UNIT II LAW OF EVIDENCE
ECONTENT.

2016 LLB 6TH SEMISTER

SECTION 60: Oral evidence must be direct.—Oral evidence must, in all cases whatever, be direct; that is to say— If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds: Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable: Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Section 60 lays down few conditions to be fulfilled before oral evidence is made admissible. According to this section oral evidence must be direct or positive. This simply means that the witness tells the court of facts of which he has personal knowledge and experience. The

word “must” in the section indicates the exclusion of indirect evidences including “hearsay” or derivative evidence. The cardinal principle is that the best evidence must be given before the court.If any person is before court as a witness , should make statement about the facts of which he is having knowledge. Section 60 lays down that oral evidence must in all cases be direct and not heard from any other sourse. Where a witness gives evidence that he received information from other person and that person does not say about it, such evidence would be inadmissible being hearsay evidence. If evidence is not based on personal knowledge but on what has been heard from other as hearsay evidence it is inadmissible. The section has specifically mentioned what is direct evidence. It is meant to say that: 1. If the evidence is to be given about fact which could be seen, it must be the evidence of a witness who must say that he himself saw it;2. If the evidence is to be given about fact which could be heard, it must be the evidence of witness who must say that he heard it;3. If the evidence is to be given about fact which could be perceived by any other sense or by in any other manner if witness produced must say that he perceived it senses or in that manner;4. If the evident is to be given about an opinion or as to the ground on which opinion is to be held, the witness must say that he holds that opinion on those ground. The section, therefore, provides four methods for proving oral evidence. The evidence must be of that person who himself witnessed the happening of facts to whom he testifies. This must be left to the parties but in weighing the evidence the court can take note of the fact that the best available witness has not been given, and can draw an adverse inference. In a murder case neither oral report was made to the investigating officer by the informant nor written report said to have been sent to the police, it was not admissible evidence as being hit by rule against hearsay.

Two proviso to Section 60 provide exception to the general rule that oral evidence must always be direct. These exceptions are technically known as "hearsay evidence." Hearsay, therefore, strictly speaking is secondary evidence of any oral statement.

What is Hearsay Evidence:

Hearsay evidence "denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person." The evidence is such that the witness has no personal knowledge about the fact in question, rather it is derivative based on the second-hand knowledge, "Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else; sometimes it is treated as nearly synonymous with 'irrelevant' ''—STEPHEN. **In Vinod Kumar Bhutani vs State Thr. Cbi on 28 May, 2013** hearsay evidence was discussed as _ it is one of the cardinal rules of the law of evidence that "in determining the admissibility of evidence the production of the best evidence should be exact" Sections 60, 64 and 91 are founded on this rule. Since witness is called an 'eye-witness' or 'a witness of fact' who has the first hand knowledge in the sense that he perceived the fact by any of his five sources." **Hearsay evidence** is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase —**hearsay evidence**‖ is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than by a witness in

giving **evidence** and a statement contained or recorded in any book, document or record whatsoever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated. An assertion other than one made by a person while giving oral **evidence** in the proceedings is inadmissible as **evidence** of any fact asserted.

Exception to hearsay rule:

There are number of exceptions to the rule of hearsay. All exceptions have been imported in the Evidence Act. These include: a) admission and confession section 17, 30., b)statement of persons who are dead section 32 or cannot be found etc., c) res gestae i.e section 6. d) evidence in former proceedings section 33 , e)entries in books of account, statement in public document, maps and charts, reputation, expert opinion and statement of experts in treaties (Proviso to Section 60).It is therefore, said that under certain circumstances the hearsay evidence is held admissible, particularly when it "relates to the question of the credibility of witness." The evidence of witness who heard the calling her name when her father was assaulting her mother is admissible.

Proviso 1:

First proviso provides for production of treatise containing expert's opinion offered for sale, if the author of the treatise is dead or cannot found etc. (Section 32). The treatise required to be admissible must be offered for sale and the burden of proving the particular treatise is on the person who desires to give such treatise in evidence. The opinion by a living authority in a treatise as to usages and tenets of a body of men or family is not admissible under this section. Similarly, opinion of experts as expressed in treatises of person who is dead can be treated as

evidence in proper case. But, using of such treatise as evidence should be made with caution when the Supreme Court explained that “every article published or a book written cannot ipso facto be regarded as conclusive or worthy of acceptance.

Proviso 2:

Second proviso requires the production of material thing (Section 45) for inspection if oral evidence refers to the existence on condition of any material thing. Secondary evidence of the contents of written document is permitted under this proviso when production of original is impracticable

SECTION 61: Proof of contents of documents.—The contents of documents may be proved either by primary or by secondary evidence.

No document can be admitted till that is established as per procedure prescribed in the act.There should be proof as to contents of document. Section 61 provides that the contents of document can be proved either.— (i) by primary evidence, i.e. by producing the document itself (Section 62) or (ii) by secondary evidence (Section 63). When primary evidence is not available secondary evidence may be permitted by the court to prove the contents of document. There is no other method of proving the contents of document. “The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence . The contents of document without formal proof cannot be taken as evidence.

SECTION 62: Primary evidence.—Primary evidence means the document itself produced for the inspection of the Court. Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document; Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original. Illustration A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

In Narbada Devi Gupta v/s. Birendra Kumar Jaiswal and another, reported in ***(2003)8 SCC7459*** it was submitted that execution of documents is to be proved by admissible evidence and in a case where the document is produced and signature on the document is admitted, the document has to be read in evidence. Judgment of the Supreme Court in the case of P. C. Purushothama Reddiar v/s. S. Perumal reported in (1972) 1SCC9 : AIR 1972SC608 It was submitted that the Plaintiff had admitted the signature on the carbon copy, hence, there was no further burden on the Defendant to lead any additional evidence for proof of the contents of the carbon copy.In Byramjee Jeejebhoy Private Ltd. v/s. Govindbhai A. Bhatte and Others, reported in 1994(1) Bom. C. R. 21114 it was submitted that once the factum of the execution is proved, the document stands proved and it is wholly

irrelevant whether the contents are proved or not. In Gutta Sriramulu Naidu And Anr. vs The State on 21 July, 1961 court held that Section 62 of the **Evidence Act** runs as follows: "Primary **evidence** means the document produced for the inspection of the Court. The document which is said to have been issued by A-l and which **act**ually functioned in the commission of the offence and which was received by P. W. 3 and can be identified by P.W. 3 is, according to the prosecution, Ex. P-l. So, it was itself primary **evidence**. Therefore, the contention of the learned Advocate for the accused that Ex. P-l is secondary **evidence** and that the pencil counter-foil would be the original is not acceptable. Explanation 2 to Section 62 of the **Evidence Act** runs as follows: Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

SECTION 63: 63. Secondary evidence.—Secondary evidence means and includes—

(1) Certified copies given under the provisions hereinafter contained1;1;"

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it. Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original

Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence. Trial Courts prefer original, or primary, evidence. They try to avoid using secondary evidence wherever possible. This

approach is called the best evidence rule. Nevertheless, a court may allow a party to introduce Secondary evidence . That has been reproduced from an original document or substituted for an original item. For example, a photocopy of a document or photograph would be considered secondary evidence. Another example would be an exact replica of an engine part that was contained in a motor vehicle. If the engine part is not the very same engine part that was inside the motor vehicle involved in the case, it is considered secondary evidence. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it .

Clause 1 to 3 deals with copies of document

This section is exhaustive in regards to the kinds of secondary evidence admissible under the Act. The expression "means and includes in this section" make it clear that the five clauses referring to secondary evidence are exhaustive. However secondary evidence cannot be made admissible mechanically. Sufficient reason for non-production of the original document must be shown. For e.g. tenant file Xerox copy of money receipt in his plea without giving proper reason and Xerox is authentic then it will be not admissible.

Certified copies, Copies prepared by mechanical process, Counter foils, Photographs,Xerox copy, Photostat copy, Copies made from or compared with original copy, Counterparts etc. are secondary documentaryevidence.

1.Certified copies: Under section 76 the certified copies is defined. A copy of the municipal record which is not issued in accordance with the

requirements of the Municipal Act, is not relevant.In the case of a sale deed of 1896, when the party failed to prove the loss of the original but produced a certified copy, for proving the contents of the document, it was held that mere production of a certified copy would not be sufficient to justify the presumption of due execution of the original document under section 90 of evidence act.

2.Copies prepared by mechanical process:

The copies prepared by mechanical process and copies compared with such copies is mentioned in clause 2 of this section. In the former case, as the copy is made from the original it ensure accuracy. To this category belong copies by photography, lithography, cyclostyle, carbon copies. Section 62 (2) states that, where a number of document are made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest, but where they are all copies of a common original, they are not primary evidence of the content of the original.

3.Counter foils:The counter foils of rent receipts being an admissible in favour of the landlord are not admissible against the tenant.

4.Photographs

Photographs properly verified on oath by a person able to speak to their accuracy are generally admissible to prove the identity of persons, or of the configuration of land as it existed at a particular moment, or the contents of a lost document"

x-ray photographs are admissible in evidence to determine the extent of a physical injury or disease, provided it is proved that the photograph is a photograph of the person injured or diseased. The person who took the photograph should be called, unless his evidence is dispensed with by consent.

5.Xerox copy: A xerox copy of the forensic report sent by FSL after certifying the same as true copy, was held to be admissible in evidence as officer of the FSL had no interest in concocting report against the accused.If any document is unregistered and its copy is produced in the court then it will not admissible in the court as secondary evidence. **6.Photostat copy:**A Photostat copy of a letter is a piece of secondary evidence, and it can be admitted in case original is proved to have been lost or not immediately available, for given reason, it is not conclusive proof in itself of the truthfulness of the contents contained therein. Photostat copies of documents should be accepted in evidence after examining the original records as genuineness of a document was a fundamental question.

SECTION 64: Proof of documents by primary evidence.—Documents must be proved by primary evidence except in the cases hereinafter mentioned.

SECTION 65: Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence2; 1[India] to be given in evidence2;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Section 65 mentions seven cases in which secondary evidence is admissible. This section relates to exceptions to the rule laid down in Section 64. The principle underlying the section is that when original

document is not available or is destructed or is in the custody of opposite party or under the control of third person who does not produce after notice secondary evidence is admissible. Application for production of secondary evidence must give full details and must be supported by a proper affidavit. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the case. A document in terms of Section 65 of the Evidence Act is to be proved by a person who is acquainted with the handwriting of the author thereof.

Cases in which secondary evidence is admissible:

Clause 1. When original is in possession of opposite party or third person: According to Clause 1 secondary evidence may be given when the original document is in possession or under the control of opposite party; the original is in possession or power of any person who is out of reach of or not subjected to the process of court; or any person legally bound to produce but did not produce it, or where the original manuscript of a leaflet was not shown to be in possession of the successful candidate in a election, when the Photostat copy was prepared, secondary evidence of Photostat copy is not permissible. e.g Tenant A failed to produce receipt of rent despite several notices and the plaintiff's application for producing secondary evidence was rejected by the trial court, it was held that the trial court could not form such opinion without affording the plaintiff an opportunity of adducing secondary evidence.

Clause 2. When the existence, condition or contents of documents have been admitted: When the existence or contents of the original document has been proved to be admitted in writing by the person or his

representative-in-interest, the production of secondary evidence is admissible. It is well settled that clauses (a) And (c) are independent of clause (c) and even ordinary copy would be admissible. When the existence and contents of a document are admitted in a letter, secondary evidence is admissible.

Clause 3. When the original has been destroyed or lost: When the original document is destroyed or lost and evidence to that effect was given that it was not arising from person's neglect or default then secondary evidence of its contents of the document may be given.

Clause 4. When the original is of such a nature as not to be easily movable:

In such type of cases the secondary evidence of its contents is admissible. For example. Legislative Proceedings, Bank Ledger, Public Record, inscription on wall, etc.

Clause 5. When the original is a public document:

When the original document is a public record under section 74 of the Evidence Act, a secondary evidence of its contents is admissible.

Clause 6. When the original is a document of which certified copy is permissible:

In such cases the certified copy of the original document is admissible as a secondary evidence to prove the contents of the original document. Certified copy of registered mortgage deed cannot be held to be public document, certified copy of which can be produced in evidence, a secondary evidence in terms of Section 65(6) of the Evidence Act. Certified copy of the sale deed can be filed to prove ownership and to session over the disputed land or property.

Clause 7. When the original consists of numerous accounts or voluminous documents:

This provision is used to save public time when the original document consist of number of documents of ponderous look or of accounts involving great inconvenience of production, secondary evidence of the relevant facts examined by the experts can be allowed to be admitted.

Secondary evidence is not permissible unless non-production of the originals is proved:

Where the originals were not produced at any time nor was any foundation laid for giving secondary evidence certified copies were not admissible.

Newspapers: Newspaper is admissible without proof, but paper itself is not proof of its contents. The Supreme Court said that without further proof it is at best second hand secondary evidence. A fact has first to be alleged and proved and then newspaper reports can be taken in support of it but not independently.

65A. Special provisions as to evidence relating to electronic record:

The contents of electronic records may be proved in accordance with the provisions of Section 65B.

65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be

admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) The computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) By a combination of computers operating over that period; or

(b) By different computers operating in succession over that period; or

(c) By different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

All the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) Identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate; and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(6) Whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) A computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Effect of provisions 65A and B is that no electronic evidence will be admitted in court of law till requirements of section 65 A and B is fulfilled. Supreme court in its previous judgment in the case of *State (NCT of Delhi) v Navjot Sandhu alias Afzal Guru 2005* held that irrespective of the compliance with the requirement of the section 65B, which has a special provision dealing with the admissibility of the electronic records there is no bar in adducing secondary evidence under section 63 and 65, of an electronic record. Section 63 merely provides that secondary evidence means and includes “copies made from the original by mechanical process which in themselves ensure the accuracy of the process and copies compared with such copies.”Electronic records being more susceptible to tampering and alteration so if the electronic records, which is not complying with the special provision of the Indian evidence act that is section 65B, may led to the travesty of justice.18 September 2014, the Supreme Court of

India delivered its judgment in the case of Anvar v. P. K. Basheer for the presentation and admissibility of any electronic evidence like computer data, CD, VCD, chip any other digital record, there is mandatory necessity to comply with section 65B of the Act.

Explanation:

For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process.

SECTION 66:

Rules as to notice to produce.—Secondary evidence of the contents of the documents referred to in section 65, clause

(a) , shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:—Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case\:" Provided that such notice shall not be required in order to render secondary evidence admissible in any of the

following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;.

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Purpose of a notice under Section 65 and 66 of the Indian Evidence Act is to give the party an opportunity of producing the original document. Secondary evidence is admissible when the party offering evidence of its contents cannot, for any reason, not arising from his own default or neglect, produce original document in reasonable time and under Section 66, the Court has absolute power to dispense with the notice when it deems it fit. Once it is established that the original deeds are being deliberately withheld by the party against whom they are sought to be used. E.g, it is established that the original deeds are being deliberately withheld by the party against whom they are sought to be used, secondary evidence in respect of those deeds can be tendered and if the secondary evidence happens to be certified copies of registered document, then the contents thereof can be read in evidence. Secondary evidence is admissible when the party offering evidence of its contents

cannot for any reason not arising from his default or neglect, produce original document within reasonable time and under Section 66 of Indian Evidence Act the Court has absolute power to dispense with the notice when it deems fit.Before secondary evidence of document could be adduced, it is essential that the procedure in Sec.66 of the Indian Evidence Act should be complied with and it is necessary that notice must be given to produce the document.In 2006(2) CTC 177 (it was held that the rejection of the trial court to refuse to grant permission for letting secondary evidence for marking xerox copy is correct as the petitioner has not chosen to explain why the xerox copy is not filed in the list of documents furnished along with the plaint. Any person seeking to receive and mark the xerox copy of a particular document has to satisfy the requirements laid down under Sec.65 of the Evidence Act. The trial court further observed that the revision petitioner has not taken any steps to secure the original documents and he has not complied with the statutory requirements under the Indian Evidence Act. Documents must be proved by primary evidence exist in the cases as mentioned under Sec.65 of the Indian Evidence Act. Sec.65 deals with cases in which secondary evidence relating to documents may be given. But under Sec.66 of the Indian Evidence Act secondary evidence shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession such document is, a notice to produce it as is prescribed by law. If no notice is prescribed by law then such notice as the court considers reasonable under the circumstances of the case.

In AIR 1936 Privy Council , the court held ,The only purpose of a notice under Ss.65 and 66 of the Act is to give the party an opportunity by producing the original to secure, if he pleases, the best evidence of the contents. Secondary evidence is admissible

when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect, produce the original document in reasonable time and under S.66 the Court has absolute power, when it thinks fit to dispense with a notice under these sections.Documents must be proved by primary evidence exist in the cases as mentioned under Sec.65 of the Indian Evidence Act. Sec.65 deals with cases in which secondary evidence relating to documents may be given. But under Sec.66 of the Indian Evidence Act secondary evidence shall be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession such document is, a notice to produce it as is prescribed by law. If no notice is prescribed by law then such notice as the court considers reasonable under the circumstances of the case.Secondary evidence of the contents of document under section 65 is not allowed unless "not to produce" notice is first given. Section 66 has laid down the conditions under which the notice can be given. It requires that notice must be given to the opposite party or somebody who is in possession of original document under section 65(a). The notice must be in writing and to be given to produce the original, and if the opposite party fails to comply with the notice, secondary evidence will be admissible to prove the contents of the document.If no notice is given secondary evidence cannot be admissible unless it is otherwise provided when the plaintiff's attorney admitted that he had the original promissory note with him, in an action of promissory note the secondary evidence of its contents was allowed. Secondary evidence can be permitted to be adduced only after non-production of primary evidence is satisfactorily accounted for, or can be filed only after notice under section 66 is given. Proviso to Section 66 enumerates six cases where no notice is required for admission of secondary evidence in the following:

1. When a document itself is a notice:

When a document to be proved is itself a notice which has already been given to the adverse party, then no notice is further required to be served for admission of secondary evidence. Where defendant refused to produce original rent note which was in' his possession, and the plaintiff sought to produce secondary evidence but the trial court rejected it, the Supreme Court held that the plaintiff should be allowed to produce the secondary evidence and then the court may pronounce on its veracity.

2. When the opposite party knows that he is bound to produce it:

When the adverse party knows that he will be required to produce the original or that he will be charged with the possession of the instrument by the plaintiff, secondary evidence is admissible without giving him notice. Where the defendant mortgagee was in possession of original mortgage deed refused to produced it before the court, a certified copy of the deed was allowed to be produced.

3. When the adverse party has obtained original by fraud or force:

No notice is required to be served when it appears or is proved that the adverse party has obtained the original document by fraud or by force.

4. When the adverse party has the original in the court. Notice to produce the original is not necessary when it is proved that the adverse party or his agent, like solicitor or vakil, has the original instrument in court. When the original instrument is in the court room in opponents 'possession an instant demand is sufficient.'

5. When the adverse party has admitted the loss:

The notice is not required to be necessary when the adverse party or his agent had admitted that the original instrument which was in his

possession, has been lost or destroyed. It is a case of admission by the opponent that presently he is not in possession of the instrument and no notice is necessary. Secondary evidence is to be admitted.

6. When the person in possession is out of the jurisdiction of the court:

When the person in possession of the original document is out of the jurisdiction of the court and not subject to the court, secondary evidence is admissible without serving any notice.

SECTION 67: Proof of signature and handwriting of person alleged to have signed or written document produced.—If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Section 67 deals with mode of proof of the execution of a document. In Shaikh Farid Hussinsab vs The State Of Maharashtra on 9 February, 1981Where the genuineness of any document is not disputed, such document may be read in **evidence** in any inquiry, trial or other proceeding under this Code without proof of the signature of the person by whom it purports to be signed :Provided that the Court may, in its discretion, require such signature to be proved." the **section** is intended to dispense with the "formal proof" of certain documents. Sub-**section** (3) providing for such dispensation is the main provision, sub-**sections** (1) and (2) being merely procedural. Such dispensing of the proof is restricted only to such documents of which genuineness is not disputed when called upon to do so under sub-**section** (1). Under the Evidence Act evidence can be oral be documentary. Even the

original primary documents cannot be read in **evidence** merely because the same are relevant and produced, unless the authenticity thereof is established. Mode of proof for establishing such authenticity is prescribed under sections 67 to 71 of the **Evidence Act**. These can be used in **evidence** for adjudication of points in dispute only after they are proved to be authentic and genuine by this mode.

SECTION: 67A Proof as to [electronic signature]. —Except in the case of a secure [electronic signature], if the [electronic signature] of any subscriber is alleged to have been affixed to an electronic record the fact that such [electronic signature] is the [electronic signature] of the subscriber must be proved.

SECTION 68: Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.)

There are very few documents in India required by law to be attested. The Transfer of Property does not apply to the whole of India.If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the

purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Section 68 applies to the cases where the execution of document has to be proved. It deals with proof of document which is required by law to be attested. A document of which the execution is required by law to be attested means “a document, the signature upon which should be put in the presence of two witnesses who themselves add their signatures and addresses in proof of the fact that the document was signed in their presence.” According to this section where a document is required by law to be attested it cannot be used in evidence until at least one witness, if alive, has been called for the purpose of proving its execution. The witnesses present are called attesting witness.

The section further provides that no attesting witness is to be called for where the document to be proved is a registered one and is not a will, and also the execution of the document is not specifically denied by the person executing it. More than one attesting witness may be necessary to prove a document according to the circumstances of a case.The evidence of one attesting witness is sufficient to prove the execution of the will. Execution must include both execution and attestation as without proof of the latter such documents are not legally valid. In these cases there can be no valid execution without due attestation and if due attestation is not also provided, the fact of execution is of no avail.” Settlement deed was executed by grandfather in favour of daughter’s children. Execution deed cannot be disbelieved merely on ground of non-execution of attestors. A document required by law to be attested will be proved by calling at least one attesting witness if he is alive and subject to the process of the court. And the witness must be capable of giving evidence. Thus the document has to be proved by examining the attesting witnesses. If no attesting witness is found, it must be proved

that the attestation of one attesting witness is in his handwriting and that the signature of the executant is in the handwriting of him. It was held that where, of the three attesting witnesses, the one who also a scriber was examined in proof of the execution of the will, it cannot be said that attesting witnesses were not examined. If no attesting witness is alive, the document can be proved according to Sections 47 and 73 of the Act.If the execution of document is not denied, no attesting witness needs to be called. The registration certificate furnished under section 63 of the Registration Act is sufficient

Proviso:

The section provides special rule in the proviso. Under the proviso, in case of registered document, and is not a will, where its execution is not specially denied by the person executing it the calling of attesting witness is not necessary. If, on the other hand, the execution of a registered document required by law to be registered is specifically denied then the attesting witness has to be called to prove it.

Under the proviso the rigour of the rule has been relaxed to some extent. It is not necessary to call an attesting witness unless the execution of the document is "specifically denied." Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered, is not specifically denied.

Codicil: means a document that is executed by a person who had previously made his or her will, to modify, delete , qualify, or revoke provisions contained in it. The execution and attestation of codicil must be in same manner as a will, became codicil is an instrument made in relation to will.The registration of document as codicil or will does not dispense with need of proving execution and attestation codicil or will as

per Evidence Act. The registrar of deeds cannot be "statutory attesting witness" to codicil merely by discharging duties of registration.

SECTION 69: Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

It is for the party resorting to the provisions of section 69 in derogation of the provisions of section 68 to show that the case is within the terms of section 69.

Section 69 contemplates that two things must be proved, viz.—

(i) It must be proved by some witnesses that the signature of the person executing the document is in his handwriting, and

(ii) That the attestation of one of the attesting witnesses at least is in the handwriting of the witness.

This section speaks of signature and handwriting only. As per above two cases (a & b) a document required by law to be attested can be proved without calling an attesting witness. When attesting witness is available Section 69 is not applicable. But, when attesting witness cannot be found Section 68 is not attracted and the case is covered by Section 71.Section 69 comes into play when no attesting witness can be found. This section is applicable only if the person says that the attesting witness cannot be found, so, he is unable to examine him.

SECTION 70: Admission of execution by party to attested document.—The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

The section lays down that if the executant admits the execution of document it shall be sufficient proof of its execution even if it is required by law to be attested. For example, if the mortgagor admits the execution of mortgage deed, then the mortgagee need not require to adduce any evidence to prove the execution of the document. "The effect of this section is to make the admission of the executants a sufficient proof of the execution of a document as against the executants himself. It appears that "admission conferred 'in section 70' is admission of validity of attested document which means that when a party admits execution of the document, he thereby not only admits the mere signing thereof but also the entire series of fact which would give validity to the document concerned".

SECTION 71: Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Section requires that execution of a document is compulsorily attestable must be proved at least by one attesting witness if he is alive and subject to the process of the court. Section 71 is also an exception to the general rule laid down in Section 68 of the Evidence Act. It lays down if the attesting witness denies or does not recollect the execution of a document, the execution may be proved by any other evidence. It can be said that the execution of a document is not entirely left to the mercy of the attesting witness. Section 71 is an exception to the rule of

proof of an attesting witness. It is permissive and an enacting section permitting a party to lead other evidence in certain circumstances.A will which have not been proved in accordance with the requirement ofs of section 68 cannot be used even for some collateral purpose, such as for showing some relationship or for the existence or absence of some other rights in the property. In M.B. ramesh v.k.m. veeraje URS (D) BY LRS. & ORS. SCR 2013 court held that Section 71 is meant to lend assistance and come to the rescue of a party who had done his best.

SECTION 72: Proof of document not required by law to be attested.—An attested document not required by law to be attested may be proved as if it was unattested.

This section lays down the procedure for proving document by admission. If the document is not required by law to be attested, but the parties get it attested, it may be proved as if it was not attested. It simply considers the document and it will be taken to be proved.

SECTION 73:Comparison of signature, writing or seal with others admitted or proved.—In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. 1[This section applies also, with any necessary modifications, to finger-impressions).

Section 73 enables the court to compare the disputed signature, writing or seal of a person with signitures, writings or seals which have been admitted or proved to the satisfaction of the court to have been made or written by that person.This section makes clear that when the court considers necessary to ascertain whether the signature, writing or seal is that of the person, alleged to have been written or made , the court can compare.This is an enabling provision for court making an enquiry in determining an issue to form its opinion by comparison of the or figures. In Ajay Kumar Parmar v. State of Rajasthan, AIR 2013 SC while dealing with the provisions of Section 73 of the Indian Evidence Act, 1872, this Court observed that courts, should be slow to base its findings solely on comparison made by it. The Court further held: "The opinion or a handwriting expert is fallible/liable to error like that of any other witness, and yet, it cannot be brushed aside as useless. There is no legal bar to prevent the Court from comparing signatures or handwriting, by using its own eyes to compare the disputed writing with the admitted writing and then from applying its own observation to prove the said handwritings to be the same or different, as the case may be, but in doing so, the Court cannot itself become an expert in this regard and must refrain from playing the role of an expert, for the simple reason that the opinion of the Court may also not be conclusive. In T. Subbiah v. S. K. D. Ramaswamy Nadar,(1) Krishnaswam Reddy, J. of Madras High Court adopted a similar approach in coming to the conclusion that section 73, Evidence Act gives no power to a Magistrate at the pre- cognizance stage or in the course of police investigation, to direct an accused person to give his specimen handwriting. K. Reddy, J. was careful enough to add that the court for the purpose of comparison can take extraneous aid by using magnifying glass, by obtaining

enlargement of photographs or by even calling an expert-all these to enable the Court to determine by comparison. There is no basis for the view that the court cannot seek extraneous aid for its comparison: but on the other hand, there is indication in Section 73 of the **Evidence Act** itself that such aid might be necessary'.In Kuppusamy Gounder and Anr Vs Palaniappan (2012) 1 MLJ 449: Court is empowered to compare disputed thumb impression with that of an admitted thumb impression of the party and may record a finding on comparison, even in the absence of an expert's opinion. In State (Delhi Administration) vs. Pali Ram, the question raised was in regard to scope of powers of Court under Section 73 of the Evidence Act. The question eventually before the Court was, "Whether a Magistrate in the course of an enquiry or trial on being moved by the prosecution, is competent under Section 73, Evidence Act, to direct the accused person to give his specimen handwriting so that the same may be sent along with the disputed writing to the Government Expert of Questioned Documents for examination, "with a view to have the necessary comparison"?And the issue was decided in affirmative.

SECTION 73-A: Proof as to verification of digital signature.—In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct—2[73A. Proof as to verification of digital signature.—In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct—"

(a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;

(b) any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person. Explanation.—For the purposes of this section, “Controller” means the Controller appointed under sub-section (1) of section 17 of the Information Technology Act, 2000.]

To know whether a digital signature is that of the person by whom it purports to have been affixed, the court may direct that person or the controller or the certifying authority to produce the original digital signature certificate. The court may direct any other person to apply the public key listed in the digital signature certificate and verify the digital signature purported to have been affixed by that person.

SECTION 91: Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence1 shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence2 shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained." Exception

1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved. Exception 2.—Wills 2[admitted to probate in 3[India]] may be proved by the probate. Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one. Explanation. 2.—Where there are more originals than one, one original only need be proved. Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact. Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

Section 91 of Indian Evidence Act, 1872 deals with Evidence of terms of contracts, grants and other dispositions of property reduced to form of document When a transaction has been reduced to writing, either by agreement of the parties or by requirement of law, the writing becomes the exclusive memorial thereof, and no evidence can be given to prove the transaction, except the document itself, or secondary evidence of its contents, where such secondary evidence is admissible. This rule is based on the principle that the best evidence, of which the case in its nature is susceptible, should always be presented. It is cardinal rule of evidence not one of technicality but of substance which it is dangerous to depart from that where written documents exist ,they shall be produced as being the best evidence of their own contents. As rightly remarked, this is a matter both of principle and of policy- because it would be attended with great danger, if a written document was allowed to be impeached by collateral evidence. What first part of section 91 says as to cases to which it applies and second part of section 91 says that in all cases in which any matter is required by law to be reduced into the form of a document, then the document itself must be put in evidence.

An extension of the Best Evidence Rule applied in Section 91 can be seen in the form of Section 92, where exceptions to the exclusivity of documentary evidence are enumerated.

Exceptions laid down in Section 91 of the Evidence Act:

1. Persons holding public office (Exception 1).

A public officer is required to be appointed by law by writing when it is shown that a particular person has acted as such officer it is sufficient proof of that appointment. The writing need not be proved.

2. Probate certificate (Exception 2).

Wills admitted to probate in India may be proved by the probate. The document containing the will need not be produced.

Probate means the grant of administration of the property by the court under the Indian Succession Act.

3. Extraneous fact (Explanation 3 of Section 91).

When the document relates to some other Facts other than those referred to or a document contains the statements of other independent facts, oral evidence is admissible in proof of them. [Illustration (d) & (e) of Section 91].

SECTION 92: Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms: Proviso

(1) .—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1[want or failure] of consideration, or mistake in fact or law: (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party,

3[want or failure] of consideration, or mistake in fact or law\:" Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document: Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved: Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents: Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract: Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts. Illustrations

(a) A policy of insurance is effected on goods “in ships from Calcutta to London”. The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(b) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(c) An estate called “the Rampure tea estate” is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B’s as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words “Bought of A a horse for Rs. 500”. B may prove the verbal warranty.

(h) A hires lodgings of B, and gives B a card on which is written— “Rooms, Rs. 200 a month”. A may prove a verbal agreement that these terms were to include partial board. A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the term verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

“Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under S. 91; in other words' it is after the document has been produced to prove its terms under S. 91 that the provisions of S. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. The illustrations appended with section are explanatory of the principle laid down in the section.The first of them illustrate the main principle and the rest are illustrative of the exceptions.e.g, a policy of insurance applies to ships leaving Calcutta. One of the ships is lost.It is sought to be proved that by an oral agreement that the particular ship was excepted from the policy. Such evidence is not admissible.

Exceptions:

There are certain exceptions to the rule excluding extrinsic evidence mentioned in Sections 91 and 92 of the Act, where oral evidence is admissible. The exceptions are as follows:

Proviso 1:

Fraud vitiates all instruments , however solemn.A party will be allowed to give parole evidence, when the execution of such document was obtained from him by fraud.Any fact which would invalidate a document or which would entitle any person to a decree or order in respect of it, may be proved on the ground that it was obtained by fraud, intimidation, illegality or without being duly executed or was executed by incompetent party or that there was mistake of fact or law or that there was want or failure of consideration. When an agreement was found illegal and opposed to public policy, oral evidence was allowed. Document mentioning by mistake some other land than one intended to be transferred was allowed to be rectified to the tune of the real agreement. [Illustrations (a) & (e)].

Proviso 2:

When the document is silent about the quality of goods which is also subject matter of contract, Proviso 2 lays down that a separate oral agreement as to a matter on which the document is silent, and which is not inconsistent with its terms, may be proved. [Illustrations (g) & (JI)].According to this Proviso a separate oral agreement should relate to a matter on which the document is silent [Illustration (g)] and that it is not inconsistent with the terms in the document [Illustration (h)]

Proviso 3:

Where there is an oral agreement constituting a condition precedent to the attaching of any obligation under the documents, it may be proved. If the document was duly signed and executed, but it is subject to certain condition, which though not mentioned in the document an oral evidence is allowed to prove the condition [Illustration (i) & (f)]. For example, where the parties to a promissory note payable on demand and orally

agreed that payment would not be demanded for five years, oral agreement was to be proved. Oral evidence was admitted in a mortgagor's suit for rejection. But, oral evidence in contradiction with terms of the written document to show that adoption took place on different date is not admissible.

Proviso 4:

This rule merely binds to a given relation of the transaction itself. This proviso permits proof of distinct subsequent oral agreement to modify or rescind the document in question may, except where such document is required to be in writing or has been registered where a transaction has been reduced into writing not because the law requires to be so, but by agreement for convenience of the parties, evidence of any subsequent oral agreement to modify or rescind it is admissible. But no evidence of an oral agreement is allowed to prove the contents of a lease document from those stated in the written lease deed.Under this proviso it is open to a party to lead evidence to show that there was, apart from the written contract, a distinct subsequent oral agreement under which the terms of original contract have been modified, but this cannot be done so in a case in which such contract, grant, or disposition of property is required by law to be in writing or has been registered.The second part of proviso (4) to Section 92 does not permit leading parole evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument. The terms of registered document can be altered, revised or varied only by subsequent registered document and not otherwise.

Proviso 5:

Under this proviso, oral evidence can be given to show that by the usage of the trade, an incident ,not expressly mentioned in the contract is a term of contract and may be proved if they are not inconsistent with its

express terms. According to this proviso parole evidence can be given to prove that a particular usage or custom is prevailing in the trade and is considered to be implied term of contract. But it is subject to the condition that such usage or custom should not be against the express terms of the document. Where goods sold are to be carried by the railways, but the contract does not mention as to who is to arrange for wagons, evidence may be offered that by the custom of the trade the seller had to arrange for wagons.

Proviso 6:

This proviso relates to the admissibility of evidence necessary to prove the operation of the document. Any fact which shows in what manner the language of the document is related to existing fact may be proved. The object of admissibility of extrinsic evidence is to assist the court to get the real intention of the parties and to overcome the difficulty caused by the ambiguity. In such a case the subsequent conduct of the parties furnishes evidence to clear the blurred area and to ascertain the true intention of the author of the document.

SECTION 93: Exclusion of evidence to explain or amend ambiguous document.—When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. Illustrations

(a) A agrees, in writing, to sell a horse to B for "Rs. 1,000 or Rs. 1,500". Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Section 93 deals with exclusion of evidence to amend or explain the document. This section deals with the first principle of patent

ambiguity. It cannot be explained under section 93 by oral evidence, but a latent ambiguity can be under section 96 of the Act. According to the section an ambiguity is such that the document is on its face is unintelligible and such defect cannot be removed. Where the document is ambiguous the language used in the document can decide the question only and not by the parties by relying upon any extrinsic evidence.

SECTION 94: Exclusion of evidence against application of document to existing facts.—When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. Illustration A sells to B, by deed, “my estate at Rampur containing 100 bighas”. A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Section 94 puts stress on accurate application to existing facts when the language used in the document is plain and unambiguous.Court will not admit any evidence to contrary. Thus, this section comes into play when the language of the document is considered by the court with reference to any factual situation. According to Illustration A sold to B his Rampur estate containing 100 bighas. Evidence cannot be given that estate of 100 bighas meant to be sold was situated in different size.

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SECTION 95: Evidence as to document unmeaning in reference to existing facts.—When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. Illustration A sells to B, by

deed, “my house in Calcutta”. A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house of Howrah.

According to the section the language used in the section is plain, but its application to the existing facts creates problem. In such circumstances the court has to rely on outside evidence to make the document more meaningful. Hence, extrinsic evidence can be given to remove latent ambiguity of the document. The section is based on the maxim falsa demonstration non nocet. It means that a false description does not vitiate the document. Latent ambiguity is hidden ambiguity and evidence can be given to remove the hidden defect.In Pradeep Kumar v/s Mahaveer Pershad and others 2002 AIR Andhara High court, facts were that the sale certificate which was the document of title for the defendants contained contradictory statement. Though the total area and the names of the judgment-debtors seemed to refer survey number 186, the survey number had been wrongly shown as 186. On behalf of the defendants it was urged that this was a misdescription and the real survey number was 185. Both the lower Courts held that the sale certificate **act**ually related to Survey No. 185 and that there was a misdescription of the plot by giving the wrong Survey No. 186. A learned single Judge of the High Court had taken a different view. While reversing the judgment of the learned single Judge and upholding the finding of both the lower Courts, a Division Bench of the Orissa High Court was of the view that it was a case of misdescription contained in the document itself. In the process, it was held that while construing the sale certificate extrinsic **evidence** would

be admissible by virtue of Section 95 read with Section 97 of the I**ndian Evidence Act**.