BASIC PRINCIPLES AND TYPES OF EVIDENCE”

AND

**ADMISSIBILITY OF ELECTRONIC EVIDENCE:**

BY

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(LAUNCH: 1.02.2018),

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BASIC PRINCIPLES OF EVIDENCE ACT, 1872.

**The Evidence Act, 1872 which came into force on 01-09-1872 has been broadly divided into XI Chapters. Sir James Fitz James Stephen is author of our Evidence Act. It was divided into 3 (three) parts, 11 (eleven) Chapters and 167 (one hundred and sixty seven) sections. It has been amended by Information Technology Act, 2000 inserting Sections which are 34, 45A, 47A, 65 A, 66 B, 67A , 73A, 81A, 85A, 85B, 85C, 88A, and 90A.**

**Basic Principles and Rules of Law of Evidence**

**'' The objective of codification to secure uniformity where you can have it, diversity where you must have it, but in all cases, certainty''** – Lord Macauly

''The Judgment should refer to the principles of law relevant to the determination of the dispute. If this is not done, then on an appeal it may be argued that the judge did not know what the principles of were or, indeed, did not know what he was deciding''— Hon’ble Dennis Mahony.

 Our Law of Evidence is totally based on The English Law of Evidence. The great mass of rules and principles of the English Law of Evidence are codified. In the case, **Parasram vs Mewa Kunwar**, it was held that '' Rules of Evidence are retrospective in their operation.'' That too, another view observed in Gardner's case is that '' the Law of Evidence is law of mere procedure and does not affect substantive rights and therefore '' alteration in form of procedure are always retrospective, unless there is some good reason or other why they should not be''. The Judge should decide a case only on accepted principles of law.

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In order to attain ''certainty'' in judgments, it is very essential to know about principles of Law of evidence. The 185th Report of The Law Commission of India opines that Principles of evidence which are applicable to criminal law have to necessarily satisfy the basic requirements both Article 20 (3) and Article 21 of our Constitution.

**Synopsis of The Indian Evidence Act, 1872: The important relevant sections:**

**Section 4 is dealt with ''May presume'', ''Shall presume'', ''Conclusive proof''.
Sections 5-55 are dealt with '' relevancy of facts''.
Sections 17-31 are dealt with '' admissions''.
Sections 32-33 are dealt with '' statements by persons that those persons who can not be called as witnesses.''
Sections 34-39 are dealt with ''statements under specified circumstances''.
Sections 40-44 are dealt with '' Judgments in other cases''.
Sections 45- 51 are dealt with ''Opinions''.
Sections 52 -55 are dealt with ''Character''.
Sections 56-58 are dealt with '' certain facts that need not be proved''.
Sections 59,60 are dealt with ''oral evidence''.
Sections 61-90 are dealt with '' documentary evidence''.
Sections 61 to 66 are dealt with '' Primary or Secondary evidence''.
Sections 66A and 66B deal with electronic evidence and its admissibility. Sections 67 t0 73 are dealt with '' attested or unattested''.
Sections 74 to 78 are dealt with '' Public or Private documents''
Sections 91-100 are dealt with '' rules as to the exclusion of oral by documentary evidence.''
Sections 79 to 90 are dealt with '' presumptions as to documentary''. In certain circumstances, some documents are presumed to be genuine.
Sections 101-114 are dealt with Burden of proof and presumptions.**

**Sections 115-117 are dealt with Estoppel.
Sections 118 – 134 are dealt with '' the persons who are competent to testify as witnesses''.**Sections 135 – 166 are dealt with '' Examination of witnesses''.
Section 167 is dealt with '' consequences of improper admission and as to rejection of evidence''. ( The improper admission or rejection of evidence is not ipso facto ground for new trial).

**ADMISSIBILITY OF ELECTRONIC EVIDENCE:**

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 Due to enormous growth in e-governance throughout the Public and Private Sector, Electronic Evidence have involved into a fundamental pillar of Communication, processing and documentation. These various forms of electronic evidence are increasingly being used in both Civil & Criminal Litigations. During trials, Judges are often asked to rule on the admissibility of electronic evidence and it substantially impacts the outcome of civil law suit or conviction/acquittal of the accused. The Court continue to grapple with the new electronic frontier as the unique nature of e-evidence, as well as the case with which it can be fabricated or falsified, creates hurdle to admissibility not faced with the other evidences. The various categories of electronic evidence such as website data, social network communication, e-mail, SMS/MMM and computer generated documents poses unique problem and challenges for proper authentication and subject to a different set of views.

 The Indian Evidence Act has been amended by virtue of Section 92 of Information Technology Act, 2000 (Before amendment). Section 3 of the Act was amended and the phrase “All documents produced for inspection of the Court” were substituted by “All documents including electronic records produced for the inspection of the Court”. Regarding the documentary evidence, section 59, for the words “Content of documents” the words “Content of documents or electronic records” have been substituted and sections 65A and 65B were inserted to incorporate the admissibility of electronic evidence.

 IN ANVAR P.V. Vs. P.K.BASHEER AND OTHERS (MANU /SC/0834/2014) In a significant Judgment, the Hon’ble Supreme Court while settling the earlier controversies arising from the various conflicting judgments as well as the practices being followed in various HIGH Courts and trial courts as to the admissibility of the Electronic Evidence. The Apex Court has interpreted Sections 22A, 45A, 59, 65A & 65B of the Evideence Act and held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate under section 65B(4) of Evidence Act. It has been elucidated that electronic evidence without certificate under section 65B cannot be proved by oral evidence and also the opinion of the expert under section 45A Evidence Act cannot be resorted to make such electronic evidence admissible. IT was further held that all these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic records sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transportation, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of JUSTICE.

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Conclusion: The admissibility of the secondary electronic evidence has to be adjudged with the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent Judgment of Apex Court and various High Courts as discussed above. The proposition is clear and explicit that if the secondary electronic evidence is without a certificate under section 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the deposition of the witness in the court of law cannot be looked into by the Court. However, there are few gaps which are still unresolved as what would be the fate of secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act cannot be taken and the accused cannot be made witness against himself as it would be violative of the Article 19 of the Constitution of India.

**Key underlying principles and rules of Law of Evidence:**

 **''Fact'' may be physical, psychological, positive and negative. Anything capable of being perceived by sense is fact (Section 3). Connection of events as cause and effect is relevancy. A fact which has a certain degree of ''probative force'' is known as ''Relevant fact''. ''Falsus in uno falsus in omnibus'' is no application in India. Circumstantial evidence must be in conclusive in nature. Three presumptions. first is rebuttable, second is irrebuttable, third is Mixed presumption. However, Indian evidence made presumption of fact and of law. Mixed presumption is confined to English law. Evidence may be given of 1. facts in issue and 2. relevant facts(Section 5). The doctrine that all facts in issue are relevant to the issue, and no others may be proved, is the unexplained principle which forms the centre of and gives unity to all these express negative rules (Stephen Dig Introduction) Law of evidence of negative rules declaring what is not evidence. The particular ways of connection which the law regards as '' relevancy'' have been describe in secs 6- 55 of the Indian Evidence Act.**

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 Different Types of Evidences under the Indian Evidence Act.:

Evidence includes everything that is used to determine or demonstrate the [truth](http://en.wikipedia.org/wiki/Truth) of an assertion. Giving or procuring evidence is the process of using those things that are either (a) presumed to be true, or (b) which were proved by evidence, to demonstrate an assertion’s truth. Evidence is the currency by which one fulfills the [burden of proof](http://en.wikipedia.org/wiki/Legal_burden_of_proof).

In law, the production and presentation of evidence depends first on establishing on whom the [burden of proof](http://en.wikipedia.org/wiki/Legal_burden_of_proof) lays. Admissible evidence is that which a court receives and considers for the purposes of deciding a particular case. Two primary burden-of-proof considerations exist in law. The first is on whom the burden rests. In many, especially Western, courts, the burden of proof is placed on the prosecution.

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The second consideration is the degree of certitude proof must reach, depending on both the quantity and quality of evidence. These degrees are different for criminal and civil cases, the former requiring evidence beyond reasonable, the latter considering only which side has the [preponderance of evidence](http://en.wikipedia.org/wiki/Preponderance_of_evidence), or whether the proposition is more likely true or false. The decision maker, often a jury, but sometimes a judge, decides whether the burden of proof has been fulfilled. After deciding who will carry the burden of proof, evidence is first gathered and then presented before the court.

**Types of Evidence are briefly as under and explained in a separate Notes:**

1). Oral Evidence

2).Documentary Evidence

3).Primary Evidence

4).Secondary Evidence

5).Real Evidence

6).Hearsay Evidence

7).Judicial Evidence

8).Non-Judicial Evidence.

9).Direct Evidence

10).Circumstantial Evidence

11).Expert Evidence

12).Presumptions of Evidence

13).Defense Evidence

14).Eye Witness

15).Hostile Witness

16).Solitary Evidence

17). Corroborative Evidence

18). Medical and D.N.A Evidence

19). Electronic video and Audio Evidence

20).Statement of dead person Evidence (Dying declaration).