

LLB 3 years IV sem
Paper III Law of Evidence
Study Material / Unit III

Oral and documentary evidence, Primary evidence and secondary evidence, Admissibility of electronic evidence

Oral evidence and Documentary evidence Sec 59-60

Sec 3 of the Indian evidence Act provides that all statements which the court permits or requires to be made before it by witness in relation to matters of fact under inquiry. Sec 59 of the Act provides that all facts except the contents of documents or electronic records may be proved by oral evidence and in certain circumstances contents of documents are proved by the oral evidence under sec 63(5). Sec 60 provides oral evidence must be direct.

Oral here means not only with 'words' but includes all method of communication thought, which the circumstances of the case or the physical conditions of the witness demands. For example, under sec 119 witness who is unable to communicate verbally can make their statements by signs, by writing or through an interpreter.

Oral evidence if worthy of credit is sufficient, without documentary evidence, to prove the fact or title. However the documentary evidence will prevail over oral evidence. (V.S. Nagraja v M. N. Krishna, 1996 AIHC 2094). Oral evidence is judged with reference to the conduct of the parties, and the presumptions and probabilities legitimately arising in the case. (Mathura Pandey v Ram Ruchya Tewaree).

Before taking oral evidence worthy, testimony of the witness has to be examined and the Court examined that whether witness have the means of gaining correct information, whether they have any interest in concealing the truth, whether they agree in their testimony.

Oral evidence must be direct sec 60.

Sec 60 of the evidence act says two principles. First that hearsay is no evidence and second what it means to be direct.

Hearsay Evidence

Hearsay evidence is indirect evidence which come not from the knowledge of the person who deposes it but through some other person. Hearsay evidence means evidence which does not derive its value solely from the credit to be given to the witness himself, also on the part of the competency of some other person. **For example**, in case of defamation witness said in the court that he himself not heard the defamatory words but some other person told him about that.

Hearsay evidence is excluded because

1. Declarant is irresponsible
2. Depreciation of truth in the process of repetition

3. There may be opportunity of for fraud its admission would open, to which are sometimes added these grounds
4. The tendency of such evidence to protract legal inquiries and
5. To encourage the substitution of weaker for stronger proof

Exception to the Hearsay rule (Sec 17-39)

1. Admissions
2. Confessions
3. Certain statements made by person dead or who cannot called as witnesses, includes dying declaration, statements made in due course of business, statements against interest, statements giving opinion as to public right , statements giving opinion as to public right or custom, or statements relating to pedigree(sec 32).
4. Previous disposition of witness who is dead or cannot be called as witness (sec 33)
5. Entries in books of account kept in the course of business (sec 34)
6. Entries in public registers or record (sec 35)

Direct as a rule

Oral evidence must be direct under sec 60 means 'saw it' 'heard it' and 'perceived it 'or saw the fact disposed to, heard the fact disposed to, and perceived the fact disposed to.(read the section 60)

For example, fact mentioned in the panchnama, have to be proved by the testimony of the panchus who seen it, or to prove a statement given the police, the evidence of the person who recorded the statement to identify the person is necessary.

Best evidence rule

It is the cardinal principle of the law of evidence that best evidence should be produced before the Court. Provision of sec 60, 64 and 91 of the evidence act provides that rule.

Sec 60 says that oral evidence must be direct it means, if facts is to be proved which can be seen it must be proved by the evidence of a witness who saw it, if it could be heard it must be proved by the witness who heard himself, if could be perceived by any other sense that person who perceived it must be examined by the court and if the facts to be proved is an opinion or the grounds on which the opinion is based the person who holds that opinion must be examined.

Sec 64 provides that documents must be proved by te primary evidence except where secondary evidence is allowed.

Sec 91 of the Act provides that when the terms of a contract grant or any other disposition of property have been reduced to the form of writing and in all cases in which a matter is required by law to be reduced to the form of writing no proof of them can be given except the document itself except the secondary evidence when it was permissible by the law.

Primary evidence and secondary evidence Sec (61-65)

The contents of documents may be proved either by primary evidence or secondary evidence (sec 61). Primary evidence means documents in its original form produced before the inspection of the Court (sec 62).

This is based on the best evidence rule that original document must be produced before the court because in its original form it is first hand and most reliable. **For example** if A executes a sale deed in favour of B for rupees 1000/- B files a suit for the possession of the property on the basis of sale deed. A denies the execution of sale deed. B produces the very sale deed before the Court. This would be the best evidence and is a primary evidence. Any other evidence such as copy of the sale deed, some person who read the sale deed and makes an oral statement about its contents or the witness who signed it have always provides a possibility of some addition or omission to the original. That is why original copy of the document is a best evidence.

Explanation 1 and 2 of the sec 61 provides the scope of the primary evidence.

When a document executed in the several parts, each part is primary evidence of the document. **For example**, if a partition deed is executed and registered in the favour of the parties who has shares in the property. Each of such parties wants the deed specifying his distinct share. All the copies of the deed for all such parties are prepared and is the primary document for them.

Further when a document is executed in counter parts, each part is primary document against the executing parties and his privies, but for the nonexecuting party and his privies it is secondary document. **For example**, Patta is executed and signed by the lessor for the lease and qabuliat is executed and signed by the lessee. Thus Patta is primary document for the lessor and secondary document for the lessee and qabuliat is primary document for the lessee and secondary document for the lessor.

Explanation 2 provides that printed lithographic, photographic, and other reproduction of the documents through the one uniform process are primary evidence of each other but if original is not the reproduction but the document from which the reproduction was made, reproduction would be merely a secondary evidence of the original. **For example** one specimen of a newspaper is not a copy of the another specimen of the newspaper of the same date. They all are originals, all are the primary document for the contents mentioned in it. Similarly carbon copies which are made by uniform process are originals of each other and secondary of the common content.

Secondary evidence(sec 63)

Secondary evidence is an evidence which can be given under certain circumstances in absence of the primary evidence. Section 63 provides the definition of the secondary evidences which can be produced in place of primary evidence under

circumstances mentioned in the sec 65. There is five clause in the sec 63, out of which first three deals with certified copies of the documents, fourth one is concerned with the counter parts of the documents and fifth one is the oral statement about the contents of documents.

1. Certified copies of the original document as certified by the public officer under sec 76 of the Act. Sec 76 lays down that every public officer having custody of a public document shall give to a person, on demand of, and on payment of legal fees, a copy of it (public document). A public officer after preparing the copy from the original will affix the certificate at the foot of such copy, that it is true copy of the document and mentioned the date on it. The name of the public officer in whose custody document was and the seal of such officer is also affixed on the copy.

If the copy of such public document with above mentioned certificate submitted to the Court, it is admissible as secondary evidence.

The secondary evidence as a certified copy of the primary evidence under this clause is presumed to be genuine under sec 77 of the Act. **For example**, Khatauni is the secondary evidence of the collect rate record.

2. Copies made from the original through mechanical process

Documents which are prepared by the uniform mechanical process such as printing, lithography, or photocopy which in themselves assure the accuracy of the copy and the copies compared with such copies. Only certified copies of the secondary evidence is admissible as an evidence under this clause when it is proved that original is in the possession of the other party.

Copy of a Copy is not admissible as secondary evidence only copies prepared by the mechanical process and copies of a copy compared with the original is secondary evidence.

3. Copies made from compared with the original. If a copy is prepared word to word from the original it is secondary evidence.
4. Counter part of the document against the party who did not execute it is secondary evidence. (See the example explanation 1 sec 61, mentioned above)
5. Oral account of the contents of a document given by a person who has himself seen or read the document.

When secondary evidence can be given in place of primary evidence sec 65

Sec 64 provides the rule that documents must be proved with the primary evidence except in the cases provided under sec 65 of the Act. Sec 65 provides seven circumstances where secondary evidence is admissible. But two condition is required

- (1) It must be proved that document can be placed as secondary evidence is in existence.
- (2) The circumstances must be justified which leads to the production of secondary evidence. **For example**, when a party wished to prove the contents of documents has to by the secondary evidence on the loss of primary evidence . They must prove the loss of document. See the illustration b of the sec 104 of the Indian Evidence Act.

Where there is no foundation is laid for the reception of secondary evidence, the court may exclude such evidence (Setal das v sant ram AIR 1954 SC 404).

The secondary evidence can be given under following circumstances

1. When the document is in the possession of
 - i. The person against whom it is to be proved, or
 - ii. Any person out of the reach of, or not subject to, the person of the Court,
or
 - iii. Any person who is legally bound to produce it but does not produce it after notice to produce the same is given.
2. When the existence or the contents of the original have been proved as an admission in writing by the person against whom it is to be proved by the or his representative. Read with sec 22 of the Indian Evidence Ac.
3. When the original has been destroyed, or lost, or the party offering evidence of its contents cannot for any other reason, not arising from his own negligence or default, produce it in reasonable time.
4. When the original is of such nature and not be easily moveable
5. When original is a public document or whose certified copy is legally permitted
6. Original consisting of several accounts or can't conveniently be examined

Admissibility of document as secondary evidence

Production of document as a secondary evidence is permissible only in case when original document(primary) is not available under any circumstance mentioned in the sec 65. Therefore secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it with one or other of the case provided for in the Section. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making an endorsement thereon. (H. Siddiqui v. A. Ramalingam, (2011) 4 SCC 240). The application seeking permission to produce secondary evidence must give full details necessary to attract the provisions and be supported by a proper affidavit. (State of Rajasthan v. Khemraj, AIR 2000 SC 1759 (paras 2 and 3). Non production of primary document has to be proved first before adducing secondary document as an evidence. For example, A sale deed cannot be considered as a source of title in favour of the person in absence of any explanation about the original sale deed and need of producing secondary evidence as a certified copy of that sale deed.

An order allowing secondary evidence of the contents of the document without compliance with the provisions of Section 65 is illegal. (Laxmi Narain v. Parmanand, 1978 Raj LW 411).

Secondary evidence under section 65 is only to prove the existence, condition and contents of a document nothing else.

Admissibility of electronic evidence (sec 65A and 65B)

By the effect of science, communication and technology, we all used computer and other information technology maximum. In that transactions for example, from the CCTV footage to the receipt of online payment, emails, etc, all are electronic evidences. These electronic evidences become the part and parcel of our life. These electronic evidences often stores

such information's which are relevant in Court proceedings .Thus to give recognition to the electronic records and to establish its admissibility in the Court of Law Information Technology Act 2000 was enacted. Information Technology Act, 2000 amended various section of the Indian Evidence Act to include the 'electronic records' as a part of documentary evidence. Such as, sec 17, 22, 34, 35,39,47,59,65,67,73,81,85, 88,90 and 131. It also added sec 22A, 47A,65A,65B,67A,73A,81A, 85B,85C and 90A.

Sec 3 of the Evidence Act provides that Documentary evidence include 'electronic records'. Electronic records has the same meaning as mentioned in the sec 2(t) of the Information Technology Act 2000, i.e Data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated microfiche.

Relevancy of the Electronic evidence

A fact to be admissible in court of law, must pass the test of relevancy provided under sec 5-55 of the evidence act. The relevancy test mentioned under these sections are equally applicable to the electronic records. But these are specific sections deals with the relevancy of electronic records such as

1. Provisions relating to the Admissions and confessions under sec 17, 22A, sec 24
2. Relevancy of statement made under certain circumstances Sec 34
3. Relevancy of part statements sec 39
4. Relevancy of Opinion of examiner of electronic evidence sec 47A

Admissibility of electronic evidence Sec 65 A and 65B

Prior the year 2000, electronic records were considered primary documents and their printed reproductions authenticated by a competent authority were treated secondary evidence. Such authority was liable to be cross-examined in the court in respect of such document.

Information Technology Act, 2000 brought new changes in the Evidence Act not only in the provisions relating to relevancy but also laid special provisions for the admissibility of electronic records as evidence under Section 65A and Section 65B. In Section 61 to 65 of the Evidence Act, the word "document" or "content of documents" have not been replaced by the word "electronic record" or "contents of electronic record". Thus, the intention of the legislature is explicitly clear i.e. not to extend the applicability of section 61 to 65 to rule the admissibility of electronic records. This contention is further strengthened by the insertion of the words "Notwithstanding anything contained in this Act" in Section 65B which is a non-obstante clause, which further fortifies the fact that the legislature has intended the production or exhibition of the electronic records by Section 65A & 65B only.

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

Conditions for Admissibility of Electronic Evidence

For a computer output (printouts or electronic or magnetic media) to be admissible in evidence before a Court of law in any proceeding, the conditions enumerated under clause (2)

of Section 65B needs to be fulfilled. The conditions mentioned under the clause are as follows:

- a) The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used;
- b) Information was fed in computer in the ordinary course of the activities of the person having lawful control over the computer;
- c) The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy;
- d) Information reproduced is such as is fed into computer in the ordinary course of activity.

Computer

Clause (3) of Section 65B explains that the term “computer” under clause (2) of Section 65B refers to a “single computer” and includes:

- a) a combination of computers operating; or
- b) different computers operating in succession; or
- c) different combinations of computers operating in succession; or
- d) in any other manner involvement of the successive operation, in whatever order, of one or more computers and one or more combinations of computers.

Authentication of electronic record

Clause (4) of Section 65B of the Act requires for a certificate of authenticity of electronic evidence signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of relevant activities, whichever is appropriate. The certificate shall be evidence of any matter stated in the certificate. Such certificate may be for any of the following purposes:

- a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- b) giving the particulars of device
- c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate.

In *State v Mohd Afjal* (2003) 107 DLT 385 it was contended whether the computer printouts for the various telephone details, stood proved as per sec 65B. It was held by the Court that compliance of the sec 65B (1) and (2) is sufficient to prove the electronic records and it can be admissible. It was mentioned that certificate under sed 65(IV) is ‘alternative mode of proof’. Treating computer output as secondary evidence under sec 65(d), it was held that the oral evidence is sufficient.

In *State(NCT Delhi) v Navjot Sandhu*(2005) 11 SCC 600), admissibility of the mobile call records was questioned. Contentions on behalf of the accused made by the accused that

reliance cannot be placed on the call records in absence of the certificate of authentication under sec 65 B(4) of the evidence Act. The court rejected the contention and held that a cross examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken was sufficient to prove the call records. It was further held that even if the requirement under sec 65B (4) were not satisfied, evidence could be produced under sec 63 and 65 of the Act.

In *Anvar P.V v P. K. Basheer* (2014)SC 10 SCC 473, The Apex Court overruled the *Navjot Sandhu* case and held that Sec 65B(4) provides a necessary pre condition for the admissibility of the electronic records, and certificate of authentication under such section is mandatory and is the only way to hold electronic record admissible before the Court of Law. The admissibility of the electronic record was entertained in the case in detail. The Court held that reading of the sec 65A with the sec 59 and 63 and 65 of the Act provides that the special provisions relating to the admissibility of the electronic records shall be governed by the procedure prescribed in the sec 65B of the Evidence Act. It is complete in all sense and being special law supersedes the general law ('*Generalia specialibus non derogant*' means special law will always prevail over general law.) This is supported by the fact that sec 65B begins with the expression 'notwithstanding anything contained' as a 'non obstante clause'. The Court rejected the contention mentioned in the *Afajal* Case that sec 61-65 can be applied when the conditions of sec 65B is not satisfied.

Thus Electronic evidence can be adduced only with the procedure provided under sec 65 B only.

Recently in 2018 Supreme Court in the *Shafi Mohd v State of Himachal Pradesh* held that a party who is in not possession of device from which the document is produced, cannot be required to produce certificate under sec 65B. Further, it was held by the Supreme Court that if an electronic record is used as primary evidence, the same is admissible in evidence, without compliance with the conditions of the sec 65 B (AIR 2017 SC 3228).

In *Amitabh Bagchi v Ena bagchi* , AIR 2005 Cal 11, Court issued detailed guidelines for the use of audio video link. (see *Monir's law of evidence* pg. 277).

In *State of Maharashtra v Prafulla B. Desai* 2003 1 SCW 1885), it was held where a certain witness is necessary for the ends of justice and the attendance of such witness cannot be procured without delay, expense or inconvenience, the Court may issue the commission for examination of witness.

