

Part II
On Proof

Chapter III

FACTS WHICH NEED NOT BE PROVED

56. Fact judicially noticeable need not be proved—No fact of which the Court will take judicial notice need be proved.

Case Law

Anti-smuggling prosecutions at the relevant time—Court may take judicial notice of. *Muhammad Shafi PLD 1959 Karachi 648.*

Section 56—The plaintiffs having been successful in proving that the original kabalas were lost it cannot be argued that inadmissible evidences were relied upon as the courts below found that secondary evidence was given of those original documents. *Abdul Khaleque Mollah vs ABM Zakaria and another 51 DLR (AD) 78*

57. Facts of which court must take judicial notice—The Court shall take judicial notice of the following facts :

¹[(1) All Bangladesh laws :]

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³[(3) Articles of War for the Armed Forces]

1. This clause within square brackets was substituted by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

2. Clause (2) was omitted, by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

3. The original clause (3) has successively been amended by the Repealing and Amending Act, 1927 (X of 1927), section 2 and Schedule I an Administrative Order, 1961, Article 2 and Schedule (with effect from the 23rd March, 1956), to read as above.

(4) The course of proceeding of Parliament and of ¹[any Legislature which had power to legislate in respect of territories now comprised in Bangladesh].

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⁴[(6) the seals of all the Courts in Bangladesh: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by any law in force in Bangladesh:]

(7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in ⁵[Bangladesh], if the fact of their appointment to such office is noticed in ⁶[any official Gazette]:

⁷[(8) The existence, title and national flag of every State or Sovereign recognised by the ⁸[Government]:

(9) The division of time, the geographical divisions of the world, and public festivals, feasts and holidays notified in the official Gazette :

1. The words within square brackets were substituted for the words "the Central Legislature and any legislature established under any laws for the time being in force in Pakistan" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

2. Explanation to clause (4) was omitted, by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

3. Clause (5) was omitted by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

4. Clause (5) was substituted, by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

5. The word "Bangladesh" was substituted for the word "Pakistan." by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

6. Substituted by Administrative Order, "1973, for "the Gazette of India or in the official Gazette of any L.G."

7. See also the Code of Civil Procedure, 1908 (Act V of 1908), section 84(2) under which every court is required to take judicial notice of the fact that a foreign state has, or has not, been recognised by His Majesty or the Central Government.

8. The word "Government" was substituted for the word "Central Government" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

- (10) The territories ^{1*} *of ²[Bangladesh]:
- (11) The commencement, continuance and termination of hostilities between ²[Bangladesh] and any other State or body of persons :
- (12) The names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates ³** and other persons authorised by law to appear or act before it:
- (13) The rule of the road ⁴[on land or at sea].

In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Case Law

Section 57—Interpretation of Act—Judicial notice should be taken of Parliamentary Commission Reports and facts known to Legislature while passing an Act. *Sellappah Nayar 5 DLR 521 (PC); PLD 1953 Privy Council 56.*

Section 57—Place of incident—not challenged during trial—May be presumed to be section 57 : the one alleged. *Kuruka 9 DLR 336; PLD 1957 Privy Council 32.*

Section 57—Signatures of officer giving sanction for prosecution—Court would take judicial notice of. *Alauddin 10 DLR 328; PLD 1959 Dacca 92.*

1. The words "under the dominion" were omitted, by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

2. The word "Bangladesh" was substituted for the word "Pakistan." by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

3. The words "attorneys, proctors, vakils, pleaders" were omitted by Act VIII of 1973, 2nd Schedule (With effect from 26-3-71).

4. Inserted by the Indian Evidence Act Amendment Act (XVIII of 1872), section 5.

Section 57—Signature of gazetted officers—The Court will recognise them without proof. *Nurul Hoq* 8 DLR 562; 10 DLR 328.

Section 57—Stab in lung—Ordinarily sufficient to kill a man—Judicial notice taken of the fact. *Muhammad Idris* PLD 1958 (WP) Karachi 232.

Section 57—Inter-ministerial/divisional communications made in the process of reaching a decision, uncommunicated to the affected persons do not create a legal right in their favour and they are not supposed to get even copies of them but if the contents thereof are not denied the Court can draw such conclusions therefrom as it thinks fit in the facts and circumstances of the case. *National Board of Revenue vs Nasrin Banu and 5 others* 1 BLC (AD) 99.

Section 57—Mere fact that a man knowing how to sign his name executed the Kabala in question by putting LTI does not render the Kabala invalid in the absence of any positive evidence to that effect. The view taken by the Court of Settlement that the kabala was not a genuine one only because the vendor executed the same by putting LTI instead of signature was not justified. *Rashida Begum vs Chairman, Court of Settlement, Bangladesh Abandoned Buildings and another* 1 BLC 138

Sections 57 and 60—The Appellate Division will set no example before the Courts to make reference to booklets of unknown origin. *State vs Abdul Khaleque alias Abdul Khaleque Howlader* 49 DLR (AD) 154.

58. **Facts admitted need not be proved**—No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Case Law

Section 58—*Ex parte* proceedings—Burden of proof becomes very light. *Muhammad Ishaq* PLD 1960 (WP) Karachi 155.

Chapter IV

OF ORAL EVIDENCE

✓ **59. Proof of facts by oral evidence**—All facts, except the contents of documents, may be proved by oral evidence.

Case Law

Section 59—Oral evidence—How should be treated—Principle laid down. *Sardar Bibi vs Muhammad Baksh PLD 1954 Lahore 480.*

Section 59—Record-of-rights—Original record not produced—Statements of Naib Tahsildar about it inadmissible. *Jalla vs Nauranga PLD 1949 Lahore 245 (DB).*

Section 59—Reliance on oral evidence of the interested witnesses in utter disregard of the principles of law of evidence deprecated. *Abani Mohan Saha vs. Asstt. Custodian 39 DLR (AD) 223.*

Section 59—Best evidence rule—Primary evidence is the best evidence affording the greatest certainty of facts. *Abdul Mojid vs State 39 DLR 414.*

Section 59—To establish charge of criminal breach of trust distinct proof of criminal misappropriation is necessary. *Abdul Majid vs State 39 DLR 414*

Section 59—Entrustment or dominion over the property implies handing over the property—But evidence disproved handing over. *Abdul Majid vs State 39 DLR 414.*

Section 59—The learned judge relied much on moral conviction than on legal testimony. *Abdul Majid vs State 39 DLR 414.*

Sections 59 and 62—Basis of oral testimony is registered but it not known why primary documentary evidence was withheld by prosecution during trial. *Abdul Majid vs State 39 DLR 414.*

✓ **60. Oral evidence must be direct**—Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Case Law

Section 60—Map of place of occurrence made by draftsman—Admissible in evidence. *Santa Singh vs State of Punjab PLD 1956 Supreme Court (Ind) 331.*

Section 60—Record by the wife of witness—Deposition on basis of record—Hearsay evidence. *Azad J & K Government vs Pehlwan Khan PLD 1951 Azad J & K, 54.*

Section 60—Medical certificate about the illness of a certain person and his inability to move is not admissible in evidence without the examination of the medical officer giving the certificate in court. *Kutubuddin Ahmed vs EPIDC 27 DLR 433.*

Section 60—Hearsay evidence—In the absence of examination of Abdus Sattar, the evidence of PW 1 narrating the story as was told by Abdus Sattar is inadmissible in evidence. *Akhtar Hossain vs State 44 DLR 83*.

Section 60—Read with section 45—Expert's opinion on any relevant point must be supported by the direct evidence of the expert concerned in the court. *Kutubuddin Ahmed vs EPIDC 27 DLR 433*.

Section 60—Expert's opinion and not the document in which it is given is admissible—It is the opinion and not the document in which such an opinion is recorded that is admissible. When a Medical Expert gives his evidence from the witness box, he expresses his opinion through his evidence and it is that opinion which is made relevant under section 45 of the Evidence Act. The medical certificate, therefore, does not prove itself. *Kutubuddin Ahmed vs EPIDC 27 DLR 433*.

Section 60—Oral evidence as to the existence of any material thing, supplemented by an order to produce that thing in Court for inspection.

Section 60 of the Evidence Act embodies the second important rule about oral evidence, viz, that it must in all cases be direct. Second proviso to section 60, however, provides that if oral evidence refers to the existence or condition of any material thing the Court may require the production of such material thing for its inspection. *Phani Bhusan Halder vs State 27 DLR 254*.

Section 60—When hearsay is admissible—Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when it is proposed to establish by the evidence the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.

Though hearsay evidence is not evidence of the fact deposed to in certain circumstances it may be looked to for some collateral purposes and cannot just be shut out.

Hearsay evidence may be relevant and admissible under section 8 of the Evidence Act showing accused's conduct which is influenced by a fact in issue. *SM Qamruzzaman vs State=BLD 1981 (HC) 107=33 DLR 156 ; Shafiullah vs State=1985 BLD (HC) 129(a)*.

Section 60—There is no evidence that the victim made any statement as regard the incident to anybody other than PW 8. So the claim of PW 4 that victim stated to him about the incident of setting fire in her body by the condemned convicts can hardly be considered reliable. *State vs Babul Hossain 52 DLR 400*.

Section 60—PW 1 has not implicated the accused with any overt act on the basis of charge but reiterated the statement as to derivative knowledge of involvement as mentioned in the first information report and in the charge-sheet which is an inadmissible evidence. *State vs Lieutenant Colonel Syed Farook Rahman* 53 DLR 287.

Section 60—The Officer in-charge of Kaliganj Police Station as informant lodged a first information report and testified as PW 1 narrating the prosecution case and the recovery of firearms when there was no apparent falsehood in his evidence which was corroborated by the PWs 3, 4, 6, 7, 10 and 11 who were members of patrol party while other public seizure list witnesses did not support the prosecution case, in spite of that there is no legal bar to convict the appellant on the unimpeachable evidence of the police. *SM Kamal vs State* 6 BLC 113.

Section 60—In the instant case, the police officer PW 10 who prepared the inquest report did neither mention the names of the eye-witnesses nor recorded any statement. In general, an inquest report is not a substantial evidence. It can only be used as a statement under section 162 of the Code of Criminal Procedure. The correct legal position is that the documents like inquest report, seizure list, side plan consists of two parts. One part is based on the observation of the witness himself. This is the direct evidence and admissible under section 60 of the Evidence Act. The other part consists of the information given to the Investigating Officer. This part is not admissible in evidence but may be used under section 162 of the Code. *State vs Golam Mostafa and anr* 9 BLC 63.

Sections 60 and 45—The inquest report being the first recorded version of the offence based on actual observation that the victim was not only raped but raped by a number of persons is admissible as direct evidence under section 60 of the Evidence Act when the post mortem report and the chemical examination report support the commission of rape. In spite of the finding of the doctors such as that no mark of rape was found it is held that the victim was raped before she met her death which brings the offence under the ambit of Nari-o-Shishu Nirjatan (Daman Bishes) Ain, 1995. *State vs Md Joynal Abedin and others* 5 BLC 672.

Sections 60 and 45—The consistent case of the prosecution is that accused Abdul Ali gave a blow by a Pal which is a pointed weapon whereupon Paritosh Kunda fell into the water but from the deposition of PW 27, Dr Abdul Ghani Khondakar it does not appear that he has found any punctured or penetrated wound on the dead body and such inconsistency of the ocular evidence with the medical evidence goes to show that the occurrence was not seen by the witnesses as claimed and it did not happen in the manner as alleged by the prosecution. *State vs Md Abdul Ali and others* 6 BLC 152.

Chapter V

OF DOCUMENTARY EVIDENCE

61. Proof of contents of documents—The contents of documents may be proved either by primary or by secondary evidence.

Case Law

Section 61—Public document—Secondary evidence may be given by producing true copy. *Ghulam Qadir vs Alam Bibi PLD 1958 Azad J & K 6.*

Objection regarding mode of proof—party neglecting to or abstaining from objecting to the mode of proof at the time evidence in proof is given, cannot be permitted to object at a later stage in appeal. *Sadequr Rahman Chowdhury vs Mvi. Abdul Bari, 22 DLR 858.*

Section 61—Secondary evidence when deed is admitted to be lost. *Abani Mohan Saha vs Asst. Custodian 39 DLR (AD) 223.*

62. Primary evidence—Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest;

but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Case Law

Section 62—A firisti is no evidence of the contents of the documents in support of relationship of landlord and tenant. *Chandan Mondal @ Kushal Nath Mondal and others vs Abdus Samad Talukder & others* 51 DLR (AD) 150.

Sections 62 and 63—Primary Evidence—Primary evidence of document means document itself and it is produced for inspection of the Court. When a party seeks to prove the contents of document the best evidence rules require that party should produce the original of the primary evidence. *Afzal Meah vs Bazal Ahmed* 45 DLR 15.

Section 63(2)—The acceptance of the secondary evidence by the Subordinate Judge and his decision in the suit relying upon such non-admissible evidence are errors of law apparent on the face of the record. *Government of Bangladesh vs Mirpur Semipucca (Tin-shed) Kalayan Samity & others* 54 DLR 364.

Sections 63(2), 65 & 66—Documents being photo copies of the originals which were not called for and are confidential official letters beyond the access of the plaintiffs are inadmissible evidence in the absence of originals. *Government of Bangladesh vs Mirpur Semipucca (Tin-shed) Kalayan Samity & others* 54 DLR 364.

✓ **63. Secondary evidence**—Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained¹;

1. See section 76, infra.

- (2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral account of the contents of a document given by some person who has himself seen it.

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy, compared with a copy of a letter made by a copying machine, is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Case Law

Section 63—Secondary evidence of forged document. 3 DLR (PC) 3.

Section 63—Photostat copy—Admissible only when it is photostat of original document. *Gustad Monekji vs State* PLD 1959 Dacca 756.

Section 63—Secondary evidence of document—Witness not having signed it as witness—Document cannot be proved by such evidence in the absence of other evidence of like nature. *Lalan Bibi* PLD 1951 Lahore 467; *PLR 1951 Lahore 719*

Section 63—Photostat copies are admissible in evidence—The minutes recorded in the order book were admitted in evidence after dispensing with their formal proof. *Mahajak Shipping Co. Ltd. vs M V Sagar* 39 DLR 425.

Section 63—The defendants have not attempted to dislodge the evidence of the plaintiffs which remained unchallenged. *Mahjak Shipping Co. Ltd. vs MV Sagar* 39 DLR 425.

Section 63—A party producing secondary evidence of a document is not relieved of the duty of proving the execution of the original. Even where a document is exhibited without objection the Court is to be satisfied as to its execution. *Sova Rani Guha alias Sova Rani Gupta vs Abdul Awal Mia and others* 47 DLR (AD) 45.

Sections 63 and 101—The onus lies heavily on the plaintiff to prove that his predecessor got delivery of possession of the property and he inherited the same by producing documentary and oral evidence but the plaintiff failed to prove that and even no secondary evidence was attempted to be taken hence no interference with the impugned judgment is called for. *Aftabuddin Sarkar vs Ashek Ali & others* 7 BLC (AD) 97.

Sections 63 and 115—As there is no evidence that Sheikh Bagu had any knowledge about the contents of the document attested by him beyond his mere attestation, it cannot be said that he was in any way bound by the transaction by the kabala in question. *Amanatullah and others vs Ali Mohammad Bhuiyan and another* 2 BLC (AD) 134.

Section 63(3)—Document lost—Memorandum in brief of document in deed-writer's register—Deed-writer as well as his register not available—Memorandum relevant as independent evidence under section 32(2)—Copy of such memorandum admissible as secondary evidence under section 63(3). 1952 PLR (Lah) 11.

Section 63(5)—"Seen it"—Meaning of—Divorce deed—Secondary evidence—Must be of one who has "seen it," that is, read it, 1951 PLR (Lah). 719.

Sections 63 and 62—Primary Evidence—Primary evidence of document means document itself and it is produced for inspection of the Court. When a party seeks to prove the contents of document the best evidence rules require that party should produce the original of the primary evidence. *Afzal Meah vs Bazal Ahmed* 45 DLR 15.

64. Proof of documents by primary evidence—Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Case Law

Section 64—Copies of documents produced—Plaintiffs applying for permission to produce originals after five years—Permission refused. *Muhammadi Steamship Co. Ltd. PLD 1959 (WP) Karachi 232.*

Section 64—Objection as to formal proof of document to be taken at "earliest point of time." The Code of Civil Procedure provided for the admission of documents and it is now well settled that if objection to the formal proof of a document has not been taken at the earliest point of time it cannot be taken subsequently and certainly not in appeal.

Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial. The document not having been objected to must be deemed to have been admitted and, as such, the trial Court was clearly wrong in excluding it from consideration on the ground that it has not been formally proved. The document having been marked as an exhibit without objection became admissible in evidence and was rightly taken into consideration by the High Court CA No.28 of 1965. *Abdullah vs Abdul Karim, 20 DLR (SC) 205.*

Section 64—Newspaper—Although a newspaper is admissible in evidence without formal proof but the paper is not proof of its contents. *Nurul Islam vs. State BLD 1987 HC 193(c).*

Section 64—Oral testimony to prove shortage of stationery is inadmissible in evidence when documentary evidence was purposely withheld. *SK Abdul Majid vs State BLD 1987 413(a).*

Section 64—Admission of private documents as evidence—Even if no objection had been taken to formal admission of the rent receipts, the plaintiff having relied upon them for this case was bound to prove their genuineness which would be decided by the court in the light of the facts and circumstances of the case. *Md Jashimuddin Kanchan vs Md Ali Ashraf 42 DLR (AD) 289.*

Section 64—In the absence of any record of settlement by way of observing any formalities provided in the different Rules of Bengal Government Estate Manual, 1932, no declaration of title can be given over the suit land on production of collateral evidence of title even on the finding of formal proof of rent-receipts and SA Khatians the legal conclusion from the so-called proved facts does not follow. *Government of the People's Republic of Bangladesh and anr vs Shhani and ors 1 BLC (AD) 6.*

Section 64—As the impugned order having not been admitted into evidence the same was not before the Court cannot make the order illegal without admitting the order into evidence and marking it as exhibit and the contradictory decision regarding genealogy given by both sides the suit was sent back on remand to the trial Court for fresh trial. *Sirajuddin Mondal vs Amena Khatun and others 1 BLC 160.*

Section 64—Although without validating with local stamp the original affidavit, duly sworn before a Magistrate in India, was filed in the Court of Bangladesh and marked as exhibit without any objection whatsoever, the plaintiff had discharged the onus of proof and, as such, it would be wrong to hold that the document is not admissible in evidence. *Additional Deputy Commissioner (Revenue) vs Serajuddin Ahmed and others 3 BLC (AD) 114.*

Section 64—It appears that the appellate Court discarded the deed of exchange and the Heba-bil-ewaz executed in favour of the plaintiff by his father simply because those were not admitted into evidence in accordance with law but he arrived at such finding without considering that the executants of the said deeds never disputed the execution thereof rather the written statement and the evidence on record support such execution and the said two documents were admitted into evidence in presence of the defendants without any objection. *Aminul Hoque (Md) vs Sanat Kumar Dhar and others 9 BLC 322.*

Section 64—The appellate Court appears to have relied on the sale certificate and writ of delivery of possession filed first time in appeal but there is no order admitting the same as additional evidence and marking them as exhibits and in such circumstances the Court of appeal was wrong in relying on sale certificate and the writ of delivery of possession in proof of auction sale and delivery of possession as well. *Abul Kashem Howlader vs Sultan Ahmed and others 9 BLC 333.*

Sections 64 and 65—Parties having not raised objection against deciding the appeal on the basis of documents already on record, their admission into evidence is a mere formality and there is no illegality in the judgment passed

relying on such documents. *Lal Chand Sardar vs Abdul Huq Howladar and others* 47 DLR 401.

Sections 64 and 65—Admission by parties of the contents of document—No formal proof necessary. *Muhammad Zaker vs Mustanser* PLD 1961 Dacca 71.

65. Cases in which secondary evidence relating to documents may be given—Secondary evidence may be given of the existence, condition or contents of a document in the following cases :

- (a) When the original is shown or appears to be in the possession or power—
of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or
of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
- (b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) When the original is of such a nature as not to be easily moveable;
- (e) When the original is a public document within the meaning of section 74;

- (f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in ¹[Bangladesh] to be given in evidence²;
- (g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Case Law

Section 65—Secondary evidence of a document is admissible in evidence. *Hazi Waziullah vs ADC 41 DLR (AD) 97.*

Section 65—Whether a party producing a document is exempted from explaining in the course of recording evidence why the original was not produced even though no objection was raised when it was produced. *Hazi Waziullah vs ADC 41 DLR (AD) 97.*

Section 65—Agreement not produced in Court—Secondary evidence of contents permissible. *Shah Bami 8 DLR (WP) 133.*

Section 65—Extract of power of attorney—Admissible only when loss of original is proved.

Writer of extract should prove the extract to be true copy. *Anand Behari Lal AIR (33) 1946 Privy Council 25.*

1. The word "Bangladesh" was substituted for the word "Pakistan". Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

2. Cf. the Banker's Books Evidence Act, 1891 (XVIII of 1891), section 4.

Section 65—Newspaper—Not admissible as evidence of its contents. *Khorshid Aspi Jamula 1960 AIR (Kar) 178.*

Section 65—Secondary evidence of a document is admissible in evidence. Whether a party producing a document is exempted from explaining in the course of recording evidence why the original was not produced even though no objection was raised when it was produced. *Haji Wajiulla vs ADC (Rev) Noakhali 41 DLR (AD) 97.*

Section 65—Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence. *Muhammad Din vs Allah Ditta, 95 IC 444.*

Section 65—Registered mortgage deed more than thirty years old—Lost—Certified true copy may be produced in evidence. *Pandappa Mahalingappa AIR (33) 1946 Bombay 193.*

Section 65—Secondary evidence—Should be given by witness who has seen the document. *Krishna Dayal vs Emperor AIR 1946 Allahabad 227.*

Section 65—Secondary evidence, when can be allowed when agreement lost: The existence of the alleged agreement was the essential foundation of the defence. The agreement relied upon was said to have been in writing. No such agreement was produced in Court.

Held—Until proof had been given of its execution and its subsequent loss or destruction no secondary evidence of its contents is admissible. *Emmanuel Grech vs. Antonio Grech, 6 DLR (PC) 598.*

Section 65—Notices under the Bengal Agricultural Debtors Act are public documents and can be proved under section 65 of the Evidence Act. *Keramat Ali vs Md Yunus 15 DLR (SC) 120.*

Section 65—Admissibility of document—When objection against not raised in the trial Court, cannot be raised in 2nd appeal—Where this principle will not apply:

The proposition that where a document was admitted in evidence by the trial Court without any objection from the other side, objection against its admissibility cannot be raised in the second appeal, is not applicable when the document produced before the court is not the original document and there is no evidence that the original copy is lost nor any explanation offered for its non-production nor the copy of the document was admitted in evidence with the consent of both the parties. The fact that it was marked in evidence without objection would not tantamount to its being marked with the consent of the other

party when it is not conceded by the lawyer of the other party that the copy is a true copy of the original document. *Husan Ali vs Azmaluddin* 14 DLR 392.

Section 65—Secondary evidence of private document—When admissible: Secondary evidence of a private document is admissible only when the party desirous of admitting it has proved that the original is lost or destroyed.

No secondary evidence of the contents of a private document is admissible until proof had been given of its execution and its subsequent loss or destruction. *Husan Ali vs Azmaluddin* 14 DLR 392.

Section 65—Newspaper report cannot be admitted into evidence unless the correspondent of such a report comes to the witness box to vouchsafe in support of the report on oath. *Osen Begum alias Babuler Ma and another vs State* 55 DLR 299.

Section 65—An omission to object in respect of an inadmissible evidence would not make it admissible. Reliance in this regard may be made to the decision in the case of *Miller vs Babu Madho Das* 23 IA 106. *National Bank Ltd and others vs Habib Bank Ltd and others* 56 DLR 15.

Section 65—When secondary evidence was produced the party producing it was exempted from explaining the cause why the original was not produced, though objection was not raised at that stage. *Haji Waziullah vs ADC (Rev) and others*-7 BSCD 87.

Section 65—Secondary evidence—Questions of admissibility without proof—Though objection was not raised when secondary evidence e.g. photostat copy was produced the party producing it was not exempted from explaining in the course of recording evidence why its original was not produced. *Haji Waziullah vs ADC (Rev) and others* 7 BSCD 87.

Sections 65, 63(2) and 66—Documents being photo copies of the originals which were not called for and are confidential official letters beyond the access of the plaintiffs are inadmissible evidence in the absence of originals. *Government of Bangladesh vs Mirpur Semipucca (Tin-shed) Kalayan Samity & others* 54 DLR 364.

Sections 65 and 64—Admission by parties of the contents of document—No formal proof necessary. *Muhammad Zaker vs. Mustanser* PLD 1961 Dacca 71.

Section 65 and 64—Parties having not raised objection against deciding the appeal on the basis of documents already on record, their admission into

evidence is a mere formality and there is no illegality in the judgment passed relying on such documents. *Lal Chand Sardar vs Abdul Huq Howladar and others* 47 DLR 401.

Sections 65 and 67—Original letter not summoned—Copy not admissible. *Ebrahim Sateh Mayer PLD (WP) Karachi* 297.

Sections 65, 74 and 76—Statements filed on orders passed by Income-tax Officer—Public documents—Certified copy may be produced as evidence. *Buchlba AIR (33) 1946 Nagpur* 377.

66. Rules as to notice to produce—Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, ¹[or to his ²[Advocate,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;

1. Inserted by the Indian Evidence Act, Amendment Act (XVIII of 1872), section 6.

2. The word "Advocate" was substituted for the words "attorney or pleader" by Act VIII of 1973, 2nd Schedule, (with effect from 26-3-71).

- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Case Law

Proviso (1)—Document to be proved is a notice—No notice to produce original document necessary. *Haripada Roy Chowdhury* 6 DLR 131; PLD 1956 Dacca 210; PLR 1953 Dacca 54.

Proviso (2)—Where the adverse party must know that he will be required to produce the document. Where a document is in the possession or under the control of a party and he fails to produce it, it should be taken that from the very nature of the case he knew that he would be required to produce it. *Sudhakar Mista vs Nilkantha Das*, 1936 P 129; *Lalan Bibi vs. Muhammad Ashfaq* PLD 1951 L 467.

Section 66—Party knowing that document must be produced not producing it—Objection to secondary evidence of document being produced by other party—Not sustainable. *Lalon Bibi* PLD 1951 Lahore 467; PLR 1951 Lahore 719.

Section 66—Photostat copy of document by prosecution—Original may not be called in evidence. *Gustad Maneckji vs State* PLD 1959 Dacca 756 (DB).

Section 66—Secondary evidence, admissibility of—Certified copies of certain kabuliyats were filed without calling for the original copies. Learned Judge of the High Court Division on a wrong consideration of section 66 Evidence Act left those out of consideration treating them as inadmissible as the originals were not called for. But the documents having been filed and marked exhibits without any objection the question of inadmissibility of those documents cannot be raised at a subsequent point of time. *Joyal Abedin & others vs Mafizur Rahman* 44 DLR (AD) 162.

Section 66—Objection as to final proof of document—Partition suit dismissed by the trial Court—The appellate Court reversed it on holding, inter alia, that kabuliyats, being inadmissible documents, the Court below correctly left them out of consideration—The defendants filed the kabuliyats as per firistis with a prayer for accepting them in evidence and those were admitted in evidence without any objection from either side and marked as exhibits—While disposing

of the appeal after two years of filing the appellate Court did not say a word with regard to the kabuliyats nor had considered them—The High Court Division also on an erroneous view of the law left the vital documents out of consideration on the view that those documents were inadmissible in evidence as the original were not called for—At the hearing of the appeal, none raised the question of formal proof of the kabuliyats—The kabuliyats were admissible in evidence—High Court Division erred in not considering them and non-consideration of the vital documents had materially affected the decision in the case. *Joynal Abedin and others vs Mafizur Rahman & others* 8 BSCD 130.

Sections 66, 63(2) and 65—Documents being photo copies of the originals which were not called for and are confidential official letters beyond the access of the plaintiffs are inadmissible evidence in the absence of originals. *Government of Bangladesh vs Mirpur Semipucca (Tin-shed) Kalayan Samity & others* 54 DLR 364.

67. Proof of signature and handwriting of person alleged to have signed or written document produced—If document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Case Law

Section 67—Objection to admission of evidence—Not taken in trial Court—Not entertained in appeal. *Shamsuddin* PLD 1960 (WP) Karachi 232.

Section 67—Pay orders in possession of defendants—Endorsement by payee on the pay order—Presumption of payment by defendant. *Muhammad Sadiq* PLD 1960 Karachi 630.

Section 67—Carriage of goods by sea—Suit for damages—Invoice Shipper not examined to prove his invoice—Invoice, held not admissible in evidence. *Tar Mahd. Janoo & Co vs Maldivian National*, 21 DLR (Karachi) 495.

Section 67—Method of proving handwriting—See the case of Benoy Bhusan vs A Samad under sections 45, 47 and 73. 6 DLR 50.

Section 67—In the absence of any suspicious circumstances surrounding the will the onus of the propounder is discharged if he proves that the testator

executed the will by putting his signature or mark in sound and disposing mind, otherwise he has an additional burden to dispel the suspicion to the satisfaction of the Court. *Palan Ch. Shaha vs Kalapana Rani Saha 1987 BLD HC 301.*

Sections 67, 45, 47 and 73—Modes of proving handwriting or signature : It is not necessary that whenever a person denies signature or handwriting in document, it should be sent to an expert for opinion. There are other modes of proving handwriting or signature as provided in sections 45, 47, 67 and 73 of the Evidence Act. *Abdul Gani Malitha vs. Sariatulla Biswas, 16 DLR 157.*

Sections 67 and 68—Will—Requirements of section 67 and 68 of Evidence Act, need be fulfilled to prove the genuineness of a will. *Paresh Chandra Bhowmick vs Hiralal Nath 36 DLR (AD) 156.*

Sections 67 and 68—In the absence of proof of its due execution a registered kabala by itself does not raise any presumption of genuineness. *Abdul Malek Sarkar vs Bangladesh BLD 170(a).*

Sections 67, 45, 47 and 73—Section 73 provides for the direct comparison by the Court of deputed signature with undisputed one. The other modes of proving hand-writing or signature have been provided in sections 45, 47 & 67 of the Act. The Court when it thinks necessary, may compare the signature itself but it is not bound to do so in every case. *Pradip Chandra Shaha vs Urmila Bala Roy and another 5 BSCD 173.*

Section 67 and 68—It is not disputed that Abdul Sattar got the suit property by transfer not from real owner namely, Sufia Begum but from Abdul Sattar to his son on the basis of oral gift confirmed by a declaration through a photostat copy of an affidavit sworn before a Notary Public which having not been corroborated by any witnesses and the same has not been attested with original or duplicate copy and the Notary Public attested the same merely collecting the execution of the affidavit from his memory cannot be said a declaration of oral gift has been proved as required by the Evidence Act. *Government of Bangladesh & others vs Paper Converting & Packaging Ltd & others 6 BLC 467.*

Sections 67 and 68—Registration attaches a statutory presumption which extends to the registration of the deed only. Such presumption is never intended to extend to the genuineness of the transaction or to prove execution and/or recitals in the deed. *Kamaluddin and others vs Md Abdul Aziz and others 56 DLR 485.*

Sections 67, 61 and 103—Muslim Marriage is a socio-religious contract between a man and a woman and as such signatures of the parties in the Kabinnama are essential for proving marriage. No amount of oral evidence can cure the deficiency and no amount of oral evidence is sufficient to prove

marriage when the plaintiff fails to prove the Kabinnama according to law. *Khodeja Begum and others vs Md Sadeq Sarkar* 50 DLR 181.

Sections 67 and 73—Guarantor—Letter of Credit—It is now well settled principle of law that in order to bind one under a written contract, the execution of the documents must be proved in the manner as provided under section 67 of the Evidence Act. The respondent bank hopelessly failed to prove that the appellants executed the guarantee form and stood guarantors to any payment payable under the letter of credit as the High Court Division itself exercised the powers under section 73 of the Evidence Act and compared the seal and signature of the appellants appearing in the application for opening their current account with the signature appearing in the guarantee form and found that those did not tally at all and hence the finding of the trial Court that the appellants were the guarantors cannot be sustained in law. *Moqbul Brothers and another vs Rupali Bank and others* 5 BLC 565.

68. Proof of execution of document required by law to be attested—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

¹[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.]

Case Law

Section 68—Applicability—Applies only in case of dispute about execution being between maker of document and the person in whose favour it was made. *Muhammad Rafiq* 8 DLR (WP) 56; *PLD 1956 Lahore* 354.

Section 68—Execution—Includes attestation—The word "Execution" includes 'attestation' as required by law. *Bam Jassa Kumar* AIR 1946 Allahabad 178.

1. This Proviso was inserted by the Indian Evidence Act, 1926 (Act XXI of 1926), section 2.

Section 68—Execution of document not to be proved—Attesting witness need not be called except where attestation by him is challenged. *Kamalsing vs Krisnabai AIR (33) 1946 Bombay 304.*

Section 68—Registered document—Execution must be proved in Court—Registration is no proof of execution when it is denied by the other party. *Muhammad Cherag 5 DLR 17; PLD 1954 Dacca 134; PLR 1952 Dacca 626.*

Section 68—A registered document carries with it a presumption of validity which can be rebutted after given due opportunities to the parties. The case is remanded for disposal after given such opportunity to prove genuineness or otherwise of the Kabala in question. *Haji Sk Md Lutfur Rahman vs Chairman, Court of Settlement 45 DLR (AD) 136.*

Section 68—It appears that the disputed bainapatra, the Ext 1 has been proved by the testimonies of the PWs 1, 2, 3 and 5 of them PWs 2 and 3 are the attesting witnesses and PW 5 is the scribe and all these witnessess uniformly stated in their evidence that Ganesh executed the said bainapatra in their presence on receiving Taka three lac and one as earnest money when the defence totally failed to shake their consistent and corroborative testimony in any manner whatsoever. *Naru Gopal Roy vs Parimal Rani Roy and others 6 BLC 323.*

Section 68—Out of the three attesting witnesses of the agreement, one of them was examined in Court who is close relation of the plaintiff as well as a chance witness. When no other attesting witness of the agreement has been examined to prove such agreement, the plaintiff's case regarding agreement is doubtful. *Shaikh Haji Musa Hakkani vs Kazi Md Abdul Majed and ors 7 BLC 534.*

Sections 68 and 3—Even if the 'Aposhbontannama', the Exhibit 'Ka' is excluded from judicial consideration since the document is not admissible in evidence on the ground that the original was not called for and the photostat copy cannot be admitted in evidence the document itself is not a registered instrument according to the provision of Registration Act and that the same is not proved by any attesting witnesses but there are other materials to determine the question of oral partition. As there is no allegation of inconvenience to the enjoyment and possession of the plaintiff's property the claim of the plaintiff as regards infringement of privacy does not stand to reason. It cannot be said that the defendant's six storied building is still part of the undivided dwelling house of the plaintiffs. Moreso, the decision of the Appellate Division on 13-1-98 in the matter of pre-emption case under section 24 of the Non-Agricultural Tenancy Act, has further affirmed the right of the defendant No. 1 to hold his purchased property. Having failed to pre-empt the land the suit has been instituted as a second device to oust the defendant No. 1 from his property and thus, from the materials on record, oral and documentary, the conclusion can be drawn that the

suit property was amicably and orally partitioned between the co-owners. *Dr Ismat Mirza and other vs Md Mosaddek Hossain and ors* 7 BLC 90 .

Section 68 and 67—It is not disputed that Abdul Sattar got the suit property by transfer not from real owner namely, Sufia Begum but from Abdul Sattar to his son on the basis of oral gift confirmed by a declaration through a photostat copy of an affidavit sworn before a Notary Public which having not been corroborated by any witnesses and the same has not been attested with original or duplicate copy and the Notary Public attested the same merely collecting the execution of the affidavit from his memory cannot be said a declaration of oral gift has been proved as required by the Evidence Act. *Government of Bangladesh & others vs Paper Converting & Packaging Ltd & others* 6 BLC 467.

Sections 68, 71—Execution—Meaning of—The word "Execution" in section 71 of the Act has the same meaning as in section 68 and means not merely signing by the executant but also means attestation according to law. When the attesting witnesses failed then other witnesses could be called under section 71 to prove not only the execution in the limited sense but also attestation. *Nogendra Bhusan* 6 DLR 122.

Sections 68 and 67—Registration attaches a statutory presumption which extends to the registration of the deed only. Such presumption is never intended to extend to the genuineness of the transaction or to prove execution and/or recitals in the deed. *Kamaluddin and others vs Md Abdul Aziz and others* 56 DLR 485.

69. Proof where no attesting witness found—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Case Law

Section 69—Execution—Meaning of—The word "Execution" in section 71 of the Act has the same meaning as in section 68 and means not merely signing by the executant but also means attestation according to law. When the attesting witnesses failed then other witnesses could be called under section 71 to prove not only the execution in the limited sense but also attestation. *Nogendra Bhusan* 6 DLR 122.

Section 69—"Can be found"—Meaning of—The words 'can be found, are not very appropriate and they must be interpreted to include not only case where the witness cannot be produced because he cannot be traced but cases where the witness for reasons of physical or mental disability or for other reasons, which the Court considers sufficient, is no longer a competent witness for the purpose as is provided in section 68. *Bom Jassa Kunwar vs. Sahu Narain Dad AIR (33) 1946 Allahabad 178 (DB)*.

Section 69—Principle—If the handwriting of the attesting witness has been proved, the presumption is that he actually witnessed the execution of the deed. *Ponnuswami Goundan vs Kalyanasundara Ayyar, 1930 AIR (Mad) 770*.

Section 69—If no attesting witness can be found—Where a party has made all reasonable efforts to procure the attendance of the attesting witness who is alive, but the witness is not found, the execution and attestation of the document may be proved by other evidence. *Muthuraman Chettiar vs Subramanian, Chettiar, 1933 AIR (Mad) 612*.

Section 69—In the absence of examination of a single attesting witness the plaintiff has failed to prove the execution of the agreement in question by Taher Ali. *Shamsul Haque (Md) vs Munsur Ali and others 5 BLC 519*.

70. Admission of execution by party to attested document—The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Case Law

Section 70—Where the execution of a document is admitted, no attesting witness need be called. *Somasasundaram Chettiar vs Mahibala Mothirulappa Pillai, 1933 AIR (Mad) 432*.

Section 70—The admission is binding only on the admitting executant and not on his co-executant or representative-in-interest—As against other parties to the suit who do not admit execution, the document must be proved by calling at least one attesting witness. *Hava vs Lokumal, 1944 AIR (Sind) 61*.

71. Proof when attesting witness denies the execution—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Case Law

Section 71—If an attesting witness called by the plaintiffs turns hostile, the plaintiff is entitled to prove attestation of the instrument by other evidence. *Jaikaran Das vs Protap Singh, 1946 AIR (Cal) 189.*

72. Proof of document not required by law to be attested—An attested document not required by law to be attested may be proved as if it was unattested.

73. Comparison of signature, writing or seal with others admitted or proved—In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

¹[This section applies also, with any necessary modifications, to finger-impressions.]

Case Law

Section 73—Handwriting—How may be proved—The handwriting may be proved by comparison of signatures of writing with others admitted and proved. The handwriting may be proved. *Benoy Bhusan vs. Muhammad Abdul Samad PLD 1956 Dacca 14; PLR 1953 Dacca 293; 6 DLR 50.*

1. Inserted by the Indian Evidence Act, 1899 (V of 1899).

Section 73—Handwriting—Court should not rely on comparison made by itself without the aid of an expert. *Muhammad Nur-ul-Haq vs. State* 10 DLR 129; PLD 1958 Dacca 341.

Section 73—The Court compared the signatures of the party and came to conclusion about the genuineness of those in question. *Faizul Haq vs. Noor Meah* 12 DLR 770.

Section 73—Handwriting—Court comparing specimens itself—Conclusion cannot be challenged in appeal. *Ahsanullah vs Abdul Jabbar* 9 DLR 543; PLD 1958 Dacca 57.

Section 73—Handwriting and finger-prints—Evidence regarding—Admissible. *Bishu Sheikh vs State* 9 DLR 626.

Section 73—Photostat copy—Cannot be compared with the admitted document to prove genuineness. *Gustad Meneckji* PLD 1959 Dacca 756 (DB).

Section 73—Thumb-impression and signatures—Comparison. *Bishu Shekh vs. State* 9 DLR 626.

Section 73—Comparison of writing or signature with admitted writing or signature is a question of fact—High Court will not interfere with lower Courts' conclusion. *Majarullah Mondal vs Matiur Rahman* 19 DLR 188.

Section 73—Comparison of signature—If a question of law—As the section permits the Court to make a comparison or signature of writings, however hazardous or dangerous the adoption of such a method, if it relates to a question of fact, does not merely by reason of the adoption of that particular method become a question of law. *Ahsanulla Chowdhury vs. Haji Abdul Jabbar Chowdhury* 9 DLR 543.

Section 73—Comparison of signatures: Conclusion arrived at by the court by a comparison of the signatures, however, unsafe as a mode of proof, cannot be interfered with in second appeal, that being a question of fact. *Faizul Huq vs Noor Mia* 12 DLR 770.

Section 73—Court itself competent to compare a disputed hand-writing or signature of a person with his admitted writing or signature to come to a conclusion. *Abdul Matin Chowdhury vs Chapala Rani* 7 DLR (AD) 205.

Section 73—Comparison of signature is a perfectly legal mode of proving handwriting and however inconclusive such proof may be it cannot be considered as error of law. *Abdul Matin Choudhury vs Cahpala Rani Sen* 1985 BLD (AD) 172

Section 73—Comparison of the disputed signatures by the lower appellate Court disregarding positive evidence is highly unsatisfactory. *Usha Rani Ghose vs Sk Anseruddin* 1993 BLD 186.

Section 73—Comparison of signature—when direction of comparison is not called for—the case is one for eviction and not for determination of title between the competing parties. Profulla Chandra who is sought to be summoned for his specimen signature was not present before the Court either as a witness or in any other capacity. In the facts of the case the question of directing him to give his specimen signature does not arise. *BIWTC vs Nazma Flour Mills Ltd* 43 DLR (AD) 105.

Section 73—The court at the time of deciding a case may compare the disputed handwriting and signature with the admitted handwriting or signature of the person concerned and come to the conclusion about the genuineness of the same. Such finding being a finding of fact cannot be assailed either in Second Appeal or in Revision. *Nowazullah vs Waz Khatun* 45 DLR 279.

Section 73—When a document is produced by a party and the signature appearing therein is proved and subsequently the person concerned denies the signature, it is the duty of the Court to compare the same with his other admitted signatures on record. *Haragram Trust Board vs Dr Golam Hartuza Hossain* 47 DLR 160.

Section 73—The trial Court committed wrong in discarding the will on mere comparison of the three signatures by naked eyes without any opinion by any expert. *Pratik Bandhu Roy and others vs Alok Bandhu Roy and others* 49 DLR 241.

Section 73—The section permits the Court to make a comparison of signature or writings and so adoption of such a method cannot be termed as hazardous or dangerous. *Ishaque (Md) vs Ekramul Haque Chowdhury and others* 54 DLR (AD) 26.

Section 73—The Court is not bound to refer a document to the handwriting expert when it can itself note the dissimilarity in LTIs and handwriting. *Mafizul Hoq Bebu (Md) vs Majida Begum and others* 54 DLR 219.

Section 73—In view of the provision of section 107(2) of the Code the High Court Division was competent to compare the signature of the defendant in the 'bainapatra' with his available signatures and, as such, was in error in sending back the case for the said purpose to the trial Court. *Aftab Ali (Captain Retired) vs SM Kutubuddin* 56 DLR (AD) 117.

Section 73—On a careful scrutiny of the signatures appearing in the written statement and appearing in the agreement for sale it demonstrates that nature and style of signatures are absolutely same and no dissimilarity is at all manifested when the execution of the deed of agreement was the product of free consent and will of the first defendant, the plaintiffs are entitled to have a decree for specific performance of contract. *Shamsul Huda (Md) and another vs Mahmooda Khatun and others* 5 BLC 649.

Section 73—It appears on a close scrutiny of the signatures of the defendant appearing on the vokalatnama and on the deposition are not the products of the same handwriting. *Abu Zafor Miah vs Abdul Motaleb & anr* 3 BLC 412.

Section 73—The High Court Division after comparing the signatures of Ganesh appearing in the bainapatra with his admitted signatures in the plaint and the compromise petition filed in title suit No. 13 of 1998 has been satisfied that these are the products of the same hand and the learned Subordinate Judge was fully justified in holding that Ganesh duly executed the bainapatra on receipt of earnest money from the plaintiff without sending the same to the hand writing expert as the High Court Division has consistently been holding that the art of calligraphy is yet to attain any degree of precision so that the court can place its explicit reliance on it. The Court being the expert of the experts was itself quite competent to compare the same exercising the power given by section 73 of the Evidence Act. *Naru Gopal Roy vs Parimal Rani Roy and others* 6 BLC 323.

Section 73—While comparing the signatures of the defendant Nos. 1 and 2 as appearing in Exhibit 4 with their signatures as appearing in the written statement, deposition sheet and vokalatnama filed in the High Court Division, it appears that the signatures as appearing in Ext 4 with respect to mode, style and manner do not tally with those as appearing in the written statement and deposition sheet and as such, the case of the plaintiff regarding the Ext 4 is not proved. *Shaikh Haji Musa Hakkani vs Kazi Md Abdul Majed and ors* 7 BLC 534

Section 73—Upon perusal of the Exhibit 4-kha, a copy of the notice under section 106 of the Transfer of Property Act dated 24-7-1993, learned SCC Judge came to his finding that the tenant-petitioner himself received the copy of the notice by signing his name on the copy of the said notice on 1-8-1993 and on comparison with the signature of the tenant-petitioner with other documents on record, he reached to his decision that the signature of the tenant-petitioner appearing in Ext 4-kha tallies with that of other documents on record and such finding of fact being based on evidence on record cannot be disturbed by the High Court Division in its revisional jurisdiction. *Mohammad Islam vs Rahicha Khatoon* 8 BLC 37.

Section 73—So far as the genuineness of the Exhibit 2 is concerned, the learned Subordinate Judge has made comparative study of the executing signatures of this deed with those of an old unassailed registered sale deed dated 25-6-68 which is admitted in evidence. The Court is quite competent to ascertain genuineness of execution of document by making such comparison under section 73 of the Evidence Act. The High Court Division closely examined those two sets of signature of Habibur Rahman Khondaker appearing on the two deeds and found those to be of the same hand. *Sajida Begum and others vs Abdul Kader and others* 8 BLC 306.

Section 73—Exercise of powers under this section by the Court—Provisions explained.

Held—Section 73 empowers the Court to come to a complete decision, if necessary, by comparison of the disputed signature with other admitted signatures. This power should not be normally exercised by the Court by substituting its own function for that of the Handwriting Expert. If the disputed signature is legible one, there is nothing in the law which prevents the Court from adjudicating the question as to its genuineness or otherwise of the signature. *Jogesh Chandra Majumder vs Suresh Chandra Majumder and others* 3 BSCD 70.

A statement recorded by the police under section 161 of the Code cannot be used by the prosecution as evidence and it can only be utilised under section 162 of the Code to contradict such witness in the manner provided by section 145 of the Evidence Act. *Md Abdul Baten and another vs State* 4 BSCD 109.

Sections 73 and 45—Examination of LTI—It is true Court itself can compare any signature or LTI of any concerned person himself under section 73 Evidence Act but it is better to have an expert's opinion also, particularly in a case of LTI. *Sk Abul Qasem vs Mayez Uddin Mondal* 45 DLR 169.

Sections 73 and 45—The expert's opinion is not a substantive piece of evidence. The Courts below were quite competent to arrive at their own conclusion as to whether or not the signatures appearing on Ext 3 series were those of the petitioner. *Nurul Huq alias Md Nurul Hoque vs State* 50 DLR (AD) 88.

Sections 73 and 45—It is always open to the Court to decide as to whether it should itself compare the questioned signature or handwriting to come to a decision or send the same for an expert opinion. *Monju Mia and others vs Shiraj Mia and others* 56 DLR 264.

Sections 73 and 45—Since by scientific process or method examination of signature, particularly thumb impression, has developed much, it is safe and sound to leave the matter of such examination to the expert or to the person specialised in the examination. *Serajuddin Ahmed and others vs AKM Saiful Alam and others* 56 DLR (AD) 41.

Sections 73 and 45—There are different modes of proving the signature or hand writing on documents but section 45 is one of them and in the instant case the court decided to have opinion of the expert and there is no hard and fast rule for the court as to which mode it should follow. *Dr Wakil Ahmed and ors vs Sufia Khatun and ors* 53 DLR 214.

Sections 73 and 45—Comparison of disputed signature/ LTI cannot be done by the expert with the said registered document which is not admitted or proved to the satisfaction of the court. *Dinesh Chandra Deb vs Dulal Chandra Karmaker and others* 53 DLR 259.

Sections 73 and 45—It is well settled principle of law that opinion of handwriting expert is not conclusive evidence but it helps the court to come to satisfactory conclusion. Section 73 empowers the court to compare itself the disputed signature with the admitted signature of the executant, when such comparison is fairly made by the court committing no wrong it calls for no interference with the conviction and sentence based on consistent and reliable evidence on record. Compassionate view is taken regarding the sentence of the appellants altering it to the period already undergone as the appellants belong to the same family and they suffered from constant mental agony which caused adverse effect to their family lives. *Azahar Ali & others vs State* 5 BLC 262.

Sections 73 and 45—It appears that the learned trial Court rightly rejected the application of the plaintiff to send the disputed signature to the hand writing expert as there are sufficient materials on record to determine the point. Learned trial Court rightly rejected the application for expert on the ground of delay as well because such application was filed after a lapse of more than one year from the date of filing of the written statement where the defendant denied the bainapatra in question. *Bazlur Rahman and another vs Md Manik Ali* 6 BLC 624.

Sections 73 and 45—The signature of the defendant on the alleged deed of agreement is found by the hand-writing expert as forged and on comparison of the signature on the alleged agreement with the admitted signature of the defendant the High Court Division rightly found that those were not in the hand

of the defendant for which it calls for no interference. *Syed Munsif Ali vs Shashanka Mohan Chowdhury & another* 3 BLC (AD) 85.

Sections 73 and 45—The safe and best course for the Court would be to avoid the practice of comparing the writing or signature etc. and should not stake its judgment on the opinion formed or view taken upon resorting to risky or, in other words, unsatisfactory and dangerous procedure and the desired course should be to go for microscopic enlargement and expert advice since the science of examination of signature, writing, etc. for determination of similarity has advanced enough and it has reached to the stage of accuracy and certainty as well as expertise skill is also available. *Tarak Chandra Majhi vs Atahar Ali Howlader and 8 BLC (AD) 67*.

Sections 73, 45, 47, 67—Modes of proving handwriting or signature: It is not necessary that whenever a person denies signature or handwriting in document, it should be sent to an expert for opinion. There are other modes or proving handwriting or signature as provided in sections 45, 47, 67 and 73 of the Evidence Act. *Abdul Gani Malitha vs. Sariatullah Biswas* 16 DLR 157.

Sections 73, 45, 47 & 67—Section 73 provides for the direct comparison by the Court of deputed signature with undisputed one. The other modes of proving hand-writing or signature have been provided in sections 45, 47 & 67 of the Act. The Court when it thinks necessary, may compare the signature itself but it is not bound to do so in every case. *Pradip Chandra Shaha vs Urmila Bala Roy and another* 5 BSCD 173.

Sections 73 and 67—Guarantor—Letter of Credit—It is now well settled principle of law that in order to bind one under a written contract, the execution of the documents must be proved in the manner as provided under section 67 of the Evidence Act. The respondent bank hopelessly failed to prove that the appellants executed the guarantee form and stood guarantors to any payment payable under the letter of credit as the High Court Division itself exercised the powers under section 73 of the Evidence Act and compared the seal and signature of the appellants appearing in the application for opening their current account with the signature appearing in the guarantee form and found that those did not tally at all and hence the finding of the trial Court that the appellants were the guarantors cannot be sustained in law. *Moqbul Brothers and another vs Rupali Bank and others* 5 BLC 565.

PUBLIC DOCUMENTS

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¹74. **Public documents**—The following documents are public documents:—

- (1) documents forming the acts or records of the acts—
 - (i) of the sovereign authority,
 - (ii) of official bodies and tribunals, and
 - (iii) of public officers, legislative, judicial and executive ²[of any] part of ³[⁴Bangladesh] or of the Commonwealth,] or of a foreign country;
- (2) public records kept in ⁴[Bangladesh] of private documents.

Case Law

Section 74—The certificate appearing at the bottom of the finger-prints are of the person who suffered the previous convictions recorded in that finger-print slip. *Md Ashraf 12 DLR (WP) 27.*

Section 74—Birth certificate and vaccination certificate—Presumption is of correctness—Admissible to prove age. *Abdur Rahman PLD 1960 Karachi 625; KLR 545.*

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Section 74—Nakhshbandi paper—Not a public document—Not admissible. *Province of Bengal vs Jamila 4 DLR 222.*

Section 74—Order of competent authority fixing price of kerosene oil—Public document—Certified copies admissible. *Ganesh Potedar, vs Emperor AIR (33) 1946 Patna 123.*

1. For the definition of common records to be public documents (with effect from the 15th August, 1947), see the Law of Evidence Amdt, Act 1965 (East Pakistan Act XVIII of 1956), section 2.

2. Substituted by Administrative Order, 1949, Schedule for "whether of British India, or of any other",

3. Substituted by Administrative Order 1961, Article 2 and Schedule, for "Her Majesty's dominions" (with effect from 23d March 1956).

4. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

Section 74—Pedigree prepared under UP Court of Wards Act— Public document—Presumption of proper and correct preparation—Extent of presumption. *Shayam Pratap AIR (33) 1946 PC 103.*

Section 74—Previous conviction—May be proved by finger-print slip showing record of convictions. *Muhammad Ashraf PLD 1960 Lahore 416.*

Section 74—Report to police under section 155 CrPC—Relevant under the section. *Nur Khatun vs Nur Khan PLD 1956 Lahore 293.*

Section 74—Reports in a register in the police-station—Public document. 8 *DLR (Lah.) 203.*

Section 74—Public documents. Disagreeing orders of Division Bench of High Court—Case referred to a Third Judge. Accused applying for copies of Division Bench orders—Copies could not be refused on the plea that orders were mere expression of opinions not amounting to the judgments *Fazlul Quader Chowdhury vs. Crown 4 DLR (FC) 104.*

Section 74—Public document, original lost—Presumption as to such document: It has been contended that when an original document is lost secondary evidence thereof is admissible and it shall be presumed to be correct as provided in section 74 of the Evidence Act.

Held—This presumption is however rebuttable and the presumption is as to regularity of the official act and not as to the correctness of its contents.

If suspicion arises about the integrity of a public institution confidence of the people will be undermined. *Rahimuddin Ahmed vs Bengal Waterways Ltd. 31 DLR 28.*

Section 74—Plaint and written statements are public documents under section 74. *Reazuddin vs Azimuddin. 39 DLR 228.*

Section 74—Documents forming the acts of records of the acts—Birth and vaccination certificates are public documents and can be admitted in proof of date of birth. *Abdul Rahman vs Abdul Haq & others, PLD 1960 Kar. 625.*

Section 74—Statements recorded by a Magistrate in a departmental inquiry are not public documents, as such inquiry is not a judicial one. *Govt. of Bengal vs Santiram Mondal, 58 ILR (Cal) 96; 1930 AIR (Cal) 370.*

Section 74—A survey and settlement report is a public document. *Brajasundar Deb vs Rajendra Narayan Bhauj Deb, 1941 AIR (Punjab) 260.*

Section 74— Considering the petition of complaint and considering the Annexures-'B' and 'E' it appears that prima facie no case under sections 166 and 217 of the Penal Code has been made out against the present petitioners. No one can be harassed in Criminal Proceeding when the allegations against the accused petitioners are vague and prima facie considered to be a malicious one and hence the proceeding is quashed in respect of the present two petitioners. *AKM Jabbar Faruque and another vs Md Abdur Rahim and another* 7 BLC 218.

Section 74(1)—Plaint or written statement after it has been filed in Court and registered becomes a public document. *Gendla Bepari vs. Abdul Mansur Mia* 19 DLR 349.

An application filed by the police before a Magistrate for issue of search warrants is a public document. *Kalinga Tubes Ltd., D Suri*, 1953 AIR (Orissa) 49.

A record of statements of witnesses made by a police officer in the course of investigation is not a public document. *Natabar Jana vs State*, 1955 AIR (Cal) 138.

Sections 74 and 76—The consistent view of the apex courts of this Sub-Continent is that not only a gift under Mohammadan Law but also under the Transfer of Property Act, a gift must be coupled with acceptance and delivery of possession of the property. Mere registration of such deed of gift is not at all sufficient, something more has to be done for making a valid gift which is lacking in the present case. *Bangladesh, represented by the Secretary, Ministry of Housing and Public Works & another vs Shirely Anny Ansari* 6 BLC (AD) 85

Sections 74 and 76—An accused is not entitled to get a copy of the statement recorded under section 164 of the Code before filing police report under section 173 of the Code to avoid prejudicing the investigation. *Mobarak Hossain alias Jewel vs State* 6 BLC 119

Section 74, 78(6) and 86—Foreign Judgment of original side of Calcutta High Court passed in 1959—reasons, if required to be stated in such a judgment—its admissibility in evidence—limitation for suit based on such judgment. *Ershad Ali vs Syed Azizul Hoq* 2 BSCD 86

Sections 74 and 114(e)—Objection as to admissibility of evidence is to be taken at the first instance. In the instant case no such objection was raised against the Commissioner's report in question which can also be relied upon as the same is an official document and was prepared in due course. *Abdul Quader Chowdhury vs Sayedul Hoque* 43 DLR 568.

- ✓ 75. Private documents—All other documents are private.

Case Law

Section 75—Private document made an exhibit on its formal proof—Presumption as to its writing—Question of its genuineness is a question of fact; There may be cases where the law requires that the contents of particular document shall be presumed to be correct unless they are rebutted by adducing evidence by a party who disputes their correctness, as has been provided in section 103 B of the Bengal Tenancy Act and section 144A of the State Acquisition and Tenancy Act, 1950. *Ajafunessa vs. Safar Miah* 30 DLR (SC) 41.

Section 75—Plaint or written statement after it has been filed in court and registered becomes a public document. *Reazuddin vs Azimuddin* 1987 BCR 273; 1987 BLD 16.

76. Certified copies of public documents—Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation—Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Case Law

Endorsement showing that a copy was true copy—Object of—No particular form necessary. *Ghulam Qadir* PLD 1958 Azad J & K 1.

Section 76—Case placed before third Judge on difference between members of Division Bench—Copies of judgments written by Division Bench should not be refused to the party. *Fazlul Quader Chaudhury vs Crown* PLD 1922 Federal Court 19; PLR 1952 Dacca 145; 4 DLR 104; 1952 FCR 1.

Section 76—According to section 76 of the Evidence Act, a public officer who issues a copy has got to certify the copy as 'true copy' but then it is not necessary that the certificate should be in a particular form. All that is required is that it must be a true copy of the original and there must be something to denote that it was so. *Ghulam Qadir vs Alam Bibi*, PLD 1958 Azad J & K 1.

Sections 76 and 74—The consistent view of the apex courts of this Sub-Continent is that not only a gift under Mohammadan Law but also under the Transfer of Property Act, a gift must be coupled with acceptance and delivery of possession of the property. Mere registration of such deed of gift is not at all sufficient, something more has to be done for making a valid gift which is lacking in the present case. *Bangladesh, represented by the Secretary, Ministry of Housing and Public Works & another vs Shirely Anny Ansari* 6 BLC (AD) 85

Sections 76 and 74—An accused is not entitled to get a copy of the statement recorded under section 164 of the Code before filing police report under section 173 of the Code to avoid prejudicing the investigation. *Mobarak Hossain alias Jewel vs State* 6 BLC 119.

77. Proof of documents by production of certified copies—Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Case Law

Section 77—The right to obtain certified copies—The section allows a certified copy of a public document only to a person who has a right to inspect the documents—It does not authorise the issue of a certified copy of a document which a person has no right to inspect, and a certified copy of any such document unlawfully issued, is inadmissible in evidence. *Promatha Nath Pramanick vs Nirode Chandra Ghose*, 1940 AIR (Cal) 187.

Section 77—The right to inspect depends on the interest which the person applying for inspection has in the document. Inspection may be refused on the ground of State policy, privileged communication and other similar grounds. *Devidatt Ramniranjandas vs Shriram Narayandas*, 1932 AIR (Bom) 291. Income-tax papers in the custody of an income-tax officer are not open to public inspection. *Promatha Nath Pramanik vs Nirode Chandra Ghose*, 1940 AIR (Cal) 187. A judgment of a criminal Court is open to inspection to any member of the public and, therefore, anyone may obtain a certified copy of such judgment. *Ladhi Prasad Zutshi vs E* 1931 A 364.

✓ 78. **Proof of other official documents**—The following public documents may be proved as follows :—

¹[(1) Acts, orders or notifications of the Government or any other Government that functioned within the territories now comprised in Bangladesh or any departments thereof—by the records of the departments, certified by the heads of those departments, or by any document purporting to be printed by order of any such Government :]

active document (2) the proceedings of the ²[Parliament and of any legislature which had power to legislate in respect of territories now comprised in Bangladesh;] by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed ³[by order of the Government ⁴*****.]

5 * * *

1. Clause (1) was substituted for the former clause (1) by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71)

2. The words within square brackets were substituted for the word "Legislatures" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

3. Substituted by Administrative Order, 1937, for "by order of Government".

4. The word "concerned" was omitted by Act VIII of 1973.

5. Clause (3) was omitted by Act VIII of 1973.

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,—by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some ¹[Act of Parliament]:

(5) the proceedings of a municipal body in ²[Bangladesh],—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6) Public documents of any other class in a foreign country—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a ²[Bangladesh] Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

Case Law

Section 78—Provides an alternative mode of proving certain public documents—It has been held by the Calcutta High Court that the mode of proof of public documents mentioned in section 78 is permissible and that the Court is not precluded from having recourse to other modes of proof. *Kalijiban Bhattacharjee, vs E* 1936 AIR(Cal) 316.

Section 78(6)—Public document of foreign country.—When may be admitted—For the copy of public document of foreign country to be admissible

1. The words within square brackets were substituted for the words "Central Act" by Act VIII of 1973.

2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973.

the copy should be certified by the legal keeper with a certificate under the seal of a Notary Public, or of a British Consul or diplomatic agent. *Shah Bono Begum* 8 DLR (WP) 133; PLR 1956 Karachi 363; PLD 1957 WP 748.

Section 78(6), 74 and 86—Foreign Judgment of original side of Calcutta High Court passed in 1959—reasons, if required to be stated in such a judgment—its admissibility in evidence—limitation for suit based on such judgment. *Ershad Ali vs Syed Azizul Hoq* 2 BSCD 86.

PRESUMPTIONS AS TO DOCUMENTS

79. Presumption as to genuineness of certified copies—The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer ¹[of the ²[Government]] to be genuine:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Case Law

Presumption of genuineness of a certificate of registration—The genuineness of a certificate for registration must be presumed under section 79 of the Evidence Act, and the evidence of the registering officer is not necessary to prove it, *Muhammad Hassain vs Sohara, etc* AIR (Lah) 389.

1. The original words "in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorised thereto by the Governor General in Council" were first amended by Administrative Order, 1937, and then substituted by Administrative Order, 1949, Schedule, to read as above.

2. The word "Government" was substituted for the words "Central Government or a Provincial Government, or by any officer in an Acceding State or Non Acceding State who is duly authorised thereto by the Central Government" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

Section 79—A registered document carries presumption of correctness of the endorsement made therein—One who disputes this presumption is required to dislodge the correctness of the endorsement. *Shishir Kanti Pal and others vs Nur Muhammad and others* 55 DLR (AD) 39.

Sections 79 and 114(e)—The Ekrarnama is a registered deed. So there arises under sections 59 and 60 of the Registration Act read with sections 79 and 114 (illustration e) of the Evidence Act a presumption that it was duly presented and registered *Wahida Begum vs Tajul Islam* 52 DLR 491.

80. Presumption as to documents produced as record of evidence—Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

Case Law

Section 80—Endorsement that the deposition had been read over—Presumption applied. *Subitri Bala* 8 DLR 154.

Section 80—Failure to read over the evidence to the accused—Not duly recorded. *Wazed Ali* 8 DLR 269.

Section 80—Court of Record's record of no higher value. Section 80 confers no high probative value upon the records of a Court of Record than of any other Courts how low so ever, viz that the courts shall presume their correctness until the contrary is established. *Fazal Elahi vs Crown* 5 DLR (FC) 44.

Section 80—Presumption as regards compliance with the provision of law while recording a complaint under section 200 Criminal Procedure Code—A

presumption arises that the statement of a complainant was recorded in the presence and hearing and under the personal direction and superintendence of the Magistrate. *Anwar Mohammad II DLR (WP) 77; PLD (Lah.) 196.*

Section 80—Confession—Satisfaction of Magistrate that it was voluntary does not prove that it was voluntary—Other things should be kept in view while determining voluntariness. *Fazlur Rahman vs The State PLD 1959(1). WP 982; PLD 1960 (WP) Peshawar 74 (DB).*

Section 80—Dying declaration—Must be proved as having been made by the deceased—A dying statement of a deceased person must be taken in the presence of an accused and must be proved in the ordinary way by a person who heard it and then only it would be admissible in evidence. *Suddha Sardar 9 DLR 645.*

Section 80—Evidence given in judicial proceedings—Presumption of correct procedure. *State vs Abdul Ghaffar Khan PLD 1957 Lahore 142; PLD 1957(1) WP 584.*

Section 80—Record not disclosing that the recorded statements were read over and explained to the witness—Not presumption of having done so under the section—Question need not be raised specifically. *Shabitri Bala Shar 8 DLR 154; PLD 1957 Dacca 327.*

Section 80—Record not read over and not explained to witness—Evidence inadmissible—Record should show that it was read over and explained. *Wazed Ali Biswas 8 DLR 269.*

Section 80—Two requirements for admitting a confession into evidence. The two requirements for admitting such a confession into evidence as a self-proved document are (1) that it was taken in accordance with law and that (2) the identity of the accused who made the confession has been satisfactorily proved before the court. *Emran Ali vs State 37 DLR 1.*

Section 80—To give rise to any presumption under section 80 the evidence must have been taken in accordance with law—The presumptions mentioned in section 80 arises only in respect of the record of evidence which has been taken in accordance with law. *Eusuf Ali vs E 1933 AIR (Cal) 190.*

Section 80—Presumption as to confession—Even though provision is there for making certain presumption in respect of a confession by an accused person produced before a court taken in accordance with law and purporting to be signed by a Magistrate, having regard to the facts of the case it was injudicious to rely upon such confession without calling the Magistrate as a witness. It respect of a

confession the court is required to see not only that the forms under sections 164 CrPC were complied with but the substance underneath the law was equally adhered to—There must not be any reason for doubt as to the truth of the statements, be it circumstantial or proved otherwise. In this particular case it is difficult to deny accused appellants an opportunity to cross-examine the Magistrate who allegedly recorded their statements. *Babul vs State* 42 DLR (AD) 186.

Section 80—It is not always necessary that the Magistrate who recorded the confessional statement should be produced in court as a witness. Section 80 provides that even without production of the Magistrate such statement may be taken into consideration and presumed to be genuine. *Abul Khayer and 3 others vs State* 46 DLR 212.

Section 80—It dispenses with the necessity of a formal proof of a confession duly recorded by a Magistrate in accordance with the provisions of section 164 of the Code of Criminal Procedure. In such a case the examination of the recording Magistrate is not imperative. *State vs Tajul Islam* 48 DLR 305.

Section 80—Non-examination of the Magistrate who conducted the TI parade renders the memorandum drawn by him inadmissible as it is not a judicial proceeding and that cannot be presumed genuine unless proved by the evidence. *Mizanur Rahman (Md) vs State* 49 DLR 83.

Section 80—In the attending facts and circumstances of the case when the veracity of the confessional statement is questionable, the same enjoys no presumption of correctness under section 80 of the Evidence Act. *Belal alias Bellal and 2 others vs State* 54 DLR 80.

Section 80—It was injudicious to rely upon confession without calling the Magistrate as a witness. The Court is required to see not only that the forms under sections 164 and 264 CrPC were complied with but the substance underneath the law equally adhered to. *Bimal Chandra Das alias Vim and 3 others vs State* 51 DLR 466

Section 80—Non-examination of the Magistrate who held the TI Parade the memorandum given by him is not admissible under section 80 of the Evidence Act as it is not a judicial proceeding and that it cannot be presumed genuine unless proved by evidence. *Abdul Mannan @ Monej and two others vs State* 1 BLC 195.

Section 80—The Magistrate who conducted the TI parade having not been examined, the memorandum drawn by him is inadmissible under section 80 of

the Evidence Act as it is not a judicial proceeding and without proving such memorandum by evidence it cannot be presumed genuine. *Mizanur Rahman (Md) alias Mija alias Mizan vs State 2 BLC 79*.

Section 80—As the confessional statement of condemned prisoner was recorded in accordance with the provisions of section 164, CrPC and it was signed by the confessing accused and Magistrate, the Court shall presume under section 80 of the Evidence Act that the document is genuine and that the statement as to the circumstances under which it was taken by the Magistrate are true and the confession was duly taken. *State vs Munir and another 1 BLC 345*.

Section 80—It appears from the record that the process as to issuance of w/w against the material witnesses were not fully exhausted to secure their presence before conclusion of prosecution evidence. Moreso, the confessional statement made under section 164 CrPC by accused Zainal Abedin was not tendered in evidence under section 80 of the Evidence Act by the prosecution. No step was taken by prosecution under section 509A, CrPC to consider and use post-mortem report as evidence by the Court under the circumstances shown therein. In the absence of such compliance the trial Court had no legal and procedural scope to consider the statement made under section 164 CrPC by the accused and the PM report at the trial to arrive at its decision. Accordingly, High Court Division sent the case back to the trial Court for retrial in order to exhaust the legal process and procedure fully to secure the presence of vital witnesses like investigating-officer, MO and Magistrate concerned only for proper disposal of this case according to law and justice. *Zainal Abedin (Md) vs State 7 BLC 24*.

Section 80—In the instant case, the Magistrate who recorded the confessional statement was not examined in Court. Such confessional statement was not admitted into evidence and marked as exhibit. Neither the identity of the appellant as maker of the confession has been established by any legal evidence nor is it proved that who forwarded the accused-appellant to the Court of Magistrate for recording the confession. The law relating to the mode in which the statement of confession of an accused has to be noted is contained in sections 164 and 364 of the Code. Thus there appears no evidence on record that who made the confessional statement and in the absence of legal evidence of the Magistrate as well as by any other witnesses and in view of the circumstances that the confessional statement was not admitted into evidence and marked as exhibit, the plea of the prosecution cannot be accepted that the confessional statement can be the sole basis of conviction of the appellant. *Sayed Ali vs State 7 BLC 180*.

Sections 80 and 137—Although the Magistrate who held TI Parade was not examined but as the recognition in the TI Parade and the statement in the deposition was not challenged by the defence, there is no reason to disbelieve the PWs and the prosecution case is proved beyond all reasonable doubt. *Abdul Hashem Molla and 5 ors vs State 1 BLC 211.*

81¹* * * * *

82. **Presumption as to document admissible in England without proof of seal or signature**—When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England and Ireland, would be admissible in proof of any particular case in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims.

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. **Presumption as to maps or plans made by authority of government**—The Court shall presume that maps or plans purporting to be made by the authority of the ²[Government] were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

1. Section 81 was omitted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), 2nd Schedule (with effect from 26-3-71).

2. The word "Government or any Provincial Government", by (Act VIII of 1973), 2nd Schedule (with effect from 26-3-71).

Case Law

Section 83—Map prepared by official for a particular case—Admissible in evidence—Proof of accuracy necessary. *Darbar Khan 10 DLR 424; PLD 1959 Dacca 26.*

Section 83—Rennell's map—Presumption of accuracy—Rennell's map has a presumption of accuracy especially in river and road surveys under section 83 of the Evidence Act. *Province of Bengal vs Jamila 4 DLR 222.*

Section 83—Village shown as located in a particular district in the map prepared under authority of Government—Recitals in private documents to the contrary cannot be given any importance. *Ram Kishore vs Union of India 27 DLR (SC) 93.*

Section 83—Maps prepared by private persons are not under authority of Government—Are irrelevant unless proof of fact that they were generally offered for public sale is given—So also no presumption in favour of the accuracy of such maps can be drawn under section 83. *Ram Kishore vs Union of India 27 DLR (SC) 93.*

Section 83—Presumption of accuracy arises in respect of those maps and plans only which are made for a public purpose—The present section creates in favour of maps and plans purporting to be made by the authority of Government a presumption that they were made by the authority of Government and that they are accurate. *Darbar Khan vs Apurba Kumar, PLD 1959 Dacca 26.*

Section 83—No presumption of accuracy in respect of a map or plan made for the purposes of a particular case—A map prepared for the purposes of a particular suit must, therefore, be duly proved, and it is not admissible in evidence in the absence of proof of its accuracy. *Maharaja Sir Kesho Prasad Singh Bahuria vs. Mst. Bhagjogna Kuer, 1937 AIR (PC) 69.*

Section 83—Settlement maps, value of—the settlement maps, however important they are, and whatever is their evidentiary value, cannot take the place of documents of title. *Lachmi Narain vs Lachmi Narain 1948 AIR (Orissa) 139.*

✓
84. Presumption as to collection of laws and reports of decisions—The Court shall presume the genuineness of ¹[every book or Gazette] purporting to be printed or published under the

1. The words within square brackets were substituted for the words "every book" by Act VIII of 1973, Second Schedule (with effect from 26 - 3-71).

authority of the Government of any country, and to contain any of the laws of that country, and of ¹[every book or Gazette] purporting to contain reports of decisions of the Courts of such country.

Case Law

Section 84—Lack of proof of motive and other attending circumstances in the commission of the crime cannot be accepted as a valid plea to absolve the accused—That may be a factor to reduce the gravity of the crime from one under section 302 to one under section 304 of the Penal Code. *Abu Nasir vs State 30 DLR 275.*

85. Presumption as to powers-of-attorney—The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by a notary public, or any Court, Judge, Magistrate, ²[Bangladesh] Consul or Vice-Consul, or representative ^{3*} * * of the ⁴[Government], was so executed and authenticated.

Case Law

Section 85—Presumption of execution and authentication as regards power of attorney—Onus of rebuttal: A reading of section 85 of the Evidence Act gives two results. A power of attorney fulfilling the conditions of the section raises a presumption of due execution and authentication without further proof, and secondly, the onus of rebuttal as a necessary corollary lies on the person who challenges it. *Salema Khatun Bibi vs Hemangini Ghash Dastidar 30 DLR (SC) 99; Md Arshad Ali vs Abed Ali 1984 BLD 150(c).*

1. The words within square brackets were substituted for the words "every book" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

2. The word "Bangladesh" was substituted for the word "Pakistan", by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

3. The words and comma "of Her Majesty, or" were omitted by Administrative Order, 1961 (with effect from the 23rd Mach, 1956).

4. The word "Government" was substituted for the words "Central Government" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

Section 85—Authentication—Presumption—Presumption attached to authentication under section 85 Evidence Act is rebuttable.

Section 85—Onus—When evidence of both sides are fully heard and digested, question of onus does not arise. *Md Nurullah Chowdhury vs Golam Solaiman Kazi* 26 DLR 70.

Section 85—Power-of-attorney though not authenticated by notary public, but when it is duly executed and registered, it is a valid document acceptable in law. *Manindra Mohan vs Ranadhir* 38 DLR 240.

Section 85—A-power-of-attorney executed by a person resident in Bangladesh and registered is a legal document. *Manindra Mohan vs Ranadhir* 38 DLR 240.

Section 85—Written statement filed under the authority of power-of-attorney executed and duly registered is duly presented in Court. *Manindra Mohan vs Ranadhir* 38 DLR 240.

Section 85—Power-of-attorney—The execution of a power of attorney may be proved by the production of an affidavit as to its execution made before a person competent to administer an oath. In the Goods of Sladen, 21 ILR (Mad) 492.

Section 85—Though the power-of-attorney was not authenticated by a notary public, the same being duly executed and registered is a valid document. *Manindra Mohan Kar vs Randhir Dutta* BLD 1987 275(a).

Section 85—Power of attorney must be executed according to the provision of section 85 of the Act otherwise a person holding a power of attorney is not legally permitted to represent his principal under Order III rule 2(a) of the Code. *Ramesh Chandra Chowdhury @ Das vs Naresh Chandra Das @ Chowdhury* 52 DLR 227.

Section 85—The power of attorney, not executed before, and authenticated by a notary public nor any representative of the foreign mission, is not admissible in evidence. *Shah Alam (Md) vs Abul Kalam and others* 54 DLR 276.

Section 85—The required certificate of genuineness was issued by the Deputy Commissioner Rajshahi, who subsequently executed the deed of transfer on 3-8-76 in conformity with the Government instructions dated 15-11-1968, 18-11-69 and 29-11-73 on the basis of power of attorney and as such the learned Subordinate Judge was wrong in holding that the exchange was not a genuine one. *Roushan Ara Bewa and others vs People's Republic of Bangladesh, & others* 3 BLC 539.

Section 85—Statements in power of attorney are to be proved like any other statements *1924 AIR (Mad) 880*.

✓ **86. Presumption as to certified copies of foreign judicial records**—The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of ¹[Bangladesh] is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative ²* * * of the ³[Government] ⁴[in or for] such country to be the manner commonly in use in that country for the certification of copies of judicial records.

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Case Law

Section 86—Foreign Court—Copy of judgment may be attested by Officer of Government of Pakistan—Form of attestation not material. *Abdul Ghani PLD 1960 (WP) Karachi 594*.

Section 86—Foreign judgment—Certificate not necessary for admission—May be proved by other means. *Moselle Elias PLD 1959 (WP) Karachi 760*.

Section 86—Respondent produced in Court certificate copies of judgment and other judicial documents of a foreign country (India) in support of his case.

Held—The documents are inadmissible in evidence unless certified to be genuine by a representative of the Government of Pakistan in India. *Bengal Friends & Co. vs Gour Benode Saha, 21 DLR (SC) 357*.

1. The word "Bangladesh" was substituted for the word "Pakistan", by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

2. The words and comma "of Her Majesty, or" were omitted by Administrative Order, 1961 (with effect from the 23rd Mach, 1956).

3. The word "Government" was substituted for the words "Central Government" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

4. Substituted by the Indian Evidence Act (1872) Amendment Act, 1891 (III or 1891), section 8, for "resident in".

5. The second paragraph of section 86 was omitted by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

Section 86, 74 and 78(6)—Foreign Judgment of original side of Calcutta High Court passed in 1959—reasons, if required to be stated in such a judgment—its admissibility in evidence—limitation for suit based on such judgment. *Ershad Ali vs Syed Azizul Hoq* 2 BSCD 86.

✓ **87. Presumption as to books, maps and charts**—The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

Case Law

Section 87—Map of 1891—No scales given—Authority on whose direction it was prepared not shown—No evidentiary value. *Kumar Bhupendra Kishore* PLD 1956 Dacca 58; PLR 1953 Dacca 320.

✓ **88. Presumption as to telegraphic messages**—The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Case Law

Section 88—No presumption as to the identity of the sender—A telegraph office makes no inquiries and is in no way responsible for the identity of the sender of a message, much less for the truth of its contents. *E v. Abdul Gani Bahadurbhai*, 1926 AIR (Bom) 71; (1956) PLD (Lah) 949.

Sections 88 and 114—Where judicial or official act is shown to have been done, it is presumed to have been done rightly and regularly complying with

necessary requirements. *Akhtar Hosain vs Government of Bangladesh and others* 45 DLR 651.



89. Presumption as to due execution, etc, of documents not produced—The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

90. Presumption as to documents thirty years old—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

Illustrations

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his titles to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody. The custody is proper.

Case Law

Section 90—Deed concerning affairs of the family—In custody of mother—Custody held proper. *Drashan Singh AIR (33) 1946 Allahabad 67.*

Section 90—Thirty-years-old document—Admissible only on proof of custody. *Province of Bengal 4 DLR 222.*

Section 90—Ancient document—How evidentiary value is to be judged. To judge the evidentiary value of ancient document one of the criteria is that it must have been produced on previous occasions on which it would have been naturally produced, if in existence at that time and some act must have been done under it. *Ghulam Qadir PLD 1958 Azad J & K 1.*

Section 90—Document thirty-years old—Presumption should be raised with care. *Shamsa PLD 1954 Peshawar 106.*

Section 90—Document thirty-years old—Presumption is only of the genuineness of signatures. *Sangam Lal AIR 1946 Allahabad 389.*

Section 90—Presumption is that signatures and handwriting is of the person concerned—No presumption of correctness of contents or freedom from undue influence. *Hajari Sardar vs Mozam Molla 8 DLR 640.*

Section 90—Thirty-years old will produced from proper custody—Presumption of valid execution. *Saran vs Abdul Rashid PLR 1950 Sind 131; PLR 1948 Sind 17.*

Section 90—Certified copy of a document not 30 years old—Presumption—When the certified copy of the document is not thirty years old, presumption under section 90 of the Evidence Act cannot be raised with regard to it. *Husan Ali vs Azmaluddin 14 DLR 392.*

Section 90—Once such a document more than 30 years old is produced from proper custody section 30 of the Evidence Act entitles the Court to presume that it is a genuine document. *Additional Deputy Commissioner (Revenue) vs Md Reazuddin Pk and others 5 BLC (AD) 76.*

Section 90—Although one of the seven executants has refused to give her thumb impression on the deed but nowhere it has been stated that she did not sign the document for its execution. Since it was a 30 years old document and its

certified copy was produced it may be presumed, under section 90 of the Evidence Act, that the document was duly executed by the executants. *Kamaruddin @ Fakira and others vs Anisur Rahman & others* 1 BLC 102.

Section 90—Section 90 is applicable to wills produced in Courts of Probate—Section 90 is applicable to a will when produced as evidence of a certain fact in the trial of a regular suit. *Mahendranath Surul vs Netai Charan*, 1938 ILR (Cal) 392.

Section 90—Proof of proper custody necessary—Proof of proper custody is a condition precedent to the application of the section. *Rudragouda vs Basangouda*, (1983) 40 Bom. LR 202, per Thakor. J. So that a document may be entitled to the presumption mentioned in this section, it must be produced from custody which the Court, in the particular case, considers proper. Mere production of an ancient document by a party is not enough. *Trimbakdas vs Mathabai*, 1930 AIR (Nan) 225.

Section 90—Case where the Court may refuse to apply the presumption—The Court may refuse to apply the presumption where evidence in proof of the document is available, *Mahendra Nath vs Netai Charan*, 1944 AIR (Cal) 241 or where evidence in proof of the document has been produced but disbelieved. *Surendra Nath Rath vs Sambhu Nath Dobby* 1927 AIR (Cal) 870.

Section 90—Presumption of a sound disposing mind and due attestation in the case of an ancient will. In the case of an ancient will, there is a presumption, under section 90 of the Evidence Act, not only that it is genuine but that it was surely executed, that is executed by a person who was in a sound disposing stage of mind at the time of execution. *Munnalal vs Mst Kashibai*, 1947 AIR (PC) 15; *Swarna Kottayya vs Karancheti Vardhamma*, 1930 AIR (Mad) 744.

Section 90—The Courts below were not justified in demanding the proof required in normal case of proof of private document less than 30 years old and this caused a miscarriage of justice. The presumption afforded in section 90 of the Evidence Act is a statutory recognition as to the genuineness of the document, and its execution. *Jamir Ali and ors vs Dilfaraz Bibi and ors* 6 BLC 588.

Chapter VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

91. Evidence of terms of contracts, grants and other disposition of property reduced to form of documents—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of document, no evidence¹ shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2—Wills² [admitted to probate in³ [Bangladesh] may be proved by the probate.

Explanation 1—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

1. Where, however, a Criminal Court finds that a confession or other statement of an accused person has not been recorded in manner prescribed, evidence may be taken that the recorded statement was duly made—see the Code of Criminal Procedure, 1898 (Act V of 1898), section 533.

2. Substituted by the Indian Evidence Act, Amendment Act (XVIII of 1872) section 7, for "under the Indian Succession Act."

3. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

Explanation 2—Where there are more originals than one, one original only need be proved.

Explanation 3—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing, with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

Case Law

Section 91—Existence of deed—May be proved by external evidence. *Muhammad Khan vs Ghulam Rasul PLD 1952 Lahore 40; PLR 1952 Lahore.*

Section 91—Excise licence—Factum of issue—May be proved by external evidence without producing the licence. *West Punjab Government vs Akbar Hossain PLD 1952 Lah. 430; PLR 1952 Lahore 576.*

Section 91—Presumption under the section—Presumptions under the section are limited to what are set forth in the section itself. Section does not allow to presume that the contents of a document are correct or a pardanashin lady executed it without undue influence. *Hazari Sardar vs Mozam Molla 8 DLR 640.*

Section 91—A thirty years old document—A thirty years old document is not admissible in evidence without proof of its custody. *Province of Bengal vs Jamila Khatun Chowdhury, 4 DLR 222.*

Section 91—When there was admittedly a written document as to any particular matter it was incumbent upon the plaintiff to procure the same as it was the best evidence. *Gouranga Chandra Banik vs Sanjib Kumar Banik*, 36 DLR 235.

Section 91—Extrinsic evidence, when excluded— It is well-settled that, subject to minor exception, no evidence except the document itself, is admissible to prove any contract or disposition of property made in writing. Nor can extrinsic evidence be admitted to interpret a document when language used in a document is plain in itself, and when it applies accurately to existing facts. *Durga Nath Tarafdar vs Loke Nath Sarkar* 5 DLR 558.

Section 91—The section which excludes oral evidence only in proof of the terms of document and not of the existence of a contract or grant of property is not a bar to such evidence. *Hochen Mandal vs Miraj Ali* 4 DLR 457.

Section 91—Unregistered lease—Bengal Tenancy Act—If any party resorted to any document creating a permanent tenancy, it must be registered but if it is not registered it can be proved independently of the written lease as under the Bengal Tenancy Act no written lease is necessary for the creation of a tenancy. *Hochen Mandal vs Miraj Ali* 4 DLR 457.

Section 91—Under the Bengal Tenancy Act no written document is necessary for the creation of a lease in respect of agricultural lands and therefore, a tenant can prove his tenancy independently of a written lease, if any. *Khan Md Biswas vs Chittaranjan Sen* 7 DLR 60.

Section 91—Agricultural tenancy can be proved without proving the lease—section 91 excludes oral evidence in respect of the terms of a document and not of the existence as a fact of the contract. *Muhammadi Steamship vs Dada Ltd.* 10 DLR 474.

Section 91—A receipt is not covered by the section—Oral evidence of payment of money will be inadmissible, unless receipt is produced. (1952) PLR (Lah) 11.

Section 91—An agreement apart from its terms can be proved by a oral evidence.

Proof of the fact that a certain excise licence was issued is distinct from proof of "contents" of the licence—Section inapplicable 1952 PLR (Lah) 576.

Section 91—Oral evidence—Conditions for inadmissibility of—Writing should be with approval of both parties.

In order that oral evidence be inadmissible by virtue of section 91 the first requisite is that the terms of the contract, grant or other disposition of property should have been reduced to the form of a writing, should be either executed by both parties to the agreement or should be executed by one with the approval of the other. *Wali Muhammad PLD 1958 Lahore 198, PLR 1958(2) Lahore 240.*

Section 91—Oral evidence—Admissible about the non-existence of agreement. *Muhammadi Steamship Co. 10 DLR 479; PLD 1959 Dacca 59.*

Section 91—Receipt not produced—Secondary evidence of its contents is admissible. *Muhammad Khan PLD 1952 Lahore 40; PLR 1952 Lahore 11.*

Section 91—Bill or note not admitted as not properly stamped—Plaintiff may plead original consideration. *Benoy Bhusan PLD 6 DLR 50; 1956 Dacca 14; PLR 1953 Dacca 293.*

Section 91—Tenancy created by unregistered hukumnama—Possession delivered and rent received—Tenancy may be proved by evidence other than the hukumnama. *Narain AIR 1946 Patna 407.*

Section 91—Lease granted by unregistered deed—May be proved by oral evidence. *Hochen Mondal 4 DLR 457.*

Section 91—Sale-deed under-stamped—Not produced—Secondary evidence cannot be produced to prove contents of sale-deed. *Lal Khan PLD 1950 Lahore 196; PLR 1950 Lahore 273.*

Section 91—Original sale-deed not proved—Other record to show sale is admissible. *Allah Dad PLD 1956 Lahore 245.*

Section 91—Oral evidence of terms of sale-deed—Inadmissible to alter or contradict the deed—Inadmissible to ascertain truth. *Saleh Muhammad PLD 1960 (WP) Lahore 231 : PLR 1960(2) (WP) Lahore 1275.*

Section 91—The provisions of section 91 (Evidence Act) preclude interpretation by oral evidence of the contents of a documents. *Syed Ali vs State 26 DLR 392.*

Section 91—But oral evidence is not to be accepted unless it inspires confidence and the mere fact that oral evidence stands un rebutted is not sufficient for accepting same to be true. Oral evidence consisting of statements of interested persons contradicting each other can never inspire confidence. *Arsala Khan vs Ghulam Mohyuddin, PLD 1966 Azad J & K 47.*

Section 91—If a document containing the terms of a contract, grant or other disposition of property is not properly stamped, it is not admissible in evidence. Section 35 of the Stamp Act; *Lal Khan vs Allah Ditta*, PLD 1950 L. 196 and other evidence in proof of the terms of such contract, grant or disposition of property is also excluded by section 91 of the Evidence Act.

Section 91—Where the promissory note contains substantially all the terms of the contract but being improperly stamped it is not admissible in evidence, the creditor is without a remedy as there is no cause of action independently of the promissory note. *Ram Nath vs Bhagwati Prasad*, 1946 AIR (All) 150.

Section 91—The view of Dhaka High Court is that where there is a pre-existing debt or liability and a bill or note is passed in respect thereof, the plaintiff can fall back on the original consideration if the document is not admitted in evidence as not being duly stamped and section 91. Evidence Act, is inapplicable in such a case. *Benoy Bhusan vs Muhammad Abdul Samad*, PLD 1956 Dacca 14.

Section 91—Whether the mere fact of payment of money gives a cause of action—Payment of money as a loan carries with it the promise and the liability to repay. *Ganesh Prasad Singh vs Bechu Singh*, 1934 AIR (All) 271.

Section 91—Insufficiently stamped note or bill given for antecedent liability. Authorities are unanimous that a suit on the antecedent liability is maintainable where security given in the form of a promissory note or bill turns out to be unenforceable for insufficiency of stamp or for some other similar reason. *Perumal Chetiar vs Kamakahi Ammal*, 1938 AIR (Mad) 785 (FB).

Section 91—When the intention in executing a document is not what is stated in the document itself but is something else—This fact may be proved—Bar of sections 91 and 92, Evidence Act, cannot be invoked in circumstances like this.

In such cases extrinsic evidence would be admissible to prove that a document which is apparently a deed of gift or a sale with an agreement for resale is, in fact, a deed of mortgage. *Jaha Baksha Par vs Fazle Karim Biswas* 37 DLR 87.

Section 91—What sections 91 and 92 provide—It is an established rule of evidence that oral evidence is inadmissible for the purpose either of construing terms of a document or of ascertaining the intention of the parties thereto. *Feroza Majid vs JB Corporation*. 39 DLR (AD) 78.

Section 91—Oral evidence can be adduced to prove that the deed in question was a document of exchange and not a sale when the disputed kabala is

between the stranger to the document and a party thereto (in a pre-emption case). *Brindaban Das & another vs Ershad Ali Mondal 1986 BLD 85.*

Section 91—On the face of registered instrument and in the absence of any contemporaneous written instrument the oral evidence is not at all sufficient to hold that there was any agreement between the parties for reconveyance of the suit land. The established rule of evidence to be relied is that oral evidence is inadmissible for the purpose of asserting the intention of the parties in the face of the written instrument. *Budhiswar Biswas vs Akbar Ali Sheikh 43 DLR 183.*

Section 91—Evidence of terms of contract—Parties in the contract are bound to fulfil terms of the contract specifically. If they fail to do so, the Court will pass a decree for specific performance of the contract. *BCIC vs Grand Basia Company Ltd 43 DLR 256.*

Section 91—Oral testimony contrary to orders recorded by the Court in due course of business cannot be relied on unless it could be shown that the same was obtained by practising fraud upon the Court. *Afsaruddin Sardar (Md) vs Md Wazed Ali Sarder 47 DLR 595.*

Section 91—While deciding the application for preemption, the Court cannot go behind the intentions of the parties in executing the deed of the transfer. Furthermore, any evidence to vary the terms of such deed is also barred under the provisions of section 91 of the Evidence Act. *Sazeda Khatun vs Asad Ali and others 53 DLR 563.*

Section 91—Since the Hukumnama shows that Firoz is the only recipient of the land oral evidence to prove that the same is not correct cannot be allowed. *Abu Ashed Bhuiyan and others vs Abu Taher Bhuiyan and others 54 DLR 209.*

Section 91—While deciding an application for preemption, the Court cannot go behind the intentions of the parties in executing the deed of the transfer. Any evidence to vary the terms of such deed is barred under the provisions of section 91 of the Evidence Act. *Sazeda Khatun vs Asad Ali and others 54 DLR 285.*

Section 91—Principle and Scope—In the instant case, the dispute centred round a written contract alleged by the petitioner to have been entered into by the defendant for sale of a piece of land. The defence was the total denial of contract and it was placed that the plaintiff converted a contract for tenancy into a contract for sale for which the defendant signed two-blank papers. The trial Court decreed the suit on both oral and documentary evidence. On appeal the High Court, on reconsideration of evidence, reversed the finding of the trial Court and dismissed the suit.

On the contention that "this High Court erred in misplacing the onus on the plaintiff to prove the genuineness of the contract, and the defendant was precluded by section 91 of the Evidence Act to plead contrary to the written contract."

Held—The defendant's denial of genuineness of the contract was essentially a question of fact and extraneous to the contract and so it was not hit by the provision of section 91 of the Evidence Act. *A Salam vs MA Abdul Rahman and another* 1 BSCD 179.

Section 91—Enemy Property—Amicable partition, claim for—Adverse Possession, Exclusive Possession and Title, question as to—Non-production of document of amicable partition—Exercise of Civil Revisional Jurisdiction by the High Court—Plaintiff claiming exclusive title to the disputed land on the basis of amicable partition of all joint properties belonging to his father and co-sharers and possessing the same in adverse for more than 12 years—First Appellate Court placing reliance upon the oral evidence of a witness on amicable partition, reversed the trial Court's decision and decreed the suit in part—High Court Division in Civil Revisional Jurisdiction upset the finding of fact of the first appellate Court—Whether the first appellate Court being the final Court of fact its finding ought not to have been disturbed in Civil Revisional Jurisdiction—Plaintiff appellant based his title to the disputed land on inheritance from his father who is claimed to have got it by amicable partition amongst the co-sharers—When plaintiff appellant's definite case is that on the basis of a document, partition was effected amongst the co-sharers, he ought to have produced it—The plaintiff neither produced it before the Court nor gave any explanation for its non-production—In view of his own admission, no oral evidence on the point is admissible—The rule of evidence is whenever a written document exists its contents proved by producing it, the document itself being the best evidence of its contents, otherwise, something contrary to what it actually contains may be represented to be its contents—If for some reason the document cannot be produced reasonable explanation for its non-production must be given—In this case, plaintiff-appellant has not been able either to produce the document upon which he based his title or give any proper explanation for his inability to produce—Having regard to the provision of section 91, the High Court Division rightly excluded the oral evidence.

Under the Heading "Enemy Property" *Sanjib Kumar Banik vs Gouranga Chandra Banik* 5 BSCD 174.

Sections 91 and 92—The oral evidence is not admissible in varying or contradicting the recitals contained in the registered sale deed in view of the sections 91 and 92 of the Evidence Act which clearly excludes oral evidence for the purpose of varying or contradicting the terms contained in a registered document. The trial Court has committed wrong and error in granting one-third share to the plaintiffs accepting the oral evidence of the DWs overlooking the provision of sections 91 and 92 of the Evidence Act. *Begum Jan and others vs Moklesur Rahman and ors* 6 BLC 580.

Sections 91 and 92—In a proceeding under section 96 of the State Acquisition and Tenancy Act the pre-emptor is a stranger to the document for which it is a case between a stranger and a party to the document and in that case there was no legal bar from the pre-emptees to lead evidence to establish the true nature and character of the deed in question. Although the deed is registered as a sale deed but both the Courts below committed no illegality in allowing the pre-emptees to adduce evidence to show the real nature and character of the disputed deed and the concurrent finding was that the disputed deed was not a deed of sale rather a deed of release cannot be assailed on the ground that the Courts below on consideration of extraneous evidence arrived at such findings. *Abdul Hashem vs Sheikh Ahmed and another* 2 BLC 561.

Sections 91, 92—Mortgage bond—Evidence of notary public as to meaning of bond—Inadmissible in evidence. *Badruddin Muhammad Ali* PLD 1957 PC 199.

Stipulation in an agreement and provisions of sections 91 and 92—When a stipulation is embodied in an agreement which one party told the other will not be enforced, sections 91 and 92 will not stand in the way. *Muhammadi Steamship vs Dada Ltd.* 10 DLR 474.

But if there is any stipulation in an agreement which the plaintiff told the defendant would not be enforced, the defendant cannot be held to have assented to it, and the document is not the real agreement between the parties, and the plaintiff cannot sue upon it. *Muhammadi Steamship vs Dada Ltd* 10 DLR 474.

Bill of lading—Not itself a contract—Oral evidence if admissible: Bill of lading, not being in itself a contract between shippers and ship owners, though evidence of its terms, evidence is admissible of the oral contract of carriage arrived at between the shipper and the ship-owners' agent before the bill of lading had been signed. *Muhammadi Steamship vs Dada Ltd* 10 DLR 474.

Oral evidence of the contents of document reduced to writing—Inadmissible. *Nasir Ahmed Khan vs Mst. Ismat Jahan Begum*, 21 DLR (SC) 145.

Provisions explained—Section 91 of the Evidence Act excludes the admission of oral evidence for proving the contents of the document except where secondary evidence is allowed to be led under any other provision of the Act. Section 92 of the Act supplements section 91 by excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from its terms.

Sale or mortgage—Substance to be looked at—Written evidence to be preferred.

It is an inviolable rule that in considering the question whether a transaction is a sale or a mortgage the Court must find the substance behind the form, but where the oral evidence is unreliable and contradictory the Court cannot depart from the written evidence of documents. *Ananda Chandra vs Abdur Rahman* 30 DLR 311.

Sections 91 and 92—Oral evidence of the acts and conduct of the parties in determining the true nature of the transaction does not infringe section 92 of the Act and can be admitted to show that the document in particular form is different from what it appears to be. *1988 BLD 33(a)*

92. Exclusion of evidence of oral agreement—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Proviso (1)—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, ¹[want or failure] of consideration or mistake in fact or law.

1. Substituted by the Indian Evidence Act, Amendment Act, (XVIII of 1872) section 8, for "want of failure".

Proviso (2)—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3)—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4)—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5)—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6)—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods "in ships from ¹[Chittagong] to London". The goods are shipped in a particular ship which is lost. The fact that the particular ship was orally excepted from the policy cannot be proved.

1. Substituted by the Central Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule, for "Calcutta" (with effect from the 14th October, 1955).

(b) A agrees absolutely in writing to pay B ¹[Taka] 1,000 on the first March, 1873. The fact that, at the same time an oral agreement was made that the money should not be paid till the thirty-first March cannot be proved.

(c) An estate called "the Rampore Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse for ¹[Taka] 500". B may prove verbal warranty.

(h) A hires lodgings of B, and gives a card on which is written—"Rooms ¹[Taka] 200 a month." A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In suit for the amount A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

1. The word "Taka" was substituted for the word "Rs." by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

Case Law

Section 92—Applicability and scope—When oral evidence is admissible to prove secondary evidence. Section 92 of the Evidence Act comes into operation only when the terms of any contract, grant or any other disposition of property or any matter required by law to be reduced to the form of a document, have been proved in accordance with section 91 by the production of the document or by secondary evidence, where such evidence is admissible. Parole evidence is not inadmissible where the proceedings are between the strangers or between a party and a stranger because the rule embodied in section 92 applies to the party to an instrument and their representative in interest. *Saleh Muhammad PLD 1960 WP Lahore 231.*

Section 92—Applicability—When oral evidence inadmissible—Oral evidence to prove that possession was not delivered to validate the gift is not admissible in evidence on account of the bar of section 92 of the Evidence Act. *Jabbar 12 DLR 149; PLD 1960 Dacca 489.*

Section 92—When the terms of a contract are embodied in a document no secondary evidence admissible except under special circumstances. *Shahabuddin vs Saijuddin 36 DLR 337.*

Section 92—No evidence will be admissible to invalidate document unless caused by fraud, intimidation, illegality. *Shahabuddin vs Saijuddin 36 DLR 337.*

Section 92—Proviso—Recitals in deed of sale—No estoppel in the matter of giving other evidence as to nature and character of land—(Pre-emption suit). *Athar Ali 12 DLR 758; PLD 1961 Dacca 349.*

Section 92—Payment of consideration mentioned in deed—Non-payment may be proved by evidence—No estoppel. *Peer Baksh 9 DLR 654; PLD 1958 Dacca 198.*

Section 92—Subsequent conduct—May not be taken into consideration when all parties are representative-in-interest of the parties to document. *Chandra Kanta Howladar 5 DLR 29; PLD 1954 Dacca 8; PLR 1952 Dacca 414.*

Section 92—Possession—Evidence may be given to prove that possession was not delivered to validate gift. *Jabbar 12 DLR 149; PLD 1960 Dacca 489.*

Section 92—Mortgage bond with promissory notes attached to it—Bond equivocal—Evidence of Notary Public interpreting it—Inadmissible. *Badardin Mohammad Ally PLD 1957 Privy Council 199.*

Section 92—Contract on printed form—Previous negotiations by letters in which some terms in the form were agreed to be excluded—Letters admissible as part of the contract *AE Supply Co. AIR 1946 Allahabad 406.*

Section 92—Written contract—When Court may resort to negotiations prior to contract—No ambiguity in written contract—Evidence as to oral negotiations is not admissible. *Joseph Darmanin AIR 1946 Privy Council 50.*

Section 92—Contract providing for reduction of commission to agent by oral agreement—Evidence of such oral agreement—Admissible. *Mirza Najim Effindi Co. AIR 1946 Allahabad 489.*

Section 92—Reconveyance, oral agreement for an additional term of agreement—Test of applicability of section. It is, of course, literally correct to say that as the agreement for reconveyance related to the lands sold it added a further stipulation respecting these lands. That, however, is not an appropriate test of the applicability of the section which is concerned to defeat the modification of a particular document. *Sara Veeraswami PLD 1948 219.*

Section 92—Consideration—Letter giving up property, not mentioning consideration for the act—Passing of consideration may be proved by oral evidence. *Mutayaly AIR 1946 Madras 452.*

Section 92—Documentary evidence—If modification by oral evidence permissible. Documentary evidence cannot be modified to any oral evidence other than that of the surrounding circumstances such as are clearly required to show in what manner the language of the document was related to the existing facts. *Abdul Majid 4 DLR 478 (DB).*

Section 92—Evidence of terms of negotiations preceding written contract not to be looked into unless the written contract is ambiguous—While construing a written contract, the Court will be erring in approaching the question what formed the subject-matter of the negotiations which preceded the written contract between the parties, without first settling to what extent the contract was so ambiguous as to justify resort to evidence as to the negotiations. *Tofai Mia vs Mst Fulbanu 27 DLR 411.*

Section 92—Operation of section 92 of the Evidence Act is confined to the parties to an instrument. *Abdul Khaleq vs Saiman Nessa Bibi 19 DLR 17.*

Section 92—Surrounding circumstances are admissible in evidence—Court's power to arrive at the true purport of a document remains unfettered. *Abdul Khaleq vs Saiman Nessa Bibi 19 DLR 17.*

Section 92—Document—If considered with endorsement on it shows it is a mortgage deed— Endorsement cannot be excluded. *Bonamali Sardar vs Jyotish Ranjan 19 DLR 782.*

Section 92—Sale or mortgage—Real thing is intention—Evidence: The distinction between a sale and a mortgage is one of intention. To prove this intention, oral evidence and other instruments were freely admitted before the passing of section 92 of the Act which excludes evidence of inconsistent oral agreement and provides only for cases of fraud invalidating a document but does not provide for a case where there is no fraud at the time of execution of the deed, but the guarantors subsequently insist that the ostensible sale is a real sale. The Courts are practically limited to the document itself and various tests have been devised for determining whether the intention is to mortgage or to sell. *Abdul Hafiz Chowdhury vs Samir Ali 4 DLR 126.*

Section 92—Question whether a document is a mortgage or a sale has to be determined with reference :

(1) To the terms of the document itself with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to the existing facts.

(2) With reference to another fact; viz., time elapsed from the time when the bargain was made between the parties to the time when the present suit was instituted.

(3) The tests for determination of the question are not the same in this country as in England.

(4) The applicability of Butler's test.

(5) The Court must find the substance behind the form. *Girish Ch Roy vs Hossain Mia 2 DLR 290.*

Section 92—In order to determine whether the document constituted an absolute sale with a condition of repurchase or a mortgage by conditional sale, subsequent conduct of the parties can be taken into consideration when some of them are not representatives-in-interest of the parties to the document.

Section 92 of the Evidence Act does not stand as to that. *Chandra Kanta Howlader vs Rama Prasanna Ganguly. 5 DLR 29.*

Section 92—The question whether a transaction amounted to sale or mortgage must be decided with reference to the materials available to the Board and placed before it though they may be inadmissible before a Civil Court under the provision of the Evidence Act. *Madan Ch Guldar vs Manindra N Guldar 1 DLR 23.*

Section 92—There is no provision under the Act under which the Board can give a declaration as to whether a transaction is a mortgage by conditional sale or sale out and out which does not involve settlement of debt. *Haji Maharam Ali vs Munsar Ali* 2 DLR 310.

Section 92—Documentary evidence—How far can be modified by oral evidence: Documentary evidence cannot be modified with reference to any oral evidence other than that of the surrounding circumstances such as are clearly required to show in what manner the language of the document was related to the existing facts. *Abdul Hafiz Chowdhury vs Samer Ali* 4 DLR 478.

Section 92—Promissory note and section 92 : A promissory note must be in writing and the provisions of section 92 Evidence Act apply when its terms are sought to be modified. *Jagendra M Deb vs Rai Saheb Nirmalya Chakladar*: 8 DLR 68.

Section 92—Contract—Communings leading to a contract. Contract when complete must be construed according to its own terms and cannot be explained or interpreted by antecedent comunings. Communings which lead up to the contract can be used to show what the parties meant but not what they did. *Muhammadi Steamship Co vs Dada Ltd* 10 DLR 474.

Section 92—Sale by deed followed by an agreement to re-sale—Whether oral evidence is admissible to prove the agreement for re-sale: Where there is a deed of sale and also a subsequent oral agreement for reconveyance or re-sale, oral evidence can be adduced to prove that there was an agreement for reconveyance or re-sale as both are independent and separate transactions and there is no question of contradicting, varying, subtracting from or adding something to the contract entered into the sale-deed. 8 PLR (Dac) 182.

Section 92—Statement in a heba-bil-ewaz that consideration money was paid can be disproved by parole evidence. *Peer Baksh vs Rabia Khatun* 9 DLR 654.

Section 92—A recital in the document showing that the donor has given delivery of possession of the heba land is no doubt binding on him and also on the persons claiming through him. But from that it does not necessarily follow that they are not entitled to disprove the recital. Any fact may be proved under the proviso (1) to section 92 of the Evidence Act which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party or failure of consideration, or mistake in fact or law. *Jabbar Pramanik vs Nurjahan Bewa* 12 DLR 149.

Section 92—Oral evidence which goes to vary the terms of the contract may not be admitted into evidence between the parties, but if it is not related to any terms or intends to vary or add to or subtract from its terms, there is no bar of adducing oral evidence to prove matters other than those specifically mentioned in section 92 of the Evidence Act. Oral evidence to prove that possession was not delivered—since delivery is necessary to validate a gift—is admissible in evidence and section 92 of the Evidence Act is not a bar to that. *Jabbar Pramanik vs Nurjahan Bewa* 12 DLR 149.

Section 92—In view of the provision of section 92, a deed of sale cannot be treated as a mortgage-deed and intention to treat it as a mortgage deed cannot also be permitted. *Feroza Majid vs JB Corporation*. 39 DLR (AD) 78.

Section 92—Oral or extraneous evidence to contradict the terms of the contents of a document is inadmissible under section 92 of the Evidence Act. *Feroza Majid vs JB Corporation*. 39 DLR (AD) 78.

Section 92—No evidence is admissible to vary the contents of the documents by oral evidence. *Joyal Abedin Molla vs Aliar Rahman* 1983 BLD (AD) 105.

Section 92—Parole evidence thought not admissible to vary, alter or modify the terms of a written registered document will, however, be admissible to prove that the nature and character of the document is different from what it is or it was a mere paper transaction never intended to be given effect to. *Mozem Par & Ors vs Fazle Karim Biswas & Ors*; 1984 BLD 173.

Section 92—Oral evidence when inadmissible—It is surprising to notice that the Subordinate Judge could be oblivious of the provision of law and decide a question of fact on the basis of inadmissible oral evidence of no worth at all contrary to admitted documentary evidence on record and could also decide the question of fact without consideration of the contents of the relevant documentary evidence. *Pragati Industries Ltd vs Shahida Khatun* 43 DLR 429.

Section 92—Reconveyance—On the face of registered instrument and in the absence of any contemporaneous written instrument, the oral evidence is not at all sufficient to hold that there was any agreement between the parties for reconveyance of the suit land. The established rule of evidence to be relied is that oral evidence is inadmissible for the purpose of asserting the intention of the parties in the face of the written instrument. *Budhiswar Biswas vs Akbar Ali Sheikh* 43 DLR 183.

Section 92—Although oral evidence contradicting the contents of document is not generally admitted, such evidence is admissible in exceptional circumstance when the validity of the document itself on the ground of fraud is in issue. *Tuglak Khan vs Sultan Nasiruddin* 45 DLR 615.

Section 92—Written terms of the contract cannot be altered or varied by oral evidence. *Serajul Islam (Md) vs Sinoy Bhusan Chakraborty and others* 47 DLR 248.

Section 92—There is nothing in section 92 of the Evidence Act to prevent the admission of oral evidence to prove that a mortgage has been discharged partly by payment and partly by release of debt. *Tafzal Ahmed Contractor vs Abdur Rahim and others* 48 DLR (AD) 94.

Section 92—The two registered sale deeds are of the year 1968 when section 95A of the State Acquisition and Tenancy Act was not born even are out and out sale deeds without any condition and shall prevail over other oral evidence and it cannot be construed in any manner whatsoever as an out and out sale with an agreement of reconveyance. *Nur Mohammad Sarkar & others vs Kashem Molla alias Kashem Ali Molla* 5 BLC 640.

Section 92—Proviso—Document (Patta)—any fact may be proved which shows in what manner the language of a document is related to existing facts—no such question involved in the case—no application of the section. *Nazir Ali Munshi vs Bahar Ali Mridha and others* 1 BSCD 179.

Section 92—Proviso (6)—Measurement of Land covered by Kabalas—Terms of Kabalas varying with the pleader commissioner's report—where the High Court upheld the concurrent findings of the courts below and accepted the pleader commissioner's report for determination of the terms of the kabala, no error found with such decision.

The respondent filed a suit for declaration of title and recovery of possession. The main question on which the dispute centred was whether the disputed land was covered by the schedule to the Kabala by which the respondent claimed to have acquired their title to the land. The kabala showed that the transferred land measured 47 hals while the Courts held on the basis of a Pleader Commissioner's report that the land transferred by the said Kabala measured 92 hals.

Observed : The pleader commissioner found that although in the kabala there was mention of 47 hals as the measurement of land but the boundaries of the said land were not identifiable and that there was a reference to a map in the kabala which was produced before the Pleader Commissioner, who by relying on

the said map found it to be measuring 92 hals. The Court below relied upon the Commissioner's report with reference to the said map for the purpose of determining the actual measurement of land covered by the kabala.

The boundaries of the land being not identifiable and the map having been specifically referred to the kabala, reference to the map for the purpose of ascertainment of the area of the land covered by the kabala appeared necessary for the purpose of understanding the terms of the kabala as has been contemplated in proviso (6) to section 92 of the Act, acceptance of the Pleader Commissioner's report by the High Court Division for the purpose of determining the terms of the kabala, Held, Valid. *Ullash Ram Kairi and another vs Amo Tea Co., Limited* 1 BSCD 179.

Section 92—Suit for declaration regarding entitlement to compensation money—The plaintiffs failed to prove their legal character as to their claim to the compensation on the basis of alleged agreement—This section will not operate in a case where the defendants had proved the defence case and apart from Ext. 1 they have proved that Ext. 3 is a forged document. *Md Abdur Rahman and another vs Nawabuddin Ahmed and others* 5 BSCD 174.

Section 92—Whether the oral evidence is admissible to show that a transfer deed, which is apparently a sale-deed, is in fact a deed of exchange—This section excludes oral evidence to contradict the terms of an instrument; but this restriction as to admissibility of oral evidence under this section is applicable only to the parties to the instrument—It is not applicable in the case of stranger to the instrument—In this case the dispute is between one of the parties to the instrument and a stranger—In this connection, the High Court Division rightly relied upon a decision of the Indian Supreme Court in the case of *Rai Hira Devi vs Official Assignee of Bombay*, AIR 1958 (SC) 448. *Brindaban Das and another vs Ershad Ali Mondal and others* 6 BSCD 187.

Section 92—This section of the Act excludes oral evidence to vary the terms of a written contract but it does not preclude the court from examining the real nature of the transaction between the parties. *Habibullah and others vs Md Solaiman and others* 6 BSCD 187.

Section 92 Proviso—This section is no bar to prove or show that a particular document is a benami transaction—Under proviso (I) any fact may be proved which would invalidate any document. *Fuljan Nessa Bibi vs Shamsher Ali Biswas* 6 BSCD 187.

Sections 92 and 91—The oral evidence is not admissible in varying or contradicting the recitals contained in the registered sale deed in view of the

sections 91 and 92 of the Evidence Act which clearly excludes oral evidence for the purpose of varying or contradicting the terms contained in a registered document. The trial Court has committed wrong and error in granting one-third share to the plaintiffs accepting the oral evidence of the DWs overlooking the provision of sections 91 and 92 of the Evidence Act. *Begum Jan and others vs Moklesur Rahman and ors* 6 BLC 580.

Sections 92 and 91—In a proceeding under section 96 of the State Acquisition and Tenancy Act the pre-emptor is a stranger to the document for which it is a case between a stranger and a party to the document and in that case there was no legal bar from the pre-emptees to lead evidence to establish the true nature and character of the deed in question. Although the deed is registered as a sale deed but both the Courts below committed no illegality in allowing the pre-emptees to adduce evidence to show the real nature and character of the disputed deed and the concurrent finding was that the disputed deed was not a deed of sale rather a deed of release cannot be assailed on the ground that the Courts below on consideration of extraneous evidence arrived at such findings. *Abdul Hashem vs Sheikh Ahmed and another* 2 BLC 561.

93. Exclusion of evidence to explain or amend ambiguous documents—When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations

(a) A agrees, in writing, to sell a horse to B for ¹[Taka] 1,000 or ¹[Taka] 1,500. Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

94. Exclusion of evidence against application of document to existing facts—When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

1. The word "Taka" was substituted for the word "Rs." by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

Illustrations

A sells to B, by deed, "my estate at ¹[Rangpur] containing 100 bighas". A has an estate at ¹[Rangpur] containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Case Law

Section 94—Acquisition of title when possible by transfer of possession. A person cannot acquire title by transfer of possession where purchase by registered deed is the only method prescribed by law. The kabala is the primary evidence of what was purchased, and where the evidence is plain in itself and unambiguous as to existing facts, extrinsic evidence of possession cannot be adduced to show that a different land was purchased, for even if such possession is proved, it cannot prevail against the deed of title; it can only mean that the purchaser took possession of a wrong land. *Durga N Terafdar vs Loke N Sarkar*, 5 DLR 558.

Section 94—Extrinsic evidence not admissible to construe an unambiguous document—Extrinsic evidence is not, therefore, admissible to construe a document which is plain and unambiguous, and the intention of the parties to such a document must be gathered from the language of the document itself. *Mst Dhanpatti vs Badri Singh*, 1956 IC 53.

Section 94—Evidence of conduct is not admissible to construe an unambiguous document—While the true construction of an obscurely framed document may be determined by reference to the conduct of the parties, no such procedure is admissible when the terms of the instrument are unambiguous, for no amount of acting by the parties can alter or qualify words which are plain and unambiguous. *Punjab National Bank vs SB Chowdhury*, 1943 AIR (Orissa) 392.

Section 94—Evidence of terms of contract—Parties in the contract are bound to fulfil the terms of the contract specifically. If they fail to do so, the Court will pass a decree for specific performance of the contract. *BCIC vs Grand Basia Company Ltd* 43 DLR 256.

95. Evidence as to documents unmeaning in reference to existing facts—When language used in a document is plain in

1. Substituted by the Central Laws (Statute Reforms) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule, for "Rampur" (with effect from the 14th October, 1955).

itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustrations

A sells to B, by deed my house in ¹[Dhaka]."

A had no house in ¹[Dhaka], but it appears that he had a house at ²[Narayanganj], of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at ²[Narayanganj].

Case Law

Section 95—Where it is not clear from the terms of a sale-deed whether the vendor who held the property as a mortgagee sold merely his mortgagee rights, or made an absolute sale of the property, oral evidence may be given to show what was in fact sold. *Daulat vs Baliram, 1929 AIR (Nag) 267.*

Section 95—Oral evidence is admissible to explain a latent ambiguity in a decree, *Jahuri Lal vs Kandhai Lal, 1935 AIR (Punj) 123.*

Section 95—The person who committed fraud should not be allowed to enjoy the fruits of his own fraud. The plaintiff has not acquired any right and title by such a fraudulent transaction by a subsequent registered sale deed when the right and title of 4 plots of land which belonged to vendor Abdul Kader had passed to the defendant-petitioner by virtue of the registered sale deed dated 26-5-65. *Abdur Rahman Mia (Md) vs Md Saber Ali Mia 4 BLC 419.*

Section 95 Illustration—Patta—whether unmeaning in reference to existing facts—Illustration to section 95 shows that when a document relates to a property the location of which may require an explanation evidence may be laid on the point—No such question involved in the case—No application of the section. *Nazir Ali Munshi vs Babar Ali Mridha & others 1 BSCD 179.*

96. Evidence as to application of language which can apply to one only of several persons—When the facts are such that the

1. The words "Dacca" was substituted for the word "Karachi" by Act VIII of 1973, 2nd Schedule, (with effect from 26-3-71).

2. The word "Narayanganj" was substituted for the word "Keamari", by Act VIII of 1973, 2nd Schedule, (with effect from 26-3-71).

language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations

(a) A agrees to sell to B, for ¹[Taka] 1,000 "my white horse". A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to ²[Saidpur]. Evidence may be given of facts showing whether ³[Saidpur in Khulna or Saidpur in Rangpur] was meant.

97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies—When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustrations

A agrees to sell to B "my land at X in the occupation of Y". A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X, Evidence may be given of facts showing which he meant to sell.

98. Evidence as to meaning of illegible characters, etc—Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

1. The word "Taka" was substituted for the word "Rs." by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

2. The word "Saidpur" was substituted for the words "Haidarabad" by Act VIII of 1973 2nd Schedule (with effect from 26-3-71).

3. The words within square brackets were substituted for the words "Haidarabad in the Dekkhan or Haidarabad in Sind" by Act VIII of 1973, 2nd Schedule, (with effect from 26-3-71).

Illustrations

A, a sculptor, agrees to sell to B, "all my mods". A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Case Law

Section 98—The ordinary rule is that the words of a document are to be understood in their ordinary sense. But where it is clear, either from the context or the facts, that such meaning cannot have been intended, extrinsic evidence may be given to show that they were used in a peculiar sense. *Muhammad Afzal vs Din Muhammad, 1947 AIR (Lah) 117.*

99. Who may give evidence to agreement varying terms of document—Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they made an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

Case Law

Section 99—The word "varying" in section 99 is used in the same sense as the words "contradicting, varying, adding to, or subtracting from" in section 92. *Pathammal vs Syed Kalai Ravauthar, 27 ILR (Mad) 329.*

100. Saving of provisions of Succession Act relating to wills—Nothing in this Chapter contained shall be taken to affect any of the provisions of the ¹[Succession Act, 1925] as to the construction of wills.

1. The words, comma and figures within square brackets were substituted for the words "Indian Succession Act (X of 1865)" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VII of 1973) 2nd Schedule (with effect from 26-3-71).

Part III

PRODUCTION AND EFFECT OF EVIDENCE

Chapter VII

OF THE BURDEN OF PROOF

101. Burden of proof—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts.

Case Law

Section 101—Burden of proof—Prosecution need not prove all incidental matters referred to by a witness. It is not part of the duty of the prosecution to prove all incidental matters that are mentioned by a witness in his deposition, and that if the matter appears to the defence to be material and it is intended to contradict a witness as to that matter, it is the duty of the defence to produce evidence to rebut the statement of the witness. *Ghulam Safdar PLD 1956 Federal Court 126.*

Section 101—Promissory note evidencing passing of consideration produced by plaintiff—Presumption that consideration was paid—Onus on defendant to prove the contrary. *Annamalai PLD 1947 Privy Council 82.*

Section 101—When the entire evidence on both sides is before the Court, the debate as to onus is purely academical.

When a question was raised as to the party upon whom the onus in respect of the matter vested.

Held—It is not necessary to enter upon a discussion of the question of onus, because the whole of the evidence in the case is before the Court and it has no difficulty in arriving at a conclusion in respect thereof. *Kumbhan vs Tangirala 2 DLR 83.*

Section 101—Onus—Question of, arises when evidence is equally balanced—Case clearly determinable on evidence—Question of onus or burden of proof does not arise. *Harmes AIR (33) 1946 Privy Council 156.*

Section 101—When the entire evidence is before the Court the discussion as to the onus of proof is purely academical. Onus however is a determination factor when there is no evidence or the evidence is so evenly balanced that the Court can come to no definite conclusion. *Jagmohan Lakhmichand AIR (33) 1946 Nagpur 84.*

Section 101—Compromise decree—Purchaser promising to pay by instalments—Not paying installment in time—Onus is on purchaser to show that they took all reasonable steps to make payment. *Bishan Singh PLD 1947 Privy Council 288.*

Section 101—Burden of proof—Heavy on the person producing the will—Duty of Court. *Harmes vs Hinkson AIR (33) 1946 Privy Council 156.*

Section 101—Undue influence—Allegation that the will was made under—Burden of proof on person challenging the will. *Harmes vs Hinkson AIR (33) 1946 Privy Council 156.*

Section 101—Murder—Committed in the presence of two persons—Explanation of both unsatisfactory—Guilty of murder. *1060 KLR (L) 591 (DB)*

Section 101—Prosecution to prove each ingredient of the offence. Subject to certain exceptions the most important of which is to be found in section 105, Evidence Act, the admitted and otherwise firmly established principle being that, before the prosecution can ask for conviction of a criminal offence, it is its duty to prove each ingredient of the offence beyond a reasonable doubt. *Shakir Hussain PLD 1956 SC (Pak) 417; PLR 1957 (1) Lahore (WP) 180.*

Section 101—Waqf—Plaintiff seeking declaration that the possession of accused is on behalf of community as mutwalli of waqf—Burden of proof on the plaintiff. *Mohammad Shah PLD 1947 SC (Ind) 111.*

Section 101—Plaintiff files receipt in support of his case of settlement of the disputed land—Burden of proof is on him to prove the genuineness of the rent-receipt. *Ajufannessa vs Safar Miah* 30 DLR (SC) 41.

Section 101—No presumption that a rent-receipt purported to be granted by landlord is a genuine one and that its contents are true—Onus is on the person who files it. *Ajufannessa vs Safar Miah* 30 DLR (SC) 41.

Section 101—Burden of proof lies on the person who asserts that a fact exists. *Haque Bros. vs Shamsul Haque*. 39 DLR 290.

Section 101—The initial onus lies on the plaintiff to prove his title. [(32 DLR (AD) 29 distinguished]. *Abani Mohan Saha vs Asst. Custodian*, 39 DLR (AD) 223.

Section 101—It is not the case that the burden of proof on the prosecution to establish the acceptance or the agreement to accept or the obtaining or the agreement to obtain the gratification of the valuable thing is at all displaced by this section. The burden still remains on the prosecution and it is only when the prosecution has discharged that burden that the presumption of (a) motive of reward or (b) absence or inadequacy of consideration will be made against the accused. But not until then such presumption can operate against the accused, notwithstanding section 4, Prevention of Corruption Act, 1947. The burden still remains upon the prosecution to prove first the accused had accepted or agreed to accept or has obtained or agreed to obtain the gratification of the valuable thing and this proof must be in accordance with the standard of proof laid down by section 3, Evidence Act. *Abdur Rahman vs State* 27 DLR 268.

Section 101—Onus of proof—It is for the defendant to prove that the disputed document was executed on the purported date—Mere assertion in the written statement cannot be treated as evidence—Document being between two brothers registered at a different Sub-Registrar's office and attesting witnesses being close relations of the recipient, there are strong circumstances in favour of collusion. *Haji Karamat Ali Master vs Lehajuddin Talukder* 41 DLR 447.

Section 101—Benami transaction—Onus of proof—Onus lies on him who asserts that the transaction is a benami one. *Mohamudul Huq vs Golap Bia* 41 DLR 314.

Section 101—Plaintiff to prove his case—It is one thing to reject the defendant's evidence but it is quite another to put the plaintiff's evidence in its place. Disbelief of the defendant does not mean belief of the plaintiff. Both may be in error. *KM Pereira vs HG Martin Dias* 10 DLR (PC) 1.

Sections 101—It is a cardinal principle of law that the plaintiff has to prove his case independent of the weakness or defects of defendant's case. Even if a foreign judgment is admissible in evidence, it does not improve the plaintiff's

case as he has hopelessly failed to prove the alleged agreement for exchange with Ghosh brothers and the plaintiff's suit is barred by limitation as he had been out of possession for long 20 years from 1949 to 1969. *Moksed Ali Mondal vs Abdus Samad Modal* 9 BLC (AD) 220.

Section 101—Proof of guilt of the accused. Any circumstance established by defence evidence or prosecution evidence favourable to the accused must go to his benefit. *Safdar Ali vs Crown* 5 DLR (FC) 107.

Section 101—Burden of proving that accused's case comes within exceptions. *Mohim Mondal* 15 DLR 615.

Section 101—Reasonable doubt—Prosecution not to examine all possible defence. *Safdar Ali* 5 DLR (FC) 107.

Section 101—Burden on the accused not so heavy. *Safdar Ali* 5 DLR (FC) 107.

Section 101—Burden of proof—Burden of proof as to particular fact: Section 101 of the Evidence Act lays down that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist and section 103 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on the particular person. *Ajufannessa vs Safar Miah*, 30 DLR (SC) 41.

Section 101—Benami transaction—How may be proved—The onus of establishing benami is on the defendants and that must be strictly established. The decision on benami cannot rest on the mere suspicion, but must rest on legal ground and legal testimony. *A Rashid* 3 DLR 471 (DB).

Section 101—Plaintiff failed to establish that there was no marriage between Amir Ali and Monowara and also that Khorshed Alam is the son of Baramoni—Again all the Courts below worked under a misconception of law as to the question of onus of proof and they placed the onus on the defendant about Monowara's marriage—Which was clearly for the plaintiff to discharge. *Khorshed Alam vs Amir Sultan* 38 DLR (AD) 133.

Section 101—Plaintiff to discharge the onus of proof that defendant was the son of Baramoni, a prostitute and was adopted by Amir Ali,—Plaintiff did not examine Baramoni to prove his case—Appellate Court's finding that Baramoni was not examined as witness by defendant which shows that defendant 1 was not the son of Amir Ali. This conclusion is unwarranted and contrary to all

presumptions of law built up over the last 150 years. *Khorshed Alam vs Amir Sultan 38 DLR (AD) 133.*

Section 101—In a case of disputed parentage onus is upon the plaintiff to establish that there was no marriage and not upon the defendant to prove marriage. *Khorshed Alam vs Amir Sultan Ali Haidar; 1985 BLD (AD) 122(b)*

Section 101—Disbelief of the defence case *ipso facto* does not make the plaintiff's case believable. Even in the case of an *ex parte* disposal of a suit, the court is required to come to a finding on assessment of the materials that the plaintiff has been able to prove his case. *Sheikha Salimuddin vs Ataur Rahman 43 DLR 18.*

Section 101—Even if the defence fails to establish its case that will not make the prosecution case proved as the burden of proof on the prosecution never shifts. *Shadat Ali vs State 44 DLR 217.*

Section 101—The defendant took the ground that late Alimuddin did not sign the will, the onus upon the defendant to prove that late Alimuddin did not sign the same. *Moinuddin Ahmed alias Farook vs Khursheda Begum and ors 54 DLR 354.*

Section 101—আসামী দোষ স্বীকার না করলে তার বিরুদ্ধে আনীত অভিযোগ প্রমাণের দায়িত্ব অভিযোগকারী পক্ষের। *Sabur Alam and others vs State (Spl. Original) 51 DLR 16.*

Section 101—Onus was squarely upon the defendant side to substantiate the plea that price of the suit property was Taka thirty lac at the time of execution of the deed of agreement but the trial Court wrongly shifted the onus upon the plaintiff and wrongly refused the specific performance of contract. *Shamsul Huda (Md) and another vs Mahmooda Khatun and others 5 BLC 649.*

Section 101—The provision as to the burden of proof is founded on the Rule "*ei incumbit probatio, qui dicit non qui negat*"- "the burden of proving a fact rests on the party who substantially assents to the affirmative issue and not upon the party who denies it; for a negative is usually incapable of proof". This Rule is derived from the Roman Law and is supportable not only on the ground of fairness but also upon that of the greater practical difficulty which is involved in proving a negative than in proving an affirmative. This Rule is an ancient Rule founded on consideration of good sense and should not be departed from without strong reasons. *Shahani Bibi being dead her heirs : Mohammad Azim and others vs Nur Islam being dead his heirs: Doly Islam and others 4 BLC 195.*

Section 101—Law is settled that plaintiff must succeed on his strength and cannot have any reliance on the weakness of the defendant. *Mohammad Hussain vs Abul Kashem and others* 3 BLC 131.

Section 101—The burden lies on the plaintiff to prove his case and he must succeed on his own strength only and not at the weakness of the adversary. *Moinab Bibi and others vs Abdur Rashid Mridha & others* 3 BLC 6.

Section 101—When the defendants had denied execution of bainapatra, the onus was on the plaintiff to prove it which the plaintiff failed to do so, the High Court Division has rightly found that the learned Subordinate Judge was not correct in coming to the conclusion of genuineness of bainapatra or payment of earnest money or of the delivery of possession and therefore set aside the impugned Judgment and decree of the plaintiff's suit. *Gofran Miah (Md) vs Raniza Khatoon and others* 6 BLC (AD) 131.

Section 101—Plaintiff has to prove his case independent of the weakness of the defence case. From the materials on record it appears that the plaintiff has failed to prove genuineness of their documents and also their possession which escaped the notice of the High Court Division and it only discussed the evidence of the defence and finding fault dismissed the defence case and restored the decree passed by the trial Court in favour of the plaintiff which is not sustainable. *Golzar Ali Pramanik vs Saburjan Bewa and others* 6 BLC (AD) 41.

Section 101—The evidence as adduced by the plaintiffs manifestly proved that they were financially solvent and they were always ready to deposit the balance consideration money but the defendants produced no materials on record proving the price of the suit property was higher at the relevant time and hence the defendants signally failed to discharge the onus which was heavily on them when the learned trial Judge misdirected himself in placing the onus upon the plaintiffs. It is posited here that inadequacy of price can hardly be a ground for refusing specific performance of contract. *Shamsul Huda (Md) and another vs Mahmooda Khatun and others* 6 BLC 82.

Section 101—Decree in favour of the plaintiff can be awarded only on the strength of the plaintiff's case and not on the weakness of the defendant's case. *Fatema Khatun vs Fazil Mia* 6 BLC 241.

Sections 101 and 102—When both the parties lead evidence question of onus is out of place and the matter is to be decided on the evidence led by the parties. *Ishaque (Md) vs Ekramul Haque Chowdhury and others* 54 DLR (AD) 26.

Sections 101 and 103—Plaintiff disowned her signatures on the withdrawal slips while the defendant admitted that the payment was made on Bengali signatures which was against the Banking Rules as specimen signature was in English and on comparison it was found that the signatures on withdrawal slips

did not tally with the specimen signature and in the written statement it was also admitted that the signatures of the plaintiff were not verified which proved gross negligence of the defendant-bank. In such circumstances, the plaintiff satisfied her initial onus and it then shifted upon the defendant who failed to prove the contrary. *Binodini Gain vs Agrani Bank Limited 1 BLC 88.*

Sections 101 and 102—The definite case of the Government being that the suit property is an abandoned property, onus lies on them to prove that it is an abandoned property. *Bangladesh vs Hosne Ara Begum and others 48 DLR 511.*

Sections 101 and 102—Onus—May be shifted by plaintiff by showing that a presumption exists in his favour—When the Court presumes the existence of a fact, the burden of proving its existence is on the party that asserts its non-existence. *Sadar Bibi PLD 1954 Lahore 480 (DB).*

Sections 101 and 102—Section 101 makes it obligatory upon the plaintiff of a civil action to prove the existence of facts on which he bases his claim—If the evidence adduced by the plaintiff to discharge the onus of proof as referred to in Section 101 is not to the satisfaction of the Court, his action shall fail in the way as indicated in Section 102 of the Act. *Jobed Ali Mondol and others vs Jamini Kanta Dey and others 5 BSCD 175.*

Sections 101 and 102—Onus—Onus on whom lies in a suit for specific performance of a contract for sale of property where the signature in the documents recording the contract is admitted by the defendant pleading that the same were obtained from them by threat, intimidation and coercion—Law does not require that all facts alleged by the plaintiff shall be strictly proved, for burden of proof is often lightened by presumptions, admissions and estoppels—Primarily, onus of course lies, in a civil proceeding, upon the plaintiff—Primary onus has been discharged satisfactorily by the plaintiff—Then onus has shifted upon the defendants to prove their particular fact that their signatures were extorted which they failed to discharge—Consequently, the evidence adduced by the plaintiffs as to the execution of the documents stands. *Jabed Ali Mondol and others 5 BSCD 175.*

Sections 101, 103—Defence case of accident—No presumption that the act was voluntary and intentional—Burden of proof to establish the guilt. The question for determination was whether the prosecution case of intentional killing, or the defence case of accident was true. In such a case, even if an act by the accused resulting in death is admitted there can be no presumption that the act was voluntary and intentional, and these elements must be established by the prosecution. It is not correct to say that the accused must be found guilty if he fails to show that circumstances necessary to establish the case of accident pleaded by him. *Sultan Mohd 6 DLR (FC) 28.*

Sections 101 and 103—Mere filing of a rent receipt or a private document without formal proof thereof and without proving the contents of such documents cannot fulfil the requirements of law. *Bangladesh vs Md Aslam* 44 DLR 69.

Sections 101 and 104—Onus of proof—Where no difficulty arises in arriving at a conclusion, the question of onus recedes to the background, but where court finds it difficult to make up its mind the question comes to the foreground and becomes the deciding factor. In the present case the onus of proving the oral contract lies on the plaintiff and this onus remained constant as neither the oral contract nor any part of it was admitted by the defendant. *Janab Ali (Md) vs Md Moslem Uddin* 44 DLR 291.

Sections 101-104—Custom in derogation of general law—Party alleging must prove it. *Muhammad Bagar* PLD 1956 SC (Ind) 318.

Sections 101-104—Defendant though pleaded marriage of Monwara with Amir Ali yet the onus of proof is not on him (but on the plaintiff.)

Plaintiff failed to prove that defendant is the son of the prostitute Baramoni—Court below shifted the onus on the defendant to prove marriage of Monwara with Amir Ali contrary to law. *Khorshed Alam vs Amir Sultan*. 38 DLR (AD) 133.

Sections 101-104 and 106—Petitioner objecting to transfer of village C to Pakistan under Part relating to Berubari Union No. 12 in Sch. 2 of Constitution (Ninth Amendment) Act (1960)—Petitioner alleging west horizontal line and therefore Amendment Act is impossible of implementation—Onus lies on him to show that attempt made by Government to transfer the village is illegal and unconstitutional—Petitioner if unable to produce evidence in support of plea cannot require the Government to show his plea untenable—Claim by petitioner that location of different villages is a matter within special knowledge of Government and should therefore be established by them is also not right—Further, where both parties have produced the maps relied on by them and the Court accepts the maps produced by Government as reliable, no question of onus really arises. *Ram Kishore Sen vs Union of India* 27 DLR (SC) 93.

Sections 101 and 106—Section 106 does not relieve the prosecution of the duty to discharge its onus of proving a case as has been imposed by section 101 of the Evidence Act. *Shahajahan Talukder @ Manik and others vs State* 47 DLR 198.

Sections 101 and 106—Since no special knowledge of the relevant fact as to committing of the crime could be attributed to the accused the provisions of section 101 & 106 of the Evidence Act have no applicability in the case. *Kawsarun Nessa and another vs State* 48 DLR 196.

Sections 101 and 106—Will—onus of proof is on the person propounding the will : In the courts in India a caution has been sounded to the effect that notwithstanding the value of the decisions in the cases of *Tyrrel vs Painton* and

Pandock Barry vs James Butlim laying down the rule that when a will is sought to be propounded the onus of proof in every case lies on the person seeking to prove the will to satisfy the conscience of the court that the instrument so propounded in the court is the last will of the testator, it must not be forgotten that the law is laid down in clear and imperative terms by Acts of the Indian Legislature, and it is by the provisions of those Acts that a court must be guided. *Somarendra N Roy vs Girish Ch. Roy* 12 DLR 788.

Sections 101 and 114(g)—In a pending Rule issued on the civil revisional application against judgment of reversal the plaintiff-petitioners filed an application under Order VI, rule 17 of the Code for amendment of the plaint for confirmation of joint possession in the suit land along with the prayer for declaration of title. It appears that the trial Court gave the finding of the possession of the suit land in favour of the plaintiffs which was not reversed by the appellate Court. It further appears that the DW I deposed that they possessed the suit land through bargadars, therefore, it was incumbent upon them to examine the bargadars and for non-examination of the bargadars an adverse presumption can very much be drawn against the defendants under section 114(g) of the Evidence Act. *Ramesh Chandra Mondal and ors vs Hemayet Ali Sheikh and ors* 9 BLC 525.

Sections 101 and 155—In view of the plaintiff's own case on which he must succeed or fall and further in view of the findings made by the High Court Division that the deceased plaintiff came before the Court with a false case and the substituted plaintiffs came before the Court with false oral evidence contrary to the documentary evidence, the point that by reason of failure of the defendant to pay the second instalment of the decretal dues within time the plaintiff was relieved of the burden under the contract for sale as has been raised by the learned Advocate for the petitioners is not only a bit loud but also rather late to deserve any consideration. *Shahida Khatun & others vs Progati Industries Ltd and another* 3 BLC (AD) 73.

102. On whom burden of proof lies—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

Case Law

Section 102—Illegality—Presumption against—Party alleging must prove. The law presumes against an illegality, and the burden of proving that an illegality has taken place rests on the party who so asserts. *Paper Sales Ltd AIR (33) 1946 Bombay 429.*

§ **Section 102**—Defendant admitting that goods were hired by him—Onus of proving the return of goods shifts to the defendant. *Muhammad Islam vs Abdul Latif PLD 1957 (WP) Karachi 409.*

Section 102—Entries in Jamabandi—Presumption of correctness—Party challenging the correctness of entries must prove the allegation. *Nur Jahan Begum vs Muhammad Ahsan Ullah Khan PLD 1960 (WP) Lahore 181; PLR 1960 Lahore (WP) 652.*

Section 102—Cheque issued as loan—Onus of proving that payment as loan is on plaintiff. *Allah Ditta vs Allah Wasaya PLD 1956 Lahore 521.*

Section 102—Onus of proving that possession has been wrongly recorded in the CS Khatian is on the person who alleges it. *Azhar Bepari vs Abdul Aziz Gazi, 22 DLR 36.*

Section 102—Burden of proof—Circumstances when it shifts from one side to another—The section shows that the initial burden of proving a prima facie case in his favour rests on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff.

It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden, but if it has on the evidence no difficulty at arriving at a definite

conclusion, then the burden of proof on the pleadings recedes into the background. *Kambhan Lakshmanna vs Tangirala Venkateshwarla*. 2 DLR (PC) 83.

Section 102—Onus is an important matter when there is a doubt as to which side should be believed and no evidence, or sufficient evidence to establish the allegations of one side or the other has been given; but in a case where the testimony given on behalf of each party has been fully heard and the learned judge had evidence before him on both sides and had to make up his mind upon it, no question of onus arises. *Ng Su Hain vs Official Assignee, Federation of Malaya* 5 DLR (PC) 214.

Section 102—Burden of proof on pleadings never shifts : What is called the burden of proof on pleadings should not be confused with the burden of adducing evidence which is described as "shifting". The burden of proof on the pleadings never shifts, it always remains constant. *Kambhan Lakshmanna vs Tangiraly Venkateshwarla*, 2 DLR (PC) 83.

Section 102—Burden of proof—Ejectment suit—It is settled law that in suit for ejectment the burden of proof lies on the plaintiff to show that he has a right to eject the defendant before the onus is shifted to the defendant to prove that he has a right of permanent occupancy. *Kambhan Lakshmanna vs Tangirala Venkateshwarla*. 2 DLR (PC) 83.

Section 102—Burden of proof when tenant had been let into possession by the landlord: In a case where it is either admitted or found as a fact that the tenant had been let into possession by the landlord who was the absolute owner, if the tenant claims rights of occupancy, the burden will be on the tenant to prove that he has such rights. *Kambhan Lakshmanna vs Tangirala Venkateshwarla*, 2 DLR (PC) 83.

Section 102—Question of burden of proof—As a plea when not available: When both parties have made their best efforts to prove their respective cases and on the evidence adduced the Court is able and has come to a definite conclusion, it is not open to the unsuccessful party to claim that he should yet succeed on the ground that the onus lay on the other party. The onus in such a case is discharged by the balance of evidence in favour of the successful party. *Md Cherag Ali vs Dullay Khan* 5 DLR 17.

Section 102—Question of onus, when becomes academic—When the entire evidence on both sides is once before the Court the debate as to onus is purely academical.

When a question was raised as to the party upon whom the onus in respect of the matter vested, it is not necessary to enter upon a discussion of the question of onus, because the whole of the evidence in the case is before the Court and it has no difficulty in arriving at a conclusion in respect thereof.

Where no difficulty arises in arriving at a conclusion, the question respecting the onus recedes into the background, but where the Court finds it difficult to make up its mind the question comes to the foreground and becomes the deciding factor. *Kambhan Lakshmanan vs Tangirala Venkateshwarla*, 2 DLR (PC) 83.

Section 102—There is no further burden of proof when the assertion of PW1 remains unchallenged. *Ratan Kha vs State* 40 DLR 186.

Section 102—The observation of the Sub-Judge was correctly made. The onus was not wrongly placed on the defendant.

Section 102—Contention of the appellant's Counsel regarding the question of limitation.

The finding of the lower appellate Court cannot be construed as making of new case regarding the barga settlement.

Limitation is a mixed question of law and fact after considering the evidence both oral and documentary. *Afroz Rashid vs Fazlul Karim* 40 DLR (AD) 79.

Section 102—Burden of proof—Wrong allocation of burden of proof on the accused appellants to prove their innocence is a dangerous proposition—Conviction cannot be based on materials produced by prosecution. *Abdul Khaleque vs State* 41 DLR 349.

Section 102—Onus in a suit for declaring a Heba-bil-ewaz deed in favour of the defendant was forged and without consideration—In a suit for declaring a deed in favour of the defendant as forged initial onus is upon the plaintiff but the same is shifted on the defendant when the plaintiff discharged the onus and the onus of proving the formalities in connection with the deed is upon the person who upholds the transaction. *Momtajur Rahman vs KM Maqbul Hussain*; 1985 BLD 18(a).

Section 102—Burden of Proof and Onus *Probandi*—The plaintiff has produced not an agreement of sale but a receipt of earnest money, signed not by the owner of suit properties but by her son—The basis of his suit is an oral agreement, not Exhibit 4 the receipt which is only a supporting evidence. The defendants have no burden to prove their alternative story with regard to the creation of Exhibit 4. *Al-Haj Ahmed Hossain vs Rejaur Rahman* 42 DLR (AD) 225.

Section 102—Burden of proof—plaintiffs having failed to prove their title and possession in the suit land there is no necessity of deciding whether the suit land vested in the Government. *Noor Mohammad Khan vs Bangladesh* 42 DLR 434.

Section 102—Burden relating to forged document—The petitioner-pre-emptor discharged his initial burden (as to his knowledge of limitation for the pre-emption proceeding) by filing in court the copy of a petition showing the date of his knowledge. The opposite parties' case is that the petitioner by forging the thumb impression of the person concerned filed the petition in order to create cause of action for the pre-emption case but there is no explanation by them as to why the person concerned (one Aynal Khan) could not be produced to deny his signature in the petition (in proof of the forgery). The opposite parties have therefore failed to discharge their burden to show that the petition was a forged document. *Abdul Malek Howlader vs Umme Kulsum* 42 DLR 459.

Section 102—Where initial onus is discharged by the plaintiffs by giving slight evidence the burden shifts to the defendant to prove the contrary. *Amirunnessa vs Golam Kashem* 42 DLR 499.

Section 102—In a case where the alleged executant denies execution of a document it is the duty of the plaintiff to prove such execution. *Serajul Islam (Md) vs Binoy Bhusan Chakraborty and others* 47 DLR 248.

Section 102—The onus is on the investigation to explain the delay in producing the accused before the Magistrate for making the confessional statement. *Shaharul Islam alias Green vs State* 1 BLC 524.

Section 102—Evidence in a suit for specific performance of contract—Onus of proof, question as to.

In the instant case 4 witnesses have given testimony that defendant Nos. 1 & 2 entered into a contract with the plaintiff's father to sell the land, that they executed the Bainapatra Ext. 1, which was written by one of them—PW 4—by putting their signatures thereon and that they received Taka 2600 on the spot on the same day. PWs 1 and 3 further testified that on a later date defendant No. 2 received the balance of Taka 400 and acknowledged it by putting his signature on the receipt written by PW 3—Ext. 1(a), Defendants Nos. 1 & 2 denied this contract for sale and receipt on consideration. But the PWs are found to be disinterested gentlemen of the locality having no motive whatever to depose falsely. As such, there is no reason why their testimony should not be given due credit. The first appellate Court while considering this evidence adduced by the plaintiffs observed that this evidence can hardly be relied on ; but we find no

reason whatever for rejecting this evidence. The finding of the first appellate Court that the plaintiffs failed to prove their contract is clearly against the overwhelming weight of evidence on record and is perverse, such a finding cannot claim immunity from interference in second appeal. *Jabed Ali Mondol and others vs Jamini Kanta Dey and others* 5 BSCD 175.

Sections 102 and 101—When both the parties lead evidence question of onus is out of place and the matter is to be decided on the evidence led by the parties. *Ishaque (Md) vs Ekramul Haque Chowdhury and others* 54 DLR (AD) 26.

Sections 102 and 101—The definite case of the Government being that the suit property is an abandoned property, onus lies on them to prove that it is an abandoned property. *Government of the People's Republic of Bangladesh vs Hosne Ara Begum and others* 48 DLR 511.

Sections 102 and 101—Section 101 makes it obligatory upon the plaintiff of a civil action to prove the existence of facts on which he bases his claim—If the evidence adduced by the plaintiff to discharge the onus of proof as referred to in Section 101 is not to the satisfaction of the Court, his action shall fail in the way as indicated in Section 102 of the Act. *Jabed Ali Mondol and others vs Jamini Kanta Dey and others* 5 BSCD 175.

Sections 102 and 101—Onus—Onus on whom lies in a suit for specific performance of a contract for sale of property where the signature in the documents recording the contract is admitted by the defendant pleading that the same were obtained from them by threat, intimidation and coercion—Law does not require that all facts alleged by the plaintiff shall be strictly proved, for burden of proof is often lightened by presumptions, admissions and estoppels—Primarily, onus of course lies, in a civil proceeding, upon the plaintiff—Primary onus has been discharged satisfactorily by the plaintiff—Then onus has shifted upon the defendants to prove their particular fact that their signatures were extorted which they failed to discharge—Consequently, the evidence adduced by the plaintiffs as to the execution of the documents stands. *Jabed Ali Mondol and others* 5 BSCD 175.

Sections 102 and 103—Burden of proof—When both parties adduced evidence in order to set up their respective cases, the question of onus of proof loses significance. *Chinibash Pranamsnik vs Md Nurul Hossain Mollah* 6 BSCD 188.

Sections 102-104—The plaintiff is to prove that he is entitled to the property he claims. When he does not prove his case the defendant is acquitted. *Abdul Gani Khan vs Tamijuddin Howladar* 5 DLR 440.

Sections 102 and 104—It is the settled principle of law that when the entire evidence come to the record the onus of proof is divided and splitted up and academic. *Chan Mahmood and others vs Md Hossain Ali being dead his heirs 1 (Ka) Md Sekander Ali & ors 3 BLC 364.*

103. Burden of proof as to particular fact—The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

¹(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

Case Law

Section 103—Burden of proof—Act of sodomy is not done in presence of others who might be eye-witness—But prosecution is not absolved from the burden of proving the offence. *Nur Mohammed vs State 41 DLR 301.*

Section 103—Absence of medical report about the sodomised act casts serious doubt on the prosecution case.

Burden of proof heavily lies on the prosecution to prove the alleged act by reliable and convincing evidence. *Nur Mohammed vs State 41 DLR 301.*

Section 103—Fraud in obtaining a document—Onus to prove fraud lies on the person who makes the allegation. *Muhammad Zaker vs Mastanser PLD 1961 Dhaka 71.*

Section 103—Both parties trying their best to adduce evidence in their favour—Onus immaterial—Onus discharged by balance of evidence in favour of successful party. *PLD 1954 Dhaka 143; PLR 1952 Dhaka 626; 5 DLR 17.*

Section 103—Subsequent transferee—When may have title to property—Burden of proving that he had no notice of prior transfer is on him. *Khuda Bakhsh vs Abdul Jabbar PLD 1952 Peshawar 32.*

1. Sic, in the Act as published in the Gazette of India, 1872, Part IV Pl there is no illustration (b).

Section 103—Party asserting the fact—Must prove it—It is the party who asserts a positive fact who should be called upon to prove his assertions and not the party who denies that fact. It is easier to prove positive than to prove negative. *Mulkhan Bibi PLD 1959 (WP) Lahore 710.*

Section 103—Burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence: The petitioner claimed that he could know of the existence of a particular document on the date he obtained a certified copy of the same but the opposite party wishes Court to believe that the petitioner knows the existence of the document earlier.

✓ **Held**—The burden of a proof lies on the opposite party to prove that the petitioner knows the existence of the document earlier. *Md Habibur Rahman vs Abdul Wadud, 21 DLR 382.*

Section 103—There is wrong shifting of onus by the Courts below. *Narayan Prosad Bhowmic vs SSJ Radha 40 DLR 449.*

Section 103—Burden of proof may shift from party to party. The party asserting affirmatively is not always under the obligation to prove it. Where a rebuttable presumption exists in favour of a party asserting affirmatively the onus lies on the other side to rebut the same. *Safia Begum vs Malkani, PLD 1965 Lah. 576.*

Section 103—Where both parties led evidence on the point at issue the question of onus was held to have lost its importance and the decision had to rest on the evidence adduced. *Arsala Khan vs Ghulam Mohyuddin PLD 1966 Azad J & K 47.*

Section 103—Objection regarding burden of proof—Objection not raised at time of framing of issues by consent of parties cannot be allowed to be raised at appellate stage. *Australasia Bank. vs Muhammad Din, PLD 1963 (Kar) 105.*

Section 103—Onus of proof that the left out co-sharers have no subsisting right of preemption is upon the pre-emptor. *Md Abdul Jalil vs Durjan Ali; 1981 BLD (AD) 241.*

Section 103—Burden of proof as to particular fact—The defendant wants the courts to believe that the sale deed Ext. 2, the basis Ext A, is a bonafide document for valuable consideration but no evidence in this regard having been adduced the said Ext. cannot be allowed to stand. *Anwar Hossain vs Abdul Hossain Molla 44 DLR 79.*

Section 103—Burden of establishing the guilt of the accused—Prosecution to prove every link in the chain of evidence to connect the appellant with the crime. *Md Nasir Ahmed vs State 42 DLR 89.*

Section 103—Burden of proof as to particular fact—The defendant in a suit for specific performance of contract admits her LTI in the agreement for sale and offers an alternative story as to how her LTI came to be put on the document. The onus lies on her to prove the alternative story *Md Chand Miah vs Khodeza Bibi* 42 DLR 344.

Section 103—Onus lies on the defendant to prove her alternative story as to how her LTI came to be put on the document. *Chand Miah vs Khodeza Bibi* 42 DLR 344.

Section 103—Onus of Proof—Transferee to discharge his onus with regard to payment of money on good faith and absence of knowledge of the earlier contract—Lower appellate Court has left this point undecided. *Mukhtar Hussain Khan vs Suresh Chandra Dey* 42 DLR 86.

Section 103—*Per Mahmudul Ameen Chowdhury J (dissenting)*—The defence failed to discharge their onus in proving the allegation that at the instance of PW I, the pre-emptor, the property was purchased by OPW 1 or that the vendor offered the property to the pre-emptor on whose refusal it was sold to OPW 1, the pre-emptee, *Rokeya Begum vs Md Abu Zaher and others* 5 BLC (AD) 97.

Section 103—The High Court Division reversed the appellate judgment in consideration of Ext. 4, missing the vital aspects of Ext. 4 which pointed to its falsity, as noticed by the appellate Court. There is nothing on record to relate Ext. 4 to the settlement claimed by the plaintiff. Again the hukumnama and the other documents of settlement in favour of the plaintiff were for the plaintiff to produce. In the absence of proof of existence of the said documents the defendants also could not be supposed to be in a position to produce them and hence the High Court Division had obviously given a wrong onus and drawn an incorrect presumption regarding Exhibit 4, an extract of the pattani register. *Government of Bangladesh and another vs Nasia Khatun and others* 5 BLC (AD) 116.

Section 103—Since the defendants have come up with a specific case, the burden shifts on the defendants to prove their part of the said specific case and the defendant Nos. 1 and 2 having failed miserably to discharge their onus to prove their part of the case, the defendants are liable to pay the cheque money amounting to taka one lac eighty-five thousand when the defendant No. 1 admitted that he put his signature on the cheque. *Shaikh Haji Musa Hakkani vs Kazi Md Abdul Majed and ors* 7 BLC 534.

Section 103—Plaintiff discharged his burden of establishing the fact that defendant sent the rent for the month of May, 1988 after June 15, 1988. It was

requirement for the defendant to disprove the said fact, but he did not take any step to disprove the oral as well as documentary evidence produced from the side of the plaintiff in assertion of the fact that rent for the month of May, 1988 was sent by money order after June 15, 1988. *Bulbul Begum vs Md Sanwar Belal and anr* 8 BLC (AD) 97.

Sections 103, 61 and 67—Muslim Marriage is a socio-religious contract between a man and a woman and as such signatures of the parties in the Kabinnama are essential for proving marriage. No amount of oral evidence can cure the deficiency and no amount of oral evidence is sufficient to prove marriage when the plaintiff fails to prove the Kabinnama according to law. *Khodeja Begum and others vs Md Sadeq Sarkar* 50 DLR 181.

Sections 103 and 101—Mere filing of a rent receipt or a private document without formal proof thereof and without proving the contents of such documents cannot fulfil the requirements of law. *Bangladesh vs Md Aslam* 44 DLR 69.

Sections 103 and 101—Plaintiff disowned her signatures on the withdrawal slips while the defendant admitted that the payment was made on Bengali signatures which was against the Banking Rules as specimen signature was in English and on comparison it was found that the signatures on withdrawal slips did not tally with the specimen signature and in the written statement it was also admitted that the signatures of the plaintiff were not verified which proved gross negligence of the defendant-bank. In such circumstances, the plaintiff satisfied her initial onus and it then shifted upon the defendant who failed to prove the contrary. *Binodini Gain vs Agrani Bank Limited* 1 BLC 88.

Sections 103, 101—Defence case of accident—No presumption that the act was voluntary and intentional—Burden of proof to establish the guilt. The question for determination was whether the prosecution case of intentional killing, or the defence case of accident was true. In such a case, even if an act by the accused resulting in death is admitted there can be no presumption that the act was voluntary and intentional, and these elements must be established by the prosecution. It is not correct to say that the accused must be found guilty if he fails to show the circumstances necessary to establish the accident pleaded by him. *Sultan Mohd.* 6 DLR (FC) 28.

Sections 103 and 102—Burden of proof—When both parties adduced evidence in order to set up their respective cases, the question of onus of proof loses significance. *Chinibash Pranamsnik vs Md Nurul Hossain Mollah* 6 BSCD 188.

Sections 103, 106—Burden of proving alibi in a wife-killing case—It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused-husband for absolving him in criminal liability lies on him. But this burden is somewhat lighter than that of the prosecution. The accused could be considered to have discharged his burden if he succeeds in creating a reasonable belief in the existence of circumstances that would absolve him from criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused. An accused's burden is lighter, because the court is to consider his plea only after, and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the husband was in his house where his wife was murdered, he cannot be saddled with any onus to prove his innocence. *State vs Mofazzal Hossain Pramanik 43 DLR (AD) 64A.*

Sections 103 and 157—If the prosecution case is considered in juxtaposition with the defence case, it appears that the prosecution has failed to discharge the onus of proving their case beyond any reasonable doubt and a genuine doubt is created in the mind as to the manner of occurrence. *State vs Azharul Islam 3 BLC 382.*

104. Burden of proving fact to be proved to make evidence admissible—The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

- (a) A wishes to prove a dying declaration by B. A must prove B's death.
 (b) A wishes to prove, by secondary evidence, the contents of a lost document.
 A must prove that the document has been lost.

Case Law

Section 104—Adverse possession against co-heir—Burden of proof is on the person claiming to displace co-heir.

The burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession. *Laxmi Reddy PLD 1957 Supreme Court (Ind) 251.*

Section 104—Guilt of the accused—Prosecution must prove—It is the cardinal principle of criminal jurisprudence that innocence of an accused person is presumed till otherwise proved. It is the duty of the prosecution to prove the prisoner's guilt subject to any statutory exception. *Nisar Ali PLD 1957 Supreme Court (Ind.) 297.*

Section 104—Burden of proof—Circumstances when it shifts from one side to another—The section shows that the initial burden of proving a *prima facie* case in his favour rests on the plaintiff; when he gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff.

It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden, but if it has on the evidence no difficulty at arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background. *Kambhan Lakshmanna vs Tangirala Venkateshwarla, 2 DLR (PC) 83.*

Section 104—The trial Court, in the absence of any direct evidence of the plaintiff's claim of settlement, appears to have drawn a conclusion by analytical deduction and not by evidence and such conclusion being not based on proper discussion nor of correct appreciation of facts and evidence on record cannot be sustained in law. *Amirul Islam and others vs Nurul Islam, and others 3 BLC 225.*

Sections 104 and 101—Onus of proof—Where no difficulty arises in arriving at a conclusion, the question of onus recedes to the background, but where court finds it difficult to make up its mind the question comes to the foreground and becomes the deciding factor. In the present case the onus of proving the oral contract lies on the plaintiff and this onus remained constant as neither the oral contract nor any part of it was admitted by the defendant. *Janab Ali (Md) vs Md Moslem Uddin 44 DLR 291.*

Sections 104 and 102—It is the settled principle of law that when the entire evidence comes to the record the onus of proof is divided and splitted up and academic. *Chan Mahmood and others vs Md Hossain Ali being dead his heirs 1 (Ka) Md Sekander Ali & ors 3 BLC 364.*

105. Burden of proving that case of accused comes within exceptions—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the ¹* * * Penal Code (XLV of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the ¹* * * Penal Code (XLV of 1860) provides that whoever, except in the case provided for by the section 335, voluntarily causes grievous hurt, shall be subject to certain punishments

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

Case Law

Section 105—Accused failing to prove his special plea aiming at bringing his case within an exception succeeding, however, in creating reasonable doubt in respect of his guilt. Court bound to give benefit of doubt to the accused—Entire evidence to be taken into account. *Md Aslam 5 DLR (FC) 133 (135 Rt hand col.)*.

Section 105—Burden of proving case covered by exceptions on accused—Nevertheless prosecution must prove ingredients of offence. (1949) *PLD (Lahore) 70*.

Section 105—Anything done by accident or mistake—Burden of proof on the accused. *Jalal Din vs Crown 5 DLR (W P) 58*.

1. The word "Pakistan" was omitted by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71)

Section 105—Anyone who claims the benefits of an exception must prove the facts entitling to it. *PLD (1953) (BJ) 17*.

Section 105—Grave and sudden provocation. Burden on the accused to prove exception—Yet in absence of affirmative proof, accused may have benefit of doubt raised as examining prosecution evidence side by side with defence version. (1957) *PLD (Lah) 31*.

Section 105—Criminal trial—Prosecution must prove every ingredient of offence. *Shakir Hussain vs State PLD 1956 SC Pak. 417; PLD (1957) (1) Lahore 180*.

Section 105—Evidence—How should be appreciated while giving judgment—Effect of Safdar Ali's case. In Safdar Ali's case it is held: you must have the entire evidence in your mind, the evidence for the accused and the evidence for the prosecution and allow the one to face squarely, that you should not be too pedantic about the burden of proof. *Ghulam Yusuf vs Crown PLD 1953 Lah 213; PLR 1953 Lahore 409*.

Section 105—Exception, benefit of—May be given by Court even when not expressly pleaded by accused but apparent from facts. *Ali Muhammad vs Crown PLD 1953 Baghdad-ul-Jadid 17 (BD)*.

Section 105—General exception—Accused must prove—But when the offence has not been proved by prosecution accused need not prove anything. *Mohammad Sadiq vs Crown, PLD 1949 Lahore 80; PLR 1948 Lahore 293 (DB)*.

Section 105—The accused took the plea that he acted in self-defence and killed the deceased. The effect, in such a case, may be to create a state of reasonable doubt, of which the Court is bound to give the benefit of doubt. *Muhammad Aslam vs Crown PLD 1953 Federal Court 115; 1952 FCR 269; 5 DLR 133 (FC) [See also 5 DLR 58]*.

Section 105—Section 105, Evidence Act, says that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any special exceptions of provision contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. *Jalal Din vs Crown PLD 1953 Lahore 34; PLR 1953 Lahore 38; 5 DLR 58*.

Section 105—General exception—Burden of proof—It lies on accused—Whole case should be considered by judge before delivering judgment. *Safdar Ali vs Crown PLD 1953 Federal Court 93; 1952 FCR 238; PLR 1953 Lahore 55; 5 DLR 107 (FC)*.

Section 105—Insanity in the accused must prove to exist at the time of commission of offence—Reasonable doubt as to—Court may give benefit of doubt to accused. *Ata Muhammad PLD 1960 Lah 11*.

Section 105—Plea of accident taken by accused—Not proved—Not sufficient ground for conviction. *Sultan Muhammad 6 DLR 28; PLD 1954 FC 29*.

Section 105—Plea of self-defence not taken by the accused—Urged by Counsel at appellate stage—To be accepted after careful consideration. *State vs Mukhtar PLD 1956 Lah 704*.

Section 105—Principal and agent—Principal claiming criminal breach of trust and proving that goods or money was at one stage with the agent—Onus of proving innocence is on agent. *Sutlej Cotton Mills PLD 1960 Lah 1060*.

Section 105—Section 105 of the Evidence Act casts a burden upon the accused to prove the existence of circumstances bringing the case within any special exception or proviso contained in any other part of the Penal Code. There has been complete failure on the part of the defence to prove those circumstances. *Md Abdul Majid Sarkar vs State 40 DLR (AD) 83*.

Section 105—Self-defence—Plea of—Evidence not led to prove the plea but it received support from prosecution evidence—Accused entitled to acquittal—Duty of court to examine accused's version in juxtaposition with the prosecution evidence and the circumstances of the case. *Shamir vs State 10 DLR (SC) 186*.

Section 105—Burden of proving that the accused's case comes within exceptions.

Whenever an accused claims the protection of an exception to criminal liability, it is for him to claim such protection and to this extent the burden lies on him, but that does not entitle the Court to presume the absence of such circumstances. *Mohim Mondal vs State 15 DLR 615*.

Section 105—To successfully sustain a plea of insanity, the burden of showing that what the accused did is excepted under section 84 of the Penal Code is on the defence though the burden of bringing the case within the exception of section 84 is not as heavy as in the case of establishing the guilt of an accused by the prosecution evidence for founding conviction—Benefit of doubt is available to an accused when evidence led raises a reasonable doubt. *Abu Nasir Bhuiya vs State 30 DLR 275*.

Section 105—Accused's statement in Court should be taken into consideration in its entirety if conviction is to be based solely on such statement. *Rahim Bux vs Crown 4 DLR 53 (61)*.

Section 105—In a criminal case the accuseds are not required to set up their case in writing, such as a written statement of the defendant of a civil suit, nor are they required to give evidence to prove their innocence, or even to establish their pleas, except a special plea within the meaning of section 105, Evidence Act, and it is entirely for the prosecution to establish the guilt of the accused—The cardinal principle of criminal justice that the accused shall be presumed to be innocent until his guilt is proved shall be followed at all stages of the trial. *Shah Alam vs State 42 DLR (AD) 31*.

Section 105—If the accused wants to bring his acts within any one or more of the general exceptions enumerated in Chapter IV of the Penal Code, it is for him to prove that his acts are so covered under any of those general exceptions. *Nikhil Chandra Halder vs State 54 DLR 148*.

Section 105—The burden of proving the existence of circumstances bringing the case within the exception lies on the accused. *State vs Abdus Samad @ Samad Ali 54 DLR 590*.

Section 105—It is settled principle of law that the plaintiff is to prove his case without depending on the weakness of the defendant's case. *Amirul Islam and others vs Nurul Islam, and others 3 BLC 225*.

Section 105—As it was not possible for any other outsider-miscreants to enter into the room of Chapa and to kill her for which the natural conclusion unmistakably goes to show that Chapa was killed by the inmates of the house and the explanation given by the defence falls through. *Zahirul Alam Kamal and another vs State 1 BLC 325*.

Section 105—The evidence of the PWs 4 and 6 suffer from contradictions and discrepancies when the appellant did not take any part in the killing and there is hardly any evidence against the appellant who is entitled to get benefit of doubt. *Khalilur Rahman alias Khalil vs State 4 BLC 372*.

Section 105—The murder having taken place while the appellant was living with his wife in the same house, he was under an obligation to explain how his wife had met with her death. *Abul Kalam Mollah vs State 4 BLC 470*.

Section 105—The murder of the wife of the accused having taken place in the house of the accused who was living with his wife in the same house and he having an obligation to her death made a plea of snake biting but the same has

been found to be travesty of truth in view of the evidence of witnesses including PW 2, the explanation given by the accused being found to be false and in the absence of any other satisfactory explanation from the defence the accused is responsible for the death of his wife and the facts and circumstances revealed through the evidence of witnesses are incompatible of explanation upon any other reasonable hypothesis than that of guilt of the accused. *State vs Abul Kalam* 5 BLC 230.

Section 105—The eye-witnesses having given inconsistent account of the injury caused by convict appellant Abdul, he is entitled to get benefit of doubt. *State vs Mainul Haque @ Mainal* 7 BLC 586.

Section 105—Burden of proving exceptions in Criminal Trial—The onus of proving the defence plea of the right of private defence of property and the right of defence of life by the appellant accused of murder is upon them. *Toyed Ali vs State* 7 BSCD 88.

Sections 105 and 106—আসামী তার উপর অর্পিত প্রমানের দায়িত্ব পালন করতে ব্যর্থ হলেও আসামীর বিরুদ্ধে আনীত অভিযোগ যুক্তি সংগত সন্দেহের উর্কে অভিযোগকারী পক্ষ কর্তৃক তা প্রমান করার দায়িত্ব কমে যায় না। *Sabur Alam and others vs State* 51 DLR 16.

Sections 105 and 114(g)—Examination of vital witnesses by the IO after a long lapse of 4 months cast a doubt and it should be discarded and non-examination of vital witnesses and non-seizing of blood-stained earth from the place of occurrence show that the prosecution has failed to prove its case beyond reasonable doubt. *Jewel vs State* 3 BLC 258.

Sections 105 and 157—As the recovery of the bayonet and its place and manner of recovery suffer from glaring contradictions making it difficult to believe such recovery from the possession or control of the appellant and the existence of *mens rea* of the appellant could not be also established, the prosecution has failed to bring home the charge against the appellant beyond all reasonable doubt. *Sukkur Ali Kha vs State* 3 BLC 206.

Sections 105 and 157—The evidences as to the order to kill victim Kastura Bibi by convicted Abdul Jabbar are inconsistent and also suffers from contradictions and the prosecution failed to prove the case beyond all reasonable doubt and as such the conviction and sentence passed upon him under sections 302/34 of the Penal Code cannot be sustained in law. *Abdul Jabbar and another vs State* 3 BLC 231.

Sections 105 and 157—As there are many contradictions and the Doctor who first examined the victim was not examined and that 2 hurricane lamps were

not before the court and that no blood-stained article was seized from the place of occurrence leading to the conclusion, the prosecution has failed to prove the case beyond reasonable doubt. *Kamrul Islam Sheikh vs State 3 BLC 187*

106. Burden of proving fact especially within knowledge—

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a train without a ticket. The burden of proving that he had a ticket is on him.

Case Law

Section 106—Alibi, pleas of—Onus is entirely on the accused to prove it.

Held—Where the accused took a plea of alibi the onus was entirely on them to prove affirmatively that they were there, and not at any other place. *Muksad Molla PLD 1957 Dhaka 503*.

Section 106—The burden of proving the plea of alibi lay on defence but, the burden of proving the case against the appellants was on the prosecution irrespective of whether or not the accused have made out a plausible defence. *Gurcharan Singh PLD 1957 Supreme Court (Ind.) 50*.

Section 106—The officer proceeded against has to show either that he had jurisdiction or that he had reasonable grounds for believing that he had jurisdiction. The onus as to grounds for reasonable belief would be on him. *Khan Ghulam Qadir vs AK Khalid 12 DLR (WP) 78; (1960) PLD (Lah.) 1037*.

Section 106—Onus that detention is lawful on the authority—Presumption in very detention is unlawful. *Govt. of West Pakistan vs Begum Agha Abdul Karim 21 DLR (SC) 3*.

Section 106—Accused's possession of the boxes containing poppy heads established—Burden of proving want of knowledge that the boxes contain poppy heads was on the accused. *7 DLR FC 204*.

Section 106—Self-defence, plea of—Not taken by accused—Benefit of doubt may be given to accused if circumstances show the existence of the possibility. *Shamir PLD (1958) 242.*

Section 106—Corroborative evidence in respect of an approvers' statement may in point of time relate to periods before as well as after the crime. *Rafiq Ahmed II DLR (SC) 91; (1958) PLD (SC) 317.*

Section 106—Corroboration under certain circumstances may be corroborated by the confession of a co-accused. *2 DLR (PC) 39.*

Section 106—Matter within the special knowledge of the accused—Inference. *Ishaq 7 DLR (FC) 37.*

Section 106—Accused pointing out the place where the corpse of the deceased was burnt and bones of a human being, etc. were discovered—Burden on accused to prove how he acquired his knowledge *PLD (1951) Lahore 352.*

Section 106—Property stolen in dacoity recovered at accused's pointing out from vicinity of crime—Accused convicted of dacoity and not of receiving stolen property—Burden on accused to prove how he came to know where property was hidden. *PLD (1957) Lahore 765.*

Section 106—Incriminating article—Accused giving information about—Explanation as to his acknowledgment not accepted—Recovery cannot be ignored. *Fateh Sher PLD 1956 Lahore 157.*

Section 106—Fact specially in the knowledge of a party—Not proved—presumption would arise against the party. *RSN Co Ltd vs Mahindra Kumar 3 DLR 143.*

Section 106—Fact specially within the knowledge of accused— Accused must prove—Accused pointing out dead body—Burden of showing that his knowledge was innocent is on him. *Sher Bahadara vs Crown PLD 1951 Lah. 352.*

Section 106—Facts specially within the knowledge of the accused—When must be proved by him—Prosecution must prove its case independently of those facts. *Humphery PLD 1952 Lah 623.*

Section 106—Loss of goods by common carrier—Onus of proving want of negligence is on the carrier. *Federation of Pakistan vs Kazi Fazal Rahim PLD 1955 Pesh 67.*

Section 106—Section 106 does not cause the burden of proving due care upon the defendant; it only makes it his duty to prove such facts relating to the

care actually taken by him which are 'especially' within his knowledge. The burden of the issue whether loss has been occasioned by the failure of the plaintiff throughout under sections 101 and 102 of the Evidence Act; and while evidence is being led on that issue the plaintiff may be exonerated from proving certain relevant "facts" but not the issue itself. *Federation of Pakistan vs Muhammad Ismail PLD 1956 Lah. 222.*

Section 106—Arrest or detention—Reasonable belief that officer has jurisdiction to arrest—Onus on officer to prove. *Ghulam Qadir PLD 1960 Lahore 1039.*

Section 106—Suit for compensation for loss—short delivery of goods: As the condition of packing the goods sent by railways is within the particular knowledge of the claimant or his agent, the onus of proving it under section 106 of the Evidence Act is on the claimant. *Chief Executive Officer vs Federation of Pak 7 DLR 611.*

Section 106—Where Steamer Companies had special knowledge within the meaning of section 106 of Evidence Act about the facts of delivery of goods to the Companies and they not having proved the same they expose themselves to the presumption under section 114(g) of the Evidence Act. *RSN Co vs Mahendra K Roy, 3 DLR 139.*

Section 106—Where the plaintiff calls for production of relevant papers in possession of the defendant to prove his case but the defendant does not produce the same, it is taken that the case of the plaintiff is proved.

When plea of privity of contract is taken in the written statement it must specially be pressed before the Courts and issue has to be framed, evidence has to be led and investigation has to be held into the matters by the Courts before the defendant is to be saddled with any liability.

Section 106—When the defendant pleaded the privity of contract, normally, the burden lies on the plaintiff to prove the contract. But in view of section 106, when any fact is specially within the knowledge of any person, the burden of proving the fact is upon him. *8 PLR (Dac.) 1103.*

Section 106—When it is established that an accused person has given information about an incriminating article it is for him to explain how he came by the knowledge of the place where that article was. *Fateh Sher vs Grown, PLD 1956 Lah. 157.*

Section 106—Burden of proof—Prosecution must prove the case—Section 106 applicable only in exceptional cases. *Shambu Nath Mehra PLD 1957 SC (Ind.) 18.*

Section 106—The onus of proving that the maid servant died in any other circumstance than by the kicking of the master was upon the master, as it was within his special knowledge. *Abdul Hakim vs Mokles Mridha; 1986 BLD (AD) 174.*

Section 106—Burden of proof—Section 106 fixes the liability of proving the facts on the accused when the same is especially within his knowledge. *Shaikh Baharul Islam vs State 43 DLR 336.*

Section 106—Husband of the deceased was found absconding without any explanation. He neither gave any information to the police nor to his mother-in-law that her daughter has died or to any local people. He thus failed to fulfil the requirement of law and the natural expectation about the cause of death of his wife. *Joynal Bhuiyan & another vs State 52 DLR 179.*

Section 106—The definite and specific defence plea being within the special knowledge of the accused a burden was cast upon him to discharge it, moreso, when the prosecution proved the guilt of the accused by convincing and overwhelming evidence. *Jamal Uddin alias Md Jamal Uddin vs State 52 DLR 330.*

Section 106—Section 106 Evidence Act is attracted in exceptional cases where a relevant fact is pre-eminently within the knowledge of the accused. *Hasmat Ali vs State 53 DLR 169.*

Section 106—In a case where the wife is proved to have died of assault in the house of the husband there would be strong suspicion against the husband that at his hand the wife died. To make the husband liable the minimum fact that must be brought on record either by direct or circumstantial evidence is that he was present in the house at the material time. *Hasmat Ali vs State 53 DLR 169.*

Section 106—The recovery of the blood-stained axe and lungi belonging to the convict constituted a strong circumstantial evidence, conclusive enough so as not to admit any hypothesis of his innocence. *Hasmat Ali vs State 53 DLR 169.*

Section 106—The wife was in custody of the husband and the death was caused while she was in the custody of her husband who has failed to explain the cause of death of his wife, the husband is liable for the cause of death of his wife and hence the appellant was rightly convicted under section 302 of the Penal Code and sentenced to suffer imprisonment for life. *Shah Alam (Md) vs State 5 BLC 492.*

Section 106—Murder of wife—Explanation of husband—Circumstantial evidence—Plea of alibi—The defence of alibi having been discarded and the

door of the room being kept open and in the absence of any acceptable explanation as to how the wife died in the room of the husband, the only irresistible and natural conclusion will be that it is the husband alone in the circumstances of the case who is guilty of committing murder of his wife. The chain of circumstances coupled with the medical evidence on record having been considered by the learned judges of the High Court Division, the circumstantial evidences admit of no other hypothesis than the guilt of the petitioner. *Goring Kumar Shaha vs State 2 BLC (AD) 126.*

Section 106—As the appellants were apprehended with the contraband articles it was the duty upon the appellants to explain the circumstances under which they had been within their knowledge and since they failed to perform such duties the only inference that could be drawn under section 25B of the Special Powers Act was that the appellants were either smugglers or aided or abetted the smuggling or kept the contraband articles in their possession for sale, etc. *Hasanuzzaman and others vs State 1 BLC 219.*

Section 106—Murder of wife—As there was no eye-witness to the occurrence but husband and wife were in the Pajero Jeep which was an inanimate object unable to speak and wife was dead and it was only within the special knowledge of husband who could only say how and under what circumstances and who murdered his wife. Even if the husband fails to discharge responsibility the onus lay on him, the prosecution is not relieved of its burden to prove beyond reasonable doubt that husband had murdered his wife. *State vs Munir and another 1 BLC 345.*

Section 106—Murder of wife—The accused person and his wife were living in the same bed and the wife having received injuries on her person which ultimately resulted in her death, onus heavily falls on the husband as he is saddled with the burden of proving the facts, especially within his knowledge and on failure to discharge such onus, adverse presumption is bound to seize him. *Gourango Kumar Saha vs State 1 BLC 97.*

Section 106—Plea of alibi—It is contended that the accused went to Faridpur for purchasing some clothes and, as such, he was not at home at the time when the occurrence took place. In the absence of any evidence that the accused went to Faridpur and stayed there and he purchased clothings at Faridpur, the defence failed to perform their obligation to prove the plea of alibi. *Gouranga Kumar Saha vs State 1 BLC 97.*

Section 106—The plea of alibi having been proved by giving oral and documentary evidence on record the High Court Division committed no

illegality or infirmity in its judgment and order in acquitting the respondent No. 1 in the absence of giving rise to doubt as to the truth and genuineness of the said oral and documentary evidence. *Nurul Islam vs Abdul Malek and another* 8 BLC (AD) 25.

Section 106—The law is now well settled that when the wife is found dead in the house of her husband, the court requires the husband or other members of his family living with her to explain the circumstances in which she died. *State vs Md Abul Kalam Azad* 8 BLC 464.

Section 106—Application of the principle of this section to criminal cases is sometimes difficult.

This section contemplates facts which, in their nature, are such as to be within the knowledge of the accused and of nobody else. It cannot be invoked to make up for the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. The State has argued that since B was last seen in the house of the accused on the previous day and his dead body was found the following day in the khal, the circumstances leading to the death were matters within the "especial knowledge" of the accused for the boy had, according to the defence, left their house before the storm in the previous afternoon and his death occurred in circumstances about which the accused might not have any knowledge. This section therefore cannot be invoked in this case. *Kashab Chandra Mistry and others vs State* 5 BSCD 176.

Sections 106 and 101—Section 106 does not relieve the prosecution of the duty to discharge its onus of proving a case as has been imposed by section 101 of the Evidence Act. *Shahajahan Talukder @ Manik and others vs State* 47 DLR 198.

Sections 106 and 101—Since no special knowledge of the relevant fact as to committing of the crime could be attributed to the accused the provisions of sections 101 & 106 of the Evidence Act have no applicability in the case. *Kawsarun Nessa and another vs State* 48 DLR 196.

Sections 106 and 101—Will—Onus of proof is on the person propounding the will: In the Courts in India a caution has been sounded to the effect that notwithstanding the value of the decisions in the cases of *Tyrrel vs Painton* and *Pandock Barry vs James Butlim* laying down the rule that when a will is sought to be propounded the onus of proof in every case lies on the person seeking to prove the will to satisfy the conscience of the court that the instrument so propounded in the court is the last will of the testator, it must not be forgotten that the law is laid down in clear and imperative terms by Acts of the Indian

Legislature, and it is by the provisions of those Acts that a court must be guided. *Somarendra N Roy vs Girish Ch. Roy* 12 DLR 788.

If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under section 106. *Siddique* 11 DLR 321; (1959) PLD (Dac.) 956.

Sections 106, 103—Burden of proving alibi in a wife-killing case—It is true that the burden of proving a plea of alibi or any other plea specifically set up by an accused-husband for absolving him from criminal liability lies on him. But this burden is somewhat lighter than that of the prosecution. The accused could be considered to have discharged his burden if he succeeds in creating a reasonable belief in the existence of circumstances that would absolve him from criminal liability, but the prosecution is to discharge its burden by establishing the guilt of the accused. An accused's burden is lighter, because the court is to consider his plea only after, and not before, the prosecution leads evidence for sustaining a conviction. When the prosecution failed to prove that the husband was in his house where his wife was murdered, he cannot be saddled with any onus to prove his innocence. *State vs Mofazzal Hossain Pramanik* 43 DLR (AD) 64A.

Sections 106, 101 to 104—Alibi—Accused must prove—Prosecution should prove the case independently of such plea. The burden of proving the plea of alibi lay on the defence but the burden of proving the case against the appellants was on the prosecution irrespective of whether or not the accused have made out a plausible defence. *Curcharan Singh* PLD 1957 SC (India) 50.

Sections 106 and 105—আসামী তার উপর অর্পিত প্রমানের দায়িত্ব পালন করতে ব্যর্থ হলেও আসামীর বিরুদ্ধে আনীত অভিযোগ যুক্তি সংগত সন্দেহের উর্দে অভিযোগকারী পক্ষ কর্তৃক তা প্রমান করার দায়িত্ব কমে যায় না। *Sabur Alam and others vs State* 51 DLR 16

Sections 106 and 123—Preventive detention—Power of the High Court to assess the sufficiency of material leading to the satisfaction of the detaining authority in making a detention order—sufficiency of material and non-existence of material distinction between—Mere information report cannot be a valid ground for passing a detention order—Mere production of a government file showing an information report before the High Courts is not sufficient to justify the detention case—Question of onus to justify the necessity of detention and claim of privilege by the government, in terms of sections 106 and 123 of the Evidence Act, discussed. *Bangladesh vs Ahmad Ali* 2 BSCD 87.

Sections 106 and 157—No reliance can be placed on the evidence of PWs 3 and 4 for holding that the witness saw the condemned prisoner and his wife in the night of 16-5-95 going inside the hut and that they slept inside the hut in the

night following the morning of which condemned prisoner's wife was found dead and hence it cannot be said that it was the condemned prisoner who caused death of his wife. Since the prosecution has not been able to establish the case by reliable witness the condemned prisoner is entitled to be acquitted. *State vs Azizur Rahman alias Habib* 5 BLC 405.

107. Burden of proving death of person known to have been alive within thirty years—When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Case Law

Sections 107, 108—Date of death—Presumption of death of a person—Person not heard of for 7 years—Death is presumed on the date on which the event in question occurred. *Muhammad Afsar* PLD 1957 Pesh. 1 (DB).

Sections 107 and 108—The evidence of PWs 1 and 2 that Md Ismail has not been heard of since 24-12-71 which made the section 108 of the Evidence Act applicable as it provides that a person presumed to be dead if he is not heard of by his family members and relations for more than 7 years when section 107 of the Evidence Act speaks of presumption for continuance of life for more than 30 years and in the facts and circumstances of the present case section 107 of the Evidence Act has no manner of application. *Islamic Foundation Bangladesh vs Firoz Alam & others* 6 BLC 599.

108. Burden of proving that person is alive who has not been heard of for seven years—¹[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is ²[shifted to] the person who affirms it.

1. Substituted by the Indian Evidence Act Amendment Act (XVII of 1872), section 9 for "when".

2. Substituted by the Indian Evidence Act Amendment Act (XVIII of 1872), section 9, for "on".

Case Law

✂ **Section 108**—Murder committed in presence of a person—Burden is on him to prove that he was not the murderer. *Akhtari Begum PLD 1960 Kar. 797.*

✂ **Section 108**—Person not heard of for seven years—Burden of proof on person who alleges that he was alive. *Muhammad Zahur PLD 1957 Custodian (Lahore) 62.*

Sections 108 and 107—The evidence of PWs 1 and 2 that Md Ismail has not been heard of since 24-12-71 which made the section 108 of the Evidence Act applicable as it provides that a person presumed to be dead if he is not heard of by his family members and relations for more than 7 years when section 107 of the Evidence Act speaks of presumption for continuance of life for more than 30 years and in the facts and circumstances of the present case section 107 of the Evidence Act has no manner of application. *Islamic Foundation Bangladesh vs Firoz Alam & others 6 BLC 599.*

109. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent—When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Case Law

✂ **Section 109**—Dakhilas granted by Karmachari of plaintiff—Burden of proof is on defendant to prove that Karmachari had the authority to grant them or they were ratified by the landlord later on. *Amiyabala (1960) 12 DLR 698; PLD 1961 Dhaka 249.*

110. Burden of proof as to ownership—When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Case Law

Section 110—Anterior title admitted—Burden is on the defendant to prove the alleged grant. *Agha Mir Ahmad Shab PLD 1957 Kar. 258.*

ξ **Section 110**—Person in possession—Presumption in favour of—Claim may be even as a co-sharer. *Wards-n Sind PLD 1959 Kar. 121.*

Section 110—Principle—A presumption of ownership arises from possession, as men generally own the property they possess. *Parit Singh vs Anjuman Imdad Qarza, 41 PLR 123.*

Section 110—Easement of necessity—The necessity must be any absolute necessity and not a convenient mode of enjoyment of property. *Mariyayi Ammal vs Arunachala Pandaram, AIR 1956 Mad. 584.*

Section 110—The presumption under section 110 in this case would apply only if two conditions are satisfied viz, the possession of the person claiming long possession is not prima facie wrongful and secondly, the title of the person against whom the long possession is claimed is not proved. *Gouri Das and others vs ABM Hasan Kabir and others 55 DLR (AD) 52.*

Section 110—Defendant—appellants have failed to prove the acquisition of title by adverse possession establishing the existence of the essential ingredients of section 7(2) of the Non-Agricultural Tenancy Act, 1949. No presumption can be drawn under section 110 of the Evidence Act, 1872 in the absence of those ingredients. Plaintiff-respondent has proved their title by registered deed dated 13-11-78 for valuable consideration which has been believed by the Courts below. Claim of long possession of the defendant-appellants remains precarious because of the finding of title of the suit land in favour of the plaintiff-respondent. *Gouri Das and ors vs ABM Hasan Kabir and others 7 BLC (AD) 140.*

ξ

111. Proof of good faith in transactions where one party is in relation of active confidence—Where there is a question as to the good faith of transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

Case Law

§**Section 111**—Person in position of confidence—Sale in favour of—He must prove good faith. *Nooro PLD 1958 Lah. 393.*

Section 111—Disposition by pardanashin lady: In case of a disposition by a pardanashin lady the onus lies on the person relying on the disposition to establish that the maker of the disposition comprehended it thoroughly and made it deliberately of her own free will. To discharge this onus it is not sufficient to show that the allegations made by the person attacking the disposition are untrue.

Section 111—Mere proof that execution had been admitted by an illiterate pardanashin lady is not enough. The real point is that the dispositions made must be substantially understood and must really be the mental act as its execution is the physical act of the maker. *Abdul Matlab vs Matulla 6 DLR 202.*

Section 111—Lender and borrower of money—Onus as to exercise of undue influence—Onus of the plea that the lender (in the matter of lending money) was not only in a position to dominate over the borrower but actually did so is on the borrower. The principle underlying section 111 of the Evidence Act is not applicable between persons who hold the position of lender and borrower of money. *Mohan Bashi Saha vs United Industrial Bank 20 DLR 9.*

Section 111—Trustee and conflicting interest : It is rule of universal application that no trustee shall be allowed to enter an engagement on which he had or can have a personal interest conflicting or which may possibly conflict with the interests of those whom he is bound by fiduciary duty to protect. *SM Sabitri Debi vs Mahadj Bahadur Ram Bijoy 3 DLR (PC) 429.*

Section 111—Where the pardanashin lady signed the document while she was under the appellant's influence and protection and without independent advice and also suffering from great distress and was unfit to understand how adversely her rights were affected by it and in fact she did not understand its meanings and legal consequences the agreement embodied in the document was

held to be voidable at the option of the lady. *Farikh Atmaram Maneklal vs Pai Hira*, PLD 1948 PC 40.

Section 111—Protection given to a pardanashin lady will extend to her legal heirs to challenge legality of disposition, if the person upon whom the property of the pardanashin woman devolves by operation of law. *Rokeya Khatoon vs Alijan*; 1982 BLD (AD) 139(b).

Section 111—There is no special onus upon the recipient of a document to prove that the document was bonafide in the absence of any pleading that the executant was a pardanashin lady and she could not understand the transaction. *Noab Chand vs Hussain Banu*; 1986 BLD 173(b).

Section 111—The party relying on a document executed by an illiterate pardanashin village woman must satisfy the court that not only the deed was read over and explained to her but also that she understood the contents and had independent and disinterested advice in the matter. *Rangbi Bewa vs Md Abed Ali*; 1987 BLD 319.

Section 111—When any deed is executed by a pardanashin lady burden lies on the person who claims benefit under the deed to establish that the deed was executed by her on her own accord. Independent advice in case of transfer of property by pardanashin lady is insisted when the transferee stands in a fiduciary relationship with the lady. *Abdul Mannan Shah and others vs Kafiran Nessa and others* 46 DLR 103.

112. Birth during marriage conclusive proof of legitimacy—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Case Law

Section 112—Child born after 229 days of coitus with husband—Held illegitimate. *Joseph Stanislaus* PLD 1950 Privy Council 75.

Section 112—"No access"—Meaning of—How presumption of "no access" may be rebutted. The words 'no access' in section 112 is not fully conveyed by assigning a precise verbal definition to the word "access" itself. A test which considers merely the bare geographical possibility of the parties reaching each other during the relevant period must be rejected completely. Taken at its face value such a test could hardly ever exempt a husband from the onus of paternity and could work real injustice in any case. "No access" would be established in any case in which on the evidence available, it was right to conclude that at no time during the period had there been "personal access of husband to wife under such circumstance that there might be sexual intercourse. "Further held, that though the presumption arising from personal access is a rebuttable one, it is in the nature of things that nothing less than cogent evidence ought to be relied on for this purpose. *Kalikutty Kanapathi Pillai PLD 1957 Privy Council 76.*

Section 112—Presumption as to the parenthood of a child.

If a person wants to prove that he is not the father of a child he must establish that he had no access to the wife. Once it is proved that he had access to his wife, the fact that his wife was a woman of bad character and that she was accessible to other people too is no ground to hold that the child born during the continuance of marriage, or within 280 days after the dissolution, is not that person's child. *Taza Gul 1 PCR 97.*

Section 112—Presumption of legitimacy—Child born within 280 days of dissolution of marriage or during continuation of marriage—Legitimate unless "no access" proved by husband. *Taza Gul PLD 1951 Peshawar 17.*

Section 112—Woman living with paramour—No proof of non-access by husband—Legitimacy cannot be challenged. *GR Sane AIR (33) 1946 Bombay 110.*

Section 112—Parenthood, proof of—If a person wants to prove that he is not the father of his child, he must establish that he had no access to the wife. Once it is proved that he had access to his wife, the fact that his wife was a woman of bad character and that she was accessible to other people too is not a ground to hold that the child born during the continuance of marriage or within 280 days after its dissolution is not that person's child. *Jashimuddin (Md) alias Md Jashimuddin vs Dali Begum and another 56 DLR 358.*

Section 112—There is no legal presumption as to maternity. This Section has no manner of application when the maternity of a person is questioned. The question of maternity is purely a question of fact. Plaintiff claimed that G, though a prostitute at the earlier part of her life, later on married one K and that she was

born of that wedlock. But the trial Court and the lower appellate Court raised the question whether this marriage is valid. These courts proceeded on the erroneous view of law that to prove her maternity, plaintiff is also required to prove her maternity on the basis of a valid marriage. *Geeta Rani Dasi vs Shamina Khatun vs Bangladesh* 5 BSCD 176.

113¹*

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114. Court may presume existence of certain facts—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

✓ The Court may presume—

- (a) that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
- ✓ (b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;
- (c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
- (d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;
- (e) that judicial and official acts have been regularly performed;
- (f) that the common course of business has been followed in particular cases;
- ✓ (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
- (h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

1. Section 113 was omitted by Act VIII of 1973. 2nd Schedule (with effect from 26-3-71).

- (i) that when a document creating an obligation is in the hands of the obligator, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it :—

as to *illustration (a)*—A shopkeeper has in his till a marked ¹[Taka] soon after, it was stolen, and cannot account for its possession specifically, but is continually receiving ¹[Taka] in the course of his business :

as to *illustration (b)*—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself :

as to *illustration (b)*—a crime is committed by several persons. A, B, and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

as to *illustration (c)*—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

as to *illustration (d)*—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

as to *illustration (e)*—a judicial act, the regularity of which is in question, was performed under exceptional circumstances:

as to *illustration (f)*—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

as to *illustration (g)*—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

as to *illustration (h)*—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

as to *illustration (i)*—a bond is in possession of the obligator, but the circumstances of the case are such that he may have stolen it.

1. The word "Taka" was subs. by Act VII of 1973, section 3 and 2nd Schedule (with effect from 26-3-71).

Case Law

Section 114—Discovery of stolen goods from a place not within accused's domain—Presumption. Stolen goods discovered at pointing out by the accused from a place not within his domain but close to his house and the accused explaining how he came to know of the same, Court's presumption in circumstances is that the stolen goods were planted and possessed by the accused. *Aminul Huq 22 DLR 99.*

Section 114—The expression "unless he can account for his possession." The expression "unless he can account for his possession" in illustration (a) of section 114 of the Act does not mean that the accused must prove affirmatively by adducing substantive evidence that he received the stolen property in the way indicated by him. The adverse presumption can be said to have been rebutted if the explanation of the accused reasonably appears to be probable. *Aminulla 21 DLR 645.*

Section 114—Confessional statement against a co-accused requires corroboration. *State vs Badsha Khan 10 DLR 580.*

Section 114—"Particulars" though in plural number means also the singular "particular". *Ishaq. 7 DLR (FC) 37 (45 Left, H. Col.).*

Section 114—Extent and nature of corroboration of an accomplice's evidence. The extent and the nature of corroboration required may, no doubt, vary from witness to witness and from case to case, but as a rule it is not necessary that there should be corroboration in every particular; all that is necessary is that the corroboration must be such as to affect the accused by connecting or tending to connect him with the crime. The corroboration again need not be by direct evidence. It is sufficient if it establishes the existence of circumstances from which the connection of the accused with the crime can be reasonably inferred and support the approvers in such a substantial manner as to make it safe to be relied upon. *Ramzan Ali vs State 20 DLR (SC) 49.*

Section 114—Burden of proof as regards adverse inference—On the defence. *State vs Badsha Khan 10 DLR 580.*

Section 114—Presumption unfavourable from non-production of evidence or document. It is hardly necessary to stress the great importance which attaches to non-production of an important witness by the prosecution in a criminal case, where no satisfactory reason for non-production is established. It is true that the prosecutor is not bound to produce before the court a witness who is not expected to give true evidence, but he cannot escape the duty of causing such a witness, if

his evidence be of importance, to be present at the trial in case the opposite party should wish to examine him. *Khairdi Khan* 5 DLR (FC) 185. *A Barik vs Crown* 2 DLR 120; *Hazarat Ali vs Crown* 1 DLR 142.

Section 114—Non production of Police General Diary and the Police personal diary called for without satisfactory grounds entitles the Court to an adverse presumption. *Haidar Ali* 21 DLR 291.

Section 114—Karachi Port Trust truck notes—No presumption that they were signed by person purporting to sign them. *British India Steam Navigation Co. Ltd* PLD 1957 Kar. 765.

Section 114—Conflicting plea—Plea of being at the place of occurrence and that the accused was an aggressor—Does not amount to admission of the presence of the accused at the place of occurrence. *Judge Ghuncha Gul* PLD 1959 Lah. 950.

Section 114—Dispute as to proceedings—Statement of Presiding Officer should be accepted as true. *Union of India* PLD 1958 SC (Ind.) 58.

Section 114—Entries in order-sheet—Evidence of service of summons. *A Rahman* 3 DLR 46.

Section 114—Service of process—Process served at a place other than where the party resides—No presumption of proper service of process. *Sm Khatuni Bibi* 3 DLR 404.

Section 114—Document in possession of a party—Other party may ask for production—Not so asked—No inference against party not producing it. *Chandra Narayan* AIR 1946 Patna 66.

Section 114—False denial by accused of his connection with the deceased—Inference may be drawn against him. *Pershadi* PLD 1957 (Ind.) 183.

Section 114—The Khasra of 1860 was prepared in discharge of official duty if it was prepared under order of the Government and that in the present case the Court could presume, under section 114 of the Evidence Act, the existence of the orders of the Government to the effect. (1960) PLR 2 WP 626.

Section 114—Presumption—Right of way—Claimed as having its origin in custom—Evidence on record not proving open and uninterrupted enjoyment of right of way for a long period—Presumption cannot, in circumstances, be raised that right claimed had a legal origin. *Ghulam Muhammad vs Murad Baksh* (1969) PLD (Lahore) 95.

Section 114—Official acts—Presumption—Application pending with relevant authority nine years ago. No material on record to the contrary—Plea that a continuance of same state of affairs should be presumed—Rejected—Presumption, in circumstances, held, should be that application pending nine years ago has been disposed of rather than left unattended. *Ram and another vs Settlement and Rehabilitation Commissioner, Khairpur Division, (1969) PLD (Karachi) 412.*

Section 114—Presumption as regards record of rights when it was prepared—Court further to satisfy itself that the state of things as found when record of rights was prepared has undergone a change: It is true that in determining the question whether the defendants have got the tenancy right in the same way as their predecessors had, as recorded in the record of rights in the year, 1919, is based upon the second kind of presumption under section 114 of the Evidence Act. But a court of facts shall have to consider that, if the entry in the record of rights that the predecessors of the present defendants had tenancy right is presumed to have been correct at the time when the records were prepared, then the Court is also to satisfy itself that the said state of things was brought to an end in course of time by some other act or event. *Sona Mia vs Momtaj Bhuiya 26 DLR 215.*

Section 114—Soon after the theft—No hard and fast rule as to length of period. Length of period depends upon circumstances. *PLD (1956) (Lah) 190.*

Section 114—Murder—Accused found in possession of jewellery worn by deceased woman at the time of murder—Presumption of guilt—Corroborative value of evidence. *State 10 DLR 580 (DB); PLD 1959 Dhaka 226.*

Section 114—Possession of stolen property some time after the robbery—Conviction under section 114 PPC Not for robbery. *Fateh Sher PLD 1956 Lahore 157.*

Section 114—Where the accused was found in possession of stolen property a few hours after a theft.

✓ **Held**—He received the amount and was in possession of it so soon after the theft that a presumption under section 114 [illustration (a),] Evidence Act can be drawn against him. *Walizar PLD 1960 (WP) Karachi 204.*

✓ **Section 114**—Possession of stolen property—No presumption that the accused knew it to have been stolen in dacoity—Presumption of offence under section 411, PPC *Wali Muhammad PLD 1957 (Lah) 261.*

Section 114—Possession of stolen property—No probable or consistent explanation for possession—Not sufficient for conviction—Presumption should prove the offence charged. *Indo PLD 1951 Baluchistan 14.*

Section 114—Person in possession of stolen property after a long time of theft—He may be presumed to be not a thief or receiver of stolen property. *Mussarat Ali PLD 1956 Lah. 190.*

Section 114—Accused pointing out the place where stolen property was hidden—Is not sufficient to convict for theft or for being receiver of stolen property—Independent evidence necessary for conviction. *Pathan PLD 1951 Bal. 30.*

Section 114—"Soon after the theft"—Meaning of—Duty of determining the time is on the Court. *Musarrat Ali PLD 1956 Lahore 190.*

Section 114—Stolen property recovered from house jointly occupied by accused and his father—No evidence to show that recovery was from the part occupied exclusively by accused—Article not considered to be recovered from possession of the accused. *Mallah AIR 1946 Patna 169.*

Section 114—An approver is undoubtedly a competent witness under the Evidence Act. His evidence, however, cannot be acted upon as rule of prudence unless it is corroborated in material particulars by other independent evidence. The reason for this caution is that the approver has participated in the commission of the offence himself. Such independent corroboration need not cover the whole of the prosecution story. It would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details. In such a case corroboration does not afford the necessary assurance for the conviction. *Yaru PLD 1959 Kar 662 (DB).*

Section 114—Co-accused, statement of—May corroborate statement of approver. *Rafiq Ahmed II DLR (SC) 91; PLR 1958 SC (Pak) 317.*

Section 114—The facts proved against the appellant by the corroborated evidence may by themselves be not sufficient to establish his participation in the offence of murder, but the corroboration required in respect of an approver's evidence is not independent evidence that the accused committed the offence, for if that were so, there would be no need for accomplice's testimony. What is required is independent testimony either direct or circumstantial which 'affects' the accused by connecting or tending to connect him with the crime. That evidence must confirm in some material particular not only the evidence that the crime has been committed but also that the accused committed it. *Rafiq Ahmed II DLR (SC) 61; PLD 1958 SC (Pak) 317.*

Section 114—Retracted confession of co-accused—No corroboration—Not sufficient for conviction. *Nurul Fakir PLD 1950 Dhaka 50.*

Section 114—Girl attacked—Not an accomplice—Nature and extent of corroboration of her statement. *Sidheswar Ganguly Bengal PLD 1958 SC (Ind) 337.*

Section 114—Accomplice's evidence—Not to be relied upon without corroboration—Reasons for this rule of prudence—Accomplice cannot corroborate another accomplice. *Bhubano Sahu 2 DLR 39.*

Section 114—Bribe giver—Accomplice's evidence not to be relied on unless corroborated. The bribe giver is in the eye of law an accomplice and his statement that Rs 100 was paid by way of bribe cannot be accepted unless there is corroboration. *Ghulam Muhammad PLD (1957) Karachi 410.*

Section 114—Illegal gratification—Person paying informing authorities beforehand—Not an ordinary accomplice—Independent corroboration not needed for conviction. *Crown vs Abdul Rahman, PLD 1950 Lah, 361.*

Section 114—Retracted judicial confession and approver's statement—Admissible in evidence—Sufficiency of corroboration. *Abdul Majid PLD 1957 Lah. 77.*

Section 114—Corroboration of the evidence of association in respect of offence under section 400 Pak Penal Code—Nature of association to be established. In order to provide corroboration to the approver's evidence that the practice has grown up, in such cases, to lead evidence of, what has been called, association general and specific.

The circumstances which may normally be regarded as sufficient for furnishing such confirmation might well be—

(1) that the witness had contemporaneously reported this fact to somebody else;

(2) that other witnesses also support the testimony;

(3) that in the information, if any, lodged with regard to a dacoity the person or persons named by the witness have been shown as accused persons;

(4) that the person so named was, in fact, arrested or challenged in that dacoity; and

(5) that some article looted in that dacoity was actually recovered from the person named or at his instance.

Section 114—Evidence of such a nature must be scrutinised with care and caution in order to eliminate all chances of false implication or even an honest mistake. *Ramzan Ali 20 DLR (SC) 49.*

Section 114—An accomplice is unworthy of credit—Corroboration. *Adwahla Chand 1 PCR 36; PLD (1959) (Pesh) 75.*

Section 114—Proof of association and the purpose of association by direct evidence or by establishing the circumstances. The association and the purpose of the association may be proved either by direct evidence to the effect that the accused met and resolved to join together for the purpose of habitually committing dacoity or in the absence of such direct evidence it may even be established by proof of fact from which the association for that purpose may be inferred. *Ramzan Ali 20 DLR (SC) 49.*

Section 114—Corroboration of the evidence of an accomplice—Extent and nature of such corroboration. Corroboration must be in respect of material particular implicating the accused and it is not necessary that the evidence of an accomplice should be corroborated in every detail of the crime. *Abdul Khaliq 22 DLR (SC) 106.*

Section 114—Evidence of approver, if duly corroborated, should not be rejected merely because he is a man of depraved character. *Rafiq 11 DLR (SC) 91; (1958) PLD (SC) 317.*

Section 114—Accomplice—A person present at the crime though not taking any part, is not an accomplice. *Crown vs Ghulam Rasool PLD 1950 Lah. 129.*

Section 114—Record-of-rights—Presumptions arising from—Presumption as to continuance of state of affairs as they were on the date of its publications—Weak and rebuttable. *Mvi Abdus Sobhan 9 DLR 467.*

Section 114—An accomplice means a guilty associate or partner in a crime, a person who is connected with the offence, or who makes admissions of facts showing that he had a conscious hand in it. *Gulam Rasul vs Crown 1 PCR 90.*

Section 114—A witness not in any way concerned with the commission of the crime but being a witness to it withheld, out of fear, the information about the same until the arrival of the police, cannot be said to be an accomplice and his statement needs no corroboration. *Gulam Rasul vs Crown 1 PCR 90.*

Section 114—Accomplice's evidence needs corroboration as a safeguard.

Although section 133 of the Evidence Act provides that an accomplice shall be a competent witness against the accused person and the conviction is not

illegal merely because it proceeds upon the uncorroborated testimony of an accomplice yet illustration (b) to section 114 of the Evidence Act is the rule of guidance to which the Court should have due regard. The said illustration (b) provides that the Court may presume that the accomplice is unworthy of credit unless he is corroborated in material particulars. The law and the rule of prudence are certainly not higher in the case of sexual offences. *Abdul Quddus vs State* 35 DLR 373.

Section 114—Certificate granted to lawyer that he was enrolled as an advocate at Karachi—Presumption in his favour. *Hatim Badruddin Tyabji* PLD 1957 SC (Pak) 272.

Section 114—Detention under Safety Act—Presumption of bonafide of detaining authority—Detenu may prove malafides. *Muhammad Hayat vs Crown* 3 DLR 172; PLD 1951 FC 15.

Section 114—Evidence given by a witness—Presumption is that it was rightly recorded. *Anwar Muhammad* 11 DLR WP Lah 77; PLD 1959 Lah. 186.

Section 114—Noting by clerk on file signed by DM—Presumption is of his having signed it after perusal of file. *District Magistrate Lahore* 13 DLR (SC) 66; PLD 1961 SC 178.

Section 114—Presumption—Only regularity of the act if it was done—Not of the factum of the act having been performed. *Abdul Mannan vs. Crown* PLD 1956 Dhaka 114; 8 DLR (Short Notes).

Section 114—The presumption under section 114(e) is that of the regularity of the official acts, whether judicial or executive, and not that of the acts themselves being done. If, for instance, a notification is issued under the powers given by law, there is a presumption that it was regularly published and promulgated in the manner in which it was required to be done. But there is no presumption that it was issued according to the terms of the section which empowers it. *Purshottan* AIR (33) 1945 Bombay 492 (DB).

Section 114—Presumption must be raised in every case—May be dropped during the proceedings and prosecution asked that official acts were regularly performed. *Muhammad Hayat* 3 DLR 172(FC); PLD 1951 FC 15.

Section 114—Sanction for prosecution granted by SP—Sanction presumed to be regularly given. *Nirode Chandra Biswas* 9 DLR 546; PLD 1958 Dhaka 90.

Section 114—Service of notice—Entry in order-sheet—Not presumption of factum of delivery.

Only presumption of regularity of delivery when delivery is proved. *Tarangni Beni* 9 DLR 57.

Section 114—Objection on the ground that the sanction was not given by the proper authority cannot be raised for the first time in the appellate Court. *FD Casla* 11 DLR 239; 1959 PLD (Dac.) 744.

Section 114—Presumption is that the judicial or official acts were performed regularly. *A Mannan* 5 DLR 533; *Nerodo Chandra* 9 DLR 546.

Section 114—Abduction of girl of marriageable age—Presumption is that it was for having sexual intercourse with her—Accused must rebut the presumption. *Siddique* PLD 1959 Dhaka ka 956.

Section 114—Returns destroyed—Entries in the order-sheet—An application under Order IX, rule 13, Civil Procedure Code was made for setting aside an *ex parte* decree. Returns of the service of summons having been destroyed, entries in the order-sheet were relied on for the finding that the summons were duly served, presuming under illustration (e) of section 114 of Evidence Act that the official acts were duly performed.

Held—The entries in the order-sheet are evidence under section 114 of the Act to show that the official acts were duly performed. *Ahmedur Rahman Chowdhury vs. Buraja M Saha*, 3 DLR 46.

Section 114—Notice by registered post—Presumption. Under the Post Office Act, delivery of a postal article at the house or office of the addressee, or his servant or agent or other person considered to be authorised to receive the article according to the usual manner of delivering postal articles to the addressee, shall be deemed to be delivered to the addressee. So, when the Income-Tax Department chooses to send a notice by registered post, they can rely on the presumption of service at the proper time unless the presumption is rebutted by positive evidence. *RP Shah vs. Commr. of Income Tax*. 7 DLR 587; *Khalil Ahmed Chowdhury vs Md Shamsul Anwar Chowdhury* 11 DLR 112.

Section 114—In a case where a registered notice has come back with the postal endorsement "refused". it is for the defendant addressee who denies receipt of the registered notice to prove that the notice was not properly addressed to him or it was never tendered to him. The plaintiff need not prove the service of the registered notice when it is duly addressed. *Monomohan Roy Chowdhury vs. Ajit Kamal Datta* 6 DLR 267.

Section 114—Notice returned with the postal endorsement "refused" is conclusive that it was so refused, unless evidence is led to prove the contrary. *Hamida Begum vs. Syed Mashaf Hossain Sha* 10 DLR 196.

Section 114—Service of process showing service—Where the return of the service of process issued under Order XXI, rule 22, CP Code shows that the process had been duly served, there is a presumption under section 114(e) of the Evidence Act that the official act of serving the process was rightly carried out. Such a presumption, however, does not arise in those cases where on the face of it the return shows the notice has been served at a place other than where the party concerned resides. *Khatun Bibi vs Abdul Kader*, 3 DLR 404.

Section 114—Order to issue notice—Presumption. Mere order on the order-sheet to issue a concise statement under section 163(3), BT Act, is not enough to raise a presumption of service of the same. *Radha Kanta Gain vs Kunal Bhusan Roy Chowdhury* 11 DLR 442.

Section 114—An application under Order IX, rule 13, CPC for setting aside an *ex parte* decree. Returns of the service of summons having been destroyed—Entries in the order-sheet were relied on for the finding that the summons were duly served, presuming under illustration (e) of section 114 of the Evidence Act that the official acts were duly performed.

Held—The entries in the order-sheet are evidence under section 114 of the Act to show that the official acts were duly performed. *Ahmedur Rahman Chowdhury vs Barja Mohan Saha*. 13 DLR 46.

Section 114—Mere production of the postal acknowledgment receipt is not enough to raise a presumption of service of notice upon the addressee without evidence to the effect that the receipt referred to in the particular notice was sent to the addressee. *M Salim vs. Sheikh Abdul Latif* 14 DLR 186.

Section 114—Concise statement under section 163 BT Act issued—Presumption is, it has reached its destination : Where the concise statement has been issued and there is no evidence that it has come back unserved, the presumption is that it has reached its destination. *Mohiuddin Mohmud vs. Mainuddin Mohammad* 16 DLR 274.

Section 114—Presumption is only "regularity" of an official act, not of its correctness: the presumption under section 114(e) of the Evidence Act besides being rebuttable is not available in favour of the correctness of any entry in the electoral roll. The presumption is only in regard to the "regularity" of the official Act. *Shahidullah Kazi vs ADC*, 20 DLR 633.

Section 114—Omission of the schedule in the copy of the decree is in accordance with the High Court Rules and cannot be read in rebuttal of the presumption raised under section 114 of the Evidence Act. *Maksud Ali vs Eskandar Ali* 28 DLR (SC) 99.

Section 114—Ballot papers not produced for which none of the contending parties responsible—Election Tribunal may act on the presumption of regularity of official acts under section 114(e) of the Evidence Act. *Ayub Ali Howladar vs Election Tribunal 28 DLR (AD) 1.*

Section 114—Casting of dead or absentee votes is a serious irregularity which demands consideration as to their effect on the election. *Ayub Ali Howladar vs Election Tribunal 28 DLR (AD) 1.*

Section 114—The endorsement on the postal cover read with the date of despatch clearly shows that these letters were actually taken for delivery on the dates mentioned therein. These acts done in normal course of official business should be presumed to have been done regularly.

In absence of any further evidence, such as evidence of the postman, the endorsements on the registered envelop can not be considered. *Abdul Karim Khan vs Chairman 1st Labour Court 31 DLR 269.*

Section 114—Printed paper-books may be presumed under section 114 of the Evidence Act as correct copies of the original records of the case—Such paper-books cannot be said to be the copies of copies making them inadmissible as secondary evidence.

Having regard to the common course of public business and regularity of official acts, there may be a presumption under section 114 of the Evidence Act that the printed paper-book, used in an appeal before the High Court, and made a part of the permanent record of the said High Court, was duly prepared and is a correct copy of the records of the case.

Elaborate procedure for preparation of paper-books on the basis of the original records of the case and use of such paper-books at the hearing by the High Court, which had during such hearing the original records in its possession, may very well lead to the presumption that the printed copies contained in the paper-book were compared with the original documents of the records and, as such, are correct and true copies of the same.

The paper-books printed by the Dhaka High Court cannot be said to be mere copies of copies and inadmissible as secondary evidence. *Maksud Ali vs Eskander Ali 28 DLR (AD) 99.*

Section 114—Since the particular case is pending in the Court of the Sub-Divisional Magistrate, it may be presumed in the absence of any evidence to the contrary, that the orders were signed by the Sub-Divisional Magistrate himself. *Pachu vs State 26 DLR 297.*

Section 114—The burden of proving that the order of arrest was malafide rests on the detenu, and in the absence of any material on the record showing that the officer ordering the arrest acted in bad faith, the Crown cannot be called upon to prove that the order was not illegal or improper. *Chiragh Din vs Crown* 3 DLR (FC) 157.

Section 114—Presumption under the clause does not go to prove that the act was actually done unless there is evidence to the effect. *State Bank of Pakistan vs. Azizul Islam* 13 DLR 476.

Section 114—When public authority's act is challenged as malafide, the burden of proof is heavy on the person making the allegation. *Azit Kumar Das vs Prov. of E Pakistan* 11 DLR 243.

Section 114—Presumption that examiners of answer-scripts performed their duties bonafide and properly.

The Examiners are in full charge of marking of the answer-scripts. It is to be presumed that the examiner marked an answer-script bonafide without bias and properly unless there are materials to show that the examiner is not a qualified one or that he bore any personal grudge against the examinee or that there was any other element of malafide in such examiner. *Chittagong University vs Md Abdul Quyyum*, 28 DLR 323.

Section 114—There is a presumption that official acts were regularly performed and malice in an officer cannot be presumed without an allegation in that behalf. *Muzaffar Ali Shah vs. Registrar, Co-operative Societies*, PLD 1968 Kar. 412.

Section 114—Where non-Muslim rioting mob, during pre-partition disturbances were found to have surrounded large number of Muslims including men and women and massacred them it was held that legitimate presumption can be drawn that menfolk were annihilated first before turn of womenfolk came. *Abdul Muquim vs. Settlement and Rehabilitation Commissioner*, PLD 1969 Kar. 217.

Section 114—Acquisition of land for Railway—Two public documents one being a copy of Gazette notification of 1933 and the other the land's plan which were more than thirty years old and filed as exhibits lead to a presumption that official acts referred to therein were regularly performed and those documents were sufficient to rebut the presumption of correctness of RS and subsequent record of right. *GM, Bangladesh Railway vs Most Sharifjan Bibi* 43 DLR (AD) 112.

Section 114—Court will take adverse presumption for non-production of any evidence or non-examination of any witness if the party is in a position to produce such evidence or witness. *Mahatabuddin Biswas vs Abdul Jalil and others* 47 DLR 441.

Section 114—There is always a presumption that government action is in public interest. The Court will not easily assume the action taken by the government is unreasonable or without public interest. It is for the party challenging authority to show that it is wanting in public interest. This burden is heavy and has to be discharged by the party concerned. *Akramuzzaman vs Government of Bangladesh, and others* 52 DLR 209.

Section 114—Tendering of vital witness amounts to withholding of material witnesses and adverse presumption ought to have been drawn against the prosecution. *Hobi Sheikh and another vs State* 56 DLR 383

Sections 114 and 88—Where judicial or official act is shown to have been done, it is presumed to have been done rightly and regularly complying with necessary requirements. *Akhtar Hosain vs Government of Bangladesh & others* 45 DLR 651.

Sections 114 and 134—Prosecution is not bound to produce each and every witness of incident irrespective of consideration whether such witness is essential to unfolding of narrative on which prosecution case is based. Non-examination of three witnesses listed in charge-sheet is not at all fatal. It is not at all necessary to multiply witnesses to prove a prosecution case. It is axiomatic that evidence is not to be counted but only to be weighed and it is not quantity of evidence but quality that matters very much. Under section 134 of The Evidence Act, which is a Golden Rule, conviction can be safely based on solitary testimony of a witness if it inspires confidence in the mind of the Judge.

Learned Counsel for condemned prisoners and accused-appellants could not show how the prosecution version had been rendered less trustworthy as a result of non-examination of other three witnesses noted in charge-sheet. *State vs Md Abdus Samad Azad alias Samad and another* 9 BLC 39

Section 114(a)—Lost article recovered from accused's hut soon after occurrence—Guilty knowledge not proved—If the accused gives an explanation which is reasonable, though it may not be true, he is entitled to acquittal. *Jumma vs Government* 6 DLR (WP) 8; *Majiruddin Fakir vs Crown* 2 DLR 34; 6 DLR 518.

Section 114(b)—Victim girl—Acceptance of uncorroborated testimony of victim girl—Court may presume to be unworthy unless she is corroborated in

material particular. The Judge may accept the testimony by assigning reason. *Abdul Quddus vs State 1983 BLD (HC) 18(b)*.

Section 114 Illus (b)—The approver is always an unreliable person and his evidence requires corroboration with regard to not only offences deposed to but also to persons implicated. *Ramzan Ali vs State, PLD 1967 SC 545*.

Section 114 (b), 113—Approver, statement of—Not to be relied upon unless corroborated. The evidence must confirm in some material particulars not only the evidence that the crime has been committed but also the accused committed it. *Rafiq Ahmed 11 DLR (SC) 91; PLD 1958 SC (Pak) 317*.

Section 114(b) and 30—Court may take into consideration the confessional statement of a co-accused under section 30 of the Act against the one who did not confess but an accomplice is unworthy of credit unless he is corroborated in material particulars. *Nazrul Islam & others vs State 45 DLR 142*.

Sections 114(b), 133—Corroboration of accomplice's statement— Nature and extent of—Reasons explained. It is necessary to see if the statement of the accomplice is corroborated in material particulars against accused person or if there are more than one accused persons against each of them. *Abdul Qadir PLD 1956 (WP) Lahore 100; PLR 1956 Lahore 757 (DB)*.

Section 114 Illus. (c)—Where execution of the receipt is admitted by debtor but his allegation is that the receipt was obtained under coercion and undue influence and that no consideration was received, the burden lies on his debtor to prove undue influence and non-receipt of consideration. *Haji Ghulam Mustafa vs Allah Bux PLD 1963 Kar. 960*.

Section 114 Illus. (c)—There being a presumption of regularity of a judicial act under section 114(c) of the Evidence Act whenever a judgment-debtor or anybody stepping into his shoes seeks to have a decree passed by a Court of competent jurisdiction adjudged void by reason of fraud, a heavy onus lies on him to prove the alleged fraud by cogent and reliable evidence. *Subitri Barai vs Asstt. Custodian. 39 DLR 172*.

Section 114 Illus. (d)—Record-of-right—Presumption as to the state of things when it was prepared: Record-of-rights—relates to the state of things when it was prepared—Presumption that the state of things has continued to be is made in view of illustration (d) of section 114, Evidence Act—A slight evidence is enough to rebut that presumption. *Abdus Sobhan Chowdhury vs Fazlur Rahman Chowdhury, 9 DLR 467*.

Section 114 Illus. (d)—The only presumption that arises from the record-of-rights is that the record-of-rights is presumed to indicate the correct state of affairs at the date of the final publication of the said record and it is only by reason of the provisions of illustration (d) of the illustrations appended to section 114 of the Evidence Act that a further presumption arises as to the continuance of that state of affairs, but from its very nature this second presumption is of a very slender character, particularly where many years have elapsed since the record-of-rights was finally published, as during that time many changes might well have taken place. Thus even the slightest evidence may be sufficient to rebut the second presumption under illustration (d) of section 114 of the Evidence Act. *Abdus Sobhan Chowdhury vs Fazlur Rahman Chowdhury*, 9 DLR 467.

Section 114(e)—Assessment levied by Government officers—Presumption is that they were instructed by Government to do so. *Government of the Province of Bombay vs Pestonji*, 3 DLR 337; *PLD 1949 Privy Council 31*.

Section 114(e)—Khatian—Presumption of genuineness.

Held—Presumption of genuineness of Khatian and contents thereof are findings of fact. They are not to be interfered with by the Appellate Division. *Nasirunnessa Bewa vs Abdul Saber and others* 1 BSCD 181.

Section 114(e)—Objection as to admissibility of evidence is to be taken at the first instance. In the instant case no such objection was raised against the Commissioner's report in question which can also be relied upon as the same is an official document and was prepared in due course. *Abdus Quader Chowdhury vs Sayedul Hoque* 43 DLR 568.

Sections 114(e) and 74—Objection as to admissibility of evidence is to be taken at the first instance. In the instant case no such objection was raised against the Commissioner's report in question which can also be relied upon as the same is an official document and was prepared in due course. *Abdus Quader Chowdhury vs Sayedul Hoque* 43 DLR 568.

Section 114(f)—Document signed by Assistant Registrar and Deputy Registrar of University—Presumption is that they are competent to sign such documents. *Hasan Imam* *PLD 1959 Lah 872 (DB)*.

Section 114(f)—Letter posted—Presumption is that it reached the addressee in usual time. *Abdul Hamid* *PLD 1959 Kar 629*.

Section 114(f)—Notice sent by registered post—Not accepted—Endorsement "refused" on the letter—Presumption is of due tender and refusal. *Mon Mohan* 6 DLR 267; *PLD 1954 Dacca 168*.

Section 114(f)—Landlord's fee—Order-sheet silent—Presumption : Order-sheet of the execution proceeding silent as to whether the auction-purchaser was called upon to deposit landlord's fees required by section 26E BT Act. *Mahendra Lal vs Nikunja Behari* 6 DLR 397.

Section 114(f)—When the order-sheet in the money execution proceedings does not show that before the confirmation of the sale, the auction purchasers were invited to deposit the landlord's fees and other requisites for service of notice on the landlord, the presumption under section 114(f) of the Evidence Act from the sale-certificate that it shall be presumed that the landlord's fees have been deposited will be held to have been sufficiently rebutted. Payment of the landlord's fees and filing of other requisites being conditions precedent to the confirmation of sale, the order confirming the sale was without jurisdiction and by such a confirmation the holding could not pass to the auction-purchaser. *Mahendra Lal vs Nikunja Behari* 6 DLR 397.

Section 114(f)—Presumption when a registered letter is duly addressed and posted.

As regards the presumption of service of notice arising from the fact of posting a letter such presumption is available if there is proof regarding the posting of the letter.

According to the provisions of section 27 of the General Clauses Act, service of notice shall be deemed to be effected if the letter containing it has been properly addressed and sent by registered post. *Khabiruddin Ahmed vs Salam Kabir* 34 DLR (AD) 271.

Presumption under section 8, Bengal Municipal Act, that the objections submitted after publication of notification under section 6 to the Act have been considered.

Where the notification under section 6, Bengal Municipal Act, itself invited objection within three months of the notification and the notification under section 8 of the Act was published long after the time for submitting objections had expired, the natural presumption is that the Government having itself invited the objections did not publish the notification under section 8 until the objection had been considered.

Where a statute expressly provides that a certain action can be taken by a public authority after only certain steps have been taken and the proceedings held show that the authority was conscious of the steps that had to be taken, the presumption is that those steps were taken before the taking of the final action and the burden of showing that was not the case is on the person who alleges to

the contrary. *Chittaranjan Cotton Mills vs Commr. Narayanganj Municipality*. 11 DLR (SC) 121.

Letter posted comes back with the remark "refused"—Presumption : If a letter is found to have been properly addressed and posted but returned with the endorsement "refused", the presumption under section 114(f) of the Evidence Act would be that it was presented to the addressee and he had refused to receive it and in such a case it would not be necessary to call the postal peon to prove the endorsement and refusal. *Amulla Kumar Ghose vs. Khama Prava Haldar*. 34 DLR 267.

Proof of the service of the notice contained in a registered cover containing an endorsement by the Post Master—Service properly made. *Amulla Kumar Ghose vs Khama Prava Haldar* 34 DLR 267.

Presumption when a registered letter is proved to have been duly addressed and posted : As regards the presumption of service of notice arising from the fact of posting a letter such presumption is available, if there is proof regarding the posting of the letter.

According to the provisions of section 27 of the General Clauses Act service of notice shall be deemed to be effected if the letter containing it has been properly addressed and sent by registered post. *Hajee Khaburuddin Ahmed vs Md Salam Kabir* 34 DLR (AD) 271.

Notice addressed duly—Returned with remarks refused—Validly served. *Ambia Khatun vs Serajul Islam* 39 DLR 287.

Section 114(f)—Where a notice is sent by registered post and is returned by post office as refused the presumption as to due delivery or service of notice depends on the circumstances of each case. No evidence dislodging presumption arising under section 114(e), Evidence Act, 1872 having been produced termination of tenancy by notice under section 105, Transfer of Property Act, 1882, was held, valid. *Jaffer Sultan Zaidi vs. United Commercial Corporation* PLD 1962 (Kar) 561.

Section 114(g)—Best evidence available not produced—Presumption against party not doing so. *Khurshed Ahmed* PLD 1957 Kar. 359.

Section 114(g)—Where the Steamer Companies had special knowledge under section 106 of the Evidence Act about the facts of delivery of goods to the Companies and they did not prove the same, they exposed themselves to the presumption under section 114(g) of the Evidence Act. *RSN Co, Ltd. vs. Mahendra Kumar* 3 DLR 119.

Section 114(g)—Presumption arises due to failure to examine material witness mentioned in the charge-sheet. *Fazlul Hasan 11 DLR 316; (1959) PLD (Dac.) 931.*

Section 114(g)—When persons specifically mentioned in the FIR as also those who were closer neighbours than the witnesses examined, were not examined, the Sessions Judge correctly explained to that Jury that under the law they were entitled to draw a presumption that the evidence which a party intentionally withheld would, if produced, go against the party and whether they would draw that presumption or not in the particular case before them depended entirely on them. *Hazrat Ali vs Crown 1 DLR 42.*

Section 114(g)—Court upholding objection to the production of register in possession of appellant—No presumption may be drawn against defendant for not producing it. *A & M Wazir Ali PLD 1957 Kar. 913.*

Section 114(g)—Document not produced by a party—Adverse inference only when it could be proved that the party could produce it. *Muhammad Syed Ali 10 DLR 447; PLD 1959 Dacca 1.*

Section 114(g)—Prosecution case will not fail merely because of the non-examination of a material witness. *State vs. Badsha Khan 10 DLR 580.*

Section 114(g)—Witness : Non-examination of witness who is considered important—Raises a presumption. *Alkas Mia 25 DLR 398.*

Section 114(g)—In a case where the parties are closely related it is not unlikely that some of the common relations will either try to bring about a settlement or refuse to depose on one side or the other. In these circumstances the mere fact that they were not examined does not affect the prosecution or entitle the defence to ask for any adverse inference. *Ishaque 22 DLR 431.*

Section 114(g)—Where the prosecution withholds material evidence Court should draw an adverse inference. *Ashrafuddin 16 DLR 224; Syed Mabaswir Ali vs. State 10 DLR 198.*

Section 114(g)—Important witness not produced by prosecution—Serious matters—Witness must be called at trial for examination by defence. *Khairdi Khan 5 DLR (FC) 185; PLD 1953 FC 223.*

Section 114(g)—Prosecution not examining witness—When adverse inference may be drawn. Before an adverse inference can be drawn for the non-examination of a witness, the onus is on the accused to show that the witness was a material witness. *Badsha Khan 10 DLR 580; PLD(1959) Dacca 2261.*

Section 114(g)—The prosecution is not bound to examine each and every witness cited in the indictment of the charge-sheet. Nevertheless it takes the risk that if any one of these witnesses is shown to be a material witness, then the court may, having regard to the facts and circumstances of the case, draw a presumption that if such a material witness had been examined he would not have supported the prosecution case. *Fazlal Haque 11 DLR 163; PLD 1959 Dacca 931.*

Section 114(g)—Party having special knowledge of the facts fails to prove them—Where a Steamer Company had special knowledge within the meaning of section 106 of Evidence Act about the facts of delivery of goods to the Company and they not having proved the same they expose themselves to the presumption under section 114(g) of Evidence Act. *3 DLR 13.*

Section 114(g)—The circumstances under which the Court would be entitled to draw inferences unfavourable to the defendant are provided for in section 114(g) and the Court must be satisfied that the evidence could be produced. The plaintiff's failure to prove that the account books were in existence and could be produced by the defendant cannot be used against the defendants. *Haji Yar Ali vs Mobarak Ali 7 DLR 6.*

Section 114(g)—The official acts carry the presumption that these are done with regularity. So, there is also the presumption that the sanctioning authority gave the sanction after consideration of all the materials constituting the offence which were placed before it. *Jainul vs State 12 DLR 870: (1961) PLD (Dac) 565.*

Section 114(g)—Failure to examine disinterested witnesses makes the prosecution case shaky. *State vs. Basirullah 16 DLR 189.*

Section 114(g)—Adverse presumption under section 114(g) is essentially a question of fact which is for the Court to decide. *Akrab Ali vs Zahiruddin Kari 30 DLR (AD) 81.*

Section 114(g)—Non-examination of relevant witness creates presumption under section 114(g) of the Evidence Act and raises a question of doubt in the prosecution and benefit of this defence would go to the accused. *Nur Hossain vs. State. 31 DLR 405.*

Section 114(g)—Important witness withheld by the prosecution—Presumption is if he had been produced in Court, he would not have supported the prosecution case.

The Police Officer (a Sub-Inspector of Police) who made the entries in the General Diary and received the telephonic message is found to have been

purposely with-held. Under section 114(g) of the Evidence Act, the Court having regard to these circumstances, can draw a presumption that if this officer had been examined as a witness he would not have supported the prosecution case. *S M Farooque vs State* 28 DLR 192.

Section 114(g)—Non-production of the witnesses named in the FIR, and the charge-sheet has weakened the prosecution case and, as such, an adverse presumption should be drawn against the prosecution. *Abdul Bahar vs State*; 1985 BLD HC 84; 1959 PLD (Dha) 931.

Section 114(g)—No adverse presumption against the prosecution can be drawn for the non examination of the investigating officer in the absence of drawing attention of the witness to any contradiction in court and statement before the police. *Bhagaban Chandra Chakma vs State*; 1987 BLD 351(b)

Section 114(g)—From the failure of the investigating officer to seize blood stained earth from the place of occurrence it cannot be inferred that the occurrence did not take place. *Mufazzel vs State*; 1987 BLD 406(a).

Section 114(g)—Non examination of impartial witnesses and failure to seize blood-stained earth from the place of occurrence and wearing apparel of the accused raises an adverse presumption against prosecution case. *Moinullah vs State*; 1988 BLD 100.

Section 114(g)—The prosecution ought to have examined the investigating officer as a witness to dispel the mystery around the two charge-sheets on the self-same occurrence, although for non-examination of investigating officer prosecution case will not fail in every case. *Abdus Sobahan Howlader & others vs State* 45 DLR (AD) 134.

Section 114(g)—Non-examination of independent witnesses, especially some of the close neighbours calls for a presumption against the prosecution. This view finds support from the case reported in 25 DLR 398. *Kawsarun Nessa and another vs State* 48 DLR 196.

Section 114(g)—Withholding of charge-sheet witnesses—In a case where there is no eye-witness or circumstantial evidence it is essential that next-door neighbours or those living near the place of occurrence be examined. *Momin alias Md. Mominul Huq vs State* 48 DLR 282.

Section 114(g)—The principle laid down in the said case along with the provision of 114(g) of the Evidence Act is applicable in the present case where the prosecution suffers for non-examination of dis-interested and independent witnesses as though the occurrence is alleged to have taken place in the broad

day light on the busy pathway. *Alamgir Hossain (Md) alias Alamgir Hossain and another vs State* 49 DLR 590.

Section 114(g)—There is nothing on record to find any justifiable reason for the absence of the plaintiff in the suit although his bonafide was seriously challenged from the very beginning. Under such circumstances, the Court of appeal below appears to be justified in drawing an adverse presumption against the plaintiff. *Abdur Rahim vs Arifur Rahman and others* 50 DLR 166.

Section 114(g)—The document is as old as 50 years and there is no evidence that the defendant had wilfully suppressed the document from producing it in court. In that view the findings of the court of appeal as to the presumption under section 114(g) of the Evidence Act is untenable. *Shahidullah and others vs Lutfur Karim and others* 50 DLR 328.

Section 114(h)—Officer claiming privilege unreasonably—If adverse conclusion may be drawn against him.

It was urged by the Crown that privilege might be claimed by an officer about any of his official acts and in such a case the presumption under section 114(h) would operate.

Held : The officers of the Crown whilst relying on illustration (e) of section 114, Evidence Act, have lost sight of illustration (h) which says that the Court may presume that if a man refuses to answer a question which he is not compelled to answer by the law, the answer, if given, would be unfavourable to him. This illustration is as good as the other and very appropriate to the case. *Chiragh Din PLD 1950 Lahore 451.*

Section 114(g)—When an action is taken by maintaining a file, the file must be produced to show that the act was done properly. As the relevant file has been withheld in this case presumption under Section 114(g) of the Evidence Act shall apply. *Chowdhury Mahmood Hasan and others vs Bangladesh and others* 54 DLR 537.

Section 114(g)—Defence was obviously deprived of scope to cross-examine investigation officer on vital aspects and it is obvious that defence was prejudiced seriously due to non-examination of the investigation officer. Prosecution offered no explanation as to non-examination of some CS witnesses including investigation officer and it will give rise to presumption under section 114G Evidence Act. *Mokbul Hossain and another vs State* 55 DLR 396.

Section 114(g)—When it is not disputed that the payments were made by cheques, in order to prove the dates of the cheques, the plaintiff could have easily

called for the record of the bank. But the plaintiff preferred not to tread the path and thereby withheld the best evidence from the Court. *Saraj Kanta Sarker and others vs Seraj-ud-Dowla and others* 56 DLR 39.

Section 114(g)—The appellate Court's finding regarding genuineness of the bainapatra is not binding on the revisional Court because of the non-consideration of the material evidence of PWs 1 and 3 and also because of non-examination by the plaintiff of one Joynal Miah who is indisputably alive and was one of the four attesting witnesses to the bainapatra. *Akiman Nessa Bewa and others vs Harez Ali and others* 2 BLC (AD) 85.

Section 114(g)—Tender of witness—Its effect—Prosecution should examine the important witness-in-chief but when sufficient evidence is already given or it is of no significance, the tendering of a witness will not be treated as with-holding of such a witness unless it is from oblique motive. As the defence failed to challenge the evidence of other PWs, the tendering of the witnesses cannot attract the provision of section 114(g) of the Evidence Act to draw adverse presumption and the tendering of witnesses were not done with any oblique motive. *State vs Munir and another* 1 BLC 345.

Section 114(g)—As there is no evidence that any other person than the PWs came to place of occurrence house just after the occurrence, no presumption could be made against the prosecution for not examining the unnamed witnesses. *Mostafa (Md) vs State* 1 BLC 82.

Section 114(g)—The doctor, the investigating officer and the material witnesses have been withheld and their non-examination cast a serious doubt in the prosecution case, had they been examined they would not have supported the prosecution case and an adverse presumption can be drawn against the prosecution case. *Munsurul Hossain vs State* 1 BLC 421

Section 114(g)—The prosecution having examined all the material eye-witnesses, non-examination of the four charge-sheet witnesses who are not at all material as they were not eye-witnesses of the occurrence and they were not at all vital witnesses for the prosecution the learned Single Judge wrongly drew adverse inference against the prosecution for not examining such witnesses. *State vs Ful Mia* 5 BLC (AD) 41.

Section 114(g)—Non-examination of Investigating Officer—Its effect—Unless the accused person is prejudiced for mere non-examination of the Investigating Officer the prosecution case will not fail. *Siraj Miah vs State* 2 BLC 402.

Section 114(g)—Although the prosecution may not examine all the prosecution witnesses but it must produce all the cited witnesses before the Court to avoid adverse presumption against prosecution. *Zahirul Hoque Khan vs Aktaruzzaman Chowdhury & others* 2 BLC 70.

Section 114(g)—It is no doubt true that the prosecution is bound to produce witnesses who are essential to the unfolding of the narrative on which the prosecution is based but it cannot be laid down as a rule that if large number of persons are present at the time and place of occurrence, the prosecution is bound to call and examine each and every one of those persons. *State vs Md Monir Ahmed* 4 BLC 426.

Section 114(g)—The prosecution has not only withheld the vital witnesses but have not also given any explanation whatsoever for their non-examination, a presumption under section 114(g) of the Evidence Act must be drawn against the prosecution for non-examination of such material and vital witnesses. *State vs Sarowaruddin* 5 BLC 451.

Section 114(g)—Non-production of other constables who were on patrol duty along with the PW 1 and also another seizure list witness casts serious doubts about the prosecution case giving rise to an adverse presumption under this section. *Masud and others vs State* 3 BLC 107.

Section 114(g)—As there were about 20/30 local people at the place of occurrence but none of them has either been cited as a witness or examined in the case and the prosecution has also not examined the informant of the case for which adverse presumption as to the alleged prosecution case and the place of occurrence can safely be drawn. *Nowsher Mollah, @ Md Nowsher Ali Mollah vs State* 3 BLC 251.

Section 114(g)—As 14 persons have been cited as witnesses in the charge-sheet but out of them 4 persons have not been examined by the prosecution and there is no explanation to that effect and as such an adverse presumption can easily be drawn against the prosecution for withholding these charge-sheet witnesses. *State vs Azharul Islam* 3 BLC 382.

Section 114(g)—It appears from the testimony of the PW 1 that he and others sent one Solaiman Choukider to the police with information of the occurrence but he was not examined and PW 25 has testified that he had received the information through one Parimal Chandra Ghose who has been withheld, by the prosecution in the trial Court and PW 15, the subsequent Chairman of Union Parishad deposed in Court that he and others had informed the police station in

respect of the dead body and the dead body was recovered by two divers but none of them was examined in this case and no explanation has been given by the prosecution for such withholding and, in that view of the matter, an adverse inference under section 114(g) of the Evidence Act can be drawn against the prosecution. *State vs Md Abdul Ali and others* 6 BLC 152 .

Section 114(g)—The prosecution has failed to prove the main ingredient of section 394 of the Penal Code regarding hurt sustained by the victim during occurrence at the hands of the accused persons as neither any doctor has examined nor any paper showing admission into hospital was filed before the Court and the non-production of recovered snatched away money has made the entire prosecution case unworthy to believe coupled with this PW 8 told that they had kept the money recovered with one Foujia Islam, a local Union Parishad member but nowhere it has been established that the same was received from the concerned Union Parishad Member by the Investigation Officer and the non-production of Chairman and Members of the Local Union Parishad made the prosecution case doubtful and benefit of this defect will go to accused person. *Noor Islam and another vs State* 6 BLC 178.

Section 114(g)—Non-examination of relevant witnesses as mentioned in the first information report as well as independent witnesses, particularly some of neighbours, raises a presumption against the prosecution to the effect that had they been examined in the case they would not have supported the prosecution case and the benefit of this defect will go to the accused persons. *Anaddi alias Ayenuddin and ors vs State* 6 BLC 310.

Section 114(g)—When the prosecution has proved its case against the accused-leave-petitioner by most consistent, corroborative and overwhelming evidence, mere non-examination of some charge-sheeted witnesses was a matter of no significance and legal consequence. There is no rule of law nor a rule of prudence to consider each and every charge-sheeted witness as a material witness for whose non-examination an adverse presumption has to be drawn against the prosecution, unless it can be shown from the evidence that his evidence is of vital importance for proper adjudication of the case. *Rakhal Chandra Dey alias Rakhal Chandra Dev vs State* 7 BLC (AD) 84 .

Section 114(g)—It is contended on behalf of the condemned prisoner that out of 29 charge-sheeted witnesses the prosecution has examined only 9 witnesses and non-examination of such a large number of charge-sheeted witnesses creates an adverse presumption against the prosecution case. Prosecution is not bound to examine all the witnesses cited in charge-sheet. In order to bring home the charge against accused persons the prosecution is bound

to produce witnesses who are essential to the unfolding of narrative on which prosecution case is based but it cannot be laid down as a rule that if there are large number of witnesses in charge-sheet, prosecution is bound to call and examine each and every one of those witnesses. The pertinent point is, whether prosecution could bring home charge against accused persons through witnesses produced in Court in its support. In the instant case, the prosecution placed in witness box those witnesses only who were required to prove prosecution case before Court. *State vs Saidul Huq* 8 BLC 132.

Section 114(g)—In a criminal case to prove the charge against accused person it is not imperative that prosecution is to produce all witnesses noted in the charge-sheet in witness box. True it is that prosecution is bound to produce witnesses who are essential to the unfolding of the narrative on which the prosecution case is based but it cannot be laid down as a Rule that if there are large number of witnesses in the charge-sheet prosecution is bound to call and examine each and every one of the witnesses cited in charge-sheet. In this case prosecution placed on the witness box witnesses whom it found sufficient to prove prosecution case. The point that is to be seen is whether the prosecution could bring home the charge against accused persons through witnesses produced in support of prosecution case. *State vs Abdul Karim & ors* 8 BLC 264

Section 114(g)—Out of fifty-six charge-sheet witnesses thirty-four witnesses had been examined in the instant case. Mere fact that prosecution failed to examine other witnesses cannot be a manifestation that such witnesses were unwilling to support prosecution case. Non production of such witnesses at the trial did not at all destroy the evidence produced and adduced by other witnesses. Condemned prisoners and appellants cannot get any benefit of section 114(g) of the Evidence Act. Moreover, nowadays citizens of the land who are cited witnesses do not dare to stand in witness box to give testimony against the offenders and do not want to invite enmity for fear of their lives and they also incur apprehension that they might even be snubbed out of the world. *State vs Ershad Ali Sikder and others* 8 BLC 275.

Section 114(g)—The exception taken by the learned Counsel for non-examination of all or reasonable number of witnesses cited in the prosecution report is of no merit since it is for the prosecution to decide amongst the cited witnesses in the prosecution report how many it will examine for establishing its case against the accused persons placed on trial. Moreso, it is not seen from the materials on record that it was the case of the convict that any particular material witness was withheld by the prosecution to their prejudice. *Zahed Ali Foreman (Driver) and others vs State* 9 BLC (AD) 122.

Sections 114(g)—Although all the first information report named witnesses have not been examined but some of them have been duly examined by the prosecution such as PWs 2-4, who corroborated the prosecution case in toto that on the date, time and manner of occurrence the convict appellant along with his associates killed the victim by causing several bleeding injuries on the person of the victim giving ramdao blows as a result of which the prosecution has successfully proved its case beyond any shadow of doubt against the appellant. *Zaman alias Muniruzzaman vs State 9 BLC 327.*

Section 114(g)—Nowhere from the evidence on record it could be gathered that Razia Khatoon was enticed by the appellant and subsequently offered to her husband to take her back. The PW 10, Ilias, husband of the deceased Razia Khatoon was surprisingly tendered by the prosecution and he was not cross-examined by the defence which gives a strong presumption of improbability of the prosecution case within the meaning of section 114(g) of the Evidence Act as he was the proper witness who could have revealed the truth or falsity of the case, particularly the fact of enticing the deceased by the accused appellant, who is entitled to get benefit of doubt. *Nekbar Hossain vs State 9 BLC 475.*

Section 114(g)—Adverse Presumption—If the prosecution does not examine vital witnesses or produce material documents, such as GD Entry, FIR, Inquest Report, Post Mortem Examination Report, the Court should take either of the two steps—it may draw an adverse presumption against the prosecution under this section to the effect that had such evidence been led, it would not have supported prosecution case, or the court may call these persons as court witnesses and cause production of the documents in which case both the parties would get opportunity to cross-examine the witnesses and examine the documents—No trial on charge of grave offences like murder can be held without such vital official witnesses, unless it is proved that it is impossible to produce these witnesses or the documents—In the instant case no attempt was made to procure the attendance of these witnesses or produce these documents—In the circumstances it may be safely held that the accused were held guilty in an unfair trial. *Kashab Chandra Mistry and others vs State 5 BSCD 176.*

Sections 114(g) and 105—Examination of vital witnesses by the IO after a long lapse of 4 months cast a doubt and it should be discarded and non-examination of vital witnesses and non-seizing of blood-stained earth from the place of occurrence show that the prosecution has failed to prove its case beyond reasonable doubt. *Jewel vs State 3 BLC 258.*

Sections 114(g) and 134—As there is no corroboration of the testimony of the PW 1 as to the alleged snatching away of Taka twenty thousand from him

conviction on the basis of such a solitary witness is not at all safe and corroboration is a must. *Kamal alias Kamal Hossain and 2 others vs State* 3 BLC 498.

Sections 114(g), 5 and 134—Although the occurrence took place on plot No. 406 belonging to Samir but he was not examined in this case and there are some huts of some persons quite a distance away from the PO plot and inmates of those houses were not cited as witnesses because none of them saw the occurrence and hence no adverse presumption can be drawn for their non-examination. The PWs 1 to 7 were natural witnesses to the occurrence as they were all present close to the place of occurrence and more particularly except PWs 1, 2, 6 and 7, PWs 3, 4 and 5 are independent and disinterested witnesses and their evidence is full, complete and self-contained. It is a settled principle of law that even the testimony of a solitary witness can be relied on in basing the conviction of an accused, if such evidence is full, complete and self-contained. Similarly, even the evidence of interested witnesses can be accepted as valid and reliable evidence if their evidence do not manifest any bias or enmity. *State vs Mainul Haque @ Mainal* 7 BLC 586.

Sections 114(g) and 145—There are series of contradictions in the evidence of the PWs when neither any tenant nor any disinterested neighbour nor microbus driver nor the owner of the house No. 6 Mirpur was examined which creates a serious doubt about the whole prosecution case and hence the trial Court was not justified in convicting and sentencing the appellants. *Mahmud-al Kader, and anr vs State* 4 BLC 224.

Sections 114 and 133—Section 133 and illustration (b) to section 114 of the Evidence Act deal with the law relating to an accomplice evidence. An accomplice namely, a guilty associate in crime, is a competent witness. Section 133 lays down that the conviction based upon uncorroborated testimony of an accomplice is not illegal but rule of guidance and rule of prudence indicated in illustration (b) to section 114 of the Evidence Act has resulted in the settled practice to require corroboration of an evidence of an accomplice which is now virtually assumed force of rule of law. The evidence of an accomplice does not demand outright rejection if there is no corroboration but, though, there is no legal necessity to seek corroboration of an accomplice evidence it is desirable that the court seeks reassuring circumstances to satisfy judicial conscience that evidence is true.

In the present case, PW I's evidence attributing authorship to Ershad Ali Sikder in causing death to Khaled stood corroborated by evidence of PWs 3, 4, 5, 7, 9, 10 and 14 and also the evidence of PW 21. PW 1, accomplice evidence

connecting Ershad Ali Sikder, Faruque alias Jamai Faruque, LM Liaquat Ali Lashkar and Nasir Khan in causing injuries to PW 3 Munir, also stood corroborated by evidence of PWs 3, 4, 5, 7, 9, 10 and 14 and, also evidence of PW 22. Evidence of PW 1, Noor Alam that is accomplice evidence satisfied the test of reliability. *State vs Ershad Ali Sikder and others* 8 BLC 275.

Sections 114(g) and 157—There is material contradiction as to recognition of accused persons and that the IO has failed to mention the place of occurrence in the sketch map and he did not seize any blood-stained earth and withholding of the identifying constables of the dead body, torch light and the GD Entry made it a case of no evidence and the appellants are entitled to be acquitted. *Sanu Mia and ors vs State* 3 BLC 441.