

LL.B 3 years IV sem
Paper III Law of Evidence
Study Material / Unit III
Presumptions and Privilege Communications

Presumptions

In general, facts has to be proved before the court in accordance to the principles mentioned in the Evidence Act. Court does not rely the facts unless it is proved. But in certain circumstances court may consider certain facts even without calling proof for them, it means court may presume certain facts. Presumption means ‘things taken for granted’. Presumption is an inference of the facts drawn on the basis of other known or proved facts. For the law of evidence, it is used to designate an inference affirmative of negative, of the existence of some fact drawn by judicial Tribunal by the process of probable reasoning of some matter of fact either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. In *Kumar exports v Sharma Carpets 2SCC513* it was held that a presumption is not in itself evidence but only makes a prima facie case for a party in whose benefit it exists.

Presumptions are based on the principle “*Omnia Prosumuntur rite esse*’ means “all acts are presumed to be rightly done”.

Types of presumption

Presumptions of fact or natural presumption

Presumptions of law or artificial presumption(rebuttable and irrebuttable)

Presumptions of fact or natural presumption

The presumptions which mind naturally and logically draws from the given fact without the help of any legal directions. **For example** when a stolen property recovered from the possession of someone, the inference can be drawn that either that person stole it himself or received from a thief as stolen property, or if a letter has been posted, the inference is that it would reached to the addressee.

Presumptions of law or artificial presumption

Presumption of law are artificial presumptions which are based on the principle of law. They are obligatory and judge cannot refuse to draw the presumption. They are of two kinds rebuttable presumptions of law and irrebuttable presumptions of law.

Rebuttable presumption: These presumptions are based on the certain legal rules which are sufficient to make a prime facie case. It means circumstances under which burden of proof lies on the opposite parties. For example, a man is presumed innocent unless proved guilty

and child born in the legal wedlock is presumed to be a legitimate child. Sec 107, 108, and 112 of the Indian Evidence Act.

Irrebuttable presumption of law are conclusive proof under the law of evidence. Irrebuttable presumptions are those legal rules which are not overcome by any evidence that the fact is otherwise. For example sec 82 of IPC, A child under seven years of age is immune from criminal liability and principles of estoppel under sec 115-117 of the evidence act.

There is also mixed presumption of law and fact but that is not applicable in Indian Evidence Act.

May Presume and Shall Presume

These presumptions are used under Indian Evidence Act by using expressions 'May presume' and 'Shall Presume'. Rebuttable presumptions are as 'Shall presume' under sec 79-85, 89 and 105 while irrebuttable presumptions are as 'may presume' sec 41, 112 and 113.

May presume means Court has discretion to presume or not. In case 'Shall presume' Court cannot exercise its discretion. It is compelled to take the facts as proved i.e it shall have to presume the fact. But in this case Court will be a liberty to allow the opposite party to adduce evidence to disapprove the fact so presumed and if the opposite party is successful in disapproving it, the Court shall not presume the fact. For example sec 89 of the Act. The Point of distinction is in case Court has discretion to presume the fact in case of may presume but in shall presume court has to presume fact, though when in former case as Court raised the presumption distinction between two ends.

Presumptions under Indian Evidence Act

1. Presumptions as to genuineness of the certified copies(sec 79)
When a certified copies of the document produced before the Court as evidence of the original the law presumes that copy is genuine product of the original. However it is required that copy must be certified by the authorised officer and it must be in the form prescribed by the law. It is also presumed that the person who certified the copies has the authority to certify it and it is not required to call such authority to prove before the Court.
2. Presumption as to documents produced as records of evidence(sec 80)
When a person is appeared before Court of Law and has recorded his testimony or confession taken in accordance with the law and purporting to be signed by a judge etc, and his statement being relevant in a subsequent case, the Court shall presume the genuineness of such certified copy and that such evidence, statement etc was duly recorded.
3. Presumption as to Gazettes Newspapers Private Acts of Parliament(sec 81)
Though newspaper reports do not constitute admissible evidence of their truth merely as a hearsay evidence.(Laxmi Raj Shetty v State of Tamilnadu, Ram Swaroop v State of Rajasthan)
4. Sec 84 raises the presumption as regards the genuineness of statutes and law reports. This sec has to read with sec 38.

5. Presumption as to power of attorney(sec 85)

A power of attorney is a document by which an agent is given the power to act for his principal. Power of attorney duly executed before and authenticated by a notary public or any judge /court etc are presumed to be genuine.

This presumption is available only for the original holder of the power of attorney (Bank of India v Allibhoy Mohdmmad)

In Suraj lamp v State of Haryana 2011 Supreme Court etc. that sale through power of attorney is invalid.

6. Presumption as to electronic agreements(sec 85A)

7. Presumption as to electronic records and signature(sec 85B)

8. Digital signature certificate (sec 85C)

9. Presumption as to telegraph message (sec 88)

Court may presume that the message delivered to the addressee corresponds with the message handed over to the post office and that the message was meant for the person whom it is purported to be delivered. But, Court shall not make any presumption as to the sender of the message since telegraphic messages can be sent by unauthorised person. A telegraph is a primary evidence of the fact that the same was delivered to the addressee on the date indicated therein.

10. Presumption in relation to the Documents not produced(sec 89)

The Court shall presume that every document, called for and not produced after notice to produce, was attested stamped and executed in the manner required by law.

11. Presumption as to Documents Thirty years old(sec 90)

Where a document is purported or proved to be thirty years old and is produced from the custody which Court considered is proper, the Court may presume that signature and every part of the document is in that's person handwriting and in case of document attested and executed that it was duly attested or executed by the person by whom it purports to be attested or executed. It is based on the principle that documents which are thirty years old proved themselves. Here presumption is for the genuineness (execution or authentication) not for the contents of documents, and for the original documents not for the copies.

Proper custody for the sec means (a) the place where the document would normally be (b) under the care of person with whom it would normally be (c) any custody which is proved to have legitimate origin (d) under the circumstances of the case the custody from which the instrument is produced is probable.

For 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 title to it. The custody is proper.s

The presumption under sec 90 is discretionary in nature, the court may refuse to draw the presumption and required the document may be proved like ordinary evidence.

Privilege Communications (Sec 121-132)

Privilege means a right or duty to refuse to disclose a fact. In certain circumstances witness can't be compelled to disclose the fact, or even when witness is willing to disclose he is not permitted to disclose. Such matters are known as privilege communications. In those cases where disclosure affects the administration of public affairs or justice, it is called the State privilege and others are Private privilege. Sec 121, 123 to 127 of the Indian Evidence Act are State privileges and sec 122, 130,131 are private privileges. The principle behind the recognition of privileges is avoidance of greater evil to the society and to the third parties. It is required to test that injury resulting from the disclosure of a fact would be greater than the advantage to be derived from the disclosure (Wigmore).

1. Privilege of Judges and Magistrates (Sec 121)

“No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any question as to own conduct in Court as such Judge or magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate, but he may be examined as to other matters which occurred in his presence whilst he was so acting”.

It means Judges and Magistrates are the competent witnesses in the case they like to be but they can't be compelled to answer any question about his conduct in Court. **For example** in case where A, on his trial before the Court of Session, says that, disposition was improperly taken by B, the Magistrate. B cannot be compelled to answer the question as to this, except upon the special order of the Superior Court.

Further, he cannot be compelled to disclose anything which he came to know as a Court in course of trial except upon special order from the higher Court. **For example** A is accused before the Court of Session for having given false evidence before B, a Magistrate. B cannot be asked what A said, Court except upon the special order of the Superior Court)

This privilege is not applied in cases where Judges and Magistrate are observing something as an ordinary man, not as an officer of the court. **For example** A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B, a Session judge . B may be examined as to what occurred.

Judge for the purpose of sec 121 means not only a person who is officially designated as a judge but includes everyone who is empowered to give in any legal proceedings civil or criminal a definitive judgement. Similarly, Magistrate means and include every person exercising all or any of the powers of a magistrate under the Criminal Procedure Code.

2. Privilege of Communications during Marriage (sec 122)

“No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married nor shall he be permitted to disclose any such communication, unless the person who made it , or his representative in interest, consents, except in suits between married persons, or proceedings in which one married is prosecuted for any crime committed against the other”.

Sec 122 of the Indian Evidence Act has to be read with sec 120 of the Act, which provides that a husband or wife of a party to a proceeding is a competent witness and capable to testify. Sec 122 provides that wife or husband may not be compelled to divulge the communication of husband to wife and the vice versa. It means any communication during the wedlock by the husband to the wife or by wife to her husband is prevented from being proved in the Court of Law. **For example** the statement of the accused to his wife that he would give her jewels and that he had gone to the house of the deceased is inadmissible.

Sec 122 is based on the principle that mutual confidence between husband and wife must not be disturbed because it causes disturbance to the family peace. If communication between husband and wife would be allowed to be proved before the cases it will disturb the peace of family. Hence, the prohibition is based on the high import which no Court can relax.

The privilege under sec 122 is limited to the 'communication during the marriage' and are being protected even after dissolution of marriage or after the death of one spouse. It is not applied to the communications made before the marriage and after the dissolution of marriage.

Sec 122 is applied not only to the confidential communication between husband and wife but covers all communications between the spouse and even in cases where husband or wife of the witness is not a party of the proceedings.

Exceptions

1. Sec 122 is not applied to the acts or the conduct of the husband or wife. For example in case where accused is tried for the murder of his neighbour and committing robbery. He gave some jewels to his wife and while presenting her he told that he had gone to house of the deceased. His wife later told to the Court that she saw one morning her husband was coming down of the roof. He then went inside the fodder store and had a bath. He put back the clothes and come to her to present the things. It was held that the what husband said to the wife is not admissible but she could testify as to his conduct.(Ram **Bharosey** v State of UP (AIR 1954 SC 704)
2. Evidence of privileged communication can be given by the husband or wife with the consent of the party who made the communication.
3. Sec 122 is not applied in case where husband and wife are parties to the suit against each other.
4. When the communication between the husband and wife is in presence third person or when overheard by the third person can be testified to by the third person without calling any of the spouse in the witness box because under sec 122 privilege is only for the spouse not to other persons. For example, if a letter having communication between husband and wife (from the husband too the wife or vice versa), get into the hands of third person, it is admissible as evidence. see **M.C. Verghese** v T.J. Ponnun AIR 1970 SC 1876)
5. Communication made before marriage and after dissolution of marriage.

3. Privilege of affairs of State (sec 123)

“ No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of the State except with the permission of the officers at the Head of the department concerned, who shall give or withhold such permission as he thinks fit.”

This section is based on the maxim “*salus populi est suprema lex*” means ‘welfare of the people is supreme law’. Privilege is given to production of such documents before the court of law which causes injury to the public interest. In general witnesses are bound to tell the truth or to produce the document in his possession which are relevant to the matter in issue. But in certain cases the production of official document may be injurious to the interest of public at large such as security issues, diplomatic relations etc . In such circumstance State has been given privilege under this section as ‘affairs of State’. For the application of sec 123 following things are required

1. The document must be unpublished record
Those documents which are already published are not treated as unpublished.
2. It should be relate to the affairs of the State
Affairs of the State concerned with documents of the State whose production causes danger to the public interest and documents pertaining to public security, defence and foreign relations are documents relating to affairs of the State, and unpublished documents relating to trading commercial or contractual activities of the State are not ordinarily,
3. It can be given in to the evidence with the permission of the Head of the Department concerned who shall give or withhold such permission

It is a matter for the authority to decide whether disclosure would cause injury to the public interest (State of Panjab v Sukhdev Singh AIR 1961 SC 443)

In State of UP v Raj Narain AIR 1975 SC 865 it was held that Sec 123 is based on the principle that there must not be injury to the public interest. The public interest must be weighed against the Public interest in the administration of justice and if former outweigh the latter, evidence cannot be admitted. If the Court is satisfied with the reasons cited in affidavit matter ends there. If no the Court may inspect the document and if it finds that any part of the document is innocuous (not related to affairs of State) it could order disclosure of such part. While ordering of the disclosure of innocuous part the court must seal the other parts whose disclose is undesirable.

In R.K. Jain v Union of India (AIR 1993 SC 1769) The SC reaffirmed the above view.

4. Privilege of Official Communications (sec 124)

“No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would be suffer by the disclosure”

Sec 124 applies to all communications made in official confidence to the public officer when such public officer thinks that disclosure of such communication public interest would suffer.

Public officer here means an officer who is discharging public duty rather than private duty. Public duty means where public interest involved. For example Payment of fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges he is a public officer. (Rex v whitekar).

Communication made in official confidence means that communication must wilful confiding the secretes with a view to avoid publicity by reason of the official position of the person in whom trust is reposed impliedly or expressly. The test is whether a document produced or the statement made was under the process of law or not. If it is under process of law it would not be communication made in official confidence. On the other hand when it is produced or made to the confidential department enquiry not under process of law but for gathering of information by the department for guiding them in the future action if any, in such case it would be communication made in official confidence (Killi Suryanarayana Naidu (in re) AIR 1955 Mad.

For example, return submitted to the Income tax Collector, any statement made to him, any order passed by him is not privileged communication.

A letter written by an individual to the Post master general complaining to the conduct of postal official is not privileged communication.

The accident register kept by the medical officer is not privileged document.

Departmental confidential noting in the files cannot be called by the Court if an affidavit filed on behalf of the Govt shows public interest involved.

A confidential report submitted as a result of confidential inquiry is a privileged communication.

Further a Court can compel the disclosure of document, if not satisfied by the public officer's contentions. Again people has right to know about the functioning of State, if matter is not concerned with the sovereignty etc.

The point to be remember here that it is to Court to decide that whether a communication is official confidence or not, but the public officer is a sole judge to decide whether it should or should not disclosed. **For example**, A party in a civil suit sought production of income tax return of the opposite party. The Court refused to summon the document asked for considering it a privileged document. It was held not justified because it is up to the commissioner of income tax to claim privilege when the document had been summoned. It is then to the Court to decide whether the privilege is to be granted or not.

Distinction between sec 123 and 124

Sec 123 applies only to unpublished official records while sec 124 applies to all communication made to the public officer in official confidence.

Sec 123 provides the discretion of disclosure to the head of department while sec 14 provides the discretion to the public officer.

5. Privilege of Communication as to commission of an Offence (sec 125)

“No Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to commission of any offence against the public revenue”

The principle underlying in sec 125 to protect the person who provides an information about the commission of offence to the police, magistrate or otherwise. Offences are generally committed with utmost secrecy and shrewdly. Hence, if someone who informs the authority his life may be in danger. Thus for the safety of informer Police, Magistrate, and others has privilege not to disclose the name of the informer.

6. Privilege of Professional Communications (sec 126-129)

No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided nothing in this section shall protect from disclosure—

- (a) Any such communication made in furtherance of any illegal purpose**
- (b) Any fact observed by the barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment**

It is immaterial whether the attention of such barrister, pleader attorney of vakil was or was not directed to such fact by or on behalf of his client.

A professional communication is a communication between a professional and his client in the course of professional’s employment as an adviser. Sec 126 of the Indian Evidence Act deals with the communications made by a legal practitioners or legal advisers (barristers, attorneys and pleaders) with their client only. This privilege would apply only when such communication made in course of employment not otherwise. For example, if A make a statement to B, who is lawyer, but as his friend not as his client. Such statement is not privileged under sec 126.

But sec 127 provides that this privilege will apply to interpreters, clerks or servants of the Barraters, Attorney and Pleaders. For example paid salaried employees who advised their employer on questions of law or in matters concerned with litigations are covered under here.

The professional communications to the Lawyers and others under sec 126 are privileged on the principle that every person has right of fair trial and defended by the counsel. A counsel cannot defend the client without knowing the whole truth. If such privilege is not given client will never disclose his case completely to the lawyer.

Thus sec 126 provided that a legal professionals cannot disclose without his client's consent

- (a) Any communication made to him in course of and for the purpose of his employment
- (b) The contents of conditions of any document which came to his knowledge in the course of and for the purpose of his employment
- (c) Any advice by him to his client in the course of and for the purpose of his employment.

For example, The Counsel has right to claim the privilege and refused to show the statement of witnesses recorded by the Court in extensor and supplied to him in order to prepare his case for the cross examination.

Communication made before the relationship as legal adviser and client came into existence or after it ceased is not privileged. If the communication is made during the existence of the relationship the privilege does not terminated with the termination of litigation or the death of the parties (*Ayasha v Peerkhan* AIR 1954 Mad. 741).

Exceptions

- 1) Communication made in furtherance of an illegal purpose (proviso 1), For example when a client consulted a lawyer to draft a fraudulent agreement. Such communication is not privileged. (See Illustration b of sec 126)
- 2) Crime or fraud since employment began (proviso 2), when within course of his employment a legal advised come to know about the commission of any crime, in such circumstances he is not bound by the privilege. This exception is on the ground that it is a duty of every person to report or prevent anything which is contrary to law. (See illustration b of sec 126).
- 3) Disclosure with consent of client- Such privilege can be waived only by the client not by the legal adviser.
- 4) If the lawyer himself sue the client for his professional services, he may disclose professional communications
- 5) Joint interest No privilege in case against the persons having joint interest with the client such as partners, shareholders
- 6) No privilege for those documents which are already put in to records.

Sec 128 provides it is not the waiver of the privilege, if party making the communication under sec 126 gives evidence at his own instance or otherwise on the matter concerned with the communication. If such party calls a lawyer as witness, it does not amount to consent to disclose, unless he asked anything concerned to the communication. But if he asked anything concerned to the communication, it would amount to consent and the lawyer can disclose it on that basis.

Sec 129 provides it would not a waiver of the privilege when a client (who made secret communication with his legal adviser) appears as a witness in a case to offer his testimony. Further, on the grounds of that opposite party will not be entitled to cross examine him about the communication nor will he be entitled to summon the lawyer to depose about it.

The client's offers of his own testimony as too specific facts about which he has happened to communicate with the attorney is not waiver.

Thus sec 126 provides a prohibition to the lawyer from disclosure of the communication with his client in course of employment while under sec 129 client is placed out of that compulsion over the communication between him and his legal adviser.