SUMMARY OF WORKSHOP NOTES

SUBJECT : RECORDING OF EVIDENCE - - Rule as to evidence beyond pleading, cross-examination, production of documents along with examination-in-chief and cross-examination, admissibility and proof of documents, impounding etc. and additional evidence.

1. Rule as to evidence beyond pleading

" *The whole object of pleadings is to bring the parties to an issue and the meaning of the rules was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing " (Throp Vs. Holdswort)*.

A party cannot adduce evidence and set a case inconsistent with his pleadings. No amount of proof can substitute pleadings which are the foundation of a claim of a litigating party. Thus, when pleadings are silent on an issue, the party is precluded from adducing evidence in respect of that issue. The court should be

vigilant while recording the evidence. The Judge should be aware of the pleadings of the parties and shall be on guard to prevent the evidence being given sans pleading.

It may sometime happen that the other party may not raise objection when the evidence without pleading is being given and such evidence comes to be recorded. However, even then, the court cannot act upon such evidence as there are no pleadings in that respect. In **Kamaludin Sumani Vs. Manuel Barreto Xavier & ors, 2012(4) All MR 256** it is held that if the pleadings are absent on a particular ground and if evidence is led then such evidence is of no use. It is held in **Rajgopal ..Vs.. Kishan Gopal, A.I.R. 2003 S.C. 4319** that when there is no pleading regarding certain issue, no finding can be given despite evidence.

In cross-examination also, a party cannot suggest a case to a witness not pleaded by him.

The pleadings however should receive a liberal construction. no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case, it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead, the substance of the pleadings should be considered. Whenever the

question about lack of pleading is raised, the enquiry should not be so much about the form of pleadings, instead, the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issue by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

2. CROSS EXAMINATION

As per Order 18 Rule 4 of C.P.C. the cross-examination of a witness is to be recorded either by the court or by the commissioner appointed by it. A commissioner is not empowered to decide any objection raised during the cross-examination of a witness. The commissioner has to record the question objected to, the objection and answer given by the witness. It is the court which has to decide the objection at the time of argument.

Order 18 Rule 11 provides that where any question put to a witness is objected to by a party or his pleader and the court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it together with the decision of the court thereon.

The main purpose of cross-examination of the witness is

to test the veracity of the witness. So also, the questions in the cross-examination can be asked to discover who the witness is and what is his position in life and to shake his credit. The leading questions are permitted during the cross-examination. If a person wants to contradict a witness as to his previous statement in writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. However, he may be cross-examined on his previous statements made by him in writing or reduced into writing without showing such a writing to him. Whenever a witness fails to support, the party calling him can cross-examine the witness with the permission of the Court.

3. Production of document along with chief examination and cross examination.

Order VII Rule 14 requires the production of documents on which plaintiff sues or relies at the time of presentation of plaint. Order 8 Rule 1 (A) of C.P.C. provides for production of documents by defendant alongwith written statement.

As per order XIII Rule 1 original documents should be produced at or before the settlement of issues. Order XIII Rule 1 Sub rule 3 has carved out following exceptions to above rule-

(a) documents produced for the cross-examination of the witnesses of the other party,

(b) documents handed over to a witness merely to refresh his memory.

Order 18 Rule 4 (1)of C. P. C. provides that in every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility **of such documents which are filed along with affidavit** shall be subject to the orders of the court.

This rule reveals that the documents can be filed along with the chief examination. The court will then decide whether they are admissible and if yes, whether the document is proved properly.

It is the intention of legislation by amending Rule 4 (1) of Order XVIII of C.P.C., to save valuable time of the Court and the litigants. Order XVIII Rule 4 makes it clear that while recording evidence, the witness shall file an affidavit, produce copies of documents which ought to be supplied to the opposite party. To disallow the production itself would be incorrect as observed in the

case of **Balkrushna S.S.Kakodkar vs. Rama Babalvasta reported in A.I.R. 2005 Bombay 200.**

In **Durgashankar S. Trivedi Vs. Babubhai Bhulabhai Parekh 2003 (2) Maharashtra Law Journal 576** it was observed that, it is to be borne in mind that order XVIII Rule 4 does not deal with the provision relating to admission and exhibition of documents in evidence. It only permits the parties and their witnesses to produce the documents along with affidavit.

In **Purshottam Shankar Ghodgaonkar Vs. Gajanan Shankar Ghodgaonkar, 2012 (6) Mh.L.J. 648** the Hon'ble High Court had occasion to deal with the case wherein documents were produced during the cross-examination of the defendant. The Hon'ble High Court observed that “during cross-examination of defendant, the plaintiff sought production of documents for contradicting defendant No.1's version about the acquiring the properties from his own income. There is distinction between a term with reference to the parties to the suit. Though production of documents can be allowed for cross-examination of witness of the other party, the documents cannot be produced at the time of cross-examination of opposite party by casting surprise upon him. Defendant cannot be confronted by the plaintiff by producing documents for the first time during the cross-examination and it was not open for the trial Court to allow the production of documents to

confront the original defendant". Accordingly order of trial Court whereby the production of documents was allowed, was quashed.

The defence advocate may refer the documents of defendant to the plaintiff during his cross-examination. There is no need to wait till defendant's turn comes to lead the evidence, because the defence side may choose not to step into witness box at all. As far as plaintiff is concerned, he should not do so. Because, generally it is plaintiff who begins first and he has no choice as not to enter into witness box.

4. <u>ADMISSIBILITY AND PROOF OF DOCUMENTS</u>.

Admissibility of documents and proof of documents are two different things. Admissibility means accepting a document in evidence and considering it while deciding a matter. Some documents cannot be admitted in evidence unless they satisfy some legal conditions. Some documents require compulsory registration as per section 17 of the Indian Registration Act for e.g. a sale deed of immovable property worth more than Rs 100/-, a gift deed of immovable property. Some documents require attestation. Unless such documents satisfy these legal requirement, they cannot be admitted as the evidence of the transaction therein.

The proof of document implies the procedure for proving a

document. The general rule is that the document itself must be produced before the court which is called primary evidence. However, in some circumstances, secondary evidence of contents of document can also be given. For adducing secondary evidence, a party has to lay foundation as per Section 65 of the Evidence Act. A party to a document is a competent witness to prove a document. Thus, a sale deed can be proved by any of the parties thereto. It is not necessary to insist for calling an attesting witness because, it is not a document which is required to be attested by law. It is only in case of a document statutorily requiring attestation, an attesting witness is to be examined if alive (section 68 of the Evidence Act).

OBJECTION AS TO ADMISSIBILITY :

There are two types of objection as to admission of a document in evidence. First is that the document itself is inadmissible in evidence. The second type of objection is that the mode of proof is irregular. In **Smt. Dayamathi ..Vs.. K. M. Shaffi, A.I.R. 2004 S.C. 4082,** it is held that objection as to mode of proof is procedural and can be waived. This objection has to be taken before the trial court. It cannot be taken for the first time in appeal.

As regards inadmissibility of document itself, merely because a document is marked as Exhibit, the objection as to its inadmissibility is not excluded and can be taken at later stage.

However, in case of irregularity of proof, objection is to be taken when the document is sought to be admitted. The test is whether an objection, if taken at the appropriate time, would have enabled the party to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal as it causes the party to assume that the other party is not serious about the mode of proof.

Regarding the admissibility of the documents, it is necessary to refer the full bench judgment of our High Court in **Hemendra Rasiklal Ghiya & Oths Vs. Subodh Modi & Oths. 2008 (6) Mh.L.J., 886** Prior to said case, there were conflicting decisions on the point of proof, admissibility and impounding of documents. One limb of decision was that, it is necessary for the Court to decide about the admissibility of document before they are exhibited in evidence and on the other side, some decisions were saying that admissibility of evidence and proof of document should be reserved until judgment in the case is given. Hence, the matter was referred to full bench. The Hon'ble Lordships formulated two questions (A) At which stage the objection to the admissibility and/or proof of document which may be produced or tendered should be raised, considered and decided by the Court. (B) At which stage objection to the admissibility or relevancy of evidence contained in the affidavit filed under Order XVIII Rule 4 of the Civil Procedure Code should be considered and decided by the Court. After considering the various case laws of the Hon'ble Apex Court and provisions of Code of Civil

Procedure and Bombay Civil Manual, the Hon'ble Lordships answered question (A) and (B) as follows.--

Question (A)

(i) :- Objection to the document sought to be produced relating to the deficiency of stamp duty must be taken when the document is tendered in evidence and such objection must be judicially determined before it is marked as exhibit.

(ii):- Objection relating to the proof of document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit.

(iii):- The objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case. The Hon'ble High Court added a word of caution that while exercising discretion judiciously for the advancement of the cause of justice for the reasons to be recorded, the Court can always work out its own modality depending upon peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation.

Question (B)

Hon'ble Lordships answered question (B) as the objection to the admissibility or relevancy of evidence contained in the

affidavit of evidence filed under Order 18 Rule 4 can be admitted at any stage reserving its resolutiChamparanyaon until final judgment in the case.

Every document admitted in evidence must be endorsed and signed by the Judge in the manner required by Order 13, Rule 4 and marked with an exhibit number.

5. IMPOUNDING OF DOCUMENTS ::

Some documents require stamp duty. Unless proper stamp duty is affixed, documents are inadmissible in evidence. Such documents can be impounded and the deficit stamp duty along with penalty can be recovered. Sec.33 and 34 of the Bombay Stamp Act provides for impounding of such document. After impounding the document, the document is to be sent to the Collector of Stamps for recovering the deficit stamp duty and penalty. The penalty @ 2 % p.m. on the deficit stamp duty is to be recovered. However, the penalty should not exceed twice the amount of deficit stamp duty. As per section 33 power to impound the document can be invoked not only by the court, but by every person in-charge of a public office. The object of this provision is to protect the revenue.

Non payment of proper stamp duty is different thing than non registration of the document. Impounding can be done only in respect of a document on which proper stamp duty is not paid. One should not be under impression that a document which compulsorily requires registration but not registered can also be impounded.

Insufficiently stamped document cannot be received in evidence for any purpose whatsoever. Whenever such a instrument is tendered in evidence, the Court has to impound it as obligated by Sec.33 of the Bombay Stamp Act and then proceed as required by Sec. 34. Unless the procedure under the Stamp Act is scrupulously followed by the Court, a document which is not duly stamped is not liable to looked into evidence even for collateral purpose. In case of **M/S. Deepak Corporation vs Pushpa Prahlad Nanderjog AIR 1994 Bom 337** it was observed by Their Lordships that, a duty has been cast on the authority or the court to impound a document under Section-33 if any such document which is inadequately stamped is produced before it to be acted upon and that duty does not come to an end on withdrawal of the document by the party liable to pay additional duty and penalty.

6. ADDITIONAL EVIDENCE

(a) Before the trial court – Order 18 Rule 17 gives power to the

trial court to recall any witness at any stage who has been examined and may put such question to him as the court may think fit. In **Madhubai -v- Amthalal, AIR 1947 Bom,156**,it has been held that the power can be exercised by court suo - motu as well as on application by either party. This provision applies only with respect to a witness who is already examined. There is no provision for adducing other additional evidence before the trial court. Earlier, Order 18 Rule 17A had provided for production of evidence not previously known or which could not be produced despite due diligence. However, this provision is omitted by the amendment of 1999. Thus now, the position is that after closing of the evidence by a party, the trial court cannot allow any evidence to be given. In **Salem Bar Association v/s Union of India 2003(3) Bom.C.R.327** it is held by the Hon'ble Apex Court that due to deletion of Order 18 rule 17 A the the position of status quo ante is restored as the said provision was introduced by the amending act of 1976 and originally it was not there in the code of civil procedure. It is further observed by the Hon'ble Apex Court that rule 17A has been deleted with a view that unnecessary applications are not filed primarily with a view to prolong the trial.

(b) Before the Appellate Court

As a general rule the appellate Court shall decide an appeal on the evidence led by the parties before the trial Court and

should not admit additional evidence for the purpose of disposal of an appeal. Section 107(1) (d) of C.P.C., however is an exception to the general rule and empowers an appellate Court to take additional evidence or require such evidence to be taken subject to the conditions laid down in Rule 27 of Order 41. In the case reported in **A.I.R.1997 Supreme Court, 3243 between Jaipur Development Authorities Vs. Kailaswatidevi,** the Hon'ble Apex Court observed that, -

"When a party is unable to produce the evidence in the trial Court under the circumstances mentioned in the Code, he should be allowed to produce the same in an appellate Court. This power is discretionary and should be exercised on sound judicial principles and in the interest of parties."

However before leading additional evidence the party requires to prove the following grounds mentioned in Order 41 Rule 27 of the Civil procedure Code -

(a) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) The party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence

was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(c) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

As per Rule 2, the court has to record the reason for allowing the additional evidence. The appellate Court may itself require additional evidence for either of the two purpose; i.e. to enable it to pronounce judgment or for any other substantial cause. However a matter cannot be remanded for allowing a party to adduce additional evidence when such evidence was available and yet not produced in the lower Court. The true test therefore, is whether the appellate Court is able to pronounce the judgment on the material before it without taking into consideration the additional evidence sought to be adduced. Similarly, the appellate Court may admit additional evidence “for any substantial cause”. The expression any substantial cause mentioned in the rule should be liberally construed so as to advance substantial justice between the parties. A mere difficulty in coming to a decision is not sufficient for admission of evidence under Rule 27. So also, the provisions of Rule 27 are not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and to fill in the gaps.

In **Mallyalam Plantation Ltd. Vs. State of Kerala and another, A.I.R. 2011 SCW 264**, the application for additional evidence has to be considered along with appeal.

In **State of Rajasthan Vs. T.N. Sahani & oths, reported in 2001 (10) S.C.C.,619** it is observed that -

"It may be pointed out that this Court, as long back as in 1963 in **K. Venkataramiah v. Seetharama Reddy [AIR 1963 SC 1526],** pointed out the scope of unamended provision of Order 41, Rule 27(c) that though there might well be cases where even though the Court found that it was able to pronounce the judgment on the state of the record as it was, and so, it could not require additional evidence to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. This is entirely for the Court to consider, at the time of hearing of the appeal on merits, whether the documents which are sought to be filed as additional evidence, need to be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the Court to look into the documents and for that purpose, amended provision of Order 41, Rule 27 (b), C.P.C. can be invoked. So the application under Order 41, Rule 27 should have been decided along with the appeal. But

taking a view on the application before hearing of the appeal, in our view, would be inappropriate. ."

MODE OF TAKING ADDITIONAL EVIDENCE.

Rule 28 and 29 lay down the mode of taking additional evidence when appellate Court admits additional evidence in appeal. The appellate Court may take the evidence itself or direct the lower Court from whose decree the appeal is preferred or any other subordinate Court to take it. Where the appellate Court directs the lower Court to record evidence, it should retain the appeal on the file and dispose it of on receipt of the additional evidence.

(P. K. Sharma)
District Judge -1, Latur.

(Sou. S.S.Sapatnekar)
Special Judge, Latur.

(S. M. Yallatti)
Civil Judge, S.D., Latur.

(L.S. Chavan)
2nd Jt. Civil Judge, S.D.
Latur.

(Mrs. Vaishali Pushkar Patil)
2nd Jt. Civil Judge, J.D.
& J.M.F.C., Latur.