-*Dr. Ajay Nathani*

Appreciation of evidence

Why evidence is to be appreciated

In a criminal case prosecution comes before the court alleging that accused has committed an offence of a particular nature. The accused pleads denial. In the trial the prosecutor places before the court the facts to prove the guilt of the accused, the defence lawyer has to prove non-involvement of the accused and the judge has to decide what is proved and what is not proved. Neither the judge nor any of the advocates appearing for rival parties have seen the incident. The accused and the complainant in case of criminal trial and the plaintiff and defendant in civil trial may not be giving true facts required to be proved before the court. In this scenario entire evidence adduced before the court if relied by the court will lead the court only to confusion. The court in the quest of truth has to search for proved facts from the reliable evidence and derive conclusion on the basis of these reliable proved facts. This entire process of emergence of truth before the court from the evidence placed before the court is appreciation of evidence.

What is evidence?

Meaning of word evidence explained in the Indian Evidence Act is different from the meaning of evidence or proof used in common parlance. Word evidence is used in the Evidence Act itself with different meanings at different places. Evidence as defined under section 3 of the Evidence Act means and includes,

1. All statements which the court requires to be made before it. Such statements are called oral evidence,
2. All documents including electronic records produced for the inspection of the courts, such documents are called documentary evidence.

What statements the court allows to be made before it by the witnesses and what document the court allows to be produced is subject to the provisions under the Evidence Act. Section 5 of the Evidence Act specifies what evidence the court will allow to be adduced. In any suit or proceeding evidence may be given of the existence of or non-existence of every fact in issue and of such other facts declared to be relevant. Before knowing what is fact in issue, we have to know what is meant by fact. Fact as defined in the Evidence Act means and includes,

1. Anything, state of things, or relation of things, capable of being perceived by the senses,
2. Any mental condition of which any person is conscious.

In view of this definition anything and everything existing and happening is a fact. In a prosecution for rash and negligent driving the driver of the vehicle was in possession of vehicle, the vehicle was in operation, the vehicle while

operating was creating a sound, the driver was conscious of reaching to a particular place at particular time are all facts but all these facts are not necessary to be proved in order to prove rash and negligent driving. The Evidence Act therefore provides that the court will allow evidence regarding fact in issue to be adduced. Fact in issue as defined under the evidence act means and includes,

1. Any fact from which either by itself or in connection with other facts existence, nonexistence, nature or extent of any right, liability or disability,
2. Asserted or denied in any suit or proceeding necessarily follows.

In view of this definition if we consider the above example of rash and negligent driving the prosecution will have to prove the fact the driver was driving the vehicle and his driving was either eroding the rules of the road or eroding the duty cast upon him as a driver or the nature of driving was such that it will result in accident and the driver aware of this possibility was continuing to drive in the same manner and not all the facts enumerated above.

The Other facts which the court allows to be adduced under the Evidence Act are relevant facts. What is relevant to the fact in issue is defined under Section 6 to 55 of the Evidence Act and it include facts forming part of same transaction, occasion, cause and effect of fact in issue, motive, preparation and previous and subsequent conduct, admissions, confessions, dying declarations, opinion of expert, evidences to character, previous statements regarding fact in issue etc. Question arises now why the Evidence Act allows adducing evidence of so many facts instead of keeping the provisions confined to evidence regarding fact in issue. Answer to this question the permissible evidence of relevant facts is used for appreciation of evidence. This entire evidence allowed to be adduced before the court may or may not emerge as a proof. On the basis of the evidence produced before the court the court has to decide what is proved, what is disproved and what is not proved.

As defined in the Evidence Act *a fact is said to be proved when,*
After considering the matter before it,
The court either believes it, or
Considers its existence so probable that a prudent man ought,
Under the circumstances of the particular case,
To act upon the supposition that it exists.

As I stated earlier the court has not seen the incident but it requires that the evidence placed before it satisfies it that the incident occurred in the manner in which it is pleaded to have been occurred. As the definition goes what the court has to consider is the matter before it that means entire admissible evidence. If the admissible evidence satisfies the court that the fact exists then there is no question of further test. The second option available with the court is to apply test of a prudent man. If the court considers that the evidence is sufficient to

provoke a prudent man to believe its existence in the particular circumstances of the case and to act upon it then the court will consider the fact is proved. The definition of disproved is converse to the definition of proved. The fact that is neither proved nor disapproved is not proved. Considering the stages of the trial the court will decide what is proved and what is disproved at the end of the trial after hearing the arguments. Till then the things are hanging in the mind of the judge like a thriller movie. It is better for the judge if stick to the rule of 'one at a time' during the trial. At the stage of adducing evidence, he should allow the parties to adduce all admissible evidence keeping in mind that he is discharging the duty of providing fair trial in criminal cases as required under article 21 of the Constitution and fair trial in civil cases as required by the code of civil procedure.

How to appreciate the evidence

There are several manners in which testimony of the witnesses is tested in the quest of finding what is proved. I will concisely deal with some of the manners.

Proved facts emerging after the cross examination

Section 137 of the Evidence Act prescribes 3 stages of the examination, examination in chief, cross examination and re-examination. Section 138 creates statutory right for the adverse party to cross examine the witness, if it so desires and right in the party calling the witness to re-examine if the court permits. If new facts are brought in the re-examination the adverse party will have right to re-cross examination. Evidence of a witness is complete when he is examined and cross-examined and if required reexamined ad re cross-examined. Proved facts emerging after searching cross examination discarding the disproved facts and not proved facts will only be used for further appreciation. So first stage is to find out which proved facts emerged from the evidence of a witness on cross examination. Take an example of the case of **Muthu versus state of Karnataka 2002 CriLJ 3782 SC**. The facts are very simple. Mohan and his wife who is the author of FIR were returning home in the evening by the road. Mohan wanted to ease himself therefore went to the edge of the road and was easing himself. The accused came there and objected to the act of the Mohan. Mohan said that it's the public place and therefore he is passing urine by the edge of the road. The accused displeased with his act and answer stabbed him by a knife and fled away. He was seen by two witnesses while he was running away. Wife has taken Mohan to the hospital with the help of two constables who came to the place of incident after the incident but he succumbed to the injuries on the way to the hospital. The wife deposed before the court that she had seen the accused for the first time at the time of incident and identified him in the court. There was however no test

identification parade. It is brought in cross examination that name of the accused is mentioned in the FIR lodged by the wife after the incident. The wife was unable to explain in cross examination how she named the accused in FIR when she was not knowing him. By her cross-examination suspicion is created about her statement that the accused was not known to Mohan and her before the incident creating doubt about the cause and motive of the incident.

Use of previous statement

Section 145 of the evidence act permits cross examination as to previous statement in writing and relevant to matter in question without such writing being shown to the witness. It is also not necessary that such writing should be proved before referring it to the witness, however when the writing or any portion of the writing is intended to be used for contradicting the witness then the writing or that part of the writing must be shown to the witness. In the criminal trial FIR, previous statement of the witnesses before the police and any other relevant writing can be used to contradict the witness. In civil cases any writing relevant to the facts of the case may be used to cross-examine or contradict the witness. The contradiction and omission in previous statement and statement before the court may be used to create suspicion about truth of witness. How contradictions and omissions are recorded is an independent subject and will be dealt separately. As mentioned in the previous example, wife of the deceased claimed in examination in chief that she had seen the accused for the first time at the time of incident. In cross examination however she contradicted her statement in the FIR where she mentioned the name of the accused disclosing that she was knowing the accused from prior to the incident. In a civil suit where the plaintiff claims that he is a partner of a particular business and claims recovery of share in profit maybe contradicted with previous writing in which he has given up his claim as partner of the firm or given in writing that he received in full his profit and investment in the business of firm.

Use of corroborative evidence

It's not a rule of law that there can't be a conviction in criminal case only sole testimony of a witness or the right claimed in the plaint cannot be proved by examining only the plaintiff if their testimony is unimpeached in cross examination and no material is brought by adversary to disbelieve the sole testimony. As held in the case of **State of Maharashtra vs Chandra Prakash AIR1990 SC 658** in a case of rape sole testimony of the prosecutrix without corroboration of medical evidence is sufficient to prove the guilt of the accused in a given case. In many of the criminal cases the prosecution relies on multiple witnesses, documentary evidence, collection of evidence from the spot

recorded in spot panchnama, medico legal evidence, inquest report, discovery of weapon, confession or extra judicial confession of the accused, dying declaration of the deceased, evidence of motive, previous or subsequent behaviour of the accused etc. In civil cases also besides examining party reliance is placed on the evidence of witnesses and documents. When such evidence of corroboration is adduced, the evidence of the complainant or the party is tested on the basis of corroboration lend or denied by the witnesses. Again, we will consider the case of **Muthu versus state of Karnataka** (cited Supra).Wife of the deceased deposed that the accused left the knife i.e. weapon of offence at the place of assault and flee way. The two witnesses who are for the prosecution had seen the accused running away from the place of incident. Two witnesses deposed before the court that they saw the accused running away from the place of incident with a knife in his hand. The evidence of witnesses is thus contradictory to the evidence of the wife of the deceased regarding the fact of presence of weapon of offence at the place of incident.

Evidence found at the place of incident recorded in spot panchnama

One of the essential and immediate step in the investigation of a criminal case is to inspect the place of incident as early as possible and record inventory of the facts found there and seize the articles, if any, found there. In many cases medicolegal evidence is also found at the place of incident. In case of causing bodily injuries blood of the victim, the weapon, some articles lying behind on the spot belonging to victim or the accused may be found at the place of incident. This evidence should corroborate the testimony of the complainant. If there is glaring variation between the two, it will adversely affect the testimony of the complainant. Again, we will consider evidence in the case of **Muthu vs state of Karnataka** (Supra). The complainant stated that the accused left behind weapon of offence at the place of incident. The weapon was however not ceased by the police from the place of incident. It is shown to have been discovered on the basis of confessional statement of the accused after one month of the incident when the accused was arrested. The Supreme Court considered this as a glaring inconsistency creating disbelief about the evidence of the complainant.

Evidence collected from the body of the victim

This evidence is very useful to corroborate testimony of the complainant particularly in cases of assault and sexual assault. In case of rape, marks of exercise of force and injury to the prosecutrix to overpower her, blood and skin of the offender in the nail clippings of the victim, semen of offender in the private parts and on the clothes of victim are some of these aspects. The evidence so collected is useful to test the creditability of the evidence of the complainant.

Evidence collected from the body of the accused

In case of rape or in case of causing body injury the evidence like presence of pubic hair of the prosecutrix on the private parts of the accused, blood stains of the blood of injured victim may be found on the body or clothes of the accused. Blood samples collected of the accused and victim and its pathological report is also evidence. These facts are also available for corroborating or contradicting the complainant.

Evidence of seizure

During the course of Investigation seizure is done more than ones. If weapon is used for causing offence it is seized, clothes of the accused and the victim are seized, in case of offences in respect of property the property seized. These are the seizures made in general manner i.e. by recording punchnama in presence of witnesses. There may be a seizure on the basis of confessional statement by the accused before the police. Section 25 of the Evidence Act makes the confession made by the accused to the police inadmissible. Section 26 makes the confessional statement of the accused made while he is in police custody inadmissible. Section 27 however provides that statement made by the accused while in custody of the police leading to discovery of fact is admissible. The part of the confession leading to the discovery of fact only is admissible. In case of theft the evidence of discovery is very much material because if the stolen property is discovered on the basis of statement of the accused it raises a presumption under section 114 of the Evidence Act shifting the burden of the accused to explain the custody of the stolen property. The evidence of seizure is also material evidence to corroborate or to contradict the complainant. Again we refer to the case of **Muthu vs state of Karnataka** (Supra).As stated earlier the complainant stated that the accused left behind knife at the place of incident. The police however came with a case that the knife was seized from the possession of the accused on the basis of confessional statement made by him. The evidence of discovery contradicts the evidence of the complainant about the presence of weapon of offence at the place of incident. The discovery was itself discredited because one of the witness deposed before the court the weapon of offence was shown to him at police station on the next day of the incident and he identified the same. This is how the evidence of seizure was used to appreciate evidence of complainant.

Statement of witnesses recorded under section 162 of the code of criminal procedure.

The investigating officer has to record statements of witnesses at the earliest. Procedure to record the evidence is given under section 161. Section162 provides procedure or rather restriction of use of the statement so recorded.

The statement can be used for recording contradiction with permission of the court by adopting requirements of S. 145 of the Evidence Act. Guidance as the how the contradiction is to be recorded is given by the Supreme Court in the case of **Tahsildar Singh And Another vs The State Of Uttar Pradesh AIR 1959 SC 1012.** Important paras of the Judgement are as under,

"At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police- officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by s. 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar"

.It is broadly contended that a statement includes all omissions which are material and are such as a witness is expected to say in the normal course. This contention ignores the intention of the legislature expressed in s. 162 of the Code and the nature of the non-evidentiary value of such a statement, except for the limited purpose of contradiction. Unrecorded statement is completely excluded. But recorded one is used for a specified purpose. The record of a statement, however perfunctory, is assumed to give a sufficient guarantee to the correctness of the statement made, but if words not recorded are brought in by some fiction, the object of the section would be defeated. By that process, if a part of a statement is recorded, what was not stated could go in on the sly in the name of contradiction, whereas if the entire statement was not recorded, it would be excluded. By doing so, we would be circumventing the section by ignoring the only safeguard imposed by the legislature, viz., that the statement should have been recorded.

From the foregoing discussion the following propositions emerge: (1) A. statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness-box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases: (i) when a recital is necessarily implied from the recital or recitals found in the statement ;

illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness-box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word " only " can be implied, i.e., the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement; illustration: in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that be was not of fair complexion; and (iii) when the statement before the police and that before the Court cannot stand together; illustration: the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediatly after stabbing he ran away towards the southern lane; as he could not have run away immediately after the stabbing, i.e., at the same point of time, towards the northern lane as well as towards the southern lane, if one statement is true, the other must necessarily be false. The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case' after comparing the part or parts of the statement recorded by the police with that made in the witness-box, to give a ruling, having regard to the aforesaid principles, whether the recital intended to be used for contradiction satisfies the requirements of law."

Inquest report

When a dead body is found during the course of Investigation inquest report is prepared of examination of corpse and the place where the dead body was found. There is a record regarding clothes on the body of corpse, injuries found on the corpse, appearance of the corpse, marks of identification of the corpse etc. The contents in the report are also useful to corroborate or contradict the complainant and other evidence. In the case of **Ravindra Prakash Haryana versus state of Haryana 2002 SAR suppl 192** the Supreme Court was dealing with a case in which the accused was convicted on the basis of circumstantial evidence. The deceased left his home on 14th of April. He was last seen in the company of the accused on a motorcycle. On 18th of April highly decomposed corpse was found in the nearby village. Wife of the deceased identified corpse as that of her deceased husband. The height of the deceased as per prosecution was 5 feet 7 inches whereas in inquest report height of the Corpse was mentioned as 5 feet 10 inches. The contents of the inquest report created doubt regarding identification of corpse as that of the deceased particularly when he can't be identified by face.

Post mortem notes

Causing death of a person is punishable as an offence of Murder, culpable homicide not amounting to murder, causing death by rash and negligent act. In the trial of all these offences the first and foremost question is of nature of death. Sometimes nature of death is apparent however in many cases doctor's opinion determines nature of death. Take a case of deceased found hanging in his house and the allegations are that he was strangulated and then his body was hanged to make a show of suicide. The postmortem report will elaborate whether the death is by strangulation or by hanging or otherwise. In a trial before me victim's body was found on a railway line cut in several pieces by train. As per PM notes all these injuries were postmortem injuries which proved that the victim was killed and then his dead body was placed on the railway track to show that he committed suicide by throwing himself before a train or he died an accidental death. The postmortem notes also contain observations regarding age of the deceased, what was found in his stomach to point out what he ate before the incident, observations regarding time of death. All these observations in the post mortem notes are useful to corroborate or contradict testimony of the complainant.

Conduct of the complainant and the witnesses

Conduct of the complainant and witnesses either brought on record during the course of Investigation or during cross examination may also be used for corroboration or contradiction. Raising cries at the time of assault, attempts made to resist assault, immediate information given to the police are some of the normal conducts of the victim of the incident. Any conduct adverse to this conduct requires explanation and if, not explained, it will create suspicion about the testimony.

Emergence of proved facts

Testimony of the complainant or eyewitnesses is tested on the basis of above material. The facts which emerge as proved fact on the basis of above test can only be used to convict the accused, believe the case of plaintiff or defence of the defendant. In many judgements of the trial courts it is written that" I have gone through the entire evidence and after close scrutiny of the evidence I come to conclusion……".It is true that the judge has to go through entire evidence and it is his satisfaction which is uppermost to determine some conclusion, however in the judgement judge has to give reasons and demonstrate how he has appreciated the evidence before him to come to particular conclusion. Unless this is done the judgement is not complete.

Different manners of appreciation of evidence

In criminal cases burden is cast upon the prosecution to prove the guilt of the accused beyond reasonable doubt. The Supreme Court in **Rang Bahadur Singh V. State of U.P. (AIR 2000 SC 1209)**observed :

"The time-tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits."

In **State of U.P. V. Ram Veer Singh another (2007 (6) Supreme 164)** Hon'ble Apex Court observed:

"The golden thread which runs through the web of administration of justice in criminal cases is that if two view are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented."

In view of these findings the rule of appreciation of evidence in criminal cases strict appreciation. When the burden is shifted on the defence and the defence adduces evidence to bring its case within exceptions or right to private defence or explanations u/s 299of the Indian Penal Code in case of offence of Murder the evidence adduced by the defence is to be appreciated on preponderance of probabilities. The evidence in civil suits and civil cases is to be appreciated on the basis of preponderance of probabilities. Besides this, confessions, dying declarations are appreciated by applying various criteria are adopted on the basis of judicial precedents.

Conclusion

No doubt advocate has to explain before the court as to how the evidence before the court is to be appreciated however appreciation of evidence is basically the job of a judge and every judge whos to learn how the evidence is to be appreciated. Appreciation of evidence is a skill of judgeship and a person sitting as a judge is not a complete judge unless he knows how to appreciate evidence. This skill of judgeship is required to be acquired by experience but for this purpose the judge from the beginning of his judgeship have to start learning and learn and learn to become an expert in appreciation of evidence.
