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THE CARDINAL PRINCIPLES OF THE LAW OF EVIDENCE

AUTHORED BY - DANISH SAMI

ABSTRACT

This paper gives a theoretical understanding of the cardinal principles of the law of evidence through which the Court can ensure that justice is done in the case. It discusses the various provisions of the Indian Evidence Act along with the process to ensure fairness, through which the cardinal principles of the law of evidence is embedded. It also discusses the rules of admissibility of evidence, the exclusion of hearsay evidence and the other dimensions of the rule of best evidence along with the special powers of the court. It also appreciates the various Hon'ble Supreme Court judgements wherein the duty of courts becomes more to shift the grain from the chaff i.e., to disengage the truth from falsehood as there is always almost a fringe of embroidery to a story, however true is the main. It also talks about the relevant provisions related to the exclusion of oral evidence by documentary evidence. It concludes with the jurisprudential essence and the constitutional spirit behind the cardinal principles of the law of evidence expressly mentioned in various provisions of The Indian Evidence Act, 1972.

Keywords: *Principles of the Law of Evidence, admissibility of evidence, exclusion of hearsay evidence, rule of best evidence.*

INTRODUCTION

The Indian Evidence Act plays its role mainly at the trial stage in the civil and the criminal procedure and the purpose of The Indian Evidence Act is to ensure fairness of procedure. "Justice has not only to be done but is has to be seen to be done". The Indian Evidence Act helps in arriving at a just decision in the case. In every suit or proceedings there will be two or more parties and justice has to be done between those parties. The Indian Evidence Act plays the role of balancing of interests between those parties. In order to do complete justice and

balancing between the parties there has to be a fairness of procedure between the parties and The Indian Evidence Act ensures such fairness of procedure.

Every law has to subscribe to the essential elements and the requirements of the Constitution and no law can afford to exist without subscribing to these principles like natural justice, reasonableness, fairness, non-arbitrariness, equity, justice, fairness etc. These essential principles are the part of the basic structure of our Indian Constitution and they cannot be violated in any circumstances by any law or any executive action. These elements are the essentials of the basic structure of the Constitution and they are implicit in Article 14, 19, 21 etc of our Indian Constitution. These principles are clearly manifest also in The Indian Evidence Act. The Indian Evidence Act essentially aims at providing finality to the requirements of procedural fairness and it serves the larger societal interest of developing societal faith and coherence.

The Indian Evidence Act logically provides for what facts will be considered to be fact in issue in a particular case and what facts will be considered to be relevant fact in that case. The Indian Evidence Act provide for entire process/mechanism of duly proving or disproving of these facts. It is only after these facts have been duly proved that the Court will apply its judicial mind in order to describe the particular case. The whole of The Indian Evidence Act is based upon logic, common-senses and the principles of justice.

RULE OF BEST EVIDENCE

The Indian Evidence Act have devised some mechanisms, some principles, some processes and rule by which the Court can ensure that the justice is done in the case until the Court ensures that best possible evidence is available before it, it cannot give a just decision in the case.

Dimensions of Rule of Best Evidence

- Relevant fact must be duly proved.
- The rules of admissibility of evidence.
- Exclusion of hearsay evidence.¹
- Documentary evidence will exclude oral evidence.²

¹ Section 60 in The Indian Evidence Act, 1872

² Section 91 in The Indian Evidence Act, 1872

Section 92 in The Indian Evidence Act, 1872

Section 99 in The Indian Evidence Act, 1872

- Exclusion of secondary evidence by primary evidence.³
- The special powers of the court.⁴

PRINCIPLES RELATED TO ORAL EVIDENCE

I. There is no presumption to perjury in the case of oral evidence but before acting upon the oral evidence the court must satisfy itself about the credibility of such oral evidence.

The credibility has to be established in the following two manners: -

a) Intrinsically

The Court has to examine the veracity i.e., the truthfulness of that statement by the process of cross-examination which the other party does, by asking the questions under Section 165 of The Indian Evidence Act which the Court does, the court examines, whether the statement has some internal inconsistencies or contradictions.

b) Extrinsically

The Court has to examine whether the said oral evidence is in line with the other proved circumstantial evidence i.e., whether it is corroborated by the other proved circumstantial evidence or not. If yes, then it will be said reliable or credible.

II. The Court also has to see whether the oral evidence is contradicted by some proved documentary evidence.

III. It is the general principle that greater credence shall be given to men's acts in the form of documents rather than their mere words. Words are always susceptible to mistakes, variations and misrepresentation. And therefore, the court shall be cautious about the oral evidence.

IV. Oral evidence shall not be utterly disregarded, if the oral evidence satisfies the intrinsic and extrinsic test then it is reliable and trustworthy.

³ Section 61 to 66 of The Indian Evidence Act & Section 162 to 164 of The Indian Evidence Act, 1872

⁴ Section 165 of The Indian Evidence Act, 1872

Section 311,313 of The Code of Criminal Procedure.

Order XVI Rule 14 and Order XVIII Rule 17 of The Code of Civil Procedure.

- V. “Falsus in uno falsus in omnibus” i.e., False in one particular false in all. If any part of the oral evidence is found to be false then the whole statement in totality will be considered to be false. But this rule/maxim is applied in England and it is not applicable in India.

If a witness has made a statement and it is found that some part of the statement is false then, in England his entire statement will be discarded and the entire statement will be considered to be false.

However, in India, the rule is different. In India, the approach is that it will be examined whether the false part of the statement is severable from the rest of the statement then the false part will be discarded and the remaining part of the statement will be admissible.

In the case of *Nasar Ali vs The State Of Uttar Pradesh*⁵ it was held that the maxim “Falsus in uno falsus in omnibus” is not a mandatory principle in India, rather the maxim is not applicable in India. It is the duty of the court to disengage the truth from falsehood i.e., to sift the grain from the chaff. It also held that if the false part is not separable from the true part, then the entire evidence will be discarded.

“There is always almost a fringe of embroidery to the story, however true is the main” i.e., whenever a person makes a statement there is always a slight fringe of falsehood, however true the main statement may. The Court should know the art to sift the grain from chaff.

Exclusion of Hearsay Evidence

Section 59 of The Indian Evidence Act is a declaration that if there is something in document or electronic record then it has to be proved by the document, but apart of that if there is any other fact then it may be proved by the Oral Evidence. It is enabling provision and it simply declares that any fact may be proved by oral evidence excepting the contents of a document and electronic evidence.

There are certain situation where even if document, oral evidence is permissible: -

- i. Secondary Evidence under Section 63 (5) of The Indian Evidence Act wherein oral accounts are allowed.
- ii. Oral admissions are allowed under Section 22 of The Indian Evidence Act.

⁵ *Nasar Ali vs The State Of Uttar Pradesh* (14 February, 1957, SC)

iii. Oral evidence of transactions is allowed under Section- 91 of The Indian Evidence Act.

iv. Oral evidence is allowed also under Proviso to Section 92 of The Indian Evidence Act.

In the case of Kalyan Kumar Gogoi vs Ashutosh Agnihotri & Anr⁶ (2 Judges Bench) (Judgement delivered by Hon'ble J.M. Panchal Justice) has discussed elaborately the defects of hearsay i.e., why hearsay evidence shall not be allowed.

Why we consider hearsay evidence inadmissible? / Defects of hearsay evidence.

- i. It's second-hand evidence.
- ii. It is susceptible to personal whims and fancies of witness.
- iii. There are chances of improvisation, concoction, fabrication, exaggeration, etc.
- iv. Since the witness has not himself perceived the thing himself, he will not feel responsible while giving evidence rather he will give an incorrect version of the real facts. Also, the administration of oath to such witness will be useless.
- v. Since the witness has not himself perceived it, he cannot be effectively cross-examined and hence his evidence will be defective evidence. Such defective evidence cannot be allowed to prove the Relevant Fact or Fact in Issue.
- vi. Allowing hearsay evidence would result into parties giving weaker proof of facts and that may result into an unnecessary protracting (delay) of the trial. And that will defeat the ends of justice.

Hearsay Evidence is a subjective concept⁷- Whether the evidence will be hearsay or not would depend upon who is giving the evidence and of what fact he is giving the evidence. There is nothing like hearsay evidence universally and this is the unique feature of hearsay evidence. It is the purpose for which the evidence has been recorded which will make it direct evidence or hearsay evidence. For example- If the evidence of dying declaration is given by the witness the if that evidence is used to prove the dying declaration i.e., to prove what the victim told to the witness before his death, then it will be direct evidence and will be admissible. However, if the purpose of recording the testimony of that witness is to directly prove the guilt of accused then it will be hearsay evidence.

⁶ Kalyan Kumar Gogoi vs Ashutosh Agnihotri & Anr (18 January, 2011, S.C.)

⁷ Balram Prasad Agrawal vs The State Of Bihar & Ors (10 December, 1996 S.C.)

Some exceptions to the rule of “Exclusion of Hearsay Evidence”: -

- i. Res Gestae (Section 6 and 7 of The Indian Evidence Act)
- ii. Dying Declaration (Section 32 (1) and 33 of The Indian Evidence Act)
- iii. Admission and Confession (Section 17 to 31 of The Indian Evidence Act)
- iv. Statement of person dead etc (Section 32 (2) to (8) of The Indian Evidence Act)
- v. Entries in books of accounts (Section 34 to 38 of The Indian Evidence Act)
- vi. Opinion of third person (Section 45 to 51 of The Indian Evidence Act) (subject to the proviso to Section 60)

Exclusion of Oral Evidence by Documentary Evidence

This is the second cardinal principle of the law of evidence. A document is prepared in order to bring about a permanence regarding that transaction and make that document perpetual in memory. The purpose of reducing something in writing is to perpetuate the memory of the transaction so as to avoid any confusion about that transaction and if that transaction has to be proved then it can be proved only by that particular document and oral evidence will not be allowed to be proved. This is what is called the principle of exclusivity of document. Here exclusivity means that the transaction can be proved only by that document and not by any oral evidence.

Rule of conclusivity of document

When you prove a transaction by a document it is final on that transaction and any changes etc related to that transaction should also be in writing. Despite the principle conclusivity and exclusivity of documents there may be some logical, equitable and some reasonable circumstances wherein the court may permit the oral evidence of some changes or variations in some specified circumstances.

Extrinsic Evidence is inadmissible to supersede the document (Section 91 of The Indian Evidence Act) or to control i.e., to contradict, vary, etc. the terms of the document (section 92 of The Indian Evidence Act). However, in some equitable circumstances oral evidence is allowed to prove the variations in the document. (The proviso to Section 92)

If as per the Indian Registration Act, a matter is required to be registered but it was not registered though it was documented. In the case where the document is required to be registered, if the transaction has been documented but it has not been registered, the following

consequences will follow:-

- i. Since the document is unregistered, as per Section 49 (c) of The Indian Registration Act the said document will not be allowed to be proved in evidence excepting in the cases where the suit is for specific performance of a Contract and also to prove any collateral transaction. Thus, excepting the exceptions the said documents cannot be used in evidence.
- ii. Since, the transaction has been documented, according to Section 91 of The Indian Evidence Act, oral evidence to prove the terms of the said document cannot be allowed.

Thus, the combine effect of Section 49 (c) of The Indian Registration Act and Section 91 of The Indian Evidence Act is that neither documentary evidence can be given nor oral evidence can be given.

Even though Section 92 of The Indian Evidence Act talks about both contract, grant or other disposition of property as well as those matters which are required by law to be documented. Here, the important point to be kept in mind is that both these phrases are qualified by the phrase “as between the parties” and this phrase “as between the parties” implies that the document should have two parties at least. And whenever a document has two parties, it will be a bilateral document and thus it comes out that the matters which are required by law to be reduced into writing is limited only to those matters which are bilateral in nature and which are therefore dispositive documents. Thus, those matters which are required by law to be reduced to writing and are unilateral in nature i.e. of a non-dispositive character, Section 92 will not apply.

Therefore, conclusivity of Section 92 of The Indian Evidence Act does not apply upon non-dispositive document which are required by law to be reduced into writing as such documents are unilateral in nature and they are not between two or more parties. And therefore Section 92 of The Indian Evidence Act does not apply upon such documents. Hence, for such documents alteration or variation can be proved even by Oral Evidence.

In the case of Bai Hira Devi Vs Official Assignee of Bombay⁸ the Hon’ble Supreme Court has very elaborately discussed the difference between Section 91 and 92 of The Indian Evidence

⁸ Bai Hira Devi And Others vs The Official Assignee Of Bombay (on 20 February, 1958) (Equivalent citations: 1958 AIR 448, 1958 SCR 1384)

Act. Section 92 of The Indian Evidence Act is in two parts: -

- i. Contract, Grant or other disposition of property which has been reduced into writing voluntarily. And has been proved under Section 91 of The Indian Evidence Act.
- ii. Any other matter required by law to be reduced to writing and which has been proved under Section 91 of The Indian evidence Act.

Both these phrases are further qualified by the phrase “as between the parties or their representatives in interests”. The above suggest that the document concerned should be between two or more parties i.e. it is a bilateral document in which there is an agreement between two or more parties who have created rights and duties amongst themselves. Thus, any such document which was required by law to be reduced into writing but which did not create bilateral rights will not fall under Section 92 of The Indian Evidence Act as that is not “between the parties”.

Thus, the restriction of Section 92 of The Indian Evidence Act will apply upon Contract, Grant and Disposition of property which are either voluntarily reduced into writing or which are required by law to reduced into writing or which are required by law to reduced into writing. Thus, the implication is that if a document is required by law to be reduced into writing and it is a unilateral document then even if it is reduced into writing and has been proved under Section 91, it will not hit by the restriction of Section 92 of The Indian Evidence Act, and therefore Oral Evidence to prove any alteration will be allowed.

In the case of *Godhra Electricity Co. vs. The State of Gujrat*⁹ it was held that if there is an ambiguity in the document then oral evidence of the surrounding circumstances can be proved. For example- Any statement made by either of the parties at the time of transaction, before the transaction or after the transaction. Similarly, any conduct made by the parties contemporaneous to the transaction or proceeding the transaction or subsequent to the transaction.

In the case of *SBI & another Vs. Mulla Sahakari Sakkar Karkhana Ltd.*¹⁰ It was held that in order to apply to proviso to Section 92 of The Indian Evidence Act, it is essential that there has to be some ambiguity in the document. If there is no ambiguity in the document,

⁹ *Godhra Electricity Co. Ltd. & Anr vs The State Of Gujarat And Another* (on 12 September, 1974) (Equivalent citations: 1975 AIR 32, 1975 SCR (2) 42)

¹⁰ *State Bank Of India & Anr vs Mula Sahakari Sakhar Karkhana Ltd* (on 6 July, 2006 S.C.)

then oral evidence of surrounding circumstances cannot be given so as to give a different meaning to the express terms of the document. In the present case the document clearly specified that the document related to bank guarantee but one of the parties sought to give oral evidence to prove that it is indemnity, this was not allowed as the document was not ambiguous.

In the case of *Mangala Waman Karandikar Vs. Prakash Damodar*¹¹ it has been held that proviso 6 to Section 92 of The Indian Evidence Act will apply only when there is an ambiguity in the document.

Section 91 clearly declares that in certain cases oral evidence may not be given rather the document itself has to be proved. The party therefore has an implicit right under Section 91 itself that if oral evidence is being given of such a document, then the opposite party can raise the objection against such oral evidence. The same thing with respect to the objection has been expressly declared in Section 144 (Ist part) of The Indian Evidence Act if it was contract/grant/or other disposition of property which has been documented. At the stage of examination of such a witness the objection can be raised by the adverse/opposite party and in that case the document itself will have to be produced. As far as the matter required by law to be reduced into writing is concerned that is not expressly covered by Section 144 of The Indian Evidence Act but still as in such cases also Oral Evidence cannot be given, the party can raise an objection under Section 91 of The Indian Evidence Act itself such a right to raise the objection will be implicit under Section 91 or it can be said to be implicit under Section 144 of The Indian Evidence Act also, but since Section 144 is a special provision and it does not expressly cover such matter, it would be better to say that the right to raise objection in such cases is implicit under Section 91 of The Indian Evidence Act.

In the second part of Section 144 of The Indian Evidence Act, it is clearly provided that if a witness is giving oral statement of the contents of any document i.e. if he is giving oral accounts of the contents of any document then the opposite party may raise an objection and the party concerned will be required to produce the original document itself and if he cannot produce the original then he will have to prove that he is entitled to give secondary evidence under Section 65 of The Indian Evidence Act, only statement i.e. the oral account

¹¹ *Mangala Waman Karandikar(D) ... vs Prakash Damodaar Ranade (on 7 May, 2021 S.C.)*

of the contents of the document.

Conclusion

“There is always almost a fringe of embroidery to the story, however true is the main” i.e., whenever a person makes a statement there is always a slight fringe of falsehood, however true the main statement may. The Court should know the art to sift the grain from chaff.

The Indian Evidence Act has devised some mechanisms, principles, some processes and rules by which the Court can ensure that justice is done in the case until the Court ensures that best possible evidence is available before it, it cannot give a just decision in the case.

The general rule in Section 92 of The Indian Evidence Act is that if the conditions of Section 92 are fulfilled then oral evidence for any alteration in the terms can not be given. However, there are some logical circumstances which are equitable justified and reasonable wherein any such alteration may be proved by oral evidence also. These circumstances have been provided in the various provisos to Section 92. The provisos to Section 92 are based upon the principles of equity, justice and reasonableness. The provisos are exception to Section 92 and the rule of interpretation says that exceptions have to be given strict interpretation. Strict interpretation here would mean that only as much is permissible under the proviso as is expressly provided in the proviso. A proviso cannot be given a liberal or wide interpretation.