BHARTIYA SAKSHYA ADHINIYAM, 2023

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INTRODUCTION

Indian Evidence Act is the most important pillar amongst all the laws available in India. There are two types of laws: One is substantive law and another is procedural law. Substantive laws are those laws which define certain rights, liabilities and privileges of individuals, as well as providing the basis for legal actions and defenses in both civil and criminal matters. In contrast to substantive laws, procedural laws, also known as **Adjective Laws**, are the laws which act as the 'machinery' for enforcing rights and duties. Procedural laws comprise the rules by which a court hears and determines what happens in civil, criminal or administrative proceedings, as well as the methods by which substantive laws are made and administered.

Law

Substantive Law　　　Procedural Law

Basically evidence Act is procedural law but Doctrine of estoppels is in substantive nature

HISTORICAL BACKGROUND

Prior to the passing of Evidence act, the principles of the English Evidence Act were in practice in the presidency towns and in Indian courts. There was no systematic enactment on this subject. In 1868, Sir Henry Maine prepared a draft bill on law of evidence but it was not adopted, as it was not suitable for our country. In 1871 Mr. Stephan prepared a new draft which was passed as Act 1 of 1872. Therefore, the Indian Evidence Act,1872 is a mode or an instrument through which the court upheld its functions by reaching the truth of each case. The Indian Evidence Act, 1872 was passed on 15th March 1872 and enforced on 1st September 1872.

MEANING OF EVIDENCE

The term "evidence" originates from the Latin word 'evidera,' denoting a clear discovery, ascertainment, or proof. According to Blackstone, evidence "signifies that which demonstrates, makes clear or ascertains the truth of the facts or points in issue either in one side or the other"

According to Stephen, "It sometimes means words uttered and things exhibited by witnesses before a Court of justice. At other times, it means the facts proved to exist by those words or things and regarded as grand work of inference as to other facts not so proved. Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry".

The Indian Evidence Act is divided into four main Parts:

PRELIMINARY

- Chapter I containing Section 1-2 deals with 'Preliminary points';

RELEVANCY OF FACTS

- Chapter II containing Section 3-50 deals with 'Relevancy of facts'.

MODE OF PROOF

- Chapters III containing Section 51-53 deals with 'Facts which need not be proved';
- Chapter IV containing Section 54-55 deals with 'Oral evidence';
- Chapter V containing Section 56-93 deals with 'Documentary evidence';
- Chapter VI containing Section 94-103 deals with 'Exclusion of oral by documentary evidence'.

PRODUCTION AND EFFECT OF EVIDENCE

- Chapters VII containing Section 104-120 deals with 'Burden of proof';
- Chapter VIII containing Section 121-123 deals with 'Estoppel'
- Chapter IX containing Section 124-139 deals with 'Witnesses';
- Chapter X containing Section 140-168 deals with 'Examination of witnesses';
- Chapter XI containing Section 169 deals with 'Improper admission & rejection of evidence'.
- Chapter XII containing Section 170 deals with Repeal and savings

AIMS AND OBJECTS OF BHARATIYA SAKSHYA ADHINIYAM, 2023 (BSA)

* The avowed aims and objects of the Indian Evidence Act, 1872 (Evidence Act), as per its long title, were to consolidate, define and amend the law of evidence.

* The avowed aims and objects of the Bharatiya Sakshya Adhiniyam, 2023 (BSA), as per its long title, are to consolidate and to provide for general rules and principles of evidence for fair trial.

* The BSA recognizes that enunciating the rules and principles of evidence is not an end in itself. The aim for providing for general rules and principles of evidence is to ensure a fair trial.

It is submitted that the provisions of the BSA should be interpreted in the light of the avowed aim expressed in long title to achieve a fair trial.

EXHAUSTIVE OR NOT

It is not exhaustive. But if there is express provision in the act, the courts have to follow it and if there is no provision, courts can follow the English law or law of any country. There are other acts which also consists the provisions for evidence such as:-

- Banker's book evidence Act.
- C.P.C O.XXVI.
- C.R.P.C, S. 291 & S.292.
- Registration Act, S.49
- T.P.A. S. 59 & S.123.
- The Limitation Act, S.19 & S.20.

LEX FORI OR LEX LOCI

The term Lex Fori means the law of the court and the term Lex Loci means the law of the land. The House of Lords observed that Law of evidence is Lex fori which govern the courts. All the questions related to evidence should be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the court sits to enforce it.

PREAMBLE:

Preamble of Indian Evidence Act was as follows;

WHEREAS it is expedient to consolidate, define and amend the law of Evidence.

However the preamble for the new code for evidence, Bharatiya Sakshya Adhiniyam, 2023 which received the assent of the President on the 25th December, 2023 and is enforced on 1st July, 2024 has made certain amends in the preamble and omitted the words 'Define and amend' The new preamble is as follows:

An Act to consolidate and to provide for general rules and principles of evidence for fair trial.

PART 1

CHAPTER 1

SECTION 1- SHORT TITLE, EXTENT AND COMMENCEMENT:-

OLD CODE:-The Act extends to the whole of India including the State of Jammu and Kashmir (after the amendment of the Jammu and Kashmir Reorganisation Act, 2019) and applies to all judicial proceedings in or before any Court, including Court-martial (other than the Court-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy Discipline Act, 1934 or the Air Force Act) but not to affidavits presented to any Court or officer, or to proceedings before an arbitrator.

The Indian Evidence Act applies to all Judicial proceedings in or before any court including courts martial but it does not apply to:-

1. Court martial convened under
   - Army Act
   - The Naval Discipline Act.
   - The Indian Navy
   - Air force Act

2. Affidavits

An affidavit is a declaration sworn or affirmed before a person competent to administer an oath. Thus, an affidavit per se does not become evidence in the suits but it can become evidence only by consent of the party or if specifically authorised by any provision of the law. They can be used as evidence only under Order XIX of the Civil Procedure Code.

"Shamsunder v. Bharat Oil Mills AIR 1964 Bom 38", it had been held that affidavits can be used as evidence if, for sufficient reasons, the Court passes an order under Order 19, rule 1,2 of the Code Of Civil Procedure 1908. It, therefore, stated that an affidavit cannot be treated as evidence unless an order has been passed under Order 19 of the Code of Civil Procedure.

So affidavit can be used in-

- order 19 of the CPC
- Sec. 331 BNSS-Affidavit in proof of conduct of public Servant (Sec 295 CRPC 1973)
- 332 of BNSS- Evidence on formal character on Affidavit (Sec 296 CRPC 1973)

3. Proceedings before any arbitrator.

According to S.2, Sub- clause (i) Cr.P.C.1973, a judicial proceeding includes any proceeding in the course of which evidence is or may be legally taken on oath.

The Act in clear terms doesn't have any significant bearing to the arbitral method. As a result of which arbitrator is not limited by the specialized standards of evidence except, if the fundamental principles of fairness and well- established principles of evidence are not disregarded. An arbitrator is unfettered by technical rules of evidence and it is not valid objection to an award that arbitrator has not acted in strict conformity to the rules of evidence.

<u>NEW CODE-</u> The phrases "It extends to the whole of India" ,"Other than court-martial convened under Army Act", "The Naval Discipline Act", "the Indian Discipline Act, 1934 or the Air Force Act" are omitted

SECTION 2- DEFINITIONS:-

Sec 2(a)- COURT

The term "Court" is inclusive of the following:

- All Judges;
- All Magistrate;
- All persons legally authorized to take evidence, except arbitrators.

Sec 2(b) - CONCLUSIVE PROOF

Conclusive proof is the most important and weighty of all the presumptions, Court does not allow disproving it. It has been said about the conclusive proof in Section 2 of the Act that- "Where one fact is declared by this act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it.

Section 116 of the BSA is a good example of conclusive proof. It has been said in section 116 that- "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, has no access to each other at any time when he could have been begotten."

Presumption has been defined as an inference, affirmative existence of some fact which is drawn by judicial authorities. Presumptions hold the field in the absence of evidence but when facts appear presumptions go back. Presumptions may be either of law or fact and when of law may be either conclusive or rebuttable but when of fact are always rebuttable. Mixed presumptions are those which are partly of law and partly of fact.

The basic rule of presumption is when one fact of the case or circumstances are considered as primary facts and if they are proving the other facts related to it, and then the facts can be presumed as if they are proved until disproved. Section 119 of Indian Evidence Act specifically deals with the concept that 'the court may presume the existence of any fact which it thinks likely to have happened.

Sec 2(c)- DISPROVED -

A fact is said to be "disproved" when after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. The definition of the expression disproved is converse of the definition of the expression proved.

Sec 2(d) DOCUMENTS -

The word "Document" in the general mean any matter written upon a paper in any language. Under the Evidence Act document means "any matter expressed or described upon any substance, paper, stone, or anything by means of letters or marks. The word "Documents" literally means "written papers".

"Document" means any matter expressed or described on any substance by means of letters, figures, or marks; or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and **includes electronic and digital records**.

Illustrations:

- Writing is a document.
- Words printed, lithographed or photographed are document:
- A map or plan is a document:
- An inscription on a metal plate or stone is a document.
- A caricature is a document
- An electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents

Sec 2(e)- EVIDENCE:

Evidence means and includes:

1. All statements which the court permits or requires to be made before it by witness in relation to a matter of fact under inquiry such statements are called oral evidence.
2. All documents INCLUDING ELECTRONIC OR DIGITAL RECORDS produced for the inspection of the court and such documents are called Documentary Evidence

Evidence may be oral or documentary. The word evidence in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the court is convinced of these facts.

Evidence under Section 2(e) of the Indian Evidence Act, 1872 may be either oral or personal (i.e. all statements which the Court permits or requires to be made before it by witnesses, and documentary (documents produced for the inspection of the court), which may be adduced in order to prove a certain fact (principal fact) which is in issue. There must be an open and visible connection between the principal fact and the evidentially facts. Facts are which form part of the same transaction, though not in issue, place or at different times and places.

In general the rules of evidence are same in civil and criminal proceedings but there is a strong difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability due regard being had to the burden of proof, is sufficient basis of a decision, but in the latter, a much higher degree of assurance is required. The persuasion of guilt must amount to a moral certainty such as to be beyond all reasonable doubt.

Three major principles of evidence are

i) it must be confined to facts in issue and relevant facts

ii) Hearsay evidence is not admissible

iii) Best evidence must be produced before the court.

Distinction between 'evidence' and 'proof' –

The word 'evidence' includes all the legal means, exclusive on mere argument which tends to prove or disprove any matter, fact or the truth of which is submitted to judicial investigation. 'Proof' is the establishment of fact in issue by proper legal means to the satisfaction of the court. It is the result of evidence, while evidence is only the medium of proof.

Sec 2 (f) - FACT

'Fact' means anything or state of thing which is capable of being perceived by the senses. It also includes any mental condition of which a person is conscious. Facts are of two kinds :

i) Physical

ii) Psychological (item which exists in mind)

Physical facts mean and include anything, state of thing or relation of things, capable of being perceived by sense. On the other hand those facts, which cannot be perceived by senses, are "Psychological Facts".

Example

- If a man hears something then that he heard something is a fact.
- That a person has said certain words is a fact.
- That there are certain objects arranged in a certain order in a certain place, is a fact.
- That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at the specified time conscious of a particular sensation, is a fact.

Sec 2(g) - FACT IN ISSUE

Facts in issue means any fact from which either by itself or in connection with other facts there necessarily follows the nature of the right asserted or denied in any civil or criminal proceedings. A fact in issue is called as the principal fact to be proved i.e. factum probandum and the relevant fact the evidentiary fact i.e. factum probans from which the principal fact follows. The facts which constitute the right or liability called "fact in issue".

Example: - Where 'A' is accused of murder following are the facts in issue:

- A caused B's death
- A intended to cause the death of B
- A had received a grave and sudden provocation from B.

Matters which are in dispute or which form the subject of investigation are to be determined by the court. When the Court investigate the facts there may be allegation and denials by the parties to the dispute. From these the court settles the facts in issue.

Basically, Any fact from which - Either by itself or in Connection with another facts:

Shows-

- the existence
- Non-existence
- nature or extent

Of any -

- Right
- Liability
- Disability

Which asserted or denied in any suit of proceedings.

* In CPC - The fact asserted by one party, denied by another

Fact in issue are also Called Main facts they are the backbone of legal Proceedings framed by the court on the basis of pleading.

Sec 2(h)- MAY PRESUME

According to it: "Whenever it is provided by this Act, that court may presume, a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it." Thus, "May presume" provides discretion to court, to presume or not, regarding any act. Section 2 provides that where a court presumes any fact, it shall either regard such fact as proved unless it is disproved and it may call for proof of it.

Sec 2 (i) – NOT PROVED -

A fact is said to be proved when it is neither proved nor disproved. A fact is said to be not proved when neither its existence nor its non-existence is proved. In other words, the man of ordinary prudence neither believes that the fact exists nor he believes that the fact does not exist

Sec 2(j) –PROVED: A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.