Appreciation of Evidence as an Appellate Judge

Speech delivered by Justice A.RAMAMURTHI

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Section – 3 of the evidence Act relate to Interpretation clause defines evidence means and clause 1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters to fact under inquiry, such statements are called oral evidence. 2) All documents produced for the inspection of the Court, such documents are called documentary evidence. The word 'relevant' in the Act means admissible. The Act does not appear to make any distinction between logical relevancy and legal relevancy of all rules of evidence. The most useful and the most obvious is this that the evidence adduced should be alike direct and confined to the matters which are in dispute or which form the subject of investigation. Anything which is neither directly or indirectly relevant to those matters, ought at once, to be put aside. Evidence may be rejected as irrelevant for one or two reasons 1) That the connection between the principal and evidentiary facts is too remote and conjectural, 2) that it is excluded by the state of pleadings or what is analogous to the pleadings, or is rendered superflous by the admissions of the party against whom it is offered.

In order to appreciate the evidence on the part of the Civil Judges, Senior Division, they must be aware that the parties can adduce oral or documentary evidence to prove their cases. The provisions under the Indian Evidence Act 1872 plays a major role in the manner of adducing evidence and also its relevancy. Oral evidence must in all cases be direct. The contents of documents may be proved either by primary or by secondary evidence. Primary evidence means the document itself produced for inspection of the Court. What are secondary evidence has been specifically provided under Section 63 of the Evidence Act. Section 65 relate to cases in which secondary evidence to documents may be given. Section 73 refer to comparison of signature writing or seal with other admitted or proved. Section 74 refer to public documents. Section 76 relate to certified copies of public documents. Section 79 relate to presumption as to genuineness of certified copies. Section 81 relate to presumption of as to Gazettes, newspapers, private Acts of Parliament and other documents. Section 83 refer to presumption as to maps plans made by authority of Government. Section 85 refer to presumption as to powers of attorney. Section 88 deals with presumption as telegraphic messages. Section 89 refer to presumption as to due execution etc., of documents not produced when called for after notice to produce. Section 90 refer to

presumption as to documents thirty year old.

Chapter-VI relates to exclusion of oral by documentary evidence. Section 92 refer to exclusion of evidence or oral agreement. Chapter-VII relates to burden of proof. According to Section 101 whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Section 102 refers to a case on whom burden of proof lies. Section 106 relates to burden of proving fact especially within knowledge of a particular person. Section 107 refers to burden of proving death of person known to have been alive within 30 years. Section 108 deals with burden of proving that a person alive who has not been heard of for seven years. Section 112 relates to birth during marriage conclusive proof of legitimacy. Section 115 relate to estoppel. Section 116 refer to estoppel of tenant and of licensee of person in possession. Section 117 refer to estoppel of acceptor of bill of exchange, bailee or licensee. According to Section 134 no particular number of witnesses shall in any case be required for the proof of any fact. As per Section 136 the Judge has to decide as to the admissibility of Evidence. Section 137 relates to Examination-in-chief. Cross examination and re-examination. Section 141 relates to leading

questions and Section 142 refer cases where leading questions must not be asked. Section 143 refer to leading question when may be asked. As per Section 148 it is the duty of the Court to decide when question shall be asked and when witness compelled to answer. Section 168 empower a Judge to put question or production in order to discover or to obtain proper proof of relevantfacts. But at the same time this section shall not authorise any Judge to compel any witness to answer any question or to produce and document which such witness would be entitled to refuse to answer or produce under Section 121 to 131 of Evidence Act. More over Court cannot compel party to examine any particular witness has been well laid in AIR 1965 Supreme Court 1008.

The Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor is any such rule possible for proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the functions.

Evidence is to be weighed and not counted. What is required in the judge is judicial training and experience and a wide knowledge of men and things. The direct evidence of one witness if believed by the Court is sufficient for the proof of a fact. The general principles are 1) Credibility does not depend on number of witness 2) In general the testimony of a single witness, no matter what the issue or who the person, may legally suffice as evidence upon which the jury may find a verdict. 3) Conversely, the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give quantitative and impersonal measure to testimony.

In determining on the credit due to the witness, the judge should have regard to the following considerations 1) Their integrity 2) Their ability 3) Their number and consistency with each other 4) The conformity of their testimony with experience 5) The conformity of their testimony with collateral circumstances valuable aid is provided by the judge's directions on the following points "who has the burden of proof, what presumptions apply, when corroboration is required that statements are evidence for some purposes and not for others, or against some parties and not against others, that documents are sometimes conclusive and some times merely prima

facie evidence of the facts recorded, that oral evidence is more reliable that that given by affidavit, and that direct and positive testimony is preferable to the speculative opinion of experts.

In appreciating the evidence against the party the prime duty of a court is firstly to ensure that the evidence is legally admissible, that the witnesses are credible and have no interest in implicating him or have ulterior motive.

In order to judge the credibility of witnesses the court is not confined only to the way in which the witnesses have deposed or to the demeanour of witnesses but it is open to it to look in to the surrounding circumstances as well as the probabilities. The real tests are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case. The versity of a witness is judged not solely from his individual statements but from his testimony taken in conjunction with all other facts brought out in the course of the testimony. So far as the appreciation of oral testimony by the appellate court is concerned there are two conflicting view points, viz on the one hand the undoubted duty of the court of appeal to review the recorded evidence and to draw its own inference and conclusions,

and on the other hand, the unquestionable weight which must be attached to the opinion of the judge of the primary court who had the advantage of seeing the witnesses and noticing their look and manner.

Generally, oral testimony can be classified into three categories 1) wholly reliable 2) wholly unreliable 3) neither wholly reliable nor wholly unreliable. Evidence may be accepted partially or in the whole are where there are certain infirmities, the evidence would be of restrictive use. If a witness is reliable on other points, his evidence is to be accepted in proof of those points and disregarded with respect to the point on which he has deposed falsely.

Where there is a conflict of testimony, the appellate court should in order to reverse decision not merely entertain doubts whether it is right but be convinced that it is wrong. In a matter of appreciation of evidence and the credibility of witnesses, the opinion of the trial judge should not be lightly disturbed in appeal. It requires circumstances of exceptional character to justify a reversal.

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When a judge hears and sees witnesses and makes a conclusion or inferences with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. Where the trial court makes no comment on the demeanour of the witness or on his truthfulness apart from comments on probabilities the appellate court is in as good a position to judge of the matter as the trial court.

In the case of first appeals, the appellate court can under Order 41 Rule 27 C.P.Code, receive evidence improperly rejected or reject evidence wrongly admitted by the original court. The words any other substantial cause, in the rule, give a very wide discretion to the appellate court in the matter of admission or additional evidence.

The exclusion of evidence in the lower court is not sufficient

ground for reversing a decree of that court, unless the appellate court comes to the conclusion that the evidence refused, if it had been received, would have varied the decision. Where a court of fact acts partly on irrelevant evidence and it is impossible to say to what extent its mind was affected by such material, the case should be remanded.

The question of the admissibility of insufficiently stamped document once admitted as evidence by a court can form no valid ground of appeal. An appellate court has no right to refuse to admit on technical ground a document which has been received and read in the court below without objection. The decision of the court of first instance as to the admissibility of a document subject to the payment of stamp duty is final and cannot be questioned in appeal and review by the appellate court.

Evidence of collateral facts having no connexion whatever with the principal transaction must be excluded. The facts in issue are facts out of which some legal right, liability or disability involved in the enquiry, necessarily arises, and upon which, accordingly, a decision must be arrived at. Matters which are affirmed by one party to a suit and denied by the

other may be denominated facts in issue; what facts are in issue in particular cases, is a question to be determined by the substantive law or in some case by that branch of the law procedure which regulates the law of pleadings, civil or criminal.

There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision, but in the latter, especially when the offence charged amounts to treason or felony, a much higher decree of assurance is required. Unlike criminal cases, in civil cases it cannot be said that the benefit of every reasonable doubt must necessarily go to the defendant. The entries in the accounts book of the seller are reliable evidence in respect of the contract of sale of goods. In respect of a claim for recovery of advance under an agreement, the best evidence will be that of the executant of the agreement. Though a document is marked by consent the content s of the same cannot be considered as evidence unless there is some proof of the same.

Order 41 Rule 23 relate to remand of case by the

Appellate Court. Before ordering remand, it is to be seen whether the party that is complaining was precluded or prevented from either taking part in the proceeding or from leading evidence or from either prosecuting or defending the proceeding.

Where all evidence has been duly placed before the trial court and it has decided the suit on merits on the several issues involved, the appellate court has no power to remand. Where no issue was left undecided an order of remand cannot be passed, remand is not meant to provide fresh opportunity to a party to litigate. If it does not agree with the decisions, it must come to proper findings of its own, but it is a shirking of duty and entirely wrong to send the case on remand. The Appellate Court should give reasons for wholesome remand and for not recording its own findings on the issues. If no useful purpose will be served by a remand and the issue can be decided on admitted facts, the empty formality must be eschewed to advance the cause of justice. Order 41 rule 24 where evidence on record sufficient, Appellate Court may determine case finally. This rule means that where all the evidence is on the record, the appellate court is competent to determine the suit

finally although the suit has been decided on a preliminary point. There is no need for remand under Order 41 Rule 23.

Order 41 Rule 25 refers that where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

Order 41 Rule 27 refer to production of additional evidence in Appellate Court. Additional evidence shall not be allowed in appellate court unless one of these conditions is satisfied a) improper refusal of evidence by trial court which ought to have been admitted or b) non-production of evidence notwithstanding exercise of due diligence or c) requirement of the appellate court itself for pronouncing judgement impossibility to pronounce judgement without the additional evidence d) any other substantial cause.

It is well settled that the requirement must be of the court and not of any party to suit. When the court is of opinion that without fresh evidence it cannot pronounce judgement and perform its functions, then and then only will it be allowed. The rule is clearly not intended to allow a litigant who had been unsuccessful in the lower court to patch up the weak parts of

his case and to fill up the omission in appeal. It is necessary to take notice of the changed circumstance which will have the effect of shortening the litigation and of doing complete justice between the parties. Appellate Court can take notice of subsequent event and would notify accordingly.

Additional evidence will not be admitted when a party had ample opportunity to produce it in trial court.

It has been held in 2009 Current Indian Judgements 51 (Supreme Court) that statements of witnesses are to be read as a whole. Few sentences here and there are not to plucked out to understand them.

It has been held in (2006) 9 Sec 213 " that the regular first appeal should not have been dismissed by such a cryptic order.

2006(9 Sec) 603 under Section 96 C.P.C that Non Consideration of relevant aspects 1 factors- Appellate Court should re-examine the matter on the two aspects and decide the same in accordance with law.

2008 (3 Sec) 181 under Sec 96 C.P.C – High Court erred in dismissing the first appeal at the admission stage itself without issuing notice to respondent and without looking into the evidence and other materials on record and also without considering the propriety of the findings made by the trial court.

2008 (4) Sec 48 under Section 96 C.P.C – "when the trial Court issues are involved, the appeals should not be summarily dismissed or disposed of in the manner done."

2006 9(11)Sec 587 " unless the actual finding is perverse, contrary to material on record, held that is practically no scope for interference.

(2007) 6 Section 546 " Justice should be administered in accordance with law and not according to Judges' whims, desire and notion of justice.

(2007) 6 Sec 737 under Sec 96 C.P.C. " The appellate court was also not justified in harping upon the so-called

absence of bonafieds on the past of the plaintiff in approaching the Court. What was called for, was an independent appraisal of the various documents produced by the plaintiff in the light of the pleadings and the oral evidence available, to come to a conclusion whether the plaintiff had established his tittle or not. "