

Chapter - I

Introductory

The 69th Report of the Fifth Law Commission India made a comprehensive revision of the Evidence Act. That Report was given on May 9th 1977. However, the Ministry of Law, Justice & Co. Affairs (Govt. of India) with the approval of the Minister, by its letter D.O.No. 3273/95-9, dated September 28, 1995 and subsequent letter D.O.No. 15/1/2001(ii)-Leg.III dated 19/22 June, 2001 and F.No. 7(11)/83-IC, dated 2.5.2002, requested the Law Commission of India, to review the Indian Evidence Act, 1872 once again, in as much as in the 25 years since the submission of the 69th Report. there have been further developments in the law of Evidence.

A review of the law of evidence is, it is acknowledged by one and all, one of the most formidable and challenging tasks for any Commission. The Act was drafted in 1872 by one of the most eminent jurists of the nineteenth century Sir James Stephen. In fact, while dealing with sections 24 to 27 of the Act which are probably some of the crucial sections of the Act and which are applicable to criminal law, Sarkar (Law of Evidence, 15th Ed., 1999, page 534), stated, in his famous commentary that these sections could not perhaps be redrafted by a person who was not as eminent as Sir James Stephen. The following is the relevant quotation from Sarkar:-

“No section has perhaps raised so much controversy and doubt as sec. 27 and several judges have recommended the redrafting of sections 24 to 27. That formidable task is not likely to be undertaken in the near future as it would require a jurist of the eminence of Sir James Stephen.”

That gives an idea of the magnitude of the task before us.

Again, the 69th Report of 1977 was prepared by the Fifth Law Commission consisted of eminent jurists, namely Hon’ble Justice P.B. Gajendragadkar (former Chief Justice of India), Justice S.S. Dhawan, Sri P.K. Tripathi, Sri S.P. Sen Verma, Sri B.C. Mitra and Sri P.M. Bakshi. That Report runs into 907 pages in small print and is probably one of the most scholarly works ever produced by the Law Commission of India in the last five decades. The Report contains such abundant research material good enough for half a dozen post graduate students or Ph.D. scholars. The amount of industry put in by the Fifth Law Commission in preparing the 69th report by going into the very origin of every section and every principle of law, with references to comparative law in various countries, is indeed unsurpassable. Unfortunately, it was kept pending from 1977 to 1995. The task before the present Commission to review such a report is therefore extremely daunting.

The present Law Commission has, therefore, taken up review of the Indian Evidence Act, 1872, in the light of the recommendations made in the

69th Report of the Law Commission. In the present Report, the Commission has also incidentally referred to the 11th Report, 14th Report, 48th Report, 60th Report, 88th Report, 91st Report, 93rd Report, 113th Report, 148th Report, the 152nd Report, 154th Report and the 172nd Report, 177th Report, 179th Report, 180th Report of the Law Commission. The Commission has also kept in mind the amendments made recently by I.T. Act, 2002, Evidence (Amendment) Act, 2003 (Act 4 of 2003), and Freedom of Information Act, 2002 (Act 5 of 2003).

We have taken up the review of the Evidence Act, 1872 in earnest and reviewed the development of the law in our country and abroad after 1977 and considered the judgments of our Supreme Court and the High Courts between 1977 and 2003. We have also referred to the views of leading authors on the subject in UK and USA.

The recommendations in the 69th Report can be categorized in five groups, as follows:-

- (1) Provisions that were not proposed to be amended;
- (2) Provisions of the Act that were proposed to be partially amended;
- (3) Provisions that were proposed to be substituted in their entirety;
- (4) Provision that were proposed to be deleted; and

(5) Provision that were proposed to be inserted.

We have gone into each of the recommendations made in the 69th Report. We have, in our turn, examined the provisions of the Act afresh in the light of subsequent developments in the law in our country and abroad and, also keeping in mind, the present scenario in the country, both in regard to criminal and civil litigation. While we have not accepted some of the amendments proposed in the said 69th Report we have accepted some others with or without modifications. We have proposed certain amendments to some of the provisions. We have also recommended insertion of certain new provisions while not accepting some of the recommendations in the 69th Report for insertion of new provisions. The initial draft of the Report was reviewed by Sri Vepa P. Sarathi, former Member of the Law Commission and author and a leading authority on Law of Evidence and several of his suggestions have been accepted though a few of them have not been accepted. We are grateful to him for his suggestions.

A summary of the recommendations made in this Report is enclosed with the Report. These recommendations would, it is hoped, be of importance for the administration of civil and criminal justice in our country. The recommendations made in the 69th Report would have served the Courts well if only they had been implemented soon after the Report was given.

The Law Commission hopes that at least the recommendations in the present Report on such a vital subject, which is the life-blood of our judicial administration, will be taken up and implemented at an early date.

CHAPTER II

REVIEW OF THE PROVISIONS OF THE INDIAN EVIDENCE ACT, 1872

Section 1:

Section 1 of the Indian Evidence Act, 1872 bears the heading ‘Short title, extent and commencement’. It refers to the extent of applicability of the Act to ‘judicial proceedings’. The section, as amended earlier, reads as follows:

“**Sec. 1:** Short title, extent and commencement.- This Act may be called the Indian Evidence Act, 1872.

It extends to the whole of India (except the State of Jammu and Kashmir) and applies to all judicial proceedings in or before any Court, including Courts-martial, other than Courts-martial convened under the Army Act (44 & 45 Vict., c.58), the Naval Discipline Act (29 & 30 Vict., c.109), or the Indian Navy (Discipline) Act, 1934 (XXXIV of 1934), or the Air Force Act, (7 Geo. 5, c.51) but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

And it shall come into force on the first day of September, 1872”.

This section requires a formal amendment in as much as the Army Act, 1881 was repealed in its application to India by the British Statutes (Application to India) Repealing Act, 1960 (Act 57 of 1960); similarly, the Indian Navy (Discipline) Act, 1934, when it was adapted by the Adaptation of Laws Order, 1950, ceased to refer to the (English) Naval Discipline Acts. The current legislation occupying the field is the Navy Act, 1957 which, in sec. 186 thereof, repealed the earlier law. The Air Force Act, 1917 has also been repealed in its application to India, by the British Statutes (Application to India) Repealing Act, 1960.

It may further be added that sec. 133 of the Army Act 1950, sec. 132 of the Air Force Act, 1950 and sec. 130 of the Navy Act, 1957 apply the provisions of the Evidence Act, 1872 subject to the provisions of these Acts.

We agree with the 69th Report of the Law Commission in this behalf and, therefore, recommend that in section 1 of the Act, the following words be deleted:

“other than Courts-martial convened under the Army Act (44 & 45 Vict., c. 58), the Naval Discipline Act (29 & 30 Vict., c. 109) or the Indian Navy (Discipline) Act, 1934 or the Air Force Act (7-Geo. 5, c 51).”

Section 3: Interpretation clause.

This clause ‘defines’ several words which occur in the Act, namely, ‘Court’, ‘Fact’, ‘Relevant’, ‘Facts in issue’, ‘Document’, ‘Evidence’,

‘Proved’, ‘Disproved’, ‘Not proved’, and ‘India’. Certain other words as defined by the Information Technology Act, 2000 (Act 21 of 2000) are to be read into sec. 3 of the Evidence Act, 1872.

We shall now take up each of these words which are defined in sec. 3.

‘Court’ : ‘Court’ has been defined in sec. 3 as “including all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.”

The word ‘persons’ here has to be read in the immediate context of ‘Judges’ and ‘Magistrates’ and will take colour from those words.

Obviously, when the definition refers to persons “legally authorized to take evidence”, this has to be understood that unless a person is taking ‘evidence’, there is no scope for the Act to apply but that does not literally mean that every person, or authority, such as a quasi-judicial tribunal or a domestic tribunal receiving evidence is a Court. This is clear from the case law to which we shall now refer.

The definition of ‘Court’ in the Act is an inclusive definition and is not exhaustive, Brajanandan Sinha vs. Jyoti Narain (AIR 1956 SC 66). But the Supreme Court has held that the Evidence Act does not apply to income tax authority (C.I.T vs. East Court Commercial Co. Ltd) (AIR 1967 SC 768) nor to the non-judicial proceedings under the Mysore (Personal and Miscellaneous) Inams (Abolition Act), 1955 (State of Mysore vs. P.T. Muniswamy Gowda)(AIR 1971 SC 1363), nor to proceedings under the

Public Servants (Inquiries) Act, 1850, (Brajnandan Sinha vs Jyoti Narain) (AIR 1956 SC 66), nor to a nominee of the Registrar under the Maharashtra Co-operative Societies Act, 1961 (Ramrao vs. Narayan) (AIR 1969 SC 724), nor to inquiries conducted by tribunals even though they may be quasi-judicial in character (Union of India vs. T.R. Verma) (AIR 1957 SC 882) (But they may have to observe principles of natural justice). The definition does not apply to domestic tribunals (Central Bank of India Ltd. vs. Prakash Chand Jain) AIR 1969 SC 983; nor to departmental proceedings (K.L. Shinde vs. State of Mysore, AIR 1976 SC 1080) (State vs. Shivabasappa, AIR 1963 SC 375).

The Supreme Court, in Brajnandan Sinha vs. Jyoti Narain (AIR 1956 SC 66) while deciding whether inquiry under the Public Servants (Inquiries) Act, 1850 is in the nature of an inquiry before a ‘Court’ went into a detailed examination of the meaning of the word ‘Court’ and pointed out that such a body or forum must have power to give a decision or a definitive judgment which has finality and authoritativeness which are essential tests of a judicial pronouncement, if it has to be treated as a ‘Court’.

But, in its 69th Report, the Law Commission, after a review of relevant authorities, felt that a specific definition of ‘Court’ is necessary to remove uncertainty and suggested that the following definition of ‘Court’ should be substituted:

“Court means, a civil, criminal or revenue court and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by or under that Act to be a court for the purposes of this Act, but does not include an arbitrator.”

We shall examine this suggestion in some detail.

The position so far as Civil Courts to which the Code of Civil Procedure, 1908 applies needs no clarification. So far as the Code of Criminal Procedure, 1973 is concerned, sec. 6 thereof refers to the classes of Criminal Courts, (besides the High Courts and Courts constituted under any law other than the Code) – namely – Courts of Sessions, Judicial Magistrates, and Executive Magistrate. However, sec. 195 of the Cr.P.C. which deals with “Prosecution for contempt of lawful authority of public servant, for offences against public justice and for offences relating to documents given in evidence”, is concerned, it contains a special definition for the purposes of sec. 195 which is in the same form as recommended in the 69th Report for inclusion in the Evidence Act. The question is whether this recommendation requires any modification?

So far as revenue courts are concerned, there are a vast number of revenue courts in the country. They are mostly governed by local laws made by State Legislatures. In some of these laws, it is customary to confer all the powers of a Civil Court while in some others, limited powers like

summoning witnesses etc. are conferred. Some of the courts conduct summary inquiries. The question therefore is whether all the revenue courts should be governed by the provisions of the Evidence Act, 1872 as recommended in the 69th Report?

The recommendation in the 69th Report might include even those revenue courts which have limited powers or have a summary procedure to follow. That would create serious problems. Where the local legislature requires a speedy decision by following a summary procedure, the revenue court will be confronted with a duty to follow all the niceties of the Evidence Act. We, therefore, feel that it is not necessary to include all revenue courts within the definition of 'Court' for purposes of the Evidence Act. The question whether the provisions of the Evidence Act apply or not, would depend upon the nature of the tribunal, the nature of inquiry contemplated and other special characteristics of each such 'revenue court' and is a matter for the appropriate Legislature or rule making authority dealing with revenue courts. We are, therefore, not in favour of applying the Evidence Act to all 'revenue courts'. We therefore differ from the recommendation in the 69th Report in this respect.

We then come to the recommendation in the 69th Report regarding applicability of the Act to tribunals. The recommendation says that if the special statute governing the tribunal requires that the tribunal be treated as a 'court' for purposes of the Evidence Act, then the Act will apply. But, in our view, this is so obvious a position that there is no need to say so by way

of a definition. It is true that in sec. 195(3) Cr.P.C., such a definition is specially given for purposes of sec. 195, which deals with procedure in the case of offence of ‘contempt’ under the Indian Penal Code. There the special definition was necessary because of the penal consequences of the ‘contempt’.

In the result, we differ from the 69th Report and recommend that the existing definition of ‘court’ does not require any amendment.

We next take up the other words for discussion.

Fact: The provisions of sec. 3 define the word ‘fact’ as follows:

“Fact” 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.”

There are illustrations (a) to (e) in the definition.

In the 69th Report, after an elaborate discussion, the Commission was of the view that no further elaboration is necessary in this definition but it was suggested that the words “and includes” be deleted as it has been creating confusion.

It is pointed out in Sarkar on ‘Evidence’ (15th Ed. 1999, 542) that Bentham classified facts into ‘physical’ and ‘psychological’. It is now recognized that the state of a person’s digestion is a fact (see also Sabapathi vs. Huntley: (AIR 1938 PC 91). Illustrations (a), (b) and (c) refer to ‘physical’ facts and (d) and (e) to the psychological.

The word ‘Thing’ used in the definition of ‘fact’ is explained, as pointed out in the 69th Report, in the Oxford dictionary as ‘that which is concerned (in action, speech or thought) - that which is or may be in any way an object of perception, knowledge or thought, a being, an entity.’

In Phipson’s Evidence (15th Ed., 2000), it is pointed out: (see para 1.04)

“No satisfactory definition of the term ‘fact’ has been or perhaps can be given. Broadly it applies to whatever is the subject of perception or consciousness. But juridically it has generally to be distinguished from law sometimes from opinion and sometimes from testimony and

documents. It is not possible always to apply these distinctions consistently.”

In as much as the existing definition of ‘fact’ has not created any legal difficulties and having regard to the fact it refers to physical and psychological facts, and there cannot also be a perfect definition – the Commission is of the view that no clarification or amendment is necessary. The Commission however disagrees with the 69th Report that the words ‘and includes’ should be deleted but on the other hand, recommends that the word “means and” be deleted.

‘Relevant’: The word ‘relevant’ has been defined in the Act as follows:

“‘Relevant’: One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts”.

In other words, one fact is relevant to another fact, if it is connected in any way as described in sections 6 to 55. Section 5 states that ‘evidence’ may be given of ‘facts in issue’ and ‘relevant facts’ and the Act also defines ‘facts in issue’. The Act also defines ‘evidence’ as oral and documentary.

There are again facts of which evidence, being not admissible, cannot be given though they are ‘relevant’ – such as the facts referred to in sections 122, 123, 126 and 127. This brings out the concept of ‘admissibility’.

Besides these, the expression ‘irrelevant’ occurs in sections 24, 29, 43, 52, 54 and 165.

Section 11 refers to situations when ‘facts not otherwise relevant become relevant’.

Phipson (15th Ed., 2000, para 6.08) points out that Stephen in his Digest first defined ‘relevance’ from the angle of ‘cause and effect’ (now in sec.7) but later defined ‘relevance’ in Art. 1 as a fact which, in conjunction with others, proves or renders probable the past, present or future existence or non-existence of the other. In the Indian Act, the concept of ‘proves or renders probable’ are used in the definition of ‘proved’ in sec. 3 and in sub section (2) of sec. 11, dealing with facts which are irrelevant.

We agree with the 69th Report and do not think that the definition of ‘relevant’ should be amended by linking it up with ‘proof’ or rendering other facts probable in as much that concept is already incorporated in the definition of ‘proved’ in sec. 3.

Facts in issue:

In the 69th Report (see para 6.51) it was pointed out that these words occur in sections 5, 6, 7, 8, 9, 11, 17, 21 [Illustration (d)] and in sections 33, 36, 43 and the words ‘questions in issue’ occur in sec. 33, while the words ‘matters in issue’ occur in sec. 132, and the Commission merely recommended omission of the words ‘and includes’ occurring in this definition.

Further in civil cases, facts in issue are decided in the manner provided in O 14. RR. 1 to 7 of the Code of Civil Procedure and in criminal cases, the charge constitutes and includes facts in issue (chapter XVII of the Criminal Procedure Code, 1973) (vide Sarkar, Evidence, 15th Ed, 1999, p.43).

We agree that with the recommendation in the 69th Report in this behalf that no material amendment is necessary and that the only correction necessary is to drop the words ‘and includes’.

Document:

‘Document’ has been defined as “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”.

The definition covers any type of document including electronic records. Record of the matter is one thing and the deciphering of its meaning is another thing.

The definition also contains some illustrations.

Under section 13 of the UK Civil Evidence Act, 1995, document means ‘anything in which information of any description is recorded,’ and this is in implementation of the recommendation of the British Law Commission Report on the Hearsay Rule in Civil Proceedings (1993) No.216). We shall also refer to some recent English decisions on the meaning of the word ‘document’: Cinematograph film (Senior vs. Holdsworth; 1975 (2) All ER 1009); Photography, Video Tapes, audio tapes (R vs. Stevenson) (1971) 1 WLR 1, R vs. Robson 1972(1) WLR 651; Grant vs. South Western and County Properties 1975. CH.185: Microdots or tape recording, telephone conversation (Grants case above referred to; Television Film (Senior vs. Holdsworth ex P Independent Television News Limited) (1976 QB 23); Facsimile Transmissions (Hastie and Jenkerson vs. McMohan 1990. 1. WLR 1575; Computer Database recorded in back ups or files (Derby vs. Weldon) (No.9) [1991] 1 WLR 652, have been held to be ‘documents’.

In Derby's case, which related to a computer data base, Venlott J. differed from the view of Mc Inerney J in Beneficial Finance Corporation vs. Convey 1976 V.R.321 that a document must be visually seen but it was held that it is not necessary to be seen visually. The learned Judge observed, agreeing with Walton J in Grant's case (above), that the position was the same in 'shorthand' or in the case of words which could be fully written down by a key. He held :

“....the mere interposition of necessity of an instrument for deciphering the information cannot make any difference in principle. A litigant who keeps all his documents in microdot form could not avoid discovery (under RSC Order 24) because in order to read the information extremely powerful microscopes or other sophisticated instruments would be required. Nor again, if he kept them by means of microfilm which could not be read without the aid of a projector.”

The learned Judge observed:

“I respectfully adopt that statement of principle. It must, I think, apply a fortiori to the tape or disc on which material fed into a simple word processor is stored. In most businesses, that takes the place of the carbon copy of outgoing letters which used to be retained in files.”

An electronic diary is a document 'Rollo vs. H.M.Advocate' 1997 SLT 958. It does not matter that it may have to be processed like – translation, decoding or by electronic retrieval. Computer print out is a document R vs. Spiby (1990) 91. Cr. A.R. 186A; Public Prosecutor vs. Ang Soon Huat; 1991(1) Malay L.J. page 1.

Here, we must accept the comment of Steve Uglow in 'Evidence, Text and Materials' 1997 page 149 that if the definition of 'document' broadens, so do the difficulties of demonstrating authenticity. While computer generated information should be treated similar to other records, its weight depends on its reliability and parties might need to provide information as to the security of their computer system.

Electronic records are 'secondary evidence' (see sec. 65B introduced by Act 21/2000). Where the original of a document cannot be produced, secondary evidence of its contents will be admissible. Since, whenever a document is produced in court as evidence, its genuineness has to be established before its contents can be referred to, the authenticity of the electronic record has to be established, except when the conditions of sec. 65B are satisfied. In that case, the electronic record becomes automatically admissible as evidence of its contents in the same manner as a certified copy of a public document. Such certified copy is also secondary evidence but is received as if it is primary evidence, because of sections 77 and 79.

In Ziyouddin vs. Brijmohan (AIR 1975 SC 1788) the Supreme Court held a tape record is a document which is no different from a photograph. However, conditions for its admissibility may be different.

In the 60th Report of the Law Commission, dealing with General Clauses Act in para 3.40, the following revised definition of ‘document’ in sec. 3(18) of the General Clauses Act was recommended:

“document” shall include any substance having any matter written, expressed, inscribed, described or otherwise recorded upon it by means of letters, figures or marks or by any other means, or by more than one of these means, which are intended to be used or which may be used for the purpose of recording that matter.

Explanation: It is immaterial by what means the letters, figures or marks are formed”

(The above recommendations in the 60th Report are quoted in para 6.36 of the 69th Report)

In paras 6.36 and 6.37 of the 69th Report, the Commission recommended a similar definition in sec. 3 of the Evidence Act.

We agree with the above proposals but we may, in the light of the developments in technology, further recommend the explanation in the modified form. It is recommended that the definition of “Document” be substituted as follows:-

“‘Document’ shall include any substance having any matter written, expressed, inscribed, described or otherwise recorded upon it by means of letters, figures or marks or by any other means or by more than one of these means, which are intended to be used, or which may be used, for the purpose of recording that matter.

Explanation:- It is immaterial by what means the letters, figures or marks are formed or decoded or retrieved.”

Evidence:

Section 3 of the Act also defines ‘Evidence’. It says that the word means and includes –

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence.

- (2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

In the 69th Report it was remarked (see para 6.38) that the definition was not exhaustive. After some discussion, it was stated in para 6.46 that the definition does not require any amendment because the question of treating other evidence like material objects or facts revealed by local inspection is sufficiently covered by the word ‘proved’ and the second proviso to sec. 60.

Sarkar in his Evidence (15th Ed. 1999, p.48) states that the meaning of the word ‘Evidence’ as given in the Act is not complete. Vepa Sarathi, however, in his book on Evidence (5th Ed., 2002, p. 12.26) opines that every type of evidence is governed by the Evidence Act.

Both the 69th Report and the commentary by Sarkar refer to oral evidence, documentary evidence, real or personal evidence, original and unoriginal evidence and so on. But still, the 69th Report recommended that no amendment is necessary.

We agree that the definition of the word ‘Evidence’ is not exhaustive. But in that event, there is no point in retaining the word “means”. We are of

the view that if we do not expand the meaning, we should at least omit the words ‘means and’ from the definition. We recommend accordingly.

Proved:

This word will be taken up along with two other words ‘disproved’ and ‘not proved’. The word ‘proved’ is defined in sec. 3 as follows:

“Proved – A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, 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.”

Disproved: The word ‘Disproved’ is defined as follows:

“Disproved - A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.”

‘Not proved’: These words are defined as follows:

“Not-proved – A fact is said not to be proved when it is neither proved nor disproved.”

In these three definitions, the prudent man’s approach has been adopted, as to the probability of existence or non-existence of facts.

The 69th Report (see paras 6.54 to 6.56) did not recommend any change.

We shall now refer to certain aspects which are relevant in the context of these words.

In a number of judgments, the Supreme Court pointed out that mere ‘suspicion’ or ‘conjecture’ cannot be the basis of a finding that a fact is proved.

We may state that under the words “matters before it”, i.e. the Court will obviously include oral and documentary evidence, circumstances, objects, maps or other material revealed from local inspection.

One other aspect here is about the ‘standard of proof’. In criminal cases, generally it should be proof beyond reasonable doubt. That principle is not applicable in civil cases. In civil cases proof is on balance of probabilities. Lord Denning stated in Bater vs Bater 1950(2) ALLER 458 that even so, there could be different degrees of proof within the standard, both in civil and criminal cases.

This matter is unnecessarily complicated by our courts.

Sir James Stephen has suggested a simple formula in the definition of the three expressions ‘proved’, ‘disproved’ and ‘not proved’. In civil cases, there are usually two versions of the facts. The court, on the basis of the evidence adduced before it, chooses that version which it thinks is more probable, that is, it will accept that version which a prudent man will act upon the supposition that exists. If there is no defence version, the court can take that fact into consideration in concluding that the plaintiff’s version of the facts exists. In conceivable cases, the court can reject both versions as false.

But in a criminal case, whether or not there is a defence version the court must be satisfied that a reasonable alternative version is not possible, because, if it is possible, a prudent man will not act upon the supposition that the prosecution version exists. He will act on the supposition that the alternative version exists. But in cases coming under sections 105 and 106

Evidence Act, though apparently the burden of proof is on the accused, if the evidence adduced by the prosecution discloses a version in favour of the accused, a prudent man will not act upon the supposition that only the prosecution version exists; but upon the supposition that the one favourable to the accused exists.

In Kishenchand Mangal vs. State of Rajasthan AIR 1982 SC 1511, the Supreme Court pointed out that proof of a fact does not depend upon whether the witness is rich or poor.

There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must rest on robust commonsense and ultimately on the trained intuition of the Judge. (State of UP vs. Kishan Gopal AIR 1988 SC 2154).

Phipson's Evidence (2000, 15th Ed. P.1) refers to 'proof' as the establishment of such facts by proper legal means to the satisfaction of the Court, and in this sense includes disproof.

These views are relevant but do not require to be incorporated in the definitions of these words.

In the light of the above discussion and the recommendation made in the 69th Report, we do not think that any amendment be made in respect of the words ‘proved’, ‘disproved’ or ‘not proved’.

India:

No modification is necessary with regard to this definition.

‘Certifying Authority’, ‘digital signature’, ‘Digital Signature Certificate’, ‘electronic form’, ‘electronic record’, ‘information’, ‘secure electronic record’, ‘secure digital signature’, ‘subscriber’

The above words have been recently brought into sec. 2(1) by the Information Technology Act, 2000 and require no further change.

Other definitions – if to be added?

In the 69th Report (see para 6.81), it was suggested that ‘Judicial proceeding’ need not be defined as the Commission was recommending amendment of the meaning of ‘Court’.

It was pointed out (see para 6.64) that so far as the Code of Criminal Procedure 1882 was concerned, ‘judicial proceeding’ was defined in sec.

4(d) and 1973 Act in sec. 2(i) but that as far as the Indian Penal Code is concerned, the Courts have refrained from attempting a definition (see para 6.68). It was pointed out at that the expression is not defined in the Code of Civil Procedure. In para 6.81 it was said that if a definition of the word was felt necessary, the ‘function of administration of justice’ should be emphasized and that it could (i.e. if felt necessary) be defined as follows:

“Judicial proceeding means any step in the administration of justice according to law in which evidence may be legally recorded for the decision of the matter in issue in the case, or of a question necessary for the decision or final disposal of such matter.”

It may be noted that ultimately, the 69th Report did not recommend a definition of ‘judicial proceeding’ because the definition of ‘Court’ was recommended to be widened (see para 6.81). But, as stated earlier, we have somewhat differed from this recommendation in respect of the definition of ‘Court’ for reasons already given. The question then is whether definition of ‘judicial proceeding’ should be included?

Having said that the definition of ‘Court’ need not be incorporated and that it is best left to the Court to decide whether a body is a ‘Court’ or not, we feel that likewise, it will be necessary to leave this aspect also to be decided on the basis of the particular provisions of the statute. If we

recommend a definition of ‘judicial proceeding’, conflicts can arise between the existing definition of ‘Court’ and the definition of ‘judicial proceeding’.

Admissible: The 69th Report recommended that the word ‘admissible’ be defined as ‘admissible in evidence’. We too agree with this recommendation.

Section 4:

Section 4 defines words ‘may presume’, ‘shall presume’ and ‘conclusive proof’.

There is no recommendation for amendment of sec. 4 in the 69th Report. We do not also think that any amendment is necessary.

Section 5:

Section 5 of the Act bears the heading ‘Evidence may be given of facts in issue and relevant facts’ and reads as follows:

“Section 5: Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation: This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure”.

In the 69th Report, it was recommended that in the Explanation, the words ‘Code of Civil Procedure, 1908’ may be substituted for the words “the law for the time being in force relating to Civil Procedure” and that so far as territories where the Code is not applicable, “suitable words can be added”.

The Explanation is obviously referable to Order 7, Rules 14, 18 and Order 13, Rule 1, Order 41, Rule 27 of the Code of Civil Procedure, 1908.

We are unable to agree with the recommendation made above so far as the Explanation is concerned in as much as the Evidence Act, 1872 does not apply to the State of J&K.

Section 6:

Section 6 reads as follows:

Section 6: Relevancy of facts forming part of same transaction: Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

There are some illustrations set out under section 6.

The section says when facts though not in issue become relevant facts.

In the 69th Report, after a very elaborate discussion, it was stated (see para 7.40) that no amendment is necessary.

The section, along with others, refers to the rule of admission of evidence relating to what is commonly known as res gestae. It is an exception to the hearsay rule in as much as facts heard are relevant as being part of the same transaction.

As pointed out by Sarkar (15th Ed. 1999 p.155) facts relevant to the issue (res gestae) have been arranged in the Act in the following manner:

- (1) Things connected with the facts in issue as part of the same transaction, occasion, cause, effect, motive, conduct etc. (sections 6-16)
- (2) Things said about it, viz., admissions, confessions (sections 17-31)
- (3) Statements by persons who cannot be called as witnesses (sections 32-33)
- (4) Statements under special circumstances (sections 34-39)
- (5) Things decreed in courts, viz., judgments in other cases (sections 40-44)
- (6) Opinions about it (sections 45-51)
- (7) Character and reputation of parties concerned (sections 52-55)

The section uses the words ‘same transaction’.

The words ‘same transaction’ occur in sections 220 and 223 Cr. P.C. in a restricted sense and also in illustration (a) of sec. 6. But the word ‘transaction’ is used in a more general sense in sec. 6.

The principle of law embodied in sec. 6 is, as stated above, usually known as the rule of res gestae. The essence of the doctrine is that a fact which, though not in issue, is so connected with the facts in issue “as to form

part of the same transaction” becomes relevant by itself. This rule is, roughly speaking an exception to the general rule that hearsay is not admissible. The rationale in making certain statements on facts admissible under sec. 6 is on account of the spontaneity and immediacy of such statement, a fact in relation to the fact in issue. But, it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneously with the acts which constitute the offence or at least immediately thereafter. But if there is an interval, however slight it may be, which was sufficient enough for fabrication, then the statement is not part of res gestae. (Gentela Vijayavardana Rao vs. State of AP, AIR 1996 SC 2791).

Thus, the provisions of sec. 6 have been sufficiently explained in judicial decisions.

We agree with the 69th Report that no amendment is necessary in section 6.

Section 7: Facts which are the occasion, cause or effect of facts in issue.

The section reads: “Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant”.

There are three illustrations below this section.

In the 69th Report, it was stated (see para 7.53) that there is no need for change of sec. 7.

The Supreme Court observed that, like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact admissible under sec. 7 and 8. The imprint on the magnetic tape is the direct effect of the relevant sources. Thus, if a statement is relevant, an accurate tape record of the statement is also relevant and admissible (Yusuf Alli vs. State: AIR 1968 SC 147), R.M. Malkani vs. State AIR 1973 SC 157; Ziyouddin vs. Brijmohan, AIR 1975 SC 1788.

The case law has sufficiently explained sec. 7. No further amendment is necessary.

Section 8:

Section 8 refers to ‘motive, preparation and previous or subsequent conduct’ and their relevance. It contains two Explanations and 11 illustrations.

We are not extracting either sec. 8 or its Explanations.

In the 69th Report, there is a very elaborate discussion and it was recommended in para 7.88 that there is no need to change the law as enacted in sec. 8.

On motive, the Supreme Court has reiterated that motive may be relevant to support a finding of guilt but absence of motive may not be evidence of innocence. See S.C. Bahri vs. State of Bihar AIR 1994 SC 2420)

There are a large number of judgments of the Court as to the relevance of motive, rendered after the 69th Report, but there is no change in the law.

Similarly, on the other aspect of previous and subsequent conduct, there are later cases, but there is no change in the law.

We agree with the 69th Report that no amendment is necessary in sec. 8. But before parting with sec. 8, we may refer to two new aspects: (1) rape victims and (2) right to silence.

(1) In the case of rape victims, the complaint of the victim is relevant under ill.(f) and also under sec. 157 (Rameshwar vs. State: AIR 1952 SC 54). There are, of course, other relevant factors, such as delay, which may or may not have varying degrees of importance in various cases. (see Sarkar, Evidence, 1999, Vol. 1, pg. 196-97). It is pointed out that in England, the complaint of the prosecutrix though given behind the back of the accused, if made at the earliest possible opportunity, is relevant. This principle is applied to victims of rape, indecent assault and other similar offences under the Criminal Law Amendment Act, 1885 (48 & 49 vic.c. 469) and only for the purpose of the credibility of the story or for negating pleas of consent. Complaint of victims is not relevant in other cases. In India, the provision is wider in sec. 8 and refers to all complaints. Distinction is however made between complaints and statements.

Illustration (j) under sec. 8 make a distinction between a complaint and a statement. While a statement is made relevant only as corroborative evidence under sec. 157, with regard to a complaint, ill. (j) demonstrates that the fact of the complaint having been made, the circumstances under which, and the terms in which made, are relevant (Aziz Bin Muhammed Din vs. Public Prosecutor : (1996)5 Malayan L.J. 473 (Melaka H.C.)

Illustration (j) below sec. 8 reads as follows:

“(j) : The question is, whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is, not relevant, as conduct under this section, though it may be relevant as a dying declaration under sec. 32, clause (1), or as corroborative evidence under sec. 157.”

It was held in Parvati vs. Thirumalai 10 Mad 334, that there is a distinction between a complaint and a statement. A complaint is expressive of feeling while a statement is expressive of knowledge. Sarkar (1999, 1 Ed. p.198) refers to Norton p. 114, where the latter points out that there may sometimes be a difficulty in discriminating between a statement and a complaint. A complaint is one made seeking redress or punishment and must be made to one in authority, the police or some other person to whom the complainant is justly entitled to look for assistance and protection. The distinction, according to Norton, is important because while a complaint is always relevant, a statement not amounting to a complaint, will only be relevant under particular circumstances – e.g. if it amounts to a dying declaration or can be used as corroborative evidence. Sri Vepa P. Sarathi in his Evidence,

(5th Ed. 2002 at pp 60-61) refers to ill.(j) and the distinction between ‘complaints’ and ‘statements’ and to the difference between English law and Indian law. The author says that conduct of an accused pointing out places, relevant under sec. 8, may be still excluded by sec. 162 Cr.P.C., subject of course to statements leading to discovery under sec. 27.

As already stated, the English Act, 1885, above referred to, deals only with relevance of complaints in cases of sexual offences. It does not deal with statements at all and sec. 8 of the Indian Act is wider.

These and other aspects were, in fact, dealt with in the 69th Report (para 7.73 to 7.87). In para 7.87 it was pointed out that ‘statement’ as to offences, (other than complaints) are relevant under sec. 6, 32, 157, 159, 145, unless excluded by sec. 162 Cr.P.C. Statements which amount to complaints are relevant under sec. 6, 8, 9 and sec. 32, unless excluded by sec. 162 Cr.P.C.

After much discussion, the 69th Report says that no change is necessary in sec. 8. In as much as the distinction between a complaint and a statement is still valid under the law of evidence, we do not propose any change in sec. 8 even in so far as the section relates to rape or other offences.

(2) The next question is about the right to silence. This aspect has been dealt with in paras 7.68 to 7.71 of the 69th Report. After considerable discussion of the philosophy behind the right to silence and to Egan vs. US 137 F.2d 369 (8th Circuit), certificate denied, (1943) 320 US 788 the Commission felt in para 7.88, no change is necessary..

This question has to be examined in the background of Art. 20(3) of the Constitution of India which precludes compulsion of a person to be a witness against himself. There have since been statutory changes in England under the Criminal Justice & Public Order Act, 1994 based on the 11th Report of the Criminal Law Review Committee (Cmmd 4991) and a further amendment to the 1994 Act inserted by sec. 58(2) of the Youth Justice and Criminal Evidence Act, 1999 – which takes into account the decision of the European Court of Human Rights in Murray vs. UK (1996)22 EHRR 29 that if in such a case, access to legal advice is denied, Art. 6 of the European Convention is violated. In this connection see also Saunders vs. UK (1996) 23 EHRR 313; Condrom vs. UK (2001) 31 EHRR 1 and Averill vs. UK (2001) 31 EHRR 839 where the European Court held that the police not having followed the condition of giving opportunity to the accused to call a lawyer, the rights of the accused under Article 6 ECHR were violated.

There is a detailed discussion of these developments in Phipson (2000, 15th Ed., para 32.01 to 32.12).

The Law Commission has given a separate Report on the Right to Silence – see 180th Report of the Law Commission.

As stated earlier, sec. 8 does not require any amendment.

Section 9:

Section 9 deals with ‘Facts necessary to explain or introduce relevant facts’.

It reads as follows:

“Section 9: Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or persons whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.”

There are six illustrations below section 9.

In the 69th Report, after an elaborate discussion, it was stated (see para 7.110) that no modification is necessary except that, in the opening clause – after the word ‘facts’ and before the word ‘necessary’, we may add the words ‘which are’.

After the 69th Report of 1977, there are indeed a large number of decisions of the Supreme Court which have relied upon sec. 9 for one or other of the purposes stated in sec. 9.

There is a mass of case law relating to identification parades. There is a Code of Practice D issued in England under the Police and Criminal Evidence Act, 1984 (see sec. 67(9)) but it has been held that identification in breach of it may not always be excluded, nor should identification under Code D be always accepted. There may also be cases outside Code D. Further the guidelines issued in R vs. Turnbull 1977 QB 224 (CA) are treated as the last word. ‘Turnbull is the seminal decision and it is where the law is to be found’ (R vs. Mussell & Dalton: 1995 Cr. LR 887) (as per Evans J). Apart from that, in England, sec. 78 of the Police and Criminal Evidence Act, 1984, allows a Judge to exclude prosecution evidence in the interests of fairness and has been used to control, in particular, the manner in which subsequent identifications are obtained.

We do not propose to lay down any standards or precautions in regard to ‘identification’ but feel that the existing case law dealing with

identification is quite elaborate (see Ramanathan vs. State of TN: AIR 1978 SC 1204) and sufficient.

It is also the law in India that a direction to appear for identification or an order to obtain finger prints or impression of hand, feet etc. or taking of samples of blood are not treated as amounting to self incrimination under Art. 20(3) of the Constitution of India (see State vs. Kathikalu AIR 1961 SC 1808).

There are also examples of identification by photograph, videos etc. But sec. 22 of Terrorist and Disruptive Activities (Prevention) Act, 1985 was struck down by the Supreme Court in Kartar Singh vs. State of Punjab 1994 CrL. LJ 3139 (SC) as being opposed to Art. 21. That section referred to photographs of accused declared as proclaimed offenders and said that identification by witnesses using the said photographs shall have the same value as test identification.

Identification through video tape is permissible provided the video is clear and is of quality and depends on the time for which the accused is shown; but the weight to be given to the tape is for the Judge, who has also to look at the video. A case of “store security” camera video tape came up before the Canadian Supreme Court R vs. Nikolovski (1996) 141. DLR.(4d) 647 and there, the above principles were laid down. Phipson says (1999,

15th Ed. para 14.24) that video and photo identification must satisfy the tests laid down in Turnbull 1977 QB 224.

Recently, in R vs. Pieterston and Holloway (1995)(2) Cr. App R 11(1A), evidence that a ‘tracker dog’ had traced the scent of the place of crime to a particular individual, was held admissible subject to proof as to the training of the dog and other precautions. In Abdul Razak vs. State AIR 1970 SC 283 it was held that it is not entitled to much weight. See also Ashok Gavade vs. State of Goa 1995 CrL LJ 943 (Bom); Bhadron vs. State of Kerala 1995 CrL LJ 679 (Ker); Pandian K Nadar vs. State of Maharashtra 1993. CrL LJ 3883 (Bom).

In State vs. S.J. Choudary: AIR 1996 SC 149, identification of typewriting by experts was relied upon.

(For discussion on DNA, see also our discussion under sec. 45 and sec. 112). DNA (Deoxyribo Nucleic Acid) evidence has been used for various types of identification. The science of DNA fingerprinting means the method of proving that a suspect’s DNA matches a sample left at the scene of a crime. It requires two things: (See <http://www.howstuffworks.com/dna.evidence.htm>)

- (i) creating a DNA profile using molecular biology protocols

- (ii) Crunching numbers and applying the principles of population genetics to prove a match mathematically

Human beings have 23 pairs of chromosomes containing the DNA blueprint that decodes all the materials need to make up one's body as well as the instructions for how to run it. One member of each chromosome pair comes from one's mother and the other is contributed by the father. Every cell of the body contains a copy of this DNA. While the majority of DNA does not differ from human to human, some three million base pairs of DNA (about 0.10% of one entire genome) vary from person to person. The key to DNA evidence lies in comparing the DNA left at the scene of a crime with a suspect's DNA in these chromosomal regions that do differ.

We do not propose to get into the molecular biology that lies behind DNA. But we shall refer to how it has been used. In 1985, DNA entered the court room for the first time. In 1988 for the first time, a person was sent to jail on the basis of DNA. This is a complex area of forensic science that relies heavily on statistical predictions: The basic procedure is to isolate the individual's DNA footprint – called RFLP (Restriction fragment length polymorphism) analyses. This requires large amounts of relatively high quality DNA.

Several countries have DNA data bases of its citizens. DNA samples are used (a) To prove guilt: by matching DNA profiles and linking a suspect

to a crime or crime scene. The British police have an online database of more than 700,000 profiles in 1999 that they compare to crime scene samples; more than 500 positive matches come up in a week; (b) Exoneration of innocent persons: At least 10% people have been freed from death row in US after DNA evidence has been studied.

DNA is useful for ‘Paternity testing’, ‘Identification’, studying the evolution of human population; studying inherited disorders.

Matching is done at different loci. The new British ten-loci-test offers very little chance of a mismatch (Scotland’s Every News 9.2.2000). When data bases grow in country or area, more loci are required to require support of a strong common source. The FBI is reported to test 13 loci which minimizes chances of mismatch. On this aspect, Phipson (2000, 15th Ed. para 14.32) says as follows:

“This evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not ‘match’ then this will prove a lack of identity between the known person and the person from who the unknown sample originated. If the samples do ‘match’ this does not conclusively prove identity. Rather, an expert will be able to derive from a database of DNA samples an approximate number reflecting how often a similar DNA ‘profile’ or

‘fingerprint’ is found. It may be, for example, that the relevant profile is found in one person in every 100,000. This is described as the ‘random occurrence ratio’.

Care must be taken in presenting such a statistic to the jury in a criminal case. In particular it is necessary to avoid "the prosecutor's fallacy": The statistic does not establish that there is only a 1 in 100,000 chance that the person has been wrongly identified (R vs. Doheny & Adams (Gary) 1997(1) Cr. App. R. 369). The Court of Appeal has indicated that an expert shall usually confine his or her evidence to providing the random occurrence ratio, and, if he or she has the necessary data, may indicate how many people with matching DNA characteristics are likely to be found in the United Kingdom or in a limited relevant sub group which the perpetrator is, in all likelihood, a member of. It is inappropriate for an expert to expound a statistical approach to evaluating the likelihood that the accused left the unknown sample.”

In England, sec. 62 of the Police and Criminal Evidence Act, 1984 governs obtaining ‘intimate sample’ (e.g. blood & fingerprint) from the suspect. If an accused refuses, then under sec. 62(10) it will be for the Court to decide what inference is to be drawn. Part III of the UK Family Law Reform Act, 1969 contains provisions for the use of blood tests in determining paternity. Again inferences may be drawn from a refusal to consent. (sec. 23 of Family Law Reform Act, 1969).

Section 62(10) of the Police and Criminal Evidence Act, 1984 states:

“62(10): Where the appropriate consent to the taking of an intimate sample from a person was refused without good cause, in any proceedings against that person for an offence –

- (a) the Court, in determining
 - (i) whether to commit that person for trial; or
 - (ii) whether there is a case to answer; and
- (b) the Court or jury, in determining whether that person is guilty of the offence charged,

may draw such inferences from the refusal as appear proper; and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to, corroboration of any evidence against the person in relation to which the refusal is material.”

In yet another case in R vs. Adams (1996)(2) Cr. App. Rep. 467, the Court of Appeal was dealing with a case of alleged rape. The State contended that the DNA profiles from the appellant and the crime’s scene sample were compared and a visual match within 1% was declared. Computer calculation indicated that the chance of a randomly chosen unrelated man matching the DNA profile was 1/297 m rounded down in the

interests of ‘conservation’ to 200,000,000. That calculation was based on 9 bands of DNA identified in the profile. The defence examined Prof. Donnelly who referred to ‘Bayes Theorem’ relating to statistical probability. The trial court convicted the accused but there were other pleas and evidence on which the accused relied, including a plea of alibi. The Court of Appeal ordered retrial holding:

“The Bayes Theorem may be an appropriate and useful tool for statisticians and other experts seeking to establish a mathematical assessment of probability.....the theorem can only operate by giving to each separate piece of evidence a numerical percentage representing the ratio between probability of circumstance A and the probability of circumstance B, granted the existence of that evidence. The percentages chosen are matters of judgment; that is inevitable. But the apparently objective numerical figures used in the theorem may conceal the element of judgment on which it entirely depends. More importantly for present purposes, however, whatever the merits or demerits of Bayes Theorem in mathematical or statistical assessment of probability, it seems to us that it is not appropriate for use in jury trials, as a means to assist the jury in the task. In the first place, the theorem’s methodology requires, as we have described, that items of evidence be assessed separately according to their bearing on the accused’s guilt, before being combined in the overall formula. That in our view is far too rigid an approach to evidence of the type that a jury characteristically has to assess.....More fundamental, however, the attempt to determine guilt or innocence on the basis of a

mathematical formula, applied to each separate piece of evidence, is simply inappropriate to the Jury's task.... Scientific evidence tempered as proof of a particular fact may establish that fact to be an extent which, in any particular case, may vary between slight possibility and virtual certainty. For example, different blood spots on an accused's clothing may, on testing, reveal a range of conclusions from 'human blood' to 'highly likely to be the victim's blood'. Such evidence is susceptible to challenge as to methodology and otherwise, which may weaken or even, in some cases, strengthen the impact of the evidence. But we have never heard it suggested that a jury should consider the relationship between such scientific evidence and other evidence by reference to probability formulas.....different jurors might well wish to select different numerical figures.....”

The court observed:

“Quite apart from these general objections, as the present case graphically demonstrates, to introduce Bayes Theorem, or any similar method, into a criminal trial plunges the jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper task.”

In 1995, CrL. L. Review (p. 464), in an article ‘Doubts and Burdens: DNA Evidence probability and the Courts’ by Mike Redmayne, the author says: (p. 466)

“The first stage in the interpretation of DNA profiles is the declaration of a match. If two profiles that are compared, do not match, then the suspect can be eliminated from the investigation.”

Keith Inman, co-author with Norah Rudom of the recently published ‘An introduction to forensic DNA Analysis’ (CRC Press 1997) and ‘Principles and Practice of Criminalistics (CRC Press) (see http://www.forensicevidence.com/_/EVID/ELDNA_error.html) say that a ‘match’ is nothing more than probable cause to look at the individual where DNA has been matched to a sample in the database more closely, not the definite and final disposition of his future in the Criminal Justice System.

In U.S., in a recent case of Crawford vs. Commonwealth (Record No.0683-99-1), the Court of Appeal of Virginia held (on 19.9.2000) that instructing the Jury that DNA testing is deemed reliable scientific technique and thus recognized under the laws of Virginia was improper when DNA evidence was used to prove a person’s identity. In that case, the defendant’s DNA was obtained and compared with the DNA extracted from the seminal stain on the rape victim’s clothing. Both samples matched. The forensic scientist conducted a PCR (polymerase chain reaction) analysis and found

that the DNA had been typed in six different systems and that defendant's DNA was consistent with that extracted from the victim's clothing. She said that the possibility of all six systems being found to match with a randomly selected African-American males was one in 970. She also said that if DNA of both samples had not been matched in any of the six systems, then that would positively exclude the defendant. The Jury convicted the defendant. The court reversed the conviction since the instruction to Jury that DNA was reliable was not proper inasmuch as it singled out one part of the evidence.

In Virginia, Code 19.2-270.5 stated that "in any criminal proceeding, DNA.... testing shall be deemed to be a reliable scientific technique and the evidence of a DNA profile comparisons maybe admitted to prove or disprove the identity of a person." Even so, the court set aside conviction based on an instruction to jury giving special importance to DNA. DNA test is admissible but court cannot comment on reliability while instructing the Jury, it was held.

The American Civil Liberation Union declared that DNA cannot be equated with 'fingerprinting'. In O.J. Simpson's case, the legal team resorted to DNA and created a doubt in the minds of the judges. Thus, while DNA, when it helps exclusions, does not infringe liberty; to rely on DNA for conviction, is not proper. The 1998 National Commission on DNA referred to the questionable assumptions in DNA.

Australia:

The position in Australia is revealed from the recent Report of the Australian Law Reform Commission. (Issues Paper 26. Protection of Human Genetic Information – 14. Evidence issues.) The Report is elaborate and refers to the case law in Australia and statutory position as also the law in England. It deals with relevance of DNA in (a) criminal proceedings, (b) civil proceedings, (c) accuracy and reliability of DNA, (d) inter-jurisdictional aspects, (e) privacy concerns, (f) equality of access to DNA, (g) ethical concerns and (h) regulation of access to paternity testing.

It says that the prosecution or the defence may introduce DNA evidence. In para 14.4, it accepts that

“The defence may seek to rely on DNA evidence to eliminate the defendant from suspicion, where the evidence establishes that the DNA sample taken from him does not match the sample taken from the crime scene or found on the victim.”

So far, there appears to be no difficulty. But the Report then discusses about situations where the DNA samples match, the extent of probability of the identity and whether evidence of experts should be admitted on the question of probability, based on the DNA data available in the particular country.

This latter aspect is still quite complicated and we feel that where the DNA samples match, it is not necessary to make any provision at all at this stage of scientific development.

But, so far as cases where the DNA samples do not match, it is now fairly accepted that the identity is not proved.

The US Federal Government is currently preparing new legislation to expand DNA fingerprinting at the national level. However, the Commission on Future DNA Evidence suggested that using DNA matching, convicts could be released in cases of mismatch. In New York and Illinois, appeals with delay by convicts are being allowed.

More recently, our Supreme Court of India, in Kamti Devi vs. Poshi Ram 2001(5)SCC 311 = AIR 2001 SC 2226 refused to rely on the result of a DNA test and held that under sec. 112 of the Evidence Act non-access between the man and woman is the only way to raise the presumption against legitimacy. This is a case where the DNA result was not given any weight.

It is, therefore, fairly established that if the DNA result does not match, then the identity of the person is not established. But, the contrary is not true. Where the test result is that the DNA does not match, it cannot lead to a conclusion of identity of the person.

Regarding the refusal of a person to undergo blood tests or a DNA test in criminal cases, we do not again think that any special provision is to be made in sec. 9 of the Evidence Act, 1872. The Courts can, in criminal or civil cases, always rely upon a person's conduct under sec. 9 and no special provision is necessary in sec. 9 of the Evidence Act.

We have however recommended that so far as refusal by a man for undergoing blood tests or DNA test, for purposes of proving paternity, is concerned, that he should be deemed as having waived his defence that he is not the father (see sec. 112).

For the reasons given in Phipson on Evidence (2000, 15th Edn.), we think that it is not possible to make the result of polygraph or lie detector test admissible under sec. 9 of the Evidence Act. Phipson (para 37.13) deals with this aspect specifically.

Thus, the only amendment we suggest in sec. 9 is the following. In the opening part, after the word "Facts" and before the word "necessary", insert the words "which are".

Section 10:

This section refers to things said or done by a conspirator in reference to a common design.

Section 10 reads as follows: “Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intentions, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it”.

There is an illustration to the section.

The 69th Report refers to the fact that section 10 is wider than the corresponding law in England as stated in R vs. Blake (1844) 6 QB 126, per Patteson J (p.139). In England, an additional requirement is that this exception applies only to acts or statements of any of the conspirators “in furtherance of” the common design. In that case, the evidence of entries made by a fellow conspirator in various documents actually used for carrying out the fraud was held admissible but entries in a document not

created for purpose of fraud and made by a conspirator after the completion of the fraud were held not admissible against fellow conspirators. The latter document evidenced what had been done and also the common intention with which at the time it had been done, but it was inadmissible against the others as it had nothing to do with carrying the conspiracy into effect, for the common intention had then ceased to operate. The narrow rule laid down in English law is explained in Phipson (Evidence, 15th Ed., para 29.11) as follows:

“But the acts and declarations of other conspirators, before any particular defendant joined the association, are receivable against him only to prove the origin, character and object of the complacency, and not his own participation therein or liability therefor, and if they were not in furtherance of the common purpose (e.g. were mere narratives, descriptions or admissions of past events), or were done or made after his connection with the conspiracy had ceased, they will not be admissible against him (R vs. Blake) (R vs. Devonport 1996 (1) Cr. App. p 221). So, acts and declarations after the event conspired for has happened are not generally receivable, since these cannot be in furtherance of the common purpose. Still, acts of accomplices after the arrest of a conspirator may be received, if done in pursuance of prior instructions from him.”

The so-called “common purpose” exception, says Phipson, has been criticized as allowing hearsay evidence to be adduced against defendants

who are charged with conspiracy where it could not be adduced against them on a joint charge of committing the substantive offence (see English Law Commission, Evidence in Criminal Proceedings: Hearsay and Related Topics, Consultation Paper No.138 (1995), Astidge and Parry on Fraud (Sweet and Maxwell) 2nd Ed. 1996 para 16.008. But, the English law has recommended what Patteson J. stated in 1844.

While it is true that section 10 does not use the words “in furtherance of the common design” but uses the words “in reference to their common intention”, the Privy Council in Mirza Akbar vs. Emperor (AIR 1940 PC p.176), in very clear terms held that the words are not to be widely construed and practically read the English law into sec. 10, that the words ‘in reference’ mean ‘in furtherance’. Lord Wright observed, after referring to the English law, (p.180):

“This being the principle, their Lordships think the words of sec. 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships’ judgment, the words “common intention” signify a common intention existing at the time when the thing was said, done or written by the one of them. Things said, done or written while the conspiracy was a foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it

would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' Judgment sec.10 embodies this principle. That is the construction which has been rightly applied to sec. 10 in decisions in India, for instance, in 55 Bom 839(Emperor vs. Ganesh Raghunath) and 38 Cal 169(Emperor vs. Abani). In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy had ended, by way of descriptions of events then past."

It is clear that the Privy Council construed the words "with reference to" as 'in furtherance of' the common intention and this has been consistently followed.

In Sardul Singh Caveeshar vs. State of Bombay (AIR 1957 SC 747 at 760), the Supreme Court, after referring to Mirza Akbar's case, said that the Privy Council stated so, "notwithstanding the amplitude of the above phrase". The principle was reiterated in all later decisions from 1960, see Madanlal Ramachandra Daga vs. State of Maharashtra: AIR 1968 SC 1267 and State vs. Nalini: 1999(5) SCC 253 (Rajiv Gandhi murder case) (per majority).

But in another judgment, namely, Bhagwan Swaroop vs. State of Maharashtra, AIR 1965 SC 682 (which concerned the same person) namely, Sardul Singh Caveeshar as in AIR 1957 SC 747 in relation to certain other offences allegedly committed in conspiracy, Subba Rao J (as he then was), adhered to the wider meaning of sec. 10 and observed that there were five conditions for the applicability of sec. 10, of which one viz., item (iv), covered actions, declarations or writings by one co-conspirator “whether it was said, done or written before he entered the conspiracy or after he left it”. It was held that the words were “designedly used to give a wider scope”.

The above observations of Subba Rao J run counter to the decision of the Supreme Court in 1957 where some of the same accused were involved in a conspiracy and in the earlier case in 1957 the width of the section had been cut down by that Court.

In State vs. Nalini, 1999 (5) SCC 253, one of the learned Judges, Justice Thomas observed that the words ‘with reference to’ are slightly wider.

Now, the observation in the above decision of Subba Rao J. (as he then was) 1965 have been explained very recently in Saju vs. State of Kerala, 2001(1) SCC 378 (at 387), as follows:

“But, with respect, the above observations that the words of sec. 10 have been designedly used to give a wider scope than the concept of conspiracy in English law, may not be accurate. This particular aspect of the law has been considered by the Privy Council in Mirza Akbar vs. King Emperor AIR 1940 PC 176 at p 180, where Lord Wright said that there is no difference in principle in Indian law in view of sec. 10 of the Evidence Act.

The decision of the Privy Council in Mirza Akbar case has been referred to with approval in Sardul Singh Caveeshar vs. State of Bombay (AIR 1957 SC 747)....”

The question before the Commission in the 69th Report was the same and after referring to the fact that this is an exception to the hearsay rule, the Commission did feel that it should be narrowly construed. But still, the Commission retained the words “with reference to” and did not substitute the said words by “in furtherance of”. We are of the view, that the section should be amended by using the words “in furtherance of” as held by the Privy Council and the Supreme Court and we accordingly differ from the 69th Report.

Sri Vepa P. Sarathi has suggested that in view of the increasing terrorist activities the view of Subba Rao, J. should be preferred and the words “with reference to” should be retained and the interpretation of the

said words by the Privy Council, viz., that the said words should mean “in furtherance of” should not be accepted. He says that the view taken in Saju’s case (supra) need not, therefore, be accepted.

We have considered the above suggestion but we feel that, for the reasons already mentioned, the view of the Privy Council in Mirza Akbar’s case (supra) and of the Supreme Court in Sardar Singh Caveeshar (supra) (1957) should be accepted. The said principles are reiterated by the Supreme Court even in the latest case in State vs. Nalini (supra).

With a view to leave no doubts in the matter and to obviate any construction giving a wider meaning, as done in 1965 and by another learned Judge in 1999, we recommend replacing the words ‘with reference to’ in sec. 10 by the words ‘in furtherance of’.

The other suggestion of Sri Sarathi is that the opening words “where there is a reasonable ground to believe” should be substituted as “where the question is whether two or more persons have....” In as much as the existing words may be interpreted as requiring the court to give a preliminary finding, and in order to avoid any ambiguity, we accept the suggestion and recommend that the words should be so changed in the proposed clause (b) of sec. 10.

There is another aspect of the matter. In the 69th Report, it was however recommended that, in sec.10, there is no reference to ‘facts in issue or relevant fact’ which is common to sections 6 to 9 and 11 and also recommended substitution of the words ‘entered into such conspiracy’ for the words “have conspired”. These changes are formal and we agree they may also be made in addition to what we have recommended.

If these amendments are made, the section as revised in the 69th Report would read as follows and we recommend that section 10 be revised accordingly:

Things said or done by conspirator in reference to common design

“10. Where-

- (a) the existence of a conspiracy to commit an offence or an actionable wrong, or the fact that any person was a party to such a conspiracy, is a fact in issue or a relevant fact; and
- (b) the question is whether two or more persons have entered into such conspiracy,

anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it”.

One other aspect is to be considered. The 69th Report recommended that the illustration below sec. 10 as at present with consequential changes may be retained.

Sri Vepa Sarathi, in his commentary ‘Law of Evidence’ (5th Ed. 2002) (p.91) says that the illustration below section 10 is wider than the section and goes beyond the English law. We are not extracting the illustration but we may point out that Sarkar’s Evidence (15th Ed. 1999 para 247) also says that the illustration goes beyond the law and refers to what Johnston J in Balmokand vs. R (AIR 1915 Lah 16, 20) said. The learned Judge observed:

“The way that the words ‘and to prove A’s complicity in it’ come into the illustration are not quite in accordance with common sense or with the section as I read it”.

Instead of making changes in the illustration, we recommend that it may be dropped.

Section 11:

This section mentions ‘when facts not otherwise relevant become relevant’. It reads as follows:

“Section 11: Facts not otherwise relevant are relevant –

- (1) if they are inconsistent with any fact in issue or relevant fact;
- (2) if by themselves or in connection with other facts they make the existence or non existence of any fact in issue or relevant fact highly probable or improbable.”

There are two illustrations below the section.

Illus.(a): The question is whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant. The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

Illus.(b): The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that

the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

Illustration (a) refers to a plea of ‘alibi’ and explains meaning of both clauses (1) and (2): If A committed a crime at Calcutta, the fact that he was at Lahore is relevant under clause (1) of sec. 11 and if he was at a distant place from Calcutta, that would render his presence at Calcutta highly improbable, though not impossible and that fact is relevant under clause (2) of sec. 11. Illustration (b) refers to facts which show that among the four accused, three could not have committed the offence, would be relevant – making clause (1) of sec. 11 apply.

There is no controversy with reference to clause (1) of sec. 11. A fact not relevant – may be called a collateral fact, can become relevant if it is inconsistent with a relevant fact. Illustration (a) first part, referring to alibi, is a clear example.

There has been lot of controversy regarding clause (2) of sec. 11 and it has been stated that the section is very wide and has to be curtailed by adding an Explanation that the ‘other facts’ which make existence of any fact in issue or relevant fact highly probable or improbable, must be admissible under some other provision of the Act such as sec. 32. Such a view was expressed by Sir James Stephen himself.

In this context, we shall refer to what Sir James Stephen stated:

“It may possibly be argued that the effect of the second paragraph of s. 11 would be to admit proof of such facts as these (viz statements as to facts by persons not called as witness; transactions similar to but unconnected with the facts in issue; opinions formed by persons as to facts in issue or relevant facts). It may for instance, be said: A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes highly probable that B did commit that crime. Therefore, A’s declaration is a relevant fact under s 11. This was not the intention of the section, as is shown by the elaborate provision contained in the following part of Ch. II (ss 31-39) as the particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it:- “No statement shall be regarded as rendering the matter stated highly probable within the meaning of the section unless it is declared

to be relevant fact under some other section of this Act.” (Stephen, Intro, pp 160, 161).

A similar view was expressed by an eminent Judge Sir S. Varadachariar in Sevugan Chettiar vs. Raghunatha (AIR 1940 Mad 273). The learned Judge observed:

“As regards sec. 11, it seems to us that sec. 11 must be read subject to the other provisions of the Act and that a statement not satisfying the conditions laid down in sec. 32 cannot be admitted merely on the ground that, if admitted, it may probabilize or improbabilize a fact in issue or relevant fact”.

A similar view was expressed by Sulaiman J earlier in Naima Khalim vs. Basant Singh AIR 1934 P 409 and by Sir Ashutosh Mookerjee in Emperor vs. Panchu Das (1920) ILR 47 Cal 671 and West J. in R vs. Parbhudas(1874) : 11. Bom.HCR 90.

The above decisions which held that the other facts must be relevant under other provisions of the Act, have reasoned that ‘statements’ are not ‘facts’ and sec. 11 cannot apply to statements. Some other cases say that sec. 32 must apply.

As against this, we have the criticism of Field who criticized the views of Stephen. He said:

“The section can hardly be limited, as has been suggested, to those facts which are relevant under some other provisions of the Act, for this would render the section meaningless.”

In other words, according to Field, if in order to make such other facts relevant under clause (2) of sec. 11, it has to be held that those other facts must be relevant under some other provisions of the Act, it would obviously render clause (2) of sec. 11 otiose.

Similarly Desai J in State vs. Jagdeo 1955 All LJ 380 has explained the position, in our view, correctly. He said:

“There is no connection between the provisions of sections 11 and 32 and there is no justification for saying that one section is dependent on the other. As a matter of fact, each section creates new relevant facts; if a fact is relevant under sec. 11, evidence about it can be given as permitted by sec. 5 even though it may not be relevant under sec. 32. If there is one provision under which a fact becomes a relevant

fact, it can be proved regardless of whether it is made relevant under some other provision or not.

If a fact is relevant under sec. 32, it can be proved notwithstanding that it is not relevant under sec. 11 and to say that a fact relevant under sec. 11 cannot be proved unless it is covered by the provisions of sec. 32 is nothing short of striking out sec. 11 from the Evidence Act. When sec. 32 itself is sufficient to allow a fact to be proved, it would have been futile for the legislature to enact sec. 11, if a fact made relevant by that section would not be proved unless it was also relevant under sec. 32.”

Wigmore (as quoted in Sarkar) deals with the same aspect (i.e. the content of clause (2) of sec. 11) in so far as American Law is concerned and says (Wig. Sec 135) in regard to “essential inconsistency” as follows:-

“Its usual logic is that a certain fact cannot co-exist with the doing of the act in question, and therefore that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. The form sometimes varies from this statement; but its nature is the same in all forms. The inconsistency, to be conclusive in proof, must be essential, i.e. absolute and universal; but since in offering evidence, we are not required to furnish demonstration but only fair ground for inference, the fact offered need not have this essential or

absolute inconsistency but merely a probable or presumable inconsistency; and its evidentiary strength will increase with its approach to absolute or essential inconsistency”.

Norton (as quoted in Sarkar) also says (p. 124):

“Any fact material to the issue which has been proved by the one side may be disproved by the other, whether the contradiction is complete, i.e. inconsistent with a relevant fact under clause (1) or such as only render the existence of the alleged fact highly improbable under clause (2). Again facts may be put in evidence under clause (2), in corroboration of other relevant facts if they render themselves highly improbable.”

In a recent Full Bench decision of the Kerala High Court in C. Narayanan vs. State of Kerala 1992 Cr. LJ 2868, Thomas J (as he then was) observed on a review of the case law.

“There is nothing in sec. 11 of the Act to suggest that it is controlled by any other section. On the other hand the words used in sec. 11 indicate that the provision is an exception to other general provisions.”

Thus, the view of Sir James Stephen and other Judges that under sec. 11(2), the facts must be relevant under some other provisions, has not been accepted by other jurists and Judges for good reasons.

We finally come to the elucidation of the law by Sri Vepa P. Sarathi in the 'Law of Evidence' (5th Ed. 2002). He says: (p. 41)

“The section starts by saying “Facts not otherwise relevant.....” What are the facts which though logically relevant are not legally relevant? They are the facts coming under the two rules of exclusion, relating to relevancy: (a) Facts which would come under hearsay, and (b) facts which would come under res inter alios acta alteri nocere non debet, which means a transaction between two parties ought not to operate to the disadvantage of a third. Under (b) are usually included

- (i) statements made behind the back of the person against whom they are sought to be used as evidence,
- (ii) similar unconnected transactions, and
- (iii) opinions of third parties.

Facts coming under the hearsay rule or under *res inter alios acta*, though logically relevant are legally irrelevant..... What sec. 11 says is this: Facts, which come under these two rules are otherwise irrelevant. They would however become relevant, if they are inconsistent with the fact in issue or make the existence of the fact in issue highly probable or improbable.”

In other words, though legally irrelevant, they become relevant because of sec. 11.

The author Sri Sarathi further says: (p. 42)

“A fact, before it can be considered by a court, should be relevant under some section of the Evidence Act. If however that is res inter alios acta or hearsay, and hence not otherwise relevant, then it has also to satisfy the additional test in sec. 11, namely, it should make the existence of the fact in issue highly probable or improbable.”

We are in entire agreement with this exposition of the meaning and purpose of sec. 11.

The view of Field, Sri Sarathi and of the High Courts of Kerala and Allahabad taking the same view are, in our view, further supported by two judgments of the Supreme Court.

In Ram Kumar vs. State of M.P. (AIR 1975 SC 1026) adverting to sec. 11 and an omission of important facts in an FIR, the Supreme Court observed:

“If his daughters had seen the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it in the F.I.R. We think that omissions of such important facts, affecting the probabilities of the case, are relevant under sec. 11 of the Evidence Act in judging the veracity of the prosecution case.”

The second case is the one in Satbir vs. State of Haryana AIR 1981 SC 2074 where the Supreme Court specifically referred to sec. 11(2). There, the appellant, Satbir was convicted by the High Court, - while the co-accused Dayanand was acquitted. The High Court had relied upon the recovery of the stolen article on 29.7.73 when Satbir was arrested. The Supreme Court referred to an application filed on 27.9.73 by Dayanand before a Magistrate stating that Satbir was already arrested (i.e. on or before 27.9.73) and that he (Dayanand) was also apprehending arrest. This statement was made at a time when there was no warrant against Dayanand. The Supreme Court

observed that the above statement probablised Satbir's arrest before 27.9.73 and the recovery of the stolen item at the accused's instance was doubtful.

There is also the other controversy that sec. 11 refers to 'facts' and not to statements. This view was expressed in some cases including Royjappa vs. Nilakanta Rao AIR 1962 Mysore 53. But the Kerala Full Bench in C. Narayanan's case above referred to, rightly referred to Ram Bharose vs. Diwan AIR 1938 Oudh 26 wherein it was stated:

"It seems to us that the statements in question are relevant under cl.(1) of sec. 11 Evidence Act, because they are inconsistent with the fact in issue." It was said that sec. 11, Evidence Act, related to facts and not to statements, but 'fact' includes

"anything, state of things, or relation of things capable of being perceived by the senses (sec. 3)

and a statement is thus included in the definition of 'fact', as is clear from illustration (a) to sec. 6 also."

We shall now refer to the 69th Report of the Commission. After a detailed review of the view of jurists and the case law, the Commission

stated that four principles can be gathered. The fourth one was as follows (see para 7.180):

“The fourth view is that statements can be admissible under sec. 11 even when they are not admissible under sec. 32.”

The Commission stated (see para 7.181):

“This question, - i.e. the question whether statements made by a third person can be relevant under sec. 11 - is, thus, a difficult one. In our opinion, on the present wording, the fourth view is the most cogent. No doubt, the court must exercise a sound discretion and see that the connection between the fact to be proved and the fact sought to be given under sec. 11 to prove it is so immediate as to render the co-existence of the two highly probable. But it is legitimate to read sections 11 and 32 independently of each other. The section, it should be remembered, makes admissible only those facts which are of great weight in bringing the Court to a conclusion one way or the other as regards the existence or the non-existence of the facts in question. The admissibility under this section must, in each case, therefore, depend on how near is the connection of the facts sought to be proved with the facts in issue when taken with other facts in the case.”

Having said all this, the Commission in the 69th Report, abruptly concludes (see para 7.188) that though this is the position in law, in as much as courts, and in particular eminent Indian Judges (Sir S. Varadachariar and Mookerjee JJ) have thought that some limitations must be imposed on sec. 11, the Commission would accept the recommendation of Sir James Stephen to add an Explanation as framed by him but in a modified form. Sir James Stephen recommended an addition to sec. 11 as follows:

“No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section, unless it is declared to be a relevant fact under some other section of the Act.”

The 69th Report recommended an Exception as follows in slight modification of Sir Stephen’s suggestion: (see 7.191)

“Exception: Evidence shall not, by virtue of this section, be given of a statement, whether by a party or by any other person; but nothing in this Exception is to affect the relevance of a statement under any other section.”

In other words, the proposal requires the statement, though relevant and sec. 11, to be relevant also under another section to be relevant as held by Sir James Stephen, Varadachariar J. and others.

We have elaborately dealt with the opinions of Field, Norton Sri Sarathi and to rulings of the Allahabad High Court of 1955 and to judgments of the Supreme Court of 1975 and 1981. In our view, when the 69th Report itself says that the fourth principle arising out of the reading of the section and out of the case law is correct, there is no reason to give it up merely because the contrary view was held in a few decisions by the Judges, Varadachariar J., Mookerjee J., Sulaiman J. and West J. in separate cases.

We are of the view that the reasons given by Field, Norton, Sri Sarathi, Justice Desai of Allahabad High Court and the principle laid down in the two judgments of the Supreme Court flow from sound principles. It is one thing to say that while accepting such statements court must be careful in weighing the probability or improbability carefully and it is another thing to require 'relevant' facts to be also relevant under other provisions of the Act and in particular sec. 32.

We, therefore, with great respect, differ from the recommendation made in the 69th Report.

Question then arises whether, in order to see that a wrong principle in certain decisions which require the facts to be further relevant under other

provisions – do not hold the field, we should amend or add an Explanation below sec. 11?

After considerable thought over the matter, we are of the view that the matter be put beyond doubt and controversy in as much as justice may suffer where a fact relevant under sec. 11 is treated as totally inadmissible. It may, in a criminal case, indeed lead to conviction of an accused who is otherwise entitled to acquittal (viz. AIR 1981 SC 2074 referred to above).

We, therefore, recommend insertion of an Explanation after clause (2) and before the illustrations in sec. 11 as follows:

“Explanation : Facts not otherwise relevant but which become relevant under this section need not necessarily be relevant under some other provision of this Act but the degree of their relevancy will depend upon the extent to which, in the opinion of the Court, they probabalise the facts in issue or relevant facts.”

Section 12:

This section states that in suits for ‘damages’, facts tending to enable the Court to determine amount of damages are relevant.

In the 69th Report, the Commission felt, after considerable discussion, that the word ‘damages’ is to be replaced by the word ‘compensation’ which

is wider in connotation. The Commission referred to suits for defamation, breach of contract (sec. 73 Contract Act), torts and to awards for damages in case of mental anguish etc.

In para 8.28 of the 69th Report, it is stated that there is an etymological distinction between the words ‘damages’ and ‘compensation’. While the term ‘damages’ is used in reference to pecuniary recompense awarded in reparation for the loss or injury caused by wrongful act or omission, the term ‘compensation’ is used in relation to a lawful act which caused the injury in respect of which an indemnity is obtained under the provisions of a particular statute, e.g. land acquisition.

In para 8.29 of the 69th Report, reference is made to the dictum of Esher M.R. in (Dixon vs. Calcraft) (1892.1.Q.B. 458) to the following effect:

“The expression ‘compensation’ is not ordinarily used as equivalent for damages. It is used in relation to a lawful act which has caused injury. Therefore, that word would not, I think, include damages at large”.

In para 8.30 of the same Report, it was explained that the word ‘damages’ is confined to civil cases but that the legal system of many

countries imposes an obligation on criminal courts also to deal with claims for compensation.

In para 8.38 of the same Report, reference is made to the fact that Dixon J in an Australian case, dealing with ‘compensation’ for acquisition of property said it is ‘recompense for loss’ and to the view of Latham CJ in another Australian case that the word ‘compensation’ is wide enough, in its ordinary significance, to include damages for the injuries suffered by a seaman.

Thereafter, in para 8.40 of the said Report, the Commission recommended that the word ‘damages’ be substituted by the word ‘compensation’.

It will be noticed that while at one stage the Commission refers to the view of Esher MR that the word ‘compensation’ is not ordinarily used as equivalent to ‘damages’, it has accepted the view of Latham CJ, at another stage, that the word ‘compensation’ will include the word ‘damages’. We feel with respect, that there is considerable inconsistency in these two paragraphs.

As far as the word ‘damages’ is concerned, it is used in sec. 73 of the Contract Act. Damages are also payable by a trespasser on land of another.

On the other hand, ‘compensation’ is payable (say) for a lawful acquisition of another’s land. The Land Acquisition Act uses the word ‘compensation’.

The Motor Vehicles Act, 1939 and 1988 when they refer to claims for injury by an injured person or by dependents of the deceased, use the word ‘compensation’ though the act which caused the injury or death is not a lawful one.

Keeping all these considerations in mind and noting that the word ‘damages’ is used in some situations or contexts and the word ‘compensation’ in others, and that opinions have differed whether one of the words would encompass the other, we are of the view that in sec. 12, it would be better if both words are used. We recommend that in the title and body of sec. 12, before the word ‘damages’, the words ‘compensation or’ are added.

Section 13:

Section 13, as it stands now, reads as follows:

“Section 13: Facts relevant when right or custom is in question:

Where the question is as to the existence of any right or custom, the following facts are relevant:-

- (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence;
- (b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.”

There is an illustration below section 13.

This is quite an important section particularly in relation to (a) relevance of earlier judgments not inter partes or findings in such judgments and (b) relevance of boundary recitals in earlier documents not inter partes. The matter requires close examination in the light of the proposals in the 69th Report for adding an Explanation and an Exception below sec. 13.

Analysing the section, it will be seen that

- (A) Clause (a) refers to “transactions” by which the right or custom in question was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence, and
- (B) Clause (b) refers to ‘particular instances’ in which right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

Apart from the use of the words ‘by which’ in clause (a) and ‘in which’ in clause (b), we find that the words ‘created’, ‘modified’ are not used in clause (b).

We mainly find that so far as the ‘right’ or ‘custom’ which is in “question” is concerned, there is a controversy with regard to relevance of (1) ‘judgments’ not inter partes as also (2) recitals in ‘documents’ not inter partes.

The case law on these two aspects is voluminous and conflicting radically but on one aspect the controversy is set at rest by judgments of the Privy Council and the Supreme Court in accepting that a ‘Judgment’ is a ‘transaction’ for purposes of sec. 13. But there is still controversy as to whether any ‘findings’ given in an earlier judgment not inter partes are relevant.

So far as recitals in documents are concerned, there is no controversy that several types of documents come within the meaning of the word ‘transaction’ while some other documents come under ‘particular instances’. But there is again controversy as to relevance of boundary recitals in documents not inter partes.

Yet another aspect is that some commentators have said that the words ‘by which’ in clause (a) require that the earlier judgment or document (i.e. transaction) though not inter partes must be one ‘by which’ the right or custom was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence and that for applicability of clause (a), it is not sufficient that there is a reference “in” in prior judgment or document, not inter partes, on the above aspects. They say that only in clause (b) of sec. 13, the word ‘in’ is used.

Yet another view is that if the right or claim is against a person’s interests, it is admissible but not if it is an earlier self-serving statement in one’s favour.

These are the various controversies under sec. 13.

In the 69th Report, the Commission recommended the insertion of an Explanation and Exception below sec. 13 as follows:

“Explanation: A previous legal proceeding, whether it was or it was not between the same parties or their privies, may be relevant as a transaction or instance, within the meaning of this section; and, when a legal proceeding so becomes relevant under this section, a judgment delivered in that proceeding is admissible as evidence of such legal

proceeding, but not so as to make relevant the findings of facts or the reasons contained in the judgment; but nothing in this Explanation is to affect the relevance of a judgment under any other section.

Exception: Nothing in this section shall render relevant recitals of boundaries in documents which are not between same parties or their privies.”

We have examined the case law prior to 1977 when the 69th Report was given and to the latter case law and we find that the above recommendations require some modifications.

So far as the first part of the proposed Explanation is concerned, there can be no dispute – when it says that a previous legal proceeding may be relevant, whether it was or was not between same parties and that a judgment delivered in that proceeding will be admissible as evidence of such legal proceeding.

The question is with regard to the latter part of the Explanation which says that relevant findings of fact contained therein are not admissible. So far as reasons are concerned, of course, they cannot be admissible in a later legal proceeding.

Question also arises with regard to the proposed ‘Exception’ and whether the recitals in documents not inter partes are inadmissible whether the document comes under ‘transaction’ in clause (a) or under particular instances in clause (b).

Having identified the scope of discussion, we shall now refer to the case law on the subject, including the case law after 1977.

So far as ‘Judgments’ not inter partes are concerned, the Privy Council treated them as admissible under sec.13 falling within the meaning of the word ‘transaction’. See Ram Ranjan vs. Ram Narain (1895) ILR 22 Cal. 533 – 22. IA 60 and Dinomoni vs. Brojo Mohini: (1901) ILR 29 Cal. 187 – 29. IA 24 and this position was clarified in Collector of Gorakhpur vs. Ram Sunder Mal (AIR 1934 P.C. 157 = 51 IA 286), wherein Lord Blanesburgh observed, criticizing the opposite view held by Sir John Woodroffe in his commentary, as follows:

“He (Woodroffe) would hold that they (statements in Judgments) are not admissible at all under sec.13; but this view is not in accordance with the decisions of the Board in Ram Ranjan Chakerbati vs. Ram Narain Singh and Dinomoni vs. Brojo Mohini.”

On this aspect, there is no difficulty because the Supreme Court of India has taken the view that a judgment not inter partes is relevant as a ‘transaction’ under sec.13 and admissible. See Srinivas vs. Narain (AIR 1954 SC 379) (three learned Judges); a Judgment is a ‘transaction’ according to Sital Das vs. Sant Ram, AIR 1954 SC 606 (four learned Judges). These Judgments were followed in 1999 in Tirumala Tirupathi Devasthanams vs. K.M. Krishniah 1998 (3) SCC 331 = AIR 1998 SC 1132 (two learned Judges). The last Judgment was followed recently in Madhukar D. Shende vs. Tarabai Shedage, JT 2002 (1) SC 74 (two learned Judges).

No doubt, a three Judge Bench of the Supreme Court in State of Bihar vs. Radha Krishna Singh AIR 1983 SC 684 (at 711-712) took a contrary view but in view of the Judgment of four learned Judges in ‘Sital Das’ case (in 1954) referred to above and the consistent view taken in a large number of cases, we cannot regard this case as governing sec.13. The court, unfortunately, did not refer to the two earlier rulings of 1954. Further, the court referred to two earlier Judgments of the Privy Council rendered before the enactment of the Indian Evidence Act, 1872 and also to other decisions of the Privy Council, which, while holding sec.13 not applicable, relied on the English law on the subject, which is different. We may state that in the 69th Report, the Law Commission referred to the fact that the English law here was different (see paras 8.71 to 8.73) as pointed out by Mahmood J. in Collector of Gorakhpur vs. Palakdhari ILR 1899 12 All.1.

Therefore, we start with the premise as accepted in several Judgments and as accepted in the 69th Report – that Judgments not inter partes are admissible under clause (a) of sec.13 as ‘transactions’.

The next question is as to what extent they can be looked into. We agree with the 69th Report that the ‘reasons’ given in the earlier Judgment not inter partes cannot be treated as admissible in a latter case.

Next question is whether earlier ‘findings’ are relevant.

We have already referred to the decision in Dinomoni vs. Brojo Mohini (1901) ILR 29 Cal. 187 = 29 IA 24 whose correctness was reiterated in Collector of Gorakhpur vs. Ram Sunder Mal (AIR 1934 P.C. 157). In that Judgment, Lord Lindley observed that the previous Judgment not inter partes, can be looked into for the purpose of noting “who the parties were, what the lands in dispute were and who was declared entitled to retain them”.

In Collector of Gorakhpur vs. Ram Sundar AIR 1934 P.C. 157 it was held that “the view in Dinomoni’s case that “on general principles and under sec.13”, orders made under the Criminal Procedure Code are admissible for the purposes mentioned in the passage at p.191 from the Board’s Judgment” (Lord Lindley’s Judgment in Dinomoni). (This has obvious reference to “who the parties to the dispute were; what the land in dispute was; and was declared entitled to retain possession”.) It was further observed that the decree to which the pedigrees were attached could be evidence that such pedigrees were filed in the suit of 1805 and it was further observed as follows:

“All really wanted here in order to prove that the pedigree filed by the Rani in 1805, is an admission of defendant 2’s descent from Bodh Mal, is to use the statement in the decree that the pedigrees produced were filed by the parties. If other entries made in records by public offices are admissible it would be absurd that such an entry as this in a decree should be inadmissible. In the result, their Lordships are prepared to hold the pedigree admissible under sec. 135. In their Judgment moreover the two decisions of the Board already referred to are sufficient authority for holding it admissible under sec. 13. The pedigree filed by the Rani in 1805 if admissible is clearly a relevant admission under sec. 21 against the present Rani as her representative in interest, and an admission within the definition in sec. 18, Evidence Act.”

First the pedigree filed in the earlier case is evidence and the admission of relationship therein is also admissible against the person who filed it.

In Srinivas vs. Narayan (AIR 1954 SC 379), there was a previous suit for maintenance by a widow in a Hindu Joint family. It was prayed that the maintenance be a charge on the joint family property. Amount of maintenance was to depend on extent of joint family property. An issue was framed in that suit as to the extent of the family property. In the latter suit for partition, where there was a plea that the properties were self acquired properties, the earlier judgment was held admissible for the purpose of referring to an assertion that certain properties belonged to joint family.

In Sital Das vs. Sant Ram AIR 1954 SC 606, the question was whether Sital Das was a spiritual collateral of one Kishore Das, the last Mahant who died on 4.4.1945 and to which office Sital Das laid claim as a 'Bhatija Chela'. He claimed to be a descendant of the fourth degree from Ram Krishna Das through whom late Kishore Das had also traced his spiritual lineage. Ram Krishna Das had a disciple Brahm Das, his disciple was Mangal Das, the latter's disciple was Sadhu Ram Das and plaintiff (Sital Das) was a disciple of the said Sadhu Ram Das. The earlier Judgment of 1912 was one in a suit filed by Kishore Das wherein he asserted his right as a spiritual collateral of Mangal Das, thus accepting Mangal Das was a disciple of Ram Krishna Das. That admission would, in its turn, make the plaintiff (Sital Das) as a fourth degree descendant. The Supreme Court held that the earlier Judgment was admissible "...as a transaction in which Kishore Das ... asserted his right as a spiritual collateral of Mangal Das and on that footing got a decree. The decree also recognized the right of Kishore Das to institute the suit as such collateral.... The Judgment.... can be used in support of the oral evidence adduced in the case.... it is fully established that Sital Das was a spiritual collateral of Kishore Das".

In Tirumala Tirupati Devasthanams case (AIR 1998 SC 1132), the Devasthanam, representing the deity Balaji of Tirupathi, was the defendant in the suit of 1968 by the plaintiff (Krishnaiah) and it relied upon an earlier judgment of 15.6.1942 in a suit of 1937 filed by it against the Hathiramji Mutt, to prove its title and that judgment referred to title deeds in favour of the deity of the year 1887 and documents showing possession of the deity from 1846. The Devasthanam had obtained possession of the land through Court in EP No.2 of 1946. The respondent claimed possessory title. The

Supreme Court referred to Dinamoni vs. Brojo Mohini (1902) ILR 29 Cal 190 and held that the Devasthanam could rely on the earlier judgment as evidence of its title.

In Madhukar D. Shende's case (JT 2002(1) SC 74), the registered will upon which the appellant – plaintiff relied against the respondent (an encroacher on the property) and whose validity was in question was held valid in an early suit filed by the same plaintiff in respect of another property held by the same defendant, but as tenant. Both properties were covered by the will. An argument was raised for defendant that the earlier judgment was not res judicata because the property was different, though covered by the same will. The Supreme Court held that, whatever be the position so far as res judicata was concerned, the earlier judgment was relevant under sec. 13 also in respect of the 'facts and findings' recorded in the said judgment.

The section, it will be noticed, refers in clause (a) to any transaction by which the right was “created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence”. The word 'recognised' means here, 'right recognized in the earlier transaction' i.e. 'right recognized in the earlier judgment'. Does a finding in an earlier judgment not inter partes declaring title of one of the parties not then come within the above words, if the finding was regarding recognition of title to property or blood relationship?

In Gobinda Narayan vs. Shamlal AIR 1931 P.C. 89, decided by the Privy Council raises a problem. It states:

“A judgment not inter partes holding that a partition of a certain estate was proved is only admissible under the provisions of sections 13 and 43 as establishing a particular transaction in which the partibility of the estate was asserted and recognized”

Up to this point there is no quarrel. But then, the next sentence is as follows:

“...The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded nor can any finding of fact there come to, other than the transaction itself, be relevant to prove partition in a subsequent suit.”

Here too, there can no quarrel that reasons given in one judgment may not be relevant while dealing with another dispute later on. But, what the Privy Council meant by stating that ‘finding of fact, there came to, other than the transaction itself’ cannot be relevant is a matter for examination. Let us assume that the earlier finding is one relating to ‘recognition of a right’. Can it then be said that it is not ‘admissible’? In fact, the previous sentence quoted accepts that ‘recognition’ of a right in an earlier judgment is relevant. Any other view will be in the teeth of the language of sec. 13.

One has to read the facts closely in the above case. The earlier judgment was concerned with partibility of property and if it was an ‘impartible estate’, the estate was obviously not partible. The earlier suit related to Pandan estate, held partible, while the latter suit related to Achra

estate. The Privy Council held (in the following sentence after the above extract) referring to the earlier judgment, as follows:

“...The judgment therefore is no evidence that Thakur Sib Singh got the Achra villages by partition; it is at most evidence that he might have done so, and this is plainly not sufficient....”

and held Achra estate was impartible according to the custom and other evidence. Thus, the case related to different properties and hence the earlier finding regarding one property was held not relevant in a latter case relating to different properties.

We find that without noticing these facts some High Courts have adopted the view that findings in earlier judgments not inter partes are not admissible. Some other High Courts have indeed taken the view that they are admissible. What did the Privy Council mean by the words “other than the transaction itself” while stating ‘the finding of fact, other than the transaction itself’ is not relevant, is not clear.

It is in the light of the analysis of the judgments of the Supreme Court and of the Privy council (like Dinomoni), we have to finally decide whether findings in earlier judgments, - even if they relate to recognition of a right – have to be declared inadmissible as proposed in the latter part of the Explanation proposed to be added to sec. 13 by the 69th Report, i.e. excluding all findings in the earlier judgment.

On a consideration of the judgments of the Supreme Court where findings as to title to property or as to blood relationships were treated as ‘recognition’ of rights, we are, with great respect, not able to accept with the second part of the Explanation as proposed in the 69th Report where all findings are excluded.

In our view, it is necessary to say that even ‘findings in earlier judgments’ may be relevant, if the right to dispute in the latter case was closely connected with the finding in the earlier case.

Another aspect is that the opening part of the proposed Explanation uses the words “whether it was or it was not between the same parties or their privies”. Now, if parties or privies are the same, a principle of resjudicata will itself be attracted and there is no need to fall back upon sec. 13. We, therefore, propose to delete these words also.

In our view, it will be sufficient to add an Explanation as follows:

“Explanation I:- A previous legal proceeding, whether it was or was not between the same parties or their privies, may be relevant as a transaction or instance, within the meaning of the section; and when a legal proceeding so becomes relevant under this section, a judgment or order delivered in that proceeding is admissible as evidence of such legal proceeding; findings of fact but not the reasons therefor contained in such a judgment or order are relevant; but nothing in this Explanation shall affect the relevance of a judgment or order under any other section.”

So far as to what extent the names of parties, or the description of laws or as to the rights recognized etc., we do not think that any detailed provisions be made and that the existing decisions of the Supreme Court are clear enough. We need not say ‘findings’ in the earlier case are relevant or that ‘reasons’ in earlier cases are not relevant.

Statements or recitals (including boundary recitals) in documents not inter partes

This aspect concerns the Exception proposed in the 69th Report by which statements as to boundaries in documents not inter partes are sought to be excluded.

We shall start with a simple example. A sold by registered deed, property to B in 1980 on to his eastern side and describes the boundaries as follows (area and length of boundary also given):

East: property of Mr. P (100 feet)

South: property of Mr. Q (200 feet)

West: property of Mr. A (100 feet)

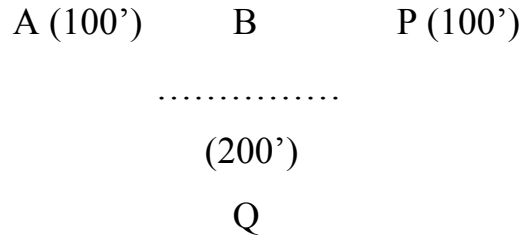
North: property of Mr. R (200 feet)

$$(200')$$

N

R

.....



In the year 2000, a dispute arises in regard to an encroachment by B, the purchaser, into the property of R on the north and R files a suit against B and R wants to rely on the sale deed by A in favour of B to show the location of R's property on the north of B's property and its measurements. Or let us take a case where R encroaches into B's property as purchased and B relies upon his sale deed from A. May be R may have a case that A sold to B property which did not belong to A. R may be having documents to prove that he owns the part of land he is alleged to have encroached into B's property or has no evidence at all.

The question here is whether, whatever be its strength, the recitals in A's sale deed to B as far as the sale of property to his east – are relevant or not. It is true R is not a party to it. In the first example where B encroached into R's property, R may say that the sale deed amounts to an admission that B had no right to any property shown therein to belong to R. In the second example where R is the encroacher, B may say he purchased this property from A and was put in possession in 1980 and R never interfered with B's possession for 20 years or more. In the latter case, it is not an admission but is a fact relating to a boundary within the knowledge of an immediate neighbour – A who had claimed that he was the owner of the plot to the south of R's property and had sold it to B in 1980.

In both these examples, one can, on plain common sense, say that the northern boundary recital is some evidence in the first example against B and in favour of R and in the second example, in favour of B and against R. In the earlier transaction evidenced by the document, title and possession was claimed or asserted by the parties to the document. We are only saying that the boundary recitals recognize but do not create rights nor are they conclusive.

What we have said in relation to boundary recitals equally applies to other statements in earlier documents.

When we come to the case law, there is clear divergence of views among the High Courts, some holding that statements or boundary recitals not inter partes are not admissible while other High Courts say they are admissible though not conclusive. We shall, therefore, confine ourselves to the judgments of the Privy Council and Supreme Court.

In (1861-63) 9. M.I.A. 344 (PC), Arya Brahmins claimed ‘purohitam’ right as against Parishai Bhattars and relied on evidence of a deed of 1675 by Adhayam Bhattars (i.e. 3rd parties) to Aryas. Deed of 1675 was held to be evidence that Aryas claimed the right and that Adhayam Bhattars admitted the right of Purohitam of Aryas.

No doubt, in Shrinivas Das vs. Meheubai AIR 1916 PC 5 (44 IA 36) the Privy Council held that recitals in deed are only evidence as against the parties to the deed or those who claim through or under them. Here their Lordships were considering whether an admission by one party in a

document is binding on a non-party. Obviously, it is not. They did not have to decide their relevance against others.

In several cases, it is accepted that a statement in an earlier document, not between parties, if it is against the interests of the person who made the statement, would obviously be relevant in a later suit not inter partes but to which the person who made the statement is a party and that, on the other hand, a statement, though self-serving may be relevant though its evidentiary value may be weak. To say it is wholly inadmissible, may not be the correct view to take. We are again not in agreement with the view in this regard expressed in the 69th Report.

Now, the Exception proposed in the 69th Report, though confined to boundary recitals, is as follows:

“Exception: Nothing in this section shall render relevant recitals of boundaries in documents which are not between the same parties or their privies.”

In the light of the earlier discussion, we are of the view, with great respect, that this may not be the correct view to take. We, therefore, drop this proposal.

We, further recommend, in order to make the legal position clear, that Explanation II be added as follows:

Explanation II :- Recitals in documents which are or not between the same parties or their privies, including recitals

regarding boundaries of immovable property are relevant in a legal proceeding.”

Thus, we recommend Explanations I and II below sec. 13 as stated above.

Section 14:

Section 14 deals with relevancy of facts showing the existence of state of mind or of body or bodily feeling and contains two Explanations and 16 illustrations (a) to (p). In the 69th Report, the Commission observed (see para 8.154) that sec. 14 does not need any amendment, except in illustration (h) to the extent indicated in para 8.150 of the Report.

Illustration (h) reads as follows:

“(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that A knew of the notice did not disprove A’s good faith.”

In para 8.150 of the 69th Report, the Commission stated as follows:

“Illustration (h), where it says that the fact that public notice of the loss of the property had been given in the place where A was, is relevant, assumes that some evidence would be given to show that the notice was within the knowledge of A, the accused. It would, therefore, be desirable to add the words “and in such a manner that A knew or probably might have known of it”, after the words “in the place where A was” in illustration (h). We recommend accordingly.”

We agree with this recommendation.

We note that illustrations (a), (b), (c) and (d) deal with knowledge, (e) with ill-will, (f), (g) and (h) with good faith, (i) and (j) with intention, (k) with state of mind, (l) and (m) with state of body, (n) with negligence, and (o) and (p) with scope of the Explanation. (see Sri Vepa P. Sarathi’s commentary, 5th Ed., 2002 pp.63 to 68)

Section 15:

Section 15 deals with relevancy of ‘facts bearing on question whether act was accidental or intentional’. There are three illustrations below the section.

The purport of this section is well illustrated by illustration (a) which refers to a series of earlier acts of the same person which resulted in a fire accident as a result of which insurance was claimed. In a later incident, the fact that in the earlier incident the same person was involved, may be

relevant in pointing out whether the fire was accidental or intentional. Sri Vepa P. Sarathi points out that the idea which is expressed in the illustration is not brought out clearly in the section, viz., that the ‘same person’ was involved in all the acts. In order to bring about this idea we agree with the suggestion of Sri Vepa P. Sarathi and recommend that sec. 15 should be recast as follows:

Facts bearing on question whether act was accidental or intentional

“15. When there is a question whether an act of a person was accidental or intentional, or was done by a person with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the same person doing the act was concerned, is relevant.”

We agree with the recommendation of Sri Vepa P. Sarathi and we recommend accordingly.

We accordingly differ from para 8.187 of the 69th Report which said that no amendment is necessary in sec. 15.

Section 16:

This section deals with relevancy of ‘Existence of Course of Business’. There are two illustrations below sec. 16.

In para 8.187, the 69th Report stated that no amendment is necessary and we agree with the view.

Section 17:

This section deals with relevancy of ‘admissions’. This was amended by the I.T. Act, 2000 (Act 21/2000) by adding the words “contained in electronic form”.

In the 69th Report, it was stated (see para 9.24) that no amendment is necessary in sec. 17. After going through the subsequent case law, we are of the view that there is no good reason to differ from the above view.

Section 18:

Section 18 deals with the relevancy of admission by party to proceeding or his agent; by suitor in representative character; by party interested in subject matter; by person from whom interest derived.

It reads as follows:

“S.18. Admission by party to proceeding or his agent.- Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

By suitor in representative character.- Statements made by parties to suits, suing or sued in a representative character, are not admissions,

unless they were made while the party making them held that character.

Statements made by –

- (1) party interested in subject-matter.- Persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or
- (2) persons from whom interest derived.- Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.”

In the 69th Report (see para 9.26) it was stated that section 18 requires changes partly (i) in expression (ii) in substance and (iii) in structure and arrangement.

The suggestions with which we fully agree, are mainly to split up para 1 into two parts, one dealing with admissions by parties and another with admissions by agents and to substitute the word “civil proceedings” for “suits”. With regard to “representative character” or “proprietary or pecuniary interest”, words are proposed to be added to say that the admissions must have been made during the continuance of the said character or interest. We are also of the view that in sub-section (1) the following words “subject to the other provisions of this section” be inserted

at the beginning of the sub-section. With these changes which have been recommended, with which we agree, the section would read as follows:

**Admission by party to proceeding or his agent or by party
interested in subject matter or by person from whom
interest is derived**

“ 18. (1) Subject to the provisions of this section, statements made by a party to the proceeding which is against his interest are admissions.

(2) Such statements made by an agent to a party to the proceeding, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

(3) Such statements made by parties to a civil proceeding, where the proceeding is instituted by or against them in their representative character, are not admissions, unless they were made while the party making them held that character.

(4) Such statements made by persons who have a joint proprietary or pecuniary interest in the subject-matter of the proceeding are admissions, provided the following conditions are satisfied:-

- (a) the statements are made by such persons in their character of persons so interested, and during the continuance of the interest of the persons making the statements; and
- (b) the statements relate to the subject-matter of the proceeding.

(5) Such statements made by persons from whom the parties to the civil proceeding have derived their interest in the subject-matter of the proceeding are admissions, if they are made during the continuance of the interest of the persons making the statements”

Section 19:

Section 19 deals with ‘admissions by persons whose position must be proved as against party to suit’.

It states that 'statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability'.

The following illustration given under the section can help in understanding the purport of the section:

Illus. “A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.”

In other words, the statements made relevant under the section are statements by persons who are not parties to the suit. Field gives another example: A and B are jointly liable for a sum of money to C. C brings an action against A alone. A objects that he cannot singly or severally be liable and that B should be joined as a co-defendant by being jointly liable. An admission by B to his joint liability is relevant between A and C. (Field, 6th

Ed. p.91) An admission in the written statement of one co-mortgagee of the receipt of the whole mortgage debt is admissible against the other co-mortgagee (Appavu vs. Nanjappa 25 Mad L.J 329).

We agree with the 69th Report that no change is necessary in sec. 19 but that the word ‘suit’ may be substituted by the word ‘civil proceeding’. A change to a like effect in the title is also recommended.

Section 20:

Section 20 refers to 'admissions by persons expressly referred to by party to suit'.

It says that “statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions”.

The illustration below the recital is as follows:

“The question is, whether a horse sold by A to B is sound. A says to B – ‘Go and ask C, C knows all about it.’”

C’s statement is an admission.

In the 69th Report (see para 9.57), it was stated that no amendment in sec. 20 is necessary except that the word ‘suit’ may be substituted by the word ‘civil proceeding’. The principle of this section was applied by the Supreme Court in Hirachand Kothari vs. State of Rajasthan AIR 1985 SC

998 and K.M. Singh vs. Secretary, Association of Indian Universities AIR 1992 SC 1356.

In the 69th Report, it was noted that the principle underlying sec. 20 may apply to criminal proceedings as well and that the absence of the accused would not affect the admissibility of the statement of the referee (see also Sarkar, 15th Ed., 1999 p.393). However, it was felt that the applicability of the principle underlying sec. 20, to criminal cases would be rare. Hence, the Commission did not make any recommendation for applying the section to criminal proceeding.

We have nothing fresh to add and we too recommend that the word ‘suit’ be substituted by the words ‘civil proceeding’ both in the title and the body of sec. 20.

Section 21:

Section 21 refers to ‘proof of admissions against persons making them, and by or on their behalf’.

The section reads as follows:

“Sec.21: Proof of admissions against persons making them, and by or on their behalf: Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:-

- (1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.
- (2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.
- (3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.”

There are five illustrations below section 21.

The 69th Report felt that the opening paragraph was incomplete (see para 9.60 of the Report) as it does not cover the following aspects covered by secs. 18 to 20 and that the opening clause may cover clause (a) and that the contingencies covered by secs. 18 to 20 may be added as clauses (b) to (d) in proposed sub-section (1) of section 21. Existing sub-section (3) could become clause (c) of sub-section (2) of sec. 21 and

- (i) statements made by an agent to any party are admissions under sec. 18 (first para).
- (ii) statements made by persons having joint interest are admissions under sec. 18 (third para of sub-para (1)).
- (iii) statements made by persons whose position must be against a party to the suit, which are admissions under sec. 19, and

- (iv) statements made by a referee are admissions under sec. 20.

It was suggested (see para 9.62) that the section could be split up into a positive branch (where the use of the admission is permitted) and into a negative branch (where the use of the admission is not permitted); though the negative branch is subject to certain exceptions referred to in clauses (1), (2) and (3) of the existing section.

It was suggested that in sec. 21, reference to sec. 18 could be to “sub-section (4) of sec. 18” which was proposed to be substituted for the above sub-para of the existing section.

We have looked into the subsequent case law after 1977 (i.e. date of 69th Report) but do not find any need for modifying the recommendation made in the 69th Report. We shall however refer to a few post 1977 cases.

It was held in Thiru John vs. The Returning Officer, AIR 1977 SC 1724 that an admission is not conclusive but shifts the onus to the person who made the admission. On a question of benami, statements made against propriety interest, much later, were held admissible in Bhim Singh vs. Kan Singh AIR 1980 SC 727. An admission as to the correctness of a newspaper report can be relied upon against the maker in Mohammad Koya vs. Muthukoya, AIR 1979 SC 154. A contractor’s settlement of bill is an admission unless explained in M/s Central Coal Fields Ltd. vs. M/s Mining Construction, 1982 (1) SCC 415.

In Satinder Kumar vs. CIT (1977) 106 ITR 72 (HP) it was held that when the assessee said an admission was mistaken, it could not be relied upon without putting the admission to him. It was held in Dy. Commissioner, Sales Tax vs. Imperial Trading Co. (1990) 76 STC 183 (Ker) that an admission by an assessee was not conclusive but might be relevant. In the absence of an explanation, it could be conclusive. See also Federal Bank vs. State, AIR 1995 Kant 62. These decisions may not be right if they hold that the admission has to be put to the person and otherwise, it could not be relied upon.

It may be noted that if there is an admission it is for the party who makes the admission to explain, inasmuch as the onus shifts to him, and it is not necessary that it should be put to him in cross-examination under sec. 145. Bharat Singh vs. Bhagirathi, AIR 1966 SC 405. But, except under sec. 145, it may still be open, as a matter of fairness, to ask the person about the admission, during examination State of Rajasthan vs. Kartar Singh, 1970 (2) SCC 61; Biswanath Prasad vs. Dwarka Prasad, 1974 (1) SCC 78; Laxman vs. State of Maharashtra, 1974 (3) SCC 704; Somnath vs. UOI, 1971 (2) SCC 387; Taksddar Singh vs. State of UP, 1959 Suppl. (2) SCR 875; State of Haryana vs. Harpal, 1978 (4) SCC 465; Prakash Chand vs. UTD, 1979 (3) SCC 90; Mohanlal Gangaram Gehani vs. State of Maharashtra, 1982 (1) SCC 700.

A self-serving statement in one's own favour cannot be allowed to affect the interests of his adversary. An entry in the counterfoil of the receipt book maintained by the landlord is an admission in favour of the

landlord and cannot be used against the tenant (Idandas vs. Anant Ramachandra Phadke, AIR 1982 SC 127).

A statement of A in a previous proceeding that B was a tenant of the property in dispute, is an admission and can be used when, in a later proceeding, he denied that fact (Dukhiram Dey vs. Mrityunjoy Prosad, AIR 1982 Cal 294). A statement in an affidavit in a sec. 145 CrPC matter can be used in later proceedings as a piece of evidence against the party though it is not conclusive (Janki Ram vs. Amir Chand Ram, AIR 1984 Pat 191).

These cases are consistent with sec. 21 and we do not find any significant change in the law concerning sec. 21 after 1977, when the 69th Report was given and hence the recommendations made therein require no change.

Sri Vepa P. Sarathi has suggested that sec. 21 is not vague and does not need any elaboration in as much as these clarifications are implied in sec. 21. We, however, feel that there is nothing wrong in clarifying sec. 21 with reference to various other sections as proposed in the 69th Report.

We, therefore, accept the recommendations, to which we have already referred, for substituting the following for the existing sections:

Proof of admissions against persons making them, and by or on their behalf

“21. (1) Admissions are relevant and may be proved against the following persons that is to say,-

(a) the person who makes them, or his representative in interest;

- (b) in the case of an admission made by an agent where the case falls within sub-section (2) of section 18, the principal of the agent;
- (c) in the case of an admission made by a person having a joint proprietary or pecuniary interest in the subject-matter of the proceeding, where the case falls within sub-section (4) of section 18, any other person having a joint proprietary or pecuniary interest in that subject-matter;
- (d) in the case of an admission made by a person whose position or liability it is necessary to prove as against a party, where the case falls within section 19, that party;
- (e) in the case of an admission made by a person to whom a party has expressly referred for information, where the case falls within section 20, the party who has so expressly referred for information.

(2) Admissions cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:-

- (a) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.
- (b) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.
- (c) An admission may be proved by or on behalf of the person making it, when it is relevant otherwise as an admission.

Illustrations

- (a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

- (b) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible, under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen. He offers to prove that he refused to sell them below their value. A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skillful person to examine the coin as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.”

Section 22:

Section 22 deals with the question as to when oral admissions as to contents of documents are relevant.

Section 22 says that “oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.”

Now the contents of the document are provable by the production of the document itself (sections 62, 64) except where secondary evidence is admissible under sections 65 and 66. This section lays down that the contents of a document cannot be proved by oral admissions unless -

- (1) the party proposing to give such evidence can make out a case for admission by secondary evidence under sec. 65, or
- (2) the genuineness or forgery of the document itself is in question. In the latter case, oral admission of a party that it is or is not genuine is admissible if the document is produced, although such admission involves a statement as to the contents of it. Written admission of the contents of a document stands on a different footing and is admissible under sec. 65(b) (see Sarkar, 15th Ed., 1999 p. 406).

This rule is different from the rule in England as stated in Slatterie vs. Pooley: (1840) M&W 669: (151 E.R. 579) under which admissions are receivable to prove the contents of documents without notice to produce and without accounting for the absence of the originals. This was criticized in Landless vs. Quesak 8. Ir.L. R 382 and that was why the Indian law in sec. 22 was differently enunciated. The Privy Council too pointed out the

dangerousness in accepting verbal admissions as to contents (Sheo Parshad vs. Jaggar Nath (1884) 10. I.A. 79 (PC)).

No doubt, the English Law remains the same even today (See Phipson, 15th Ed., para 28.04, 28.14 and 46.11).

There is some ambiguity in the last part of sec. 22 which the 69th Report proposed to correct (see para 9.74). In this context, we may refer to Sarkar's Evidence (15th Ed., 1999 p. 407) quoting Norton (p.153).

“The effect of the last clause of this section seems to be, that if such a document is produced, the admission of the parties to it, that it is or is not genuine, may be received.”

We accordingly agree with the 69th Report that sec. 22 be redrafted as follows (see para 9.74).

When oral admission as to contents of documents are relevant

22. Oral admissions as to the contents of a document are not relevant

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- (a) unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained; or
- (b) except where a document is produced and its genuineness is in question.”

Section 22A:

This section introduced by Act 21/2000 does not require any further amendments. We recommend accordingly.

Section 23:

Section 23 deals with the question as to ‘admissions in civil cases, when relevant.’

It states that: “In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given”.

It contains an Explanation which reads as follows:

“Explanation: Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.”

The policy here is that if during some negotiations to settle the dispute, some concessions are made but the negotiations fail, the concession should not be admissible.

The section deals with the principle of ‘offers without prejudice’. Taylor on Evidence (p.795, cited in Woodroffe) (see para 9.77 of 69th Report) explains this as follows:

“Confidential overtures of pacification and any other offer or proposition between litigating parties, expressly or impliedly made without prejudice (see re River Steamer Co. (1871) LR 6. Ch. 822) are excluded on ground of public policy. Now, if a man says his letter is without prejudice, that is tantamount to saying: “I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all”. As has been said do not “without prejudice” mean ‘I make you an offer; if you do not accept it, this letter is not to be used against me’.”

The scope of the Explanation below sec. 23 is that if an advocate is consulted by an accused and the information is used for committing a crime or if an advocate discovers that a crime or fraud has been committed by his client after his employment as an advocate, the said advocate could disclose, as a witness, what his client had told him or what he (the advocate) had disclosed. The client would not be able to say that there was an express or implied agreement against the disclosure.

We shall first refer (I) to the recommendation in the 69th Report and then (II) to certain latest developments in the law, discussed extensively in Phipson (15th Ed. 2000, paras 21.10 to 21.17).

(I) In the 69th Report, it was pointed out that sec. 23 does not deal with ‘all statements made’ during negotiations but only admissions which are

expressly made or which can be implied from the circumstances. It would be fair to provide that statements made with a view to, or in the course of negotiations for a settlement should always fall within the section. The Commission referred to the views of Denning L.J. (as he then was) in Mc Taggart vs. Mc Taggart 1948(2) All ER 754 and to Mole vs. Mole 1950(2) All ER 328 and suggested (see para 9.85), addition of a second Explanation as follows:

“Explanation 2: Where an admission is made for the purposes of or in the course of negotiation of a settlement or compromise of a disputed claim, the parties shall be deemed to have agreed together that evidence of that admission shall not be given”.

We agree respectfully that such a provision is necessary but that instead of an Explanation, the following words can be added in the section itself after the words “upon an express condition that evidence of it is not to be given” and the words, “or if it is made for the purposes of or in the course of a settlement or compromise of a disputed claim.” We may also refer to the observation in the 69th Report that this Explanation does not affect the operation of Order 23 R 3, Code of Civil Procedure 1908, since the compromise in writing can be proved.

(II) Recent developments in English law may now be noticed. In Cutts vs. Head 1984 Ch. 290, Oliver L.J. referred to the principle of public policy and

said that the object was to encourage parties to settle disputes peacefully without resort to litigation. This could lead to concessions for purchase of peace and these could not be treated as admissions and proved.

The following new aspects need consideration:

- (a) Whether (see Sarkar, 15th Ed., 1999 p.411) a privilege can be unilaterally waived at the behest of the party entitled to the privilege or whether, it can be waived only with the consent of both parties to the correspondence, Rush & Thompkins vs. G.L.C. 1989 AC 1280. (This aspect is to be considered.) (The better view appears to be that both parties must consent.)
- (b) The other aspect is the three party situation which arose in Rush & Thompkins vs. GLC 1989 A.C. 1280. There, the main contractors settled proceedings arising from a building contract with the principal (i.e. employer, the GLC). The proceedings continued between Rush & Thompkins and their sub-contractors, the latter sought disclosure of the 'without prejudice communications' between Rush & Thompkins and the GLC anticipating that there might be some discussion of the strength of the case of the subcontractor and admissions by Rush & Thompkins. The Court of Appeal took the view that once the proceedings between the main contractor and GLC concluded, the correspondence therein must be available in the sub-contractor's proceedings. But the House of Lords reversed this view and held that the public policy basis for the privilege

would be weakened if a party negotiating with one defendant could not express his views openly for fear that if he reached a compromise with that defendant, admissions made in those negotiations would be admissible either in the same action or in another action against another party. (This is an aspect to be considered.)

- (c) The further new aspect is that though the admission in negotiation are not admissible as admissions in relation to the validity of the claim by the party against the other yet, when the reasonableness of the settlement is in question later, the negotiations will be admissible, a view taken by the Court of Appeal in Muller vs. Linsley & Mortimer: 1996(1) P.N.L. R 74 = 1995 vol. 92(3) L.S.G. 38 (CA). This view of Hoffman LJ (as he then was) was accepted by two other Judges of the Court of Appeal but they also relied on waiver of privilege. But recently, the Court of Appeal in Paragon Finance vs. Freshfields 1999(1)WLR 1183 however felt that they were not able to derive any principle from the above judgment. Phipson says (para 21.15 it is doubtful whether the Hoffmann LJ's view will be fully accepted. (In Unilever vs. Procter & Gamble : 1999(2) All ER 691.) (This aspect, therefore, need not be considered)
- (d) The fourth aspect (see Phipson, 15th Ed., 2000, para 21.15) concerns certain exceptions to this privilege – in other words, situations where the admissions during negotiations may be received in evidence -

- (i) To ascertain whether parties concluded agreement Tomlin vs. Standard Telephone : [1969] 1 WLR 1378(CA). (This aspect can be considered).
- (ii) To explain delay – where the opposite party files an application to strike out a plea on ground of delay, e.g. delay in amending a patent under the Patents Act or any plea of laches (Walker vs. Wilsher (1889) 23 Q.B.D.335; Family Housing Assn(Manchester) vs. Michael Hyde & Partners 1993(1) WLR 354; Redifusion Simulation vs. Link Miles Ltd. 1992. F.S.R. 195; Simaan General Contracting Company vs. Pilkington Glass : 1987(1) WLR 516 (This aspect can be considered)
- (iii) To draw or rebut inferences on an application without notice (The Giovanna) 1999(1) Lloyd’s Rep 867 – e.g. an application for an asset freezing injunction or where an offer of security has been made ‘without prejudice basis’ and there it may be relevant to rebut inferences that the defendant is likely to dissipate assets. (This need not be considered)

So far as the first aspect is concerned, we are of the view that a further provision can be added at the end of sec. 23, to the following effect: “unless the party who made the admission and the party in whose favour the admission is made agree that evidence be given”. So far as the second aspect is concerned, the admission would not be relevant in issues between the person who made the admission and a third party. The third aspect referred to above need not be taken note of. So far as the fourth aspect is

concerned – the following words can also be added at the end “evidence as to the admission becomes necessary to ascertain if there was at all a settlement or to explain delay where a question of delay is in issue”.

We have recommended insertion of a new section 132A for disclosure of source of information contained in a publication. According to this proposed provision, a person in certain circumstances may be required to disclose source of information contained in a publication. There is a need to exempt provision of section 23, in case a person who made a publication, from giving evidence of any matter of which he may be required to give evidence under proposed section 132A. In this regard, reference may be made to the discussion made under proposed section 132A.

Therefore we recommend that sec. 23 should upon such amendments, read as follows:

Admission in civil cases when relevant

“23 (1) In civil cases, no admission is relevant:

- (a) if it is made either upon an express condition that evidence of it is not to be given; or
- (b) if it is made for the purposes of or in the course of a settlement or compromise of a disputed claim; or
- (c) under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given,

unless the party who made the admission and the party in whose favour the admission is made agree that evidence be given, or evidence as to the admission becomes necessary to ascertain if there was at all a settlement or compromise or to explain any delay where a question of delay is raised;

(2) Such an admission which is not relevant under subsection (1) may be relevant in so far as it touches upon an issue between the person who made the admission and a third party to the admission.

(3) Nothing in this section shall exempt;

(a) any legal practitioner from giving evidence of any matter of which he may be compelled to give evidence under section 126; or

(b) a person who made a publication, from giving evidence of any matter of which he may be required to give evidence under section 132 A.

Explanation I: ‘legal practitioner’ as used in this section shall have the meaning assigned to it in Explanation 2 to section 126.

Explanation II: ‘publication’ as used in this section shall have the meaning assigned to it in para (a) of the Explanation to section 132 A.”

Section 24:

Section 24 refers to a “confession caused by inducement, threat or promise, when irrelevant in criminal proceedings.”

So far as section 24 is concerned, the 69th Report stated (see para 11.6) that there is no need to amend this section. But, for reasons given in our discussion under sec. 27, we recommend to add some more words, ‘coercion, violence or torture’ in the body of sec. 24 and in the title.

We recommend that for the words ‘inducement, threat or promise’ the words ‘inducement, promise, threat, coercion, violence or torture’ be substituted.

We recommend accordingly.

Section 25:

Section 25 reads as follows:-

“Section 25: Confession to police officer not to be proved: No confession made to a police officer shall be proved as against a person accused of any offence.”

In paragraph 11.9, the 69th Report stated, (after referring to the First Report of the Indian Law Commission of the 19th Century), that it is not necessary to disturb the section except to the extent indicated in para 11.7. In para 11.7, the Report stated that they were making a separate recommendation for inserting sec. 26A, making confessions to senior police officers admissible subject to certain safeguards.

We agree that section 25 be left as it is.

Section 26A: (as proposed in the 69th Report)

In paras 11.17 and 11.18, the 69th Report suggested that under a new section 26A all confessions made to senior police officers should be made admissible subject to certain conditions. We shall presently be referring to the said conditions. Question is whether this recommendation for a new sec.

26A should be accepted in the light of what is happening in police stations today.

In recent times, there has been a view particularly by the police departments that confessions made to senior police officers should be made admissible in all cases without distinction. It is pointed out that in UK and other countries (except Pakistan), such confessions are no longer inadmissible. It is said that time is ripe for removing this stigma.

Any discussion on this subject must start with the provisions of clause (3) of Art. 20 of the Constitution of India which states that

“No person accused of any offence shall be compelled to be a witness against himself.”

Art. 21 requires that no person is deprived of his life and liberty express by a “procedure established by law”.

The judgment in Maneka Gandhi’s case has now held that the procedure must be fair, just and equitable. Mere prescription of a procedure – whether fair or unfair – is no longer an excuse. The earlier view in A.K. Gopalan’s case is no longer a good law.

Art. 20(3) is on the same lines as the Fifth Amendment to the American Constitution where it deals with the right against self-incrimination. Art. 6 of the European Convention also raises a presumption of innocence.

The recommendation in the 69th Report made for insertion of sec. 26A is intended to make confessions to senior police officers, subject to some conditions, admissible, in all cases. (see paras 11.16 to 11.18 of the Report). The Commission there referred to the 48th Report of the Law Commission relating to Criminal Procedure Code, 1898 (pages 6-7, paras 21-22) where the Commission had made a similar recommendation. They were accepted in the 69th Report. Reference was made to the safeguards imposed in the 48th Report and it was stated that if those safeguards are followed, the confession should be admissible and that the prohibition against admissibility in sections 25 and 26 should not apply.

The safeguards suggested in the 69th Report are as follows: (in regard to confession to Superintendents of Police or higher officers).

- (a) the said police officer must be concerned I
- (b) n investigation of the offence;
- (c) he must inform the accused of his rights to consult a legal practitioner of his choice, and he must give the accused an opportunity to consult such legal practitioner before the confession is recorded;
- (d) at the time of making and recording of the confession, the counsel for the accused, if he has a counsel, must be allowed to remain present. If the accused has no counsel or if his counsel does not wish to remain present, this requirement will not apply;
- (e) the police officer must follow all the safeguards as are now provided for by section 164 Cr.P.C. in relation to confessions recorded by

Magistrates. These must be followed whether or not a counsel is present;

- (f) the police officer must record that he has followed the safeguards at (b), (c) and (d) above.

Identical guidelines have been suggested in the 49th Report where the confessions are recorded by officers lower in rank than a Superintendent of Police. It is not clear why two separate paragraphs were devised for confessions – one before senior officers and one before others,- if the safeguards were identical. That means that confessions whether made to Superintendent of Police (or above) or to officers inferior in rank to Superintendent of Police will be admissible, if the same guidelines are followed.

We may now go back and refer to the First Report of the Indian Law Commission given over 150 years ago. The Report said that the evidence of the Parliamentary Committee on Indian Affairs showed gross abuse of powers by the police officers in India leading to oppression or extortions. They also said:

“A police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not infrequently done by extorting or fabricating false confession; and, when this step is once taken, there is of course impunity for real

offenders, and a great encouragement to crime... We are persuaded that any provision to correct the exercise of this power by the police will be futile; and we accordingly propose to remedy the evil...”

The question is whether this comment which was the basis for introducing sections 25 and 26 in the Evidence Act in 1872 is no longer relevant now in the year 2003.

In the last three decades,- as revealed from the media and innumerable law reports of the Supreme Court and High Courts, police conduct appears to have deteriorated rather than improving from what it was years ago. The Law Commission in its 113th Report had in fact suggested incorporation of sec. 114B in the Evidence Act raising a presumption against police officers in case of custodial deaths of prisoners. The judgments of the Supreme Court on police violence are in good number, at least forty to fifty in the last three decades. We shall, however, refer to the most important of these judgments.

In Nandini Satpathy vs. P.L. Dani, AIR 1978 SC 1025=1978(2)SCC 424, the Supreme Court, while dealing with the investigation by police in India, stated that Act 20(3) is applicable at the stage of investigation and trial also. The Court referred to sec. 161(2) of the Cr.P.C. of 1923 and also to sec. 26 of the Evidence Act (see para 22 at p 435 of SCC). The Court noticed in para 23 the recent trend in the thinking that the interest of society have also to be kept in view and police be given more powers. Still, the Court spoke through Krishna Iyer J as follows:

“The first is that we cannot afford to write off the fear of police torture leading to forced self incrimination as a thing of the past. Recent Indian history does not permit it, contemporary world history does not condone it.”

The Court quoted an article saying that “the technology of torture all over the world is growing ever more sophisticated – new devices can destroy a prisoner’s will in a matter of hours – but leave no visible marks or signs of brutality.” The Court observed, “Many police officers, Indian and foreign, may be perfect gentlemen, many police stations, here and elsewhere, may be wholesome. Even so, the law is made for the generality and Gresham’s law does not spare the police force.” The Court quoted from Miranda vs. Arizona 384 US 436 and from the Wickersham Commission Report and cases of interrogation by police to extract confessions. The police, the Court said must give rest to its fists and restlessness to its wits. The Court referred to Art. 20(3) and to the right against ‘self incrimination’ and the right to silence. The Court referred to Art. 22(1) and the right to consult a lawyer which is available even if a person is not under arrest. The Court finally emphasized (see para 68 of SCC):

“Special training, special legal courses, technological and other detective updating, are important. An aware policeman is the best social asset towards crimelessness... More importantly, the policeman must be released from addiction to coercion and be sensitised to constitutional values.”

More recently, in D.K. Basu vs. State of West Bengal 1997(1) SCC 416, the Supreme Court referred to the recommendation of the Law Commission in its 113th Report (para 8 and para 27) regarding “injuries in police custody and suggested implementation of that Report and incorporation of sec. 114-B in the Indian Evidence Act”, as follows:

“Section 114B: (1) In a prosecution of a Police Officer for an offence constituted by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the court may presume that the injury was caused by the Police Officer having custody of that person during that period.”

The above proposal was made by the Law Commission after the judgment of the Supreme Court in State of UP vs. Ram Sagar Yadav: AIR 1985 SC 416.

The Supreme Court in D.K. Basu had issued a number of directions, after referring to Joginder Kumar vs. State of UP 1994(4) SCC 260 and Nilabati Behera vs. State of Orissa: 1993(2) SCC 746. Before doing so, the Court observed (see para 13):

“‘Custodial violence’ and abuse of police power is not only peculiar to this country, but it is widespread.....”

“In England, torture was once regarded as a normal practice to get information regarding the crime, the accomplices and the case property or to extract confessions.” (para 14)

but that, with the development of human rights jurisprudence, this position changed, and scientific and professional methods of investigation have been slowly introduced. The English law now provides for various safeguards to the person interrogated which the police have to follow,- as laid down in the Police and Criminal Evidence Act, 1984.

In D.K. Basu, the Supreme Court observed (see para 18):

“Experience shows that worst violation of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resort to third-degree methods... The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system.”

The Court again referred to torture, (see para 24) the tendency of the police,

“... to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession...”

The Court finally emphasized that the remedy indeed lies in proper training to the police to adopt more sophisticated methods of investigation and providing them with the necessary infrastructure or tools rather than making confessions to police admissible. The Court referred to the

celebrated observations of the Supreme Court of America in Miranda vs. Arizona (1966) 384 US 436. It was therein observed as follows:

“A recurrent argument, made in these cases is that society’s need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. (see e.g. Chambers vs. Florida 309 US 227: 84 L.ED. 716: 60S Ct. 472 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.”

The Supreme Court in D.K. Basu (see para 33) stated that therefore, a just balance has to be struck between the right to interrogate and the right against self incrimination. Using any form of torture for extracting any kind of information would neither be “right nor just nor fair and, therefore, would be impermissible, being offensive to Art. 21.” The Court said that

“Such a crime-suspect must be interrogated – indeed subjected to sustained and scientific interrogation – determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third-degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc.”

The Court then referred (see para 35) to 11 requirements as to what the police should do, and observed (in para 36)

“Failure to comply with the requirements hereinabove mentioned shall, apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.”

We have referred to the above judgment in extenso for the purpose of highlighting that what the First Report of the Law Commission stated more than 150 years ago holds good today and, in fact, the situation has vastly deteriorated.

Today the Supreme Court has also developed a jurisprudence to award compensation against the State for the offensive acts of the police officers. In some cases, criminal complaints were directed to be filed against senior police officers as well.

The experience of the Law Commission in seminars held in relation to the ‘Law of Arrest’ during the year 2000 showed that several senior police officers suggested that the suspicion and stigma against arrest by police or in regard to police investigation while in custody is no longer warranted. The plea was that arrest should be allowed to be made on mere suspicion and that confessions to police must be made admissible. These suggestions, in our view, do not take into consideration the ground realities today as disclosed by the press and Court judgments as to what is happening inside a police station and these suggestions overlook the importance of clause (3) of Art.

20 and Art. 21. Further, the annual reports of the National Human Rights Commission are abundant evidence of the violence police are inflicting on prisoners and the said Commission has recommended to government in several cases to pay compensation to the victims of police violence. These are also widely reported in the press.

Therefore, we are compelled to say that confessions made easy, cannot replace the need for scientific and professional investigation. In fact, the day all confessions to police, in all types of offences (other than those relating to a few specified categories like confessions by terrorists to senior police officers) is permitted and becomes the law, that will be the day of the demise liberty. The police will no longer depend on scientific techniques of investigation.

It is true, the provisions of certain special Acts dealing with terrorists or organized crime (such as the TADA or the POTA or the Maharashtra Organised Crime Act and other similar State Acts) contain provisions for recording confessions by and before senior officers of the level of Superintendents of Police and for treating them as admissible, subject to certain conditions. There is good reason for doing so. In the case of such grave offences, like terrorism, it is normal experience that no witness will be forthcoming to give evidence against hard-core criminals. Further, these offenders belong to a class by themselves requiring special treatment and are different from the usual type of accused.

The exception made in cases of ‘terrorists’ should not, in our view, be made applicable to all accused or all types of offences. That would erode

seriously into Article 21 and sections 24 and 25 of the Evidence Act and violate Art. 14. Exception cannot become the rule.

In fact, in D.K. Basu's case (see para 31), it was recognized that there were special class of serious offenders. It was stated:

“We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in the society..... To deal with such a situation, a balanced approach is needed to meet the ends of justice.”

The fact that terrorists and organized gangs require special treatment has been accepted by the Supreme Court and special laws made in respect of such classes of offenders have been upheld.

In Niranjan Singh Karan Singh Punjabi vs. Jitendra Bhimraj Bijja 1990 SC 1962, the Supreme Court pointed out that TADA provisions which related to terrorists are drastic and are a departure from ordinary law since the law was found to be inadequate and not sufficiently effective to deal with the special class of offenders indulging in terrorist and disruptive activities. The legislature has made special provisions in the Act which can, in certain respects, be said to be harsh, created a special force for speedy disposal of cases, provided for raising a presumption of guilt, placed extra restrictions in

regard to the release of the offender on bail, and made suitable changes in the procedure with a view to achieving its objects. These are all valid.

The above judgment has been followed recently in Karamjit Singh vs. State: 2001(9) SCC 161.

Thus special provisions, in a particular class of cases, has been upheld. But the procedure of confession before senior police officers in all cases, cannot be made. It will be violative of Art. 14, 21.

Adverting to sec. 15 of the TADA and confessions by terrorists before a senior police officer, the majority in Kartar Singh vs. State of Punjab 1994(3) SCC 569, held that the Act deals with a special type of offenders and deviates from the ordinary law and this is justifiable. (para 192 at 664). After a review of the case law relating to confessions under sections 24 to 27 of the Evidence Act, 1872, the Supreme Court stated (see para 220) that terrorists (as defined in the Act) formed a special class for whom a special provision like sec. 15 of that Act could apply i.e. where confessions to a senior police officer would be admissible. The plea of invalid discrimination under Art. 14 was rejected (paras 244 and 252). The Supreme Court also referred to the 4th Report of the National Police Commission which while admitting the notoriety of the police suggested that such confessions could at least be taken as a piece of evidence. In para 251, the Court again referred to brutalities and custodial deaths rampant in our country.

The statement of law by Pandian J in Kartar Singh's case is very important in the present context. There, the learned Judge noticed that in England the law as to confessions to police officers was no doubt different.

The learned Judge said that adopting a procedure as under English law so far as terrorists in India were concerned could be permissible. In fact, in para 263, the Court issued five guidelines for the Superintendents of Police to follow and suggested that they should be incorporated into the Act and Rules. The safeguards include production of a person before a Magistrate soon thereafter and that the Magistrate should record anything which the accused would want to say. The accused may also be soon sent for medical examination. If the accused refuses to make a confession, the police officer should not compel him to make a statement.

But as the guidelines were not incorporated in to the special Act, the Supreme Court, in a recent decision, was constrained to hold that a confession recorded where the guidelines were not followed, was not invalid: Lal Singh vs. State of Gujarat: 2001(3) SCC 221. This view was taken obviously because the guidelines were not incorporated in the special Act.

But, the effect of sec. 26A as proposed in the 69th Report, would be to bring in drastic provisions which make confessions to senior police officers admissible, in every case, and even if the case does not relate to terrorism falling under TADA. If, according to the Supreme Court, the case of terrorists stands on a separate footing where confessions made before senior officers could be made admissible, that principle, as already stated, if extended to all criminal cases, would, in our view, violate Art. 14 as well and will amount to a serious encroachment into Art. 21 of the Constitution of India. Once this part of the law is now settled by judgments of the Supreme Court, namely, that such confessions to senior police officers could be made admissible only in case of grave offences like those committed by

terrorists, a provision like the one proposed in sec. 26A, if made applicable to all offences – would, in our view, be violative of both Art. 14 and Art. 21 of the Constitution of India, as to a fair trial.

Further, the proposal as made in sec. 26A, in the 69th Report (accepting the one in the 48th Report), are that the same provisions as to admissibility are made applicable whether the confession is to senior police officers or not. The precautions envisaged in both classes of cases are almost identical. The provisions as recommended cannot, in our opinion, be accepted. No distinction is made in the Report between grave offences and ordinary offences. We are not therefore inclined to accept these proposals in para 11.17 of the 69th Report nor those recommended in the 48th Report.

Till today, the guidelines or precautions indicated in D.K. Basu have not been implemented by the police. In fact, most police officers are ignorant of them. Question also is whether in India we can accept the statement of any police officer that these precautions were indeed taken. In our view, today courts in our country cannot accept any such assertion on the part of the police. In a pending public interest case when the Supreme Court asked the States to submit whether D.K. Basu guidelines were being followed by the police in various States, the amicus curiae is reported to have stated that the reports from States are that the said guidelines were not being followed. (State of AP vs. Upadhyaya).

As stated earlier, police today no doubt desire that confessions should become easily admissible so that there is no need for effective scientific and professional investigation. This tendency has gone so high that they want confessions to senior officers be made admissible not only in cases of

terrorists but in all offences. That would practically put an end to the guarantee in Art. 21 of the Constitution as to a fair trial and to the principles of liberty enshrined in the Universal Declaration of Human Rights, 1948 and in the International Convention on Civil and Political Rights, 1966 to which India is a party and violate Art. 14 also.

Police quote the low percentage of convictions in courts as compared to other countries. There are various other factors which are responsible for a large percentage of acquittals but making all confessions to senior police officers is a dangerous remedy.

We are not, in the light of hundreds of cases of custodial deaths noticed by the Supreme Court, National Human Rights Commission and the High Courts, prepared to place any faith in the police that senior officers will, in all cases, obtain confessions without threats or coercion etc. We are indeed sorry to say so but we cannot shut our eyes to these ground realities.

No doubt, in England, there is today, a trial within a trial. Under English law, confessions have been made admissible under the Police and Criminal Evidence Act, 1984 and under sec. 76(1) the confession is made relevant unless it is liable to be excluded under the section. Section 76(2) says that if “it is represented to the court that the confession was or may have been obtained (a) by oppression of the person who made it or; (b) in consequence of anything said or done which was likely, in the circumstances existing at the time to render unalienable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession

(notwithstanding that it may be true) was not obtained as aforesaid”. The word ‘oppression’ has been widely construed by the Court as including torture, inhuman or degrading treatment, use of violence. The 1984 Act of UK lays down detailed provisions for the treatment of suspects by the police, including their arrest, detention and questioning. Code C of the Code of Practice has been issued. Sec. 67(11) says that the court may take into account any of these provisions of the Code if they are relevant to any matter arising in the proceedings. Phipson says (see para 31.09, 15th Ed., 2000) that breach of the Act or Codes will not necessarily amount to oppression or to render the confession inadmissible. The nature of the common law discretion to exclude relevant evidence, including confessions is preserved by sec. 82(1) of the 1984 Act. Sec. 78 was added to at a later stage, without modifying sections 76 and 82, and gives discretion to the Court to disallow a confession if it ‘would have such an adverse affect on the fairness of the proceedings’. This procedure results in a trial within a trial. It has been stated in R vs. Sat Bhambra (1988) 88 Cr App R.55 that as sec. 76 and sec. 82 were not amended, sec. 82 has become practically otiose.

In England, at the time these provisions were introduced, the Human Rights Act, 1998 had not come into force. Even Phipson says, the courts in England will have to go into various human rights concerns after the new Act of 1998. Further, it may not be incorrect to state that the degree of adherence to guidelines in an Act or in a judgment in India is not the same as in UK.

In the light of the above discussion, we do not agree that sec. 26A as recommended by the 69th Report and the 48th Report permitting confessions recorded by Superintendents of Police, or others in all cases to be made

admissible. Such a provision, cannot satisfy Art. 14 and Art. 21 and the judgments of the Supreme Court. We, therefore, do not accept the recommendation for introducing sec. 26A though recommended in the 69th Report.

Section 26:

Section 26 bears the heading ‘Confession by accused while in custody of police not to be proved against him.’ It reads as follows:

“Section 26: No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.”

Explanation: In this section, ‘Magistrate’ does not include the head of a village discharging magisterial functions in the Presidency of Fort. St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)

In the 69th Report, the recommendation was to revise the section as follows (see para 11.15), after omitting the Explanation:

“Section 26: No confession made by any person whilst he is in the custody of a police officer, shall be proved as against such person, unless it is recorded by a Magistrate under section 164 of the Code of Criminal Procedure, 1973”.

In view of certain proposals for adding sec. 164A in the 154th Report of the Commission on Code of Criminal Procedure, 1973, it would be necessary to omit the words “under section 164” and add “in accordance with Ch. XII”. With that modification, the section, after omitting the Explanation, will read as follows:

Confession by accused while in custody of Police not to be proved against him

“26. No confession made by any person whilst he is in the custody of a police officer, shall be proved as against such person, unless it is recorded by a Magistrate in accordance with Chapter XII of the Code of Criminal Procedure, 1973.”

We recommend accordingly.

Section 27:

This section is one of the most important but, at the same time, controversial sections in the Evidence Act. It has tremendous bearing upon criminal proceedings in the courts in the country. Sarkar’s Evidence (15th Ed., 1999 p.534) brings about the complexity of sec. 27 and the need to take extreme care in interfering with this section. He says:

“No section has perhaps raised so much controversy and doubt as sec. 27 and several judges have recommended the redrafting of sections 24-27. That formidable task is not likely to be undertaken in the near

future as it would require a Jurist of the eminence of Sir James Stephen.”

This obviously is the magnitude of the task before us.

Sec. 27 reads as follows:

“Sec. 27: How much of information received from accused maybe proved: Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

The section starts with the words ‘provided’ but on its face, it is not clear to which section, among sections 24 to 26, it is a proviso.

The 69th Report (see para 11.45 to 11.57) dealt with sec. 27 and considered whether it could be treated as a proviso only to sec. 26 (i.e. confession by accused while in custody of police) or could be treated as a proviso to sec. 25 (confession to police officer i.e. while not in custody) and also to sec. 24 (confession caused by inducement, threat or promise).

Several questions fall for consideration under sec. 27. We shall take them up one after the other.

(I) Is section 27 a proviso only to sec. 26 or also to sec. 25 and sec. 24 so as to make facts discovered from statements under all those sections admissible?

(a) Section 25 and section 27 in relation to Art. 14:

There is no difficulty that sec. 27 is a proviso to sec. 26. But is it also a proviso to sec. 25, where statements leading to a discovery are made by accused not in custody?

In Pakala Narayanaswami's case (AIR 1939 PC 47), the Privy Council observed that "section 27 seems to be intended to be a proviso to sec. 26". The question whether a statement made to a police officer (i.e. one under sec.25), which is wholly inadmissible under sec. 162 Cr.P.C. could, if it led to a discovery, make the statement to the extent it related to the discovery, relevant under sec. 27, was not decided by the Privy Council. In Udai Bhan vs. State of UP, AIR 1962 S.C. 1116, the Supreme Court observed that sec. 27 was a proviso to sec. 26.

In State of UP vs. Deoman Upadhaya AIR 1960 SC 1125, the Supreme Court (by majority) rejected a plea that sec. 27 was violative of Art. 14. The question arose in regard to facts discovered from statement of persons while in custody (under sec. 26) and persons not in custody (under sec. 25).

The plea was that if, as indicated by the language of sec. 27, only discovery of facts on the basis of statements by the person in the custody of a police officer (as per sec. 26) are made relevant and not to facts similarly discovered from those not in custody under sec. 25, that would violate Art. 14 of the Constitution of India. The majority rejected this plea (Subba Rao J dissenting). The learned Judges in the majority pointed out that cases of persons not in custody (i.e. under sec. 25) giving such statements leading to discoveries are quite rare. However, in so far as a person not in custody who

“approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact”, the Supreme Court observed that he may appropriately be deemed to have surrendered to the police under sec. 46 Cr. P.C., but sec. 27 would apply and the information is provable. But, if it did not amount to surrender, it may be that the statement leading to discovery (when a person is not in custody) is not provable and this may be anomalous. They said (p. 1130):

“Whereas information given by a person in custody is to the extent to which it distinctly relates to a fact thereby discovered is made provable, by sec. 162 of the Cr. P.C., such information given by a person not in custody to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical”.

The majority observed:

“Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence.”

Adverting to statements leading to discoveries, the majority said (p.1130)

“It is provable if he was in custody at the time when he made it, otherwise it is not.”

The majority observed that this anomaly in regard to inadmissibility of statements by persons not in custody was the result of sec. 162 of the

CrPC and not because of anything in the Evidence Act (p.1130-31). Hence, Art. 14 was not violated if facts discovered from statements by persons in custody under section 26 alone were made admissible relevant and facts discovered from statements by persons not in custody under sec. 25 were not made admissible, under sec. 27.

As stated earlier, if the statement is made voluntarily to a police officer it may, in certain cases, amount to surrender to police under sec. 46 for arrest and in that case, if the person is deemed to be under arrest, sec. 27 would apply but if he writes a letter to the police officer, it will be inadmissible under sec. 162 CrPC. The Supreme Court upheld the distinction between facts discovered from statements under secs. 25 and 26 as not being violative of Art. 14. Subba Rao J. (as he then was) however held the provision in sec. 27 discriminatory if it applied only to statements made under sec. 26 and not under sec. 25. This is one aspect of the matter.

(b) Whether facts discovered by statements of persons not in custody (i.e. under sec. 25) are admissible under sec. 27?

There is considerable authority for making them relevant. In fact, a three Judge Bench in Chinnaswamy's case (AIR 1962 SC 1788 (at 1793)) stated that sec. 27 was an exception to sec. 25 also. In Aghnoo Nageria vs. State (AIR 1966 SC 119), this has been reiterated. See Sanjay vs. State Govt. of Delhi 2001 (3) SCC 190 = AIR 2001 SC 979; Pandurang Kalu Patil & Anr vs. State of Maharashtra 2002 (1) JT SC 229. That means that discoveries made pursuant to statements falling under sec. 25 by persons not in custody are also admissible.

In our view, sec. 27 is a proviso not only to sec. 26 but also to sec. 25.

We shall separately deal with facts discovered from statements falling under sec. 24.

If that be so, should the word ‘or’ be introduced in sec. 27 between the words ‘from a person accused of any offence’ and the words ‘in the custody of a police officer’? This aspect will be considered under the next heading.

II. Question whether the word ‘or’ is to be introduced in sec. 27 as it was in sec. 150 of CrPC of 1861 (as amended in 1869)?

In the context of these latter decisions, referred to above, it is necessary to refer to the legislative history behind sec. 27 to find out if there was any mistake in the legislative drafting of sec. 27 in not expressly making sec. 27 a proviso to sec. 25 also, in the sense whether the word ‘or’ which was there earlier between the words “from a person accused of any offence”, and the words “in the custody of a police officer” in sec. 27, was wrongly omitted. The historical background of sec. 27 was referred to some extent in the 69th Report. It is also referred to in Sarkar’s Evidence (1999, 15th Ed., pp. 532-534) but in greater detail. In this context the 152nd Report of the Law Commission will also be referred to.

In the Criminal Procedure Code, 1861 (Art. 25 of 1861) (i.e. before the Evidence Act of 1872 was enacted), there were three sections – sec. 148 which made confessions or admissions of guilt to police officers inadmissible; sec. 149 to confessions or admissions of guilt whilst a person is in custody of a police officer, which was inadmissible unless made in the immediate presence of a Magistrate; and sec. 150 which related to ‘discoveries’. Sec. 150 read:

“When any fact is deposed to by a police officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence.”

Here the words ‘in the custody of a police officer’ were altogether missing. But it was interpreted that sec. 150 was wide enough to apply to statements by persons in custody or not in custody. (see Sarkar, Evidence, 1999, 15th Ed. p 526 and p. 532).

By virtue of the Amending Act 8/1869, sec. 150 of the said Cr.P.C. came to be read as follows: (newly added words are underlined)

“Sec. 150: Provided that any fact that is deposed to in evidence as discovered in consequence of information received from a person accused of any offence, or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence.”

This section is clear so as to cover statements by those in custody and not in custody. (see Sarkar, Evidence, 1999, 15th Ed. pages 526 and 532).

Sarkar (Evidence, 15th Ed. 1999, p 526) refers to this and to the opinion of Sir James Stephen himself, made in 1872 in his book, as follows:

“Section 148-150 Cr.P. Code of 1861 contained provisions now covered by sections 26-27. Evidence Act and under those sections confessions to police were not barred if they led to discovery of facts.

Stephen, the framer of the Act, says that he took sec. 27 verbatim from section 150 of the Cr.P Code of 1861: “Admissions in reference to crimes are usually called confessions. I may observe upon the provisions relating to them that sections 25, 26 and 27 were transferred were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act 25 of 1861” (Stephen: Introduction to the Evidence Act, p 165, 1892 Ed. being reprint of 1872 Ed.”

Sarkar says:

“When the Act was enacted in 1872 (i.e. when sec. 27 was enacted in 1872), sec. 150 was transferred to the Evidence Act by omitting the word ‘or’ and putting a comma instead.”

It is significant that the Amendment, by introducing ‘or’, was made in 1869 and the present Act is of 1872 and the comments by Sir James Stephen were in 1872 itself that he verbatim shifted sec. 150 of the CrPC of 1861 (as amended in 1869) into the present Act of 1872. At any rate, that was his intention.

But, when the Evidence Act of 1872 was introduced, secs. 25, 26 and 27 came to be drafted as they stand at present. Sec. 25 corresponds to sec. 148 of the old CrPC; sec. 26 to sec. 149 and sec. 27 corresponds to sec. 150. While drafting sec. 27, in language identical as in sec. 150 (as amended in 1869), the word ‘or’ between the word ‘offence’ and ‘in the custody’ was omitted. Can it be said this was deliberate, in the light of the above discussion?

Sarkar says (p. 533): “No possible reason is however conceivable when the information coming from any person whether in custody or not in custody satisfied the same test of relevancy in sec. 27, viz., the discovery of a fact in consequence of information received from the accused. Sec. 27 is based on the theory of confirmation by discovery of subsequent facts.” In fact in the Allahabad High Court in Deoman vs. State of U.P. (AIR 1960 All p.1) (reversed by the Supreme Court in State of U.P. vs. Deoman Upadhyaya AIR 1960 SC 1283) decided in 1960, the dissenting opinion of Desai J. says that if ‘or’ was a deliberate omission, the comma just before it should have also be deleted.

Sarkar, as stated above, also says that Stephen had stated that “sec. 150 (sic. sec. 27) was transferred ‘verbatim’ from sec. 150 CrPC”(See Stephen’s introduction to the Evidence Act (1872) Reprint 1892 at p. 165). The dissenting opinion of Subbarao J. in Deoman Upadhyaya also refers to this aspect, but Subba Rao J. held the provision in sec. 27 as offending Art. 14.

Further, as pointed by Sri Vepa P. Sarathi, in his Evidence (5th Ed, 2002, p. 139), if what is admissible under sec. 27 is (a) the discovery of the material object, (b) the place where it was discovered and (c) the knowledge of the accused about the object, then such facts are relevant and admissible even when the accused is not in police custody. This either under sec. 8 (subsequent conduct) or under 9 (being facts necessary to explain or introduce relevant facts). There is no reason therefore for not applying sec. 27 to statements leading to discovery made under sec. 25.

In the 69th Report, it was proposed that the words ‘Notwithstanding anything in secs. 25 and 26’, be added at the beginning of sec. 27. That means the discoveries under sec. 25 will also be admissible. In that proposal, the Commission also introduced the word ‘or’ (see para 11.58) and added some more words. The relevant portion read:

“received from a person accused of any offence, being information given to a police officer or given whilst such person is in the custody of a police officer”

In the 152nd Report of the Commission relating to ‘Custodial Crimes’, two alternatives were suggested (see para 11.6 of that Report). The first one was that sec. 27 should be altogether repealed while the second alternative was to redraft sec. 27 in the following manner:

“Sec. 27: Discovery of facts at the instance of the accused: When any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact discovered may be proved, but not the information, whether it amounts to a confession or not.”

It will be noticed that here ‘or’ was introduced, so as to cover facts discovered from statements falling under sec. 25 as well as sec. 26.

After the first draft of this Report by us, Sri Vepa P. Sarathi suggested that the word ‘or’ be not introduced in sec. 27 and that the omission of the word ‘or’ in sec. 27 when the Evidence Act was drafted in 1872 by Sir James Stephen, was deliberate but not accidental. He has tried to support his

view by certain examples. But, the earlier history of these provisions goes back to sec. 150 of the Cr.P.C. of 1861 as amended in 1869 and shows that ‘or’ was therein 1869 and in 1872, that section 150 as it stood in 1869 was intended by Sir James Stephen to be verbatim shifted into sec. 27, as stated by himself, in the question already referred to. We, therefore, recommend introduction of the word ‘or’ as accepted in the 69th Report as well as the 152nd Report.

(III) Should sec. 27 be altogether repealed as recommended in the 152nd Report or only partially by excluding discoveries from statements falling under sec. 24?

The next question is whether section 27 should be altogether repealed as recommended in 152nd Report and all facts leading to discoveries should be excluded if they were made in a statement by persons whether falling under sec. 24, or by persons not in custody (sec. 25) and in custody (sec. 26).

Now, the confessional part of it, that is the part relating to the guilt is undoubtedly not admissible but the question is about the facts discovered. Should all such facts be excluded by repealing sec. 27 altogether?

In the 69th Report, such a policy was not adopted and it was felt that as a policy discoveries made pursuant to statements falling under sec. 24 alone should be excluded for, in case they are made admissible, police may indulge in threats, inducements and promises for extracting confessions. The Report which proposed a draft of sec. 27, made the facts inadmissible so far as they were discovered pursuant to statements falling under sec. 24. The draft section in the 69th Report opens with a non-obstante clause, covering

sections 25 and 26 only i.e. persons in custody or not in custody, but does not include sec. 24. That would mean that all discoveries relatable to statements made pursuant to threats, inducement or promises under sec. 24 get excluded in that draft.

But the proposal in the 152nd Report was for repeal of sec. 27 altogether.

The history of admissibility of discoveries in various countries, in our view, shows, on the other hand, that it was intended that all discoveries, including those made from statements of persons – (a) whether obtained by threat, inducement or promise; or (b) whether while not in custody or (c) while in custody are by and large, be treated as admissible. This is so in UK, USA and Canada even today. This is based on the principle of independent ‘confirmation’ of the facts discovered.

There is total divergence between the views in UK, USA and Canada on the one hand and the first alternative of total repeal suggested in the 152nd Report. The 69th Report goes half way and only includes discoveries made pursuant to statements falling within sec. 24.

Principle of confirmation of facts:

The rule was laid first in R vs. Warickshall (1783) 1. Leach. CC. 298 (168 E.R. 234) that the fact that stolen property was discovered under a mattress in the prisoner’s lodgings pursuant to information given by the prisoner was admissible. It was held:

“The principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them

be obtained in consequence of an extorted confession or whether it arises from any other source.”

This was based on the “doctrine of confirmation”, for “a fact, if it exists at all, must exist invariably in the same manner whether the confession from which it is derived be in other respects true or false”.

The Court in Warickshall’s case stated: “This subject has more than once undergone the solemn consideration of the Twelve Judges; and a majority were clearly of the opinion, that although confessions improperly obtained cannot be received in evidence, yet that any acts done afterwards might be given in evidence, notwithstanding they were done in consequence of such confession”.

Coerced confessions, the Court said, were unreliable, but the fruits here posed no problem. To exclude these fruits simply in order to prevent a suspect from being “made the instrument of her own conviction” would be “novel in theory”, “dangerous in practice” and “repugnant to the general principles of criminal law”.

Hidayatullah J. (as he then was) in Deoman Upadhyaya’s case (AIR 1960 SC 1125) relied upon the above statement of law and held that discoveries from statements were all admissible under sec. 27 even if the statements as to confession were inadmissible because they were made by threats, inducement or promise, i.e. even if they fell foul of sec. 24

After referring to Warickshall’s case and to R vs. Lockhart (1785)1 Leach CC 386 = 168 ER 295, Hidayatullah J (as he then was) in State of UP vs. Deoman (AIR 1960 S.C. 1125) referred to the Judges Rules 1912, made

by the King's Bench Division for the guidance of the police. These rules, it was observed, have no force of law but laid down the procedure to be followed. At first four rules were framed but later, five more were added. They were reproduced in Halsbury's Laws of England (3rd Ed.) Vol 10, p 470, para 865. These rules, the Supreme Court observed, also clearly divide persons suspected of crime into those who are in police custody and those who are not. Report of the Royal Commission (1928-29 CMD 3297) was also referred. It was finally held that the information obtained in cases falling under sec. 24 was admissible. In para 65, Hidayatullah J. held (p. 1145 Col. 2) as follows:

“Section 27, which is framed as an exception has rightly been held as an exception to sections 24-26 and not only to sec. 26. The words of the section were taken bodily from R vs. Lockhart (1785) 1 Leach 386: 168 ER 295 where it was said:

“But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true.”

If what is ‘discovered’ is true and a fact independently in existence, the fact that it was discovered pursuant to a confession made under threat, inducement or promise was irrelevant, according to the above dictum. If the fact discovered existed, it existed even without an induced confession.

Thus, according to Hidayatullah J, facts discovered from statements,- including those made pursuant to threats etc. were admissible.

The 69th Report proposed exclusion of facts if obtained by threats, inducement or promise (sec. 24).

The 69th Report observed that, on the contrary, that, as a matter of policy, facts discovered from statements of persons falling under sec. 24, have to be wholly excluded. First we shall refer to the reasons given in the 69th Report. In para 11.49, the Commission observed:

“But, as a matter of policy, the question arises whether a confession caused by an undesirable inducement, threat or promise – and hence inadmissible under sec. 24, – should become admissible under section 27, because a fact was discovered in consequence thereof. We are of the view that the paramount rule of policy embodied in sec. 24 must override sec. 27.... Section 24 enacts a rule which should have universal application. That rule is not based on any artificial or peculiar considerations relatable to the supposed excesses of the police. It is intended to discourage the “tendering of hopes or promises or the exercise of coercion”, in order to induce or compel the making of confessions. These considerations weigh against sec. 27 overriding sec. 24. Section 24 is not based merely on the criterion of truth. It is intended to discourage coercion in the wide sense for securing confessions.”

The Commission thus felt that if such facts were part of statements made in the circumstances stated in sec. 24, i.e. threats, inducement or promise that

would encourage police to act arbitrarily. Hence facts revealed from statements falling under sec. 24 were not to be made admissible.

Then after referring to Durlay vs. Emperor AIR 1932 Cal 297 and to Emperor vs. Misri (1909) ILR 31 All 592, Ibrahim vs. King Emperor 1914 AIR(P.C) 155 which deal with the basis of sec. 24, the Commission felt that though the subjective pressure referred to in sec. 24 which operates in the mind of the person making the confession, may not lead to the “creation” of facts discovered under sec. 27, in view of the policy underlying sec. 24, the information leading therefrom to the discovery, should also be excluded.

UK:

It would be advantageous to look into the comparative position in the law, having regard to the fact that the provisions of sec. 27 were bodily lifted from the statement of law in R vs. Lockhart (1785) 1. Leach 386 and R vs. Warickshall 1783(1) Leach CC 283 as pointed by Hidayatullah J. (as he then was) in Upadhyaya's case.

In UK, the Revised Judges Rules made by the Judges of the Queen's Bench Division (which came into force on 27.1.1964) deal with admissibility of evidence at the trial of any person in respect of answers and statements which are voluntarily made by him to police officers and to provide guidance to police officers in the performance of the duties (see these Rules in 1964(1) All ER pp 237-240). The Judges Rules have not the force of law but still the Court has discretion to admit the evidence (R vs. Smith 1961(3) All ER 972) but no cross-examination of the prisoner is permissible. The Rules are not mandatory. They are rules of conduct for the

police (R vs. Ovenell 1968(1) All ER 933). They apply to all professional investigations (R vs. Nichols as 51.(Crl. A R 233).

On non-admissibility of confessions and admissibility of facts discovered as a result of an excluded confession, Phipson says (see Phipson, Evidence, 2000, 15th Ed. para 31.29) as follows:

“Admissibility of facts discovered as a result of an excluded confession:

It has long been the law that facts discovered as a result of an inadmissible confession are admissible. (R vs. Warwickshall (1783)1. Leach 298). Such evidence did not after all render the relevant part of the confession admissible (ibid at p 300; R vs. Berriman (1854) 6 Cox 388, 389); Lam Chi Ming vs. R. 1991(2)A.C. 212 (PC) (But see R vs. Gould (1840) 9 C&P 364). The law is now statutory. The Police and Criminal Evidence Act, 1984, sec. 76(4) makes admissible any facts discovered as a result of an excluded confession. Evidence that a fact was discovered as a result of such a confession is not admissible unless evidence of how it was discovered is given by or on behalf of the defendant, in which case it would be relevant to the accused’s credibility as a witness”.

We shall here refer to sec. 76 of the UK Police and Criminal Evidence Act, 1984:

“76.- (1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any

matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained-

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence-

(a) of any facts discovered as a result of the confession; or

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

(5) Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.

(6) Subsection (5) above applies-

(a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and

(b) to any fact discovered as a result of a confession which is partly so excluded, if that fact is discovered as a result of the excluded part of the confession.

(7) Nothing in Part VII of this Act shall prejudice the admissibility of a confession made by an accused person.

(8) In this section “oppression” includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).”

Thus, under sec. 76(4)(a), whatever be the circumstances under which the statement was made, facts discovered would all be relevant.

It will be seen from sec. 76 that while under sec. 76(2) confession obtained by oppression or inconsequence of anything said or done may be

unreliable and could be treated by the court as unreliable but under sec. 76(4), the fact that a confession is wholly or partly excluded in pursuance of sec. 76 shall not affect the admissibility of –

(a) any facts discovered as a result of the confession; or

(b) when the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, if so much of the confession as is necessary to show that he does so

and under sub-section (5), evidence that a fact to which this sub-section applies was discovered as a result of the statement made by an accused person shall not be admissible unless evidence how it was discovered is given by him or on his behalf, and under sub-section (6) it is stated that sub-section (5) applies to –

(a) any fact discovered as a result of a confession which is wholly excluded pursuant to this section; and

(b) to any fact discovered as a result of a confession which is partly so excluded, if that fact is discovered as a result of the excluded part of the confession.

What we wish to point out is that as the law stands today in UK, all facts discovered from information discovered under circumstances similar to those referred to in sec. 24 of the Indian Act are admissible in UK where the person making the statement accepts the mode of discovery.

This is contrary to the proposal in the 69th Report, as already stated, which excludes all discoveries from statements falling under sec. 24.

U.S.A.:

So far as the American law is concerned, (see American Jurisprudence vol. 29, para 531) the position is that facts discovered, even if force was used, were admissible. It is stated that as per Miranda vs. Arizona 384 US 436, 16L Ed 2nd 694, 86 Sct 1602, an involuntary confession is inadmissible, regardless of its truth or falsity and this is so even if there is ample evidence aside the confession to support the confession and the conviction is invalid if based on any part of such a confession. “But”, as to fruits, the authors say:

“it is not clear, however, as to whether facts discovered because of the confession, as distinguished from the confession itself, are admissible in evidence. Many of the State Courts have admitted evidence of the inculpatory facts discovered by reason of an inadmissible confession (see Commonwealth vs. Knapp 9 Pick (Mass) 496; State vs. Danelly, 116 SC 113, 107 SE 149, 14 ALR 1420; Silver vs. State 110 Tex Crim 512, 8 SW 2d 144, 9 SWZd 358, 60 ALR 290; McCoy vs. State 24 Ind 104, 107 NE 2d 43), but other cases have held or indicated that evidence of such facts is inadmissible under the ‘fruit of the poisonous tree’ doctrine (see State vs. Self 59 Wash 2d 62, 366 P.2d 193, Cert denied 370 US 929, 8 L Ed 508, 82 S ct 1569). In still other cases, the courts have established an exception to the admissibility of evidence obtained by aid of an inadmissible confession to the effect that thing found must be identified by evidence other than the confession (Daniels vs. State 78 Ga 98, Whitley vs. State 78 Miss 255, 28 SO 852).”

The latest position in US appears from Prof. Akhil Reed Amar's book 'The Constitution and the Criminal Procedure, First Principles, 1997'. While dealing with the Fifth Amendment, the author refers to this aspect in Chapter II. The author says, after referring to Warrickshell's case decided by the English Courts in 1783, as follows (Note 238 at p. 225):

"In America, it was hornbook law as late as 1960 that courts would not exclude the fruits of coerced confessions. See 2 Francis Wharton, Wharton's Criminal Evidence para 357-58 (Ronald A. Anderson ed, 12 k Ed, 1953); 3 Wigmore, Treatise on the Anglo-American System of Evidence in Trials at Common Law (3rd Ed, 1940, para 856-59); Yale Kamisar, Wolf and Lustig, 'Ten Years Later: Illegal Evidence in State and Federal Courts', 43 Minn. L. Rev 1083, 1115 n.109 (1959). In fact, I am aware of no US Supreme Court case – before or after 1960 – that actually excludes physical fruits of a coerced confession that occurred outside formal proceedings. Miranda does contain an ambiguous sentence about fruits, see 384 US 436, 479 (1966) (speaking of "evidence obtained as a result of interrogation), but that sentence has since been repudiated. See supra text at notes 85-94. But cf. Wong Song vs US 371 US 471 (1963) excluding the Fourth Amendment grounds, physical evidence as fruit of illegal arrest."

At p. 61, Prof. Amar refers to New York vs Quarles 467 US 649 (1984), Justice O'Connor advocated a bright-line rule that physical evidence obtained as a result of a confession after a Miranda violation should be admissible. She had taken the same view in Oregan vs. Elstad 470 US 290 (1985). She said that nothing in Miranda requires exclusion of non-testimonial evidence. Thus, facts discovered, irrespective of whether the

statement on which the discovery was made, was by threats or force or by inducement/promise, immaterial in USA.

Canada:

In Canada too, the position appears to be the same (see p. 224 of Prof Amar's book). In Canada in R vs. Collins 1987 (1) SCR 265, it was held that 'real evidence that was obtained in a manner that violated the Charters (constitutional protection against self-incrimination, unreasonable search and seizure and so on) will rarely operate unfairly for that reason alone. See also Black vs. Regina 1989 (2) SCR 138 (Can) and Mellinthin vs. Regina : 1992 (3) SCR 615 (Can) because what is discovered could have been found without compelled testimony and independently existing evidence that would have been found without compelled testimony. In Don Stuart's Charter Justice in Canadian Criminal Law 401 (1991) it is stated that there is an

“overwhelming tendency of our courts to characterize any tangible evidence such as weapons or drugs as real evidence not going to the fairness of the trial and under Collins regime, generally admissible.”

It is, therefore, clear that in England – from where we borrowed the principle underlying sec. 27 (read with sec. 24) and in the USA and in Canada, the information leading to discovery is admissible even where the information is obtained from an inadmissible confession.

Certain reasons as to why facts discovered should be admissible and why sec. 27 should not be altogether repealed.

In fact, Prof. Amar considers, under the heading ‘what is the Big Idea’ (ibid, p. 658) as to what is the basic rationale of the privilege under which psychological cruelty permits self-accusation to survive – but, the balancing fact is that otherwise, the privilege benefits really guilty persons. Further, if the government is obliged to supply to a defendant any exculpatory evidence or information, it has, which is beneficial to him why should not the defendant be obliged to supply the government, with inculpatory evidence and information he has. The obligation to serve as a witness when necessary to enforce the laws is part of the duty of citizen and generally, the law is entitled to every person’s evidence. If photograph, finger printing and voice tests or blood examination is permissible, why not these discovered facts be admissible? Should the government shoulder the entire burden of proof, or at least its prima facie proof, without any help from the accused? While a coerced statement may be not admissible, why exclude the physical fruits of confessions when these are quite reliable and are often highly probative pieces of evidence. Prof Amar concludes:

“In short, the various rationales repeatedly wheeled out to explain the privilege do not fit with the current scope of immunity. Small wonder, then, that the self-incrimination clause – virtually alone among the provisions of the Bill of Rights – has been the target of repeated analytic assault over the course of the twentieth century from thoughtful commentators urging constitutional amendments to narrow it or repeal it altogether.”

(At p. 82), the author says that the Fifth Amendment does not, unlike the Massachusetts’s Constitution of 1780 (which says “shall not be

compelled to furnish evidence against himself”) prohibit the government from compelling a defendant to ‘furnish evidence against himself’ – compelled fruit is admissible, but compelled testimony, i.e. the confession, is not.

At p. 84, Prof. Amar says that ‘fruits and physical evidence (i.e. as opposed to testimonial evidence) are more reliable than coerced testimony itself. Judge Henry J. Friendly’s ‘The Fifth Amendment Tomorrow’, The Law of Constitutional Change 37. U. Civil. Rev 671 (1968) stated that physical leads are often more important to law enforcement than getting statements for use in courts – because of huge leaps in technology, physical evidence can yield far more reliable information today. This enhanced reliability only strengthens the evidence of respecting the ‘testimony – fruits’ distinction established in 1783. Reliance on ‘fruits’ subserves the purpose of investigation and can lead to protect other persons being unnecessarily questioned or tried. The ‘fruits’ are more reliable than the oral testimony.

No doubt, in the 152nd Report, (see para 11.6 of that Report), the Commission recommended repeal of sec. 27. A perusal of the said report shows that the Commission did not have occasion to consider the above aspects in detail. It felt that basically if a confession to police is to be excluded, all facts including facts leading to the discovery have also to be excluded and sec. 22 be repealed.

We are not in favour of a total repeal of sec. 27 excluding evidence of discoveries of (a) statements unless obtained by threats, inducement or

promise under sec. 24; (b) discoveries from statements made by those not in custody falling under sec. 25 and (c) from those in custody under section 26. (We would like to treat discoveries from statements under sec. 24 separately). This is what was done in the 69th Report.

The recommendation in the 152nd Report for repeal and the law in UK, USA and Canada appear to be totally at variance. The recommendation under the 69th Report appears to take a middle path.

IV. Should facts discovered from statements made by threats, inducement or promise (i.e. falling under sec. 24) be excluded as recommended in the 69th Report?

We have already referred to the passages from the 69th Report referring to this issue. Commission in that Report felt that if such facts were admissible, it would definitely encourage third degree methods being employed by the police. It may even be felt by the police that sec. 27 indirectly permits use of threats, inducement or promises. It agreed for 'sec. 25 and 26 facts' to be admissible but not to 'sec. 24 facts'.

Balancing human rights and public interest:

We have given our deep consideration to the question of balancing sec. 24 and sec. 27.

Here, on the one hand, we have the prisoner's human right under sec. 24 that he should not be subjected to any threats or physical violence. But

sec. 24 deals with ‘inducement or promise’ apart from ‘threats’. We have, in sec. 24, proposed that ‘threats, coercion, violence, torture’ be substituted.

We then proceed to Canada. Whether we can further sub-divide the statements referred to in sec. 24? Can we treat ‘inducement and promise’ – which do not involve ‘threats, coercion or violence or torture’ separately and treat discoveries made from statements obtained by ‘inducement and promise’ admissible, while making facts obtained by threats, coercion or violence or torture inadmissible? In our view, Yes. A right balance must be struck between the right of the accused on the one hand and the public interest involved in making such facts relevant. We therefore propose to segregate ‘inducement, promise’ from ‘threat, violence or torture’.

We propose to make a change in sec. 27 by permitting facts discovered from statements made under sec. 24 if the statements were the result of ‘inducement or promise’ only but not if they were the result of ‘threat, coercion, violence or torture’.

We recommend that sec. 27 be amended by taking a further classification within the ‘facts discovered from statements’ referable to sec. 24. That would be a further balancing act between human rights and public interest. In our view, facts discovered from statements made pursuant to ‘inducement, promise’ should be admissible while facts discovered from statements made pursuant to ‘threats, coercion, violence or torture’ be excluded. This would protect victims against human rights violation in great measure.

- (V) The next question is whether the words ‘so much of such information’ in sec. 27 should be dropped and admissibility restricted to ‘facts’ discovered?

It is worthwhile quoting sec. 27 again. It reads:

“Sec. 27: Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

Now, a careful reading of sec. 27 would show that “such” refers to the entire statement or information given by the person. The words “so much” relate to “so much” out of the total statements as relates distinctively to the fact thereby discovered. In other words, what is relevant is that part of the statement relating “distinctively to the facts thereby discovered”.

The Privy Council in Pulukuri Kotayya vs. The Emperor AIR 1947 PC 67 held that the inculpatory part of the statement is not admissible even under sec. 27. In that case the High Court convicted the accused, following the judgment in In re Athappa Gounder ILR 1937 Mad 695 and holding as admissible the word “with which I stabbed”. The Privy Council held this was not permissible and overruled an earlier view of the same High Court that was followed in that case by the High Court. It was observed that:

“It is fallacious to treat the ‘fact discovered’ within this section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the

accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ‘I will produce a knife concealed in the roof of my house’ does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added ‘with which I stabbed A’, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant’.”

If Kotayya’s case is followed then, if the accused has no explanation to offer as to how he came to know that the dead body was in a particular place, a presumption will be drawn against him that he merely aided in its hiding and he would be guilty of an offence only under sec. 201 IPC. (see Vepa P. Sarathy 2002, 5th Ed, p. 130)

If the police already knew about the material object in a particular place, there is then no discovery within sec. 27. That means that if the circumstances show the police have planted the object at the place, it can never be treated as a discovery at the instance of the accused.

What do the words ‘so much’ in sec. 27 mean?

Nice questions have arisen in a number of cases as to what extent, on facts, a particular part of the statement is admissible. In Trimbak vs. State of MP (AIR 1954 SC 39), the property was recovered from a field belonging to

a third party and accused gave an explanation from his knowledge. The case related to an offence under dacoity. The Supreme Court reversed the High Court and held that the stolen property was not in possession of accused as required by sec. 411 as it was recovered from a field. The field was open and accessible to all and sundry. It was difficult to hold that the accused was in possession.

But in K. Chinnaswami vs. State of A.P. AIR 1962 SC 1788, a three Judge Bench held that the words “where he had hidden” were admissible under sec. 27 as they are not on par with ‘with which I stabbed the deceased’ as observed in Pulukuri Kottaya’s case. The words may merely show “possession of the appellant” but would not prove the offence. The police has to still show that the articles were connected with crime i.e. were stolen.

In a recent case, Limbaji & others vs. State of Maharashtra 2001 (8) SCALE P. 522, a two Judge Bench preferred to follow the three Judge Bench case in Chinnaswami, and held that though the articles were recovered in a field the accused had concealed them in his possession. The court had also to explain the principle behind illustration (a) of sec. 114 of the Evidence Act. Following Sanwat Khan vs. State of Rajasthan AIR 1956 SC 54 which was a three Judge Bench case, the court in Limbaji’s case observed that even using sec. 114, only a presumption could be drawn that the persons were receivers of stolen property or were persons who committed theft but could not be presumed to have murdered the deceased who was in possession of the articles.

As already stated, question is whether sec. 27 be amended by restricting the admissibility to ‘facts discovered’ rather than ‘so much’ of the statement.

Sec. 76 of the English Act of 1984 – which we have extracted in our discussion under para II above says in subsection (4):

“the fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence-

- (a) of any facts discovered as a result of the confession; or
- (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, if so much of the confession as is necessary to show that he does so”

It will be noticed that the English Act confines the relevancy to “facts discovered” and not to that ‘part of the confession’.

In order to avoid arguments as to what extent the words ‘so much’ extend, and to preclude the police authorities from using sec. 27 indirectly to violate sec. 25 and sec. 26, it will, in our opinion be advisable to confine sec. 27 to the ‘facts’ discovered as stated in the 152nd Report of the Commission (Report on Custodial Crime). As already stated, the section was revised in that Report as follows: (para 11.6)

“Sec. 27. Discovery of facts at the instance of the accused: When any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact

discovered may be proved, but not the information, whether it amounts to a confession or not.”

It will be noticed that sec. 27 as recommended in that Report, omits the words “provided that” and brings in information given by those in custody or not, - whether the information amounts to a confession or not – but makes the ‘fact’ discovered relevant and not the information. This is on par with sec. 76 of the English Act of 1984.

(VI) There was another suggestion that the word ‘distinctly’ should be deleted from sec. 27.

In the revised sec. 27 as drafted in the 152nd Report, once the words “so much of such information” were dropped, the words ‘distinctly’ were also dropped. The words ‘distinctly’ became necessary to confine the relevancy to the facts which were distinct from other parts of the statements. In fact, courts have been very zealous of retaining the words ‘distinctly’ if the words ‘so much of such information’ were to be retained. Sarkar says (1999, 15 Ed. p.549) that the words “relates distinctly” have been used by Taylor (sec. 902) while Phipson used the words ‘strictly relates’ (8th Ed p. 255) which are found in Leach’s Crown Law (see Leach’s notes R vs. Warickshall and R vs. Lockhart). The Supreme Court pointed out in Md. Inayatullah vs. State of Maharashtra AIR 1976 SC 483 that ‘distinctly’ means ‘directly, indubitably, strictly, unmistakably’.

If the format of the 152nd Report is not to be adopted, and the existing format is retained (of course, adding ‘or’ as discussed earlier), we do not want to relax the strictness of sec. 27 by dropping the word ‘distinctly’. But if the format in 152nd Report is to be used, the word ‘distinctly’ can be

dropped along with the words ‘so much’ of the information. We recommend the latter course.

(VII) Section 27 is an exception to sec. 162 Cr.P.C.: (historical facts):

Section 161 of the Code of 1898 corresponds to section 161 of the Code of 1973 and sec. 162 of that Code corresponds to sec. 162 of the new Code, with minor changes.

Sec. 161(1) of the Cr.P.C. 1973 permits police to examine any person supposed to be acquainted with the facts and circumstances of the case and sec. 161(2) says ‘such person shall be bound to answer truly’, all questions relating to such case.... “other than questions the answers to which would have a tendency to expose him to a criminal charge or to penalty or forfeiture”. Sec. 161(3) states that a police officer may “reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records”. The words ‘any person’ in sec. 161(1) include accused persons too or persons who become accused ultimately. If it is the accused, he has a right to silence.

A statement made under sec. 161 of the Code of 1973 cannot be used as substantive evidence but can only be used for the purpose of contradicting the evidence of a prosecution witness. It cannot be used for corroborating the evidence of a prosecution witness.

Sec. 162(1) of the new Code as it stands stipulates that the statement shall not be signed. Of course, in the 154th and 177th Reports of the Commission have suggested signatures or the thumb impression of the

person to be taken but that will not make the statements admissible. Sec. 162(1) says that such statement shall not be used for any purpose, save as provided “hereinafter”.

The proviso to sec. 162 permits use of the statement for purposes of sec. 145 of the Evidence Act, while sec. 162(2) gives overriding effect to sec. 27. We shall refer to the previous history of sec. 162 under the old Code of 1898.

Before the amendment of 1941 to sec. 162(2) of the Cr.P.C., 1898, a view was expressed by some High Courts that sec. 162(1) applies to statements by persons other than accused while sec. 27 relates to statements by accused. Some other High Courts took the opposite view that sec. 162(1) applies also to statements of accused. The Privy Council in Pakala Narayanswami vs. R AIR 1939 PC 47 accepted the latter view. After that, some High Courts held that sec. 27 being a ‘special law’ was not affected by sec. 162 CrPC while a contrary view was taken in some other High Courts. The legislature intervened by Act 15 of 1941 and added the words ‘or to affect the provisions of sec. 27 of that Act, thus allowing sec. 27 to override the prohibition in sec. 162(1) in so far as ‘facts discovered’ are concerned.

Sec. 162(1) of the Criminal Procedure Code, 1898, was identical with sec. 162(1) of the present Act and contained two provisos, the first one corresponding to the present proviso referring to sec. 145 Evidence Act. The second proviso gave the court discretion to exclude from the copy of the statement given to the accused, any part of the disclosure which was not essential in the interests of the justice. Subsection (2) of sec. 161 as it was before the amendment of 1941, permitted the statements, if they fell under

sec. 32(1) of the Evidence Act, to be used. It was only in 1941 that the words ‘or to affect the provisions of sec. 27 of that Act’ were introduced in sec. 162(2). Present sec. 162(2) accepts and permits use of the statements under sec. 32(1) as well as sec. 27. Present Explanation to sec. 162 permits ‘omission’ in the statements to be used. There was no such Explanation in sec. 162 of the old Act.

We have thus given a brief history of sec. 162 of the Cr.P.C. and the introduction of amendment ever since 1961, to give overriding effect to sec. 27, thus making ‘facts discovered’ admissible.

[In the 154th Report, the Commission has suggested introduction of sec. 164A. In the 179th Report, while submitting a draft of Law Reforms (Miscellaneous) Provisions Act, 2002, certain amendments were suggested in sec. 162 and 164 but those amendments proposed do not affect or have any bearing on sec. 27 or on the present proposals for amendment of sec. 27.]

Recommendation:

In the light of the above discussion, we recommend that the words “Notwithstanding anything to the contrary contained in sections 24, 25 and 26” be placed at the beginning of sec. 27 and that thus the non-obstante clause should cover sec. 24 also and not merely sec. 25 and 26, as recommended in the 69th Report. The word ‘or’ is to be introduced as recommended in the 69th and 152nd Reports. The word ‘such’ and ‘distinctively’ be dropped. In stead of ‘so much of the information’, the

‘facts’ discovered will be treated as admissible. A proviso is proposed to sec. 27 limited to making facts inadmissible if those facts were discovered from statements made under sec. 24 where the statements were the result of ‘threats, coercion, violence or torture’. Facts discovered from statements made under sec. 24 by ‘inducement or promise’ and facts discovered from statements made under sec. 25 and 26, would also be admissible.

We propose sec. 27 should be substituted as follows:

Discovery of facts at the instance of the accused

“27. Notwithstanding anything to the contrary contained in sections 24 to 26, when any relevant fact is deposed to as discovered in consequence of information received from a person accused of any offence, whether or not such person is in the custody of a police officer, the fact so discovered may be proved, but not the information, whether it amounts to a confession or not:

Provided that facts so discovered by using any threat, coercion, violence or torture shall not be provable.”

Section 28:

Section 28 deals with ‘confession made after removal of impression caused by inducement, threat or promise, relevant:

“Sec. 28: If such a confession as is referred to in sec. 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.”

In the 69th report (see para 11.60), no amendment was suggested to sec. 28 but that it should be renumbered as sec. 24A as it is a qualification of sec. 24.

We are of the view that in the light of the amendment proposed in sec. 24 in this Report, in sec. 28, for the words “inducement, threat or promise”, the following words be substituted in the body of sec. 28 and the title, namely,

“inducement, promise, threat, coercion, violence or torture”.

We are also of the view that sec. 28 need not be renumbered as sec. 24A and there is no need to delete sec. 28.

Section 29:

Section 29 deals with the subject ‘confession otherwise relevant not to become irrelevant because of promise of secrecy etc. It says:

“Sec. 29: If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or

because he was not warned that he was not bound to make such confession, and that evidence might be given against him.”

We have seen that a confession caused by any inducement, threat or promise relating to the charge and proceeding from a person in authority (sec. 24) or a confession to the police (sec. 25) or when in police custody to any person other than a magistrate (sec. 26), is inadmissible. This section deals with confessions otherwise relevant, i.e. if it is not obtained by any inducement, threat or promise having reference to the charge against the accused person, obtained before a person in authority, or a confession is not tainted with any other cause making it invalid or untrustworthy. It can only be an extra judicial confession. It does not become irrelevant because it was made under (1) a promise of secrecy or (2) in consequence of a deception or artifice practiced on the accused, or (3) when he was drunk, or (4) because it was elicited in answer to questions, or (5) because no warning was given that he was not bound to say anything and that whatever he might say might be used against him.

The principle of sec. 29, as pointed by Sarkar (5th Ed, 1999, p. 581) is that a confession is to be excluded if it is involuntary but not if the confession is in breach of confidence or violation of a promise of secrecy or practice of deception. This is also the law as laid down in Wigmore, paras 823, 841 quoted in Sarkar (ibid p. 580) and in England (R vs. Derrington 1826 2 C&P 418: Halsbury states (3rd Ed, Vol 10, para 876) that such a confession has very little weight (Sarkar, ibid, p. 582).

Confessions recorded by bugging (R vs. Ali, The Times, Feb.19, 1991) (CA), by detectives, by secret tape recording (R vs. Katz) (1990) 90 Cr Ap.R 456 (CA), have been held relevant.

But the question is whether a confession before a Magistrate falling under sec. 29, can be admissible even if it obtained in breach of sec. 164(2) of the CrPC.

Sec. 164(2) of the CrPC 1973 (and sec. 164(3) of the old Code) prescribes the procedure to be followed by a Magistrate before recording a confession. This has to be read with sec. 463 of the CrPC, 1973 (sec. 533 of old Code).

The Privy Council held in Nazir Ahmed vs. Emperor AIR 1936 PC 253 that a confession not recorded strictly in accordance with provisions of ss. 164 and 364 of the old Code was inadmissible.

In Chinna Gowda vs. State of Mysore, 1963 (2) SCR 517, it has been held that where the accused has not been told that he need not make a confession, his confession is inadmissible in evidence and sec. 463 Cr.PC will not cure the defect.

If a Magistrate does not certify that, according to him, the confession is voluntary, the defect is fatal, Chandran vs. State of Tamil Nadu, AIR 1978 SC 1574.

But, a three Judge Bench of the Supreme Court appears to have taken the view in Dagdu vs. State AIR 1977 SC 1579 that a failure to comply with sec. 164(2) CrPC or with High Court circulars will not render the confession inadmissible if it does not violate any of the conditions in ss. 24 to 28 of the Evidence Act, though it may impair the evidentiary value of the statements and the court has to consider whether it can be accepted as true. Similar view was taken in Aghnoo Nagesia vs. State of Bihar, AIR 1966 SC 119.

But a contrary view, namely, that a confession recorded in breach of sec. 164(2) of CrPC is inadmissible has been taken in a good number of cases – see Shiv Bahadur Singh vs. State of Vindh Pradesh, AIR 1954 SC 322; Sarvan Singh vs. State of Punjab, AIR 1957 SC 637; Deep Chand vs. State of Rajasthan, AIR 1961 SC 1527.

Recently in Kehar Singh vs. State, AIR 1988 SC 1883, it has been held that the compliance with subsection (2) of sec. 164 is mandatory and imperative and non-compliance with it renders the confession inadmissible in evidence. If the court comes to a finding that such a compliance had in

fact been made, the omission to record the same in the proper form, will not however render it inadmissible in evidence and the defect can be cured under sec. 463 (sec. 533 of the old Code) but when there is non-compliance of the mandatory requirements of sec. 164(2), and it comes in the evidence that no such explanation as envisaged in the aforesaid subsection had been given to the accused by the Magistrate, this substantial defect cannot be cured under sec. 463 CrPC.

So far as sec. 29 is concerned, the 69th Report recommended that it should be subject to sec. 164(2) so that confessions made before a Magistrate where the Magistrate violates the procedure, do not become admissible under sec. 29. But, in our view, instead of the ‘Exception’ relating to sec. 164(2), it is better if a second subsection is added.

The 69th Report recommended sec. 29 to be redrafted as follows:-

“29. If a confession is otherwise relevant, it does not become irrelevant merely because –

- (a) it was made
 - (i) under a promise of secrecy, or
 - (ii) in consequence of a deception practised on the accused person for the purpose of obtaining it, or

- (iii) when he was drunk, or
- (iv) in answer to questions which he need not have answered,
or
- (b) the accused person was not warned that he was not bound to make such confession and that the evidence of it might be given against him.

Exception: Nothing in this section shall affect the provisions of subsection (2) of section 164 of the Code of Criminal Procedure, 1973, as to the recording of Magistrates.”

But, we are of the view that the language of the Exception as proposed does not give effect to what is now decided in Kehar Singh’s case. In our view, it must be modified. We are of the view that it should be made clear that a confession made in violation of sec. 164(2) of the CrPC will be inadmissible, but that this will be without prejudice to sec. 463 of the CrPC, 1973.

In the 69th Report, it was stated that there were two meanings as to what was meant by “otherwise relevant”. One view, as in Patna was that it must be a confession other than those referred to in sec. 24 to 28. The other view taken by the Bombay High Court was that it may be one admissible and not excluded by sec. 24 to 28 or by any other provision of law. The latter view was accepted and it was suggested that the words “is otherwise

relevant” be replaced by the words “made by an accused person is not irrelevant or incapable of being proved under sec. 24 to 27” or to drop the word ‘such’.

The Commission also considered sec. 29 in relation to sec. 164 and finally recommended that sec. 29 must be made subject to sec. 164(2) CrPC. But in our view, this should be without prejudice to sec. 463 CrPC, 1973 also.

We entirely agree with these two recommendations and adding our further recommendation thereto, sec. 29 should be redrafted as follows:

Confession otherwise relevant not to become irrelevant because of promise of secrecy etc

“29. (1) If a confession is otherwise relevant, it does not become irrelevant merely because –

- (a) it was made
 - (i) under a promise of secrecy, or
 - (ii) in consequence of a deception practised on the accused person for the purpose of obtaining it, or
 - (iii) when he was drunk, or
 - (iv) in answer to questions which he need not have answered, whatever may have been the form of those questions.
- (b) the accused person was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

(2) Subject to the provisions of section 463 of the Code of Criminal Procedure, 1973, nothing contained in sub-section (1) shall make a confession relevant which is recorded in contravention of the provisions of sub-section (2) of section 164 of that Code.”

Section 30:

Sec. 30 concerns the ‘consideration of proved confession affecting person making it and others jointly tried for same offence’:

It reads as follows: “sec. 30: When more persons than one are being tried jointly for the same offence, and a confession made by one of such person affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.”

Explanation – “Offence” as used in this section, includes the abetment of, or attempt to commit, the offence.

There are two illustrations given below the section as follows:

- (a) “A and B are jointly tried for the murder of C. It is proved that A said, “B and I murdered C”. The court may consider the effect of this confession as against B.
- (b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said - “A and I murdered C”.

This statement may not be taken into consideration by the court against A, as B is not being jointly tried.”

The joint trial contemplated by the section must be for the same offence, that is, under the same section of the penal law, including, - by reason of the Explanation – an attempt to commit or abetment of the offence; and the trial must be in accordance with the provisions of the Criminal Procedure Code, 1973 (vide sec. 223).

In the 69th Report, the Commission recommended (para 11.89) the repeal of sec. 30 mainly because the “co-accused” can hardly rebut the incrimination as he cannot cross-examine the accused who made the confession. It was felt that this position is a potential source of great injustice in many cases and practically amounted to a violation of the principle that no man should be condemned unheard. The co-accused against whom the allegation is made cannot take the risk of entering the

witness-box and his privilege against self-incrimination by being exposed to cross-examination. If he does not enter the witness-box, there will be injustice. He may be unable to rebut the allegations made by the other accused since the person who made the statement is not available for cross-examination. The English law, it was pointed out, does not accept this principle.

It was also pointed out (para 11.93) that there are different views as to the meaning of the word ‘proved’ and that the view that sec. 30 does not apply to a ‘confession made in the course of the trial’ is correct. (We accept the latter of these views as accepted in para 11.93 of the 69th Report, as being the correct view. This is supported by the express language of sec. 164(1) of the Code of Criminal Procedure, 1973.)

On the other hand the basic logic of sec. 30 is that a person who is prepared to implicate himself in the offence could be speaking the truth. In the 69th Report, it was observed (see para 11.80) that this is not convincing and self-implication is not an adequate substitute for cross-examination. The co-accused cannot be compelled to prove a negative nor does he have an opportunity to cross-examine the accused who implicated him. In US the right to ‘confront’ by cross-examination is treated as a fundamental basis for fairness in a criminal trial. The statement of an accused may be on account of malice, or revenge or other circumstances.

Reference was made to the views of Bar Associations, Judges and State Law Commissions (see para 11.81) for the repeal of sec. 30 and also to a note by the Ministry of Law itself which was forwarded to the Law Commission.

Therefore, the Commission recommended repeal of sec. 30.

We are inclined to take a different view that sec. 30 should not be repealed. We shall now give our reasons. Now, the Supreme Court in Kashmira Singh vs. The State AIR 1952 SC 159, allowing an appeal by the co-accused observed:

“The proper way to approach a case of this kind is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.”

It is quite important to notice that the confession is not given an oath and cannot be used as substantive evidence on which the conviction of the co-accused can be based, nor is it treated as ‘relevant’, the section only says the court ‘may take into consideration’ the confession by a co-accused.

Another aspect is whether an accused could absolve himself and implicate his co-accused. Some High Courts have held that this is not permissible. Further, in a charge of murder where the accused stated that the other accused killed and then under threat, compelled him i.e. the deponent to dispose of the body (s.207 IPC), the confession, it was held, could not be used against the co-accused (Periaswamy vs. R ILR 54 Mad 75).

An opposite view has also been expressed by some High Courts that the word ‘offence’ may be read as ‘offences’ and a person may exonerate himself of one of the offences and implicate others with regard to other offences (Mia Khan vs. R, AIR 1923 Lah 293); In re Manicka Padayachi, AIR 1921 Mad 490; Mirza Zahid vs. R, AIR 1938 All 91; Shiva Bai vs. R, ILR 50 Bom 683.

Sarkar says (15th Ed, 1999, p. 602) that the former view is correct and that a confession must implicate the maker and the other accused in all the

‘offences’ for which they are jointly tried and that the section must be interpreted strictly.

Of course, where the accused who confessed dies, the statement is held admissible under sec. 32(3), see Haricharan Kurmai vs. State of Bihar, AIR 1964 SC 1184 following and approving Bhuboni Sahu vs. The King, AIR 1949 PC 257. In the latter case, Sir John Beaumont observed: it is “weak evidence”. The Delhi High Court observed PUCL vs. CBI, 1997 CrL LJ 3242 (Del):

“.... a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of ‘evidence’ contained in sec. 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Sec. 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence.”

Section 15 of TADA specifically provided that the confession of a co-accused shall be admissible in the trial of the co-accused, abettor or conspirator for an offence under that Act or Rules. But co-accused must have been tried under TADA but the confession is not admissible if the co-accused is not tried under TADA.

There are a number of judgments of the Supreme Court in the context of sec. 30. The latest is State vs. Nalini (the Rajiv Gandhi Murder case) 1999(5) SCC 253. In this case, the Court was concerned with the non obstante clause in TADA, which excluded the provisions of the Evidence Act and thereby made the confession of an accused ‘admissible’ i.e. substantive evidence. The majority, Wadhwa & Quadri JJ considered the law under sec. 30 and held that while sec. 30 only permitted the confession of a co-accused to be ‘considered’, though the TADA allowed it to be treated a “substantive evidence (see page 573 para 680); Quadri J however said (para 706) that rule of prudence cautions the judicial discretion that it cannot be relied upon unless corroborated generally by other evidence on record. The caution referred to by the Privy Council in Bhuboni’s Sahu’ case by the Privy Council which was quoted in Kashmira Singh’s case by the Supreme Court was referred to. It reads as follows:

“The tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the Court to guard against the danger.”

If the accused's confession against a co-accused is not substantive evidence and cannot be used except for corroboration of other reliable evidence and the only purpose the confession serves is to lend further assurance to the evidence otherwise available, is the criticism that the co-accused who is incriminated does not have a fair trial because he cannot cross-examine the deponent-accused who made the confession justified? In our opinion, it is not necessary to go to the length of repealing sec. 30 in as much as the Supreme Court has clearly held in Kashmira Singh's case that when there is other reliable evidence, sufficient to support a conviction, the Court need not rely on this statement of the co-accused; but where there is other reliable evidence and the Court is searching for some corroboration, it can use the confession of one accused against another for that purpose.

We, however, feel that the confession must relate to all the offences in regard in which the deponent-accused is allegedly involved and the confession cannot be one made in the course of the trial. These two aspects, we propose to bring into sec. 30 by way of amendment.

The title shall be amended by adding the words "or offences" after the word "offence".

In the light of the above, we do not think sec. 30 should be repealed. We recommend its retention in a modified form as follows:

Consideration of proved confession affecting person making it and others jointly under trial for same offence or offences

“30. When more persons than one are being tried jointly for the same offence or offences, and a confession made, before the commencement of trial, by one of such persons affecting himself and some other of such persons in respect of same offence or all the offences affecting himself and some other of such persons is proved, the Court may, where there is other relevant evidence against such other person or persons, take into consideration such confession as lending credence against such other person or persons as well as against the person who makes such confession.

Explanation: ‘Offence’ as used in this section, includes the abetment, of or attempt to commit the offence.

Illustrations

- (a) A and B are jointly tried for murder of C. It is proved that A said – “B and I murdered C”. The court may consider the effect of this confession as against B.
- (b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said – “A and I murdered C.” This statement may not be taken into consideration by the court against A, as B is not being jointly tried.”

Section 31:

Section 31 deals with the question as to the effect of admissions – whether they are not conclusive proof but only raise an estoppel. It reads as follows:

“Section 31: Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained”

The 69th Report stated (see para 11.95) that section 31 does not require any amendment.

There are several principles laid down by courts that an admission must be considered as a whole and may be accepted in part or rejected in part. We do not think that any further additions to sec. 31 are necessary.

We are in entire agreement with the 69th Report that no amendments are necessary in sec. 31.

Section 32:

Sections 32 and 33 deal with relevance of ‘Statement by persons who cannot be called as witnesses’. Section 32 bears the heading ‘Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. Section 32 has eight clauses. The clauses of section 32 deal with relevancy of statements made (i) if it relates to cause of death; (2) or made in course of business, (3) or against the interest of maker (4) or gives opinion as to public right or custom, or matters of general interest (5) or

relates to existence of relationship, (6) or is made in will or deed relating to family affairs, (7) or in document relating to transaction mentioned in section 13, clause (a) and (8) or is made by several persons and expresses feelings relevant to matters in question.

There are 14 illustrations below section 32.

In the 69th Report, in Chapter 12, the following recommendations were made:

- (i) opening para to be revised (para 12.24)
- (ii) clause (1) of sec. 32 – to be amended (see para 12.64)
- (iii) clause (2) of sec. 32 – to be amended (para 12.103)
- (iv) clause (3) of sec. 32 – to be amended (para 12.141)
- (v) clause (4) of sec. 32 – No change is necessary (para 12.149)
- (vi) clause (5) and (6) of sec. 32 – No change is necessary (para 12.167)
- (vii) clause (7) of sec. 32 – to be amended (para 12.179)
- (viii) clause (8) of sec. 32 – No change necessary (para 12.189)

All the sub clauses deal with exceptions to the hearsay rule.

Opening part of sec. 32:

It was pointed out in para 12.13 that sec. 32 and 33 refer to statements by various classes of persons and that while sec. 33 also refers to statements of a person ‘who is kept out of the way by the adverse party’ and that in sec. 32, this category appears to have been omitted by mistake. It was also pointed out in para 12.14, that in sec. 33 the words ‘whose presence cannot be obtained without an amount of delay or expenses which, under the circumstances of the case, the court considers unreasonable’ whereas in sec. 32 the words used are ‘whose attendance cannot be procured without an amount of delay and expense, which, under the circumstances of the case, appears to the court unreasonable’. It was recommended that language of sec. 32 must be amended by adopting the language in sec. 33.

We agree with these suggestions.

The opening part of section 32 will have to be amended as follows:

“Statements, written or verbal, of facts in issue or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose presence cannot be procured without an amount of delay or expense which, under the circumstances of the case, the court considers

unreasonable, or who is kept out of the way by the adverse party, are themselves relevant facts in the following cases:”

Clause (1) of sec. 32

Clause (1) of sec. 32 refers to the relevance of dying declarations. The principle is based on the theory that a dying man may not speak untruth. Mathew Arnold stated in Sohrab and Rustum

“Truth sits upon the lips of a dying man”

Shakespeare also referred to it in King John (Act 5, scene 4)

“That I must die here, and live hence by truth?”

There is a vast amount of case law on various aspects of relevancy of dying declarations and it is not necessary to cover the entire ground.

In the 69th Report, it was pointed out that when clause (1) of sec. 32 makes relevant “the circumstances of the transaction which resulted in his death’, questions have arisen whether motive spoken to by the deceased

would also be relevant. Conflict between the views of the High Court has been referred to. That was the position in 1977.

But now, this question has been resolved by the Supreme Court in State of UP vs. Ramesh Prasad Misra: AIR 1996 SC 2766 and it has been held that sec. 32(1) is to be construed in a wide manner and includes a statement by the deceased regarding motive behind the criminal act.

Courts have also held that dying declaration can be the sole basis for a conviction.

It has however been accepted that in India, that there is a tendency among persons dying to implicate all their enemies who may have had nothing to do with the offence. Sir James Stephen referred to this tendency (see History of Criminal Law in England, Vol. I, pp. 448-449) quoted by Sri Vepa P. Sarathi in his Commentary 'Law of Evidence', 5th Ed. 2002, p 81-82. The courts in India have, therefore, accepted that one must be very careful in relying on dying declarations. In State of Gujarat vs. Khuman Singh Karsan Singh AIR 1994 SC 1641 the first dying declaration referred to one person initially but a second and third implicated others. This has cast doubts on these statements. Where it is in contradiction with evidence of other witnesses, it was not acted upon Jagga Singh vs. State of Punjab AIR 1995 SC 135.

In the 69th Report (see para 12.52), after discussion of case law, it was observed that two questions arise:

- (1) whether the circumstances of the transaction which resulted in his death would include ‘cause of death of another person’ also?
- (2) whether the clause which says – ‘whether or not the person who made it was under expectation of death’ should be modified by restricting the clause to statements made ‘in expectation of death’?

On the first aspect, the 69th Report said that an Explanation can be added by making statements relating to death of others also admissible.

On the second aspect, the 69th Report accepted that clause (1) of sec. 32 be modified by dropping the words “whether or not the person who made it under expectation of death’ and relied upon the English case R. vs. Woodcock (1789) 1 Leach 500 that the maker of the statement must be ‘on the point of dying’. The Report did not agree with the reasoning of the Select Committee (1871) (Report under II) that the relevance of the statement whether made in contemplation of death or not, was a matter more concerned with the weight of the statement rather than with its admissibility.

The 2nd para of clause (1) of sec. 32 was to be modified accordingly and treated as Explanation I.

So far as the first proposal is concerned, we find that in Ratan Gond vs. State of Bihar AIR 1959 SC 18, it was held that the words ‘his death’ are clear and a statement by a dying person regarding another’s death were not admissible. The recommendation runs contrary to this judgment and the Commission’s only reasoning in para 12.53 was that the words ‘transaction’ and ‘circumstances’ have to be and has always been construed widely. The Commission did not make reference to the above judgment nor to two earlier judgments in In re Peria Chelliah Nadar AIR 1942 Mad 450 nor Kappanaiah vs. R AIR 1931 Mad. 233. Two English cases in R vs. Mead (1824) 2 B&C 605 and R vs. Hind (1860)8 Cox CrL. Cases 300 were explained as not conclusive. It was further stated (para 16.57) that if it is to be treated that a person about to die would normally speak truth, there is no reason why that logic should not apply to the statement relating to cause of death of others.

We may add that, apart from conflicting with a decision of the Supreme Court, the above recommendation runs counter to the principle that we are dealing with exception to hearsay and this should not be extended to cases of cause of ‘death of others’ and has to be confined to cause of death of the person making the declaration. In Phipson (15th Ed., 2000 para 35.62), after referring to the above English cases, reference is made to the observation of Pollock CB in one of them, namely, R vs. Mead:

“Speaking for myself I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of England, which I think ought not to be extended.”

Phipson observes in same para:

“It is submitted that this view is one which should be followed and the admissibility of such evidence should not be extended to cases other than homicide, for instance causing death by reckless driving.”

For the above reason we are of the view that the first recommendation that the statement as to cause of death of others should be made admissible by adding Explanation 2 is not acceptable to us.

So far as the second part of the recommendation i.e. dropping the words “whether the person who made them was or was not, at the time when they were made, under expectation of death”, we find that this part of the recommendation again runs counter to the observations of the Privy Council in Pakala Narayana Swami vs. Emperor AIR 1939 PC 47 to the following effect

“The statement may be made before the deceased has any reason to anticipate being killed”

This view has been accepted by the Supreme Court in Tehal Singh vs. State of Punjab AIR 1979 SC 1347 (NOC) where Chinnappa Reddy J said (at 1349-50). “We do not also see any force in the suggestion of Dr. Chitale that the statement of Harmel Singh was not made in expectation of death and was, therefore, not entitled to weight. Apart from the fact that S.32 of the Evidence Act does not require that a statement should be made in expectation of death...”

The case law was reviewed by a three Judge Bench in Sudhakar vs. State of Maharashtra AIR 2000 SC 2602 – 2000(6)SCC 671 and the same principle was reiterated. See also Kansraj vs. State of Punjab 2000(5) SCC 207 = AIR 2000 SC 2324. Proximity has however been stressed in these Judgments. In fact sec. 162(2) Cr.P.C. in express terms excludes from its purview, statements made under sec. 32(1).

It is true that under English law, as stated by Lord Alverstone CJ in R vs. Perry : 1909(2) KB 697, the requirement is that the person must have ‘a settled hopeless expectation of death’. It is then the law that if condition was satisfied, it is immaterial that he lingered for several days or weeks or he subsequently entertained hope. Under English law, there should be no hope of recovery, however slight not a belief. It may not be of an instant or

immediate death but must be of an imminent and impending death, as distinguished from one deferred in point of time.

Sarkar says (15th Ed., 1999, page 630) that the Indian law is different from English law and there is no need that the man should be in expectation of death. The express provision to sec. 32(1) has been there since 1872 and we see no good reason to change the law, particularly when the Privy Council and the Supreme Court have accepted it.

In the light of the above discussion, we disagree with the recommendations made in the 69th Report so far as clause (1) of sec. 32 is concerned and recommend that the said clause be left as it is.

Clause (2) of Section 32:

This clause deals with the relevancy of statements made in the course of business by persons who are dead or cannot be found etc. The clause is quite important as it also deals with the relevance of ‘dying declarations’.

Clause(2) of Section 32 reads as follows:

“(2) Or is made in course of business – when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him”.

Now there are differences between the English law and the Indian law, (as stated in clause (2) of sec. 32). Under English law (see Sarkar, Evidence, 15th Ed., 1999, 683), such statements and entries are relevant only if (i) they are made in discharge of a duty or (ii) were made contemporaneously, or (iii) were made by a person having personal knowledge or (iv) and do not relate to collateral matters regarding which there was no duty to record. The legislation did not bring the restrictions in English law into clause (2) of sec. 32 of the Indian law. Under our law, the only requirement is that the statement or entries must refer to relevant facts. (Sitaji vs. Bijendra : AIR 1954 SC 601).

Section 34 of the Evidence Act also refers to ‘Entries in books of account’ but that deals with entries which are not made by dead persons etc. which specifically come under clause (2) of sec. 32. Section 34 which makes entries relevant says that mere entries alone are not sufficient to

create liability. Under sec. 34, there are number of judgments – see Jain hawala case, CBI vs. V.C. Shukla 1998(3) SCC 410 and Manish Dixit vs. State of Rajasthan: AIR 2001 SC 93. So far as clause (2) of sec. 32 is concerned, it was suggested in Gopeswar Sen vs. Bejoy Chand Mahatar (1928) ILR 55 Cal at p. 1175 that there would be a similar provision in clause (2) of sec. 32 that mere entries cannot be sufficient to cast liability but in the 69th Report, it was felt (see paras 12.81 to 12.83) it was not necessary to add any words in clause (2) of sec. 32.

But the Commission, however, recommended splitting up of clause (2) in clause (2) and (2A), the former dealing with the first part of clause (2) of sec. 32 which is general in nature and the latter, dealing with specific particular situations as follows.

The Commission in para 12.103 of the 69th Report suggested the following format for clauses (2) and (2A) of sec. 32:

“(2) When the statement was made by such a person in the ordinary course of business; and, in particular, and without prejudice to the generality of the foregoing provisions of this clause, when it consists of any entry or memorandum made by him in books kept in the ordinary course of business;

(2A) when the statement consists of an entry or memorandum made by such person in the discharge of professional duty or of an acknowledgment written or signed by such person of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him or of the date of a letter or other document usually dated, written or signed by him”.

The words ‘books of account’ and ‘course of business’ and ‘regularly kept’ have been explained by the Supreme Court in the havala case CBI vs. V.C. Shukla 1998(3) SCC 410.

Before making the above proposals, the Commission in the 69th Report, referred to the relevant case law and to three possible interpretations of clause (2) of sec. 32:

- (i) requirement of ‘ordinary course of business’ is confined to the opening part and not to latter part containing specially enumerated cases. Books kept in course of business are different from books kept in the discharge of professional duties.
- (ii) whole clause is subject to the opening portion – ‘ordinary course of business’ or whether the clause should apply to non-commercial activities also.

- (iii) whole clause is subject to opening words and only statements made in the ‘ordinary course of business’ are admissible and the transaction must be a mercantile one.

Illustrations to sec. 32 support the interpretation (i), as also illustration (1) in section 21.

The Commission felt (see para 12.102) that the first interpretation had superior merit in bringing about clarity and avoiding artificiality. Accordingly, it was suggested (see para 12.103) that the first part of clause (2) of sec. 32, as it stands, should be confined to statements made ‘in the ordinary course of business’ and that a new clause should be introduced, namely, clause (2A) to deal with the enumerated type of statements in the second part of clause (2) of sec. 32, where the statements could be those made in the ordinary course of business or otherwise (as in the case of letter written by a husband to his wife of which Ramamurthi vs. Subba Rao AIR 1937 Mad 19 was quoted as an example).

We are in agreement with the recommendation for splitting up sec. Clause (2) of 32 into clauses (2) and (2A) for purposes of clarity and for avoiding artificiality as follows:

“(2) or is made in course of business: When the statement was made by such a person in the ordinary course of business and, in particular, and without prejudice to the generality of the

foregoing provisions of this clause, when it consists of any entry or memorandum made by him in books kept in the ordinary course of business.

(2A) or is made in discharge of professional duty etc: When the statement consists of an entry or memorandum made by such person in the discharge of professional duty or of an acknowledgement written or signed by such person in respect of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him or of the date of a letter or other document usually dated, written or signed by him”

Clause (3) of Section 32:

The clause deals with statements against ones’ interest made by persons who are dead, cannot be found etc.

Under the English law, the statements by deceased persons etc. are admissible if made only against pecuniary or proprietary interest and not otherwise. Clause (3) of Section 32 of our Act is wider and makes admissible statements against ones’ liberty or exposing him to damages.

The Privy Council held in Dal Bahadur vs. Bijai AIR 1930 PC 79 that the person must have known that the statement is against his interest. Same view was expressed in Ramrati vs. Dwarika AIR 1967 SC 1134.

The statements may be verbal or written. They need not be contemporaneous with the facts in issue. They need not be ante litem motam as required under other clauses of sec. 32, viz. clause (4), (5), (6). Connected or collateral facts would also be relevant, under English law and the Indian law, though not against one's interest, but which are necessary to explain the context.

In Bhim Singh (dead) LRs and another vs. Kansingh, AIR 1980 SC 727, statements against proprietary interest made several years after the transactions were held admissible under clause (3) of sec. 32 and sec. 21. The fact in issue was whether the transaction was benami. The statement must have been made consciously, with knowledge that it may be used against his interest: (T.S. John vs. State of Kerala 1984 CrLJ 753 Kerala).

In the 69th Report, there is an elaborate discussion as to the relevance of boundary recitals which may contain statements against one's interest. Such recitals may be there in documents between some parties or parties from whom they claim or in a document by the maker of the statement executed in favour of a third party.

There is considerable controversy so far as relevance of boundary recitals in documents not between parties. We have already referred to this problem while discussing sec. 13 and we have differed from the recommendations in the 69th Report that boundary recitals in documents

between persons not inter parties are not relevant. We have taken the view that they are relevant. Under clause (3) of sec. 32 question is whether such statements made by a dead persons (or persons of the category referred to in section 32) are relevant even if made in documents not inter partes.

In the 69th Report, it was finally recommended that such recitals should not be admissible and that, therefore, an Explanation as stated below is to be added below clause (3) of sec. 32.

“Explanation: Recitals of boundaries containing statements as to the nature or ownership of adjoining lands of third persons are not statements against pecuniary or proprietary interest within the meaning of this clause”.

A reading of the 69th Report as well as Sarkar (15th Ed., 1999, p 701) shows that decisions are not uniform. There are a large number of decisions taking the view that such recitals are not admissible while an equally large number say they are admissible – provided the person making the statement was conscious that it can be used against him that it was statement of a relevant fact when it was made. (Soney vs. Darbedeo AIR 1935 Pat 167 (FB); Roman Catholic & C vs. State AIR 1976 Knt 75).

While dealing with sec. 13 and relevancy of statements as to boundaries in documents not inter partes, we have referred to the fact that the English law was no doubt different but there is no reason why such statements should not be relevant. We have given examples of various situations to show why the recommendations in the 69th Report are not acceptable. We do not want to repeat all those reasons. If statements as to boundary made by living persons are to be treated as relevant under sec. 13 as per our recommendation, afortiori there is a stronger case to treat as relevant such statements by persons who are dead, or cannot be found etc.

We have recommended insertion of an Explanation in sec. 13 as Explanation II so far as boundary recitals are concerned. We recommend a like Explanation be added below clause (3) of section 32 as follows:

“Explanation: A recital as regards boundaries of immovable property in document containing such statements, as to the nature or ownership or possession of the land of the maker of the statement or of adjoining lands belonging to third persons, which are against the interests of the maker of the statement, are relevant and it is not necessary that the parties to the document must be the same as the parties to the proceedings or their privies.”

Clause (4) of Section 32:

The clause deals with relevancy of statements by dead persons etc., being ‘opinions as to public right or custom, or matters of general interest’. Statement must have been made before the dispute arose.

In the 69th Report, it was recommended (see para 12.149) that no amendment be made in clause (4) of sec. 32. It was pointed out that the amendment of the opening part as suggested now will take care of the view of the Bombay High Court which held that statements will be relevant only if they relate to facts in issue and not to relevant facts, - a view which was dissented by the Madras High Court. The amendment overrules the Bombay view. We have perused the reasons given and we agree with the view that no specific amendment is necessary in clause (4) of sec. 32.

Clauses (5) and (6) of section 32:

These two clauses can be taken up together. It was so done in the 69th Report.

Clause (5) of Section 32 refers to a statement which ‘relates to existence of relationship’ and clause (6) of sec. 32 to statement ‘made in will or deed relating to family affairs’. In both sub clauses, wherever the word ‘relationship’ occurs, the words ‘by blood, marriage or adoption’ were added by Act 18/1872. These clauses are quite important in matters of pedigree and legitimacy.

In the 69th Report, it was recommended, after an elaborate discussion (see para 12.167) that no amendments are necessary in these two clauses.

The statement as to relation being made under clause (5) of sec. 32 by the deceased (or other person referred to in sec. 32) could be of the relationship of persons living at the time the deceased (or other person referred to in sec. 32) made the statement or even those who had died by that date. But under clause (6) of sec. 32 the statement is about relationship of deceased persons only. Statements must have been made before the dispute arose. Under clause (5) of sec. 32 special means of knowledge is necessary and not under clause (6) of sec. 32.

Family Bibles, coffin plates, mural tablets, etc. and even horoscopes, school registers come under these clauses. In certain respects cl.(5) is wider while in certain respects cl.(6) is wider. Under clause (5) of sec. 32, the maker must have special knowledge while under clause (6) the maker need not have special knowledge.

The English law is stricter in regard to pedigree evidence. While under the English law, a declaration made by the deceased person is admissible only when a question relating to pedigree is in issue, under clauses(5) and (6) a declaration is admissible to prove facts contained in them 'on any issue'. In Dhanmull vs. Ram : Ch. 24 Cal 265, Petheram CJ stated that law in India as to admissibility of statements of deceased persons relating to the existence of any relationship by blood, marriage or adoption is different from the law in England and the effect of the section is to make the statement aforesaid admissible to prove facts contained in the statement, on any issue – whether relating to pedigree or not, but in other situations also to

prove commencement of the relationship in point of time or the date of birth of the person in question. Blood relation includes the degree of descent from a common ancestor. ‘Existence of relationship’ includes non-existence of relationship also (Suba Raut vs. Dindayal AIR 1941 P. 205)

Further, in India, statements of persons deceased, other than blood relations are also admissible under clause(5), by persons having special means of knowledge. The restriction as to special means of knowledge is not there in clause(6) and it is sufficient if the statement is contained in the will, formal pedigree or tombstone etc. Thus, a family pedigree not admissible under clause (5) may be admissible under clause(6), but , it must be noted that clause(5) refers to existence of relationship between any person (dead or alive) while clause (6) refers only to relationship between deceased persons. Under both clauses, the statement must have been made ante litem motam, i.e. before the controversy arose (and not before the commencement of the court case).

Section 50 of the Evidence Act is also relevant in this context and deals with ‘opinion on relationship, when relevant’. It reads as follows:

“Section 50: When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who,

as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869), or in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).”

The difference between clause (5) of section 32 and sec. 50 is that sec. 50 makes the opinion expressed by conduct in cases of pedigree relevant. Under sec. 50, an opinion must be proved by the persons who held that opinion while sec. 32 deals with statements of persons who are dead etc. and cannot be called.

In England declarations by persons who are illegitimate were excluded on the ground they did not belong to the family. Section 47 of Act 2 of 1855 rescinded the English rule and also admitted declarations, not only of illegitimate members of the family, but also of persons who, though not related by blood or marriage, were yet intimately acquainted with the members and state or position of the family. Clause (1) of Section 32 would include, in India, statement of servants, friends and neighbours who are excluded under English law. (see para 12.163 of the 69th Report).

In the 69th Report, it has been stated in para 12.167 that no changes are necessary in clauses (5) and (6) of section 32.

We have referred to the basic principles governing pedigree evidence and allied matters and to the difference between English and Indian law. We agree with the view in para 12.167 of the 69th Report.

We may however refer briefly to a few cases after 1977. It has been held that original horoscopes though admissible under clause(5) of sec.32 their evidentiary value may depend on facts of the case. Horoscopes prepared subsequent to the time of birth but before the question in dispute was raised are admissible (The Secretary to Government Home Dept. vs. Hari Rao AIR 1978 Mad 42). The statement in his will that defendant was his adopted son is admissible but it is not conclusive and the burden of proving adoption lies heavily on the person setting up the plea of adoption. (Banwarilal vs. Trilok Chand AIR 1980 SC 419). A statement of date of birth in a horoscope is not relevant under sec. 32. Any statement of a date of birth given in an horoscope is not a relevant fact under sec. 32 as it does not relate to 'relationship'. (Savitri Bai vs. Sitaram AIR 1986 MP 219). When the case of a party is based on genealogy consisting of links, it is incumbent on the party to prove every link thereof and even if one link is found to be missing then in the eye of the law, the genealogy cannot be said to have been proved: (State of Bihar vs. Sri Radha Krishna Singh: AIR 1983 SC 684).

We agree that no amendments need be made in clauses(5) and (6) of section 32.

Clause (7) of Section 32:

This clause refers to statements ‘in document relating to transaction mentioned in sec. 13, clause (a)’ and states that when ‘the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in sec. 13, clause (a).

This clause only refers to ‘transactions’ referred in clause(a) of 13 and not to ‘instances’ referred to in clause (b) of sec. 13. It does not include ‘verbal’ statements which words are contained in the opening part of sec. 32. Sec. 13 applies to private and public customs and this section also applies to them. Clause (7) of section 32 does not permit oral evidence of reputation if statement in a document is relevant unlike English law where reputation evidence is generally not admissible in question concerning private rights. In some jurisdictions in US, proof of reputation may be received in proof of private boundaries (see Sarkar, 15th Ed., 1999 p. 727).

The effect of clause(7) of sec. 32 is that a statement of a relevant fact contained in any document which is admissible under clause (a) of sec. 13 could be itself a relevant fact, if the party making the statement were dead, or could not be found etc. The transaction referred to in clause (a) of sec. 13 is one relating to a right or custom and about its creation, assertion, recognition etc.

In the 69th Report, a proposal was made to restrict the scope of Clause (7) of section 32 by adding an Explanation that such statement will

be relevant ‘where the question in the proceeding now before the court is as to the existence of the right or custom’. The Explanation also clarified that it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies.

Though, there can be no objection to the latter part of the proposal in principle, we feel that it does not fit in with all the types of document referred to in clause (7) of sec. 32. For example, in the case of a will, there is no question of there being two or more parties to the will who can be identified by themselves or through their privies, in the proceeding inasmuch a will is a unilateral document and not between two parties. If the case law, as pointed out in the 69th Report, has broadly accepted the principle in the latter part of the proposed Explanation, there is no need to put it in any Explanation particularly when a ‘will’ does not fit into the language proposed to be employed.

So far as the first part of the Explanation is concerned, in the 69th Report, the Commission differed from the decision of the Patna High Court in Khudiram vs. Amodebala AIR 1948 Pat 426 (see paras 12.171 to 12.175) and accepted the view of the Oudh Court in Rajnarayan vs. Maharaj AIR 1937 Oudh 133 and took the view that “such statement is relevant where the question in the proceeding now before the court is as to the existence of the right or custom”. For understanding this recommendation, it is necessary to refer to facts in the Patna case which were, in fact, discussed in detail in the 69th Report (para 12.171). In that case, the mortgagor M (who died later) while executing a usufructuary mortgage stated that money to be received

under the mortgage was necessary for the purpose of shraddha ceremonies of one S, who was dead by that time. S was, in fact, the real owner. The mortgagee was already in possession. Thereafter, there was a proceeding in the court which was not between the same parties to the document nor did it involve any right under the mortgage. On death of widow S, M had taken possession of the property and in the mortgage, he had admitted death of S. In a later court sale, arising of a decree against M, the property was sold and purchased by A. The heirs of S's husband brought a suit for declaration and possession against A. The defence of A was that M had, before the court sale, acquired title by adverse possession for more than 12 years, and A relied upon the fact that the earlier mortgage by M referred to death of S and produced evidence of date of death of S, to prove his possession from about the time of death of S. By the date of the latter suit, M had died. As to the proximate time of death of S, the mortgage was put in evidence. It was held that the statement of the mortgagor M about death of S was admissible in favour of the court auction purchaser A to prove the title of the mortgagor M by adverse possession of more than 12 years against S. The court held for purposes of clause (7) of sec. 32 reference to clause (a) of sec. 13 was necessary only in regard to the nature of the right and did not require the whole of sec. 13 (i.e. which also required the right or custom to be in issue) to be read into clause (7) of sec. 32. Statements made before the dispute arose i.e. ante litem motam, are entitled to weight.

The 69th Report differed from the judgment and stated that the statement in the document by the deceased M should have been excluded because the statement was by the mortgager against a court auction

purchaser who purchased property in a court auction for money due by M, who was in possession of the property of the widow. The date of death of the widow was not directly in issue in the latter suit but was relevant indirectly only in relation to the main issue of adverse possession of M against the widow.

We may here go back to clauses (5) and (6) of section 32 where we pointed out that unlike English law, the statement of the deceased need not have a direct nexus with the issue arising in a later suit. The 69th Report accepted that position. On facts of that case, we are of the view, that the statement of deceased M about time of death of S was relevant and admissible though that date was not in issue in the latter suit and the only issue was as to M's adverse possession as against S and her heirs.

We do not find any good reason why the Commission stated in para 12.178 that "as a matter of policy, some restrictions need to be placed on the relevance of statements under clause (7)". We are unable to identify the 'policy' which the Commission had in mind while dealing with clause (7) of sec. 32 and why no such 'policy' was held applicable to clauses(5) or (6) of section 32. We are of the view that ante litem motam statements made are quite relevant and that it is not necessary to restrict the scope of clause (7) of sec. 32 when the provision has been there for more than 130 years in the present form particularly when the 'policy' has not been spelled out.

Thus, while we accept the second part of the proposed Explanation for clause (7) of sec. 32 we do not subscribe to the first part. In our view, the fact mentioned in the document to which the deceased is a party need not be in issue directly in the latter proceeding before the court. The Explanation proposed in the 69th Report, in our view, be modified as follows:

Explanation I:- Such statement is relevant where the question in the proceeding now before the court is as to the existence of the right or custom or if such statement related to facts collateral to the proceeding and it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies.

In the result, we modify the recommendation in para 12.179 and after such modification, clause (7) of sec. 32 will read stated below, by using the actual words used in sec. 13 rather than merely referring to sec. 13. We propose Explanation as stated above.

We then come to the Exception proposed. It reads as follows:

Exception: Nothing in this clause shall render relevant –

(a) a recital as to boundaries containing a statement as to the nature or ownership of adjoining lands of third persons; or

(b) any statement made after the question in dispute was raised.

There is some controversy under clause (7) of sec. 32 whether a will or other document there can be a transaction. The Madras High Court in Periasami vs. Veradappa AIR 1950 Mad 486 held that a will (though not intervivos) is a ‘transaction’. The Calcutta High Court took a different view. We agree that a ‘will’ is a document which can ‘create’ a right and that the Madras view is correct. We are retaining the word ‘will’.

We are omitting clause (a) of the proposed Exception which makes inadmissible the boundary recitals in documents not inter partes. The reasons given by us in our discussion under sec. 13 for rejecting a similar proposal for sec. 13 need not be repeated by us. See also our recommendation under clause (3) of sec. 32 in this connection. We propose an Explanation making boundary recitals relevant.

Therefore, we propose clause (7) of section 32 to be revised as under:

“(7) or in documents relating to transactions mentioned in section 13, clause (a):When the statement is contained in any deed, will or other document, being a deed, will or other document which relates to any transaction by which a right or custom was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence, as mentioned in clause (a) of section 13.

Explanation I:- Such statement is relevant where the question in the proceeding now before the court is as to the existence of the right or custom or if such statement related to facts collateral to the proceeding and

it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies.

Explanation II:- A recital as regards boundaries of immovable property in a document containing such statement, as to the nature or ownership or possession of the land of the maker of the statement or of adjoining lands belonging to third persons, shall be relevant and it is not necessary that the parties to the document must be the same as the parties to the proceeding or their privies.”

Clause (8) of Section 32:

Clause (8) of Section 32 refers to the statements of person who cannot be found or whose attendance cannot be procured and where the statement expressing feelings relevant to the matter in question. While section 14 refers to the relevance of expression of feelings of an individual, this section refers to feelings of a number of persons.

Illustration (n) is relevant here. It is the well-known case of ‘Beauty and the Beast’ (Du Bost vs. Beresford (1810) 2 Cambell’s Reports 511, 512)

“(n). A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature

and its libelous character. The remarks of a crowd of spectators on these points may be proved.”

The facts of the case above referred to are set out in detail in Sarkar (15th Ed., 1999, page 730). Lord Ellenborough held:

“the declarations of the spectators, while they looked at the picture in the exhibition room, were evidence to show that the figures portrayed were meant to represent the defendant’s sister and brother-in-law”

There, the defendant, brother of the lady whom the caricature portrayed, destroyed the picture and the suit was filed for damages against him.

In the 69th Report, it was observed that clause (8) of sec. 32 did not require to be amended (see para 12.189). We agree with this recommendation.