DISTRICT AND SESSIONS COURT, OSMANABAD

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SUMMARY/GIST

FOR THE

3rd JUDICIAL OFFICERS
WORK-SHOP

Schedule to be
Held on 06th February, 2016.

-: Subjects :-

Civil- *"Enforcement of specific performance, discretion and powers of the Court."*

Criminal-*"Admission, exhibition and proving of documents."*

Part -A

CIVIL

Subject - "Enforcement of specific performance, discretion and powers of the Court."

SUMMARY WORKSHOP PAPER
(Civil Side)

Enforcement of Specific Performance, Discretion and Powers of the Court

Introduction :

The Specific Relief Act, 1963 (In short "the Act") provides for specific reliefs. A specific relief means an exact or particular relief. It is generally understood as relief of specific kind rather than general relief of damages or compensation. It is a remedy which aims at the exact fulfillment of an obligation or specific performance of the contract. For instance, if somebody unlawfully dispossesses someone of his property, the general relief may require the wrong doer to pay compensation to the other party equivalent to the loss suffered by him due to dispossession. Specific relief may enable him to have the possession of the same property over again by requiring the wrong doer to restore possession of the property.

A contract is an agreement upon sufficient consideration to do or not to do a particular act. The party on whom this contractual obligation rests must not fail to discharge such obligation. In case of his failure, the other party will have a right to sue for performance of the contract. This is called 'Specific Performance'. Specific performance is a remedy developed by principle of equity. A party to a contract, who has suffered damage due to breach of contract has the option to file a suit for specific performance compelling the other party to perform his part of contract.

The court will not enforce the performance of contract which involves continuing acts and would require the supervision of

the Court, nor for personal work or service. Specific relief can be granted only for the purpose of enforcement of individual civil rights and not for penal laws. This being an equitable remedy, it is the discretion of the Court either to grant or to refuse specific relief. However, discretion is to be exercised judiciously.

A) The contracts relating to movable and immovable property which can be specifically enforced.

Section 10 of the Act provides that specific performance of such contracts may be enforced when there exists no standard for ascertaining the actual damage caused by the non performance of the act agreed to be done, or when the act agreed to be done is such that compensation in money for its non performance would not afford adequate relief. In case of a contract to transfer movable property, normally specific performance is not granted except in certain circumstances. For example, the satellite signals for transmission to cable operators were not goods. They were not articles of commerce and were not easily available in the market. Moreover, there was no standard of assessment of loss caused if signals were not supplied to cable operators. Therefore, the contract could be specifically enforced under Section 10.

The Explanation states that, in case of immovable property, the Court shall presume that the breach of contract to transfer immovable property cannot be adequately compensated in money and that the breach of a contract to transfer movable property can be compensated. But there are some exceptions such as :

(i) Where the property is not an ordinary article of commerce, or is of special value or interest, or consists of goods which are not easily obtainable in the market. For example, contract for sale of huge

quantity of coal ash is contract for sale of potential property in which compensation is not adequate relief for its breach. It is not an ordinary article of commerce and, therefore, contract is specifically enforceable.

(ii) Where the property is held by the defendant as agent or trustee of plaintiff.

As per Explanation, the Court should presume that monitory relief is not the adequate remedy for breach of contract to transfer of immovable property unless and until the contrary is proved. For example, there is a contract in favour of plaintiff for re-conveyance of house not needed for his personal residence. Before instituting the suit for specific performance, he agreed to sell it at profit to a third party. This contract cannot be said to be a contract that cannot be compensated in terms of money.

A person entering into contract for sale of immovable property cannot escape from it for his own convenience by alleging that the person in whose favour the contract was made can be compensated in money. Hence, the Explanation to section 10 enacts to presumption that compensation in such cases cannot be an adequate remedy. For example, where the defendant executed an agreement of sale agreeing to sell a plot situated in a co-operative society. But he subsequently pleaded that he could not execute the sale deed on the ground that the said sale was prohibited by the By-laws of the society. But the said By-laws were found to be illegal and void. The plaintiff could not be denied the specific performance of the contract.

B) <u>Enforcement of part of contract</u>

Section 12 of the Act provides for specific performance of part of contract. Sub-section (1) provides the general rule that specific

performance of a part of contract shall not be decreed. This sub-section has overriding effect. Sub-section (2) to (4) contain exceptions to the general rule. They provide all circumstances where partial performance is permissible. When a part of the contract, which cannot be performed and it is not separable from the other part of the same contract, which can be specifically performed. In such case, the Court may direct only to perform specifically the first part of the contract. It means the second part cannot be enforced.

Example

Where A, B and C, who were tenant-in-common agreed to sell certain houses to D and if afterwards appears that C had no power to make the contract, D is entitled to have specific performance of the part of his contract against A and B and the latter (A and B) can be compelled to convey their interest to D.

In the case of **Rachakonda Narayana ...Vs... Ponthala Parvathamma –- AIR 2001 SC 3353,** it is held,

> "A perusal of sub-section (3) of Section 12 shows that the first part of the said provision mandates refusal of specific performance of a contract on certain conditions. However, latter part of the provision permits a Court to direct the party in default to perform specifically so much of his part of the contract as he can perform if the other party pays or has paid the agreed consideration for the whole of the contract and relinquishes all claims to the performance of the remaining part of the contract and all the rights to compensation for the loss sustained by him. If a suit is laid by the other party, the Court may direct the defaulting party to perform that part of

the contract which is performable on satisfying two pre-conditions, i.e (i) the plaintiff pays or has already paid the whole of the consideration amount under the agreement; and that (ii) the plaintiff relinquishes all claims to the performance of other part of the contract which defaulting party is incapable to perform and all rights to compensation for loss sustained by him."

C) <u>Contracts which can not be specifically enforced:</u>

Sub-section (1) of Section 14 of the Act describes the kinds of contracts which cannot be specifically enforced. It implies that there is little scope of discretion in this case. Where there is a case that falls within categories i.e. (a) to (d) of sub-section (1), the Court cannot order specific performance by exercising its discretion. A combined reading of Sections 10 and 14(1), shows that there is more scope of discretion in refusing specific enforcement rather than allowing it. Sub-section (1) of Section 14 however has several exceptions i.e. cases in which specific performance may be enforced. These exceptions are contained in sub-section (3). The word 'may' is meaningful. That is to say, the Court may grant the relief of specific performance. The word 'may' implies the discretion of the Court.

Compensation in money adequate relief :-

Clause (a) sub-section (1) of section 14 provides that a contract, for the non-performance of which, compensation in money can be awarded as an adequate relief, cannot be specifically enforced.

<u>Examples</u> : i) where A agrees to supply to B 1000 bags of Basmati Rice within a month but fails to supply within the stipulated period,

non-performance of this contract cannot be specifically enforced because compensation in money would be an adequate relief.

ii) Sale of shares of companies which are easily available in the market. Such a contract cannot be specifically enforced. However, the position about the shares of companies which are not easily and immediately available in the market will be different. Such contracts can be specifically enforced.

i) Contract running into minute details :-

Clause (b) of Sub-section (1) provides that a contract which runs into minute or numerous details cannot be specifically enforced. The specific enforcement of such a contract will require performance of continuous acts requiring the certain supervision of the Court and as such the Court does not enforce such contracts.

For example, there was a contract between A and B that, B will grow particular crops for three years next after the date of the contract on the land in his possession in consideration of annual advance to be made by A. B would deliver the crops to A when cut and ready for delivery. The Court will refuse to grant specific performance of the contract.

(ii) Contract dependent on personal qualifications or volition of parties

The contracts dependent on personal qualifications or volition of parties cannot be specifically enforced.

For example, where the defendant agreed to sing or act at plaintiff's theater for a certain period and there was a stipulation in the

agreement that during this period she would not sing at any other theater. In breach of this agreement, the defendant entered into an agreement to sing at some other theater and refused to sing at the theater of the plaintiff. The plaintiff instituted the suit for specific performance. The prayer for specific enforcement of the contract is not enforceable.

(iii) Contract being of nature which Court cannot enforce

Clause (b) of Sub-section (1) of Section 14 lays down that a contract cannot be specifically enforced if it is of such nature that the Court cannot enforce specific performance of its material terms.

For example, if the performance of a contract becomes impossible, the Court cannot specifically enforce it. Similarly, a contract of sale of shares of a company, before its winding up, cannot be specifically enforced after the Court orders winding up of the company because such a contract would be void under the Companies Act. Contracts which are of such nature such as those relating to form and carrying on of partnership, which the Court cannot specifically enforce, even though they are neither illegal nor fraudulent nor otherwise improper.

iv) Contract being determinable in nature :-

According to Clause (c) of Sub-section (1) of Section 14, a contract which is in its nature determinable cannot be specifically enforced.

For example, A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically enforced for if it were

so performed, A or B might at once dissolve the partnership.

v) Contracts involving performance of a continuous duty which the Court cannot supervise :-

Clause (d) of Sub-section (1) of Section 14 is based on the principle that the court does not enforce performance of a contract requiring continuous acts and the watching and supervision of the court. That is why, the Court normally does not specifically enforce the contracts to build or repair.

Examples :

i) In a contract between A and B, A let out his railway to B for 20 years to be used on B's land. It was also agreed that B should have a right of running carriages over the whole line, and A should keep the whole railway in good repair. Specific performance of this contract must be refused to B as it requires continuous supervision.

ii) Similarly, where a writer gave an article to a magazine to be published but the article was reedited and considerably changed even in style. Consequently, the writer refused to have his name published as the author of the article, since specific enforcement of such a contract required continuous supervision of the Court, and such a contract could not be specifically enforced.

vi) Arbitration agreements :-

No contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it,

sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit.

Exceptions :

Even though the contracts are determinable, the compensation is adequate relief or performance is difficult, still the following contracts may be enforced.

I - When the suit is for enforcement of a contract to execute a mortgage or other security pertaining to repayment of loan which the borrower is not willing to repay at once then such contract is enforceable though monetary compensation is adequate relief. Provided that the loan is advanced in part and lender is ready to give remaining part of loan according to the contract or to take up and pay any debentures.

II - When business of partnership is commenced between the parties, the suit for the execution of a formal deed of partition is maintainable.

III - The suit for purchase of a share of a partner in a firm is maintainable.

IV - The suit for enforcement of a contract pertaining to construction of building or execution of any other work on land is maintainable.

D) <u>Who can obtain specific performance of the contract:</u>

Section 15 of the Act simply enumerates the parties who may obtain specific performance of the contract. It is not exhaustive.

Any party to a contract :-

Clause (a) of Section 15 says that any party to a contract may obtain specific performance of the contract.

For example, where a guardian enters into a contract on behalf a minor for sale or purchase of some immovable property, the contract will be specifically enforceable by or against the minor.

Representative in interest or the principal :-

The words “representative in interest” are used in the context of the specific performance of a contract and not in the context of property rights and as such, they include a person who becomes entitled to the benefit of rights under a contract

For example, Specific performance may be obtained by transferees and assignees from contracting party. Assignee would be entitled to claim specific performance.

Marriage settlement or family arrangement :-

This entitles the beneficiary to a settlement on marriage or a compromise of doubtful rights of the same family to obtain specific performance.

Remainder-man :-

Where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman; the person who takes the remainder, may obtain specific performance, even though he is neither the assignee nor the successor of the title of the tenant for life.

Reversioner in possession :-

The ‘reversioner’ means, either the owner of any estate in expectancy or a remainderman. ‘Reversion’ implies the residue of an estate to commence in possession after the estate granted by the settler has been determined. It provides that a reversioner in possession, where the agreement is such a covenant entered into with his predecessor in title, and the reversioner is entitled to the benefit of such covenant, may obtain specific performance.

Reversioner in remainder :-

It provides that a reversioner in remainder, where the agreement is such a covenant and the reversioner is entitled to the benefit thereof and sustains material injury by reason of its breach, may obtain specific performance of the agreement.

Amalgamated company :-

When a company has entered into a contract with another company and as a result of this becomes amalgamated with another company, the new company which emerges out of the amalgamation may enforce contracts made by the transferor company.

Company :-

When the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company may obtain specific performance of such contract.

E) Discretion and powers of the Court while granting relief of Specific Performance :

As per Section 20 of the Act, the jurisdiction to pass a decree for specific performance is discretionary. The Court is not bound to grant the relief merely because it is lawful to do so. But the discretion should not be exercised in an arbitrary way, it must be based upon the sound and reasonable judicial principles. The Court is bound by the principles of justice, equity and good conscience and has to act with fairness with both the parties. Therefore, where the respondent has himself claimed the alternative relief of compensation, it would be unjust and unfair to grant the relief of specific performance. Thus, in appropriate cases, the Court instead of granting the relief of specific performance, may grant the alternative relief of compensation on the basis of equity.

Plaintiff having unfair advantage over defendant, conduct of parties etc. :-

If the performance of a contract involved some hardship on the defendant which he did not foresee while non-performance involving such hardship on the plaintiff is one of the circumstances in which the Court may properly exercise not to decree specific performance and the doctrine of comparative hardship has been statutorily recognized.

For example, where the suit property was ancestral and an agreement to sell the property was executed by some co-sharers and other co-sharers were not signatories to the agreement, such an agreement can be said to be giving under advantage to one co-sharer over others and as such it cannot be specifically enforced.

Hardship on defendant and no such hardship on plaintiff for non-performance :-

The Court may properly exercise not to decree performance where the performance of the contract would involve some hardship on the defendant which he did not foresee, where non-performance would involve no such hardship on plaintiff.

Inequitable to enforce :-

Where the defendant has entered into the contract under circumstances which are not rendering the contract voidable, but it makes it inequitable to enforce.

In the case of **Gobind Ram ...Vs... Gian Chand – AIR 2000 SC 3106,** it is observed,

> " The Court should meticulously consider all facts and circumstances of the case and the motive behind the litigation should also be considered. In the instant case, the appellant tried to wriggle out of the contract for sale of property because of escalation of prices of real estate properties. The Supreme Court held that the respondent is entitled to get a decree of specific performance as he had not taken any undue advantage over the appellant. It is further observed that it would be inequitable and unjust to deny the decree of specific performance to the respondent. However, to mitigate the hardship to the appellant, the Apex Court directed the appellant to deposit a further sum of Rs. 3,00,000 within four months".

Onerous to defendant or improvident in nature :-

Explanation 1 to Sub-section (2) of Section 19 clarifies the meaning of 'unfair advantage' or 'hardship'. It says that mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b).

Hardship on defendant :-

The mere fact that it will cause hardship to the defendant cannot prevent the Court from passing any decree for specific performance especially when the defendants have not brought to Court's notice any circumstance necessitating non-granting of specific performance.

In the case of **S.V.R. Mudaliar (dead) by L.Rs ...Vs... Rajabu F. Buhari (dead) by L.Rs – AIR 1995 SC 1607**, it is held,

> "If merely because the prices have risen during the pendency of litigation, we were to deny the relief of specific performance if otherwise due, this relief could hardly be granted in any case, because by the time, the litigation comes to an end, a sufficiently long period is likely to elapse in most of the cases. This factor, therefore should not normally weigh against the suitor in exercise of discretion by a court in a case of the present value".

Discretion to grant specific performance where plaintiff has done substantial acts or suffered losses :-

It provides that the Court may properly exercise

discretion to decree specific performance in any case where the plaintiff has substantial acts or suffered losses in consequence of a contract capable of specific performance.

There are two essential requirements of Sub-section (3). In the first place, the plaintiff must have done substantial acts or suffered losses. Secondly, the contract must be capable of specific performance. If the contract is capable of specific performance and the plaintiff has substantial acts in pursuance of the contract, this may weigh in his favour and the Court may properly exercise discretion to decree specific performance in his favour.

Mutuality not a necessary condition :-

It abolished the doctrine of mutuality and provides that the Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

In the case of **M. Meenaxi & others ...Vs... Metadin Agrawal (decased) by LR's -- 2006 (8) SCJ 509,** it is held,

> "Section 20 of the Specific Relief Act, confers a discretionary jurisdiction upon the courts. Undoubtedly, such discretion cannot be refused to be exercised on whims and caprice; but when the passage of time the contract becomes frustrated or in some cases increase in the prices of land takes place, the same being relevant factors can be taken into consideration for the said purpose. While refusing to exercise it's jurisdiction courts are not precluded from taking into consideration the subsequent events. Only because the plaintiffs/ respondents ready and willing to perform their part of contract and even assuming that the defendant was

not entirely vigilant in protecting their rights, same cannot be ground for granting specific performance."

In the case of **Parakunnan Veetill Joseph's Son Mathew ...Vs... Nedumbara Kuruvila's Son -- (1987)Supp.SCC 340**, it is cautioned and observed,

"Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff."

Power to award compensation :

Person suing for specific performance can also ask for compensation for breach in addition to or in substitution of such performance. If Court found that specific performance ought not to be granted, but there is a contract between the parties and defendant broken the contract and plaintiff is entitle to compensation for its breach, then Court can award compensation.

If Court found specific performance ought to be granted but in addition in the interest of justice compensation should be given, in such circumstances compensation shall be awarded.

Compensation shall not be awarded unless it is claimed by plaintiff in the plaint.

Power to grant relief for possession, partition, and refund of earnest money, etc. :

The plaintiff may in an appropriate case also ask for possession, partition and separate possession of the property. He can also ask for refund of any earnest money or deposit paid or made by him if his specific performance is refused.

The Court has a power to grant the said relief in favour of plaintiff in addition to compensation.

If the plaintiff not claimed the said reliefs in the plaint then Court shall allow him to amend the plaint at any stage of the proceeding.

F) Concept of "Readiness and Willingness" :

Section 16(c) of the Act is based on the maxim "**He who seeks Equity must do Equity**".

The word "readiness" is about the capacity to perform the contract and the word "willing" is with regard to intention. The word willing means prepared in mind or willing to perform the contract. It is mainly with respect to the person's mental process to an act. These words are interpreted or described by the Hon'ble High Court in the case of **Amarjeet S. Vidhyarthi ...Vs... Sushiladevi K. Pillani – 2002(2) B.C.R.694.** It is held,

> "The words "ready and willing used in S.16(c) are very significant …. where the performance on the part of plaintiff contemplates payment of certain money, the word "**ready**" means his capacity or capability to raise that money. The word "**Willing**" in the same context means the plaintiff's desire to pay the money to the

> defendant. The term "ready and willing" where the contract involves payment of money therefore, refers to both physical and mental elements, the combination of which answers the requirement of the term. A plaintiff may have the money ready and with him or he may be capable of raising the requisite money, yet he may not have desire to pay the same. Conversely, a plaintiff may have an earnest and sincere desire to pay the money but he may not have the same ready with him or he may not be in a position to raise the same. In either case the result is the same. Such a plaintiff cannot perform his obligation to pay the consideration amount to his vendor and therefore, he cannot be regarded to be a person "ready and willing" to perform the essential obligation regarding making of payment".

The readiness and willingness is necessary to be pleaded and proved by the plaintiff for granting the relief of specific performance. No specific language is prescribed in the aforesaid Section for pleading the phrase of "readiness and willingness", but as a whole it must show that the plaintiff was and is ready and willing to perform his contract.

In the case of **Jugraj Singh and Anr. ...Vs... Labh Singh and Ors. – AIR 1995 (SC) 945,** it is observed,

> "Continuous readiness and willingness at all stages from date of agreement till date of hearing of suit must be proved. Even the conduct of the parties prior to and subsequent to filing of the suit can be taken in to consideration to infer their readiness and willingness to perform their part".

G) <u>When time is essence of contract</u> :

Section 55 of the Contract Act is very relevant. It lays down that if a party to the contract fails to do a certain thing agreed upon within the stipulated period the contract or so much of it as has been not performed becomes voidable at the option of the other party to the contract if the party intended that time would be of the essence of the contract. If time is of the essence of the contract delay operates as a bar to a decree for specific performance. "Time is essence of a contract" means a stipulation in the contract, which mandates its performance by one party within the period specified in the contract. In case the condition regarding stipulation of time is not strictly fulfilled, the opposite party may treat that the contract is breached or not performed. However, such a stipulation of time cannot always be considered as the time was the essence of contract. An intention to make time the essence of contract must be expressed in unambiguous language.

Common situation where such clauses used are in the sale of property which is perishable or having subject to rapid fluctuating of value.

In the case of **Chand Rani ...Vs... Kamal Rani – 1993 (1) SCC 519,** it is held that,

a) In the case of sale of immovable property, time is never regarded as the essence of the contract. In such cases, the presumption is against time being the essence of the contract.

b) The law of equity looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in

unequivocal language.

c) Fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract

d) Even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time:-

(i) from the express terms of the contract;

(ii) from the nature of the property and

(iii) from the surrounding circumstances as for example, the object of making the contract.

Hon'ble the Apex Court in the case of **Mrs. Saradamani Kandappan ...Vs... Mrs. S. Rajalakshmi – AIR 2011 SC 3234** took serious note of galloping inflation and steep rises in the market value of immovable properties and also expressed serious need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances. Hon'ble the Court has explained the same by giving an example : In these days of galloping increases in prices of immovable properties, to hold that a vendor who took earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice.....

As a result, an owner agreeing to sell a property for Rs. One lakh and received Rs. Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs. Ninety Thousand, when the property value has risen to a crore of rupees".

CONCLUSION

Specific Relief Act explains and enunciates the various reliefs which can be granted under the provisions contained therein. The Act assures suit or a remedy which he is deprived of and ought to be entitled to ask for and aims at the exact fulfillment of an obligation. It directs the obtaining of the very thing which a person is deprived of. Specific Relief, is a form of judicial redress, belongs to the law of procedure, and in a body of law arranged according to natural affinities of the subject matter. This Act is distinct part than other divisions of Civil remedies.

Part -B

CRIMINAL

Subject - " Admission, exhibition and proving of documents."

SUMMARY OF WORKSHOP PAPER
(Criminal side)

Admission, Exhibition and Proving of Documents

Introduction :

"Document" has broad meaning under the Indian Evidence Act, 1872. Documentary evidence is any evidence introduced in a trial in the form of documents. Although this term is most widely understood to mean writing on the paper, it actually includes any media by which information can be preserved. Admissible evidence is that which a Court receives and considers for the purpose of deciding a particular case. The rules of evidence determine what matters may be admitted or not admitted for the purpose of proving the fact or facts in issue.

In general, a party must disclose every document relevant to any matter in issue that is or has been in its possession, control or power, whether or not privilege is claimed in respect of the document. This is called "discovery of documents". A document must be disclosed if it is relevant to a "matter in issue" in the case, whether or not the documents would be admissible in a trial. Mere discloser of document does not mean that it is automatically entered or admitted in evidence.

Exhibiting of document is nothing but marking of the document by number for identification and does not amount to its proof. It requires to be proved. The contents of documents must be proved either by production of the document itself, which, is called primary evidence or by copies or oral accounts of the contents, which are called secondary evidence.

A) Admission of documents in evidence

There are two basic factors to be considered while determining admissibility of evidence.

(i) Relevance : The evidence must prove or disprove an important fact in the case. If the evidence does not relate to a particular fact, it is considered irrelevant and is therefore inadmissible.

(ii) Reliability : Reliability refers to the credibility of a source that is being used as evidence. This usually applies to witness testimony.

Evidence must be relevant, material and competent. To be considered relevant, it must have some reasonable tendency to help prove or disprove some fact. It need not make the fact certain, but at least it must tend to increase or decrease the likelihood of some fact. A given piece of evidence is considered material if it is offered to prove a fact that is in dispute in a case. Competent evidence is the evidence that accords with certain traditional notions of reliability. Admissibility means that the facts which are relevant are only admissible by the Court. According to Section 136 of the Indian Evidence Act, the final discretion on the admissibility of a evidence lies with the Judge. The essential ingredients of Section 136 are as follows :

(i) It is the Judge who decide the questions of relevancy and admissibility.

(ii) When a party proposes to adduce evidence of any fact, the Judge may ask the party to clarify “in what manner” the fact would be relevant.

(iii) The Judge would admit the particular adduced fact only if he is satisfied with the answer of the party that it is indeed relevant under one or the other provisions of Sections 6 to 55 of the Indian Evidence Act. Thus, the consideration of the relevancy comes first and of

admissibility later and the Judge will admit the fact only if it is relevant.

Admitting document in evidence does not dispense with proof of its contents. Admission of document enables the Court to treat what is recorded therein as evidence. Section 51-A of the Land Acquisition Act, 1894 makes the certified copies admissible in evidence. In the case of **Land Acquisition Officer ...Vs... Narasaiah – MANU/SC/1725/2001**, it has been held,

> "The words "may be accepted as evidence" in the section indicate that there is no compulsion on the Court to accept such transaction as evidence, but it is open to the Court to treat them as evidence. Merely accepting them as evidence does not mean that the Court is bound to treat them as reliable evidence. What is sought to be achieved is that the transactions recorded in the documents may be treated as evidence, just like any other evidence, and it is for the Court to weigh all the pros and cons to decide whether such transaction can be relied on for understanding the real price of the land concern".

(B) Secondary evidence and its admissibility :

Secondary evidence means a reproduction of or substitute for an original document that is offered to establish a particular issue in legal action. It is the evidence that has been reproduced from or substituted for an original document. It is a species of proof which is admissible on the loss of primary evidence and which becomes, by that event, the best evidence.

Section 64 of the Indian Evidence Act lays down that, the documents must be proved by primary evidence only, except in the

cases provided in Section 65 of the Act. Firstly, it is to be seen what is mean by the primary evidence. It means the document itself, while the secondary evidence usually means its copy i.e. a document prepared from the original. For example, the photo copies or copies prepared from the original sale deed are to be treated as its secondary evidence. Similarly, the certified copies of the sale deed filed in the case are also its secondary evidence.

When the original is in possession or power of the person against whom the document is to be proved. Like in a suit for redemption of mortgage, if the original mortgage deed is in possession of the opposite party, the plaintiff-mortgagor can file its certified or xerox copy as a secondary evidence. Similarly, in a case where the person in whose possession the document is, not reachable and such person in spite of sending notice under Section 66 of the Act does not produce the said document.

When the existence, or contents of the original are admitted in writing by the person against whom it is sought to be proved. Suppose if the defendant admits contents of the original sale deed, the document can be proved even by its xerox copy which is obviously a secondary evidence. The secondary evidence can also be adduced, when the original is destroyed or lost or the party wishing to produce it, is unable to produce it, not because of his own fault. In this case, it must be shown by the person seeking permission to lead secondary evidence that he was not responsible for loss of the original. If the plaintiff satisfies the Court that the original document on which he relies was destroyed in the flood, (or other calamities) the permission can be granted to him to lead secondary evidence. The secondary evidence can be led even when the original is of such a nature that it cannot be moved easily. Particularly when the document

is very much voluminous, such permission can be asked. In case where the document is a public document it can be proved by its certified copy, which is evidently the secondary evidence of the original.

It is a general practice that, the application for seeking permission to lead secondary evidence is filed without giving necessary details which entitles the applicant to lead such kind of evidence. Therefore, such application must contain adequate details. The affidavit in support of the application is also necessary. Section 66 of the Act further provides that, notice must be given to the other party, in whose possession the document is, before secondary evidence can be received except when the document itself is a notice or when the adverse party admits the loss of the document.

In the case of **State of Rajasthan ...Vs... Khan Raj – AIR 2002 SC 1759**, it is held,

> "Application seeking permission under Section 65 of the Act to read secondary evidence must contain full details and must be supported by a proper affidavit".

The conditions laid down in Section 65 of the Evidence Act must be fulfilled, before secondary evidence can be admitted.

In the case of **Rakesh Mohindra ...Vs... Anita Beri and Ors. (2015) 8 Mh.L.J. 200,** it has been held,

> " If a party wants to lead the secondary evidence, the Court may examine the probative value of the document produced in the Court or their contents to decide the question of admissibility of secondary evidence. At the same time, it is also necessary for the party to show that how he is legally entitled to lead secondary evidence. It is further observed that, neither mere admission of a

document in evidence nor mere exhibiting it, dispense with its proof. Similarly mere admission of secondary evidence, does not amount to its proof. The genuineness, correctness and existence of the documents shall have to be established during the trial and the trial Court shall record the reasons before relying on those secondary evidence".

C) Electronic evidence – Proof and admissibility

As per amended provision Sec 3(2) of evidence Act, **electronic evidence** is documentary evidence. All documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence. Under Section 2(t) of Information Technology Act, 2000 **electronic record** means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

As per Sec. 22A of Evidence Act, oral evidence as to the contents of electronic records are not relevant, unless the genuineness of electronic record produced as in the question.

In the light of the provisions incorporated under Sec. 65-A & 65-B of Evidence Act, Electronic Evidence is one another type of documentary evidence which is if duly proved in the manner provided in sec 65-B, can be considered as strong evidence.

Evidence Act deals exclusively with the admissibility of the electronic record which in view of the compelling technological reasons can be admitted only in the manner specified under Section 65-B Indian Evidence Act.

Section 65-B provides admissibility of electronics records but it must be:-

i) Computer output of the information stored in optical / magnetic

media is deemed documents and can be produced in evidence.

ii) The conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original.

a) Out put was produced / generated by computer when it was used regularly to store / process the information, it was used for activities regularly carried on during the period.

b) Out put was by the person having lawful control over the use of computer.

c) It will have to establish that during the period information was being regularly feed.

d) That through out the material period the computer was operating properly. During that period if the computer was out of order, it had not affected the electronic record and accuracy.

e) The computer out put is reproduction / derivation of the information feed in the ordinary course of business.

iii) Where over the period, the computers are used for processing and storing the information for activities regularly carried out as mentioned in sub section 2(a) of section 65-B by use of more than one computers either in succession or simultaneously or by different combination, such use of computer /combination shall be deemed to be a single computer for the purpose of this section. Consequently, out of any terminal / computer would be deemed primary evidence if conditions in Sub-section 2 are satisfied.

iv) In the proceeding where computer out put is desired to be produced in evidence, a certificate by a person responsible for the operation of the computer system or the management of related activities shall be the evidence of matter stated in the certificate, stated to be true to the best of knowledge and belief of the person

certifying his certificate.

The certificate may give following details:-

a) Identification of the electronic record and description of manner of production.

b) Particulars of device used in production and

c) Details indicating compliance of condition in para 2 above.

v) For the purpose of this section:-

a) The information shall be taken as supplied to the computers, if supplied in appropriate form, whether directly or by other appropriate equipment.

b) Even if the information is supplied to the computer by a computer otherwise in the course of those activities, information is duly supplied to that computer in the course of activities carried out by official with a view to process and store, the information shall be deemed to have been duly supplied.

c) Out put shall be deemed to be production by the computer, even if the same is directly or by other appropriate equipment like printer.

In the light of the provisions incorporated under Sections 65-A and 65-B of the Evidence Act, electronic evidence is one another type of documentary evidence which is, if duly proved in the manner provided in Section 65-B, can be considered as strong evidence.

In the case of **Anvar ...Vs... Basheer and Ors. – (2014) 10 SCC 473,** an election petition was filed to set aside election on the ground that alleged songs, announcements and speeches made as part of election propaganda amounting to corrupt practice. Speeches, songs and announcements were recorded using some instrument by feeding them into computer and CDS were made. These CDS were produced in Court as proof of allegations. However, certificate in terms of

section 65-B of Evidence Act was not produced in respect of such CDS. The Hon'ble supreme court has held that admissibility of secondary Evidence of electronic record depends upon satisfaction of condition as prescribed under section 65-B. However, if the primary evidence of the electronic record is produced i.e. original electronic record itself is produced in court, then the same is admissible in evidence without compliance with conditions in section 65-B. It is further held that producing copy of statement pertaining to electronic record in evidence not being the original electronic record, such statement has to be accompanied by a certificate as specified in section 65-B (4). In absence of such certificate, secondary evidence of electronic record is not permissible.

Hon'ble the Supreme Court in the case of **Tomso Bruno and anr. ...Vs... State of U.P.** decided on **20/01/2015** has held,

> "The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by section 65-B of the Evidence Act. The contention of the petitioner that the Floppies, Pen-drives, CDs etc., seized in this case should be treated as mere goods cannot be accepted. But, they are electronic records/documents."

Uday Kumar Singh Vs. State of U.P. decided on 01-04-2015 (S.C.)

In this case, the trial Court convicted the accused and awarded death sentence. Hon'ble Patna High Court set aside the conviction. Matter was before Supreme Court. In the said matter Investigating Officer obtained the print out of the subscribers of mobile numbers and accordingly accused were identified. Hon'ble High Court held that the print-out, which was produced before the Court has not been proved in accordance with the provisions of Section 65B of the Evidence Act. Further, the High Court noticed that the print-out

produced does not bear any certificate of the competent officer of the telephone exchange, certifying the correctness of the data indicated therein. Hence, Apex Court held that Hon'ble Patna High Court correctly held that the said printout cannot be admitted in the evidence and it would not be safe to rely on the same for convicting the accused.

Presumptions regarding genuineness of Electronic Evidence are that – i) every electronic record purporting to be the Official Gazette or any legally governed electronic record kept substantially in the form required by law and produced from proper custody; ii) every electronic record purporting to be an agreement containing the electronic signatures of the parties was so concluded by affixing the electronic signature of the parties; iii) secured electronic record has not been altered unless contrary is proved; iv) information listed in a electronic signature certificate is correct; v) electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; vi) electronic signature on electronic record, purporting or proved to be five years old, produced from any custody which court consider proper.

D) <u>Different modes of proving of documents under Evidence Act</u>

The contents of documents must be proved either by the production of the document itself which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence.

<u>By admission</u> :

An admission can be oral or written. Admission by a party

of execution of the document by himself, dispenses with the proof.

In the case of **Narbada Devi Gupta ...Vs... Birendra Kumar Jaiswal – AIR 2004 SC 175**, it is held,

> " Mere production and marking of a document as exhibit by the Court cannot be held to by due proof of its contents, its execution has to be proved by admissible evidence i.e. by the "evidence of those persons who can vouchsafe for the truth of the facts in issue". The situation is however different where the documents are produced, they are admitted by the opposite party, signatures on them are also admitted and they are marked thereafter as exhibit by the Court."

By examination of scribe :

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting**.** It mandates that the signature and handwriting of a person on a written document can be proved only by examining the person concerned. The best evidence is that of a person who executed it.

By examination of attesting witness :

If a document is required by law to be attested, its execution shall be proved by at least one attesting witness. It shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, unless its execution is denied. For example, a deed of conveyance was denied to have been executed by its executant and all the attesting witnesses are dead. A person knowing the handwriting of one of the attesting

witnesses deposed that the signature of that witness is genuine. Therefore, the execution of deed is proved and it is admissible in evidence.

By opinion of expert/ By person acquainted with handwriting :

An expert witness is one specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible to enable the Court to come to a satisfactory conclusion. His opinion may be relevant by itself but it carries little weight unless supported by clear statement of what he noticed and upon what he based his opinion.

By Court's Comparison

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**.** The provisions of this section will apply only when a matter is pending before the Court and not otherwise. The Court may compare the disputed signature, writing, or seal of a person with signatures, writings or seal which have been admitted or proved to the satisfaction of the Court to have been made or written by that person. In the case of **State of Maharashtra ...Vs... Sukhdeo Singh – AIR 1992 SC 2100**, it is held,

"Court should be slow to compare disputed document with

admitted document for comparison although Section 73 empowers the Court to compare disputed writing with the specimen/admitted documents shown to be genuine."

E) <u>Presumption as to documents thirty years old (Section-90):-</u>

As a general rule if a document is produced before a Court, its execution must be proved by a witness and if the document is required by law to be attested, its attestation must also be proved by some witness. But as per section 90 there is a presumption regarding 30 years old documents.

<u>Conditions for presumption:</u>-

(i) It must have been in existence for 30 years or more.

(ii) It must be produced in court from proper custody.

(iii) The document must be in appearance free from suspicion.

(iv) Which purports to be in the handwriting of a person and should not be anonymous.

The age of the document, its unsuspicious character, the production from proper custody and the other circumstances are the foundation for the presumption under this section. The presumption in section 90 is of due execution and attestation of an old document. The presumption does not extend to the truth of the contents of the document.

<u>Example:-</u> "A" executes a will in favour of "B" in the year 1901. The will was written by" C "and signed by "A "in presence of "D" and "E" and they affixed their signatures on the will in presence of "A" as a mark of attestation. In the year 1940, "B" filed a suit against one "X" alleging that he (B) became owner of the property through the will mentioned above. "X" denied the execution of the will. "B" produced the will before the court on the date of the controversy, the will was

more than 30 years old, as it was produced by "B" in whose possession it naturally should have been so it was produced from proper custody. It might be presumed by the court that the will was duly executed and attested and "B" may be exempted from proving the will. If a document more than 30 years old is produced from proper custody its genuineness may be presumed.

F) <u>Exhibition of documents under Evidence Act</u>

Exhibition of documents is nothing but administrative act of the Court. The purpose of exhibiting the document is to give identity to that particular document. It means that even if the document is exhibited, it cannot be said that it is proved. Likewise, if the document is not exhibited, it cannot be said that it is not proved. If document produced by one party is admitted by other party, it can be exhibited even if such document is xerox copy.

Certified copies of public documents are to be exhibited as there is presumption regarding their correctness & genuineness as per Sec. 86 of the Evidence Act. However, it is apposite to note that the maps or plans made for the purpose of any cause cannot be exhibited unless its accuracy is proved through the testimony of the person who prepared said maps or plans, in view of Sec. 83 of the Evidence Act.

Will cannot be exhibited except examination of one of attesting witnesses. Onus to prove execution of will always lies upon the person propounding it. If execution of sale deed is not disputed, it can be exhibited through the evidence of executee or executor & therefore, there is no need as such to examine the attesting witness on the sale deed. If the document is referred in cross-examination of the witness, it cannot be exhibited unless its contents are admitted by the

said witness. However, in criminal trials, if contradictions are proved through testimony of the investigation officer, the same can be exhibited.

Para 34 & 35 of Criminal Manual deal with exhibition of document

Para. 34 **:-** When a witness proves any document, the correct exhibit number should immediately be noted (i) on the document itself, and (ii) in the body of deposition against the description of the document so that the Appellate or Revisional Court may not be required to waste its time in tracing the document. Similarly, when another witness who has already been examined is referred to by any witness in its deposition, the exhibit number of the deposition of such other witness should invariably be noted in the deposition immediately after the reference to the witness.

Para 35 :- When only a portion of document is admissible, a note should be made as soon as the document has been proved and admitted into evidence stating the part admitted into evidence. The exclusion of the inadmissible portion of such documents should not be left over for consideration at the time of writing judgment.

In the case of **Bama Kathari Patil ..V/s.. Rohidas Arjun Madhavi – 2004 (2) Mh.L.J. 752,** it is held,

> "A document is required to be proved in accordance with the provisions of Indian Evidence Act. If merely for administrative convenience of locating or identifying the document, it is given an exhibit number by the Court, it has nothing to do to its proof though as a matter of

convenience only the proved document is to be exhibited. Thus, exhibiting a document is an administrative act. If a document is seen to have been duly proved, but mistakenly or otherwise is not exhibited still the document can be read in evidence. This makes its clear that the document is required to be proved in accordance with the provisions of Indian Evidence Act. Whether it is exhibited or not, it makes no difference as such a proved document has to be read in evidence being admissible".

Whether a document can be de-exhibited ?

Some times there arises question regarding de-exhibition of document. Once the document is exhibited in evidence, it cannot be de-exhibited. If the court finds at the final stage that objection raised is sustainable then such evidence can be excluded from consideration. In the case of **Sunil Tukaram Bharadkar Vs. Santosh Gopichand Rane-- 2006 (5) B.C.R. 237**, it has been held,

".... the documents were yet to be exhibited in evidence in accordance with the provisions of law under Order 18 Rule 4 read with Order 13 Rule 4 of the Civil Procedure Code and that function was performed by the trial Court on 16/8/2005. Being so merely because the expression "de-exhibited" has been used in the order dated 16/8/2005, it would not amount to de-exhibition of documents in evidence. It would simply mean that the documents other than those which are exhibited in terms of Order 13 Rule 4 on 16/8/2005, are not admitted in evidence."

G) EXPERT EVIDENCE

Expert means one who is skilled in any particular art or trade, profession being professed of particular knowledge, concerning the same. And if a person has acquired any special experience or special training in a particular subject to which Court enquiry relates, such a person can be considered as an expert. There are Medical experts, Hand-writing experts, Report of Ballistic and Fire-arms experts, Goldsmith as experts, Fingerprint Expert, Chemical Analyzer etc.

There is nothing in the Act which requires the evidence of an export to be corroborated. As a matter of fact Courts do not ordinarily base their decision on export evidence only, unless it is corroborated or supported by other evidence. Similarly, Section 46 of The Evidence Act states that facts, not otherwise relevant, are relevant if they support or are inconstant with the opinions of experts, when such opinions are relevant.

When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the hand-writing of the person by whom it is supposed to be written or signed that it was or was not written or was not signed by their person, is a relevant fact. Expert's opinion must be supported by reasons and it is a reason which is important in assessing the merit of the opinion.

Section 47-A of the Evidence Act, inserted by the Information Technology (amendment) act 2000, states that 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.

Section 45-A of the Evidence Act, inserted by the

information Technology(amendment) act 2008 States that when in proceeding the Court have to power an opinion on a matter relating to any information transmitted or store in any computer resource or any other electronic or digital form, the opinion of the Examiner of electronic evidence referred to in Section 79-A The Information Technology Act 2000, is relevant fact. However, explanation to Section 45-A mandates that examiner of electronic evidence shall be an expert.

In the case of **Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. & Ors. – 2010 AIR SC 806,** it is held,

> "In order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquire special experience therein or in other words that he is skilled and has adequate knowledge of the subject".

Under section 292 of Criminal Procedure Code, the reports of certain Gazetted officers of Mint or of Indian Security press upon any matter duly submitted to them for examination and under section 293 reports of certain Govt. scientific experts, namely: (a) Chemical Examiner or Asst. Chemical Examiner; (b) Chief Inspector of Explosives; (c) Director of Finger Print Bureau; (d)Director, Haffkeine Institute; (e) Director, Deputy Director and Asst. Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory; (f) Serologist to the Govt are admissible in evidence without calling them as witness even though the Court may summon and examine them, if it thinks fit.

Conclusion :

Thus, all these provisions prescribed in the Indian Evidence Act aims that, the documents relied upon by the parties are

properly proved and established, so that there shall not be any grey area while deciding their rights. Whenever any transaction is reduced into writing, the intention of the parties can be best known by going through that document itself. Any other extraneous evidence cannot take that place. Therefore, it is very important for the Court to interpret that document in the right way to come to the right conclusion as to what was the intention of the parties, while making that document. The provisions regrading proof of the document aims to achieve this basis object. Similarly it also take care that, the valuable rights of the party shall not be taken away only because the document on which he relies is not possessed by him or it is lost. Now due to advent of technology the suitable amendments are made in the Indian Evidence Act, with regard to electric record, which specifically states how the digital documents or records can be proved in the Court of law. Hence, a thoroughly study of all these provisions and it's precedents will certainly help us in deciding whether a particular document is properly proved or not and with what intention it was bought into existence.