsi Dass* v. *Teeku Dutta*.

In Banarsi Case Supreme Court observed,

- "We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature.
- ***The result of a genuine DNA test is said to be scientifically accurate.*** But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable.
- This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception.
- Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above".

Arguments of appellant-

1. **Request for DNA Test was not opposed -**The respondents, in fact, had not opposed the prayer of DNA test when such a prayer was being considered. It is only after the reports of the DNA test had been received, which was adverse to the respondents, that they are challenging it on the ground that such a test ought not to have been directed.
2. **Ratio -** In *Goutam Kundu Case* & *Banarsi Dass Case* Supreme Court considered whether order for blood test should be given or not. But in these cases objections were raised at initial stage. But in present case objection was raised after coming report of DNA Test.

Decision- Supreme Court concluded following important points –

1. Two DNA test reports show that the ***Nandlal Wasudeo Badwaik*** is not the biological father of the girl-child.
2. In *Kamti Devi Case* & *Banarsi Dass Case* Supreme Court accepted that *the result of a genuine DNA test is said to be scientifically accurate.*
3. section 112 makes the legitimacy of the child to be a conclusive proof, if the conditions of this section are satisfied. It can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten.
4. Both parties admitted that the child has been born during the continuance of a valid marriage.

Some other Points

[177] (2005) 4 SCC 449

Conflict between legal presumption and scientific evidence - scientific evidence prevails

Conflict

Section 112	**Two Reports of DNA Test**
The provisions of Section 112 of the Evidence Act conclusively prove that Neha is the daughter of the appellant.	The DNA test reports suggest that the appellant is not the biological father.

Supreme Court observed, **"**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".

Distinction between Legal fiction and Presumption of a fact

Legal fiction	***Presumption of a fact***
Legal fiction assumes existence of a fact which may not really exist.	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.

"Truth must triumph"

Supreme Court observed, "We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice".

Maintenance

Appellant was not bound to give maintenance to his wife and her daughter**.**

Conclusion

Ground	**Important Points**
Meaning	*Legal fiction and Presumption of a fact*
Conflict	In case of conflict between legal presumption and scientific evidence, scientific evidence shall prevail if that evidence is well established all over world.
Hallmark of justice	Truth must triumph

***Dipanwita Roy* v. *Ronobroto Roy*[178]**
(October 15, 2014, S.C. Division Bench)
(Hon'ble JJ. Jagdish Singh Khehar & R.K. Agrawal)

Hon'ble Justice Jagdish Singh Khehar wrote this judgment.

Issue – *Whether Court can pass order for DNA Test.*

Facts -

The petitioner-wife Dipanwita Roy and the respondent-husband Ronobroto Roy, were married at Calcutta. Their marriage was registered on 9.2.2003. The present controversy emerges from a petition filed under Section 13 of the Hindu Marriage Act, 1955 by the respondent, inter alia, seeking dissolution of the marriage solemnised between the petitioner-wife and the respondent-husband, on 25.1.2003.

S. No.		
1	Dipanwita Roy	***Wife***
2	Ronobroto Roy	***Husband***
3	Marriage in Calcutta	25.1.2003.
4	Registered	9.2.2003.
5	Divorce petition by husband u/s 13, HMA, 1955	adulterous life style of wife
6	According to Ronobroto he never shared bed at all after 22.09.2007	22.09.2007
7	He filed petition for divorce on the ground of adultery	24.07.11
Forum		
8	**Family Court** dismissed prayer for DNA Test	27.08.2012
9	**High Court** directed for DNA Test on the request of Ronobroto	06.12.2012
10	**Supreme Court** allowed DNA Test but modified order of High Court and provided option for Dipanwita	15.10.14

That since 22.09.2007 the petitioner never lived with the respondent and did not share bed at all. On a very few occasion since then the respondent came to the petitioner's place of residence to collect her things and lived there against the will of all to avoid public scandal the petitioner did not turn the respondent house on those occasion. That by her extravagant life style the respondent has incurred heavy debts.

She is leading a fast life and has lived in extra marital relationship with the said Mr. Deven Shah and the respondent has given birth to a son. She denied.

Husband moved an application on 24.7.2011 seeking a DNA test of himself and the male child born to the petitioner-wife.

She asserted, that she had continuous matrimonial relationship with husband, and that, husband had factually performed all the matrimonial obligations with her, and had factually cohabited with her. The petitioner-wife accordingly sought the dismissal of the application filed by the husband, for a DNA test of himself and the male child born to wife.

[178] AIR 2015 SC 418. This case is available at: https://main.sci.gov.in/jonew/judis/42021.pdf (Last visited March 31, 2020).

Family Court - The Family Court by an order dated 27.08.2012 dismissed the prayer made by the husband, for conducting the afore-mentioned DNA test.
High Court - Husband approached the High Court at Calcutta. The High Court allowed the petition filed by husband on 6.12.2012.
Supreme Court – SLP before Supreme Court was filed by wife.
Argument of wife-

1. *Gautam Kundu case* (1993) & *Kamti Devi Case* (2001)
2. *Sham Lal @ Kuldeep* v. *Sanjeev Kumar and others*[179]– Supreme Court observed, "Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access".
3. *Bhabani Prasad Jena* v. *Convenor Secretary, Orissa State Commission for Women and another***,** (2010)[180], Supreme Court held as under:
   - "In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely *delicate and sensitive aspect*.
   - **One view** is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires.
   - **Other view** is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.
   - **Conflict-** When there is apparent conflict between the ***right to privacy*** of a person not to submit himself forcibly to medical examination and ***duty of the court to reach the truth***, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.
   - The State Commission has no authority, competence or power to order DNA test.

Despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties

Respondent –

1. In several above discussed cases it has been accepted that result of a genuine DNA test is scientifically accurate.

[179] (2009) 12 SCC 454.
[180] (2010) 8 SCC 633.

2. *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik and another*[181]–The result of DNA test is said to be scientifically accurate. 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.

Supreme Court –

1. It is borne from the decisions rendered by this Court in *Bhabani Prasad Jena* and *Nandlal Wasudeo Badwaik Case* that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided.
2. **Opportunity for both (Husband & Wife)** –It is opportunity for both. 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.
3. **Option for wife and right to privacy –**Supreme Court held that order passed by High Court for DNA Test is correct. But this order was modified and two options were given for wife regarding DNA Test. These are –

   First Option (DNA Test) –In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively dispute regarding paternity.

   Second Option (Presumption u/s. 114)- In second option , she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof.

   This will protect right to privacy without sacrifice cause of justice.

   Section 114. Court may presume existence of certain facts – Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

   Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.

Dipanwita Roy* v. *Ronobroto Roy
I am impressed from this judgment. This judgment by giving option to other party has established cordially relation between scientific evidence (DNA Test) and right to privacy.

❖ **Maternity is fact and paternity is matter of inference..**

[181] (2014) 2 SCC 576.

MP Civil Judge 1989 –A & B got marriage. After three days of marriage B delivered a baby. B says that baby is child of A and A denies.

Which of the following condition is necessary to prove paternity?

A. Baby was born during marriage
B. Baby was born within 280 days after divorce and mother did not remarry.
C. There was possibility to access each other.
D. All of the above.

Answer- D.

Question Shivam & G were students of Faculty of Law, University of Delhi. They were boyfriend and girlfriend and they were meeting in hostel of Shivam. This fact was known to everyone. Later on they got marriage. They got baby after three days of marriage. Delivery was pre mature (7 months).

Now Shivam is denying and taking defence that he had not made sexual intercourse before marriage. She did not allow touching her body before marriage. He has expressed his doubt over Kapil that Kapil might be father of that girl.

1. Whether Shivam will be father of baby?
2. Whether Shivam will be allowed to disprove by DNA Test?

Answer – Answer of first question –

Before Nandalal (2014) & Dipanwita Roy Case (2014)	**After Nandalal (2014) &** *Dipanwita Roy Case (2014)*
Yes. Shivam is father. (1) Baby was born during marriage (2) He had access in hostel. What he did it does not matter. (3) DNA test is allowed only in rare cases.	No. **Shivam is not father. He can disprove it.** DNA test will be allowed. Shivam can apply for DNA Test. G has two option as I discussed in *Dipanwita. He can disprove that he was the father of that baby. In case of legal presumption and scientific (DNA) evidence, scientific evidence shall prevail* ***What would be liability of Kapil?*** *Kapil is good person..hahhahah…He has no liability….Now section 497 is unconstitutional. So Shavam can not file a case against Kapil for committing adultery with his.*

Estoppel
(Sections 115 to 117)

Krishna Murari Yadav
Law Centre- 1

Summary of Maxim & Leading Cases

1. Allegans contraria non est audiendus.
2. *Pickard* v. *Sears* (Lord Denman).
3. *Central London Property Trust Ltd.* v. *High Trees House Ltd. (Discovery of Promissory estoppel) (1946) (Denning)*
4. *Canada & Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steam Ship Ltd.* (Lord Wright, 1947).
5. *Chhaganlal Keshavlal Mehta* v. *Patel Narandas Haribhai*[182] *(Dec.11, 1981) (Ingredient and Difference between estoppel and admission)*
6. *R. S.Maddanappa* v. *Chandramma* (March 5, 1965, Justice Mudholkar)
7. *Sanatan Gauda* v. *Berhampur University and Ors.* (S.C., April 2, 1990.Justice P.Sawant).
8. *Kumari Madhuri Patil* v. *Additional Commissioner, Tribal Development.*
9. *Motilal Padampat Sugar Mills* v. *State of U.P*[183].

LL.B. DU -2019 Question 5(a)
Y, a student got marks-sheet from CBSE, showing that he has passed in Biology, Physics and Chemistry with good marks. Y as a matter of fact neither opted for Biology as subject nor appeared for Biology examination. However he silent and sought admission in 1st Year of MBBS at KGMC, Lucknow. When he had to appear in his first semester examinations, CBSE realized error and sent correct marks-sheet. KGMC, Lucknow cancelled his admission in MBBS. Y consults you for using estoppel against KGMC. State you opinion and give reasons.

Previous Year Question Papers –

Ingredients of estoppel

Question Bihar (J) 1977 – Explain briefly the ingredients of estoppel.
Question Bihar (J) 1984 –What are essential elements of estoppel as a rule of evidence?
Question Bihar (J) 2000 & 2006 – Explain 'Estoppel' and kinds of estoppel.
Question HJS 1994 - A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.
The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. Can A prove his want of title? Give reasons.
Question HJS 2001 –State and illustrate the rule of estoppel as enacted in Indian Evidence Act.
Question HJS 1998 & 2006 – What conditions must be satisfied by a person before he can raise the plea of estoppel?
Question RJS – State and illustrate the rule of estoppel as enacted in Indian Evidence Act.

[182] Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai is available at: https://main.sci.gov.in/jonew/judis/9956.pdf & https://indiankanoon.org/doc/1136104/ (Last visited on April 1, 2020).
[183] AIR 1979 SC 621.

UP(J) 1982 & 2003- "Estoppel is complex legal notion , involving a combination of several essential elements , the statement to be acted upon , acted on the faith of it, resulting to the detriment of the actor".
Critically examine the statement and point out whether estoppel can be pleaded by both plaintiff and defendant. Illustrate your answer.

Estoppel, Waiver and Admission

Question Bihar (J) 1979 – Write brief explanatory note on waiver.
Question Raj. (J) 1971 – Distinguish between 'Estoppel' & 'Waiver'
Question UP (J) 2015- Explain the docrine of estoppel and make distinction between estoppel and admission.

Kinds of estoppel

Question Bihar (J) 2000 & 2006 – Explain 'Estoppel' and kinds of estoppel.
Question Raj. (J) 1999 – What is estoppel? State different kind of estoppel?
Question DJS 1990 – Write short note on issue estoppel.
Question DJS 2006 – Write short note –
The plea of issue estoppel is not the same as the plea of autrefois acquit.

Promissory estoppel

Question Bihar (J)1984 -After the Government of U.P. published and announced a scheme of giving exemption from sales tax from three years to new industrial units, M.P.Sugar Mills established a plant for manufacturing Vanaspati. After some time, the Government modified the scheme and provided *partial exemption* from sales tax to such units. M.P.Sugar Mills did not object to it. But when the Government afterwards withdrew even the partial exemption, the proprietors of the Mills filed a writ petition to claim full exemption from sales tax. Decide.
HJS 2009 – Comment on the doctrine of promissory estoppel with the help of suitable examples. Explain
RJS 1986 – What is promissory estoppel?
UP(J) 1991 –Write short note on 'Doctrine of Promissory estoppel.

Tenants, Licensee, Acceptor of bill of exchange, Bailee or Licensee

HJS 1986- A takes a house on rent from B and lives in the same as tenant. Can A be permitted to deny the title of B, his landlord regarding the said house. If not, why?
UP (J) 1991 – Explain the principle of estoppel with the aid of decided cases
A applied for eviction of B from the house on the ground of his personal need. B contends that since the house is joint property of A and his brothers and his brothers did not joint the proceedings. A's application is liable to be dismissed . It is argued on behalf of A that B was estopped from challenging the right of A to sue. Decide.

UP (J) 2015 - A takes a house on lease from B and lives in the same as tenant. B made a demand to A for payment of arrears of rent for three months.
A contends that B is not the owner of the house.
Can A be permitted to deny the title of B in the said house? Give reasons for your answer.

Uttar Pradesh Judicial Service

Previous Year Question Papers –

UP (J) 1982 & 2003-

Question 8. "Estoppel is complex legal notion , involving a combination of several essential elements , the statement to be acted upon , acted on the faith of it, resulting to the detriment of the actor".
Critically examine the statement and point out whether estoppel can be pleaded by both plaintiff and defendant. Illustrate your answer.

UP (J) 1991

Write short note on 'Doctrine of Promissory estoppel.

UP (J) 1991

Question 4 (a) Explain the principle of estoppel with the aid of decided cases
Question 4 (b) B had taken the house on rent from A and since then he is regularly paying rent to A. A applied for eviction of B from the house on the ground of his personal need. B contends that since the house is joint property of A and his brothers and his brothers did not joined the proceedings. A's application is liable to be dismissed. It is argued on behalf of A that B was estopped from challenging the right of A to sue. Decide.

UP (J) 2003 & 1982

Question 7 (a) "Estoppel is complex legal notion , involving a combination of several essential elements , the statement to be acted upon , acted on the faith of it, resulting to the detriment of the actor".
Critically examine the statement and point out whether estoppel can be pleaded by both plaintiff and defendant. Illustrate your answer.

UP (J) 2015

Question 6 (a)- Explain the doctrine of estoppel and make distinction between estoppel and admission.
Question 6 (b)- - A takes a house on lease from B and lives in the same as tenant. B made a demand to A for payment of arrears of rent for three months.
A contends that B is not the owner of the house.
Can A be permitted to deny the title of B in the said house? Give reasons for your answer.

UP (J) 2018

No Question

Introduction

Estoppel has been derived from English word 'estop'[184]. Section 115 of the Evidence Act are in one sense a rule of evidence and are founded upon the well -known doctrine laid down in ***Pickard* v. *Sears***[185](1837)**.** In this case Lord Chief Justice Denham observed : *"Where one by his word of conduct wilfully causes another to believe for the existence of a certain state of thing and induced him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the first time."*

Object

In the case of *R. S.Maddanappa* v. *Chandramma* (March 5, 1965, S.C.) Justice Mudholkar observed, **"**The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith. Therefore, where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel, if that other person knew the true state of facts and must consequently not have been misled by the misrepresentation".

Kinds of Estoppel

Sir Adward Coke classified estoppel into three categories –

1. *Estoppel by matter* of record/judgment
2. *Estoppel by matter* in writing/ deed
3. *Estoppel by* in paiis/ pais/ conduct [Sections 115 to 117].

(1) *Estoppel by matter of record*

'Estoppel by record' which is known in English Law is substantially same to 'Res Judicata' in Indian Law. This type of estoppel is based upon 'Final Judgment of Competent Court'. The basis of estoppel by record is the conclusiveness of judgment.

Lockyer Vs. Ferryman (1876) is leading case on this point. Suit for declaration of marriage against a woman was brought and dismissed. After her death it was again brought. It was dismiised on the ground of estoppel by record. In this case Lord Blackburn observed, "The rule of res judicata is always be on two grounds:

(a) Public policy that there should be an end to litigation; and

(b) Hardship to the individual. He should not be vexed twice for the same cause".

Indian Law -

- Code of Civil Procedure – Section 11.
- Indian Evidence Act – Sections 40 to 43

Issue Estoppel

Where issue if fact has been has been tried by competent court on a previous occasion and finding had been reached to such issue, such finding would constitute an estoppel in subsequent trial or

[184] A.K.Ganguly, "Principles of estoppel and ultra vires in their application to the discharge of public duties by public authorities" Journal of the Indian Law Institute Vol. 41, No. 3/4 (JULY-DECEMBER 1999), pp. 335-356 (22 pages). It is available at: https://www.jstor.org/stable/43953334?read-now=1&seq=1#page_scan_tab_contents (last visited on April, 03, 2020.

[185] 6 A &E 469, 1837

proceeding where evidence is sought to be led to disturb that finding of fact recorded in the earlier proceedings[186].

(2) *Estoppel by matter* in writing

Estoppel by deed or writing is that a party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated.

(3) *Estoppel by* in paiis/ pais/ representation/ conduct [Sections 115 to 117 Section 115]

Doctrine of estoppel is based on Latin maxim which is ***"Allegans contraria non est audiendus"***.It means contrary allegation should not be heard. Yesterday if you have said, tomorrow you cannot deny your previous statement.

Section 115 to 117 is based on *estoppel by* in paiis/ pais/ representation/ conduct. Section 115 is based on *Pickard* v. *Sears* decided by Lord Denman in 1837. Sections 115 to 117 encompasses not just rule of estoppel by representation or conduct but also by agreement[187]. Sections 115 to 117 deals rule of evidence.

***Pickard* v. *Sears*[188]**(1837)

Pickard was the mortgagee of certain machinery and articles. The owner of the machinery and articles, who had the possession, made agreement for the sale of the same with Sears. On coming to know of the proposed transaction, Pickard came to the premises, but did not give any notice [6 A &E 469, 1837] regarding his claim. Instead, Pickard consulted the lawyer of Sears regarding the course to be adopted. Pickard, however, never mentioned the mortgage or claim to the goods as his own. The defendants purchased the goods bona fide and was not aware of the fact that Pickard had an interest over the same. The suit was decreed in favour of Sears 6n the ground that Pickard had virtually no interest over the same on the basis of his mortgage in the peculiar circumstances of the claim. This judgment was rendered by Denman, Chief Justice, deviating from the established common law[189].

	Mortgage and Subsequently sell	

[186] A.K.Ganguly, "Principles of estoppel and ultra vires in their application to the discharge of public duties by public authorities" Journal of the Indian Law Institute Vol. 41, No. 3/4 (JULY-DECEMBER 1999), pp. 338. It is available at: https://www.jstor.org/stable/43953334?read-now=1&seq=1#page_scan_tab_contents (last visited on April, 03, 2020.
[187] A.K.Ganguly, "Principles of estoppel and ultra vires in their application to the discharge of public duties by public authorities" Journal of the Indian Law Institute Vol. 41, No. 3/4 (JULY-DECEMBER 1999), pp. 339. It is available at: https://www.jstor.org/stable/43953334?read-now=1&seq=5#page_scan_tab_contents (last visited on April, 03, 2020.
[188] 6 A &E 469, 1837.
[189]http://ndl.iitkgp.ac.in/document/VHdDYjJaQmhsTzVrYVdFZkpveVl5TmVab2xOZ3dmWjJyWWtFcXdsZkREOD0

Subject matter	certain machinery and articles	
X	Mortgagor / Seller	
Pickard	Mortgagee	Pickard had opportunity but did not tell about his right as mortgagee.
Sears	Purchaser	Sears purchased in good faith from X without knowing right of Pickard.
Decision	Pickard claimed his right from Sears. Estoppel was applied.	Court held that Pickard was not entitled for this.

Lord Denman observed, "Where one by his word of conduct wilfully causes another to believe for the existence of a certain state of thing and induced him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the first time."

Lord Denman [*Pickard* v. *Sears*]	**Section 115 of Indian Evidence Act**
"Where one by his word of conduct **wilfully** causes another to believe for the existence of a certain state of thing and induced him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the first time."	When one person has, by his declaration, act or omission, **intentionally** caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.
Willfully	**Intentionally**

Is 'Estoppel' rule of evidence (Adjective law) or substantive law?
Differences

Ground	**Rule of evidence (Adjective law)**	**Rule of substantive law**
Jurist	Taylor, Stephan, Lord Viscount Haldane, Lord Maugham	Phipson, Cross, Nokes & Lord Wright
Cause of action	If estoppel is rule of evidence, it will support only during litigation to stop other party to retract from his earlier position.	If estoppel is rule of substantive law, it itself provides '**cause of action'**. It will enable the party to initiate legal proceeding against other.
Timing	It applies only to present or past fact.	It applies not only to present or past facts but also future conduct of promisor also.
Relationship	There must be pre-existing relationship like contract.	There is no need of pre-existing relationship.

Canada & Dominion Sugar Co. Ltd. **v.** *Canadian National (West Indies) Steam Ship Ltd.*
1947
Lord Wright
Estoppel is rule of substantive law
"Estoppel is complex legal notion, involving a combination of several essential elements, the statement to be acted on, acted on the faith of it, resulting to the detriment of the actor"[190].

CHAPTER VIII – ESTOPPEL [Sections 115 -117]

Section 115. Estoppel -When one **person**[191] has, by his

i. declaration,
ii. act or
iii. omission,

intentionally

i. caused or
ii. permitted

another person to believe a thing to be true **and** to act upon such belief,

- ❖ neither he
- ❖ nor his representative

shall be allowed, in

- ➢ any suit or
- ➢ proceeding

between himself and such person or his representative,

- ❖ to deny the truth of that thing.

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Section 116. Estoppel of tenants and of licensee of person in possession - No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession there of shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

Section 117. Estoppel of acceptor of bill of exchange, bailee or licensee. - No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence.

***Explanation* (*1*).** The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

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[190] UP(J) (Mains) 1982 & 2003.

[191] Person includes human being as well as other legal entities including companies.

***Explanation* (*2*).** If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

Chhaganlal Keshavlal Mehta* v. *Patel Narandas Haribhai[192] (Dec.11, 1981)
In this case Hon'ble Justice R.B. Mishra , Supreme Court, discussed following important points

i. *Ingredients of section 115 of Indian Evidence Act, 1872.*
ii. *Difference between estoppel and admission.*
iii. *No estoppel against right.*

Ingredients of section 115

To bring the case within the scope of estoppel as defined in section 115 of the Evidence Act:

1. There must be a representation by a person or his authorised agent to another in any form a declaration, act or omission;
2. The representation must have been of the existence of a fact and not of ***promises de futuro*** or intention which might or might not be enforceable in contract;
3. The representation must have been meant to be relied upon;
4. There must have been belief on the part of the other party in its truth;
5. There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to his prejudice or detriment;
6. The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice;
7. The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel;
8. Only the person to whom representation was made or for whom it was designed can avail himself of it. A person is entitled to plead estoppel in his own individual character and not as a representative of his assignee.

Difference between Estoppel and Admission

The difference between admission and estoppel is a marked one.

- Admissions being declarations against an interest are good evidence but they are not conclusive and a party is always at liberty to withdraw admissions by proving that they are either mistaken or untrue.
- But estoppel creates an absolute bar.

No estoppel against right

It may be pointed out that estoppel deals with questions of facts and not of rights. A man is not estopped from asserting a right which he had said that he will not assert. It is also a well-known principle that there can be no estoppel against a statute.

[192] Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai is available at: https://main.sci.gov.in/jonew/judis/9956.pdf & https://indiankanoon.org/doc/1136104/ (Last visited on April 1, 2020).

Meaning of Waiver

Basheshar Nath* v. *The Commissioner of Income-Tax, Delhi & Rajasthan & Another.

(Date of Judgment -19/11/1958, S.C.)

In this case Supreme Court said, "To constitute 'waiver', there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege".

Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence.

Difference between estoppel & waiver

(1) Provash Chandra Dalui & Anr. v. *Biswanath Banerjee & Anr.*[193] (April 3, 1989).

The essential element of waiver is that there must be a **voluntary and intentional** relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right.

- Waiver is distinct from estoppel in that in waiver the essential element is ***actual intent to abandon or surrender right***,
- while in estoppel such **intent is immaterial**. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question.

(2) ***Basheshar Nath* v. *The Commissioner of Income-Tax, Delhi & Rajasthan & Another.***

Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence.

Difference between estoppel & waiver

Essence of waiver is estoppel. I

Ground	**Waiver**	**Estoppel**

[193]Provash Chandra Dalui & Anr. v. Biswanath Banerjee & Anr. is available at: https://main.sci.gov.in/jonew/judis/7974.pdf (Last visited on April 2, 2020).

Intention	There must be voluntary and intentional relinquishment of right or conduct.	Intention of party is immaterial.
Benefit	One party must loss and other gain	Here there is no such requirement.
Cause of action	Waiver is an agreement to release or not to assert a right may constitute cause of action.	Estoppel does not constitute cause of action.
Judgment	From the judgment of the court waiver does not arise.	From the judgment of the court estoppel may arise.
Contractual / Rule of evidence	it is contractual and is an agreement to release or not to assert a right;	Estoppel is a rule of evidence.
Application	Waiver is not applicable in case of fundamental right. No one can waive his fundamental rights.	Estoppel is not applicable against parliament.

Difference between Res Judicata and Estoppel

Res Judicata is also part of estoppel. Every res judicata is estoppel but every estoppel is not res judicata.

Ground	Res Judicata	Estoppel
Source	Res Judicata is result of judgment of competent court.	There are three types of estoppel. It may be result of deed of conduct of party.
Effect	It affects jurisdiction of court. Court is not allowed to try decided matter by competent court. It shuts closes door of court. It ousts the jurisdiction of Court.	It prevents party to retract from his earlier statement. It shuts the mouth of party.
Public Policy/Equity	It is based on public policy. There should be end of litigation.	It is based on equity. If on your conduct someone has changed his conduct, you will not be retreat from your conduct.
Party	It binds both parties.	It binds only one party.

***Kumari Madhuri Patil* v. *Additional Commissioner, Tribal Development*[194]**

[194] https://main.sci.gov.in/jonew/judis/11286.pdf

(Supreme Court, Sept. 2, 1994)

Summary

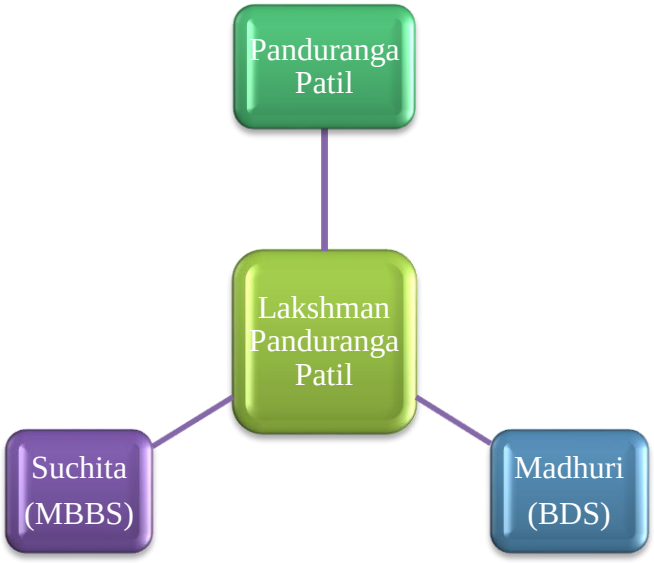
Facts – There are two facts of this case. One fact is related to admission of Suchita in MBBS Course and other fact is related to admission of Madhuri in BDS Course. Both claimed that 'Hindu Koli' is 'Mahadeo Koli' which falls under 'Scheduled Caste' Category. In this case ratio of decision of Supreme Court is same for both facts but remedy for both (Suchita & Madhuri) is different. Supreme Court said that 'Hindu Koli' is not 'Mahadeo Koli'. Supreme Court decided that they were not Scheduled Tribe (ST). They belonged to Other Backward Classes (OBC). They had got admission on the basis of false Caste Certificate.

Ratio – No one will be allowed to deprive genuine beneficiary.

Remedy –

1. **In case of Suchita –**She was allowed to complete. She will not be entitled in future for any benefits on the basis of the fraudulent social status as Mahadeo Koli.
2. **In case of Madhuri –**She was not allowed to complete as ST candidate.

Suchita and Madhuri are daughters of Lakshman Panduranga Patil who was son of Panduranga Patil.



Panduranga Patil	***Grand Father***	
Lakshman Panduranga Patil	***Father***	***Hindu Koli***
Suchita (MBBS)	***Daughter***	***Mahadeo Koli (ST)***
Madhuri (BDS)	***Daughter***	

Issue 1– *Whether Hindu Koli is 'Mahadeo Koli' (Scheduled Tribe)?*
Issue 2- *Whether Suchita was 'Mahadeo Koli' and entitled to take admission as S.T. in MBBS Course?*

Issue 3- *Whether Madhuri was 'Mahadeo Koli' and entitled to take admission as S.T. in BDS Course?*
Issue 3- *Whether appellants are entitled to their further continuance in the studies?*

High Court

Suchita was urgent need of 'Caste Certificate'. She was in dire need caste certificate for taking admission in MBBS Course. There was some delay by authorities. So she filed writ petition in High Court. On the direction of High Court she got certificate subject to other conditions. She took admission in 1990.
Madhuri - On the basis of direction of High Court in favour of Suchita Maduri also got admission in BDS course in 1992.
Verification Committee declared that she did not belong to ST.
Writ petition was dismissed.

Supreme Court

Appeal was filed in Supreme Court. Supreme Court observed following important points-
(1) Guidelines – Scrutiny Committee proceedings started on 8-12-1989 were prolonged till 26-6-1992. So Guidelines were issued to issue 'Social Status Certificate' (SC,ST. OBC etc.) so that delay can be avoided.
(2) Preamble, Fundamental Rights & DPSPs - The courts have constitutional duty and responsibility, in exercise of the power of its judicial review, to see that constitutional goals set down in the Preamble, the Fundamental Rights and the Directive Principles of the Constitution, are achieved.
(3) Kolis & Mahadeo Kolis - Kolis have been declared to be OBC in the State of Maharashtra being fishermen, in that their avocation is fishing and they live mainly in the coastal region of Maharashtra. Mahadeo Kolis are hill tribes and it is not a sub-caste.
Suchita and Maduri were declared OBC rather than ST.
(4) No estoppel in case of fraud – Suchita and Madhuri got caste certificate but for that certificate, they were not entitled. After taking admission, they plead estoppel against State and University. Supreme Court observed, **"**There is no estoppel as no promise of the social status is made by the State when a false plea was put forth for the social status recognised and declared by the Presidential Order under the Constitution as amended by the SC & ST (Amendment) Act, 1976, which is later found to be false.
Therefore, the plea of promissory estoppel or equity have no application. When it is found to be a case of fraud played by the concerned, no sympathy and equitable considerations can come to his rescue. Nor the plea of estoppel is germane to the beneficial constitutional concessions and opportunities given to the genuine tribes or castes".
(5) A party that seeks equity, must come with clean hands – "*A party that seeks equity, must come with clean hands"* is Latin maxim. He who comes to the court with false claim, cannot plead equity nor the court would be justified to exercise equity jurisdiction in his favour. There is no estoppel as no promise of the social status is made by the State when a false plea was put forth for the social status

(6) Remedy –

S.No.	Suchita	Madhuri
1	Suchita was in final year.	Madhuri was in mid-session.
2	Suchita had cgot certificate on the direction of High Court subject to confirmation. He had submitted to Scrutiny Committee. There was delay	She had got certificate from unauthorized authority after showing caste certificate in favour of her sister.
3	She was allowed to complete.	She was not allowed as ST candidate. It was said that if she was otherwise eligible, then she should be allowed.

Conclusion

Supreme Court, "We uphold the cancellation and confiscation of Madhuri and of Suchita of social status as Mahadeo Koli ordered by Scrutiny Committee and affirmed by the order of Appellate Authority and that of the High Court in that behalf. Subject to the above modifications, the appeal is dismissed but without costs".

Sanatan Gauda* v. *Berhampur University and Ors. (S.C., April 2, 1990.Justice P.Sawant).

Issue - Whether the appellant was eligible to be admitted to Law Course?

Sanatan Gauda passed his M.A. examination in July 1981 securing in the aggregate 364 marks out of 900 marks, i.e., more than 40 per cent of the total marks.

In 1983, he secured admission in Ganjam Law College which was affiliated to Berhampur University. At the time he took admission, he had submitted his marks-sheet along with his M.A. degree certificate.

The appellant completed his first year course & second year in 1984 & 1985 respectively. He was admitted in final years in 1985. But his result of first & second year was not declared.

On November 14, 1986, the Chairman of the Board of Studies wrote to the Deputy Registrar of the University pointing out that the Board of Studies in its meeting held on October 29, 1986 had recommended that those students who had passed their M.A. examination and had secured more than 40 per cent of the total marks should be considered eligible for admission to the Law course *even though they had secured less than 20 per cent marks in any one of the papers in the said examinations.* In spite of this, the University did not take any step to announce the appellant's results.

High Court - Writ petition was filed before High Court but that was dismissed. Appeal was filed before Supreme Court.

Supreme Court - University replied that he had not secured qualifying marks in M.A. So he was not eligible for admission.

(1) Qualification of admission in LL.B. Course –There were two conditions –

I. He should have on the aggregate more than 39.5 per cent marks in Master's Degree Examination

II. In each paper he must secure 25percent.

Supreme Court held that these qualifications are applicable for under graduate course. A person who had passed Master Exam for those it is not applicable.

(2) Estoppel against University - Sanatan Gauda submitted his marks-sheet along with the application for admission. The Law College had admitted him. He had pursued his studies for two years. He was also admitted to the Final year of the course. It is only at the stage of the declaration of his results of the first year and second year examinations that the University raised the objection to his so-called ineligibility to be admitted to the Law course. The University is, therefore, clearly estopped from refusing to declare the results of the appellant's examination or from preventing him from pursuing his final year course.

Remarks – It is unfortunate that this case has been prescribed in syllabus in the topic of 'Estoppel' but in this case 'Principle of Estoppel' has not been discussed.

R.S. Madanappa and Ors* v. *Chandramma and Anr.

(March 5, 1965, Justice Mudholkar)

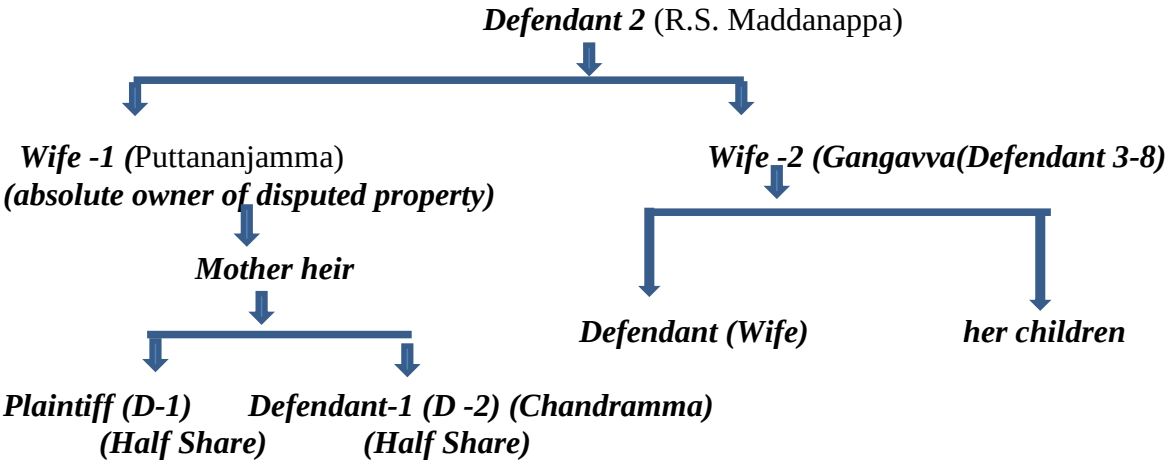
Question –*When does conduct not amount to estoppel?*

Issue – Whether the first defendant was estopped by her conduct from claiming possession of her alleged half share of the properties.

Fact –Suit was filed for declaration of ownership of certain property, its partition and possession.

Plaintiff and Defendants

Plaintiff and defendant -1	Both are sisters to each other	
R.S. Maddanappa	Husband of two wives.	Defendant -2 He was in possession of property.
Puttananjamma	First wife and absolute owner of disputed property.	She died leaving behind her two daughters - **Plaintiff and defendant -1**
Gangavva	Second wife	Defendant & her children are also defendants
Chandramma	Second Daughter	
Defendants-3 to 8	Second wife and her children	
defendant -1	Defendants claimed that estoppel must be applied against defendant -1.	Supreme Court rejected this.



Facts- Suit properties belonged to Gowramma, the mother of Puttananjamma. Gowramma had no issue except Puttananjamma. So Puttananjamma was absolute owner of property. After her death her two daughters became absolute owner of property. R.S. Maddanappa got another marriage. Relation between children of two wives was not good. Although possession of property was in the hands of their father.

Initially second daughter was not interested in property. So she did not join as a co-plaintiif. So she became defendant 1. But later on she claimed her share also. Before claiming her share she has writeen some letter in favour of her father. She did not reply of notice. Once she claimed her share, defendants demanded for application of doctrine of estoppel. She went to High Court and got judgment in her favour. So against her father and children of second wife went to Supreme Court. During hearing in Supreme Court her father died but other defendants (Applellants) continued it.

Supreme Court – Supreme Court observed replied answer one by one. These are following-

(1)First argument of appellants –

I. She did not reply notice
II. She did not join as a co-plaintiff

Reply of Supreme Court – Supreme Court said that merely non-replying of suit and and non-cooperation with plaint are not sufficient for applying estoppel against respondent (Defandant -1-*Chandramma*). It does not mean that she impliedly admitted that she had no interest in the properties.

(2) Second argument of appellants – Chandramma wrote a letter to her step-mother on January 17, 1941. She wrote, "I have no desire whatsoever in respect of the properties which are at Bangalore. Everything belongs to my father. He has the sole authority to do anything .... We give our consent to anything done by our father. We will not do anything." So this conduct clearly shows that she had abandoned her right in favour of her father.

Reply of Supreme Court - Father knew the true legal position. That is to say, the father knew that these properties belonged to Puttananjamma, and that he had no authority to deal with these properties.

The father's possession must, therefore, be deemed to have been, to his knowledge, on behalf of the plaintiff and the first defendant. There was thus no possibility of an erroneous belief about his

title being created in the mind of Maddanappa because of what the first defendant had said in her letter to her step- mother.

There is nothing on the record to show that by reason of the conduct of the first defendant Maddanappa altered his position to his disadvantage.

(3) Object of estoppel and truth known by both parties- The object of estoppel is to prevent fraud and secure justice between the parties by promotion of honesty and good faith.

Therefore, where one person makes a misrepresentation to the other about a fact he would not be shut out by the rule of estoppel, if that other person know the true state of facts and must consequently not have been misled by the misrepresentation.

(4) Detriment- The person claiming benefit of the doctrine must show that he has acted to his detriment on the faith of the representation made to him. In this case there was no detriment. Reason was that both parties aware about truth. Defendants had not changed their position.

(5) Equitable Estoppel –'Equitable Estoppel' is beyond section 115 of the Indian Evidence Act.

(6) Sarad v. Gopal - The person who sets up an estoppel against the other must show that his position was altered by reason of the representation or conduct of the latter and unless he does that even the general principle of estoppel cannot be invoked by him.

As already stated no detriment resulted to any of the defendants as a result of what the defendant No. 1 had stated in her letter to her step-mother.

Conclusion

Estoppel was not applied against *Chandramma. Main reason was that truh was known to both parties.*

LL.B. DU -2019 Question 5(a)

- Y, a student got marks-sheet from CBSE, showing that he has passed in Biology, Physics and Chemistry with good marks.
- *Y as a matter of fact neither opted for Biology as subject nor appeared for Biology examination. However he silent and sought admission in 1st Year of MBBS at KGMC, Lucknow.*
- When he had to appear in his first semester examinations, CBSE realized error and sent correct marks-sheet.
- *KGMC, Lucknow cancelled his admission in MBBS.*
- Y consults you for using estoppel against KGMC. State you opinion and give reasons.

Answer –In this case following legal points are relevant –

1. Section 115 of the India Evidence Act, 1972
2. Ratio of *University Of Delhi* v. *Ashok Kumar Chopra and Anr. (1967)*
3. Ratio of *Shri Krishnan* v. *The Kurukshetra University (1975)*
4. *Bal Krishna Tiwari* v. *Rewa University (1977)*
5. *Kumari Madhuri Patil* v. *Additional Commissioner, Tribal Development (1994)*

Section 115

This section has already been discussed. In the case of *University of Delhi* v. *Ashok Kumar Chopra and Anr.* Delhi High Court bifurcated section 115 into three parts.

University of Delhi* v. *Ashok Kumar Chopra and Anr.

(DOJ- 9 October, 1967 Delhi H.C.)

This case is related to admission in Deshbandhu college, University of Delhi, New Delhi, for studying B. A. course.

In this Case Delhi High Court said that according to Section 115 for the application for the principle of estoppel the following ingredient must be present:

A. There must be a declaration, act or omission on the part of one person.
B. By the said declaration act or omission that person must have intentionally caused or permitted another person to believe a thing to be true, and
C. he must have intentionally caused or permitted the said another person to act upon such belief,

unless all these three requirements are cumulatively present in a particular case, the principle of estoppel cannot come into operation.

It is significant that it is not merely a positive or active declaration that can be the basis for a plea of estoppel but also an act or omission can constitute such basis.

An estoppel may arise from silence as well as words. However, to constitute an "estoppel by silence" or "acquiescence" it must appear that the party to be estopped must be bound in equity and good conscience to speak and that party claiming estoppel relied upon such silence or acquiescence and was misled thereby to change his position to his prejudice.

Decision -Estoppel will be available against the University. In this case remedy was given to students. High Court said that this decision has no application to a case where a ***student is guilty of fraud, deception or concealment of material particulars while seeking and obtaining admission***.

Estoppel against institution shall not be applied if fraud has been committed or material fact has been concealed.

Shri Krishnan* v. *The Kurukshetra University
(Supreme Court, November 17, 1975)

Fact – He was the student of LL.B. This case was regarding short of attendance.
In this case Supreme Court observed, "It is obvious that during this period of four to five months it was the duty of the University authorities to scrutinise the form in order to find out whether it was in order. Equally it was the duty of the Head of the Department of Law, before submitting the form to the University to see that the form complied with all the requirements of law. If neither the Head of the Department nor the University authorities took care to scrutinise the admission form, then the question of the appellant committing a fraud did not arise.
It is well settled that where a person on whom fraud is committed is in a position to discover the truth by due diligence, * fraud is not proved. It was neither a case of *suggestion falsi, or suppression yeri.* The appellant never wrote to the University authorities that he attended the prescribed number of lectures. There was ample time and opportunity for the University authorities to have found out the defect. In these circumstances, therefore, if the University authorities acquiesced in the infirmities which the admission form contained and allowed the appellant to appear in part I Examination in April 1972, then by force of the University Statute the University had no power to withdraw the candidature of the appellant".
Estoppel was applied against Kurukshetra University.

It is well settled that where a person on whom fraud is committed is in a position to discover the truth by due diligence, there no question of fraud aroused. University had ample time to scrutinize, but it failed. This deficiency was regarding shortage in attendance.

Bal Krishna Tiwari* v. *Registrar*, *Awadhesh Pratap Singh Vishwavidyalaya, Rewa
(Rewa University) (Madhya Pradesh High Court) (Dec. 16, 1977)

Fact - Bal Krishna Tiwari was student of LL.B.
Ratio of judgment –In this case Hon'ble Madhya Pradesh High Court summarized law regarding estoppel against educational institutions. Cases where occasion arises for refusal to permit a candidate to appear in an examination or cancel his examination may broadly be categorised into four categories-

i. **Fraud or suppression of facts-** Where the candidate practised fraud on the authorities, or was guilty of mis-statement or suppression of facts in his application, form on the basis of which admission to examination was granted – **No estoppel against university**

ii. **technical defect in the filling of the form or shortage of attendance -**where there is some technical defect in the filling of the form or where there was any deficiency, such as shortage in attendance, which defect or deficiency could be condoned by the authorities in exercise of discretion vested in them under the statute, Rules or Regulations- **Estoppel against authority**

iii. where the candidate was patently ineligible on the particulars supplied by him – **No estoppel against authority.**

iv. where the question of eligibility depends upon interpretation of any provision of law, or rules or regulations having the force of law, and two interpretations are reasonably possible – **Estoppel depends upon the peculiar facts of each case**

Madhya Pradesh High Court observed, "In our opinion
(i) in the first category of cases no question of estoppel arises. The authorities will be within their rights to cancel the admission card or the examination on the discovery of fraud. This is because a person, who practices fraud or makes a mis-statement or suppresses material facts cannot claim estoppel. Fraud vitiates everything,
(ii) In the second case, if admission card has been issued to the candidate and he has appeared even in one paper of the examination, estoppel will operate against the authorities. The reason is that the authorities will be deemed to have represented to the candidate that the defect has been cured or the deficiency has been condoned. Where the examination has not yet begun, whether the authorities will be estopped from cancelling the admission card will depend upon the facts of each case.
(iii) In the third category of cases, there will be no estoppel, the principle being that there can be no estoppel against the statute. For instance, if a candidate has not passed the B.A. examination and has applied for appearing in LL.B. examination, even if an admission card has been issued and even if the candidate had stated the facts truthfully, the authorities will be entitled to cancel the admission card and the examination,
(iv) It will depend upon the peculiar facts of each case falling under the fourth category whether or not estoppel will operate against the authorities to cancel the examination once a candidate has appeared in a single paper. In such a case, the authorities may be deemed to have accepted the other possible interpretation, which is in favour of the candidate".

In case of fraud or suppression, there is no estoppel.

***Kumari Madhuri Patil* v. *Additional Commissioner, Tribal Development*[195]**
(Supreme Court, Sept. 2, 1994)

In this case *Kumari Madhuri Patil got caste certificate for which she was not entitled. She took admission in BDS course in Scheduled Castes. Her admission was cancelled as candidate of Scheduled Caste. In this case Supreme Court said, "A party that seeks equity, must come with clean hands"* . He who comes to the court with false claim, cannot plead equity nor the court would be justified to exercise equity jurisdiction in his favour. In case of fraud, estoppel will not be applicable.

"A party that seeks equity, must come with clean hands". In case of fraud, there is no estoppel.

DU LL.B. Problem-In this case estoppel against KGMC cannot be applied.
Reason –

1. *Y as a matter of fact neither opted for Biology as subject nor appeared for Biology examination.* It means Y had full knowledge that he had not passed in biology. Even he took admission in MBBS. This was fraud.
2. *There was no any fault on behalf of KGMC.* Even after scrutinizing marks-sheet, KGMC was not in a position to discover fraud. So here *Shri Krishnan* v. *The Kurukshetra University* case is not applicable. In *Shri Krishnan Case* university committed gross negligence and did scrutinize documents. That wrong was easily traceable.
3. *There was fraud.* Estoppel cannot be applied against KGMC. Ratio of *University Of Delhi* v. *Ashok Kumar Chopra and Anr. (1967), Bal Krishna Tiwari* v. *Rewa University (1977) and Kumari Madhuri Patil* v. *Additional Commissioner, Tribal Development (1994)* suggest that in case of fraud doctrine of estoppel is not aaplicable.
4. Y has not clean hands. In the case of *Kumari Madhuri Patil* v. *Additional Commissioner, Tribal Development Supreme Court said, "A party that seeks equity, must come with clean hands"* . He who comes to the court with false claim, cannot plead equity nor the court would be justified to exercise equity jurisdiction in his favour. In case of fraud, estoppel will not be applicable.

Conclusion

Opinion for Y - From the above discussion, my opinion for Y is that Y will not get remedy and 'Estoppel' is not applicable against KGMC.

[195] https://main.sci.gov.in/jonew/judis/11286.pdf

Promissory Estoppel

History – History of promissory estoppel was discussed by Supreme Court in the case of *Jit Ram Shiv Kumar and Ors. Etc* v. *State of Haryana and Anr. Etc.*[196] (April 16, 1980) by Hon'ble Justice P.S. Kailasam. He observed, "The doctrine of promissory estoppel burst into sudden blaze in 1946 when Justice Denning sitting in the Court of Kings Bench delivered the judgment in *Central London Property Trust Ltd.* v. *High Trees House Ltd.* which has now become famous as the *High Trees Case*.

Nomenclature- In the case of *Motilal Padampat Sugar Mills* v. *State of U.P.*[197] Supreme Court observed, "This doctrine has been variously called 'promissory estoppel', 'equitable estoppel', 'quasi estoppel' and 'new estoppel'. It is a principle evolved by equity to avoid injustice and though commonly named 'promissory estoppel'".

Promissory estoppel is based on equity.

Estoppel as a rule of substantive law - Estoppel as a rule of substantive law has been entirely developed by Courts in India and England. Court developed when equity and good conscience. Promissory estoppel is best example of this. It is applied even in those case where there is neither pre-existing relationship, nor consideration. It is also applied for future promise. Only two conditions are necessary –

1. There must be promise to perform an act in future.
2. On believe of such promise other person did an act and altered his position.

England – Promissory estoppel was accepted by Justice Denning in *High Trees Case (Central London Trust Property Ltd.* v. *High Trees House Ltd.* [1956(1) All E.R. 256]**.**

India –

1. *Union of India and Others* v. *M/s Indo-Afghan Agencies Ltd. (1968) 2 S.C.R. 366*
2. *Motilal Padampat Sugar Mills* v. *State of U.P.*[198]
3. *M/s Jit Ram Shiv Kumar* v. *State of Haryana (1981) 1SCC 11.*

Union of India and Others* v. *M/s Indo-Afghan Agencies Ltd. (1968) 2 S.C.R. 366

Supreme Court observed following important points-

1. Whether the agreement is executive or administrative in character, the courts have power in appropriate cases to compel performance of the obligations imposed by the schemes upon the departmental authorities.
2. Government is not exempt from the equity arising out of the acts done by citizens to their prejudice, relying upon the representations as to its future conduct made by the Government.
3. Even though the case does not fall within the terms of Section 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution".

[196] AIR 1980 S.C. 1285
[197] AIR 1979 SC 621.
[198] AIR 1979 SC 621.

***Motilal Padampat Sugar Mills* v. *State of U.P.*[199]**
(Hon'ble Justice P.N. Bhagwati, 1978)

Facts -After the Government of U.P. published and announced a scheme of giving exemption from sales tax from three years to new industrial units, M.P.Sugar Mills established a plant for manufacturing Vanaspati. After some time, the Government modified the scheme and provided *partial exemption* from sales tax to such units. M.P.Sugar Mills did not object to it. But when the Government afterwards withdrew even the partial exemption, the proprietors of the Mills filed a writ petition to claim full exemption from sales tax.

High Court –High Court did not provide any remedy to Motilal Padampat Sugar Mills on the ground that by accepting partial concession, he has waived his right. In this case doctrine of promissory estoppel was not applied.

Supreme Court - Motilal Padampat Sugar Mills filed appeal before Supreme Court. Supreme Court thoroughly discussed 'Doctrine of Waiver' & 'Principle of Promissory Estoppel'. Supreme Court discussed following important points -

(1) Meaning of Waiver - In this case Supreme Court said, "To constitute 'waiver', there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege".

Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be 'an intentional act with knowledge'.

(2) Waiver must be pleaded - It is elementary that waiver is a question of fact and it must be properly pleaded and proved. No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings.

In this case State did no plead in reply of writ petition. It was raised for the first time at the hearing of the writ petition.

(4) No waiver without full knowledge - There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it.

In this case appellant had not full knowledge about his right. So there was no waiver.

(5) Difference between estoppel & waiver -Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence.

(6) Meaning of 'Promissory Estoppel'-

The true principle of promissory estoppel, where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not.

(7) Detriment -

[199] AIR 1979 SC 621.

Issue –Whether detriment is necessary for application of 'Promissory estoppel'?
Contention of State - The State contended that the doctrine of promissory estoppel had no application in the present case because the appellant did not suffer any detriment by acting on the representation made by the Government : the vanaspati factory set up by the appellant was quite a profitable concern and there was no prejudice caused to the appellant.
Decision of Supreme Court- This contention of the State is clearly unsustainable and must be rejected.
Supreme Court said, "We do not think it is necessary, in order to attract the applicability of the doctrine of promissory estoppel, that the promisee acting in reliance of the promise, should suffer any detriment.
Reason of decision-

1. What is necessary is only that the promisees should have altered his position in reliance on the promise. This position was implied accepted by Denning, J., in the High Trees' case when the learned Judge pointed out that the promise must be one "which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact acted"
2. The alteration of position need not involve any detriment to the promises. If detriment were a necessary element, there would be no need for the doctrine of promissory estoppel because in that event the detriment would form the consideration and the promise could be binding as a contract.

Decision of Case –
Government was bound to exempt the appellant from payment of sales tax in respect of sales of vanaspati effected by it in the State of Uttar Pradesh for a period of three years from the date of commencement of the production and was not entitled to recover such sales tax from the appellant.

M/s Jit Ram Shiv Kumar* v. *State of Haryana (1981) 1SCC 11.
*In this case Justice Kailasam observed, "*The scope of the plea of doctrine of promissory estoppel against the Government may be summed up as follows :-

1. **Legislative functions -** The plea of promissory estoppel is not available against the exercise of the legislative functions of the State.
2. **Functions under the law-** The doctrine cannot be invoked for preventing the Government from discharging its functions under the law.
3. **Acts outside the scope of his authority -** When the officer of the Government acts outside the scope of his authority, the plea of promissory estoppel is not available. The doctrine of ultra vires will come into operation and the Government cannot be held bound by the unauthorised acts of its officers.
4. **Acts under Authority -** When the officer acts within the scope of his authority under a scheme and enters into an agreement and makes a representation and a person acting on that representation puts himself in a disadvantageous position, the Court is entitled to require the officer to act according to the scheme and the agreement or representation. The Officer cannot arbitrarily act on his mere whim and ignore his promise on some undefined and undisclosed grounds of necessity or change the conditions to the prejudice of the person who had acted upon such representation and put himself in a disadvantageous position.

5. **Special considerations -** The officer would be justified in changing the terms of the agreement to the prejudice of the other party on special considerations such as difficult foreign exchange position or other matters which have a bearing on general interest of the State.

Difference between 'Estoppel' & 'Promissory Estoppel'

There are following difference between both –

Ground	**Estoppel (Adjective law)**	**'Promissory Estoppel' Rule of substantive law**
	It is adjective law. It is law of evidence.	Such types of estoppel is substantive law.
Old/New	This is old concept.	This is newly discovered concept.
Basis	It is based on strict law.	It is based on equity.
Source	It is enacted law	It was developed by Court.
Cause of action	If estoppel is rule of evidence, it will support only during litigation to stop other party to retract from his earlier position.	**'Promissory Estoppel'** is rule of substantive law, it itself provides '**cause of action'**. It will enable the party to initiate legal proceeding against other.
Timing	It applies only to present or past fact.	It applies not only to present or past facts but also future conduct of promisor also.
Relationship	There must be pre-existing relationship like contract.	There is no need of pre-existing relationship. It would apply even where there is no pre-existing legal relationship between the parties, but the promise is intended to create legal relations or affect a legal relationship which will arise in future.
Detriment	There must be detriment	There is no need of detriment.
	It is rule of evidence.	It has played vital role in protection of public rights and sensitizing Government, its officers. It has become well established principle of administrative law.

Exceptions of 'Estoppel

There are following cases when 'Estoppel' is not applicable. These are –

I. Minor *(Mohori Bivee* v. *Dharmodas)*
II. Facts known to parties (*R. S.Maddanappa* v. *Chandramma)*
III. No promissory estoppel in case of fraud *(Kumari Madhuri Patil Case)*
IV. Sovereign