Forensic Audit and Indian Evidence Law

Lesson 13

KEY CONCEPTS

■ Evidence ■ Primary Evidence ■ Secondary Evidence ■ Opinion Evidence ■ Facts ■ Question of Fact ■ Question of Law ■ Relevant Facts ■ Adducing evidence

Learning Objectives

To understand:

- The classification of Evidence, i.e., Primary and Secondary
- What is Facts and its examples?
- What is Evidence under Bharatiya Sakshya Adhiniyam?
- Understand about finding facts as per Bharatiya Sakshya Adhiniyam.
- What is Question of Fact and Question of Law?
- The various types of Evidences.
- Understand the meaning of relevant Facts as per the Act along with examples
- Understand about admission of evidence
- What are the various methods to prove cases?

Lesson Outline

- Background to Forensic Audit and the Bharatiya Sakshya Adhiniyam, 2023
- Finding Facts
- Question of Facts
- Question of Law
- Types of Evidences
- Meaning of Relevant Fact
- Admission of Evidence
- Method to Prove Cases
- Proving a matter through evidences on the basis of sources
- Procedure to be performed while doing Forensic Audit
- Case Study
- Lesson Round-Up
- Test Yourself
- List of Further Readings

BACKGROUND TO FORENSIC AUDIT AND BHARATIYA SAKSHYA ADHINIYAM, 2023 (BSA)

We learnt in previous lessons that forensic audit is a specialised type of audit that involves the application of accounting, investigative, and legal skills to examine and evaluate financial information for use in legal proceedings. In India and across the world, forensic audits are becoming increasingly important in cases of financial fraud, corruption, bribery, embezzlement, Bankruptcy fraud and other white-collar crimes.

Forensic audit is the application of forensic techniques in financial analysis to investigate and establish evidence in a legal dispute or investigation. The forensic audit is done to gather evidence that can be used in a court of law to prove or disprove a legal claim.

The Indian Evidence Act,1872 is being replaced with the Bharatiya Sakshya Adhiniyam, 2023 and Adhiniyam is notified to be effective from July 1st, 2024.

The Bharatiya Sakshya Adhiniyam ('the BSA") is a legislation to consolidate and provide for general rules and principal of evidence for fair trial. Section 1 of the BSA omits this provision on territorial jurisdiction. It also omits the definition of "India" given in section 3 of the Evidence Act. This is to overcome admissibility related challenges pertaining to evidence generated outside India (especially digital evidence).

The BSA plays an important role in determining the admissibility and weight of evidence in cases involving forensic audits. By understanding the rules and principles of evidence law, forensic auditors can ensure that their findings are presented in a manner that is admissible and persuasive in court.

The BSA provides the framework for the admissibility and relevance of evidence in legal proceedings. Under the BSA, evidence can be classified as oral, documentary, or material, and must be relevant and admissible to be considered in a court of law.

The BSA defines different types of evidence, such as direct evidence, circumstantial evidence, and hearsay evidence. It also sets forth the rules for presenting evidence, such as the requirement that evidence must be relevant and admissible.

The BSA governs the admissibility, relevance of evidence and proof of documentary evidence, including the rules for proving handwriting, electronic records, and public documents in legal proceedings. It also covers the admissibility of expert evidence, documentary evidence, and electronic evidence. It sets out the requirements for the admissibility of each type of evidence and how it should be presented in court. It provides that 'evidence' includes any information given electronically, which would permit appearance of witnesses, accused, experts and victims through electronic means.

BSA provides for admissibility of an electronic or digital record as evidence having the same legal effect, validity and enforceability as any other document; BSA seeks to expand the scope of secondary evidence to include copies made from original by mechanical processes, copies made from or compared with the original, counterparts of documents as against the parties who did not execute them and oral accounts of the contents of a document given by some person who has himself seen it and giving matching hash value of original record will be admissible as proof of evidence in the form of secondary evidence. It seeks to put limits on the facts which are admissible and its certification as such in the courts.

Under the BSA, evidence can be classified into two types: Primary evidence and Secondary evidence.

Primary Evidence is evidence that directly proves a fact in issue, such as an Original document or a witness testimony. Primary evidence would include original financial and accounting records, as well as witness testimony from individuals involved in the financial transactions being audited. Primary evidence means the document itself produced for the inspection of the Court.

Secondary Evidence is evidence that is used to prove the contents of a document or statement, such as a certified copies, copies made from the original by mechanical processes and copies compared with such copies, copies made from or compared with the original, counterparts of documents as against the parties who did not execute them, oral admissions, written admissions, evidence of a person who has examined a document and who is skilled in the examination of such documents that are used to support the findings of the audit.

In addition to primary and secondary evidence, the BSA also recognises the concept of "opinion evidence," which refers to evidence given by an expert witness who is qualified to provide an opinion on a particular matter. In a forensic audit, an expert witness might be called upon to provide an opinion on the authenticity of financial records or to explain complex financial transactions to the court.

In the case of forensic audits, the reports generated by the forensic auditor can be considered as documentary evidence and can be admitted in court as evidence under certain conditions.

In the context of forensic audits, the BSA is relevant in determining what types of evidence can be used to support the findings of the audit. The BSA defines what constitutes evidence, how evidence should be presented, and what type of evidence is admissible in a court of law.

In addition to the BSA, the Institute of Chartered Accountants of India (ICAI) has issued Standards for doing forensic accounting and investigation (FAIS). These guidelines cover the principles and practices of forensic accounting and audit, the role of the forensic accountant or auditor, and the procedures for conducting a forensic audit.

The admissibility of forensic audit reports as evidence in Indian courts is determined by the BSA, which requires that the evidence be relevant, reliable, and authenticated. The forensic auditor must have a thorough understanding of the BSA and the rules of evidence to ensure that the various evidences gathered is admissible in court.

The BSA also defines the burden of proof in a case, which is the responsibility of the party bringing the case to prove their case. The burden of proof can shift from one party to the other during the course of a trial, depending on the evidence presented.

Overall, the Sakshya Adhiniyam plays a crucial role in ensuring that evidence presented in Indian courts is reliable, admissible, and relevant to the case at hand. It is an essential tool in the administration of justice in India.

In conclusion, forensic audits have become an essential tool in detecting and investigating financial fraud and white-collar crimes in India. However, the admissibility of forensic audit reports in court is subject to the rules of evidence under the BSA,2023..

Section 2(1)(d) of the BSA, while retaining the earlier definition of "document" under the Indian Evidence Act, adds "electronic and digital records" within its ambit.

BSA adds an illustration "electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents."

FINDING FACTS

Meaning of Fact

As per Oxford Learner's Dictionary- "a thing that is known to be true, especially when it can be proved."

As per Section 2(1)(f) of the Bharatiya Sakshya Adhiniyam, 2023, "Fact" means and includes

(1) anything, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Example

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

Fact sometimes refers to that which is **adduced** by a party at the trial as a means of establishing factual claims. ("Adducing evidence" is the legal term for presenting or producing evidence in court for the purpose of establishing proof.)

As per Section 2(1) (j) of the BSA, "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists".

As per Section 2(1)(c)"Disproved"- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved" - A fact is said not to be proved when it is neither proved nor disproved.

"To be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue".

"any two facts to which [relevance] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other".

Evidence under the BSA

As per Section 2 (e) of the BSA, "Evidence" means and includes:

1. all statements including statements given electronically which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
2. all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence.

Evidence can be anything presented to the five senses (sight, smell, hearing, taste and touch) including testimony, documents and material objects.

Evidence is divided into three main categories:

1. Oral evidence (the testimony given in court by witnesses),
2. Documentary evidence (documents produced for inspection by the court), and
3. "Real evidence".

Oral evidence and documentary evidences are self-explanatory and real evidence captures things other than documents such as a knife allegedly used in committing a crime, finger prints found at the crime scene etc.

The term "evidence" can refer to a proposition of fact that is established by evidence in the first sense. This is sometimes called an "evidential fact". That the accused was at or about the scene of the crime at the relevant time is evidence in the second sense of his possible involvement in the crime.

But the accused's presence must be proved by producing evidence in the first sense. For example, the prosecution may call a witness to appear before the court and get him to testify that he or she saw the accused in the vicinity of the crime at the relevant time. Success in proving the presence of the accused (the evidential fact) depends on the fact-finder's assessment of the veracity of the witness and the reliability of his or her testimony.

The fact-finder is the person or body responsible for ascertaining where the truth lies on disputed questions of fact and in whom the power to decide on the verdict vests. The fact-finder is also called "trier of fact" or "judge of fact".

Fact-finding is the task of the jury or, for certain types of cases and in countries without a jury system, the judge.) Sometimes the evidential fact is directly accessible to the fact-finder. If the alleged knife used in committing the crime in question (a form of "real evidence") is produced in court, the fact-finder can see for himself the shape and size of the knife; he does not need to learn of it through the testimony of an intermediary.

A third conception of evidence is an elaboration or extension of the second. On this conception, evidence is relational. A factual proposition (in Latin, factum probans) is evidence in the third sense only if it can serve as a premise for drawing an inference (directly or indirectly) to a matter that is material to the case (factum probandum).

The fact that the accused's fingerprints were found in a room where something was stolen is evidence in the present sense because one can infer from this that he was in the room, and his presence in the room is evidence of his possible involvement in the theft. On the other hand, the fact that the accused's favorite colour is blue would, in the absence of highly unusual circumstances, be rejected as evidence of his guilt: ordinarily, what a person's favorite colour cannot serve as a premise for any reasonable inference towards his or her commission of a crime and, as such, it is irrelevant.

Suppose if it emerges during cross-examination of the finger print expert that his testimony of having found a finger-print match was a lie. Lawyers would describe this situation as one where the "evidence" (the testimony of the expert) fails to prove the fact that it was originally produced to prove and not that no "evidence" was adduced on the matter.

Here "evidence" is used in the first sense—evidence as testimony—and the testimony remains in the court's record whether it is believed or not. But lawyers would also say that, in the circumstances, there is no "evidence" or proof that the accused was in the room, assuming that there was nothing apart from the discredited expert testimony of a fingerprint match to establish his presence there.

Here, the expert's testimony is shown to be false and fails to establish that the accused's fingerprints were found in the room, and there is no (other) factual basis for believing that he was in the room. The factual premise from which an inference is sought to be drawn towards the accused's guilt is not established.

Fourthly, the conditions for something to be received (or, in technical term "admitted") as evidence at the trial are sometimes included in the legal concept of evidence. On this conception, legal evidence is that which counts as evidence in law. Something may ordinarily be treated as evidence and yet be rejected by the court. Hearsay is often cited as an example. It is pointed out that reliance on hearsay is a commonplace in ordinary life. We frequently rely on hearsay in forming our factual beliefs.

In contrast, "hearsay is not evidence" in legal proceedings. As a general rule, the court will not rely on hearsay as a premise for an inference towards the truth of what is asserted. It will not allow a witness to testify in court that another person X (who is not brought before the court) said that on a certain occasion (an out-of-court statement).

In summary, at least four possible conceptions of legal evidence are in vogue:

i. As an object of sensory evidence,

ii. as a fact,

iii. as an inferential premise, and

iv. as that which counts as evidence in law.

The sense in which the term "evidence" is being used is rarely made explicit in legal discourse although the intended meaning will often be clear from the context.

QUESTION OF FACT

In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.

All questions of fact are capable of proof or disproof by reference to a certain standard of proof. Depending on the nature of the matter, the standard of proof may require that a fact be proven to be "more likely than not" (there is barely more evidence for the fact than against, as established by a multitude of the evidence) or true beyond reasonable doubt.

Answers to questions of fact are determined, by a trier of fact such as a jury, or a judge.

In many jurisdictions, appellate courts generally do not consider appeals based on errors of fact (errors in answering a question of fact). Rather, the findings of fact of the first venue are usually given great high opinion by appellate courts.

QUESTION OF LAW

A question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. Answers to questions of law are generally expressed in terms of broad legal principles and can be applied to many situations rather than be dependent on particular circumstances or factual situations.

An answer to a question of law as applied to the particular facts of a case is often referred to as a "conclusion of law." In several civil law jurisdictions, the highest courts consider questions of fact settled by the lower court and will only consider questions of law. They thus may refer a case back to a lower court to re-apply the law and answer any fact-based evaluations based on their answer on the application of the law.

International courts will only answer questions of law, asked by judges of national courts if they are not certain about the interpretation of the law of multilateral organizations. While questions of fact are resolved by a trier of fact, which in the common law system is often a jury, questions of law are always resolved by a judge or equivalent. Whereas findings of fact in a common law legal system are rarely overturned by an appellate court, conclusions of law are more readily reconsidered.

TYPES OF EVIDENCES

Direct Evidence: It proves a fact directly and includes testimony that tends to prove or disprove a fact. A video tape captured by CCTV in the factory showing James taking high value item by entering the warehouse and clandestinely carrying it out of the factory is a direct evidence and it is compelling.

Circumstantial Evidence: It tends to prove or disprove a fact in issue indirectly by inference. If we go to bed at night and at that time there is no wetness on the ground and the next morning there is wetness on the ground, this is circumstantial evidence that it rained last night. Many fraud cases are proved entirely by circumstantial evidence, or by a combination of circumstantial and direct evidence, but seldom by direct evidence alone.

MEANING OF RELEVANT FACTS

In India, which is a common law country, we follow adversarial system of law. Judges do not question the parties and merely rely on evidence put forth by them. From such evidences, judges infer actual circumstances and therefore come to truth and deliver justice.

Section 2(k) of the BSA "Relevant" - One fact is said to be relevant to another when it is connected with the other in any of the ways referred to in the provisions of this Adhiniyam relating to the relevancy of facts.

Section 2 (g) of the BSA,

The expression "facts in issue" means and includes —— any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Whenever, under the provisions of the law for the time being in force relating to Civil Procedure any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Example:

A is accused of the stealing inventory of B Limited.

At this trial the following facts may be in issue:- That A stole B Limited's inventory;

That A intended to steal B Limited's inventory.

As per Section 3 of the BSA, Evidence may be given of facts in issue and relevant facts. Evidence may be given in any suit or proceeding of the existence of non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

As per Section 4 of the BSA, Closely connected facts.

Facts which, though not in issue, are so connected with a fact in issue or a relevant fact as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Example:

The question was, whether A stole inventory from B Ltd. The facts that, shortly after stealing, A went out of the factory with inventory in his possession, and that was captured in CCTV are relevant.

As per Section 6 of the BSA, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1

The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2

When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Example:

A sues B upon a Bond for the payment of money, B denies the making of the Bond. The fact that, at the time when the Bond was alleged to be made, B required money for a particular purpose, is relevant.

As per Section 7 of the BSA: Facts necessary to explain or introduce relevant facts.

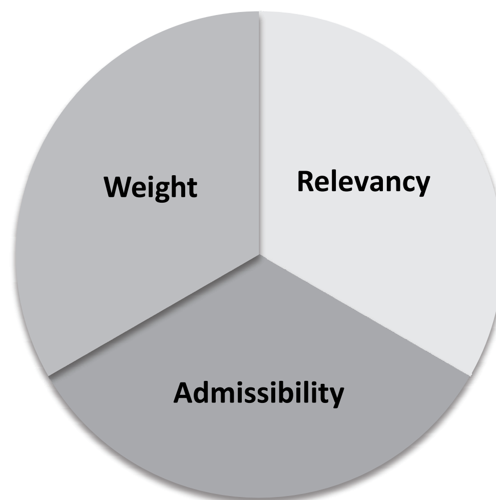
A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's Wife. B says as he delivers it– "A says you are to hide this."

B's statement is relevant as explanatory of a fact which is part of the transaction.

Whether a particular piece of evidence is relevant or not depends on what the evidence is offered to prove. An item of evidence might be relevant and admissible if offered to prove one thing, but not relevant and inadmissible if offered to prove something else.

Evidence would be admissible if offered to prove motive, intent, identity, absence of mistake, or modus operandi, if such factors are at issue.

For an evidence to have any value in the eyes of court of law and be relied upon on reaching the decision these few rules have to be kept in mind:



1. Relevancy;
2. Admissibility; and
3. Weight.

Relevancy

There are two important ingredients:

1. **Material connection (or relation to fact in issue or another fact.):** It means that the fact in issue and the fact to be produced must have some sort of connection or they should be related to each other. Something cannot exist without any reason. The state of one thing affects the formulation of another and thus the material connection defines that relation, effect, cause or reasoning.

2. **Probative value:** Probative means 'capacity to prove something'. A relevant fact must 'prove' or 'render probable' the existence or non- existence of fact in issue or other fact. It implies that either something is proved beyond doubt or the probability that something exists has grown higher by producing the evidence.

CASE STUDY

Who is the culprit?

A, B and C are very good friends who trust each other a lot and often visit each other. C is kleptomaniac. He comes to visit A at his home along with B. All the three had dinner together. All of them discussed about cricket match going on. After B and C left, A suddenly finds that his i-Phone is missing. Now the question comes who has stolen it? The discussion about cricket match is not anyway related to the fact of missing mobile phone. The visit of both B and C is material. But it does not prove or make probable anything as they often visit A.

Also, the fact that C is kleptomaniac and possesses special interest in stealing high value mobile phone is material to show that he might have interest. It also makes it more probable that he has stolen and not B. Thus the fact of C being kleptomaniac is material and makes his guilt more probable.

Tests to determine Relevancy

Often it becomes difficult to draw a line between relevant and irrelevant material. In such circumstances it becomes necessary to lay down test of relevancy. The test can be considered by also having a look at two types of relevancy.

Logical Relevancy:

The reliance is to be proved on common stock of knowledge about the world that is logic, common sense and general experience. Thus when we derive relevancy on the basis of logic it can be said logical relevancy. There are many ways to derive relevancy on the basis of logic. For example syllogism. A syllogism is a type of logical reasoning where the conclusion is gotten from two linked premises.

- An apple is a fruit. All fruit is good. Therefore apples are good.
- All Thieves are Criminals; A is a Thief; Therefore, A is a Criminal.

But, Logical relevance is not necessarily be admissible in the court of law. If the legislature lays down guidelines to test relevancy then such guidelines will prevail over logical reasoning.

Legal Relevancy:

By legal relevancy it means that a fact should be relevant under the rules laid down by law. In India Section 5 of the Act, provides that only those evidences can be given which are relevant under the Act. (Section 6 to 55). Hence, these provisions lay down what are the relevant facts to be considered while recording evidences. Any fact howsoever material not falling under the provisions will not be considered as evidence and hence not admissible. Thus, the actual test to determine relevancy becomes whether the fact is relevant under the provisions of the statute or not.

Admissibility and Weight of an Evidence

The court after deciding whether the fact is relevant or not decides upon the matter of admissibility. By admissibility it means capability to be accepted. A fact may be highly relevant but to the disappointment of lawyer court may refuse to admit the evidence because it is non-admissible for several reasons. Thus if an evidence is legally relevant and does not prejudice the trial then only it will be admissible in the court of law.

Whether evidence outweighs costs of admission depends on the discretion of the court. Thus if admission has an adverse effect on the course of fair proceeding the court will not admit it.

That is, if admission of an evidence misleads a jury or causes undue delay in the proceedings or proves an already established fact then such an evidence will be rejected. Normally a trial judge would first determine the logical relevance of evidence and then weighs its potential probative value against the possible costs of admissions.

The above mentioned rules were to be decided by the jury or the trial judge. They used to have large discretion for admitting evidence on record. However, in India the Evidence Act, 1872 lays down in detail all the tests of relevancy and admissibility of the facts to determine a fact in issue and pronounce the judgment. The Act has incorporated in itself all these rules thereby narrowing down the scope for discretion of judges.

ADMISSION OF EVIDENCE

Every case, whether civil or criminal, that comes before a court of law has a fact story behind it. Facts out of which cases arise keep happening in the ordinary course of life.

To illustrate, imagine that there is a crowded road and it is Monday morning, people are moving, and vehicles are moving. Everyone is running at unmitigated speed, suddenly two vehicles collide against each other. The nature and cause of the accident would be in question. The facts which led up to the climax will have to be reconstructed before the court, so that the judge in the court is able to consider what really happened. Only then he will be able to apply the appropriate law to the fact to arrive at a solution about the right and liabilities of the parties.

The practical reality is that the truth of a case is worthless unless they can be proved to the satisfaction of the judge and allows him to act on them. The means by which facts are proved are governed by the law of evidence.

The function of the law of evidence is laid down rules according to which the facts of case can be proved or disproved before a court of law. The means which can be used to prove a fact are all controlled by the rules and principles lay down by the law of evidence. The law of evidence does not affect substantive right of parties but only lays down the law for facilitating the rules of evidence for the purposes of the guidance of the court.

It is procedural law which provides how a fact is to be proved. The evidence means, any things by which any alleged matter of facts is either established or disproved. Evidence is of many kinds and one of the important ones is 'Admission'.

Admission

Admission is a statement, oral or documentary or contained in electronic form which suggests any inferences as to any fact in issue or relevant fact which is made by any of the persons. It is a voluntary acknowledgment of a fact. Importance is given to those admissions that go against the interests of the person making the admission. This concept is governed by the rules and regulations mentioned under Bharatiya Sakshya Adhiniyam, 2023, Section 15-21.

For example, when A says to B that he stole money from C, A makes an admission of the fact that A stole money from C. This fact is detrimental to the interests of A. The concept behind this is that nobody would accept or acknowledge a fact that goes against their interest unless it is indeed true.

Unless A indeed stole money from C, it is not normal for A to say that he stole money from C. Therefore, an admission becomes an important piece of evidence against a person.

On the other hand, anybody can make assertions in favor of themselves. They can be true or false. For example, A can keep on saying that a certain house belongs to himself, but that does not mean it is necessarily true. Therefore, such assertions do not have much evidentiary value.

An admission is any statement made by a party to a lawsuit (either before a court action or during it) which tends to support the position of the other side or diminish his own position. For example, if a husband sues his wife for divorce on the grounds of adultery, and she states out of court that she has had affairs, her statement is an admission.

Any admission made by a party is admissible evidence in a court proceeding, even though it is technically considered hearsay (which is normally inadmissible). Attorneys tell their clients not to talk to anyone about their case or about the events leading up to it in order to prevent their clients from making admissions.

An admission is the testimony which the party admitting bears to the truth of a fact against himself. It is a voluntary act, which he acknowledges as true the fact in dispute. An admission and consent is, in fact, one and the same thing, unless indeed for more exactness we say, that consent is given to a present fact or agreement, and admission has reference to an agreement or a fact anterior for properly speaking, it is not the admission which forms a contract, obligation or engagement, against the party admitting. The admission is, by its nature, only the proof of a pre-existing obligation, resulting from the agreement or the fact, the truth of which is acknowledged.

Section 15 – "An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned."

An admission is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true.

Admissions are admitted because the conduct of a party to a proceeding, in respect to the matter in dispute, whether by acts, speech or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue. Admissions are very weak kind of evidence and the Court may reject them if it is satisfied from other circumstances that they are untrue. Ref: *Latafat Husain v. Lala Onkar Mal (1934) 10 Luck 371.*

The Supreme Court has observed: Admissions as defined in Sections 17 and 20 of the Indian Evidence Act **(now refer Section 15 and Section 18 of BSA)** and fulfilling the requirements of Section 21 of the Indian Evidence Act **(now refer Section 19 of BSA)** are substantive evidence. An admission is the best evidence against the party making it and, though not conclusive, shifts the onus to the maker on the principle that what a party himself admits to be true may be reasonable presumed to be true so that until the presumption is rebutted the fact admitted must be taken to be true. Ref: *Thiru John v. Returning Officer, AIR 1977 SC 1724*.

Admissions made in several documents ante litem motam--Burden of proof shifts on the maker to show that they are erroneous. From the evidence on record it stood clearly established that on the date of the scrutiny of nominations Sri John was less than 30 years of age and in view of Article. 84(b) of the Constitution he was not competent to contest the election for the Rajya Sabha.

An assessee cannot resile from his admission made in tax return even at appellate stage. Ref: *Federal Bank Ltd. v. State, AIR 1995 Ker 62*.

Subject to certain exceptions, the general rule, both in civil and criminal cases, is that any relevant statement made by a party is evidence against himself. The weight of the declaration is, of course, a totally different matter; this may vary with the circumstances and will not doubt, be greater if against interest at the time, than the contrary"

An admission is defined in Section 15, BSA, as a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances mentioned in the three succeeding sections.

The section does not, therefore, contain a complete definition of the word “admission”, in as much as it does not define the persons whose statements amount to admissions, nor the circumstances under which a statement must be made so that it may amount to an admission.

This part of the definition of an admission is left to Section 16, Section 17 and Section 18 of the BSA. Therefore, the question whether a statement amounts to an admission or not depends upon whether it was made by any of the persons, and in any of the circumstances, described in sections 16-18, and whether it suggests an inference as to a fact in issue or a relevant fact in the case.

The fact that the statement suggests an inference in favor of the person who made the statement does not make the statement any the less an admission, as the question whether a statement is or is not an admission different from the question whether an admission may or may not be proved in favor of the person making it.

A statement may be an “admission” in the sense in which this word is used in this set of sections, it must be an oral or documentary statement. A statement may be made otherwise than by word of mouth or writing but such a statement can hardly be described as an oral or documentary statement. Ref: *Brij Nandan v. Emperor., 133 IC 154: 1931 A 9: 32 Cr LJ 1006*.

Admissions by conduct are not governed by this set of sections, as inferences suggested by active or passive conduct are not oral or documentary statements. The proper section under which the relevancy of admissions by conduct must be established is the Section 6 of the BSA, as a statement made by conduct will be admissible or inadmissible according to whether it falls or does not fall within the terms of that section.

An admission must be used either as a whole or not at all. Ref: *Hanumant Govind Nargundkar v. State of Madhya Pradesh, 1952 SCR 1091*.

When a statement which is sought to be given in evidence forms part of a longer statement, evidence shall be given of so much of the statement as is necessary to the full understanding of the nature and effect of the statement. Section 39 of Indian Evidence Act, 1872. (**Now refer to Section 33 of BSA**)

Before any statement can be used as an admission, it must be shown to be unambiguous and clear on the point at issue. Ref: *Paresh Nath v. Ghasi Ram, AIR 1960 Pat 407.*

If an admission is capable of two interpretations, an interpretation unfavorable to the person making it should not be put on his admission. The requirement is that an admission must be clear, precise, not vague or ambigious. Ref: *C. Koteshwara Rao v. C. Subbarao, AIR 1971 SC 1542.*

When an admission is intended to be relied upon, the admission must be regularly proved. Ref: *Moni Lal Kar Chowdhry v. Uma Charan Chakravarty, 25 IC 571: 19 Cr LJ 541.*

An admission may be proved in any of the ways in which a statement is permitted to be proved. The person who made the admission may be called and questioned as to his having made the alleged admission, or any person in whose presence the statement was made may be called and examined.

If the admission is contained in a document, the document must be proved in any of the ways in which a document is provable.

An admission contained in a plaint must be proved in one of the ways in which a statement contained in a document may be proved; and since a plaint is not a public document a certified copy of it is not the proper proof of an admission contained in it. Ref: *Ahmad Khan v. Hurmuzi Khanam, 61 IC 117*

Section 16 postulates that statements made by a party to the proceeding or by an agent to any such party, whom the Court regards, under the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions.

Equally: statement made by a person who has any proprietary or pecuniary interest in the subject matter of the proceedings or by persons having derivative interest during the continuance of the interest also is admissions. Ref: *Shrichand Gupta v. Gulzar Singh, AIR 1992 SC 123*

Where a party sues or is sued in a representative capacity, e.g. as trustee, executor, administrator or the like, his representative capacity is distinct from his ordinary capacity, and only admissions made in the former capacity are receivable whereas statements made before he acquired the representative character are inadmissible. Ref: *Sena Yasim Sahib v. Kadur Ekambara Iyer, 54 IC 497*

Thus, an admission by the trustee of a bankrupt, made before he acquired the character of a trustee, is not receivable against him when he is sued as a trustee. Ref: *Fenwick v. Thornton, (1827) M&M 51*

Conversely, an admission by a person in his representative capacity is not receivable against him as a party in his personal capacity.

***Section 17* – Admissions by persons whose position must be proved as against party to suit.**

Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them and if they are made whilst the person making them occupies such position or is subject of such liability.

The admissions of a bankrupt before the act of bankruptcy are receivable in proof of the petitioning creditors' debts. A statement made by a servant is admissible in evidence against his master under section 17, both for the purpose of deciding whether he is a servant and also as regards his liability as such servant. "Occupying the position" of a servant does not involve, as an essential ingredient, acting in the course of his employment. Ref: *M.E. Moses v. Shaik Bakridhone Chowdhury, 39 CWN 736*

Section 18 - Admission by persons expressly referred to by party to suit - Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

This section forms another exception to the rule that admissions by strangers to a suit are not relevant. Under it, the admissions of a third person are also receivable in evidence against, and have frequently been held to be in fact binding upon, the party who has expressly referred another to him for information in regard to an uncertain or disputed matter.

Section 19 - Admissions are relevant and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases: –

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons.

(2) An admission may by proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by on behalf of the person making it, if it is relevant otherwise than as an admission.

As a general rule, a man shall not be allowed to make, evidence for himself. But on the other hand, universal experience testifies that, as men consult their own interest and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears. Refer Section 19 of the BSA.

The question between A and B is whether a certain deed is or is not forged. A affirms that deed is genuine, B states that it is forged. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

Section 20 - Oral admissions as to contents of a document are not relevant unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document or unless the genuineness of a document is in question.

As to the validity of a gift deed, one of the donors stated that he was a minor at the time of its execution. But in the gift deed itself he admitted his age to be 22. This admission was contained in the registered deed. This was held to be binding on him unless he could show any vitiating circumstance like fraud, coercion etc. Ref: *Patel Prabhudas Hargovandas v. Heirs of Patel Babubhai Kachrabhai, AIR 2007 Guj 148.*

Section 21 - In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Section 21 of the Act is applicable to civil as well as to criminal cases. It consists of two distinct parts. Under the first part, an admission is not admissible in evidence, if it is made on the express condition that it is not to be given in evidence. If the admission is not made upon such condition, but the Court can infer that the person making the admission and the party to whom the admission was made had agreed that the admission would not be given in evidence, the admission thus made will be inadmissible under the second part of the section.

Where an admission is made upon a condition that it is not to be given in evidence, it is usual, though not necessary, to describe it as “without prejudice”. Thus, where the plaintiff, to save limitation, relied upon a post card written by the defendant «without prejudice,” in which he promised to pay Rs.XXX and acknowledged his liability to pay any sum that may be due, the post card was held to be inadmissible in evidence under this section. Ref: *Madhavrav Ganeshpant Oze v. Gulabbhai Lallubhai, 23 B 177*

An offer, made by the Government “without prejudice” to pay a certain amount for acquisition of land under the Land Acquisition Act is not admissible in evidence. Ref: *Ranzor Singh v. Secretary of State, 92 IC 319: 1926 L 509*

It has been held in an Oudh case that a letter written “without prejudice” is not admissible in evidence as it merely shows a desire on the part of the writer to have the privilege, and not an agreement on the part of the other party to respect the privilege. Ref: *Lucknow Improvement Trust v. Jaitly & Co., 5 Luck 465*

But, it is submitted that such letter would be inadmissible under the first part of the section, as it amounts to an admission upon an express condition that it is not to be given in evidence.

An admission contained in a draft of a compromise deed filed in Court must be excluded where the document provides that the parties to it would be free to repudiate any condition of the proposed compromise by which, in their opinion, their rights were prejudicially affected. Ref: *Surendra Prasad Lahiri v. Gobinda Das, 48 CWN 15.*

METHODS TO PROVE CASES

As per Section 2 (e) of the BSA, "Evidence". – "Evidence" means and includes –

1. All statements or any information given electronically which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements or information are called oral evidence;
2. All documents including electronic or digital records produced for the inspection of the Court; such documents are called documentary evidence.

Evidence can be anything presented to the five senses (sight, smell, hearing, taste and touch) including testimony, documents and material objects.

Evidence is basically of two types- Oral Evidence and Documentary Evidence. These have been explained in detail below:

Oral Evidence

As per Section 2 (e) of the BSA, it means statements or any information given electronically which the Court permits or requires to be made before it by witnesses in relation to matter of fact under inquiry.

As an Evidence, Oral evidence is as much less satisfactory medium of proof than documentary evidence. But however fallible such evidence may be and however carefully it may have to be watched, justice can never be administered in the most important cases without recourse to it.

Oral evidence is generally is not subject to rule of presumption and is judged with reference to the conduct of the parties. It means - false in one particular, false in all.

This principle has no application in India. Even if major portion of evidence is found to be deficient, still residue is sufficient to prove guilt of an accused, notwithstanding acquitted of number of other co-accused persons. In *Gangadhar Behera vs. State of Orissa*. It has been held that the maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. This maxim is merely a rule of caution.

In *Sucha Singh v. State of Punjab*, it has been held this maxim has no application in India. The Supreme Court has even observed that "the principle of Falsus in uno falsus in omnibus does not apply to criminal trials and it is the duty of the court to separate, the grain from the chaff instead of rejecting the prosecution case on general grounds. Ref: *Bhe Ram v. State of Haryana, AIR (1980) 1 SCC 201*

Appreciation of Oral Evidence Oral evidence should be approached with caution. Following are among the most important points to be ascertained in deciding on the credibility of witnesses:

a) Whether they have the means of gaining correct information;

b) Whether they have any interest in concealing truth; and

c) Whether they agree in their testimony.

The credibility of a witness is primarily to be decided by referring to his evidence and finding out as to how the witness was found in the cross-examination and what impression is created by his evidence taken in context of the other facts of the case.

In *State of Bihar v. Radha Krishna Singh, AIR 1983 SC 684* the Supreme Court observed: "in considering the oral evidence regarding a pedigree a purely mathematical approach cannot be made because where a long line of descent has to be proved spreading over a century.

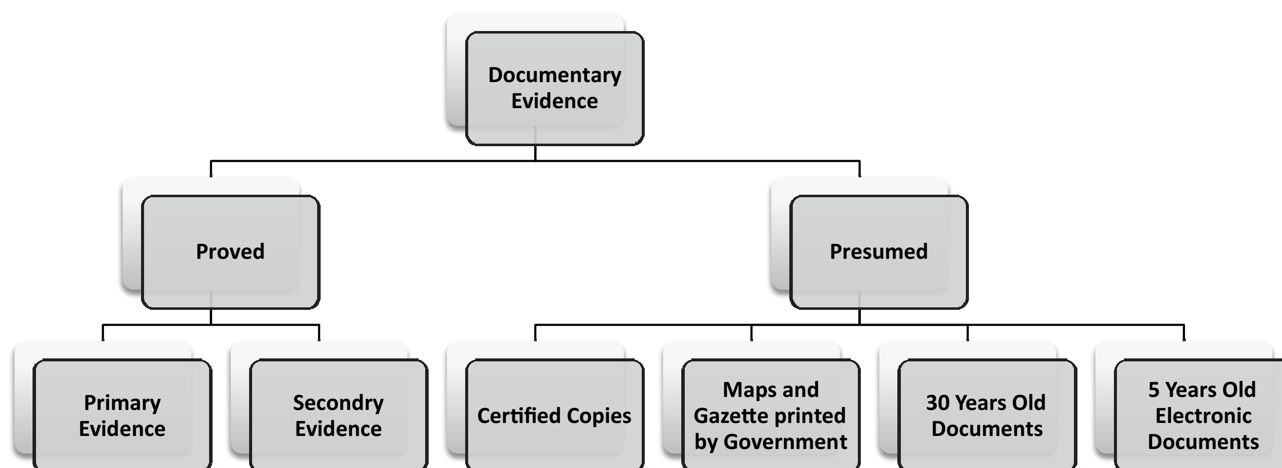
Section 55 of BSA requires that the oral evidence must, in all cases whatsoever, be direct. Where the testimony of the witness is entirely hearsay and on some matters hearsay of hearsay, it cannot be admitted in

evidence. 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. Ref: *Kirtan Prasad v. State of Madhya Pradesh, 2005 Cr LJ 69 MP.*

Rejection of Hearsay Evidence

The reasons that hearsay evidence is treated as untrustworthy are that the original declare ant of the statement which is offered in a second hand manner is not put on oath, nor is he subject to cross-examination, and the accused, against whom, such evidence is offered, loses his opportunity of examining into the means of knowledge of the original maker of the statement, the truth of the original statement is diminished in course of repetition of that statement, that admissibility of hearsay evidence would open up opportunities of weaker for stronger proof regarding proof of a fact in issue or a relevant fact. Ref: *Herbetus Oram v. State, (1971) 37 CLT 477.*

Documentary Evidence



Meaning under Section 2 (e)(ii) of the Evidence Act, all documents including electronic or digital records produced for the inspection of the Court together constitutes to be documentary evidence.

The word 'Document' is again defined under Section 2 (c) as- 'any matter expressed or described or otherwise recorded upon any substance by means of letter, figures or makes, or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records .'

1. Proof of document by primary or secondary evidence
2. Public and Private Documents
3. Presumptions of the various documents.

Proof by Primary and Secondary Evidence

The content of the document will be taken as evidence only when it is proved by some primary or secondary evidence. Section 56 read with section 59 and 60.

Primary evidence means documents presented in the Court itself for examination.

Explanation 2 of Section 57 states that- 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 executing party.

Explanation 3 of Section 57 states that- Printed, lithographic, photographic and other reproductions made by one uniform process are primary evidence of each other, but where they are all copies of a common original, they are not primary evidence of the contents of original.

Explanation 4 of Section 57 states that - Where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence.

Explanation 5 of Section 57 states that—Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed.

Explanation 6 of Section 57 states that —Where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence. Explanation 7 of Section 57 states that - Where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence.

For instance, if it is desired to prove the publication of a libel in a newspaper, any copy of the issue in which libel appeared would be primary evidence of the publication in all the other copies of that issue. But if it were necessary to prove the original libel from which the article was set up, the printed paper would not be primary, but only secondary, evidence of the manuscript and admissible only under the conditions, which render the reception of secondary evidence admissible. Ref: *Prithi Chand v. State of Himachal Pradesh, AIR 1989 SC 702*

In the latter case there is no more guarantee of a printed copy being a true copy than of a written copy.

Section 59 of the BSA makes it a rule to prove any document through primary evidence, unless they specifically fall under the category of documents to be proved by Secondary under Section 60.

Secondary Evidence

Section 58 of the BSA defines the kinds of secondary evidence permitted by the Act; whereas section 60 defines the circumstances under which secondary evidence of the kind mentioned in Section 58 becomes admissible. Section 58 mentions eight kinds of secondary evidences. It includes:

(1) Certified copies given under the provisions hereinafter contained;

(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.

(6) oral admissions;

(7) written admissions;

(8) Evidence of a person who has examined a document, the original of which consists of numerous accounts or other documents which cannot conveniently be examined in Court, and who is skilled in the examination of such documents.

The copy to be given in evidence must be proved to be a correct copy by the evidence of someone who can swear to its being a true copy. It is not necessary that the scribe of the copy should be produced. What is required to be proved is that the document produced is a true copy of the original. Copies of original documents would not be admissible in evidence when the originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence. Ref: *Baidya Nath Dutt v. Kaminikant Gupta, 6 Cr LJ 572.*

Further, the Court in *Doerd Gilbert v. Ross*,held that if a party cannot produce original document, then an oral evidence of it can be given provided they are have some secondary evidence with them to prove the oral content.

Section 60 lays down the conditions, wherein specifically secondary evidences have to be given. It includes:

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 Adhiniyam, or by any other law in force in India to be given in evidence;

g) When the original 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.

h) when the genuineness of the document itself is in question.

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.

Under Section 65 of the BSA, where a document is written by one person and signed by another, the handwriting of the former and the signature of the latter have both to be proved in view of the section. Thus, the basic idea is that the document must be proved before it is admitted in the Court. This has been upheld by the Court in *Abdool Ali v. Abdoor Rushman.*

Section 67 of the BSA, further provides that if a document is required by law to be attested then it cannot be accepted as evidence unless attested. However, it would not be necessary to call the attesting witness as evidence in the Court.

However, Section 69 and 70 of the BSA says that if the attesting witness fails to recall of the attestation of such documents by him then the documents may be proved by other means. A record of the proceedings of a Court of Justice of any country beyond India will be presumed to be genuine and accurate, if it is certified in the manner laid down in this section 88.

Private and Public Documents

Public Documents have been explained under Section 74 (1) of the BSA. It includes records of the Sovereign Authority, official bodies, tribunals,public officers legislative, judicial and executive of India or of a foreign country;. Apart from these, all other documents constitute private documents under Section 74 (2).Public records kept in any State or Union territory of private documents as per Section 74(1)(b).

Such public documents may be produced as a proof of such documents by producing the certified copy, which has been certified by the public officer in control of such document, certifying them to be a true copy of the document.

Presumption of Documents

In general terms, presumption is an inference drawn from the contents of the document. Such presumption holds good unless they have been disproved by the other parties. The various kinds of presumptions have been explained under Section 4 of the Act.

Section 78 to 93 of the BSA deals with the various types of presumption in evidences.

Section 78 of the BSA says that the Court shall presume all certified copy to be evidence admissible in Court provided they have been certified in the manner prescribed by law.

Section 79 of the BSA further provides that where any document is produced by the Evidence as part of his evidence, then such document, when accepted by the Court will qualify to be a part of the evidence so produced by the evidence and it shall be presumed that such evidence is genuine and the evidence in support of which it is presumed is also accepted in the Court.

Any maps, books or gazette printed and compiled by the Government are also presumed to be true under Section 80, 81 and 82 of BSA. Section 84 of BSA presumes that every power-of-attorney made before a notary is also true.

Under Section 85 of BSA, the Court shall presume that every electronic record purporting to be an agreement containing the electronic signature of the parties was so concluded by affixing the electronic signature of the parties. Any certified copy of foreign judicial record is also presumed to be a valid document under Section 88.

If any telegraphic message is sent, then the Court shall make no presumption with regards to the person who has been given the message merely for the purpose of transmission.

The position is the same in case of electronic message under Section 90. Here, the Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.

Section 92 of the BSA deals with the resumption of documents which are 30 years old. It says that Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Example : A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody shall be proper.

Section 93 of the BSA - Any electronic message which is 5 years old. It says that any such message is assumed to have been electronically signed by person or by someone authorized by him.

PROVING A MATTER THROUGH EVIDENCES ON THE BASIS OF SOURCES

Direct Evidence

Evidence is either direct or indirect. Direct Evidence is that evidence which is very important for the decision of the matter in issue. The main fact when it is presented by witnesses, things and witnesses is direct, evidence whereby main facts may be proved or established that is the evidence of person who had actually seen the crime being committed and has described the offence.

We need hardly point out that the evidence of the witness in Court is direct evidence as opposed to testimony to a fact suggesting guilt. The statement before the police only is called circumstantial evidence of, complicity and not direct evidence in the strict sense. It directly related to the real point in issue.

For example, testimony of an eye witness will be treated as a direct evidence. In another example if one person is alleging that another person has breached the terms of the agreement and hence he is liable to pay compensation to the first person in such category the original document of the agreement will constitute a direct evidence.

Direct evidence is considered to be superior to circumstantial evidence because it creates a direct nexus between the evidence and fact in question.

Circumstantial Evidence

There is no difference between circumstantial evidence and indirect evidence. Circumstantial Evidence attempts to prove the facts in issue by providing other facts and affords an instance as to its existence. It is that which relates to a series of other facts than the fact in issue but by experience have been found so associated with the fact in issue in relation of cause and effect that it leads to a satisfactory conclusion.

According to Justice Fetcher Monten the acceptance of evidence and there appreciation thereof is not a rigid mathematical formulae and hence the circumstantial evidence qualifies a significant role in any matter before the court to make it possible that the court should reach to truth, reality and actual happenings of the things.

According to Justice Stetson, circumstantial evidence is like a light in the dark which slowly touches all corners of a matter and bring the reality in front of the adjudicator. He further observes that circumstantial evidence has to be appreciated with utmost caution because if light is strong enough to remove all darkness then it will uplift the justice in the matter but if the light is weak and removes darkness from some part of the matter it may result into grave injustice to both the parties.

In modern times, circumstantial evidence are given importance. It is seen as an evidence which relates to the series of the facts other than the fact in issue. Circumstantial evidence assumes importance in both categories when either direct evidence is lacking or the direct evidence is not conclusive of the fact in issue.

In *Hanumant v. State of Madhya Pradesh*, The Hon'ble Supreme Court Observed, "In dealing with circumstantial evidence there is always the danger that suspicion may take the place of legal proof. It is important to remember that in cases where the evidence is of a circumstantial nature the circumstances from which the conclusion of guilt is to be drawn should in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused.

In other words there can be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

In *State of U.P. v. Ravindra Prakash Mittal* Supreme Court had taken a stron stand while redefining and reframing the evidentiary value of circumstantial evidence. Court said that circumstantial evidence. Court said that circumstantial evidence will be treated as a good piece of evidence if it qualifies the following tests:

a) The circumstances from which guilt is established must create a series of circumstances and must be fully proved.

b) The circumstances must be of conclusive nature and tendency.

c) Circumstantial evidence must not need any reasonable doubt regarding existence of fact.

d) It should create the hypothesis of guilt in such a way which includes all possibilities that only accused

has committed the crime and it should exclude all possibilities that any person other than the accused has committed the crime.

Other kinds of Evidence

1. Real Evidence

Real Evidence means real or material evidence. Real evidence of a fact is brought to the knowledge of the court by inspection of a physical object and not by information derived from a witness or a document. Personal evidence is that which is afforded by human agents, either in way of disclosure or by voluntary sign. It indicates the object in proving or disproving the facts for which it is given in the court of law.

For example, contempt of court, conduct of the witness, behaviour of the parties, the local inspection by the court. It can also be called as the most satisfactory witness.

2. Expert Evidence

Section 39, 40 and 41 of BSA deals with expert evidence. It constitutes significant evidence in the court of law because it qualifies the test of reliability in the court of law. The expert evidence is considered to be reliable because an expert is having a much better knowledge in the specific area in comparison to other people outside that area.

For example, a legal professional will be a reliable source on the constitutionality of any provision in comparison to an engineer about the constitutional validity or invalidity of evidence in the court of law.

There are certain principles which make expert evidence admissible evidence in the court of law:

a) The expert must be qualified in that discipline.

b) The expert must be within the recognised field of his expertise.

c) The evidence of the expert should be supported by his reliable and logical contentions. d) The expert should have acquired an expertise in these matters by his continuous work and continuous practice in the particular field.

d) He has been duly channelized under the scheme of examination in the court of law.

3. Hearsay Evidence

Hearsay Evidence is very weak evidence. It is only the reported evidence of a witness which he has not seen either heard. Sometime it implies the saying of something which a person has heard others say.

In *Lim Yam Yong v. Lam Choon & Co.* The Hon'ble Bombay High Court adjudged "Hearsay Evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his council fails to take objection when the evidence is tendered."

Hearsay Evidence is that evidence which the witness has neither personally seen nor heard, nor has he perceived through his senses and has come to know about it through some third person. There is no bar to receive hearsay evidence provided it has reasonable nexus and credibility.

When a piece of evidence is such that there is no prima facie assurance of its credibility, it would be most dangerous to act upon it. Hearsay evidence being evidence of that type has therefore, to be excluded whether or not the case in which its use comes in for question is governed by the Evidence Act.

4. Primary Evidence

Section 57 of BSA says Primary Evidence is the top-Most class of evidences. It is that proof which in any possible condition gives the vital hint in a disputed fact and establishes through documentary evidence on the production of an original document for inspection by the court. It means the document itself produced for the inspection of the court. In Lucas v. Williams Privy Council held "Primary Evidence is evidence which the law requires to be given first and secondary evidence is the evidence which may be given in the absence of that better evidence when a proper explanation of its absence has been given."

5. Secondary Evidence

Section 58 of BSA defines Secondary Evidence. It is evidence that occupies a secondary position. It is such evidence that on the presentation of which it is felt that superior evidence yet remains to be produced. It is the evidence which is produced in the absence of the primary evidence therefore it is known as secondary evidence.

If in place of primary evidence secondary evidence is admitted without any objection at the proper time then the parties are precluded from raising the question that the document has not been proved by primary evidence but by secondary evidence.

But where there is no secondary evidence as contemplated by Section 64 of the BSA, then the document cannot be said to have been proved either by primary evidence or by secondary evidence."

6. Positive and Negative Evidence

Evidence was categorized as positive and negative in the case of *Rahim Khan vs. Khurshid Ahmad.*

Positive evidence is any evidence which claims the existence of a fact. A negative evidence is an evidence that claims non-existence of a fact.

The distinction lies on the fact that they guide the court towards the approach they have to take. Evidence includes everything that is used to determine or demonstrate the 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. In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lays.

Admissible evidence is that which a court receives and considers for the purposes of deciding a particular case.

There are two primary burden-of-proof considerations exist in law.

The first is on whom the burden rests. In many, Western countries, the burden of proof is placed on the prosecution.

The second consideration is the degree of certainty proof must reach, depending on both the quantity and quality of evidence. These degrees are different for criminal and civil cases.

Criminal cases require evidence beyond reasonable, the civil cases considers only which side has the preponderance (multitude)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.

PROCEDURE TO BE PERFORMED WHILE DOING FORENSIC AUDIT

Plan the Investigation

When the forensic auditor is appointed by any client (including statutory authorities) the auditor needs to understand the scope and focus first before starting the assignment.

Collect the Evidence

The forensic auditor is required to understand and identify the possible type of fraud that has been carried out in the organisation and how the fraud has been perpetrated. The evidence collection should be reliable and adequate to prove the charges and identify the fraudsters in court of law. Forensic auditor should reveal the details of fraud scheme with the help of evidence collected during the course of assignment. Forensic auditor should document the evidence to prove the amount of loss sustained, the parties directly and indirectly affected by the fraud.

Interviewing the suspects

Forensic auditor should interview only if the client gives mandate in the engagement letter. The basic difference between interview and interrogation is: interview is typically a less formal and the main objective is to elicit information; interrogation is formal and designed to get a suspect to confess.

Reporting

A report is required so that it can be presented to a client about the fraud identified. The report should include the brief scope of the work, findings of the investigation, a summary off the evidence, an explanation of how the fraud was perpetrated, who are the perpetrators and how long this has been going on and suggestions on how internal controls can be improved to prevent frauds in the future.

CASE STUDY-1

PQR Ltd is a multinational company with its headquarters in India. The company has been under scrutiny for its financial dealings with its subsidiary in a tax haven. Income Tax Department wants your firm to conduct a forensic audit to investigate whether PQR Ltd had siphoned off funds to its offshore entity to evade taxes. Elaborate the various steps that will be taken by your firm based on the concepts discussed in the above lesson.

Solution:

Siphoning off funds refers to the illegal practice of transferring funds from a company for personal gain or to hide illegal activities. There are several ways in which a company can siphon off funds, including:

Over-invoicing: A company may inflate the cost of goods or services purchased to receive a higher amount of money from the purchaser. The excess amount paid is then siphoned off for personal gain.

Under-invoicing: A company may undervalue goods or services sold to reduce the amount of tax payable. The difference between the actual value and the undervalued amount is then siphoned off.

Ghost employees: A company may create fake employees and pay them a salary, but in reality, the money is siphoned off by the company's management.

Round-tripping: A company may create fictitious transactions with a third party to show an increase in revenue. The third party then returns the money, and the company's management siphons off the amount.

Transfer pricing: A company may manipulate prices when transferring goods or services between its subsidiaries to reduce tax payable. The difference in prices is then siphoned off.

Misappropriation of funds: A company's management may directly take money from the company's accounts for personal use, without any legitimate reason or business purpose.

Offshore entities: A company may transfer funds to an offshore entity to evade taxes or hide illegal activities. The money is then siphoned off by the company's management.

These are some of the various ways a company can siphon off funds. It is important for companies to maintain transparency and ethical standards in their financial dealings to prevent such practices and avoid legal consequences. A forensic audit can help detect such fraudulent activities and bring perpetrators to justice.

The forensic audit revealed that PQR Ltd had indeed siphoned off funds to its subsidiary in the tax haven through a series of fraudulent transactions. The audit also found evidence of falsified invoices and inflated expenses to cover up the siphoning of funds.

The forensic audit report was presented as evidence in a court case filed by the Income Tax Department against PQR Ltd for tax evasion. The report was considered to be admissible evidence under the Bharatiya Sakshya Adhiniyam.

The court found PQR Ltd guilty of tax evasion and ordered them to pay a substantial fine. The forensic audit report played a significant role in the court's decision as it provided concrete evidence of the fraudulent transactions and siphoning of funds by PQR Ltd.

CASE STUDY-2

A forensic audit was conducted to investigate allegations of financial irregularities and fraud in a public sector company. The forensic audit was carried out by a team of independent auditors appointed by the company's board of directors. The auditors examined the company's financial statements, accounting records, and other relevant documents to identify any discrepancies or irregularities.

During the forensic audit, the auditors uncovered evidence of fraudulent transactions and financial irregularities committed by certain employees of the company. The evidence included falsified invoices, manipulated accounting records, and unauthorized transactions. The auditors also found evidence that some of the employees had colluded with outside parties to carry out the fraud.

Bharatiya Sakshya Adhiniyam, 2023 was crucial in this case, as it provided guidelines for the admissibility of evidence in legal proceedings. The forensic auditors were required to follow the procedures outlined in the Act to ensure that the evidence they gathered was admissible in court. The Act also provided guidelines for the cross-examination of witnesses and the presentation of evidence in court.

Based on the evidence gathered during the forensic audit, the company's board of directors took immediate action to terminate the employment of the employees involved in the fraud. The company also filed a criminal complaint with the police.

CASE STUDY-3

ABC Ltd. is a large manufacturing company that has been experiencing financial difficulties. The company has a number of subsidiaries and joint ventures, and its financial statements are complex and difficult to understand. The board of directors of ABC Ltd. suspect that there may be financial irregularities within the company, and they decide to conduct a forensic audit.

The board hires CS LLP as forensic accountants to conduct the forensic audit to detect the financial irregularities within the company. Elaborate the various steps that will be taken by CS LLP based on the concepts discussed in the above lesson without referring to the suggested solution below.

Solution:

CS LLP (Forensic auditors) will begin the forensic audit by examining the financial statements of ABC Ltd. and its subsidiaries and joint ventures with books of account and other records in the company to identify whether the allegation is true or not. They identified a number of unusual transactions and accounting entries that warranted further investigation.

Forensic auditors then conduct a series of interviews with key employees of ABC Ltd. and its subsidiaries and joint ventures. During these interviews, they uncovered evidence of fraud and financial irregularities, including falsified invoices, kickbacks, and unrecorded liabilities.

Based on the evidence gathered during the forensic audit and the forensic audit report submitted by the forensic auditors, the board of directors of ABC Ltd. decided to take legal action against the individuals responsible for the financial irregularities.

The board of directors after discussing with legal counsel filed a complaint with the police, and the case went to trial.

In the court, the evidence gathered during the forensic audit is presented to the Judge. The Judge relied on the Forensic Audit and Bharatiya Sakshya Adhiniyam, 2023 to determine the admissibility of the evidence. The act provides guidelines for the admissibility of expert evidence, including forensic audit reports, in court.

The Judge determines that the evidence gathered during the forensic audit is admissible, and the individuals responsible for the financial irregularities are found guilty and sentenced to prison.

Thus Forensic audits can be an effective tool for investigating financial irregularities and fraud. Bharatiya Sakshya Adhiniyam, 2023 provides the legal framework for conducting forensic audits and using the evidence gathered in such audits in a court of law.

In the case study above, the forensic audit was able to uncover evidence of financial irregularities acceptable to the court of law, which led to successful prosecution and conviction of the individuals responsible.

LESSON ROUND-UP

- Sometimes the evidential fact is directly accessible to the fact-finder.
- A factual proposition (in Latin, factum probans) is evidence in the third sense only if it can serve as a premise for drawing an inference (directly or indirectly) to a matter that is material to the case (factum probandum).
- In summary, at least four possible conceptions of legal evidence are in currency: as an object of sensory evidence, as a fact, as an inferential premise and as that which counts as evidence in law. The sense in which the term “evidence” is being used is seldom made explicit in legal discourse although the intended meaning will often be clear from the context.
- In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law.

- In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.
- The law does not allow evidence to be adduced to prove facts that are immaterial or that are not in issue. "Relevance" is often used in the broader sense that encompasses the concepts under discussion.
- Thus for an evidence to have any value in the eyes of court of law and be relied upon on reaching the decision these few rules have to be kept in mind:
  1. Relevancy
  2. Admissibility
  3. Weight
- There are Two types of relevancy, which includes:
  1. Logical Relevancy and
  2. Legal Relevancy
- Every case, whether civil or criminal, that comes before a court of law has a fact story behind it. Facts out of which cases arise keep happening in the ordinary course of life. This concept is governed by the rules and regulations mentioned under Bharatiya Sakshya Adhiniyam, 2023, Section 15-28.
- Oral evidence, as defined under Section 2 of the BSA, means statements or any information given electronically which the Court permits or requires to be made before it by witnesses in relation to matter of fact under inquiry.
- Under Section 2 of BSA, all documents including electronic or digital records produced for the inspection of the Court constitutes documentary evidence.
- In law, the production and presentation of evidence depends first on establishing on whom the 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. 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, 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.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation.)

Multiple Choice Questions 'MCQs'

1. Bharatiya Sakshya Adhiniyam came into force on?
   - a) 15th March,2024
   - b) 1st September 2023
   - c) 1st January 2024
   - d) 1st July 2024
2. Facts under the Bharatiya Sakshya Adhiniyam means:
   - a) Anything capable of being perceived by the senses and any mental condition of which any person is conscious
   - b) Only any mental condition of which any person is conscious
   - c) Anything capable of being perceived by the senses only
   - d) Anything capable of being perceived by the mental condition only
   3. Which Section of the BSA deals only with civil matters?
   - a) Section 21
   - b) Section 29
   - c) Section 46
   - d) Section 53
4. Which one of the following sections of BSA provides that evidence may be given of facts in issue and relevant facts?
   - a) Section 3
   - b) Section 4
   - c) Section 7
   - d) Section 10
5. Electronics records produced before the court are:
   - a) Ordinary evidence
   - b) Technical evidence
   - c) Oral evidence
   - d) Documentary evidence
6. Which are the provisions under BSA,2023 that deals with relevancy of opinion of experts?
   - a) Sections 39 and 40
   - b) Sections 81 and 82
   - c) Sections 23 and 24
   - d) Sections 49 and 50

7. BSA, 2023 applied to?
   a) Proceedings before Tribunals
   b) Proceedings before an arbitrator
   c) All judicial proceedings in or before any Court including Courts-martial.
   d) All the above
8. Evidence may be given in any suit or proceeding of the existence of non-existence of?
   a) Every fact in issue
   b) Such other facts as are hereinafter declared to be relevant
   c) Both A and B
   d) None of the above
9. A is tried for the murder of B by beating him with a club with the intention of causing his death. Which of the following facts are in issue at A's trial?
   a) A's beating B with the club
   b) A's causing B's death by such beating
   c) A's intention to cause B's death
   d) All of these
10. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places is defined under which Section of BSA?
   a) Under Section 3
   b) Under Section 4
   c) Under Section 7
   d) Under Section 8

Answers MCQ

1). d **2)**. a **3).** a **4).** a **5).** d **6).** a **7).** c **8).** c **9).** d **10).** b

Questions for Practice

1. What do you mean by Question of Fact and Question of Law?
2. What are the different types of evidences that are suitable in law useful for Forensic audit?
3. Discuss about the relevancy of Evidence.
4. What is meant by Admission of Evidence? Discuss in detail the provisions of BSA,2023.
5. What is meant by Positive Evidence and Negative Evidence?
6. Discuss the Direct and Circumstantial Methods of Proving a Case.

REFERENCES

1. Bharatiya Sakshya Adhiniyam, 2023
2. Sir J.F. Stephen, Digest of the Law of Evidence

LIST OF FURTHER READINGS

- **Forensic Audit Decoded**

  Author: G.C. Pipara

  Publishers: Taxmann

- **Forensic Audit**

  Author: CA Kamal Garg

  Publishers: Bharat's