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EVIDENCE LAW

*Annam Subrahmanyam**

I. INTRODUCTION

LAW MAY be broadly categorized under two heads namely (a) substantive law and (b) procedural or adjective law. While substantive law defines the facts which constitute a right or liability; procedural law or adjective law defines the manner by which substantive law is applied in particular cases. The law of evidence is one of the most significant branches of procedural law. The fact that there have been only few amendments to the Indian Evidence Act, 1872 (the Act), an enactment which is more than a century old, signifies the fairness of the principles established in the enactment. The main object of the Act is to prevent laxity in admissibility of evidence and to introduce a more correct and uniform rule of practice. In other words, its main object is to help courts ascertain the truth and avoid confusion.

The courts of law usually have to find certain facts before pronouncing judgment on the rights, duties and liabilities of the parties on the basis of such evidence, as they will receive in furtherance of this task. Thus, in every system of jurisprudence, it is recognized that before a fact is accepted and acted upon, it must be proved as evidence, which is the foundation of proof. The function of the law of evidence is to lay down rules as to what matter is or is not admissible and relevant for the purpose of establishing facts in dispute. The courts of law usually have to find and ascertain the occurrence and existence of some facts before pronouncing judgment on the rights, duties and liabilities of the parties.

During the year under survey, there are several decisions of the Supreme Court and various High Courts, which provide good clarifications on the law of evidence. The principles laid down in these decisions and the clarifications provided in them on the law of evidence have been articulated under different heads in this survey.

II RELEVANCY OF FACTS

Res gestae

In *Bhairon Singh* v. *State of Madhya Pradesh,*[1] the Supreme Court

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1 AIR 2009 SC 2603.

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rendered judgment on the rule embodied in section 6 of the Act usually known as the rule of *res gestae.* The rule provides that a fact, which, though not in issue, is so connected with the fact in issue as to form part of the same transaction, becomes relevant by itself. For a particular statement to become part of the same transaction, utterances must be simultaneous with the incident or substantially contemporaneous, that is, made either during or immediately before or after its occurrence. In the facts and circumstances of the case, in so far as the admissibility of statements of witnesses, on what the deceased had told them against the accused, of the treatment meted out to her, the court held the rule was not attracted at all.

Identification parade

In *Ankush Maruti Shinde* v. *State of Maharashtra,*[2] the Supreme Court held that the object of conducting test identification parades was twofold: (i) to enable witnesses in satisfying themselves that the suspect is really the one who was seen by them in connection with commission of the crime, and (ii) to satisfy the investigating authorities that the suspect is the person whom the witnesses had seen in connection with the said occurrence. The court commented that test identification parades are not primarily meant for the court. They are meant for investigation purposes.[3]

In *State of U.P.* v. *Sukhpal Singh,*[4] the Supreme Court held that identification parades under section 9 of the Act are to test the veracity of the witness and his capacity to identify the unknown persons whom the witness must have seen only once. However, in the instant case, the witnesses otherwise knew the accused. Therefore, the court opined that the test identification parade is not of much relevance in the facts and circumstances of the case.

Confessions

Sir James F. Stephen defines confession to mean "an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime." A confession is a statement admitting in terms, the ingredients of an offence. It follows, therefore, that confessions relate only to criminal proceedings. The only test, to decide whether a statement is a confession or not, is to see whether the accused stated that he did certain things which amounted to an offence, thereby accusing himself of committing the offence.

According to section 25 of the Act, a confession made to a police officer is irrelevant. But under section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987, a confession made to a police officer not below the rank of a superintendent of police is relevant. In *Ahmed Hussein*

2 AIR 2009 SC 2609.
3 See s. 9 of the Evidence Act.
4 AIR 2009 SC 1729.

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Vali Mohammed Saiyed v. *State of Gujarat*,[5] on 03.8.1992, the accused formed an unlawful assembly and conspired together with the absconding other accused persons to launch an attack on the deceased person and other persons who were with him. In pursuance of the same, nine persons were killed and three persons were injured from indiscriminate firing resorted to by the appellants/accused with revolvers and automatic guns. The Supreme Court observed:[5a]

> (T)he TADA Act, being a special Act, which permits recording of confessional statement by a police officer not below the rank of Superintendent of Police and the same is also admissible in evidence. However, it is the duty of the prosecuting agency and the trial court/special court to see that strict compliance are adhered to while recording the confessional statement and relying on the same.

Extra-judicial confessions

Extra-judicial confessions are those, which are made elsewhere than before the magistrate or in court. Very often, these confessions are not of much value as, unless the veracity of the person who deposes to such statement is above board, they cannot be relied upon. They are a weak type of evidence and must be received with great care and caution. The weightage given would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witness to whom such a confession is made.[6]

In *Inspector of Police, T.N.* v. *Palaniswamy Selvan,*[7] the Supreme Court decided about the reliability of extra-judicial confessions. In the instant case, the confession was alleged to have been made by the accused to the former president of the village *panchayat* almost one week after the occurrence. The president neither reduced it into writing nor produced the accused before police. Information about the confession having been made was given to the police only after many hours. The court held that the confession was unreliable. In *State of Tamil Nadu* v. *Manmatharaj*,[8] the court held that an extra-judicial confession made to the village administrative officer, who goes to the scene of occurrence; observes the dead body as well as the scene; satisfies himself about the truth of the statement given by the person concerned; and then prepares the material records, was reliable.

5 (2009) 7 SCC 254.
5a. *Id*. at 270.
6 *Narayana Singh* v. *State of Madhya Pradesh,* AIR 1985 Ker 84.
7 AIR 2009 SC 1012.
8 AIR 2009 SC 757.

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The reliability of extra-judicial confessions was also considered by the apex court in *State of Punjab* v. *Harjagdev Singh.*[9] The court held that it must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which have untrustworthy testimonials, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. In the instant case, the accused had allegedly killed his parents at their farm house. The trial court convicted the accused basing on his extra-judicial confession and judicial confession under section 164, Cr PC. The High Court acquitted him stating that the extra-judicial confession did not support the prosecution's case and the requisite procedure for recording confession under section 164,Cr PC admissible in evidence was not followed. The Supreme Court reversed the High Court judgment and convicted the respondent. While dealing with the issue of extra-judicial and judicial confessions, the court observed: [10]

> [E]xtra judicial confessions are those which are made by the party elsewhere than before a magistrate or court. Extra judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a magistrate who is not especially empowered to record confessions under section 164 of the Cr PC 1973 or a magistrate so empowered but receiving the confession at a stage when section 164 of the Cr PC does not apply.

In *Shiva Karam Payaswami Tewar* v. *State of Maharashtra,*[11] the Supreme Court held that extra-judicial confession when made by the appellant to a friend and not to a stranger could be relied on. It was also held that the expression 'confession', though not defined in the Act, is a statement made by an accused which must either admit in terms the offence, or at any rate substantially, all the facts which constitute the offence. The dictionary meaning of the word 'statement' is "act of stating; that which is stated; a formal account, declaration of facts etc." The word 'statement' includes both oral and written statements. Communication to another is, however, not an essential component to constitute a 'statement'. An accused might have been over-heard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a statement. If such statement is an admission of

9 AIR 2009 SC 2693.
10 *Id.* at 2694.
11 AIR 2009 SC 1692.

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guilt, it would amount to a confession whether or not it is communicated to another.

Dying declaration

Dying declarations are admitted in evidence on the principle of necessity. A dying declaration stands on the same footing as any other piece of evidence which is to be judged in the light of surrounding circumstances. It is relevant and admissible under section 32 of the Act.[12] Dying declarations are an exception to the rule that hearsay evidence is not admissible. The reason for treating dying declarations as a substantive piece of evidence is the assumption that a dying person will not lie and implicate any innocent person. As a dying declaration is taken in the absence of the accused and the declarant, being dead, cannot be cross-examined, a dying declaration should be subjected to the strictest scrutiny and closest circumspection by the court.

In *State of Punjab* v. *Chatinder Pal Singh,*[13] the Supreme Court held that when two courts on analysis of the evidence found the respondents not guilty, there is no scope for interference in the appeal. The reasons indicated by the trial court and affirmed by the High Court discarding the two dying declarations do not suffer from any infirmity. In *The State of Tamil Nadu rep. by Secretary to Government* v. *Subair alias Mohamed Subair*[14] there was a delay in sending the FIR and the complaint to the magistrate. It was held that declaration recorded by the magistrate was liable to be rejected and the accused was acquitted.

Dying declaration - sole basis for conviction in a wife burning case

The question whether a dying declaration can form the sole basis of conviction was examined in *Satish Ambanna Bansode* v. *State of Maharashtra.*[15] In this case, the victim was the wife of the accused. The incident in which both the victim and the accused were injured took place at about 2.30 a.m. The neighbors took both of them to the hospital. The police were informed at about 4 a.m. The victim's statement was recorded at the hospital by a police constable only after taking the opinion of the doctor and in the presence of the doctor between 6.30 and 7 a.m. She succumbed to the injuries at about 10 a.m. She had stated in her dying declaration that 'accused-husband was drunk; he abruptly woke up at about

12 When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question (s. 32 (1).

13 AIR 2009 SC 974.

14 AIR 2009 SC 1189.

15 *Satish Ambana Bansode* v. *State of Maharashtra*, AIR 2009 SC 1626.

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2.30 a.m. and started beating her and she got scared. Accused picked up kerosene tin from the house, poured it on her person and ignited her by using a match-stick.' She also stated that 'as the saree caught fire, she started shouting. At this juncture, her husband tried to remove saree from her and in that process he suffered burn injuries on both his hands. Neighbors also gathered and both were taken to civil hospital.' The dying declaration was treated as a FIR. The husband was convicted on the sole basis of the dying declaration. In view of this, the court observed:[16]

> The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded, it will result in the miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence…though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross- examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason, the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant…

In *S.P. Devaraji* v. *State of Karnataka,*[17] the Supreme Court reiterated that though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason that courts also insist that a dying declaration should be of such a nature as to inspire full confidence of the court in its correctness.

In *Kalawati W/o. Devaji Dhote* v. *State of Maharashtra*[18] the Supreme Court held that dying declaration once found to be true and voluntary can be made the basis of conviction without further corroboration. In this case, there was a quarrel between the accused and the deceased and exchange of ugly abuses. It was witnessed by PW 1, the son of the deceased, and PW 3, a neighbor. PW 3 left for his home because of ugly unbearable abuses

16 *Id*. at 1628, para 12.
17 AIR 2009 SC 1725.
18 AIR 2009 SC 1932.

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between the appellant and the deceased. He, however, returned back from his house after hearing shouts of PW 1 that his mother was set on fire. He noticed the deceased in flames so he took a gunny bag and put the same on the deceased and extinguished the fire. Thereafter, the husband of the deceased came there. The deceased was taken to the hospital and her dying declaration was recorded. The testimony of the child witness and the reliance on the dying declaration were in question against a plea that the deceased had committed suicide because of the allegation of illicit relations.

In *State of Rajasthan* v. *Ashfaq Ahmed,*[19] the Supreme Court considered the evidence of the father showing that he was not in a condition to give any evidence and held that since that was the only evidence on which the conviction was recorded by the trial court, the High Court was justified in reversing the judgment of conviction and directed acquittal. The Supreme Court did not find any infirmity in the judgment of the High Court to warrant interference.

Dying declaration in a dowry harassment/dowry death case

In *Kanti Lal* v. *State of Rajasthan* with *Arvind Kumar* v. *State of Rajasthan,*[20] the Supreme Court analyzed the credibility of dying declarations and held that one of the important tests of credibility is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. It added that for placing implicit reliance on dying declarations, the court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, it is highly unsafe to place reliance on it. Further, the dying declaration should be voluntary and should not be prompted and the physical as well as mental fitness of the maker is to be proved by the prosecution.

Another case where dying declaration and its evidentiary value was discussed was *State of Rajasthan* v. *Yusuf,*[21] wherein the Supreme Court held that where there are more than one statements in the nature of dying declaration, the one first in point of time must be preferred. Of course, if the plurality of the dying declarations could be held to be trustworthy and reliable, it has to be accepted.[22] In the instant case the High Court found the dying declaration not to be truthful and that there was an inherent attempt to falsely implicate the accused which was borne out by various statements in the so-called dying declaration which were proved beyond doubt to be false. The court reiterated the principles laid down in *Chandrappa.* v. *State of Karnataka,*[23] and stated that it cannot, however, be forgotten that in case

19 AIR 2009 SC 2307.
20 AIR 2009 SC 2703.
21 AIR 2009 SC 2674.
22 *Mohanlal Ganaram Gehani* v. *State of Maharashtra* (1982) 1 SCC 700.
23 (2007) 4 SCC 415.

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of acquittal, there is a double presumption in favour of the accused. *Firstly,* the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent court of law. *Secondly,* the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court. Hence, the court found no reason for interference with the order of acquittal and dismissed the appeal.

In *Varikuppal Srinivas* v. *State of A.P.*,[24] the Supreme Court delineated the principles governing dying declarations and held that once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. It may be noted that the veracity of dying declarations depends upon the genuineness of the person recording and the party relying on the same. Corroboration may be insisted depending upon the facts and circumstances of each case. No general rule may be laid down as to the credibility of the same.

In *Bhairon Singh* v. *State of Madhya Pradesh,*[25] the question was whether the statements attributed to the deceased could be used as evidence for entering a finding that the accused subjected the deceased to cruelty as contemplated under section 498A, IPC. The Supreme Court opined:[25a]

> [T]he evidence of PW4 and PW5 about what the deceased Ranjana Rani had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into in evidence. The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW4 and PW5 has no connection with any circumstance of transaction which resulted in her death. The death of the deceased was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW5 is

24 AIR 2009 SC 1487.
25 AIR 2009 SC 2603.
25a *Id.* at 2607.

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hardly evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted.

Circumstantial evidence

Circumstantial evidence is the evidence which draws inference on the basis of circumstances. Hence, it is called circumstantial evidence. These facts are facts which are not themselves in issue but from which the existence or nonexistence of a fact in issue might reasonably be inferred. Circumstantial evidence is just like a rope of many strands which stay together. It means that the evidence is the chain of circumstances. The chain of events tends to show that in all human probability, the act must have been done by the accused. It relates to a series of facts which are closely associated with other facts in issue. It may relate to the cause and effect that leads to some definite conclusion and help the court in deciding the case.

In *Asraf Sk.* v. *State of West Bengal,*[26] the court held that 'there is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this court as far back as in 1952. is view was reiterated in *Vithal Eknath Adlinge* v. *State of Maharashtra.*[27] Circumstantial evidence and inference of guilt was also considered by the court in *Krishna Ghosh* v. *State of West Bengal.*[28]

Circumstantial evidence: death penalty for child rape and murder

in *Shivaji Dadya Shankar Alhat* v. *State of Maharashtra*,[29] conviction on the basis of circumstantial evidence was held justified in a child rape and murder case when all incriminating facts and circumstances were proved beyond reasonable doubt and found incompatible with the innocence of the accused or the guilt of any other person was considered by the Supreme Court, In this case, a girl of nine years of age became the victim of the animal lust of the accused-appellant, a B.A., B.Ed., teacher in a horrendous manner. She was not only raped but was murdered by the accused appellant. The accused was married and had three children. His wife and children were not residing with him. The accused was known to the deceased and her family. The deceased was studying in 5th standard. She had two sisters. Her mother was working as a maid. All of them were staying with their grandmother. On *Makarasankranthi* day in 2001, the accused told the deceased that he would give her fuel wood from the hill and she went with him. Since then, the deceased did not come back and after searching in vain her grandmother gave a missing complaint to the police. The next day, a neighboring lady located the deceased dead body on the hill and informed

26 AIR 2009 SC 271.
27 AIR 2009 SC 2067.
28 AIR 2009 SC 2279.
29 AIR 2009 SC 56.

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her mother. The mother gave a complaint after locating the body. The accused was last seen in the company of the deceased and the injury on the abdomen and the rope by which the deceased was strangulated were recovered at the instance of the accused. The fact that the accused had absconded and was arrested from a place where he was hiding and the presence of blood on his clothes was a relevant fact. In view of this the court observed:[30]

> The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact, in most of the cases, where death sentence are awarded for rape and murder and the like, there is practically no scope for having an eye witness. They are not committed in the public view. But very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect.

Last seen together

Besides the above case, in *Chattar Singh* v. *State of Haryana*,[31] the Supreme Court rendered its opinion on the phrase 'last seen together':[31a]

> The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.

30 *Id.* at 66, para 40.
31 AIR 2009 SC 378.
31a *Id.* at 383.

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The above view was reiterated in *State of Goa* v. *Pandurang Mohite*.[32] The Supreme Court explained the meaning of the expression 'proof beyond reasonable doubt' stating that to constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial. The doubts must be as to the guilt of the accused persons arising out of the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.[33] Reference was made by the court to *State of U.P.* v. *Ashok Kumar Srivastava*,[34] wherein the court pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. The court also opined that while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and any infirmity or lacuna in the prosecution's case cannot be cured by false defence or plea. The conditions precedent, in the words of the court, before conviction could be based on circumstantial evidence, must be fully established. [35]

In *Arun Bhakta Thulu* v. *State of West Bengal*,[36] the Supreme Court pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt and must reiterate the same. In this case, the deceased and accused were wife and husband. They were said to have slept together after taking food. In the morning, the deceased was seen in a pool of blood. The lower courts relied on the 'last seen together' concept and held the accused guilty. The Supreme Court observed:[36a]

> So far as the evidence relating to the last seen aspect is concerned PW 1 stated that the accused and the deceased slept together in the room. Strangely PW 9 stated that the deceased slept alone and the appellant had not come to his house. PW 1 is the sister of the deceased. PW 8 the de- facto complainant *i.e.* the father of the deceased relied from the statement made during investigation and stated that he had not told anybody that appellant was sleeping with the deceased. In view of the diametrically opposite version as to

32 AIR 2009 SC 1066.
33 *Id*. at 1081, para 49.
34 1992 Crl LJ 1104.
35 *Id*. at 1331 para 20.
36 AIR 2009 SC 1228.
36a *Id.* at 1232.

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> whether the accused and the deceased were seen together in the house, the court held it would be unsafe to direct his conviction. Therefore the applicability conviction on the basis of last seen together theory depends upon circumstances of each case. The prosecution has failed to prove the accusations. That being so, the conviction of the appellant is set aside and he is acquitted of the charges. Since he is in custody let him be released forthwith unless required to be in custody in any other case.

In *Raju* v. *State by Inspector of Police*,[37] the Supreme Court discussed inference as to the guilt of the accused and held that it has been consistently laid down that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence's of the accused or the guilt of any other person. "The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances."[38] The court observed thus:[39]

> Sir Alfred Wills in Chapter VI of his book titled '*Wills, Circumstantial Evidence*" lays down the following rules specially to be observed in the case of circumstantial evidence
>
> (i) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum;* (ii) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability: (iii) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (iv) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (v) if there be any reasonable doubt of the guilt of the accused, he is entitled of the right to be acquitted.

Applicability of judgment in criminal case to civil suit

In general, judgments of criminal cases are not admissible in civil suits. However, an admission made by a party in previous criminal proceedings is admissible in subsequent civil proceedings but genuineness of document must be gone into. This was held in *Seth Ramdayal Jat* v. *Laxmi Prasad.*[40]

37 AIR 2009 SC 2171.
38 *Id.* at 2174 para 7.
39 *Id.* at 2174 para 11.
40 AIR 2009 SC 2463.

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The respondent filed a civil suit against the appellant for recovery of certain jewellery pledged with him for the purpose of obtaining loan. A criminal proceeding was initiated against the appellant for violation of the Madhya Pradesh Money Lenders Act relating to the above grant of loan. In the said criminal case, the appellant had admitted his guilt. A fine was imposed on him. The admission of the appellant was recorded in writing. While he was deposing in the suit, he was confronted with the question as to whether he had admitted his guilt and pleaded guilty of the charges framed against him in the criminal case. He did so. It was held by the court that the appellant having accepted that he had made an admission in the criminal case, the same was admissible in evidence.

When judgment becomes conclusive proof

In *Syed Askartn Hadi Ali Augustine Imam* v. *State (Delhi Admn),*[41] the Supreme Court held that the situation of two proceedings pending, whether civil or criminal, however, by itself would not attract the provisions of section 41 of the Evidence Act. A judgment has to be pronounced.

Opinion of handwriting expert

As a general rule, the opinions of third persons are not allowed in the courts. But there are some exceptions to this rule. Opinion of an expert is an exception. An expert is a person who by practice and observation has become experienced in any science or trade.[42] He is one who has devoted time and study to a special branch of learning, and is thus especially skilled in the field. The term includes both superior knowledge and practical experience in a particular field. An expert need not have academic qualifications.

A suit for declaration of right of passage was filed on the basis of an agreement. The defendant denied execution of the agreement and his signature thereon. In such a case, in *Velaga Sivarama Krishna* v. *Velaga Veerabhadra Rao.,*[43] the Andhra Pradesh High Court held that it is essential to send the document for expert opinion for comparison of signatures. *Karuppa Gounder* v. *Kuppusamy*[44] is a case regarding a suit for specific performance. In this case, the signature in an agreement of sale was in dispute which was denied by the defendant. Since the plaintiff took no step to obtain the opinion of handwriting expert, the defendant sought the opinion after considerable delay. The court held that merely because there was delay in seeking opinion of the expert, application should not be rejected. In *J.L. Bavy* v. *S. Gowri Shankar*,[45] the Andhra Pradesh High Court held that the burden to prove the agreement of sale and receipts relied upon by the

41 AIR 2009 SC 3232.
42 S. 45 of the Act.
43 AIR 2009 AP 47.
44 AIR 2009 Mad 122.
45 AIR 2009 AP 203.

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petitioner squarely rests upon him. The respondents no doubt have denied the execution of the documents. That denial would only lead to framing of an issue, touching upon the same. Sending of a document for opinion of an expert under section 45 of the Act is a step in the direction of proof. The exercise as regards proof of the document would only start with the commencement of trial. The CPC as well as the Evidence Act enshrine the principles that are relevant in this regard, touching upon the burden and the priority to be followed in the context of adducing evidence. When the burden squarely rests upon the petitioner to prove the documents relied upon by him, the court held that it could not at all be the genuine concern of the respondents to initiate steps for disproving it.

Opinion of the medical board

In *Ram Suresh Singh* v. *Prabhat Singh and Chhotu* Singh,[46] the apex court held that in terms of the provisions of section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2000, the Central Government has framed the Juvenile Justice (Care and Protection of Children) Rules, 2001. Rule 22 of the provides for the procedure to be followed in respect of determination of age of a person. It indicates that the opinion of the medical board is to be preferred only when the date of birth certificate from the school first attended is not available. Hence, this is the condition laid down in section 35 of the Act for proving an entry pertaining to the age of a student in a school admission register so as to be considered for the purpose of determining relevancy thereof. But, in this case, the said condition must be satisfied.

Tape recorded evidence

The admissibility of tape recorded evidence was considered in *All India Anna Dravida Munneta Kazshagam* v. *L.K. Tripathi.*[47] Here, the Supreme Court held that the law on the admissibility of tape-recorded versions is well settled. While deciding the case, the court relied on *Ram Singh* v. *Col. Ram Singh.*[48] The court laid down the following tests for determining the admissibility of a tape-recorded version: (i) The voice of the speaker must be identified by the maker of the record or other persons recognizing his voice. Where the maker is unable to identify the voice, strict proof will be required to determine whether or not it was the voice of the alleged speaker; (ii) The accuracy of the tape-recorded statement must be proved by the maker of the record by satisfactory evidence, direct or circumstantial; (iii) Possibility of tampering with, or erasure of any part of, the tape-recorded statement must be totally excluded; (iv) The tape-recorded statement must be relevant; (v) The recorded cassette must be sealed and kept in safe or

46 AIR 2009 SC 2805.
47 AIR 2009 SC 1314.
48 1985 (Supp) SCC 611.

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official custody and (vi) The voice of the particular speaker must be clearly suitable and not be lost or destroyed by other sounds or disturbances.

DNA Test - evidentiary value

In *Panthangi Balarama Vekata Ganesh* v. *State of A.P. with State Through CBI* v. *Vistaria Prakash,*[49] Magunta Subba Rami Reddy, a popular M.P. and philanthropist and his gunman were killed by a peoples war group (PWG) activist, *i.e.* the appellant. The Supreme Court observed that in the instant case not only the appellant's presence has been admitted, the fact that he is member of PWG also remains undisputed; his participation with reference to wearing a pink colour shirt and his arrest immediately after the occurrence in an injured condition; recovery from him of the pistol and two cartridges and the evidence of deoxyribonucleic acid expert and the ballistic expert must be held to be sufficient to prove his participation in the commission of the offence of the murder of the deceased and his gunman causing injuries to PW-1 and PW-3.

Regarding admission of DNA tests, it was held that DNA, which is found in the chromosomes of the cells of living being, is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, hair, nails and so on. Using genetic finger-printing, identification of an individual is possible like in the traditional method of identifying fingerprints of offenders. Experts opine that the identification is hundred per cent precise. There cannot be any doubt whatsoever that there is a need for quality control. Precautions are required to be taken to ensure preparation of high-molecular-weight DNA, complete digestion of the samples with appropriate enzymes and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control.[50] The court also held that there is nothing to show that such precautions were not taken. Indisputably, the evidence of the experts is admissible in terms of section 45 of the Act. During cross-examination PW-46, the DNA expert, had stated as under:[51]

> If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population.

The court was also not oblivious of the fact that the experts used the term 'similar' and not 'identical.' For the purpose of the present case, it was not of much consequence as the court had not taken into consideration the evidence of DNA experts alone for the purpose of recording a judgment of conviction. It had been considered along with other evidence. The

49 AIR 2009 SC 3129.
50 *Id.* at 3135.
51 *Id.* at 3135-36.

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prosecution's case was considered as a whole. The cumulative effect of the evidences adduced before the learned trial judge had been taken into consideration for the purpose of arriving at a finding of guilt against the appellant.[52]

It is submitted that the decision of the court was not all unfair. It was based on direct eye-witnesses along with the circumstantial evidence added by the DNA test for corroboration.

III HEARSAY EVIDENCE

Hearsay evidence

Hearsay evidence is a statement made by a person not called as a witness or a statement recorded in a document which is not produced and proved. In *J.D. Jain* case,[53] the Supreme Court pointed out that sometimes hearsay means whatever a person is heard to say and sometimes it means whatever a person declares on information given by someone else. The statement of a person who is called as a witness may or may not be hearsay, *e.g*. a slanderous statement of a third person heard by witnesses is relevant not regarding the truth of the contents of the statement, but regarding the fact of the statement having been made. Hearsay evidence that is barred under section 60 means the version which depends upon the veracity of some other person or source and not on the personal experience of the witness himself. It is second-hand knowledge and is, therefore, rightly rejected.

The reliability of hearsay evidence was considered by the Supreme Court in *Brindaban Das* v. *State of West Bengal*,[54] wherein the court held that evidence seeking to connect the appellant accused with commission of the offence was hearsay in nature. The court held, 'there must be substantive evidence against a person in order to summon him for trial, although, he is not named in the charge-sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction.' Except for a statement in the FIR that the complainant strongly believed that the offence was pre-planned and there were many conspirators involved, there was no direct evidence of complicity of the appellant in the incident and provisions of section 319 cannot be invoked to summon the appellant.

IV DOCUMENTARY EVIDENCE

Public document

Public documents consist of the acts of public functionaries in the executive, legislative and judicial departments of the government, including

52 *Id.* at 3136.
53 AIR 1982 SC 673.
54 AIR 2009 SC 1248.

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those under the general head of 'transactions' which official persons are required to enter into books or registers in the course of their public duties.[55] In *Nathmal* v. *Urban Improvement Trust, Bikaner*,[56] the Rajasthan High Court dealt with the admission of a certified copy of sale deed. The original sale deed was lying with another suit pending in the same court. The court held that the sale deed was not a public document and the only remedy available to the plaintiff was to summon the file of the civil original suit with the permission of the court in which the original sale deed was filed.[57]

Proof of public document

In *Shyam Lal alias Kuldeep* v. *Sanjeev Kumar,*[58] the Supreme Court held that an objection as to the admissibility and mode of proof of a document must be taken at the time of trial before it is received in evidence and marked as an exhibit. Even otherwise, such document falls within the ambit of section 74 of the Act and is admissible *per se* without formal proof.

Admissibility of secondary evidence

In *P. K. Pandian* v. *Komala,*[59] the Madras High Court considered admissibility of secondary evidence and held that a certified copy of power of attorney which is a registered document on the file of sub-registrar is a public document. Section 74 of the Act indicates as to what are all the documents which could be termed as public documents. As per sub-section (2) of section 74, public records kept in any state of private documents are public documents. Section 76 mandates that every public officer having custody of a public document, which any person has right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be. Such certificate shall be dated and subscribed by such officer with his name and his office title and shall be sealed wherever such officer is authorized by law to make such use of seals. Further, such copies so certified shall be called certified copies. The court also held that section 65 of the Act permits secondary evidence in respect of the existence, condition or contents of a document and, as per section 65(f), secondary evidence is permissible, when the original is a document of which a certified copy is permitted by the Act or by any other law in force in India to be given in evidence. In fact, section 63 of the Act defines what secondary evidence is and certified copies given under the provisions contained in the Act and copies made from or compared with the originals are also considered as

55 S. 35 of the Act.
56 AIR 2009 Raj 60.
57 *Id.* at 61.
58 AIR 2009 SC 3115.
59 AIR 2009 Mad 51.

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secondary evidence. The alleged alteration in the original deed is a matter of evidence. It would be open to the respondent to summon the office copy of the document sought to be marked and to take steps to prove her contention that there were alterations made in the document subsequent to the registration. Things would have been different in case the document is not a registered one.'

In *The Atul Products Ltd.* v. *P. Mehta,*[60] the Bombay High Court held that copy of a fax is not admissible in evidence. This was held by the court because of the many technical problems in transmission of a fax message electronically from one number to another. The court further held that the word *Atul* means incomparable, unparalleled or unweighable. In fact, it is an aspect of which judicial notice is required to be taken. Hence, under section 56 of the Evidence Act, such fact need not be proven.[61]

In *Rajesh Kumar Bhati* v. *Additional District Judge, Jodhpur,*[62] the High Court of Rajasthan mentioned three conditions where secondary evidence can be given. As per clause (a) of section 65, the secondary evidence of the existing condition or contents of the document can be given in the three situations; *firstly*, when the original is shown or appears to be in possession or power of the person against whom the document is sought to be produced, *secondly* when it is in possession and power of any person who is out of reach of or not subject to the process of the court and *thirdly,* when it is in possession of any person legally bound to produce it but he fails to produce the same even after the service of notice in terms of section 66 of the Act.

V PRESUMPTIONS

Presumption in favour of undue influence

In *Bellachi (Dead) by L.R.* v. *Pakeeran*,[63] a sale deed was executed in favour of the respondent. The contention was that it was vitiated by misrepresentation, undue influence, fraud and collusion as the appellant was made to believe that she would obtain financial assistance by executing the said document. The apex court held that any relationship between the parties so as to enable one of them to dominate the will of the other is a *sine qua non* for constituting undue influence. The court held that the jurisdiction of the High Court in terms of section 100 of the Code of Civil Procedure is limited. It can interfere with the concurrent findings of two courts if any substantial question of law arises for its consideration, the court observed. The law does not envisage raising presumption in favour of undue influence. Apart from alleging undue influence, the appellant must prove the same,

60 AIR 2009 Bom 84.
61 *Id.* at 88.
62 AIR 2009 Raj 137.
63 AIR 2009 SC 3293.

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subject of course to just exceptions. The court explained that in a given case it is possible to hold that when an illiterate, *pardanashin* woman executes a deed of sale, the burden would be on the vendee to prove that it was the deed of sale and a genuine document. Where it is, however, a registered document, it carries with it a presumption that it was executed in accordance with law. The court dismissed the appeal.

Presumption as to dowry death

In *Tarsen Singh* v. *State of Punjab,*[64] the Supreme Court held that presumption as to dowry death is available only if trial is for offence of dowry death. The court maintained that the presumption can be raised only (i) if the accused is being tried for the offence under section 304-B, IPC; (ii) the woman was subjected to cruelty or harassment by her husband or his relatives, (iii) such cruelty or harassment was for or in connection with any demand for dowry and; (iv) such cruelty or harassment was soon before her death. In *Prem Kanwar* v. *State of Rajasthan,*[65] the Supreme Court elaborated the meaning of 'soon before her death' by saying that the expression 'soon before her death' used in the substantive section 304B, IPC and section 113-B of the Indian Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to the expression 'soon before' used in section 114, Illustration (a) of the Act is relevant. The expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on the dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.

In *Anand Kumar* v. *State of M.P.*,[66] the Supreme Court decided the presumption as to abetment of suicide and dowry death wherein it held that a comparative reading of certain portions of the two provisions would highlight that under section 113-A, the court 'may presume', having regard to all the other circumstances of the case, an abetment of suicide as visualized by section 306, IPC, but in section 113-B which is relatable to section 304-B, the word 'may' has been substituted by 'shall' and there is no reference to the circumstances of the case. Admittedly, the conviction of the appellant has been recorded under section 306 which is relatable to section 113-A and though the presumption against an accused has to be raised therein as well, the onus is not as heavy as in the case of a dowry death.

64 AIR 2009 SC 1454.
65 *Id*. at 99, para 8.
66 AIR 2009 SC 2155.

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Rebuttal of presumption

In *Arup Hazra* v. *Smt.Manashi Hazra,*[67] the husband filed a case for divorce on the ground of desertion by his wife. The husband had written at least five registered letters to his wife but all those letters came back with postal endorsement 'refused'. Here, no defense was taken by the wife in the written statement regarding collusion of husband with the postal peon. The Calcutta High Court held that the presumption of correctness of postal endorsement does not stand rebutted by the wife.[68]

VI BURDEN OF PROOF

In criminal trial, the burden of proving everything essential to establish the charge against the accused lies upon the prosecution and that burden never shifts. Notwithstanding the general rule that the burden of proof lies exclusively upon the prosecution, in the case of certain offences the burden of proving a particular fact in issue may be laid by law on the accused.[69]

In criminal cases, the burden of proving the guilt of the accused beyond all reasonable doubts always rests on the prosecution and, therefore, if it fails to adduce satisfactory and reliable evidence to discharge that burden it cannot fall upon the evidence adduced by the accused persons in support of their defence to rest its case solely thereupon.[70] The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence and that it is not the law where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.[71]

Standard of proof means the degree up to which the burden of proof has to be discharged. In a sense, standard of proof indicates the extent of quality and cogency of evidence that ought to be there for establishment of a case: (a) in a civil case, the standard of proof demanded is no more than a preponderance of probabilities; (b) in a criminal case, a higher standard of proof is necessary. The prosecution must establish the guilt of the accused beyond reasonable doubt; and (c) in an exceptional situation, when the accused in a criminal case has to discharge any burden of proof on an issue, the standard of proof is the same as is required in a civil case, *i.e.* the preponderance of probabilities.

Onus to prove simple injuries

Proof of simple injury suffered by the accused in a murder case and the prosecution's responsibility to prove it was considered by the Supreme

67 AIR 2009 Cal 135.
68 See Evidence Act, s.114.
69 *State of Maharashtra* v. *Wasudeo Ramchandra Kaidalwar,* AIR SC 1186 : 1981 Cr LJ 884.
70 *Jamail Sing* v. *State of Punjab*, AIR 1996 SC 755.
71 *Sharad Birdhichand Sarda* v. *State of Maharashtra,* AIR 1984 SC 1622.

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Court in *Ram Pat* v. *State of Haryana*[72] whilst dealing with non-explanation of simple injuries. In this case, the accused purchased an undivided share of land. PW 8 was ploughing his land with his tractor and his father (the deceased) was also standing in the field. The accused attacked the deceased and others who came to his rescue. The accused also suffered minor injuries and tried to claim the right of private defense which the court negated. The court held that it was well settled that whereas grievous injuries suffered by the accused are required to be explained by the prosecution, simple injuries need not necessarily be. Non-explanation of simple injuries of the nature suffered by the accused would not be fatal. In *State of Punjab* v. *Sukhchain Singh,*[73] the Supreme Court while deciding the standard of proof held that a person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is no absolute standard. What degree of probability amounts to "proof" is an exercise particular to each case.[74]

Burden of proof and unsoundness of mind

Proving unsoundness of mind was discussed in *Siddhapal Kamala Yadav* v. *State of Maharashtra.*[75] The accused and the victim were kept in a common room in the prison. The accused had removed his hand cuffs and had apparently attacked the deceased with a saline stand resulting in his death. The Supreme Court held that the onus of proving unsoundness of mind was on the accused. But where during the investigation, previous history of insanity was revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court and if this is not done, it creates a serious infirmity in the prosecution's case and benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to this offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. The burden of proof rests on an accused to prove his insanity which arises by virtue of section 105 of Act and it is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. The court also observed that every person is presumed to know the natural consequences of his act. Similarly, every person is also presumed to know the law. The prosecution does not have to establish these facts.[76]

72 AIR 2009 SC 2847.
73 AIR 2009 SC 1542.
74 *Id.* at1551, para 38.
75 AIR 2009 SC 97.
76 *Id.* at 99 para 8.

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Birth during marriage and DNA test for proof of legitimacy

In *Veeran* v. *Veeravarmalle,*[77] the Madras High Court was called upon to decide the paternity of a child. In the instant case, a suit was filed by a child for a declaration that she was the legitimate child born to her parents. The court directed the father of the child to undergo a DNA test, which according to him, was violative of his right to personal liberty under article 21 of the Constitution. According to the court, a DNA test can be performed on the petitioner father alone, which will prove that the paternity of the child, even without any test conducted on mother.[78] In *Shyam Lal alias Kuldeep* v. *Sanjeev Kumar,*[79] the apex court analyzed section 112 of the Act and several precedents[80] and observed: [81]

> Section 112 of the Indian Evidence Act is based on English law. Section 112 reproduces rule of English law that it is undesirable to inquire into paternity of child when mother is married woman and husband had access to her. Adultery on her part will not justify finding of illegitimacy if husband has had access.... On ground of public policy, it is undesirable to enquire into the paternity of a child whose parents "have access" to each other. The presumption of legitimacy arises from birth in wedlock and not from conception … since the onus to rebut the presumption was on the defendants, it was for them to prove that the plaintiff and defendant … are not the sons of the deceased.

Birth during marriage conclusive proof for legitimacy

L. Yuvaraj v. *Kirubaarani Devi*[82] is a case regarding *interim* maintenance for a child born during wedlock of the parties wherein the

77 AIR 2009 Mad 64.

78 On-site Medical Testing in California speaks about the paternity test, wherein it is stated as follows:
"DNA paternity testing uses DNA, the biological basis of inheritance, to prove or disprove the relationship between a child and an alleged father. It is based on the fact that we inherit half of our DNA from our father and half from our mother. Cells are collected from the child, the alleged father, and the mother if possible. Using sophisticated laboratory procedures, genetic profiles are created for each individual. By comparing these profiles, it is possible to statistically prove whether the alleged father is or is not the child's biological father**.**

79 AIR 2009 SC 3115 (http://www.indiankanoon.org/doc/1981103/).

80 For details, see *Chilukuri Venkateswarlu* v. *Chilukuri Venkatanarayana,* AIR 1954 SC 1761; *Badri Prasad* v. *Deputy Director of Consolidation,* AIR 1978 SC 1557 : (1978) 3 SCC 537; *Goutam Kundu* v. *State of W.B.,* AIR 1993 SC 2295; *Raghunath Parmeshwar Panditrao Mali* v. *Eknath Gajanan Kulkarni* (1996) 7 SCC 681; *S.P.S. Balasubramaniyam* v. *Suruttayan alias Andalipadayachi* 1994 (1) SCC 460; *Smt. Kanta Devi* v. *Poshi Ram,* AIR 2001 SC 2226.

81 *Supra* note 79 at 3117, 3119.

82 AIR 2009 Mad 13.

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husband disputed the paternity of the child. The High Court held that simply because a husband disowns paternity of a child imputing adultery on the part of the wife, this would not handicap the family court in awarding *interim* maintenance for a child born during wedlock. The burden lies on the husband to prove his plea during enquiry in the main petition for evidence and his liability to pay interim maintenance to his minor child subsists.[83]

Burden of proving a fact especially within knowledge

Asharani Das v. *Union of India*[84] was a case filed by a railway passenger claiming compensation from the railway authorities. The Calcutta High Court, while interpreting section 106 of the Act, observed if a fact is within the special knowledge of' a person, the burden of proving such fact is on that person as provided in illustration (b) of that section. If a person is charged with travelling on a train without a ticket, the burden of proving that he had a ticket is upon him. But such a principle is not applicable to a case of a dead person who was proved to have died in the course of railway travel and whose body was taken in the custody of the railway police. In such a situation, it is the duty of the railway authority to first give evidence that he was without a valid ticket and if such evidence is given, the onus shifts upon the claimants to prove that he was a bona fide passenger having a valid ticket. In this case, as no person on behalf of the railway had given any such evidence nor had any person come forward to disclose what articles were found with the victim, the High Court held that the initial burden of proving such fact had not been discharged. The court held that it cannot lose sight of the fact that one is not entitled to enter even the platform of a railway station without having a valid platform ticket and one takes the risk of criminal prosecution by boarding a train without ticket. In such circumstances, in the absence of any evidence of the railway authority asserting absence of a valid ticket, the court was of the opinion that there was no just reason for totally discarding the evidence.[85]

Burden of proof - factum of adoption

In *Sriram Jain* v. *Manjubai Jain*,[86] the Orissa High Court held that the burden of proof lies upon the person who sets up the plea of adoption. The court also held that the law is well settled that a very grave and serious onus rests on the person who seeks to displace the natural succession by reason of adoption and that the burden of proving the adoption is on the party setting up such adoption.[87]

83 *Id.* at 139, para 9. See also s.112.
84 AIR 2009 Cal 205.
85 *Id.* at 208, para 16.
86 AIR 2009 Ori 104.
87 *Nagayasami Naidu* v. *Kochadai Naidu*, AIR 1969 Mad 329.

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VII ESTOPPEL

In *Smt. Amarjit Kaur* v. *S.L. Husain,*[88] the A.P. High Court held that a decree of eviction can be passed on the basis of a valid quit notice. The basis for eviction in a suit under section 106 of the Transfer of Property Act, 1882 is the issuance of valid notice to quit. In the instant case, issuance of notice by the plaintiff was not denied by the defendants. Therefore, the court held that the admitted facts need not be proved as per section 58 of the Act. The defendants who admitted the quit notices and did not challenge the validity of the notices were estopped from contending that they cannot form the basis of eviction without examining the plaintiff.

Dissolution of marriage and proof of non-access

In *Ramroop Rathore* v. *Rajkumari,*[89] a husband filed a case for dissolution of marriage on the ground that just after 8 days of consummation of marriage, the wife left the matrimonial house. The other grounds were that the wife was having an illicit relationship with another man and was also having a child from that man. The husband failed to prove that after consummation of the marriage, the wife had stayed only for 8 days with him. Presumption under section 112 of the Act was also not dispelled by the husband by proof of non-access. Hence, the court held that the dismissal of petition for dissolution of marriage by the earlier court was proper.

VIII WITNESSES

Relative or interested witnesses

There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused. This was held by the Supreme Court in *Rajesh Kumar* v. *State of HP*.[90]

In *Mohabbat* v. *State of MP,*[91] the Supreme Court held that merely because the eye-witnesses were family members, their evidence cannot *per se* be discarded. When there is an allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused, cannot be a ground to discard evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relative would not conceal the actual culprit and make allegations against an

88 AIR 2009 AP 213.
89 AIR 2009 MP 82.
90 AIR 2009 SC 1.
91 AIR 2009 SC 1893.

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innocent person. Foundation has to be laid if plea of false implication is being made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.[92]

In Arumugam v. *State*[93] while reiterating its earlier decisions,[94] the Supreme Court held similar view. In the instant case, PW 2 was the wife and PW 5 was the son of the deceased. But they had spoken in one voice that at the time of occurrence, when they were chatting along with the deceased in front of the house of Anandhayee, at that time, the accused came with a knife and attacked the deceased indiscriminately and caused his death. Apart from this, the ocular testimony projected by the prosecution tallied with the medical evidence given by the doctor, who conducted post-*mortem* and the injuries found in the post-*mortem* certificate corroborates the evidence of PWs. 2 and 4, which clearly indicated that the evidence given by PWs 2 and 4 was genuine and it had to be accepted. This view was reiterated by the Supreme Court in *Ram Singh* v. *State of M.P.*[95] and *Rajender Singh* v. *State of Haryana with Suraj Niwas* v. *State of Haryana.*[96] The court also observed that evidence of a related witness, when found reliable and believable has to be accepted because he would, *inter alia*, be interested in ensuring that the real culprits are punished. In *Bheru Lal* v. *State of Rajasthan with State of Rajasthan* v. *Girraj,*[97] the Supreme Court held that as the witness, being mother of the deceased, would not be interested in allowing the real culprit to go unpunished, her evidence cannot be disbelieved.

Chance witness

In *Ramvir* v. *State of U.P.,*[98] the Supreme Court considered the issue of chance witnesses and held that the incident happened in broad day light and witnesses being residents of locality, their presence at the place of occurrence could not be considered unnatural. They had no cause to give false evidence and their testimonies cannot be discarded by treating them as chance witnesses. In *Satvir* v. *State of Uttar Pradesh,*[99] the Supreme Court held that where evidence of eye witnesses was concise, precise and satisfactory, it may be taken into consideration. Simply because eye witnesses did not make any attempt to save the deceased cannot be a ground to disbelieve and discard their testimony.

92 *See also State of U.P.* v. *Sheo Lal,* AIR 2009 SC 1912*; State of U.P.* v. *Atul Singh,* AIR 2009 SC 2713 and *Joginder Singh* v. *State of Punjab,* AIR 2009 SC 2263.
93 AIR 2009 SC 331.
94 *Supra* note 90.
95 AIR 2009 SC 282.
96 AIR 2009 SC 1784.
97 AIR 2009 SC 3205.
98 AIR 2009 SC 3185.
99 AIR 2009 SC 1741.

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Child witness

Evidence of a child witness was considered in *State of Karnataka* v. *Shantappa Madivalappa Galapuji*,[100] wherein the Supreme Court held that the Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, section 118 of the Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions because of tender years, extreme old age, disease - whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify, if he has intellectual capacity to understand questions and give rational answers thereto.

Minor's evidence: veracity

Veracity of minor evidence was considered by the court in *Mallappa Siddappa Alakanur* v. *State of Karnataka*[101] in which it was observed that a doubt regarding the veracity of the evidence of the witnesses should be a reasonable doubt and the evidence cannot be simply brushed aside on minor aspects. In the instant case, in the absence of any such possibility, the evidence of the boy could not be thrown out, more particularly, when the boy had faced the ordeal of the cross-examination in a very efficient manner.

Delay in recording evidence

In *Himmat Sukhadeo Wahurwagh* v. *State of Maharashtra,*[102] the accused were convicted for 5 years for attempting to murder but the sentence was reduced from 5 to 3 years. The incident took place within 4 months after their release. While the deceased along with PW 1, the child witness of 11 years age, were returning from the plough fields, they were surrounded by all the eight accused, variously armed with axes and sticks, who attacked the two deceased. PW1 managed to escape, rushed home revealed the story to his grandfather and family and then hid himself till the next morning. When the PWs along with the other deceased were planning to go to the police station, they had been apprehended by the accused who injured the deceased which led to his death. The Supreme Court endorsed the finding of the High Court that section 118 of the Act does not preclude a child from being a witness and the only test that is applicable is as to whether the witness understood the sanctity of an oath and the import of the questions that were being put to him. The court found the child a competent witness. His testimony was also corroborated by the dying declaration of the deceased. It was held that the court was also aware of the fact that the

100 AIR 2009 SC 2144.
101 AIR 2009 SC 2959.
102 AIR 2009 SC 2292.

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evidence in most of the cases had been recorded after some delay. Where a large number of victims, witnesses and accused are involved and the incident itself was spread out over a distance and period of time and more glaringly a reign of terror had been let loose by the accused, some inconsistencies are bound to arise.

Weight of evidence

The Supreme Court in *Bur Singh* v. *State of Punjab*[103] held that the maxim "*falsus in uno falsus in omnibus"* has no application in India and that witness cannot be branded as liars. It is merely a rule of caution. All that it amounts to is that in such cases testimony *may* be disregarded and not that it *must* be discarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given state of circumstances, but it is not what may be called 'a mandatory rule of evidence.'[104] Similar opinion was expressed by the court in *Jayseelan* v. *State of Tamila Nadu*.[105]

IX EXAMINATION OF WITNESSES

In *T. Nandakumar Singh J. Kailash Chanadra Sarma* v. *Biraj Krishna Das,*[106] the Gujarat High Court held that debarring the plaintiff from cross-examination of defence witnesses who were present was improper.

Testimony of witness

In *Anna Reddy Sambasiva Reddy* v. *State of Andhra Pradesh,*[107] while deciding about the credibility of the injured witness, the A.P. High Court held that a large number of persons attacked the deceased and injured the witnesses. Thus, it would not be possible for the injured witnesses to attribute specific injury individually to each accused. Minor discrepancies in their evidence are not sufficient to shake their trustworthiness. Testimony of the said witnesses cannot be discarded on the ground of not mentioning the specific overt acts. It also held that credibility of their deposition would not be affected merely because two of the accused persons were acquitted.

Examination of particular witness

In *Abuthagir* v. *State Rep. by Inspector of Police, Madhurai,*[108] the Supreme Court held that it is well settled that delay in examination of the prosecution witnesses by the police during the course of investigation *ipso*

103 AIR 2009 SC 157.
104 See *Nisar Ali* v. *The State of Uttar Pradesh,* AIR 1957 SC 366 and *Prem Singh* v. *State of Haryana,* AIR 2009 SC 2573.
105 (2009) 2 SCALE 506.
106 AIR 2009 Gau 73.
107 AIR 2009 SC 266.
108 AIR 2009 SC 2797.

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facto may not be a ground to create a doubt regarding the veracity of the prosecution's case.

Discrepancy in evidence

In *Babasaheb Apparao Patil* v. *State of Maharashtra,*[109] while discussing the credibility of witnesses of both the eye witnesses, the Supreme Court held that the discrepancies which do not shake the basic version of the prosecution case may be discarded. Similarly, the discrepancies which are due to normal errors of perception of observation should not be given importance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record as a whole and should not disbelieve the evidence of a witness altogether, it is otherwise trustworthy.

Testimony of single witness

In *Ravi* v. *State Rep. by Inspector of Police,*[110] while considering the testimony of a single witness, the Supreme Court observed that on a consideration of the relevant authorities and the provisions of the Indian Evidence Act, 1872, the following propositions may be safely stated as firmly established:[111]

(i) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

(ii) Unless corroboration is insisted upon by statute, courts should not insist on corroboration, except in cases where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

(iii) Whether corroboration of the testimony of a singly witness is or is not necessary, must depend upon the facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.[112]

The aforesaid view was reiterated in *Vithal Pundalik Zende* v. *State of Maharashtra*.[113] The court, while dealing with the issue whether

109 AIR 2009 SC 1461.
110 AIR 2009 SC 214.
111 *Id*. at 217.
112 *Id*. at 217, para 8.
113 AIR 2009 SC 1110.

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corroboration of the testimony of a single witness is or is not necessary, held that it depends upon the facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.[114]

Eye witnesses

In *Bhanwar Singh* v. *State of M.P.*,[115] the Supreme Court held that for appreciation of evidence, there cannot be any hard and fast rule. But when implicit reliance is placed on eye witnesses, any of the prosecution witnesses being declared hostile, cannot be a ground by itself to discard the entire prosecution case. Each case must be judged on its own facts. The Supreme Court in *Jagat Singh* v. *State of U.P.,*[116] while upholding the decision of High Court, held that giving undue importance to minor inconsistencies appearing in the statements of two eye-witnesses which are of a very trivial nature and acquitting the accused on such insignificant contradictions was not proper. In *State of Maharashtra* v. *Prakash Sakha Vasave,*[117] the Supreme Court, while deciding on the testimony of eye-witnesses and their reliability, held that non-mentioning of remaining injuries on the body of the deceased would be irrelevant and eye-witnesses are not supposed to go on counting the number of assaults.

Ocular evidence vs. medical evidence

The Supreme Court in *Chhotanney* v. *State of Uttar Pradesh,*[118] while testing the credibility and trustworthiness of eye-witnesses' evidence, held that coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses accounts which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant." The court also held that it is trite that where the eye witnesses' account is found credible and trustworthy, due to medical opinion pointing to alternative possibilities, they are not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice, hence, the importance and primacy of the quality of the trial process. Eye-witnesses' accounts would require a careful independent assessment and evaluation for their credibility which should not be adversely pre-judged by any other evidence, including medical evidence.

114 *Id*. at 1113, para 6.
115 AIR 2009 SC 768.
116 AIR 2009 SC 958.
117 AIR 2009 SC 1636.
118 AIR 2009 SC 2013.

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In *Sunil Dattatraya Vaskar* v. *State of Maharashtra*,[119] the deceased was standing in the courtyard of his house. The accused fired at him from the gallery of their house just opposite to the house of the deceased. During the shooting, the two sons of the deceased and ladies in the family of the deceased also received injuries. Holding that the ocular evidence was not only credible but also trustworthy, the High Court was of the view that the trail court had erred in discarding the evidence of the eye-witnesses, most of whom were related to the deceased, and relying on the medical evidence. The Supreme Court was of the view that the impugned judgment of the High Court did not warrant any interference.

In *Rajendra* v. *State of U.P.*,[120] the Supreme Court, while dealing with the importance of eye-witnesses over the medical evidence, held that if the evidence of the eye-witnesses was to be believed and found to be reliable and there was no reason as to why they should not be so held, only because the autopsy surgeon talked of some other possibility, it would not lead to the conclusion that the medical evidence did not corroborate the prosecution case.

X MISCELLANEOUS

Affidavit

In *Veer Singh Kothari* v. *State Bank of India,*[121] the petitioner was the defaulter of a bank loan of Rs.25,00,000. The bank issued notice for the recovery of Rs.1,05,61,676. The petitioner claimed that the loan documents were not executed properly and that the bank obtained signatures on a blank document. The petitioner wanted to cross-examine the bank manager before the tribunal. The tribunal declined. Hence, the writ petition was filed for quashing the order of the tribunal. The division bench of the Orissa High Court held that the right of cross-examination was an integral part of the principles of natural justice. It was further held that affidavit was not 'evidence' within a meaning of section 3 of the Act. Rule 12(6) made under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides that the tribunal may for sufficient reasons order that a particular fact be proved by affidavit and the party may be permitted to cross-examine the deponent of the affidavit.

Doctrine of election

In *M/s. Lakshminrayana Industries* v. *Karnataka State Financial Corporation Vidhana Soudha, Bangalore,*[122] the Karnataka High Court clarified that the law does not permit a person to both 'approbate and

119 AIR 2009 SC 210.
120 AIR 2009 SC 2558.
121 AIR 2009 Ori 29.
122 AIR 2009 Kar 65.

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reprobate' which principle is based on the doctrine of election under section 35 of the TP Act, 1882. It postulates that no party can accept and reject the same instrument and that a person cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn around and say it is invalid for the purpose of securing some other advantage. The borrower in the instant case was a defaulter of the loan on the asset. He had requested the state finance corporation to finalize the sale transaction of the seized asset in favour of the appellant in terms of the offer made to one bidder. The appellant acted in pursuance thereof. After the appellant deposited the amount and fulfilled all the terms and conditions contained in the communication of the corporation offering the property for sale to him, the borrower or the corporation cannot later on contend that the action was incorrect or unfair and should not be acted upon.

Declaration of title and possession

T.K. Mohammed Abubucker (D) Thr. L.Rs. v. *P.S.M. Ahamed Abdul Khader,*[123] while dealing with the declaration of the title, the Supreme Court held that a plaintiff in a suit for declaration of title and possession, can succeed only by making out his title and entitlement to possession and not any alleged weakness in the title or possession of the defendants.

Diary of investigating officer

In *Md. Ankoos* v. *The Public Prosecutor, High Court of A.P.,*[124] five persons died in the intervening night of 2/3.10.2000 in village Thimmapur, District Warangal. The villagers suspected that the deceased were practising sorcery and due to that few deaths took place in the village. 77 persons were sent up for trial for the offences under sections 148, 448, 307, 302, 120-B read with section 109, IPC. The additional sessions judge acquitted all of them. In an appeal preferred by the state of the Andhra Pradesh, the High Court confirmed the judgment of acquittal of 59 accused but convicted 19 persons for the offence punishable under section 302 read with section 149, IPC and sentenced them to undergo imprisonment for life. Their acquittal for other offences was, however, confirmed. All the 19 convicted persons preferred special leave petition in which leave had been granted. The Supreme Court observed:[125]

> In the first place, High Court erred in accepting the evidence of PW2 to PW4 without adequately meeting the reasons given by the Trial Court for not accepting their evidence. Moreover, we considered the evidence of these witnesses ourselves and we find

123 AIR 2009 SC 2966.
124 S.C. Criminal Appeal No.120 of 2008.
125 *Id.* at 574.

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> that the view of the trial court in not accepting the evidence of PW2, PW3 and PW4 cannot be said to be erroneous. Secondly, and more importantly, the High Court committed a serious error of law in discarding the evidence of PW20 on the basis of case diary summoned in exercise of power conferred on the Court under section 172 of the Code… .

Under section 172(2), Cr PC, a criminal court can use the case diary in the aid of any inquiry or trial but not as evidence. Section 172(3) places restrictions on the use of the case diary by providing that the accused had no right to call for the case diary but if it was used by the police officer who made the entries for refreshing his memory or if the court uses it for the purpose of contradicting such police officer, it will be so done in the manner provided in section 161 of the Code and section 145 of the Evidence Act. The court's power to consider the case diary is not unfettered. In light of the inhibitions contained in section 172(2), it is not open to the court to place reliance on the case diary as a piece of evidence, directly or indirectly. Further, according to the court, in the absence of cogent and reliable evidence against the appellants connecting them to crime, the view of the trial court in passing the judgment of acquittal cannot be said to be unjustified.

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