DISTRICT COURT BHANDARA
WORK-SHOP
SUMMARY/GIST OF PAPERS OF
SECOND WORKSHOP HELD ON 15TH FEBRUARY,2015

SUBJECTS :-

1. **DOCUMENTARY EVIDENCE (CHAPTER V OF EVIDENCE ACT)**
2. **SENTENCING POLICY AND PUNISHMENT.**

The workshop on the subjects "documentary evidence (Chapter V of Evidence Act) and sentencing policy and punishment" was held on 15-02-2015 at District Court, Bhandara under the Chairmanship of Hon'ble Principal District and Sessions Judge, Bhandara. The discussion was opened by reading the summary of paper on the subject "documentary evidence (Chapter V of Evidence Act)". Thereafter the discussion on the topic and case laws relating to the subject was made. After completion of discussions on civil subject, summary of another paper on the subject "sentencing policy and punishment" was read. Thorough discussions were made on both the subjects. Relevant case laws were discussed. The difficulties raised by the Judicial Officers were discussed and solved.

Que.No. 1 :When the original dying declaration is lost, whether secondary evidence can be given ?

Answer :When the original dying declaration is lost and is not available, prosecution is entitled to give secondary evidence. (AIR 1979 SC 1567 : 1979 Cri LJ 1081)

Que.No. 2 :Whether the Magistrate has power to give direction to accused to give his specimen handwriting for comparison ?

Answer :Magistrate has no power to issue direction to accused to give his specimen handwriting for comparison. (State of Haryana vs Jagbir Singh alias Lilli 1996 Cri.L.J.2545 : AIR 1980 SC 791)

Que.No.3 :What is meant by imprisonment for life ?

Answer : Life imprisonment means imprisonment till breath of the convict.

Que. No.4 :Whether imprisonment in default of fine is mandatory ?

Answer :Imprisonment in default of fine is not mandatory but only directory. (AIR 1926 Bom. 62 : AIR 1953 TC 233)

Que.No.5 :Whether the fine imposed on the accused can be recovered after his death ?

Answer :Fine when accused has no means to pay can be recovered from his property even acquired subsequently within the period of imprisonment even though he may be dead by the time. (AIR 1953 TC, 1953 Cri.L.J.1265.)

Que. No.6 :What is to be done in case of awarding enhanced sentence for previous conviction ?

Answer :If the Magistrate has to award enhanced sentence for previous conviction, charge is required to be framed in respect of previous offence and conviction awarded in it.

Que.No.7 :When a registered sale-deed is not available for any reason whether its certified copy is admissible (as secondary evidence) ?

Answer :Yes, it is admissible by way of secondary evidence. (Nanibai vs Gitabai,AIR 1958 SC 706 : Kalyan Singh Vs Chhoti, AIR 1990 SC 398.)

Que.No.8 :Whether Hindu Marriage Register is a Public Document and is admissible in evidence ?

Answer :Yes, Hindu Marriage Register is a Public Documents and its evidence are admissible.

Que.No. 9 :Whether tape-recorded conversation can be relied upon?

Answer :Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon. (Mahabir Prasad Verma v. Dr. Surinder Kaur. AIR 1982 SC 1043)

Que.No. 10 :Whether Will can be proved by scribe when there are three attesting witnesses , out of them two were dead?

Answer :Three attesting witnesses, two of them dead and one not produced, scribed examined to prove will- Manner in which he was examined and whether from his statement he could be regarded as attesting witness not held by lower appellate Court-Conclusion of High Court from evidence of scribe that he can not be regarded as an attesting witness, proper- Will not duly proved. (Kannmian v. Sethurama. AIR 2000 SC 3522)

Que.No.11 :Whether presumption under section 90 can be drawn in respect of a copy of Will purporting to be 30 years old ?

Answer :Production of copy of Will purporting to be 30 years old does not warrant presumption of its execution or attestation. Presumption under section 90 arises in respect of original document. (Kalidindi Venkata Subbaraju v. Chintalapati Subbaraju. AIR 1968 947)

DISTRICT COURT BHANDARA
SECOND WORKSHOP

SUMMARY OF LEGALWORKSHOP PAPER ON THE SUBJECT "DOCUMENTARY EVIDENCE (CHAPTER V OF EVIDENCE ACT)"

Documentary evidence means all documents produced for the inspection of the Court (Section 3). Documents are of two kinds : public and private. Section 74 gives a list of documents which are regarded as public documents. All other documents are private.

The production of documents in Courts is regulated by the Civil Procedure Code and the Criminal Procedure Code.

The contents of documents must be proved either by the production of the document which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Where there is documentary evidence oral evidence is not entitled to any weight. ***(Muraka Properties P. Ltd. v. Beharilal Muraka, AIR 1978 SC 300)***.

The section is based upon the principle that the "best evidence in the possession of power of the party must be produced. What the best evidence is, it must depend upon circumstances. Generally speaking, the original document is the best evidence. This is the general and ordinary rule; the contents can only be proved by the writing itself." The section 61 lays down that contents of the document may be proved either by primary or secondary evidence and the rule means that there is no other method allowed by law for proving the contents of documents.

Where a document was not required to be registered, it was admissible in evidence, even though unregistered.

Primary evidence is evidence which the law requires to be given first. Secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better record. Primary evidence is defined in Section 62 and secondary evidence in Section 63.

Section 62 :- This section defines the meaning of Primary evidence which means the document itself produced for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart is primary evidence as against the party executing it. Where a number of documents are made by printing, lithography or photography, each is primary evidence of the contents of the rest. Where they are all copies of a common original, they are not primary evidence of the contents of the original.

Section 63 :- This section describes what constitutes 'secondary evidence. Secondary evidence', evidence which may be given under certain circumstances in the absence of that better evidence which the law requires to be given first.

Secondary evidence means and includes-

(1) certified copies;

(2) copies made from the original by mechanical processes, and copies compared with such copies;

(3) copies made from or compared with the original;

(4) counterparts of documents as against the parties who did not execute them;

(5) oral accounts of the contents of a document by a person who

has seen it.

Clauses 1 to 3 deal with copies of documents. Where a copy of a document is admitted in evidence in the trial Court without objection, its admissibility cannot be challenged in the Appeal Court. Because omission to object to its admission implies that it is a true copy and, therefore, it is not open to the Appeal Court to say whether the copy was properly compared with the original or not.

The matters of secondary evidence are to be decided by the Judge who is recording evidence. Objection to the secondary evidence have also to be decided by him. In the case of evidence before a Commissioner, objection, if any, can only be recorded by him. The decision has to be made only by the Judge. ***(Indian Overseas Bank v. Trioka Textile Industries, AIR 2007 Bom.24).***

Section 64 :- A written document can only be proved by the instrument itself. It is a general rule that if a person wants to get at the contents of a written document the proper way is to produce it if he can. “Where the contents of any document are in question, either as a fact directly in issue or a subalternate principal fact, the document is the proper evidence of its own contents. But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus although a receipt has been given for the payment of money, proof of the fact of payment may be made, by any person who witnessed it. So, although where the contents of a marriage register are in issue, verbal or other evidence of those contents is not receivable, the fact of the marriage may be proved by the independent evidence of a person who was present at it.

Once a document is properly admitted, the contents of that document are also admitted in evidence, though those contents may not be conclusive evidence. ***(P.C.Purushothama v. S. Perumal, AIR 1972 SC 608).***

In ***Malay Kumar Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162***, the Supreme Court observed that "it is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit he is estopped and precluded from questioning its admissibility at a later stage. But it is trite that a document becomes inadmissible in evidence unless the author is examined also as to contents and also subjected to cross-examination.

Section 65 :-This section enumerates the seven exceptional cases in which secondary evidence is admissible. Under it secondary evidence may be given of the contents of a document in civil as well as in criminal proceedings.

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner so as to bring it within one or other of the cases provided for in the section. It is incumbent on the person who tenders secondary evidence to show that it is admissible, the question of admissibility is ordinarily for the Court of first instance. Secondary evidence cannot be accepted unless sufficient reason is given for non-production of the original. ***(State Bank of India v. Allibhoy Mohammed, AIR 2008 Bom 81)***.

'Document' means a document admissible in evidence. If a

document is inadmissible in consequence of not being registered or not being properly stamped, secondary evidence cannot be given of its existence.

Section 65-A and 65-B :- The new section 65-A says that the contents of electronic records may be proved in accordance with the provisions of section 65-B. This section is also a new provision. It prescribes the mode for proof of contents of electronic records. The primary purpose is to sanctify proof by secondary evidence. This facility of proof by secondary evidence would apply to any computer output, such output being deemed as a document A computer output is a deemed document for the purpose of proof. The section says in sub-section (1) that any information contained in an electronic record which is printed on a paper, stored, recorded to as computer output, shall also be deemed to be a document. The section lays down certain conditions which have to be satisfied in relation to the information and the computer in question. Where those conditions are satisfied, the electronic record shall become admissible in any proceedings without further proof or production of the original as evidence of any contents of the original or of any fact stated in it.

Conditions as to relevancy of computer output (Section 65B(2): The conditions which have to be satisfied so as a to make a computer output as evidence are stated in sub section (2). They are as follows :

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process the information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) the information contained in the electronic record is of the kind

which was regularly fed into the computer in the ordinary course of its activities;

(c) the computer should have been operating properly during the period of the data feeding, or, if it was not operating properly during that period or was out of operation, that gap was not such as to affect the electronic record or the accuracy of its contents;

(d) the information contained in the electronic record was derived or is reproduced from the information fed into the computer in the ordinary course of its activities.

Section 66 :- This section lays down that a notice must be given before secondary evidence can be received under section 65(a). Notice to produce a document must be in writing. Order XI, Rule 15 of the Civil Procedure Code, prescribes the kind of notice to produce a document. Notice is required in order to give the opposite party a sufficient opportunity to produce the document, and thereby secure the best evidence of its contents. Such notice may be dispensed with if it is not necessary on the pleadings, or the Court thinks fit to dispense with it.

Section 67 :- This section merely requires proof of signature and handwriting of the person alleged to have signed or written the document produced. Mere admission of execution of a document is not sufficient. Proof that the signature of the executant is in his handwriting is necessary.

This section mandates that the signature and handwriting of a person on a written document can be proved only by examining the person concerned. When the person is very much available and alive, an attempt to prove his signature and handwriting by examining a third person as a

witness would have its own drawback. An inference of the type indicated in section 114[clause (e)] would become applicable.

Hon'ble Bombay High Court in a case of ***Bama Kathari Patil vs. Rohidas Arjun Madhavi and another, 2004(2) MhLJ 752*** has held that a document is required to be proved in accordance with provision of 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 with its proof though as a matter of convenience only the proved document is to be exhibited. Thus, exhibiting a proved document is an Administrative Act. If the 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 it clear that a document is required to be proved in accordance with the provisions of the Evidence Act. Whether it is exhibited or not, it makes no difference as such a proved document has to be read being admissible in evidence. Even if a document is marked as an exhibit without its proof, it can be challenged at the time of arguments and even in appeal or revision.

Section 67A. :- Except in the case of a secure digital signature, if the (electronic signature) of any subscriber is alleged to have been affixed to an electronic record the fact that such (electronic signature) is the (electronic signature) of the subscriber must be proved.

Section 68 :- This section applies to cases where an instrument required by law to be attested bears the necessary attestation. What the section prohibits is a proof of execution of a document otherwise than by the evidence of an attesting witness if available. This section applies only where the execution of a document has to be proved or when the allegation is that

the executant was not in a fit state of mind to know the real nature of the document. Where, however, the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that the attesting witness has not witnessed the execution of the document.

Section 69 :- An attesting witness, if available, should be called in evidence. If the attesting witness is dead, or is living out of the jurisdiction of the Court or cannot be found after diligent search, or if the document purports to have been executed in the United Kingdom of Great Britain and Ireland, two things must be proved :

(1) the signature of one attesting witness, and

(2) the signature of the executant.

Section 70 :- This section serves as a proviso to section 68. This section operates only where the person relying on a document has not given any evidence at all of the due execution of the document by the executant but relies on an admission of execution by the latter.

Section 71 :-Where an attesting witness has denied all knowledge of the matter, the case stands as if there was no attesting witness, and the execution of the document may be proved by other independent evidence. This section only operates if the attesting witness denies or does not recollect the execution of the document or has turned hostile.

Section 72 :-Where the law does not require attestation for the validity of a document, it may be proved by admission or otherwise, as though no attesting witnesses existed.

There is no presumption that attesting witness knows contents of

document. **A.M.A. Abdul Mithalif v. Syed Bibi Ammal. 1980 (Supp) SCC 771.**

Section 73 :- 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.

Although section 73 specifically empowers the Court to compare the disputed writings with the specimen or admitted writings shown to be genuine, prudence demands that the Court should be extremely slow in venturing an opinion on the basis of more comparison, particularly when the quality of evidence in respect of specimen or admitted writings is not of high standard or is not beyond doubt. ***(State of Maharashtra v. Sukhdev Singh, AIR 1992 SC 2100).***

Handwriting can be proved in the following ways :-

(1) By proof of signature and handwriting of the person alleged to have signed or written the document (S. 67).
(2) By the opinion of an expert who can compare handwriting (S.45)
(3) By a witness who is acquainted with the handwriting of a person by whom it is supposed to have been written and signed (S.47)
(4) By comparison of signature, writing or seal with others admitted or proved (S.73).

Section 73A :- For the purpose of ascertaining whether a digital signature is that of the person by whom it purports to have been affixed, the

Court may direct that person or the controller or the certifying authority have to produce the digital signature certificate. The Court may also direct any other person to apply the public key listed in the digital signature certificate and verify the digital signature purported to have been affixed by that person.

Sections 74 to 78 :- Section 74 states what comes in the category of public documents. Section 75 states that all other documents are private. Sections 74-78 deal with (a) the nature of public documents, and (b) the proof which is to be given of them. Section 74 defines their nature; and section 76-78 deal with the exceptional mode of proof applicable in their case. The proof of private documents is subject to the general provisions of the Act relating to the proof of documentary evidence contained in Sections 71-73.

Public Document – Admissibility- Two documents of two different public schools showing same age of child-Documents would be admissible under section 35, Evidence Act- Section 74 would be irrelevant. **AIR 1982 SC 1057 : 1982 Cri L.J.994.**

Sections 79 to 90 :- Sections 79 to 90 deal with certain presumptions as to documents. A dying declaration which has been recorded by a Magistrate, can be tendered in evidence without the Magistrate who recorded it being called. When a deposition taken in open Court or a confession is taken by a Magistrate, there is a degree of publicity and solemnity, which affords a sufficient guarantee for the presumption that everything was formally, correctly and honestly done.

Under section 79, a Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the certified copy is substantially in the form and purports to be executed in the manner provided by law in that behalf. If a certified copy was executed substantially in the form and in the manner provided by law, the Court raises a rebuttable presumption in regard to its genuineness.

Where, therefore, a Patwari issues a certified copy of Khatauni without complying with the provisions of law governing its issue, the Court is not bound to draw the presumption in regard to its genuineness. **(Bhinka v. Charan Singh. AIR 1959 SC 960 : 1959 Cri.L.J. 1223)**

Presumption under section 90 extends to testamentary documents. A will purporting to be thirty years old and produced from proper custody may be presumed to have been duly attested and executed. The Court must however act with extreme caution and atmost circumspection. The period of thirty years will run from the date of the will and not from the death of the testator. Proper custody under section 90 means the custody of any person so connected with the deed that his possession of it does not excite any suspicion of fraud. Presumption can be raised at any stage of the proceedings including the Appellate stage. A belated claim of presumption would not by itself confer any right on the other party to claim an opportunity to lead evidence in rebuttal.

The presumption enacted in Section 90 can be raised only with reference to original documents and not to copies thereof. If the documents are signed by the agent of the person and there is no proof that he was an

agent, section 90 does not authorise the raising of a presumption as to the existence of authority on the part of the agent to represent that person.

Section 90A :-Where an electronic record purports to be or is proved to be five years old and is produced from any custody which the Court considers proper in the particular case, the court may presume that the digital signature which purports to be the digital signature of any person was so affixed by him or by any person authorised by him in the behalf.

Defining the expression “proper custody” the explanation to the section says that electronic records are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but that no custody is improper if it is proved to have had a legitimate origin or the circumstances of the particular case are such as to render such an origin probable. This explanation also applies to the presumption under section 81A as to Gazettes in electronic forms.