District Court, Sindhudurg-Oros.

SUBJECT OF THE SECOND WORKSHOP.

-: Criminal Group :-

(I) Important provision of Evidence Act-Sec. 3, 27, 32 proof of document Sec. 61, 80, Sec. 91, 92, Sec. 145, 154 etc..

(II) Recording of evidence (video conferencing).

(A). Appreciation of Evidence.

(1) Words and expressions used in the Evidence Act u/s. 3 for Appreciation of Evidence.

(2) (a) Admissibility of statement of accused u/s. 27 of the Indian Evidence Act.

(b) Relevancy of statement made by a person who is dead or can not be found as contemplated u/s. 32 of the Indian Evidence Act.

Introduction :-

In any case or suit the Court deliver and give judgment on the basis of evidence lead before him by appreciating it. This evidence is led in different ways or brought on record by way of documentary evidence or oral evidence as well as by way of confession, admissions, dying declaration, evidence u/s. 27 of Indian Evidence Act etc. The above mentioned topics are covered in this paper.

(i) WORDS AND EXPRESSIONS USED IN THE EVIDENCE ACT U/S. 3 FOR APPRECIATION OF EVIDENCE

The word 'evidence', considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. This term and the word proof are often used as a synonyms, but the latter is applied by

accurate logicians rather to the effect of evidence than to evidence itself. 'Evidence' has been defined to be any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or dis-affirmative, of the existence of some other matter of fact. " 'Evidence' means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute." It also includes the contents of that testimony.

The juristic conception of the term 'evidence' in the case of the oral testimony of witnesses is that the party against whom it is used has had the right and opportunity of cross-examining the witnesses. So long as the accused is not allowed the right and opportunity of cross-examining the witnesses, any statements made by them can only be described as statements but cannot be dignified with the name of evidence. The definition of 'evidence' covers (a) the evidence of witnesses, and (b) documentary evidence.

The word 'evidence' does not cover everything that a Court has before it. There are certain other media of proof; e.g., the statements of the parties, the result of local investigation, facts of which the Court takes judicial notice, and any real or personal property, the inspection of which may be material in determining the question at issue, such weapons, tools or stolen property. The definition of evidence is considered to be incomplete as it does not include the whole material on which the decision of the Judge may rest.

Difference between evidence in civil and criminal proceedings :-

The rules of evidence are in general the same in civil and criminal proceedings, and bind alike State and citizen, prosecutor and accused, plaintiff and defendant, counsel and client. There are, however, some exceptions, e.g. the doctrine of estoppel applies to civil proceedings only; the provisions relating to confessions (ss. 24-30), character of persons appearing before Courts (ss. 53, 54), and incompetence of parties as witnesses (s.120) are peculiar to criminal proceedings.

In a civil case, a Judge of fact must find for the party in whose favour there is a preponderance of proof, through the evidence is not entirely free from doubt. In a criminal case no weight of preponderant evidence is sufficient, short of that which excludes all reasonable doubt. Unbiased moral conviction is no sufficient foundation for a verdict of guilty unless it is based on substantial facts leading to no other reasonable conclusion than that of guilt. Circumstantial evidence not furnishing conclusive evidence against an accused, though forming a ground for grave suspicion against him, cannot sustain a conviction. The onus of proof in criminal cases never shifts to the accused, and they are under no obligation to prove their innocence or adduce evidence in their defence or make any statement. In a civil case, it is the duty of the parties to place their case before the Court as they think best, whereas in a criminal case it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done.

Appreciation of Evidence :-

The Court has to decide on the basis of the evidence adduced before it by the parties whether the guilt of the accused is made out beyond a reasonable doubt and whether, in a civil case, on a balance of probabilities the plaintiff has made out a case for relief. The prosecution case has to rest on its own strength, and not on absence of any explanation by the accused person or his inability to raise any plausible defence. The governing principle is known as that of "standard of proof". But here under the Evidence Act all such cases are reported under the caption "appreciation of evidence". Absolute standard of proof does not exist. For a proof to be beyond reasonable doubt, the standard of reasonable man must be adopted. This is a very delicate task. The higher courts have often to reject or remand cases because the evidence was not properly appreciated. A testimony without a fringe or embroidery of untruth is rare. The Court can reject it only when it is tainted to the core, that is, where falsehood and truth are inextricably intertwined. If this is not so the Court must separate the grain from the chaff. Where the story told by the witnesses in the Court was consistent and also fitted into medical evidence and contents of FIR, it

warranted implicit reliance notwithstanding different statements obtained by the police under s. 162, Cr.P.C.

In the case of ***Kanwar Pal Singh Vs. State of Haryana AIR 1994 SC 2795 : 1994 Cr.LJ 1392*** the Hon'ble Supreme Court held that, though the statement of the witnesses recorded under s.164 Cr.P.C. is to be viewed with some initial distrust, it is not a rule of law and such evidence cannot be discarded in all cases. The Court cannot proceed on the hypothesis that eye-witnesses are implicitly reliable. Every piece of evidence has to be subjected to the test of objectivity. Fabric of truth should be the guiding factor, and not the village or rustic background of the witness.

The maxim "*falsus in uno falsus in omnibus*" i.e. false in one thing, false in everything, is neither a sound rule of law, nor a rule of practice. It has been held that this maxim does not apply to criminal trials because the court has to disengage the truth from falsehood.

It is well settled law that evidence may be accepted partially or in the whole. Where the case rested entirely on documentary evidence, oral evidence, though only partially acceptable, can be used to the limited extent of filling in the gaps in prosecution evidence. Where a part of the evidence was not separable from the rest of the unbelievable part, entire statement was liable to be rejected. Where the evidence is of conflicting nature, the evidence favouring the accused should be accepted. Merely because a portion of evidence of a witness is not acceptable, entire evidence can not be rejected. Witnesses cannot be branded liars in toto and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful.

(ii) (a) ADMISSIBILITY OF STATEMENT OF ACCUSED UNDER SECTION 27 OF THE INDIAN EVIDENCE ACT.

Section 27 of the Indian Evidence Act speak, how much of information received from accused may be proved – Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of

such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Applicability of the section :-

For the applicability of Section 27, two things are pre-requisite, (i) information must be such as caused discovery of the fact; (ii) the information must relate distinctly to the fact discovered so much of such information, whether, it amounts to a confession or relate distinctly thereby discovery may be proved. It also assumed that there should be a statement first and it would be followed by the discovery and if there was first discovery followed by the statement, such statement would be inadmissible. It is also settled proposition of law that the statement of the accused must be volunteered. It should not be given by prompt or threat with any pointed question.

On a bare reading of the terms of Section 27 it appears that what is allowed to be proved is the information or such part thereof as distinctly related to the fact thereby discovered. If the police officer wants to prove the information or a party thereof, the court would have to consider whether it relates distinctly to the fact thereby discovered and allow the proof only if that condition was satisfied.

The requirement of the section :-

The conditions necessary for the application of the Section 27 are :

(1) The fact must have been discovered in consequence of the information received from the accused.

(2) The person giving the information must be accused of an offence.

(3) He must be in custody of a police officer.

(4) Only that portion of the information which relates strictly to discovery can be proved. The rest is irrelevant.

(5) The discovery of fact must relate to the commission of some crime.

(6) Before the statement is proved somebody must depose that some article was discovered in consequence of the information received from the accused.

Manner of proving the information leading to discovery :-

(A) Discovery of a fact to be deposed to :-

The condition necessary to being the section into operation is that discovery of articles 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. The first thing which the Court trying the criminal case involving an information contemplated by Section 27 does is to allow the officer to prove the facts discovered by him in consequence of the information imported to him by the accused.

(B) The whole statement should be before the Court :-

A prosecution witness, as said before, will depose that the article or articles were recovered at the information of the accused. Then comes the stage of the proof of the information rather the statement of the accused leading to discovery. After leading evidence to the effect that an article recovered at the information of the accused, the prosecution shall put before the court the whole of the statement of the accused and court would allow only that part of the statement which distinctly relates to discovery and would reject the rest. When the prosecution has, after satisfying the Court about its relevancy deposed to the fact discovered by him, he has laid the foundation for proving the information received by him from accused.

It is at this state that Section 27 comes into operation. The police officer to whom that statement is made is not at liberty himself to dissect and give evidence of a part of it only. He can only state the facts of what information was given to him. When the Judge gets evidence of that information, he must before he records it as evidence divide the sentence into

what are really its component parts, and only admit that part which has led to the discovery of particular facts viz. the hidden property.

In some cases the admissible portion of a confession is so mixed up with inadmissible one that the two cannot be separated without modifying the language in which the confession was made by the accused. This may be due to the folly of a prisoner or due to the ingenuity of the police officer. Suppose a prisoner on being asked about the weapon of the offence says "I buried the hatchet in my field. I killed A with it." Now, it is indisputable that the recovery of hatchet from a field renders only first part of the statement (I buried a hatchet in my field) admissible and that second part cannot be given in the evidence. In this case both parts are easily separable. But if the police officer converts the two sentences into one and represents the accused as saying; "the hatchet with which I killed A, I buried in my field." This sentence involves first, the admission that the accused killed A with the hatchet, secondly, the admission that the accused buried that hatchet in his field. It is the duty of the Court to divide the sentence in two parts as said above and admit into evidence only that part which involves that the accused had buried the hatchet in his field. Suppose an accused says, "I will produce the share which are received in such and such dacoity." The statement is expressed in a single sentence but it really involves first an admission that there was a dacoity; secondly, an admission that the accused took part in it, thirdly, an admission that he got part of the property and fourthly, a statement as to where the property is. The first three parts of dissected sentence are not admissible but the fourth part is admissible.

(C) Recovery memorandum generally not to be executed- Oral evidence about the statement can be given :-

Now as regard the proving of such information the matter seen to be governed by section 60, 159 and 160 of the Indian Evidence Act. The panch witness or the investigating officer, as the case may be, must prove orally whatever statement attributed to an accused person in police custody giving information leading to discovery like any other fact.

Signature of accused on confessional statement not obligatory :-

In the case of ***Natarajan v. Union Territory of Pondicherry, 2003 Cri. L.J. 2372*** **,** it is observed by Hon'ble High court that, it is not obligatory on the part of the investigating officer to get the signature of the accused in the confessional statement recorded under Section 27 of the Evidence Act and as such, the failure to obtain the signature of the accused in that statement would not make the statement invalid in the eye of law.

(ii) (b) RELAVANCY OF STATEMENT MADE BY A PERSON WHO IS DEAD OR CANNOT BE FOUND AS CONTEMPLATED U/S. 32 OF THE INDIAN EVIDENCE ACT.

Section 32 of the Evidence Act is an exception to the general rule of exclusion of the hearsay evidence. Statement of a witness, written or verbal, of relevant facts made by a person who is dead or cannot be found or who has without an amount of delay or expense, are deemed relevant facts under the circumstances specified in Sub-sections (1) to (8).

The general ground of admissibility of the evidence mentioned in this section is that in the cases there is question no better evidence is to be had. The provisions in the section constitute further exceptions to the rule which excludes hearsay. As a general rule oral evidence must be direct. (Sec.60). The eight clause of Section 32 may be regarded as exceptions to that general rule. The purpose and reason of the hearsay rule is the key to the exceptions to it, which are mainly bases on two considerations, a necessity for the evidence, and a circumstantial guarantee of trustworthiness.

Sub-section (1) of Section 32 specifically 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. Such statements are admitted in evidence on the principle of necessity. In case of homicidal deaths, statements made by the deceased are admissible only to the extent of proving the cause and circumstances of his

death. To attract the provisions of Section 32 for the purposes of admissibility of the statement of a deceased, it has to be proved:-

(a) The statement to be admitted was made by a person who is dead or who cannot be found of whose attendance cannot be procured without an amount of delay and expense or is incapable of giving evidence.

(b) Such statement should have been made under any of the circumstances specified in Sub-sections (1) to (8) of Section 32 of the Evidence Act.

Dying Declaration :-

The Hon'ble Supreme Court has delivered a number of judgments reiterating the following principles in respect of dying declaration,-

(1) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. A dying declaration can be accepted and acted upon even without corroboration provided that such declaration is scrutinized and recorded in absence of the accused.

(2) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it without corroboration.

(3) For this purpose the court has to apply strictest scrutiny and has to be on guard to ensure that the declaration is not the result of tutoring, prompting or imagination and that the deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration.

(4) Where dying declaration is suspicious it should not be acted upon without corroborative evidence.

(5) Where the deceased was unconscious and could never make any dying declaration the evidence with regards to it is to be rejected.

(6) A dying declaration which suffers from infirmity cannot from the basis of conviction.

(7) A dying declaration is not to be discarded because it does not contain details as to the occurrence.

(8) A dying declaration is not to be discarded merely because it is a brief statement. Shortness of the statement itself appears to be the guarantee of truth.

(9) Normally the Court looks for medical opinion for satisfying itself whether the victim was in a fit mental condition to make the dying declaration. But the medical opinion cannot wipe out the direct testimony of the eye-witnesses stating that the deceased was in a fit and conscious state to make the dying declaration.

(10) A dying declaration is not reliable and cannot be acted upon where the prosecution version differs from the version spurted out in the dying declaration.

(B). Proof of facts by documentary evidence

(i) Proof of facts by documentary evidence Section 3 & 61 of the Indian Evidence Act.

(ii) Proof of contents of documents and mode of proving the same (Sections 61 to 63 r/s. Sections 47 and 47(A) of the Indian Evidence Act.

(iii) Secondary evidence when admissible.
Sections 63, 65 of the Indian Evidence Act.

(iv) Proof of signature.
Handwriting electronic signature attested documents.
Sections 65(A), 65(B), 67, 67(A), 68 to 78 of the Indian Evidence Act,

The main principles which underlie the law of evidence are that,- (1) Evidence must be confined to the matter in issue. (2) Hearsay evidence must not be admitted; and (3) Best evidence must be given in all cases. In Section 3 of the Indian Evidence Act 1872 definition are given. The definition of fact is " Fact" means an includes (1) any thing, state of things, or relation of things, capable of being perceived by the senses; (2) any material condition of which any person is conscious. Relevant means one fact is said to be relevant to another when one is connected with the other any of the ways referred to the provisions of the Indian Evidence Act 1872 relating to the relevancy of facts. The definition of document is "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 record in the matter. This definition is similar to the definition in Sec. 29 of the Indian Penal Code.

The definition of "Evidence" is that (1) all statements which the Court permits or required to be made before it by witnesses, in relation to matter of facts under inquiry; such statements are called as oral evidence. (2) (All document including electronic record produced for the inspection of the Court;) such documents are called documentary evidence.

Section 61 of the Indian Evidence Act 1872 speaks that the contents of documents may be proved either by primary or by secondary evidence. But Section 59 of the Indian Evidence Act 1872 speaks that all facts, except the (contents of documents or electronic record), may be proved by oral evidence. Oral evidence has been defined by the Act to be all statements which the Court permits or record to be made before it by the witnesses in relation to the matter of facts under inquiry. All facts except the contents of documents may be proved by other evidence is mentioned in Section 59 of the Indian Evidence Act 1872. Contents of document may be proved by oral evidence under certain circumstances, viz., when evidence of there contents is admissibility as secondary evidence. It is a cardinal rule of evidence that when written documents exist they must be produced as being the best evidence of their own contents. When oral testimony is conflicting, much grater credence is to be given to men's act than to their alleged words, which are so easily mistaken or misrepresented. Documentary evidence means all documents produced for the inspection for the Court. Documents are of two kinds : Public and Private. Section 74 of the Act gives a list of documents which are regarded as public documents. All other documents are private.

The contents of documents must be proved either by the production of document which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Where there is documentary evidence oral evidence is not entitled to any weight. The section is based upon the principle that the “best evidence in the possession of power of party must be produced. What the best evidence is, it must depend upon circumstances. Generally speaking, the original document is the best evidence. This is the general and ordinary rule; the contents can only be proved by the writing itself. A newspaper report cannot be read in evidence. But when the identity of the reporter is found out and be supports the report, his version becomes admissible.

There is probably no rule of evidence that is better known than this that secondary evidence of contents of written document is, in general, not relevant. “The contents of every written paper are, according to the ordinary and

well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. Where a document was not required to be registered, it was admissible in evidence, even though unregistered.

Sections. 61 and 62, read together show that the contents of a document must, primarily, be proved by the production of the document itself for the inspection of the Court. The truth of the contents of the document, even prima facie, cannot be proved by merely producing the document for the inspection of the Court. What it states can be so established. The writer of a document is required to depose to the truth of its contents.

Section 67 of the Act requires the proof of the handwriting or signature upon a document. If by mere production of the original document for the inspection of the Court the truth of its content was proved prima facie, the requirement of proof of the handwriting and of the signature upon it would be almost superfluous.

The Act requires, first, the production of the original document. If the original document is not available, secondary evidence may be given. This is to prove what the document states. Upon this the document becomes admissible, except where it is signed or handwritten, wholly or in part. In such a case the second requirement is, under S. 67, that the signature and handwriting must be proved. Further, where the party tendering the document finds it necessary to prove the truth of its contents, that is, the truth of what it states, he must do so in the manner he would prove a relevant fact.

The production of certified copies under the provisions of S. 63 is means of leading secondary evidence. Secondary evidence can, obviously, be led only of what the document states, not as to whether what the document states is true. Under Sec. 65(e), secondary evidence may be given when the original is a public document within the meaning of S.74 and only a certified copy of the public document is admissible. Secondary evidence of a public document so led only proves what the document states, no more. In other words, he who seeks to prove a public document is relieved of the obligation to produce the original. He can produce instead a certified copy. All other requirement he must still comply with.

No doubt, in respect of public documents which form the acts or record of the acts of the sovereign authority, official bodies and Tribunals, and of public officers, legislative, judicial and executive, the presumption can be, and is, in fact, invariably drawn that the judicial and official acts have been regularly performed. It is necessary, however to appreciate that the source of the presumption is S. 114. The Court is also obliged to draw the presumption in regard to documents included in Part I to the Schedule of the Commercial Documents Evidence Act that they have been duly made and that the statements contained therein are accurate. In respect of documents included in Part II of the Schedule to that statute the Court is given discretion to presume that they were so made and that the statements contained therein are accurate.

However, so far as the provisions of Sections 61-63, 65, 67, 74-90 are concerned, it is clear that a certified copy of a public document can be admitted as secondary evidence to prove only what the document states. The truth of what the document states must be separately established.

The definition of 'evidence' has been amended to include electronic records. The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court. Section 3 of the Evidence Act, 1872 defines evidence as under: "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.

The term 'electronic records' has been given the same meaning as that assigned to it under the IT Act. IT Act provides for "data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated microfiche". The definition of 'admission' (Section 17 of the Evidence Act) has been changed to include a statement in oral, documentary or electronic form which suggests an inference to any fact at issue or of relevance. New Section 22-A has been inserted into Evidence Act, to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question. The definition of 'evidence' has been amended to include electronic records. The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court. New sections 65-A and 65-B are introduced to the Evidence Act, under the Second Schedule to the IT Act. Section 65-A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65-B. Section 65-B provides that notwithstanding anything contained in the Evidence Act, any information contained in an electronic, is deemed to be a document and is admissible in evidence without

further proof of the original's production, provided that the conditions set out in Section 65-B are satisfied. The conditions specified in Section 65-B (2) are:

> Firstly, the computer output containing the information should have been produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer.
>
> The second requirement is that it must be shown that during the said period the information of the kind contained in electronic record or of the kind from which the information contained is derived was 'regularly fed into the computer in the ordinary course of the said activity'.
>
> A third requirement is that during the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time that break did not affect either the record or the accuracy of its contents.
>
> The fourth requirement is that the information contained in the record should be a reproduction or derived from the information fed into the computer in the ordinary course of the said activity.

Under Section 65-B(4) the certificate which identifies the electronic record containing the statement and describes the manner in which it was produced giving the particulars of the device involved in the production of that record and deals with the conditions mentioned in Section 65-B(2) and is signed by a person occupying a responsible official position in relation to the operation of the relevant device 'shall be evidence of any matter stated in the certificate'.

Section 65-B(1) states that if any information contained in an electronic record produced from a computer (known as computer output) has been copied on to a optical or magnetic media, then such electronic record that has been copied 'shall be deemed to be also a document' subject to conditions set out in Section 65-B(2) being satisfied. Both in relation to the information as well as the computer in question such document 'shall be admissible in any proceedings when further proof or production of the original as evidence of any

contents of the original or of any fact stated therein of which direct evidence would be admissible.'

(C). <u>Exclusion of Oral or documentary evidence</u> -

(i) Section 91 & Evidence of terms of contracts, grants and other disposition of properties reduced to form of document.

(ii) Section 92- Exclusion of evidence of oral argument.

(iii) Section 93 to 99 – Exclusion of evidence to explain or amend ambiguous document etc.

The association of Section 92 with Section 91 was established in the case of **<u>Bai Hira Devi and Ors. v. The Official Assignee of Bombay [AIR 1958 SC 448]</u>**, where some creditors of Daulatram filed a petition for an order to adjudge Daulatram insolvent due to his notice of suspension of debt payments, which was passed. A gift deed was executed by the insolvent in favour of his wife and three sons and they contended that, although it was a gift, it was actually a transaction with valuable consideration. The issue was whether the appellants were entitled to lead oral evidence to show the real nature of the contract.

The Court stated that Section 91 prohibits the admission of oral evidence to prove the subject of a document, but in this case, the subject of the document was proved by its production itself and hence it cannot be covered under Section 91 or Section 92. Thus, Section 92 is not applicable to the case and thus the appellants could lead oral evidence. The concepts dealt with the differences between Sections 91 and 92 were brought out by the Court as under :

> Section 92 excludes oral evidence in cases where the terms of contracts are being proved by producing appropriate documents under Section 91.
>
> Since Sections 91 and 92 are supplementary to each other, the former would be incomplete without the latter and the latter would be inoperative without the former.
>
> Section 92 excludes oral evidence for “contradicting, varying, adding to or subtracting from” the information of a document

> proved under Section 91 and thus can be said to decide the conclusive nature of the contents. This can act as substantiating the Best Evidence rule.

However, Section 91 applies to all documents, irrespective of whether they seek to dispose of rights, while Section 92 pertains to dispositive documents, the former to both bilateral and unilateral documents, but Section 92 is limited only to bilateral documents.

Section 91 has universal application and can be sought by persons other than the executants of the documents as well, while Section 92 can be applied only between the parties to the contract or their representatives. But, persons other than parties to the document are not prevented from providing extrinsic evidence to contradict or vary the terms of the agreement.

The document itself is the best evidence to prove any fact. Such fact should be proved either by the primary or secondary evidence of the document. The section forbids the proof of the contents of a writing otherwise than by the writing itself. Even a third party, who is seeking to prove a written contract, can prove it only by producing the writing. In this respect section 91 and 92 supplementary to each other. They are both based on the "best evidence rule" though they differ in some material particulars also. The Supreme Court in **Taburi Sahai v. Jhunjhunwala [AIR 1967 SC 106]** has held that a deed of the adoption of child is not a contract within the meaning of section 91 and, therefore, the fact of adoption can be proved by any evidence apart from the deed. Further the principle of exclusion of all other evidence applies only to the terms happens to be mentioned in a contract, the same can be proved by any other evidence than by producing the document. Where both oral as well as documentary evidence are admissible on their own merits, there is nothing in the act requiring that the documentary evidence should prevail over the oral evidence.

Section 92 excludes evidence of any oral agreement or statement, when the terms of a contract, grant or disposition of property or any matter required by law to be in writing have been proved as required under Section 91 for the purpose of contradicting, varying, adding to or subtracting from its

terms. The principle lays down that when the terms of any such document have been proved by the primary or secondary evidence of the document, no evidence of any oral agreement or statement shall be admitted.

Exceptions :-

1. Validity of document – The first proviso to section 92 says that evidence can be given of any fact which would invalidate the document in question or which would entitle a party to any decree or order relating to the document. In case the validity of a document may be questioned.

2. Matters on which document is silent – The second proviso states that evidence can be given of an oral agreement on a matter on which the document is silent. Such evidence is allowed subject to two conditions; firstly, the oral agreement should not be inconsistent with the terms stated in the document. Secondly, in permitting the evidence of oral agreement the court is to have regard of the degree of formality of the document.

3. Condition precedent – The third proviso provides that the existence of any separate oral agreement constituting condition precedent to the attaching of any obligation under the document may be proved. If the party liable under a document has already stated making payments under it, he cannot afterwards set up the defence of an oral condition precedent to liability.

4. Recession or modification – As per proviso 4, to rescind a document means to set it aside and to modify means to drop some of it as cancelled or to modify some of its terms; such oral agreement may be proved. This is, however, subject to one qualification stated in the proviso itself, namely, where the contract is one is required by law to be in writing, or where it has been registered according to the law relating to registration of documents, then proof cannot be given of any oral agreement by which it was agreed either to resign the document or to modify its terms.

5. Usages and customs – The proviso 5, therefore, provide that the existence of any usage or a custom by which incidents are attached to a particular type of contract can be proved. But this is subject to the condition that the usage or custom of which proof is offered should not be against the express terms of the document as disclosed by all the relevant surrounding circumstances.

Exception 1 – Appointment of a Public Officer : Where the appointment of a public officer is required by law to be made by writing and the question is whether an appointment was made, if it is shown that a particular person has acted as such officer that will be sufficient proof of the fact of appointment and the writing by which he was appointed need not be proved.

Exception 2 – Wills : Wills admitted to probate in India may be proved by the probate. The document containing the will need not be produced. "Probate" is copy of the will certified under the seal of the court and, therefore, is a sufficient proof of the content of the will.

Section 93 deals with the Exclusion of evidence to explain or amend ambiguous document. In **Keshavlal v. Lalbhai Trikamlal Mills Ltd [AIR 1958 SC 512]** it was held that if the document had mentioned no price at all, oral evidence of the price would have been allowed under section 92 as to a matter of the fact on which the document is silent, but not when the document mentions price of ambiguous nature.

Section 94 deals with the Exclusion of evidence against application of document of existing facts. This section applies when the execution of the document has been admitted and no vitiating fact has been proved against it. In the case of **Kandamath Cine Enterprises P. Ltd. v. John Philipose [AIR 1990 Ker 198]** it was held that oral evidence of explanatory nature was admissible.

Section 95 deals with the Evidence as to document unmeaning in reference to existing facts. When the language of a document is plain but in its application to the existing facts it is meaningless, evidence can be given to show how it was intended to apply to those facts.

Section 96 deals with the Evidence as to application of languages 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 anyone 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 which was intended to apply to.

Section 97 deals with the Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies. The principle of the section is that where the language of a document applies to one set of facts and partly to another, but does not apply accurately to either, evidence can be given to show to which facts the document was meant to apply.

Section 98 deals with the Evidence as to meaning of illegible character, etc. This section permits evidence to be given of the meaning of words or marks of illegible character or words which are not commonly of intelligible characters of foreign, obsolete, technical, local and provincial expressions of abbreviations and of words used in a peculiar sense. In **Canadian General Electric Co. Ltd. v. Fada Radio Ltd. [AIR 1930 PC 1]** It was held that Oral evidence is admissible for the purpose of explaining artistic words and symbols used in a document.

In accordance with the provisions of Section 99 persons who are not party to a document or their representative in interest may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document.

To conclude the topic, it can be said that, documentary evidence has more value than the oral evidence. Court is bound to accept the documentary evidence. But oral evidence may take in to consideration. It also needs some corroboration. In brief, it is submitted that two types of evidence are given by the parties oral and documentary evidence. In Courts the value of oral evidence is less than documentary evidence. Because the law always requires the best evidence. Oral evidence is a evidence which is confined to the words spoken by the mouth. On another side, documentary evidence are of two types. Primary evidence is more reliable and best evidence consider by court. In the absence of primary evidence, secondary evidence is that which the witnesses are giving on the basis of his own perception. Where as primary evidence is the original document which is presented to the Court for its inspection. Direct evidence is best oral evidence of fact to be proved. But primary evidence is the best evidence in all circumstances. There is also exclusion of oral evidence by documentary evidence, document also of two kinds ambiguous and non ambiguous. The person giving direct evidence available for cross examination for testing its veracity.

Hence, as it is considered that document is written to perpetuate the memory, Sections 91 and 92 exclude oral evidence by documentary evidence. Oral proof cannot be substituted in the place of written documents

where the written document exists in proof of certain transactions referred to in Section 91 as written testimony is of higher grade, more certain and more reliable than oral evidence.

(D). Procedure of recording contradictions and omissions -

(i) Procedure of recording contradictions and omissions as stipulated u/s. 145 and 157 of the Indian Evidence Act.

(a) Use of contradictions :-
Sections 145 & 157 of the Indian Evidence Act.

A contradiction or omission means that a certain statement made by a witness in his evidence in Court was not made by him when he was examined by the police. Such non-existence of a statement in a witness' police statement must be proved in the first instance, and the legal way of proving it is to ask the Police Officer in his evidence whether a particular statement was made by the witness before him. An Advocate's knowledge of the non-existence of a certain averment in the witness' police statement, derived from a perusal by him of the said Police statement, cannot take the place of proof that such an averment was in fact not made by the witness before the police. We are pointing this out to avoid the danger of bringing upon the record of a case answers to questions which might be misleadingly obtained and incorrectly utilized at the time of arguments for proving contradictions or omissions."

In the case of Bhagwan Singh v. State of Punjab reported in 1952 S.C.R. 812, the Hon'ble Apex Court held that, Resort to Sec.145 of the Evidence Act is necessary only if a witness denies that he made the former statement. In that event it would be necessary to prove that he did and if a former statement was reduced to writing, then Sec.145 of the Indian Evidence Act requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statements. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made.

In *Tahsildar Singh's case*, Hon'ble Apex Court, has given some illustrations in respect of contradictions and omissions. Which are as follows:

(1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose;

(2) statements not reduced to writing by the police officer cannot be used for contradiction;

(3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement;

(4) such a fiction is permissible by construction only in the following three cases:

(i) when a recital is necessarily implied from the recital or recitals found in the statement; illustration : in the recorded statement before the police the witness states that he saw 'A' stabbing 'B' at a particular point of time, but in the witness-box he says that he saw 'A' and 'C' stabbing 'B' at the same point of time; in the statement before the police the word "only" can be implied, i.e. the witness saw 'A' only stabbing 'B';

(ii) a negative aspect of a positive recital in a statement; illustration: in the recorded statement before the police the witness says that a dark man stabbed 'B', but in the witness-box he says that a fair man stabbed 'B'; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that be was not of fair complexioned; and

(iii) when the statement before the police and that before the Court cannot stand together; illustration: the witness says in the recorded statement before the police that 'A' after stabbing 'B' ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing, i.e. at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must be necessarily be false.

Section 157 of the Indian Evidence Act read thus :-

157. *Former statements of witness may be proved to corroborate later testimony as to same fact* - In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally component to investigate the fact, may be proved.

The principle behind this section is that, a witness's former statement relating to the same fact made at or about the time when the fact took place may be proved in order to corroborate his present testimony. There are only two things which are essential for the section to apply. The first is that a

witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. But in order to make the former statement admissible it is not necessary that the witness to be corroborated must also say in Court in his testimony that he had made the former statement. Generally, the statements made immediately on the occurrence of an event contains truth, for no time has elapsed for concoctions to creep in; similarly, statements solemnly made in the presence of a legally competent authority bear the impress of truth. Statements like these are, therefore, a legitimate means of corroboration. They support the credibility of the person whose evidence is corroborated.

The general rule laid down in sec.157 is controlled by the special provisions of sec.162 the code, so far as statements to the police taken under sec.161, are concerned. Sec.162 the code prohibits the use of the record containing the statement of a witness to the police as evidence against the accused as well as proof of such statement by oral evidence. Such statements cannot be used as corroboration under this section. A first information report does not prove itself; it has to be tendered under some section of the Evidence Act. The usual course is for the prosecution to tender it under this section to corroborate the informant, and the defence can prove it to impeach his credit under sec.155, or to contradict him under sec.145 of the Indian Evidence Act, 1872. It is admissible also in proper cases under sec.08 and sec.32(1) of the Indian Evidence Act. Unless there is substantive evidence before the Court, first information report and other reports by a witness cannot be used in corroboration. Where the prosecution witness gives a different account in evidence before the Court, his previous reports cannot be admissible as corroborative evidence against the accused. In order to corroborate a witness by a previous deposition, or by a first information report recorded under sec.154, these documents must be produced, for they are documents required by law to be reduced to writing and secondary evidence of their contents cannot be given.

Rule 29 of Chapter VI of Criminal Manual states about proof and statements under sec.161 of the Code of Criminal Procedure as under :-

(1) When a statement is recorded under sec.161 of the Code of Criminal Procedure, is used in the manner indicated in sec.162 of the Code, the passage which has been specifically put to the witness in order to contradict him should first be marked for identification and exhibited after it is proved.

(2) The method of proving such a statement is to question the Police Officer, who had recorded the statement whether the passage marked is a true extract from the statement recorded by him.

(3) When a statement recorded under sec.161 of the Code is used to contradict a witness, the specific statement put to the witness should be set out accurately in the record of the deposition of the witness.

(4) Omissions in the statements recorded under sec.161 should, if denied by the witness, be proved by questioning the Police Officer whether the witness had made the statement which he says he had.

(b) Appreciation of evidence of hostile witnesses :-
Section 154 of the Indian Evidence Act.

A 'hostile witness' is one who from the manner in which he gives evidence shows that, he is not desirous of telling the truth to the Court. A hostile witness is not necessarily a false witness. Merely because one part of the statement of a witness was not favorable to the party calling him, the Court should not readily conclude that he was suppressing the truth or that his testimony was adverse to that party. Hostility of a witness is to be judged from the answers given by him. A witness who is gained over by the opposite party is a hostile witness. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.

In **Gulshan Kumar v/s State** reported in **1993 Cri.L.J. 1525**, it was held that, the “Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in

toto." Thus, the statement of the hostile witness can be relied upon partly. It is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of, but in such a situation, the Court shall have to be extremely cautious and circumspect in such acceptance. The testimony of the witness who has turned hostile is not to be excluded entirely or rendered unworthy of consideration. His testimony remained admissible. A conviction can be based on it, if it finds corroboration.

In **State of Uttar Pradesh v/s Ramesh Prasad Misra and another** reported in **(1996) 10 SCC 360**, the Hon'ble Apex Court opined that, the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.

In **Balu Sonba Shinde v/s State of Maharashtra** reported in **A.I.R. 2002 SC 3137**, it is held that, while it is true declaration of a witness to be hostile does not ipso facto amount to rejection of his evidence, and it is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of, but the court before whom such a reliance is laced shall have to be extremely cautious and circumspect in such reliance.

A witness is considered to be hostile witness when in the opinion of the Court the witness is saying against the party which have invited him and the witness adopts an adverse attitude to the party that has invited him. A hostile witness is that who gives evidence in his own way but he shows that he does not intend to speak truth. The hostility of the witness and his adverse attitude can only be inferred from his statement and his conduct. The Court should exercise its discretion very judiciously because the witness wants to conceal the truth or who has been won over by the adverse party. Therefore it is necessary that, if witness did not disclose the fact even though he knows the fact the court should declare the witness hostile and permit to cross- examination to the party who has called such witness to adduce evidence.

Sec.137 gives only the three stages in the examination of a witness, namely examination-in-chief, cross- examination and re-examination. This is a routine sequence in the examination of a witness. Sec.154 does not in terms, or by necessary implication, confine the exercise of the power by the Court before the examination-in- chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand.

(c) <u>Recording of Evidence (Video Conferencing)</u> :-

In the case of **Twentieth Century Fox Film Corporation** v/s **NRI Film Production Associates (P) Ltd.** reported in **A.I.R. 2003 Kant 148** certain conditions have been laid down for video recording of evidence :

1) Before a witness examined in terms of the Audio-Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen.

2) A copy is to be made available to the other side.

3) The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.

4) The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.

5) The witness should not plead any inconvenience on account of time different between India and USA.

6) Before examination of the witness, a set of plaint, written statement and other documents must be sen t to the witness so that the witness has acquaintance with the documents and an acknowledgment is to be filed before the Court in this regard.

7) Learned Judge is to record such remarks as is material regarding the demeanor of the witness while on the screen.

8) Learned Judge must note the objections raised during recording of witness and to decide the same at the time of arguments.

9) After recording of the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.

10) The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.

11) The learned Judge may also impose such other conditions as are necessary in a given set of facts.

12) The expenses and the arrangements are to be borne by the applicant who wants this facility.

In the case of **State of Maharashtra v/s Dr. Praful B. Desai** reported in **A.I.R. 2003 SC 2053,** the Hon'ble Supreme Court observed that, video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The Court allowed the examination of the witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.

With this I conclude the summary/gist of all papers under subject of workshop.

Sd/-

Sindhudurg-Oros.

Date :- 15/01/2016

(R. V. Huddar),
Chief Judicial Magistrate &
Civil Judge (Senior Division),
Sindhudurg-Oros.
Head of the Core Group of Judges,
(**CRIMINAL GROUP**).