Course Name – LL.B 3rd 4th Sem

Subject –Law of Evidence

Teacher - Ram Kumar Bhardwaj

Concept Covered – UNIIT-III (Whole)

Chapter IV deals oral evidence. There are two sections in this chapter namely sections 59 & 60. Both sections contain two rules respectively namely; –

1. All facts, except the contents of documents or electronic records, may be proved by oral evidence (Section 59).

2. Oral evidence must be direct rather than hearsay evidence (Section 60).

Sections 60 - Sections 60 deals what is direct. For example in case of seeing, hearing, perceiving and making opinion and grounds of opinion, evidence must be given only by that person who has seen, heard, perceived or made opinion. Section 60 itself contents one exception.

This exception is that the **opinions of experts** expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

Section 59. Proof of facts by oral evidence - All facts, except the contents of documents or electronic records, may be proved by oral evidence.

„Oral" means by word of mouth. But according to section 119, „A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, evidence so given shall be deemed to be oral evidence". Section 119 is extension of „Oral Evidence". It is fiction of law.

Queen Empress v. Abdullah (1885) ILR 7 All 385 - Oral is different from the word „Verbal".

Section 60. Oral evidence must be direct - Oral evidence must, in all cases whatever, be direct; that is to say –

if it refers to a fact which could be **seen,** it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be **heard,** it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be **perceived** by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an **opinion** or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Exceptions of Hearsay Evidence

According to section 59 "Oral Evidence" must be direct. Hearsay evidence is not direct evidence. So rule is that „Hearsay Evidence" is not acceptable. There are certain exceptions of this rule. There are following exceptions of this –

1. Res gestae
2. Conspiracy
3. Admission & Confession
4. Dying Declaration
5. Evidence in former proceeding

6. Opinion published in treatises

7. Sections 32, 33

Documentary Evidence:
Sec 61 The contents of documents may be proved either by producing
(a) Primary evidence or
(b) Secondary evidence

Sec 62 Primary Evidence: means, the document itself produced before the Court for its inspection. If the document is in several parts, each part is primary evidence. Where the documents are produced by mechanical process like printing lithography, Photography each one is primary evidence.

Sec 63 Secondary Evidence: It means and includes the following:
(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.

Illustrations
(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.
(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.
(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.
(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

COMMENTS Admissibility Application moved for permission to lead secondary evidence based on ground of loss of document.

Section 63 provides meaning of secondary evidence. There are five parts of meaning of secondary evidence. Parts 2 (mechanical processes) and 4 (counterparts of documents) must be read in the light of meaning of primary evidence as provided in section 62 of the Indian Evidence Act. In section 62 has been provided what primary evidence is and is not. So after dividing section 63 in two parts in the light of section 62, it becomes very easy to understand and remember meaning of secondary evidence. All five categories of section 63 are of equal value. None of them has priority over other.

Secondary evidence means and includes – Term „includes" used in section 63 denotes that five list of secondary evidence is not exhaustive.

Presence of document proved from the facts pleaded - Allowing secondary evidence not illegal; **Sobha Rani v. Ravikumar, AIR 1999 P&H 21.**

Tape-recorded statements are admissible in evidence; **K.S. Mohan v. Sandhya Mohan, AIR 1993 Mad 59**.

Certified copies of money lender's licences are admissible in evidence; **K. Shivalingaiah v. B.V. Chandrashekara Gowda, AIR 1993 Kant 29.**

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

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

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

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

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

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

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

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

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

Sec 66. Rules as to notice to produce.—Secondary evidence of the contents of the documents referred to in section 65, clause (a) , shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:—

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

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

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

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

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

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

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

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

Attestation:

Nature of proof required:

Sec. 68 to 72 deals with the nature of the proof required to prove attestation.

(i)In the case of an attested document, it should not be admitted until at least one of the attesting witnesses, if alive testifies to its execution. Sec 68

This will not apply to documents duly registered under the Registration Act. (But, if the execution is itself denied, then attester's evidence is relevant).Proviso of Sec 68

(ii) If the attesting witnesses are dead or cannot be found, then at least the signature of one of the attesters', and the executor's signature should be proved. Sec 69

Further, the admission of an executant is sufficient proof of its execution Sec70

.

iii) If the attester denies or does not recollect the execution of a document then it must be proved with independent proof. Sec 71

Documents which need not be attested according to law, may be proved by admission or Otherwise

Public Document and Private Documents (S 74-78)

74. Public documents -The following documents are public documents: -

(1) Documents forming the acts, or records of the acts –

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive,

of any part of India or
of the Commonwealth, or
of a foreign country;

(2) Public records kept in any State of private documents.

Section 75 Private documents - All other documents are private.

Electoral roll

Naladhar Mahapatra and Anr. v. Seva Dibya And Ors. (21 August, 1990, Orissa H.C.) Electoral roll is a public document and does not require any formal proof. The certified copy of a public document is admissible in evidence under Section 77 of the Evidence Act.

School Leaving Certificate

Shyam Lal @ Kuldeep v. Sanjeev Kumar & Ors. (15 April, 2009) School leaving certificate issued by Head Master, Government Primary School falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof.

Records of Nationalized Bank

Gorantla Venkateswarlu v. B. Demudu (DOJ 26 July, 2002) AIR 2003 AP 251. Since Central Bank of India is one of the Nationalised Banks, in my considered opinion, it is an official body‟ within the meaning of Section 74 of Evidence Act and so records of its acts would be „public documents‟ within the meaning of Section 74 of Evidence Act.

Judgment/Decree

The Collector of Gorakhpur v. Ram Sundar Mal (Bombay High Court 11 June, 1934) In India judgments have to be in writing and signed by the Judge and the original judgments and decrees are records of the Court and retained in the record room, the parties being supplied with certified copies only

Charge sheet

Tola Ram v. Dist. Judge and Anr. (Raj.H.C. 19 March, 2008) Hon‟ble Justice Vineet Kothari observed, "Charge sheet is public document."

Proof of the contents of Public documents:

The contents of a public document may be proved by **means of a certified copy**. Sec 76 & 77

A person, who is interested in such a public document, may apply to the public officer, who is having custody of the public document, for certified copy, He should pay the prescribed fee. The officer prepares a copy and at the foot duly certifies that it is a true copy of such document. He shall sign the same with date and seal of the office. Such copy is called a 'Certified Copy'. Such certified copies are admissible in evidence to prove their contents.

In particular, the following provide for the mode of proving the contents of the Public document. Sec 78

(i) Acts, orders, notification of Central Govt. proved by records certified duly.

(ii)The Legislative proceedings are proved by producing Journals. Publication of the Houses duly authorised.

(iii) Proclamation, orders etc. are proved by producing copies.

(iv) Municipal proceedings are proved by producing certified copies.

(v) Public documents, in a foreign country are proved by producing the original or a certified copy issued by the Consul or diplomatic agent

Exclusion of Oral evidence Sec 91-100

One basic rule of the Evidence Act is that the **best evidence** should be adduced by the parties. Hence, if the transaction is in writing, the document itself should be produced before the court, and the court will not hear oral evidence of the contents of the document. The principle is to prevent any fraud. If the party does not produce the document, he may have some design or bad motive behind it. Hence, the best evidence about a document is the document itself.

For transactions which are voluntarily reduced to writing by the parties, or where, as per law it is in writing containing the terms of a contract, grant or any other disposition of property, no oral evidence is allowed and the document itself should be produced before the court. However, Secondary evidence can be adduced according to the Evidence Act.

Sec 91 Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—

When the terms of a contract, or of a grant, or of any other disposition of property, have **been reduced to the form of a document**, and in all cases in which ***any matter is required by law to be reduced to the form of a document***, **no evidence** shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, **except** the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills 2[admitted to probate in [India]] may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation. 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

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

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

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

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

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

Sec 92 Exclusion of evidence of oral agreement.—

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

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

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract:

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

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

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

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

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

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

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

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

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

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

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

Differences between Section 91 & Section 92-

The two sections are differ in some material particulars. These are –

Section 91	Section 92
Section 91 applies to all documents, whether they purport to dispose of rights or not	Section 92 applies to documents which can be described as dispositive.
Section 91 applies to documents which are both bilateral and unilateral.	Section 92 the application of which is confined to only to bilateral documents.
Section 91 is concerned solely with the mode of proof of a document	Limitation on section 91 is improved by Section 92 which relate only to the parties to the document.
First Stage- Section 91 If after the document has been produced to prove its terms under Section 91, section 92 comes into force.	Second Stage- Section 92 After section 91 provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms
It is silent about the parties to instrument or their representatives in interest.	It prohibits only the parties to instrument or their representatives in interest rather than stranger.

Sec 93 Exclusion of evidence to explain or amend ambiguous document.—

When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. Illustrations

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

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

Sec 94. Exclusion of evidence against application of document to existing facts.—

When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to B, by deed, “my estate at Rampur containing 100 bighas”. A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Burden of Proof

The subject of burden of proof has been dealt with in Section 101 to 114 of the Evidence Act.

One of the cardinal principles of the Evidence Act is that the Onus probandi is on him who desires the Court to find a fact in his favour. This is called the burden of proof. This has two distinct meanings, as a matter of law and pleading.

In the trial the first is fixed and remains unchanged, but the second will be shifting from one party to the other as soon as evidence is adduced by one to establish a fact.

The Evidence Act has made provisions to state on whom the burden of proof-lies.

(i) A person who wants the court to give a judgment as to his legal right or liability on certain facts must prove the existence of those facts; that is, the burden of proof lies on him who substantially 'asserts the affirmative of the issue'. The proving of negative is weighed down with many difficulties due to lack of direct proof. Hence the affirmative is to be proved.

Eg. A desires the court to convict B of theft under Sec 380, I.P.C. A must prove that B has committed the crime.

(ii) The onus lies on that person who would fail if no evidence at all, was given on either side.

'A' sues B for Rs.3,000 on a promissory note. The execution of the promissory note is admitted but B says that there was fraud. A denies this. The burden to prove fraud is on B. If no evidence is given on either side, A would succeed as the fraud is not proved.

(iii) The onus on any particular fact lies on him who wishes the court to believe in its existence (Any law may suitably provide on whom the burden shall lie).

Eg. A prosecutes B for robbery. A wishes the court to believe that B admitted robbery to C. A must prove the admission.

(iv) When it is necessary to prove any fact, in order to make evidence of any other fact admissible, the onus of proving it is on the person who wants to give such evidence.

(v) The burden of proving the circumstances to come within the general exceptions in the I.P.C. is on the accused. A is accused of murder. He alleges that he was of unsound mind. The burden is on A.

(vi) **Special Knowledge:** When any fact is especially within the knowledge of any person, the burden of proving is on him. A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him.

(vii**) Life and Death of a person:** If a person is known to be alive within 30 years, the onus of proving that he is dead is on the person who affirms it. If a person is not heard of for seven years, there is a presumption of law that he is dead. However, if a person asserts that he is alive, he must prove it.

(viii) **Relationships:** When there is existence of a relationship such as partnership, agency, tenancy, the burden of proving that there is no such relationship is on him who so asserts. A, B and C are partners of a firm. D, a distributor asserts that there is no firm. D must prove that.

(ix) **Active confidence:** If one party to a transaction 'A' stands in a position of active confidence to B the burden of proving good faith is on A. This is called the great rule of the court; the person who makes a bargain must prove his good faith,

e.g. Trustees, Attorneys etc. The risk of abuse by such person is always there. Hence, the rule is that he must prove 'good faith' in his dealings.

A, a client sues his advocate B to set aside a sale. B must show that he has acted in good faith.