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THE RULE OF BEST EVIDENCE AND ADVERSE INFERENCE

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ABSTRACT

In a world where to prove an offense proof is of utmost value and importance, it becomes rather essential to safeguard the interest of a part whose proof or evidence can be withheld by the opposite party, and to cater to this need of the hour, the principle of Best Evidence and Adverse Inference come in play.

INTRODUCTION

As per the Indian Evidence act, and as provided under Section 3 of the Act, 'Evidence' means and includes all statements made before the courts by witnesses, and all documents including electronic records produced in the Court.

Further, these Documents can be Primary or Secondary in nature and form, the same can be in Section 61 of the Indian Evidence Act, with respect to electronic records as evidence, these too can be produced in the court in the abovementioned two forms. For instance, the WhatsApp chats of two individuals is being taken into account as evidence, and it has come to the court that the same would be produced as evidence then in such a case, there can be two possibilities –

(a) If the mobile phone on which the chats had originally taken place is produced in court, then the same would be considered as Primary evidence.

(b) If the printouts of such chats are, produced in the court of law then the same would be considered as Secondary evidence.

Furthermore, when taking into account the rule of best evidence, the same can be found in Section 60[3] which states, 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;

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[3] Indian Evidence Act, 1872 .

- 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.

This rule has further been upheld by a catena of case laws; wherein various courts have taken into account the vitality of best evidence when deciding cases of Criminal nature. It has further been held by the apex court that if the prosecution is unable to produce the best evidence, then in such a case Adverse Inference would be drawn against it.

ORIGIN OF THE BEST EVIDENCE RULE

The rule of best evidence finds its origin from the doctrine of ***profert in curia*** which means if the party to a suit is not able to produce the original documents in the written form before the court of law concerned, then the same would have mislaid his or her privileges and rights that were conceived by the documents, the best evidence rule is also called the "original document rule". This rule was further shaped an conceptualised by Justice Hardwicke's in the judgement of ***Ford v. Hopkins*** and ***Omychund v. Barker*** wherein he stated that and further reiterated that ***"no evidence will be admissible unless it is the best evidence that nature will allow"***.

This connotation was further explained as, when during an investigation or at the time of a matter in question, if the evidence produced is not of the best form, or is not sufficient enough to prove the accused guilty, then such evidence would not be admissible thereof. In Indian context the best evidence rule is embodied in Section 91 – 100 of the Indian Evidence Act, 1872, which makes sure that the authenticity and genuineness of the document is enacted. These sections provide and give more importance to documentary evidence as compared to oral evidence. For instance, if there is a conflict between an oral and documentary evidence then the latter will always be considered superior.

BARRING OF ORAL EVIDENCE BY THE DOCUMENTARY EVIDENCE

As stated above when ORAL and DOCUMENTARY evidences are contesting each other, the latter always wins, the same has been laid down by a catena of Supreme Court and High Court cases.

1. ***Chandrawati v. Lakhmi Chand***[4] – In this case it was held that Section 91 of the Indian Evidence Act of 1872 includes in itself the legal axiom that whatever content or material is existing and available in written form, must be proved by means of written form only. In furtherance it was taken into account by the Hon'ble High Court and on such basis it,

[4] AIR 1988 Delhi 13, 1987 (13) DRJ 248.

rejected the admissibility of oral evidence in case of the contents of a partition deed as the same was not registered, meaning was not available in written form.

2. ***Ratan Lal v. Hari Shanker***[5] **–** The Allahabad High Court took the above judgement into account and did not accept the contents of a partition deed into account as oral evidence because, it was not registered.
3. ***Taburi Sahai v. Jhunjhunwala***[6] **–** In this case the Hon'ble Supreme Court of India, elucidated the realm of Section 91 by discerning that in a given case a document or a deed which cannot in any way be labelled as a contract, grant, or disposition of a property will not be moved by the best evidence rule as established under the provisions of Section 91 of the Indian Evidence Act, 1872.
4. In 1996 a rather differential or rather contradictory opinion to the precedent of written over oral, was given by the Supreme Court of India, wherein the case of ***Bakhtawar Singh v. Gurdev Singh***[7]- the court held that when in a given case both oral and documentary evidence are present at hand, are admissible in the Court of law on the basis of their specific merits, then in such a case the Court has the discretion that it may go by the evidence which it reasons to be much more trustworthy and reliable, and not necessarily follow the rule of documentary over oral evidence always.

AMBIGUOUS DOCUMENTS – SECTION 93 TO 100

As the name suggests the word ambiguous means and suggests something that is vague or unclear in nature and form, to the extent that it would be difficult to draw a conclusion out of it, with respect to a document, it could mean that either the document so produced has an unclear language or the same when applied to the facts of a given case may cause reservations and doubts. In this regards the Indian Evidence Act provides two types of ambiguities.

1. **PATENT AMBIGUITY –** Section 93 and 94 of the Act provides for this provision. In layman terms a patented ambiguity can be suggested or symbolized as a defect in a given document pertinent to a case which is ostensible on the face of it, meaning that any individual going through such document has the same is a man of ordinary intelligence can easily make out and detect such a defect. In the case of ***Keshav Lal v.***

[5] AIR 1980 All 180.
[6] AIR 1967 SC 106.
[7] (1996) 9 SCC 370.

Lal Bhai Tea Mills Ltd[8] it was observed by the Hon'ble Supreme Court that no extrinsic evidence can be afforded to subtract a patent defect in a given document. In its place, the concerned Court can in such cases of defect receive the benefit of additional documentary contents to satisfy such defects.

2. **LATENT AMBIGUITY –** As opposed to patent defect, latent defect is a defect which is not apparent on the face of a document, meaning which cannot be made out by a man of ordinary intelligence. This provision is contained in Section 95 to 97 of the Indian Evidence Act. The three Sections of 95, 96 and 97 lays this defect down in a three-principle manner.

   Section 95 - of the Indian Evidence Act, 1872 words around evidence to document unmeaning with reference to prevailing facts. If we try to put it easily and simply, it would suggest that when the language of a document with respect to the case in question, is bare and flawless but in the process of applying the equivalent to the prevailing facts, the conclusion turn out to be meaningless, then in such circumstances, evidence can be provided in order to add meaning to the meaningless.

   Section 96 – The Second type of latent ambiguity is iterated in Section 96, which provides for the provision of evidence as to the appliance of language which can pertain to any one barely of numerous persons.

   Section 97 - of the Indian Evidence Act, 1872 addresses the evidence as to the application of language to one of two sets of facts to neither of which the whole correctly applies. This signifies that wherever the semantics of a document partly pertains to one party and partly to the other, evidence can be provided to demonstrate on which facts the documents provided apply.

In a very recent judgement, the Hon'ble Supreme Court held that, the rule of best evidence is exhaustive in nature and "so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it."

THE PRINCIPLE OF ADVERSE INFERENCE AND THE RULE OF BEST EVIDENCE

[8] AIR 1958 S.C 512.

As we read the term adverse the first connotation that comes to mind is a negative one, for an instance, when we take a medicine or a drug, the very basic question that we ask is, are there any adverse effects to this, meaning we give it a negative connotation to it.

The same is with the principle of adverse inference as mentioned in the Indian evidence Act, this principle stems out of the very basic question, "***Why would the prosecution not lead the best evidence available to establish it case?***"

In a number of cases the answer to this question has been seen and observed in a view that most the times when the prosecution does not lead the best evidence is because, it can deteriorate its case and in return benefit the accused. To avoid such miscarriage of justice and to prevent the investigating authorities and agencies the rule of adverse inference was introduced.

Section 114 of the Indian Evidence Act talks about this Rule ***"Court may presume existence of certain facts. – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***[9]

The Supreme Court and various other High Courts have relied upon illustration (g), of the Section mentioned above(114) which states "***that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it***" while deciding and passing the judgement in a plethora of cases, wherein the Courts in plain and clear words stated that when the prosecution was in a capacity to lead the best evidence to the court and when in such a case the latter is unable to do so, then such an act would lead the court to draw an adverse inference against the prosecution, and would in turn benefit the accused.

This rule is one which is non-negotiable and the same was held by the Apex court wherein the case of ***Tomaso Bruno & Anr vs State of U.P*** the best piece of evidence in order to prove a murder was the CCTV footage, which had recorded the accused in the act of committing the crime, and it was stated by the court that it is the duty of the prosecution to produce such evidence before the court, failure to do so would be detrimental to the prosecution's case.

In the same case the prosecution in the argument advance took the shield of Section 106 of the Indian Evidence Act and argued that, it is duty of the person who has certain knowledge to the facts of the case to prove the presence of such knowledge. However, the Apex Court took the view that in order to take the defence of Section 106, the prosecution first has to produce the

[9] Indian Evidence Act, 1872.

best evidence which it has very well and without any doubt agreed that it would be the CCTV footage. Failure to produce the same would not only lead to faulty investigation but also the suppression of best evidence, which would thereby result in a great travesty of justice.

All of this being stated adverse inference cannot be applied blindly to a case in question, the courts are required to understand evaluate the relevance of the document being withheld and then apply the said rule.

PRIMARY PRINCIPLES ON BURDEN OF PROOF

The primary principle of burden of proof is always static in nature and does no shift, that same is vested in the person who would fail if such evidence is not produced in the court of law. It is otherwise interesting to note that the onus of proof shifts on producing sufficient evidence from the person on whom such burden initially lied. To further present more clarity on this subject the Supreme Court in the case of ***Addagada Raghavamma v Addagada Chenchamma***[10] held that there is a major and essential difference between burden of proof and onus of proof, the burden in any case does not shifts from the person who is supposed to prove it, but on the contrary the onus of proof shifts, in a way that when one person has by all means possible has proved his side of the case with adequate evidence then in such a case the onus of the proof would shift onto to the other party.

Furthermore, in the case of ***Arumugham v. Sundarambal,*** AIR 1999 SC 2216, it was held that, the concept and question of burden of proof is not relevant when both the parties have adduced the evidence from their respective side in the best way and manner possible, the question will only arise when the person on whom such burden lied failed to discharge it.

ADVERSE INFERENCE ATTRACTED WHEN A PARTY WITHHOLDS DOCUMENTS, EVEN IF HE HAS NO BURDEN

There have been numerous instances when a party upon whom the burden of proof did not lie, withheld important evidence in order to weaken the case of the party on whom such burden lied, in such instances it is always the accused who suffers. For an instance, in a drug trial under the NDPS Act, as per Section 35, of the same, the culpable mental state or the burden of proof lies on the accused to prove that he/she is innocent, this provision can easily be used to the

[10] AIR 1964 SC 136.

disadvantage of the latter by the investigating agencies or the prosecution, wherein they could withhold necessary evidence which could benefit the trial of the accused to their advantage, to avoid this miscarriage of justice The Supreme Court in the case of ***Gopal Krishnaji Ketkar v. Mahomed Haji Latif***[11] observed that even if in a given case in point the burden of proof does not lie on a respective party, the court can still draw an adverse inference against such party for withholding important document in his/her possession, which could have been vital to the case and would have in turn helped in throwing some light on the given issue.

ADVERSE INFERENCE DEPICTED IF A PARTY DOES NOT SCRUTINIZE HIMSELF: NOT AN INFLEXIBLE RULE

The Supreme Court in the case of **Vidhyadhar v. Manikrao**[12] held that, if an individual who is a party to a suit chooses not to testify and appear in the witness box, then in a such a case no adverse inference can be drawn against such party, to the extent that it would be incorrect to do so. To add more meaning to this in the case of **Janki Vashdeo Bhojwani v. Indusind Bank Ltd.** the apex Court trailed the judgement in Vidhyadhar **v. Manikrao**, and held that, when an individual who is a party to a suit chooses not to present himself/herself in the witness box then in such a case the individual cannot delegate this right to any other person. Not even a person holding a power of attorney can appear in the box. That being stated, this principle is not invariable in nature, two contra-situations exist;

1. This stipulation is applied only on the party upon whom the burden of proof lies;
2. It is no applicable in situation and cases wherein there is not much value to oral evidence.

CONCLUSION

The best evidence rule is a part doctrine of adverse inference, both these principles go hand in hand, meaning if the best evidence is not adduced adverse inference would be drawn, and vis-à-vis. These are rather essential principle in taking into account the Indian Evidence Act, as it provides a safeguard to the accused, or any other party, who can be a victim of any scheme plotted by the prosecution, when not producing the best evidence in the court of law.

[11] AIR 1968 SC 1413.
[12] AIR 1999 SC 1441.