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Legacy and Comparative Analysis of the Best Evidence Principle

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ABSTRACT

The journey of evidence in India through the ancient, medieval and modern period in history can be traced in different manifestations. In the ancient era, the Dharmashastras paved the way for three types of evidence namely-lekhya or documentary evidence, ,sakshi or witness and bukhthi or possession. The Mohammedan law recognises itself with documentary and oral evidence, where the latter is again divided into direct and hearsay evidence. In British India, the presidency towns were in a much better condition than the mofussil towns with regards to the definite rules of evidence. After around eleven unsuccessful enactments made during 1835-1853, a commission chaired by Sir Henry Mayne in 1868 submitted a draft which also turned out to be futile. Finally the task of codification of the rules was handed over to Sir James Fitzjames Stephen whose draft cleared the test of enactment and came into force on 1st September 1872. Section 3 of the Indian Evidence Act, 1872 states that evidence means and includes all oral evidence and documentary evidence to be produced before the Court for inspection, which will help decide the fate of a case as the meaning of evidence may vary owing to facts, circumstances and kind of case. Gradually the classification of evidence has grown considerably and so has the dynamics of best evidence rule. There are no watertight compartments for the types of evidence and with the development of a digital world the ambit of best evidence rule is walking between broader horizons and blurred lines.

Keywords- oral, documentary, hearsay, direct, in-writing, principle.

I. INTRODUCTION

To confirm the truth and to avoid any uncertainty in the mind of the judges, the Indian Evidence Act, 1872 was formulated so that a disciplined approach was followed while handing over the evidence to the Court. It is the *lex fori* which governs the Court and it decides the credibility of a fact or anything related to it where a remedy is waiting to be enforced. The rules and principles engraved in the law of evidence provides the means for proving a fact, facilitating the way for justice without affecting the substantive rights of parties.[2] The facts that are

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[2] Ram Jas v. Surendranath AIR 1980 AII 385

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presented should be interlinked, admissible, relevant enough to have proper weightage, material and competent irrespective of the method in which the evidence was obtained.[3] The rules for civil and criminal cases are similar except for certain sections of the Act like Sections 115-117 which deal with estoppel (civil cases) and Sections 24-30 concerning confessions (criminal cases). The burden of proof is on the prosecution to establish it beyond reasonable doubt in criminal cases and the law presumes that the accused is innocent until proven guilty whereas in civil cases the responsibility falls on the plaintiff, bound by *res ipsa loquitor* principle.

Section 3 means and includes oral and documentary evidence where the former refers to all statements of witness allowed by the Court related to matter of fact of inquiry and the latter includes all the electronic records essential for the case proceedings. The definition is limited by the absence of weapon, identification proceedings, statements made in court, local inquiry results etc.

II. KINDS OF EVIDENCE

- *Direct evidence*- It is considered to be the most authentic form of evidence for deciding a matter which instantly proves or disproves a fact. There is hardly any opposition as the evidence of the witness is real and tangible which easily defeats the testimony of the other party but the same cannot be relied upon in cases of perjury. It has a superior factor when the fact itself is established by direct declaration. It was decided that when there is a number of eye witnesses, their statements should lead up to a chain of events for the Court to be satisfied.[4]
- *Oral evidence*- It refers to the type of evidence limited to the words spoken from the mouth of the witness laid down in Chapter IV of the Indian Evidence Act, 1872. The statement should not be contradictory to the one previously made otherwise the evidence may lose its credibility. Oral evidence includes connection in between both the statements made by the witnesses of one party and also the one cross-examined by the opposite party.[5] Section 59 and 60 of the Act implies that the oral evidence must be direct and not hearsay, perceived by any of the five senses.
- *Primary and Secondary evidence*- Section 62 of the Act considers the primary evidence to be of a superior quality as it refers to the original document that needs to be presented before the court for verification of the facts. Section 63 states that secondary evidence should be

[3] Pushpa Devi M Jatia v. M.L. Wadhwa AIR 1987 SC 1748
[4] C. Magesh v. State of Karnataka AIR 2010 SC 276
[5] Nandam Mohanamma v. Markonda Narasimha Rao, AIR 2006 AP 8: 2006 AIHC 662

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submitted only when a primary evidence is not available to fill in the gaps, providing the reason for the absence of the primary evidence.

- Electronic evidence- The Information Technology Act, 2000 included electronic records under the wings of evidence and it means any data or information received or sent in an electronic form.
- *Circumstantial evidence or indirect evidence*- It points towards those facts which prove the main facts in issue by producing other facts and then associating them to have a cause and effect relation. It is covered under "relevant facts" of the Act and needs to be supported by a direct evidence in the form of oral or documentary evidence. In order to prove guilt by circumstantial evidence, the circumstances establishing guilt, all facts consistent with hypothesis of guilt should be proved where the circumstances should have a conclusive tendency and moral certainty.[6]
- *Analogical evidence*- It is the underutilised evidence which comes in handy usually at the last moment and rescues someone when they lack a strategy.
- *Anecdotal evidence*- It refers to personal views or observation of the world complemented with statistical evidence for validation which helps in building up a topic. It is seen as untrustworthy but may be useful in disproving generalisations with correct example for contradicting a claim.
- *Character evidence*- It is a type of evidence which helps in deciding the guilt of a person based on a summary of his/her past actions, whether good or bad and such practice is vague and subjective except for disputed issues in which it is imperative like defamation. Character refers to an overall personality whereas habit is a trait that a person does regularly. For example the fact that a person going to a café every morning for 7 years may be used as an evidence when there is a robbery.
- *Demonstrative evidence*- It is an evidence which is shown to the judges which is neither a testimony nor substantive evidence. It is only admissible if it is fair and not detrimental. It may include charts, timelines, maps, film or video, scale models, checklists exhibits, animation, photo enlargements, sample product display, diagrams of crime scene or anything which helps the jury to understand the case better.
- *Documentary evidence*- Document is defined under Section 3 of the Act and such evidence under Sections 61 to 66 can be produced in the form of letters, figures, marks or other means used for recording the matter in order to prove a disputed fact. The subject matter of

[6] State of Uttar Pradesh v. Ravindra Prakash Mittal, 1992 Cr LJ 369

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documentary evidence relies upon how the contents are to be proved, its genuine nature and the extent to which oral evidence can be excluded.

- *Exculpatory and inculpatory evidence*- Exculpatory evidence have specific rules and is favourable to the prosecution in a criminal trial. If such evidence is not revealed by the defence then the case may be dismissed by claiming a mistrial. The inculpatory evidence aids the defendant in a criminal trial which is not bound by any special rules. For example- If a person is stabbed to death by a knife, DNA evidence on a knife will be exculpatory evidence against the linked individual and if the knife is found in possession of the wife of the deceased person then it would be inculpatory evidence against the wife.
- *Forensic evidence*- It is the type of evidence invisible to the naked eye and can be divided into physical and biological evidence where the former refers to non-living and inorganic matter like fingerprints, impressions, paints etc. while the latter refers to organic matter like blood, saliva, urine, hair etc.
- *Hearsay evidence*- Such evidence is inadmissible unless it has a reasonable credibility and a nexus otherwise it is irrelevant as the witness has neither personally seen or heard the facts, which has probably been picked up from a third person.
- *Prima facie evidence*- It is also known as presumptive evidence and refers to questionable presumptions which also establishes a basic fact. For example- discrimination of performance between white people and black people.
- *Statistical evidence*- It refers to the data for investigatory purpose of proving a point strengthening the evidence. For example-sugar free chewing gums advised by eight out of ten dentists.
- *Testimonial evidence*- It refers to spoken or formal written statements used to prove certain points in the court and is inadmissible if it is misleading, unfair, harmful, not coming from expert witness and if the information is gathered from between the client and the lawyer.
- *Judicial and Non- Judicial evidence*- Judicial evidence includes confessions of the accused, statement of witnesses and documentary evidence and facts produced before the court for examination. Non-judicial evidence refers to the confessions made by the accused to any person outside the court of law and if it is proved then it takes the form of judicial evidence.
- *Scientific/Expert/trace evidence*- It is of an unbiased nature and such evidence requires the diligent effort of the researcher to establish the set standards. The validity of the evidence along with the authenticity of the science behind it and its influential demeanour may be under the scrutiny of the judge.

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- *Real evidence*- It is covered by second proviso of Section 60 and covers crime weapons, scars of wounds or other injury alleged to be inflicted etc.
- *Substantive and corroborative evidence*- Substantive evidence has a more concrete and absolute base whereas corroborative evidence is auxiliary in nature and its existence is dependent on the former one. They can be direct or circumstantial or both.

III. EVOLUTION OF THE BEST EVIDENCE RULE

In the Middle Ages, former Roman residents believed that original written documents were not just a sign of rights, but rights themselves. This idea finally disappeared in 1800, when the doctrine of the right of abode was spread in the evidence law. The doctrine of *profert in curia* is similar to the best evidence rule. If an appeal is filed because the party cannot provide the original written document, he will lose all the rights created by the document. Since ancient times, people have accepted and focused on the evidence rules for court proceedings to seek the truth about controversial issues by exhausting the best available resources.

In U.K.

The rule was stated by Lord Hardwicke LC in Omychand v Barker (1745) 1 Atk 21 at 49 as follows: 'The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit.' Oral evidence of the condition of tangible objects was rejected on the ground that the objects might have been produced,[7] and the circumstantial evidence of an event on the ground that the objects might have been called.[8] An accused was charged of keeping a disorderly house and a film was prepared by the defence for deliberate reconstruction, where the evidence was not considered to be the best as there was uncertainty of material time.[9]

A former decision of exclusion of indirect evidence on the ground that it was not the best evidence of a fact[10] was challenged by Lord Denning stating the importance of admitting all relevant evidence rather than the best, the pros and cons of it goes only to the weight and not to admissibility.[11]With time rule was confined to the requirement for primary evidence of the contents of the documents and will be construed narrowly, so as to favour the admission of relevant evidence.[12] The exclusion is never absolute and to a certain degree, the best evidence

[7] Chenie v. Watson (1797) Peake Add Cas 123
[8] Williams v. East India Co. (1802) 3 East 192
[9] R v. Quinn [1962] 2 QB 245
[10] Robinson Brothers (Brewers) Ltd v. Houghton and Chester-le-Street Assessment Committee [1937] 2 KB 445, 468-9 per Scott LJ
[11] Garton v. Hunter [1969] 2 QB 37
[12] Kajala v. Noble (1982) 75 Cr App R 149; Taylor v Chief Constable of Cheshire [1986] 1 WLR 1479

rule is extinct.

In U.S.

Wigmore pointed out that in cases where the judge must rule on the relevance of the proposed evidence, the judge is bound by the previously decided case ("judicial precedent"), so the relevance is legal. Citing a judgement he concluded that the "united logic of a great many judges and lawyers may be said to furnish…the best evidence of what may be properly called *good-sense and wit*, and thus to acquire the authority of law."[13] Best evidence emphasizes on litigants to provide evidence that will best facilitate a court's task of accurately resolving disputed issues of fact.[14]

In the United States Federal Court, the best evidence rule is part of Article X of the Federal Evidence Rules (rules 1001-1008). The rule sets out guidelines under which when "original documents are not available", one of the parties to the court can be required to request a copy, record or photo of its content to be submitted for trial as evidence. If the parties can provide acceptable reasons to provide the original evidence, they can accept "auxiliary evidence" or a copy of the original document as evidence. The best evidence rule only applies to situations where the parties attempt to confirm non-original documents submitted as evidence during the trial. Prior to the state court system, the admissibility of documents may vary. The court determined that the printed-out emails of the text messages were acceptable for purposes of satisfying the best evidence rule.[15] When a party attempts to submit a reproduction of electronically stored information using unreliable methods, courts will likely exclude the evidence under the same rule. [16]

IV. ANALYSIS OF THE INDIAN SCENARIO

The best evidence rule is regarded as an ideal upon which the law of evidence relies. Even if it is not specifically mentioned anywhere, it is the basis of Articles 91 and 92 of the Indian Evidence Law,1872. Sections 60 and 64 of the Act also express this principle.

Sections 60

Section 60 refers to direct oral evidence to be given importance with respect to the witness who has seen or heard the evidence first, perceived a fact by a sense or in that manner and holds an opinion on such grounds[17]. The credibility of oral evidence was tested and proved to be reliable

[13] State v. LaPage 1876 57 N.H. 245 at 288
[14] Dale Nance, The Best Evidence Principle, 73 Iowa L. Rev. 227, (1988).
[15] Greco v. Velvet Cactus, Civil Action No.: 13-3514, 6-8 (E.D. La. June 27, 2014).
[16] U.S. v. Jackson, 488 F. Supp. 2d 866 (D. Nebraska 2007).
[17] Jyotirmoyee v. Durgadas, AIR 1976 Calcutta 238

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when depositions moving harmoniously with fard-beyan recorded before the Police was merely elaborated with minor contradictions.[18] Evidence conveyed not to establish the truth of the statement but the fact that a statement was made is admissible and is frequently relevant in considering the mental state and conduct of the witness or some other person in whose presence the statement was made.[19]There are cases which are disposed on the grounds of being hearsay[20] whereas some cases held hearsay evidence admissible for corroborating substantive evidence of eye-witnesses.[21] In case of living person his statement should be recorded in the witness box in judicial proceedings and should not be substituted by affidavit except in special provisions permitting it.[22] When informant is not examined, testimony of the witness or police officer as evidence is not admissible.[23] 'Opinion evidence' about the existence of relationship is admissible provided it satisfies the tests of Section 50 of the same Act[24] whereas opinion evidence as to handwriting is hearsay and would be relevant only if it fulfils Section 47 of the Act first.[25]

Section 64

While Section 64 says that documents must be proved by primary evidence except in the cases hereinafter mentioned Section 62 says: "Primary evidence means the original document itself." It refers to proof of documents by primary evidence only with respect to certain exceptions mentioned in the latter Sections of the Act. Inability to raise an objection about an inadmissible document cannot lead it to be taken in evidence.[26] Admission of payment in writing by one of the parties and non-production of cheque does not count the evidence as insignificant.[27]

Section 91

It deals with "terms of a contract, or of a grant, or of any other disposition of property" reduced to writing[28] by agreement of parties as also with any matter which "is required by the law to be reduced to the form of a document." It is not limited in its operation to the parties[29] to such instrument[30] or their representatives in interest. The rule in Section 91 universally applies to

[18] Sheikh Juman v State of Bihar, AIR 2017 SC 1121 p. 1126
[19] J.D. Jain v. Management, State Bank of India, AIR 1982 SC 673
[20] Jagroop v. Rex, AIR 1952 AII 276
[21] Mukhtiar Singh v. State of Punjab, AIR 2009 SC 1855 at p. 1858; Pawan Kumar v. State of Haryana (2003) 11 SCC 241 relied on.
[22] Munir Ahmad v. State of Rajasthan, AIR 1989 SC 705
[23] Bhugdomal Gangaram v. State of Gujarat, AIR 1983 SC 906
[24] Balaram v. Jayakrushna, AIR 1972 Ori 141
[25] Rahim Khan v. Khurshid Ahmad, AIR 1975 SC 290
[26] Malay kumar Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162 at p. 1179
[27] M/s. Sharda Talkies (Firm) v. Madhulata Vyas, AIR 1996 M.P. 68
[28] Amina (Mst.) v. Lakhmi Chand 1934 L 705
[29] Meenakshisundaram Pillai v S T Chenchu Mudaliar AIR 1928 Mad 459
[30] Tulsi v Chandrika Prasad AIR 2006 SC 3359

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parties to documents as well as strangers. It looks into all documents whether *dispositive*, eg, contract, grant, etc, or *non-dispositive*, eg, record of evidence, memorandum, etc, reduced to writing either by requirements of law or by agreement of parties. It further covers both bilateral documents like contracts, grants etc and unilateral documents like power of attorney, wills, etc. It supports *exclusiveness of documentary evidence* where no extrinsic evidence is admissible in substitution for the written document.[31] A written document must be proved by the writing itself[32] would have been vague[33] if extrinsic or oral evidence is admitted to vary, contradict, etc, its terms. It has two exceptions where a public officer to be appointed in writing and will admitted in India are exempted.

Sections 92

Section 92 applies only to the parties to such instrument or their representatives in interest. Strangers are out of its reach. It deals only with dispositive documents required by law to be in writing which is evident from words like "as between the parties to any such document" and "any matter required by law". It covers only with bilateral documents, reduced to writing either by consent of parties or by requirements of law which can be interpreted from "as between the parties" with reference to "separate oral agreement." It relates with the *conclusiveness and inclusiveness of documentary evidence* taking into account extrinsic evidence is inadmissible to control or alter the terms of a written instrument, ie, to contract, vary, add or subtract from its terms. The grounds for exclusion of extrinsic were stated to be the unacceptability of inferior evidence nullifying the law and to emphasize the significance of agreements to be in writing dodging future controversy and treacherous memory.[34] Section 92 comes into picture after the document has been produced[35] to prove its terms under Section 91.[36] It follows six provisos namely- facts invalidating the document, separate oral arguments and its condition precedent, distinct oral arguments made to change the contract, usage or customs supporting omissions in a contract and extrinsic evidence of surrounding circumstances.

V. CONCLUSION

The best evidence rule states that original writing, recording or photograph must be produced before the court in order to prove its content rather than producing a copy of the same unless it

[31] Meer Mohammed Kajen Jowhurry v Khetoo Debee 10 WR 150
[32] Emperor v Gulabu ILR (1913) 35 All 260; Fort Gloster Industries v Sethia Mercantile Pvt Ltd AIR 1971 SC 2289
[33] State bank of India v Mula Shakari Sakhar Karkhana Ltd (2006) 6 SCC 293; Hans Raj Agarwal v. CIT (2003) 2 SCC 295
[34] Roop Kumar v Mohan Thedani AIR 2003 SC 2418
[35] Bhawanbhai Premabhai vs. Bai Vahali AIR 1955 Bombay 320
[36] Bai Hira Devi and Ors. v. The Official Assignee of Bombay 1958 AIR 448 Bom

is unavailable. If it is in case of oral evidence under ideas expressed in Section 60 of the Indian Evidence Act, 1872 requires that the person who has experienced the event should make the statement about it and no one else. Sections 60 and 64 deal with electronic evidence, which is also a form of written evidence, so it can be said to be based on the best evidence rule. If it is documentary evidence, the Act requires that ordinarily the original document should be produced with rules for exclusion of oral evidence, because a copy may contain omissions or mistakes of a deliberate or accidental nature. In the case of contracts, grants or other dispositions of property coming under Sections 91 and 92, the document is evidence, both of the contents and the truth of the contents. The preference is given to a first-hand document in place of a second-hand narrative. With the advancement in science and technology, loopholes with regards to fraudulent and tampered evidence needs to be checked but it can never undermine the grandeur that the rule holds.

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