Modes of Proving Execution of Documents in Oral Evidences

BY:
RAVI SHANKAR MISHRA
SENIOR CIVIL JUDGE, VIKASNAGAR, DEHRADUN

Documentary evidence means and includes all documents including electronic records produced for the inspection of the Court.

Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter.

In order to prove a documents original document is to be produced. Documents produced in court have to pass through two steps:

(1) Admission and Exhibitions

(2) Proof of contents, Veracity, reliability etc)

Proof of contents of document: Mere marking of a document cannot be said to be the proof of said document. The document has to be proved in accordance with law and the same has to be appreciated in order to ascertain the genuineness of the document with other materials available on record. In that context, both the parties would get ample opportunity to counter those documents as well to submit their arguments with reference to the evidence already4 recorded by the court. S. Ravichandra vs. M/s. Elements Development Consultants, Bengaluru, 2018 Cri. LJ 4314 (Kar).

Proof of contents of document

Normally, any party who wants to prove the content of the document is required to lead evidence by production of the original document before the court through its author. Under Section 61, the original document can be presented before the Court through the author, who created the document and it can be proved. G. Subbaraman vs. State, 2018 Cri. LJ 2377 (Mad).

Proof of contents of documents: The legal position is not in dispute that mere production and making of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can Birendra Kumar Jaiswal, 2003 (8) SCC 745: AIR 2004 SC 175; see also, Alamelu vs. State represented by Inspector of Police, 2011 (2) SCC 385: AIR 2011 SC 715.

Proof of documents

A document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial. Documents can be proved in the following ways:

(1) Admission of the person who wrote or signed the document.

(2) Evidence of a person in whose presence the document was signed or written ocular evidence

(3) An attesting witness

(4) Opinion of a person who is acquainted with the writing of the person who signed or wrote

(5) Admission made by the person who signed or wrote the document made in judicial proceedings

(6) Evidence of handwriting experts opinion evidence/ scientific evidence

(7) Evidence of a peron who in routine has been receiving the document, or a document signed by such a person in the ordinary course of his business or official duty, though he may have never seen the author signing the document.

(8) Public document

(9) Invoking presumptions under section 79 to 90A and 114

(10)Circumstantial evidence

(11) Court Comparison

Recitals in documents

The recitals in the document do not become a part of the evidence. They are assertions by a person who is alive and who might have been brought before the Court if either of the parties to the suit had so desired. This distinction is frequently overlooked and when a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence. Nihar Bera vs. Kadar Bux Mohammed, AIR 1923 Cal 290.

Admissibility of carbon copy of documents:

Since the carbon copy is made by one uniform process the same was primary evidence within the meaning of Explanation 2 to Section 62 of the Evidence Act. Therefore, the medical certificate was clearly admissible in evidence. That apart, there is strong, reliable and dependable evidence of the prosecution witness which clearly proves that the prosecutrix was raped by the appellant. Prithi Chand vs. State of Himachal Pradesh, 1989 (1) SCC 432: 1989 Cri. LJ 841 (SC).

Admissibility of carbon copy of documents: The post- mortem report is to be prepared in triplicate by pen-carbon and in the instant case also, the post-mortem report was6 prepared by pen-carbon in one uniform process and as such, in view of the provisions of Section 62 of the Evidence Act, such carbon copy is primary evidence. Md. Yakub Ali vs. State of Tripura, 2004 Cri. LJ 3315 (Guj).

Admissibility of counterpart originals:

Section 62 of Evidence Act deals with Primary evidence. Explanation 2 says that where a number of documents are made by one uniform process, each is primary evidence of the contents of the rest. Under Explanation 2, all the documents must be taken at a time under one uniform process in which case, each of such documents is a primary evidence of the contents of the rest. Printing, cyclostyle, lithography are some mechanisms which are recognized under law through which documents can be obtained under a uniform process. Thus, documents prepared under the uniform process of either printing or cyclostyle or lithography cannot be mere copies in strict legal sense of the term, in fact, they are all counterpart originals and each of such documents is a primary evidence of its contents under Sections 45 and 47 of the Evidence Act. Surinder Dogra vs. State, 2019 Cri. LJ 3580 (J&k).

Proof of execution of documents:

Proof of handwriting:

Except when judicial notice is taken of official signatures, the handwriting or signature of unattested documents must be proved. 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. This can be done in the following ways:

1. By calling the writer;

2. by an expert;

3. by a witness who is familiar with the handwriting of the writer; (AIR 1983 SC 684 "State of Bihar vs. Radha Krishna Singh")

4. by comparison of the disputed writing, signature or seal with some other admitted or proven writing, signature or seal of the person; or

5. by admission of the party against whom the document is

tendered.

Proof of sealing:

The sealing of a document can be the subject of judicial notice, proof or presumption. When the seal of a foreign notary is put on a document, a presumption regarding the genuineness of the seal of the notary can be raised.

Proof of attestation:

If a document is required to be attested by law, it must not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if such a witness is alive and subject to the process of the Court and capable of giving evidence. (AIR 1959 SC 443 “H. Venkatachala Iyengar vs. B.N. Thimmajamma”)

If there is no denial of execution of document, then it is not necessary to call a witness for the purpose of proving the same. For the purpose of valid attestation of a Will under Sec. 63, it is absolutely necessary that the attesting should either sign or affix thumb impression or mark himself, as the Section does not permit an attesting witness to delegate that function to another.

In the decision reported in S.R.Srinivasa & others vs. S. Padmavathamma, 2010 AIR SCW 3935 it is held that mere signature of scribe cannot be taken as proof of attestation without evidence regarding other witnesses to Will.

Scribe:

The party who sees the Will executed, is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness. The scribe or writer of a document may perform a dual role; he may be an attesting witness as well as the writer.

Sub-Registrar and Identifying Witnesses:

A Will is not required by law to be registered Sec. 63 of Indian Succession Act, merely requires that the Will should be attested by two or more witnesses. Each of whom, has either seen the testator sign, or affix his mark to the Will, or has received a personal acknowledgment of his signature from the testator, and each of the witnesses should sign the Will in the presence of the testator- no matter when, but before the Will had come into operation; where before it was presented for registration, it bore the signature of only one attesting witness, the signature of sub-registrar and of another person who are proved to have signed the Will in the presence of the testator, though as registering authority or an identifying witness, after its execution had been admitted before them by the testator must be regarded as sufficient compliance with Sec. 63 Succession Act. Reference may be made to the decision reported in Pentakota Satyanarayana vs. Pentakota Seetharatnam, AIR 2005 SC 4362.

Sec. 69: Proof where no attesting witness found:

The words ‘can be found’ in the Section are not very appropriate and must be interpreted to include not only cases where the witness cannot be produced because he cannot be traced but also cases where the witness for reasons of physical or mental disability, or for other reasons, when the Court considers sufficient, is no longer a competent witness for the purpose, as is provided in Sec. 68 of the Act.

If no attesting witness is available, it must be proved that attestation of one attesting witness is in his own handwriting and that the signature of the executants is in his handwriting. Signature includes mark.

When both the attesting witnesses are no more alive, Section 68 Indian Evidence Act cannot apply. So by applying Section 69, it has to be proved by other evidence as mentioned in Section 69. The word not found occurring in Section 69 of the Act should receive a wider purposive interpretation.

Bonds:

Although, for the purpose of the Stamp Act, it may be necessary for a bond to be attested, it is not a document required by law to be attested within the meaning of Sec. 68.15

If document is not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act unless its execution by the person by whom it purports to have been executed is specifically denied, Rosammal Issetheenammal Fernandez (dead), (2000) 7 SCC 189 .

In Irs vs. Joosa Mariyan Fernandez Wherein, it is held that:

“Under the proviso to Section 68 the obligation to produce at least one attesting witness stands withdrawn if the execution of any such document, not being a will which is registered, is not specifically denied. Therefore, everything hinges on the recording of this fact of such denial. If there is no specific denial, the proviso comes into play but if there is denial, the proviso will not apply. In the present case as we have held, there is clear denial of the execution of such document by the plaintiff, hence the High Court fell into error in applying the said proviso which on the facts of this case would not apply. In view of this the very execution of the gift deed, Exhibit B-1 is not proved. Admittedly in this case none of the two attesting witnesses has been produced. Once the gift

deed cannot be tendered in evidence in view of the non- compliance of Section 68 of the Indian Evidence Act, we uphold that the plaintiff has successfully challenged its execution. The gift deed accordingly fails and the findings of the High Court contrary are set aside. In view of this no rights under this document accrue to the respondent concerned over Schedule A property which is covered by this gift deed.”

Primary Evidence:

Documents must be proved by producing them at trial. Section 62 of Indian Evidence Act defines primary evidence which means a documents itself produced for inspection of Court.

Secondary evidence of the contents of private documents is admissible only if the original document is not in existence or not available. Therefore, it is usually necessary to account for the absence of the original and for this purpose, proof of primary evidence is not available may be required.

What is secondary evidence?

Secondary evidence are;

1. Certified copies of documents;

2. copies made from the original by a mechanical processwhich ensures 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; and

5. oral accounts of the contents of a document given by some person who has himself seen it.

The contents of documents can be proved by oral evidence. However, the contents must be proved by admissible evidence. If the truth of the facts stated in the documents itself is in issue, then, proof of execution of the document should not be equated with the proof of facts stated in the document.

Production of Certified Copy:

Mere production of a certified copy of a document more than 30 years old, is not sufficient to raise a presumption under Sec. 90 of Evidence Act, regarding the genuineness or execution, although, the certified copy may be used to prove the contents of the document. Mere production of a certified copy of the registered document would not amount to proving the original deed by way of secondary evidence.

Proof of lost or destroyed documents:

Secondary evidence can be accepted by the Court for the existence, condition or contents of a document if the original has been lost or destroyed. In this regard, the decision reported in AIR 1979 SC 1567 “Aher Rama Gova vs. State of Gujarat” may be relied upon.

Secondary evidence can be accepted by the Court for the existence, condition or contents of a document; 1) when the original appears to be possession or power of the person against whom the document is to be in the possession or power of the person against whom the document is sought to be proved, or of a person not subject to the power of the Court or of any person legally bound to produce it, who has not it despite being given the required statutory notice,

2) when the party offering such evidence cannot, though no default or neglect of his own, produce the original in reasonable time. (AIR 1975 SC 1748 “Ashok Dulichand vs. Madhavlal Dube”)

3) when the original document is not easily movable,

4) when the original document comprises numerous accounts or other documents which cannot be conveniently examined in Court and the fact to be proved is the general result of the whole collection.

Photocopies of documents

The photocopies which are exhibited were not public documents. Therefore Section 65 (e) does not apply. Though the seal and signature of the manager on those photocopies mention it as ‘certified copy’, in fact it does not fall within the meaning of certified copy as referred under Section 65(e) or 65(f), nor such certificate found on the exhibits satisfies the mandate of Section 4 of Banker’s Book Evidence Act. Refer G. Subbaraman vs. State 2018 Cri. LJ 2377 (Mad).

Proof of Call Records

The information contain in the call records is stored in huge servers which cannot be easily moved and produced in the Court. Hence, printout taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personalknowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65 of the Act.

Admissibility of electronic evidence:

The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded.

In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65-B(4) of the Evidence act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not22 always mandatory. Accordingly, the legal position was clarified on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act.

Necessity of certificate:

An electronic record is not admissible unless it is accompanied by a certificate as contemplated under Section 65-B(4) of the Indian Evidence Act. The Court emphasised that non-production of a certificate under Section 65B on an earlier occasion is a curable defect. Union of India vs. Ravindra V. Desai, (2018) 16 SCC 272: AIR 2018 SC 2754.

Non-production of certificate:

The crucial test is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency as held in Sonu @ Amar vs. State of Haryana, (2017) 8 SCC 570: AIR 2017 SC 3441: (2017) 3 SCC (Cri) 663.

THUMB IMPRESSION

Document executed by illiterate person. Such person who has put the thumb impression need not say that it is his thumb impression. Suffice to say that this is the document on which he put thumb impression. Marking of thumb impression as exhibit is wrong (AIR 1963 Rajasthan 84 – Bheek Chand vs. Parbhuji).

Execution of a document by pardhanashin woman.

Pardanashin lady has to admit the contents of the document. In India pardahnashin ladies have been given a special protection in view of the social conditions of the times; they are presumed to have an imperfect knowledge of the world, as a result by the pardah system they are practically excluded from social intercourse and communion with the outside world. AIR 1925 PC 204, Rel. on. – AIR 1963 SC 1203 “Kharbuja Kuer vs. Jangbahadur Rai”.

How to prove the Photographs?

By producing both photographs and their negatives. By examining the photographer, a person who has developed the photographs. If other side admits the contents of the photographs, then negatives need not be produced. In case of digital photographs, production of photos and

CD is necessary.

If the photograph confronted is admitted, then it can be said that photograph has been proved. possibility of tricking the photograph. Court has to be more cautious. There may be To avoid the tricking This is well discussed in (1991 Cr.L.J. 978, AIR 1968 SC 938, AIR 1976 Bombay 204).

TAPE RECORDED STATEMENT

Whether tape recorded statement is admissible in evidence?

Yes. The person who speaks must identify that it is his voice. Accuracy of the recording must be proved. must be free from tampering. Such statement Subject matter of statement must be relevant (AIR 1968 SC 147 “Yusufalli Esmail Nagree vs. State of Maharashtra”.

news paper items are concerned it is neither primary nor secondary evidence but it is second hand secondary evidence. Therefore, the news paper items cannot be admitted in evidence unless the original manuscript is produced (AIR 1994 SC 1733 “Quamarul Islam vs. S. K. Kanta”, wherein at head note D it is held that “Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Evidence Act.”

COUNTER PART

Counter Part means duplicate of original. So, far as evidentiary value attached to such document is to the effect that parties are bound by the contents of counter part signed by both the parties. For example Lease Deed, one retained by the land lord and one given to the tenant.

Whether video conferencing is permissible?

Yes: So, far as video conferencing is concerned it is a latest technological invention. It enables the Court to record the evidence without bringing the accused to Court. Evidence recorded through video conferencing is admissible in evidence (AIR 2003 SC 2053 “State of Maharashtra vs. Praful B. Desai”).

DEPOSITIONS IN EARLIER PROCEEDINGS

To prove the statement of a witness in earlier proceedings with regard the admission true copy cannot be confronted. Certified copy of the deposition can be confronted. If such deposition is admitted it has evidentiary value (AIR 1974 SC 117 "Biswanath Prasad vs. Dwarka Prasad"). However, if the witness in earlier proceedings has deposed that he is the owner of Vidhana Soudha and if suchdeposition is produced in subsequent proceeding it cannot be relied upon (AIR 1974 SC 280 "Krishnawati vs. Hans Raj").

So, far as sale deeds are concerned registration is compulsory. If an unregistered sale deed is produced for collateral purpose (purpose other than the enforcing) it can be received on record (AIR 1936 Calcutta 130).

In case of sale deeds, if there is a change in date of execution and date of registration. The date of execution is to be taken into consideration as it to relates back to the date of execution (AIR 1998 Patna 1), (AIR 1961 SC 1747 – Ram Saran Lall vs. Domini Kuer)

So, far as gift deeds are concerned attestation is necessary and it is to be proved in accordance with law. To prove the same examination of at least one attesting witness is necessary (AIR 1975 Patna 140).

Section 45 (Indian Evidence Act): Opinion of Experts
Section 47 (Indian Evidence Act): Opinion as to Handwriting when relevant
Section 60 (Indian Evidence Act): By calling a person in whose presence the said document has been written or signed
Section 65 B (Indian Evidence Act): Admissibility of electronic document
Section 68 (Indian Evidence Act): By calling of attesting witnesses and Section 63 Indian Succession Act regarding Will, Gift Deed and Mortgage Deed
Section 73 (Indian Evidence Act): Comparison of signature writing or seal with others admitted or proved
Section 73 A (Indian Evidence Act): Proof as to verification of digital signature

CONCLUSION

- Documentary evidence plays a crucial role in the legal system and is widely used in courts to prove facts and establish truth. The Indian Evidence Act, 1872 provides for various provisions related to the admissibility and proof of documentary evidence.
- Section 61 to 72 of the above Act covers aspects of documentary evidence, such as proof of handwriting, attestation, admission by parties and exceptions to the rule of attestation. It is important to note that documentary evidence has to be properly authenticated and the accuracy of the record must be established for it to be admissible in court.