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On the Subject

Recording of Evidence, Marshalling Appreciation, Admissibility & Relevancy



Prepared by
Mrs. Sweta Upadhyay Gaur,
Secretary, District Legal Services Authority, Balod
Satpreet Kaur Chhabra,
A.J. to I C.J. Sr. Division, Balod at Doundilohara
Madhuri Markam,
I Civil Judge Junior Division, Balod

In the patronage of
Shri Shyam Lal Nawaratna,
Principal District & Sessions Judge,
District - Balod (C.G.)

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Recording of Evidence, Marshalling Appreciation,
Admissibility and Relevancy

"Evidence in legal acceptance includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved..." **Prof. Green**

INTRODUCTION-

The task of administration of justice in any state is assigned to the Judiciary, and to deliver justice, the Evidence play crucial role. For the same purpose, it is the task with the duty to appreciate evidence given during the course of a proceeding by the party asking the Court to enforce any right or liability of others. The same is based on the application of systematic rules provided under the law or based on verdicts of the Honourable High Courts and Supreme Courts.

When a case is brought before a court for judicial scrutiny, the judge has to ascertain the correctness or otherwise of the allegations, claim or assertion. This is done in accordance with the law through the evidence of witness who appears before the court to depose on oath which in legal sense is termed as evidence. Evidence , therefore is mode of ascertaining the truth. Facts tendered in evidence should be stated before the legal authority on oath and tested by cross-examination and unless this is done the statement cannot be dignified by the name of evidence. The Court

might be in know of the fact wholly or partially but he is not entitled to import his personal knowledge through other sources. He is also not entitled to superimpose his personal knowledge about rectitude of the witness **“To use his personal knowledge in judging the truth is a travesty of justice”**

"Evidence is factual knowledge or data that lends support to or casts doubt on the hypothesis" – Morris

What is Evidence-

According to Section 2(e) of the Bhartiya Sakshya Adhiniyam, evidence includes-



Oral Evidence (S. 54) Documentary Evidence (S. 56 – 58)

i All statements, including statement given electronically which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence.

ii All documents, including electronic or digital records produced for the inspection of the court. Such documents are called documentary evidence.

The following are the major types of evidence before the court-

- (i) Direct evidence;
- (ii) Circumstantial evidence;
- (iii) Substantial evidence;
- (iv) Corroborative evidence.

Recording of evidence should be confined to relevant fact and fact in issue in view of section 3 of the Bhatiya Sakshya Adhinyam. While recording oral evidence the Trial Judge is expected to be “**ears and eyes**”, which means, that he has to closely observe the demeanor of the witness and note whether he hesitates, weaves, prevaricates or looks around, with a view to gain an insight into the mind of the witness to grasp whether he tells the truth or not, and to see, whether he has under duress of any one or under threat or pressure. So, the assessment of oral evidence by the trial Judge is given more weight by appellate Courts.

MAIN PROVISION AS TO RECORDING OF EVIDENCE

“Evidence” in Civil proceedings –

- ◆ Order XIII of C.P.C., states that While recording evidence, the presiding officer has to see whether original documents are filed or not .
- ◆ Order XVI & Order XVIII of the Code of Civil Procedure (CPC) 1908- Witnesses are summoned to appear before the court and adduce evidence.
- ◆ **Chapter 8 Rule 146 to 150 of Civil Rules and Order**

II. Criminal proceedings –

- ◆ **From Section 253-257 and from Section 308 to 335 of Bhartiya Nagrik Suraksha Sanhita provides-** Procedure of

collecting evidence and the Court's power to compel the witness to appear before it to give evidence.

◆ *Secondly, Rule 180 – 213 (chapter 7) of Rules and Order (Criminal) provides provisions related to recording of Evidence.*

ORDER OF EXAMINATION- as per **Section 143 of Bhartiya Sakshya Adhinyam**, the witnesses shall be first examined-in chief then (if the adverse party so desires), cross examined, then (if the adverse party so desires), re-examined.

“Examination-in-chief (Section 142 of Bhartiya Sakshya Adhinyam). - The examination of a witness by the party who calls him shall be called his examination-in-chief.”

The object of this examination is to elicit from the witness such of the facts to which he can depose in order to prove the case of a party calling him. In the same way, a party appears as his own witness and gives evidence.

“Cross-examination (Section 142 of Bhartiya Sakshya Adhinyam). - The examination of a witness by the adverse party shall be called his cross- examination.”

As a rule, Cross-examination should be restricted to matters that are material and relevant. The trial judge may limit or even prohibit a line of inquiry that is being pursued, if it is minimally relevant.

“Re-examination (Section 142 of Bhartiya Sakshya Adhiniyam). -

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.”

The re-examination shall be directed to the explanation of matters referred to in cross-examination & re-examination cannot be allowed for new matters except with leave of the court.

In *Himanshu Singh Sabarwal v. State of M.P. AIR 2008 SC 1943-*

Honble SC has commented that if a criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves.

In Save life foundation and another Vs Union of India and Another (2016(3) ALT 17 (DNSC)), it was held that in accident cases, the method of examination of a witness (bystander or good samaritan) may be either be by a way of Commission under Sec.284 of the Cr.P.C. or formally on affidavit as per sec. 296 of the Cr.P.C. or Video conferencing may be used extensively to record the evidence of a witness who is an eye witness inorder to prevent harassment and inconvenience to good samaritans.

RECORDING OF EVIDENCE IN CIVIL CASE -

Right to begin (O- 18 R- 1) - The plaintiff has right to begin unless the defendant admits the fact alleged by the plaintiff and contended that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case defendant has the right to begin. And Order-18 R-4 provides that the examination-in-chief of a witness shall be on affidavit and cross-examination and re-examination of witness shall be taken either by the court or by the Commissioner appointed by the court.

RECORDING OF EVIDENCE IN CRIMINAL CASE - The Bhartiya Nagrik Suraksha Sanhita provides procedure for recording prosecution evidence in sections 253, 254, 265, 267 and for recording defence evidence under sections 256, 266, 270 and the accused is examined under section 351.

Section 168 of the Bhartiya Sakshya Adhinyam, empowers the Judge to put questions in any form, at any time and further empower to interrogate the witnesses because the position of judge is not that of moderator between contestant in a game.

Under Criminal Rules and Order in Rule 181 provides as – when witness gives evidence in a language not understood by the accused or by the court. The court may take help of an interpreter.

Section 356 of Bhartiya Nagrik Suraksha Sanhita, provides for Inquiry, trial or Judgment in absentia of proclaimed offender- when a person is declared as proclaimed offender, whether or not charged jointly, has absconded to evade trial and there is no immediate prospect of arresting him, it shall be deemed to operate as waiver of right of such person to be present and tried in person, and the Court shall, after recording reasons in writing, in the interest of justice, proceed with the trial in the like manner and with like effect as if he was present, under the sanhita and pronounce the judgment.

Provided, that the Court shall not commence the trial unless a period of ninety days has lapsed from the date of framing of charge.

The Court must ensure following things before following the procedure above-

(a) issuance of execution of two consecutive warrants of arrest within the interval of atleast thirty days.

(b) publication in a national or local daily newspaper circulating in the place of his last known address of residence, requiring the proclaimed offender to appear before the Court for trial and informing him that in case he fails to appear within thirty days from the date of such publication, the trial shall commence in his absence.

(c) inform his relative or friend, if any, about commencement of the trial and

(d) affix information about the commencement of the trial on some conspicuous part of the house or homestead in which such person ordinarily resides and display in the police station of the district of his last known address of residence.

Section 336 of Bhartiya Nagrik Suraksha Sanhita,- provides that where any document or report prepared by a public servant, scientific expert, medical officer or investigating officer is purported to be used as evidence in any inquiry, trial or other proceeding, but, such public servant, expert or officer is either transferred, retired or died; or such public servant, expert or officer cannot be found or is incapable of giving deposition or securing presence of such public servant, expert or officer is likely to cause delay in holding the inquiry, trial or other proceeding then the Court shall secure presence of successor officer of such public servant, expert, or officer who is holding that post at the time of such deposition to give evidence on such document or report. The deposition of such successor public servant, expert or officer may be allowed through audio-video electronic means.

Section 530 of Bhartiya Nagrik Suraksha Sanhita- makes provision as to Trial and proceeding to be held in electronic mode- it states that all trials, inquiries and proceedings including (i) issuance, service and execution of summons and warrant, (ii) examination of complainant and witnesses, (iii) recording of evidence in inquiries

and trials, (iv) trials before Honourable High Courts and (iv) all appellate proceedings or any other proceedings may be held in electronic mode, by use of electronic communication or use of audio-video electronic means.

CERTAIN OTHER PROVISIONS REGARDING RECORDING OF EVIDENCE IN SOME CASES :-

Insane person & minor and Dumb witness :- Section 124 of the Bhartiya Sakshya Adhinyam, states that any competent person can be a witness unless the same has been barred by the Court or any law. They need to understand the questions that are being put to them. They need to give rational answers to the questions. A lunatic is also competent to testify if he is able to understand the questions that are being put to him. The answers given by him should be rational as well.

Section 125 of the Bhartiya Sakshya Adhinyam, states that a witness who is dumb i.e. unable to speak can give evidence in any manner by which he/she makes it understandable. He can do so by writing the event down, or by signs. Such a written document or the signs should be made in the open Court. Furthermore, Section 125 of the Adhinyam provides that evidence thus provided will be deemed as Oral Evidence in the Courts of Law.

Child Witness- Section 124 of the Bhartiya Sakshya Adhinyam , provides that any person is competent to be a witness unless the

Court thinks that he cannot answer the questions being put to him. Furthermore, a child can be easily framed to answer the questions. The factor of age is a reasonable restriction on this. For the determination of the competency of a child to be a witness, the Courts check the intellectual capacity of the Child. It all depends upon the judge to take a child as a witness or not.

It was held in *Santosh Roy v. State of West Bengal (1992 CriLJ 2493)* that the sole test for checking the competency of a child witness is his intellectual capacity to answer the questions with rationality.

Marshalling and Appreciation of Evidence

Marshalling and Appreciation of Evidence are backbone of a Judgment. The quality of judgment ultimately depends upon proper marshalling and appreciation of evidence. The two expressions have nowhere been defined.

"**Marshalling**", simply means, critical grouping together of the relevant statements of witnesses for and against a particular point. In other way, it can be said the skill of picking up various pieces of evidence on a particular disputed point and putting them together.

"**Appreciation**", means assessing the worth, value and quality of a particular piece of evidence.

Marshalling & Appreciation Of Evidence In Criminal And Civil Cases :-

Evidence is fundamental to the outcome of any civil litigation case because, ordinarily, the facts in issue in a case must be proved by evidence, and the judge will decide the case on the evidence adduced by the parties. In particular, it looks at relevance, the exclusionary rules, and the discretion to exclude admissible evidence. It also looks at proving admissible evidence.

How to appreciate Evidence- In appreciating evidence by applying the provisions of Bhartiya Sakshya Adhiniyam, the Courts either believed that certain facts exist, or it consider it existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the proposition that be exist, so, the judges have to test the evidence.

The Bhartiya Sakshya Adhiniyam does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor, is any such rule possible for proper appreciation of evidence. It is the matter of experience, common sense and novelty to the human affairs. The law has left it to Courts; to decide whether, the evidence should be believed or not.

In the process of decision making, the appreciation of evidence assumed utmost importance. Appreciation of documentary as well as oral evidence adduced by either party.

APPRECIATION OF DIFFERENT FORMS OF EVIDENCE:-

a) Oral evidence- There is a reason given in Halsbury's Law of England for rejection of hear say evidence, that reads: "the irregularity of original declarant, the depreciation of truth in the process of repetition, the opportunities for fraud, which, its admission would offer and waste of time involved in listening to the idle rumour" As far as appreciation of oral evidence, there are no set of hard and fast rules. It is the Judge, who is to sieve the evidence, so as to separate chaff from the grain and should consider such evidence to be relevant, probable, trustworthy consisting to the fact under consideration and surrounding circumstances thereto. Therefore, appreciation of oral evidence is not a 'cake- walk'. It varies from Judge to Judge. It must be a view or conclusion that a "reasonable" man ought to consider; without perverse , whimsical or bias.

In weighing evidence, certain considerations are prescribed, such as observation of demeanor; his intellectual capacity, interestedness, notices, consistency of his testimony, discrepancies in material particulars, collateral circumstances, admitted facts, probabilities of the case, burden of proof, necessity of corroboration in case of conflicting evidence.

(b) The second Limb of appreciation of evidence is '**admissibility and appreciation**' of documentary evidence. The Bhartiya Sakshya Adhinyam classify document into two types: one is according to section 74 is 'public document' and 'private document.

Before a document rendered by a party, is received in evidence, the question of its **admissibility** arises and the same is to be decided in accordance to certain statutory provisions that deal with the admissibility of documentary evidence. It is a cherishing aspect to remember that admissibility of document in evidence is distinct from that of proof of its execution and contents.

Even if a document is marked with the consent of both parties, it does not dispense with the necessity to prove the contents and its **relevancy**.

All admissible evidence is relevant but all relevant evidence is not admissible. Relevancy is the genus of which admissibility is the species.

Appreciation of evidence involves weighing the credibility and reliability of the evidence presented in the case. In criminal cases, the burden of proving the guilt of an accused is upon the prosecution. It must stand by itself. Essentially, accused need not establish his case beyond all reasonable doubt. Of course, in some cases, where the burden of proof relating to a fact in issue

in a case is on the accused, the stand of proof required of him is not the same as is required from the prosecution. The law always requires that the conviction should be certain and not doubtful. If the evidence on record establishes the truth of the charge and satisfies the reason and judgment of the Court such evidence must be taken to have proved the charge beyond all reasonable doubt justifying conviction.

In the case of *State of Gujarat Vs. Bharwad Jakshibhai and others, 1990 CrLJ 2531*, the Hon'ble Supreme Court held as follows:

“For appreciating the evidence of the injured witnesses the Court should bear in mind that :

- (1) Their presence at the time and place of the occurrence cannot be doubted.
- (2) They do not have any reason to omit the real culprits and implicate falsely the accused persons.
- (3) The evidence of the injured witnesses is of great value to the prosecution and it cannot be doubted merely on some supposed natural conduct of a person during the incident or after the incident because it is difficult to imagine how a witness would act or react to a particular incident. His action depends upon number of imponderable aspects.

● **Section 76 of Bhartiya Sakshya Adhiniyam**, deals with “Certified copies of document may be permitted in evidence and it presumed that their contents are proved. Various categories of

official documents and the method of their proof is laid down in Section 77 of Bhartiya Sakshya Adhinyam.

● **Section 78 to 92 of Bhartiya Sakshya Adhinyam**, enumerates various kinds of documents of which presumption as to their genuineness can be drawn. Here, it needs to have special attention, with regard to Section 92 of Bhartiya Sakshya Adhinyam which speaks about presumption as to document 30 years old, which are usually referred as old document; that are not only admissible in evidence. But, further, it is presumed that the signature and hand writing contained therein are those of that particular person, whose signature it bears or in whose hand writing to it purports to be. This section does away the 'strict rule of proof', by giving right to a presumption of genuineness, provided the document is 30 years old and produced from proper custody.

● Wills do not require to be stamped, but testator may choose to get it register, at his option. These are not compulsorily registerable documents. Therefore, a document, purporting to be a will can be admitted in evidence.

● As a corollary Section 35 of the Stamp Act, mandates that the documents not stamped or insufficiently stamped or inadmissible in evidence for any purpose; but, such instrument, can be received in evidence on payment of stamp duty and penalty. However, there are certain exceptions under section 35; significant being promissory note and bill of exchange. Un-stamped or not duly

stamped promissory note cannot be received in evidence at all, and the defect cannot be cured by collecting Stamp Duty and Penalty. If an instrument not duly stamped has been admitted in evidence without objection being raised, by the opposite party, such admission cannot be called in question at any later stage of the same suit or proceeding on the ground it is not being duly stamped; as per section 36 of the Stamp Act.

- Then, passing on to **instrument compulsorily registerable**, section 17 of Registration Act, deals with the instruments whose registration is compulsorily means that these documents shall not be admitted in evidence not registered.

- **Section 49 of the Registration Act**, laid down that no document required by section 17 or by any provision of the Transfer of Property Act, to be registered, shall be received as evidence of any transaction affecting such party. Therefore, unregistered instrument in respect of immoveable property are clearly in admissible in evidence.

However, by virtue of the proviso section 49 of Registration Act, such an unregistered document may be received in evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purpose of Section 53 (A) of the Transfer of Property Act, or as evidence of any collateral transaction, not required to be effected by registered instrument.

● Some documents are required by law to be attested, because without due attestation, they are not to be acted upon, wills under the Indian Succession Act, mortgage deed, gift deed, required attestation at least by two persons. In connection to this, **section 67 of Bhartiya Sakshya Adhinyam** enjoins that compulsory attestable documents, shall not be his evidence under which one attesting witness at least is to be examined, to prove their execution if its execution is denied. But, in case of will, examination of at least one attester is mandatory in all cases. Suppose, if an attestable document is not duly attested, Courts would have no option but to eschew them from consideration. In case of a will, propounder of the will has to establish that the attester executed it, while, he was in a sound and disposing state of mind out of his own free will and consent.

● **Section 94 of Bhartiya Sakshya Adhinyam** exclude adduction of oral evidence when there is documentary evidence. While section 95 of Bhartiya Sakshya Adhinyam elaborates this principle providing emphasis to it. ‘3rd party given evidence’ on document may be considered under section 102 of Bhartiya Sakshya Adhinyam.

The following are some of the practices to be adopted by the judges while evaluating the evidence and recording findings:

1. The proof of each material facts lies in corroboration. Proof means full proof only. There is nothing like part proof in criminal law.

2. Evidence is to be weighed and not counted.
3. The charge must be proved beyond reasonable doubt.
4. Whole evidence is to be considered.
5. Judge should scrutinize the evidence of prosecution and defence witness with one standard.
6. Evidence of interested witness should be examined with caution.
7. Expert evidence though relevant, is not conclusive. The court shall not simply adopt it but necessarily give an independent finding.
8. Status of witness shall not be a criterion in assessing the reliability of the evidence.
9. Cogency, consistency, knowledge, memory and ability of the witness will go a long way in assessing the credibility of the witness.
10. The court shall not search for contradictions and collect all relevant and irrelevant contradictions.
11. The court shall not brand a witness as untrustworthy and reject his evidence but consider the evidence on its merits.
12. Mere marking of documents is not enough. It has to be proved. Marking is only for the purpose of identification.
13. There should be a proper narration of facts, appreciation of all Evidence without omissions and all the findings given must be based on reason.

CONCLUSION

Appreciation of evidence is a matter of experience and knowledge of human affairs. It is a delicate task to be carried out by Judges for weighing evidence and drawing inferences. Each case presents its own peculiarities. Common sense and dexterity are also part of the tools. The correct method of appreciation and assessing evidence of a witness is by scrutinizing it on merits and ascertain the truth to render justice to the litigants. Judges have to use their own skills, experience, natural faculties and appreciate the evidence taking the aid of provisions of Bhartiya Sakshya Adhinyam, precedents rendered by the Hon'ble Supreme Court and Honourable High Courts and appreciate the evidence in correct perspective with an ultimate object that neither innocents be punished nor culprits be escaped in any Criminal Case.