Introduction

Chapter VI of Evidence Act deals with exclusion of oral evidence by documentary evidence. Documents once reduced into writing are considered to be the best evidence. It is on the higher footing than oral evidence. The very object for which writing is used is to perpetuate the memory of what is written down, and so to furnish permanent proof of it. In order to give effect to this, the document itself must be produced. Assuming that the document has been produced as required, the important pair of Sections in Indian Evidence Act, 1872 [hereunder referred to as 'Evidence Act'] with certain provisos, excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from, its terms. Section 61 of Evidence Act provides that the contents of documents may be proved by primary evidence or its secondary evidence. Section 62 of Evidence Act makes it clear that primary evidence is the document itself.

This Chapter VI of Evidence Act begins with Section 91. It deals with the exclusion of oral evidence by documentary evidence. Section 91 of Evidence Act contains two exceptions, two explanations and five illustrations. Production of the document is required by said Section to prove its contents. In a sense, the rule enunciated by Section 91 of Evidence Act can be said to be an exclusive in as much as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed. It is based on the **'best evidence rule'**. The best evidence rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its desire is to prevent the introduction of any evidence than the document itself. It is adopted for the prevention of fraud or when better evidence is withheld. It is fair to presume that the party has some sinister motive for not producing the best evidence and that if offered his design would be frustrated. This Section lays down the best evidence rule but it does not prohibit any other evidence where writing is capable of being construed differently and which shows how the parties understood the document.

Under this Section 91 of Evidence Act,

(1) when the terms of

(a) a contract,

(b) a grant; or

(c) any disposition of property

have been reduced to the form of a document; or

(2) where any matter is required by law to be reduced to the form of a document, then

(a) the document itself, or

(b) secondary evidence of its contents,

must be put in evidence.

There are two exceptions to these provisions:

(1) When a public officer is required by law to be appointed in writing; and any officer has acted as such, the writing need not be proved;

(2) *Will* admitted to probate in India may be proved by the probate. Sec. 91 and 92 applies only to contracts, grants and other dispositions of property.

A *Will* is neither a contract, nor a grant, nor a disposition of property until the death of the testator makes it operative. Hence, these Sections do not apply to *Wills*.

The expression "*any other disposition of property*" would include a sale, mortgage including equitable mortgage, lease and sub-lease. Where a document is intended to be the evidence of a partition, oral evidence as to the terms of the document is excluded by this Section. The oral evidence is admissible to prove the intention and conduct of the parties as to whether the transaction is to be treated as a sale or mortgage.

The expression "*terms*" in Section 91 and 92 of Evidence Act relates to statements, assertions or representations contained in a written contract and to something to be done or not to be done under the contract, and has no application to a provision in the nature of a condition precedent to the very existence or formation of a contract. The Section does not preclude from proving that the real contract was different from what was found in the deed.

Few Examples:

Where Government land was sold to displaced persons and deeds of conveyance were issued, oral evidence to add to the terms are not admissible. Where certain specified plots have been transferred through

the sale-deed, a party to the sale-deed cannot be permitted to lead evidence to show that plots other than the specified plots were intended to be transferred, as it would amount to permitting evidence to contradict, vary, add to or subtract from the terms of the contract impermissible in view of Section 91 of the Evidence Act. In the sale-deed, when there was no mention of any easement, the same cannot be brought by oral evidence. An agreement to refer to an arbitration is a contract within the meaning of this Section. A receipt acknowledging payment of money is not a contract or a grant nor in the ordinary sense of the terms is it a disposition of property within the meaning of Section 91 and so oral evidence is admissible where the receipt is found to be suspicious or is unregistered. An agreement to compromise is a contract within the meaning of this Section, and so also an agreement to sell.

The expression 'any other disposition of property' [as appearing in the text of Section 91 of Evidence Act] would include a sale, mortgage including equitable mortgage, lease and sub-lease. Where a document is intended to be the evidence of a partition, oral evidence as to the terms of the document is excluded by this Section. The oral evidence is admissible to prove the intention and conduct of the parties as to whether the transaction is to be treated as a sale or mortgage. By this process parties were able to show that they intended to enter into a transaction of mortgage and not sale[1]. The surrounding and attending circumstances are relevant for the construction of the document only when some ambiguity exists in the document and not otherwise[2].

It is a cardinal rule of evidence, not one of technicality but of substance, which is dangerous to depart from that where written documents exist, they shall be produced as being the best evidence of their own contents. Thus, it is a matter both of principle and policy; of principle, because such instruments are in their nature and origin entitle to much higher degree of credit that parole evidence; of policy, because it would be attained with great mischief, if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence.

Oral evidence is not excluded where the fact to be proved is neither

1 *Tulsi Vs. Chandrika Prasad,* AIR 2006 SC 3359
2 *State Bank of India Vs. Mula Sahakari Sakhar Karkhana* (2006) 6 SCC 293

the contents of a document, nor the terms of a contract, grant or disposition of property, nor a matter required by law to be reduced to writing. Where a matter does not fall within any of the three classes, no reason exists why it should not be proved by oral evidence. For instance, if a written communication be accompanied by a verbal one to the same effect, the latter may be received as independent evidence though not to prove the contents of the writing, nor as a substitute for it.

Explanation III appended to Section 91 of the Act:

Other evidence not excluded if the fact to be proved is a fact other than facts referred to in the Section. The facts referred to in the Section are, (i) the terms of a contract, grant or other disposition of property, and (ii) matters required by law to be reduced to writing. Where, therefore, evidence tendered does not relate to the terms of a contract, grant or other disposition of property, or to a matter required by law to be reduced to writing, it will not be inadmissible. Illustrations (d) and (e) appended to Section 91 of Evidence Act makes it easy to understand the provision. A mere receipt for payment of money is not a contract, grant or other disposition of property and hence, evidence in proof of the payment of money is admissible. Conversely, where a receipt for money has been given, it may be shown by oral evidence that the money was, in fact, not paid.

Section 91 deals with the proof of two distinct matters : (i) the terms of contract, grant or disposition of property; and (ii) the terms of matters required by law to be reduced to writing. In the first case, to exclude oral evidence it is necessary to show that the terms of contract, grant or disposition of property were reduced to writing; but in the second case, the language of the Section is self explanatory to mean that oral evidence is excluded whether the matter has or has not been reduced to writing. When a particular transaction is required by law to be in a particular form, then it follows that no one setting up such a transaction can seek to prove it except by showing that it was done in that form. Therefore, where a contract, grant or disposition of property is itself a matter required by law to be reduced to writing, oral evidence in proof of the term of that contract, grant or disposition of property, will be inadmissible whether it has been actually

reduced to writing or not. Thus, in the States where Transfer of Property Act is in force, certain transfers [for example, Sales, Mortgages, Gifts] are required to be in writing and oral evidence in proof of the terms of such transfers is inadmissible whether such transfers have or have not been reduced to writing.

There is a distinction between proof of the terms of contract or grant and proof of the fact that a grant was made or a contract was entered into. The fact of a grant or contract as distinct from the terms of the grant or contract can be proved by other evidence. Section 91 of the Evidence Act excludes other evidence in proof of the terms of contract, grant or other disposition of property, and not in proof of the factum or existence of any such transaction. Thus, the fact of the existence of the particular relationship may be shown by oral evidence, through the terms which govern such relationship appear to be in writing. The rule contained in Section 91 of Evidence Act applies to the terms and not to the factum of a contract.

Distinction between Sections 91 and 92:

The two Sections, however, differ in some material particulars.

1. Section 91 deals with the exclusiveness of documentary evidence. It deals with the proof of the matters mentioned in that Section. On the other hand, Section 92 deals with the conclusiveness of such evidence. It deals with disproof of the matters mentioned in the Section.
2. Section 91 makes inadmissible oral evidence of the terms of a contract or of a grant, or of any other disposition of property which have been reduced to the form of a document. Section 92 provides that when the terms are proved by the document, no evidence of any oral agreement or statement shall be admitted, as between the parties, to contradict or vary them. Section 92 has application when the terms of a contract, grant or other disposition of property, among other things, have been proved in accordance with Section 91.
3. The distinction between these two Sections as well as Section 99 has been clearly brought out by the Honourable Supreme Court in *Bai*

Hira Devi V. Official Assignee of Bombay[3] wherein it is held that, *"The final position, therefore, is that if the terms of any transfer reduced to writing are in dispute between a stranger to a document and the party to it or his representative-in-interest. Section 92 does not prevent both the stranger to the document and the party there to or his representative-in-interest, to lead evidence of oral agreement, notwithstanding the fact that such evidence if believed may contradict, very, add to or subtract from, its terms."* It has been further observed that "*In fact, S. 91 and 92 really supplement each other. It is because S. 91 by itself would not have excluded evidence of oral agreements which may tend to vary the terms of the document, that S.92 has been enacted; and if S. 92 does not apply to a case, there is no other Section in the Evidence Act which can be said to exclude evidence of agreement set up".*

4. Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of relevant documents themselves under Section 91; in other words, it is after the document has been produced to prove its terms under Section 91 that the provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.
5. Section 91 applies to all documents, whether they purport to dispose of rights or not. Section 91 applies to documents which are both bilateral and unilateral, unlike 92, the application of which is confined only to bilateral documents.
6. Section 91 lays down the rule of universal application and is not confined to the executants of the documents. Section 92, on the other hand, applies only between the parties to the instrument or their representatives in interest. There is no doubt that Section 92 does not apply to strangers who are not bound or affected by the terms of the document. Persons other than those who are parties to

3 *AIR 1958 SC 448*

the document are not precluded from giving extrinsic evidence to contradict, vary, add to, or subtract from, the terms of the document.

Relationship amongst Section 91 and 92 of Evidence Act:

It would be noticed that Sections 91 and 92 of Evidence Act are supplemental to each other. In old but landmark case of *Bhawanbhai Premabhai versus Bai Vahali*,[4] it has been observed that Section 92 is supplementary to Section 91 of Evidence Act, and is [to some extent] implied in it. Section 91 would be frustrated without the aid of Section 92 and Section 92 would be inoperative without the aid of Section 91. Since Section 92 excludes the admission or oral evidence for the purpose of contradicting, varying, adding to or subtracting from, the terms of the document property proved under Section 91, it may be said that it makes the proof of the document conclusive of its contents.

It is only where a question arises about the effect of the document as between the parties or their representatives-in-interest that the rule enunciated by Section 92 about the exclusion of oral agreement can be invoked. This position is made absolutely clear by the provisions of Section 99 itself. Section 99 provides that 'persons who are not parties to a document or their representative-in-interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document. Though it is only variation which is specifically mentioned in Section 99, there can be no doubt that the third party's right to lead evidence which is recognized by Section 99 would include a right to lead evidence not only to vary the terms of the document, but to contradict the said terms or add to, subtract from, them. If that be the true position, before considering the effect of the provisions of Section 92 in regard to a party's right to lead oral evidence, it would be necessary to examine whether Section 92 applies at all to the proceedings.

The bar imposed by sub-Section (1) of Section 92 of Evidence Act applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted

4 *AIR 1955 Bombay 320: (1954) 57 Bom LR 250*

as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-Section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatsoever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties[5].

The legal position that emerges from the discussion of the authorities and the relevant provisions of the Evidence Act is that S. 92 of the Evidence Act does not constitute a bar to an attempt on the part of a party to prove that the real transaction in suit was different than what the document or documents in suit purport to show. While this can be done by showing the surrounding circumstances, and perusing the document or documents themselves, oral evidence to prove the real nature of transaction can also be led and Section 92 of the Evidence Act would not stand in the way.

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.

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5 *Gangabai w/o Rambilas Gilda vs Chhabubai w/o Pukharajji Gandhi* AIR 1982 SC 20,

When a transaction has been reduced into writing either by requirement or agreement of parties, the writing becomes an exclusive memorial thereof and no extrinsic evidence appears to be either to prove independently transaction, or to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved either by primary or secondary evidence[6].

Honourable Supreme Court in the case of *Hiradevi Versus Official Assignee Bombay*[7] has considered the scope of Section 92 of the Evidence Act. 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. It is held that, Section 92 of the Evidence Act was not applicable to the proceedings and the appellants were entitled to lead evidence in support of the plea raised by them. Section 92 is only applicable to cases as between parties to an instrument or their representatives-in-interest. Where, however the dispute is between a stranger to an instrument and a party to it or his representative in interest, Section 92 is inapplicable, and both the stranger and the party or his representative are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence if believed, may contradict, vary, add to or subtract from its terms. It was held that Section 92 of the Evidence Act come into operation for the purpose of excluding evidence of oral agreement or statement, after the document has been produced to prove its terms under Section 91 of the Act. It was further observed that Sections 91 & 92 in effect supplement each other. Section 91 would be frustrated without the aid of Section 92 and Section 92 would be inoperative without the aid of Section 91. Section 92 makes the proof of the document conclusive of its contents. Thereafter, the Honourable Supreme has explained the distinction between two Sections by stating that they differ in some material particulars. Section 91 applies to all documents,

6 *Roopkumar Vs. Mohan Khedani,* AIR 2003 SC 2418
7 AIR 1958 SC 448

whether they purport to dispose of rights or not, whereas Section 92 applies to documents, which can be described as dispositive. Section 91 applies to documents, which are both bilateral and unilateral, unlike Section 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant/s of the documents. Section 92, on the other hand, applies only between parties to the instrument or their representatives in interest.

There are two reasons for exclusion of oral evidence. Firstly, when the law requires superior evidence, inferior evidence cannot be admitted. Secondly, when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.

Exceptions to the rule:

There are six exceptions to the general rule under Section 92 of Evidence Act.

(1) Any fact which would (i) invalidate any document or (ii)entitle any person to any decree or order relating thereto may be proved, such as fraud, intimidation, illegality, failure of consideration, mistake of fact or law.

(2) Any separate oral agreement (i) as to any matter on which the document is silent, and (ii) which is not inconsistent with its terms, may be proved.

(3) Any separate oral agreement, constituting a condition precedent to the attaching of any obligation under the document, may be proved.

(4) Any subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except when such contract of grant (i) is required to be in writing, or (ii) has been registered.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not repugnant to, or inconsistent with, its express terms.

(6) Any fact which shows in what manner the language of the document is related to existing facts, may be proved.

Proviso (1) provides that any fact may be proved which would invalidate any document which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want of consideration or mistake in fact or law. Under the said proviso, the facts which may be proved must be such as to show either that legal requisites for a valid agreement did not exist at all or that one of the parties did not give his free consent to it or that document does not express what was really intended to be embodied therefore parol evidence may be given to show that by a mistake of parties not entered into valid contract. The evidence of contemporaneous oral agreement contracting document is admissible therefore for example, usufructory mortgagee has right to show that he has not mortgaged the property. In a mortgagors suit for redemption, oral evidence can be admitted to prove that the document was not intended to be acted upon and it was sham document executed only as co-lateral security. Such evidence does not have the effect of varying or contradicting the terms of documents[8].

Proviso (2) provides that existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved therefore, when a document in writing does not contain the entire agreement but, embodies only some of the conditions, oral evidence to prove some other terms agreed upon and not inconsistent with the written instrument is admissible[9]. The separate agreement should be on a distinct collateral matter, although it may form part of same transaction; the test being that it should not vary or contradict the terms of written contract. For example when a promissory note was silent as to interest, subsequent verbal agreement to pay interest can be allowed to be proved.

Proviso (3) provides that, existence of any separate oral agreement, constituting condition precedent to be attaching of any obligation under such contract, grant or disposition of property, may be proved. As per this proviso, when there is separate oral agreement, the terms of written contract will not take effect or will be of no force until a condition

8 *Ishwardas Jain Vrs. Sohanlal AIR 2000 SC 426*

9 *Balaram Vrs. Ramesh AIR 1973 Orissa 13*

precedent has been fulfilled or certain event has happened, oral evidence is admissible to show that the conditions not having been performed the contract did not mature so there was no written agreement at all. It is permissible to adduce evidence of contemporaneous agreement under which the parties agreed that until happening of certain event, no obligation whatever under the written contract should attach[10].

Proviso (4) deals with three situations (A) Where a transaction has been reduced into writing not because the law requires but, by agreement for the convenience of the parties, oral evidence of any distinct subsequent oral agreement modifying or rescinding it altogether is admissible. Thus, oral evidence is admissible to show that prior written contract has been waived or replaced by new parol agreement. (B) Where a transaction has been reduced to writing because law requires to be in writing then, subsequent agreement rescinding or modifying should also be writing, and oral agreement is not admissible. (C) In a contract, grant etc. has been registered, parol evidence of any subsequent agreement modifying or rescinding the registered instrument is not admissible but, it can be modified only by another registered instrument.

Proviso (5) provides that Oral evidence is admissible to explain or supply terms in commercial transaction for example contracts, Bill of exchange, insurance policies etc. on the presumption that contract is to be interpreted or regulated by established usages or customs provided that they are not inconsistent with the terms of contract.

Proviso (6) provides that any fact may be proved which shows in what manner the language of document is relating to existing facts. The object of the admissibility of the evidence of surrounding circumstances is to ascertain the real intentions of the parties, but those intentions must be gathered from the language of the document as explained by extrinsic evidence. No evidence of any intention inconsistent with the plain meaning of the words use will be admitted, as the object is not to vary the language used, but merely to explain the sense in which the words are used by the parties. Thus, this proviso comes into play when there is latent ambiguity in the document i.e. when there is conflict between plain meaning of

10 *Narandas Vrs. Pappamal* AIR 1967 SC 333

language used and the facts existing or when put together they lead to an ambiguity. Extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of subject matter of the instrument, or in other words to identify the persons and things to which the instrument refers must of necessity be received. It was held by the Hon'ble Apex Court that Section 92 precludes a party who under valued the property for the purpose of stamp duty from claiming that their own document did not reflect the correct market value. Estoppel arises under Section 115 of Evidence Act[11].

It was held by the Honourable Supreme Court in the case of *Kamladevi Versus Takhatmal*[12] that if the words are clear in the context of surrounding circumstances the court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document.

It is held in the case of *Chhaganlal Kalyandas V. Jagjiwandas Gulabdas*[13] that proviso 3 presupposes that the contract, grant or disposition of property itself remains intact, but the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder.

Unstamped or insufficiently stamped documents:

It is settled law that unstamped or insufficiently stamped documents cannot be used in evidence. Section 35 of the Indian Stamp Act prohibits the use of any instrument chargeable with duty unless it is duly stamped. Where probate was insufficiently stamped and therefore inadmissible in evidence, the terms thereof cannot be proved by adducing oral evidence, since it is barred under Sec.91 of the Evidence Act.

Benami Transaction:

It applies only to the terms of a transfer and does not preclude the admission of any evidence to show the benami character of the transaction. The Honourable Supreme Court allowed oral evidence to show that the real

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11 *Krishi Utpanna Mandi Samitee Vs. Bipin Kumar, AIR 2004 SC 1850*
12 *AIR 1964 SC 859*
13 AIR 1940 Bombay 54: *(1939) 41 Bom LR 1263*

tenant was someone other than the ostensible tenant[14].

Some important judicial pronouncement:

It is held in the case of *Hriday Narayan Versus Shyam Kishore Singh*[15] that where an unregistered partition deed is not admissible in evidence, other evidence may be adduced by a member to show the extent of his land holding and such evidence has to be considered.

It is held in the case of *Parvinder Singh V/s Renu Gautam*[16] that an oral evidence in departure from the terms of a deed is admissible to show that what was mentioned in the deed was not a real transaction, but that was something different.

It is held in the case of *Shankarlal Ganulal V/s Balmukund*[17] that oral evidence was allowed to show that the sale deed was executed not as a sale deed but by way of security for the loan transaction between the parties."

It is held in the case of *Fabril Gasona V. Labour Commissioner*[18] that an industrial dispute was compromised under a settlement. The Industrial Disputes (Central) Rules 1957 contemplate only written settlement. No oral agreement was allowed to prove to vary, modify or supersede the written settlement.

It is held in the case of *Bageshri Dayal V. Pancho*[19] that plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. The plaintiff not being a party to transaction was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale.

It is held in the case of *Svenska Handelsbanken V. Indian Charge Income*[20] that Fraud would have to be proved by leading evidence and not by mere avernments in the pleading. The material on record must be capable of spelling out at least a prima facie case of fraud.

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14 *Niranjan Kumar Vs Dhyanshing* AIR 1976 SC 2400
15 AIR 2002 SC 2526
16 AIR 2004 SC 2299
17 AIR 1999 Bom 260
18 AIR 1997 SC 954
19 (1906)28 All 473
20 AIR 1994 SC 626

It is held in the case of *Krishi Utappadan Mandi Samiti V. Bipin Kumar*[21] that Section 92 precludes a party who undervalued the property for the purposes of stamp duty from claiming that their own document did not reflect the market value.

It is held in the case of *Prayya Allayya Hittlamani V. Prayya Gurulingayya Poojari*[22] that the consent decree did not cover the entire dispute between the parties and also some vagueness remained. The factual background as also the manner in which the existence of rights had been claimed by the parties had also to be considered. Evidence could be given of such matters, Section 92 of Evidence Act was not attracted.

It is held in the case of *Gangabai V. Chhababai*[23] that the distinction in point of law is that the evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is permissible. There is no rule of law to estop parties from showing that a paper, purporting to be a singed agreement, was in fact singed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid or something else was done, or that was intended to be a sham and not operative.

New Contract:

This proviso does not exclude evidence of a subsequent oral agreement substituting a new contract for one reduced to writing and registered according to law, the said proviso only referring to subsequent oral agreement to rescind or modify such contract. The distinction between a substituted new agreement by novation and the mere alteration of an old contract is that in the former case the old contract is extinguished, while in the latter it remains binding subject to the alteration which the parties have agreed to.

Extraneous Evidence when admissible:

It is held in the case of *Kailash Chandra Nath V. Sheikh Chhenu*[24] that a receipt which purported to show that simple and not compound interest was to be charged (though the mortgage bond contained provision

21 AIR 2004 SC 1850
22 *AIR 2008 SC 241*
23 AIR 1982 SC 20
24 (1914) 42 Cal. 546

for the payment of compound interest), was held to be admissible in evidence. The receipt did not require the registration and was therefore admissible in evidence. It operated as a waiver.

Extraneous Evidence when not admissible:

A lease contained a covenant for renewal of the lease whereby if the lessee desired to renew the lease he should give three months' notice in writing of his intention to do so. The lessee, however, failed to observe this covenant and relied on an oral agreement between himself and his lessors for renewal of the lease. It was held that evidence of such oral agreement was not admissible. Oral evidence was similarly not allowed to show that another person than the one mentioned in the deed was intended to be the lessee. Variation of rent fixed by a registered lease deed must be made by another registered instrument. The rent was increased under a separate agreement. It being a variation of the registered deed was not admissible.

Parole evidence of usage or custom is admissible in aid of the construction of a written instrument. Such evidence is received for explaining or filing up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writing of a similar kind, when the language, though well understood by the parties, and by all who have to act upon it in matter of business, would often appear to the common reader scarcely intelligible and sometimes almost a foreign language. The terms used in the instruments are to be interpreted according to the recognized practice and usage with reference to which the parties are supposed to have acted; and sense of the words, so interpreted may be taken to be the appropriate and true sense intended by the parties. But the rule of the admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication. where the incident sought to be annexed to a contract is unreasonable or illegal, it cannot be annexed to the contract by evidence of usage.

Doctrine of Mutuality-

The Honourable Supreme Court in the case of Hiradevi (cited earlier) has ruled down that though it is only variation which is specifically

mentioned in Section 99, there can be no doubt that the third party's trying to lead evidence which is recognized by Section 99 would include a right to lead evidence not only to vary the terms of the documents but to contradict the said terms or to add to on subtract from them. Ultimately, it was held by Honourable Supreme Court that when the terms of any transfer reduced to writing are in dispute between a stranger to the document and a party to it or his representative-in-interest, the restriction imposed by Section 92 of Evidence Act in regard to the exclusion of the oral evidence is inapplicable; and both the stranger and the party to the document or his representatives in interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary, add to or subtract from its terms. Section 92 is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against the party to a document or his representative-in-interest in the case of a dispute between the said party or representative in interest on the one hand and the stranger on the other.

Honourable Supreme Court in the case of *S. Saktidevi Vs. M. Venugopal Pillai*[25] has considered the scope and ambit of proviso (4) of Section 92 of the Evidence Act. It was held that proviso(4) to Section 92 contemplates the situations (i) the existence of any distinct subsequent oral agreement as to rescind or modify any earlier contract, grant or disposition of the property can be proved. (ii) However, this is not permissible where the contract, grant or disposition of property is by law required to be in writing (iii) No parole evidence can be let in to substantiate any subsequent oral arrangement which has effect of rescinding a contract or disposition of property which is registered according to the law in force for the time being as to the registration of document.

A careful reading of proviso (4) to Section 92 shows that there is an exception to exception. In the first part, this proviso admits oral evidence, however, in the later part, it excludes the oral evidence. It, therefore, can be said that there is a proviso to proviso (4) to Section 92 of the Evidence Act.

CONCLUSION :

Documentary evidence has more value than the oral evidence. Court

25 *AIR 2000 SC 2633*

is bound to accept the documentary evidence. But oral evidence may be taken into consideration in certain circumstances. Thus, considering these legal provisions, parties should be allowed to adduce evidence. If evidence, which can not be allowed to be given/adduced is permitted by any Court of law to come on record, then the other party, against whom inadmissible evidence is adduced, will suffer. Per contra, if any such evidence which can not be excluded by virtue of these Sections is refused to be adduced, contending that it can not be adduced in view of these Sections, then the party who has right will be deprived of its vital right.
