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RESEARCH PAPER

THE INCLUSION AND EXCLUSION OF CRITERIA IN CHAPTER V - PRESUMPTIONS AS TO DOCUMENTS

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ABSTRACT

This research paper examines the provisions covering presumptions as to documents within the Indian Evidence Act, 1872, i.e., Sections 86-90, in light of the mandatory and discretionary power to presume that has been conferred upon the judiciary in respect of documents as covered under these provisions. The provisions cover various aspects of documentary evidence, upon which presumptions can be made by Courts, including foreign judicial records (Section 86), books, maps and charts (Section 87), telegraphic messages, and electronic messages (Section 88), due execution without production post notice (Section 89), documents thirty years old (Section 90) and electronic records five years old (Section 90A). The paper identifies various aspects pertaining to the provisions in question through judicial pronouncements and through comparison with foreign jurisdictions while also analysing loopholes within the sections in question. The sources employed are secondary sources, viz. newspaper articles, journal articles, committee reports, parliamentary debates, etc. An attempt, in particular, has been made to address problems regarding a lack of clarity within the provisions while also dealing with the inclusion and exclusion of certain aspects from and within the provisions, owing to a shift in the need for such presumption as given in the sections in question. The suggestions, taken in light of the 69th Law Commission Report, include the inclusion of a specific definition for representatives within Section 86, the inclusion of the term "plans" within Section 87 and more clarity within the provisions of Section 90.

Keywords: Books, Certified, Charts, Discretionary, Documents, Electronic, Maps, Presumption, Telegraphic

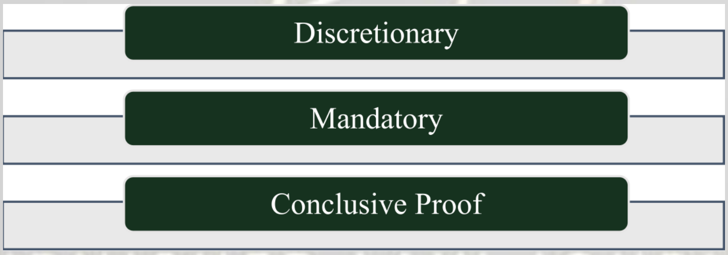
INTRODUCTION

Presumption may be described as an **affirmative or negative conclusion** derived regarding the **truth or falsity** of a fact by employing a process of **likely reasoning** from what is considered to be granted. A presumption is stated to function where certain facts are considered to exist **even when there is no comprehensive proof**. A presumption is a rule where **if one truth, which is known as the main fact, is shown by a party, then another fact, which is known as the supposed fact, is considered as proved** if there is **no counter-evidence** of the same. It is a regular procedure where some facts are regarded in a **uniform manner** with regard to their effect as proof of certain other facts. It is a **conclusion made from facts** which are known and proven.

The fundamental rule of presumption is that if one truth from a case or set of circumstances is taken as the main fact and if it establishes additional related facts, those facts can be assumed to be true unless disproved.

CATEGORIES OF PRESUMPTION

Section 4 of the Indian Evidence Act[1] covers the categories of presumptions, which are as follows:



1. ***Discretionary Presumption***

The provisions of the Indian Evidence Act, which cover discretionary presumptions pertaining to documents, are the sections that shall be covered in the present paper, i.e., **Sections 86[2], 87[3], 88[4], 90[5] and 90-A[6].**

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[1] Indian Evidence Act, 1872, §4, No. 1, Acts of Parliament, 1872 (India).

[2] Indian Evidence Act, 1872, §86, No. 1, Acts of Parliament, 1872 (India).

[3] Indian Evidence Act, 1872, §87, No. 1, Acts of Parliament, 1872 (India).

[4] Indian Evidence Act, 1872, §88, No. 1, Acts of Parliament, 1872 (India).

[5] Indian Evidence Act, 1872, §90, No. 1, Acts of Parliament, 1872 (India).

[6] Indian Evidence Act, 1872, §90A, No. 1, Acts of Parliament, 1872 (India).

Such presumptions are those where the words **"may presume"** are used, and such use indicates that the Courts have **discretion to determine** whether or not raising a presumption is permitted[7]. In the event of these presumptions, Courts **may presume the truth of a fact unless it is stated to be refuted before the Court,** or the Court may request proof for such a fact.[8]

2. Mandatory Presumption

The provisions within the Indian Evidence Act, which talk about Mandatory Presumptions, include **Sections 79[9], 80[10], 80-A[11], 82[12], 83[13], 85[14], 89[15].**

Such presumptions include the use of **"shall presume."** In the case of mandatory presumption, the Courts **shall presume a fact to be true unless it is refuted and proved to be untrue** before the Court. The words indicate that there is a need for Courts to raise a presumption **mandatorily,** and such a presumption **shall take away discretionary powers** from Courts[16]. The similarity between discretionary and mandatory presumptions, however, is that **both presumptions are rebuttable in nature.**[17]

3. Conclusive Proof

Under Section 4, conclusive proof is defined as evidence that a fact supports another fact, and the court regards the latter to have been proved in light of the former.

It provides certain facts that have an artificial probative impact by law, and no evidence should be permitted to be supplied that **would contradict that effect**. It adds **finality** to the presence of a fact

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[7] Sahu, A., 2020. Presumptions under Indian and Common Law. *Jus Corpus L.J., 1,* 323.

[8] Thayer, J.B., 1889. Presumptions and the Law of Evidence. *HLR,* 141-166.

[9] Indian Evidence Act, 1872, §79, No. 1, Acts of Parliament, 1872 (India).

[10] Indian Evidence Act, 1872, §80, No. 1, Acts of Parliament, 1872 (India).

[11] Indian Evidence Act, 1872, §80A, No. 1, Acts of Parliament, 1872 (India).

[12] Indian Evidence Act, 1872, §82, No. 1, Acts of Parliament, 1872 (India).

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[16] Ganesan, D., 2017. Thayer and Morgan v. Stephen: How Presumptions Operate under the Indian Evidence Act, 1872. *NALSAR Student Law Review., 11,* 75.

[17] Ibid

that is intended to be proven[18]. This often occurs in circumstances when it is in the **wider interest of society** or it is against the official policy[19]. A conclusive proof is irrefutable in nature.

[18] PANDEY, P.K., COMMENTARY ON INDIAN EVIDENCE ACT, 1872. (OrangeBooks Publication, 2020).

[19] *Supra* note 16.

RESEARCH QUESTION(S)

The research questions for this paper are in multitude, as follows:

1. How do the specific provisions of Sections 86-90A define and regulate presumptions related to documentary evidence?
2. How have Indian courts interpreted and applied Sections 89-90A in various judgements?
3. What potential reforms can be suggested to enhance the clarity, consistency, and effectiveness of these provisions?

RESEARCH OBJECTIVE(S)

The primary objective of this paper is to critically analyse and evaluate the provisions covering presumptions as to documents under S.86 to S.90A of the Indian Evidence Act of 1872. This includes:

1. To define and categorise the types of presumptions as they pertain to documentary evidence.
2. To analyse relevant judicial pronouncements that interplay and apply to these sections.
3. To identify the ambiguities, inconsistencies, or gaps within these provisions and their practical applications.
4. To evaluate the relevance of these sections in the context of contemporary legal and technological developments.

CRITICAL ANALYSIS

PROVISIONS IN FOCUS

The categories of presumptions that shall be dealt with in the present paper include **a) Discretionary Presumption Pertaining to Documents (Sections 86, 87, 88, 90, 90-A)** and **b) Mandatory Presumption Pertaining to Documents (under Section 89).**

1. ***Discretionary Presumption Pertaining to Documents (Sections 86-88, 90, 90-A)***

As stated earlier, discretionary presumptions provide Courts with the discretion to presume the true or false nature of a particular fact. This discretionary presumption, when it relates to documents, is found under Sections 86-88, 90 and 90-A.

The sections, their principles and scope are defined as follows:

Section 86 – Presumption relating to copies of certified nature of judicial records from foreign jurisdictions

PRINCIPLE & SCOPE OF THE PROVISION:

The provision states that the Court has the discretionary power to create a presumption that a document that purports to be a copy of certified nature from any record of judicial nature from a country outside India is of an accurate and genuine nature, in case the doc is purporting to be certified in nature in a way that is certified by a "representative" of the Government of India to be the commonly used manner for certification in that jurisdiction.

An officer who is a "Political Agent" within such a jurisdiction, as defined under Section 3(43) of the General Clauses Act of 1897[20], shall be considered to be a **Government representative** in and for that jurisdiction for the purpose of this provision.

EXAMPLE OF THE APPLICABILITY OF SECTION 86

In a Habeas Corpus Application pertaining to Art. 226, the petitioner being a citizen of the USA, the petitioner's children were brought to India in light of criminal charges against the petitioner. The petitioner, however, was discharged as per an American Court order. The court order was presumed to be a certified copy since it met the standards of certification in the USA.[21]

[20] General Clauses Act, 1897, §3(43), No. 10, Acts of Parliament, 1897 (India).

[21] Aleyamma Kuruvilla v. Pennamma Thomas & Ors., MANU/KE/0660/1993.

Section 87 – Presumption relating to books, maps and charts

PRINCIPLE AND SCOPE OF THE PROVISION:

The provision states that it is up to the discretion of the Court to create a presumption that a book may be referred to for matters pertaining to the general or public interest and that a map or a chart which presents relevant facts as statements and has been brought to be produced for the purpose of being inspected, was published and written at the time and place and by the person as purported.

This further also allows a reference to **Section 83 of the Evidence Act**[22], which creates a requirement for a mandatory presumption for the Court to presume that any maps or plans that seek to serve the purpose of having been made by the authority of the Government of India were made by the authority of India and are correct, but a map or a plan that has been made to fulfil the purpose of any cause has to be demonstrated to be correct. The rationale behind the difference between conferring mandatory presumption in Section 83 and conferring discretionary presumption in Section 87 is said to be that since Section 83 covers Government maps and plans, it thus gives credibility to the authority of the presumed creator.[23]

A reference at this juncture can also be made to **Section 36 of the Act**, which states that in issue, statements of facts or relevant facts that are included in maps or charts that are published and usually put up for sale to the public or in plans or maps that the Government has created under its authority represent relevant facts.[24]

EXAMPLE OF THE APPLICABILITY SECTION 87

In considering the admissibility of a book while adjudging a matter related to sedition, the Court opined that certain limited class of books that fall under the purview of Section 87 are the ones that can allow the Court to presume that they were written by the person described as the author. The book, in the present case, as described by the Court, did not fall into this category.[25]

Section 88 – Presumption pertaining to telegraphic messages

PRINCIPLE AND SCOPE OF THE PROVISION:

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[22] Indian Evidence Act, 1872, §83, No. 1, Acts of Parliament, 1872 (India).

[23] MONIR, M, TEXTBOOK ON THE LAW OF EVIDENCE, (Universal Law Prublishing, 2013).

[24] Indian Evidence Act, 1872, §36, No. 1, Acts of Parliament, 1872 (India).

[25] Emperor v. T.K. Pitre, AIR 1923 Bom 255.

The provision states that the Court has the discretion to presume that any message that has been forwarded from a telegraph office to the **"addressee"**, i.e., the person that it purports it to be addressed to, is in correspondence with a message that has been delivered for transmission at that particular telegraph office from where it is purported to be sent.

However, the provision bars the Court from making any presumptions regarding the person who delivered the message for transmission.

Example of the Applicability of Section 88:

In a matter concerning the admissibility of telegraphic messages as evidence, the Court presumed that the message sent to the addressee corresponds to the message that was purported to have been sent for transmission from that particular telegraph office. However, the Court refused to delve into the identity of the sender of the message[26].

Amendment – Section 88-A

Vide the 2000 Information Technology Act, **Section 88A**, covering **electronic messages** under telegraphic messages was included in the Act.

Principle and Scope

As per this provision, the Court has the discretion to create a presumption that an e-message that has been sent by the **"originator"** of that message to the **"addressee"** to whom it is purported to be addressed(using an email server), is in correspondence with the message that he has received into his system for transmission. However, **no presumptions as to the identity** of the originator shall be made.

The section makes use of the definitions of "addressee" and "originator" as given in **clauses (b) and (za) of Section 2(1), respectively.**

"Addressee" refers to a person to whom the original message is intended to be sent to, and this definition excludes any intermediaries.[27]

[26] Emperor v. Abdul Ghani, (1925) 27 Bom LR 1373.

[27] Information Technology Act, 2000, §2(1)(b), No. 21, Acts of Parliament, 2000 (India).

"Originator", on the other hand, is a person who *"sends, generates, stores or transmits"* the message in question or gives way to such a message that needs to be stored, transmitted, generated or sent to another person. This, again, does not encompass intermediaries. [28]

Section 90 – Presumptions relating documents thirty years old

PRINCIPLE AND SCOPE

Under this provision, if a document purports to be or is more than 30 years old if the Court considers it to have been produced from proper custody, it is up to the discretion[29] of the Court to presume that[30]:

a. Every segment of that particular document, including and other than the signature, which is purporting to be in that person's handwriting, is, in fact, in their handwriting and

b. That the due execution of the document, along with its attestation, is done by the person who purports to have done so.

As per the explanation given under the Section in the Act, a document is considered to fall under the ambit of "proper custody" if it is in its natural place and with the person who would naturally have custody over it. No custody can thus be considered improper if the circumstances have already rendered the origin of the custody probable or if it has already been demonstrated that the custody has legitimate origins.

If a document that has been demonstrated to have been produced out of proper custody does not look suspicious, *ex-facie*, the document could attract presumption in its favour. **(Parkash Chand v. Hans Raj[31])** There can however be interference in Court's finding if the finding was based on no evidence and the document on which reliance was placed was less than 30 years old. **(State v. Mallikarjunagouda[32])**

It is not required to prove that the attesting witness or the scribe has put their signatures because proof of everything would leave no room for speculation. **(Raghubir Singh v. Thakurain**

[28] Information Technology Act, 2000, §2(1)(za), No. 21, Acts of Parliament, 2000 (India).

[29] Om Prakash v. Shanti Devi, (2015) 4 SCC 601, para 10.

[30] Ekcowree Roy v. Kailash Chunder Mookerji, (1873) 21 WR 45; Fatima Bibi v. Begum, AIR 1980 All 394.

[31] AIR 1994 HP 144.

[32] 1994 (5) Kar LJ 266.

Kaur[33]) The Court can, however, not presume the identity of the performer of the document[34], and what power he had to sign the document[35], or if the document consists of true contents[36], or \ the legal effect that is purported to be created on its behalf can be created by the document[37]. The discretion conferred upon Courts under Section 90 as regards a document that is 30 years old and comes from proper custody is applicable to the elements of, execution, and attestation of a document, i.e. the fact that it is genuine, but it does not allow the Courts to presume that every included in it is correct. Like any other fact, it needs to be proven that the material contents in the doc are real and were acted upon[38].

The Supreme Court stated that when assessing opposing claims, the court must avoid delving into a long chain established by a string of documents or a maze of allegedly old lineages. **(State of Bihar v. Radha Krishna Singh[39])**

The presumption permitted by this provision is not one that the court is obligated to adopt, and the Court may choose to ask the parties to prove the document in the customary way. **(Mussammal Singh v. Raja Shaban Ali Khan[40])**

ILLUSTRATIONS

(a) A person possesses land for a long time now. He produces his custody title deeds relating to the land. The custody is proper.

(b) A person who is the mortgagee of a land produces deeds relating to it. The mortgagor possesses the property currently. The custody is proper.

(c) A person who is a connection of another person produces deeds relating to a land possessed by the latter, which were deposited with him by the latter to ensure safe custody. The custody is proper.

AMENDMENT – SECTION 90-A

33 (1938) 14 Luck 393.

34 Sri Prasad v. Special Manager, (1936) 12 Luck 400.

35 Ram Naresh v. Chirkut, (1932) 8 Luck 18.

36 Mohinuddin v. President, Municipal Committee, AIR 1993 MP 5; Chandulal v. Bai Kashi, (1938) 40 Bom LR 1262.

37 Ramaji v. Manohar, AIR 1961 Bom 169.

38 Union of India v. Ibrahimuddin, (2012) 8 SCC 148.

39 AIR 1983 SC 684.

40 (1904) 6 Bom LR 750.

Through the 2000 IT Act, this provision was introduced into the Indian Evidence Act.

Principle and Scope

The amendment seeks to include electronic records that purport to be or are proven to be five years old and produced from proper custody within the ambit of the documents covered under Section 90 of the Act.

2. *Mandatory Presumption Pertaining to Documents (Under Section 89)*

Mandatory presumptions are those which are binding upon the Court to presume the true or false nature of those documents. Such mandatory presumption pertaining to documents is covered under **Section 89** of the Evidence Act.

Section 89 – Presumptions relating to due execution, etc., of documents that have not been produced post-notice

Principle and Scope

When a document is requested and not presented after adequate notice, the court presumes that it was properly attested, stamped, and executed in accordance with the law. The section only discusses document stamping, execution, and attestation. It is limited to situations in which a party is given notice to submit a document. When a document is proved to have gone unstamped for an extended period of time after its execution, the party who depended on it must prove that it was properly stamped.

Example of the Applicability of Section 89:

In a matter where a defendant could not produce a mortgage deed, the Court had to presume that the mortgage deed was duly attested. (**Kodri Smt. v. LRs of Fakira**[41])

[41] AIR 1994 NOC 182 (Raj).

COMPARATIVE ANALYSIS

In the United Kingdom

1. The UK's Evidence Law, in particular, uses the Common Law principle concerning the presumption regarding the working of a computer system as regards the transmission of an email or a message. This principle allows Courts to presume the functioning of a system at the time of origin of the message. Before Section 69 of the UK Evidence was repealed, the functioning of such computer systems had to be proved[42]. The Evidence Law in the UK also creates a provision for presumption concerning a document that is 20 or more years old, a provision similar to the State Amendment within Section 90, which, unlike the union provision, reduces the usual 30-year-old requirement to 20 years old[43].
2. Comparison with the United Kingdom provides a direct parallel of comparison against another nation with common law.

In the United States

1. The Federal Rules of Evidence of the USA under Rule 902 define the kinds of evidence that are self-authenticating. This includes, under Rule 902(1)[44], domestic documents which are sealed or signed, similar to a provision under Section 90 in the Indian Act that covers signed documents. However, the Indian Act does not cover the sealing aspect of signatures and authorisation.
2. The Federal Rules further cover, under Rule 902(2), documents that are not sealed but signed by an authority, specifying that for such evidence to be admissible, such authority needs to have the official capacity to sign[45].
3. Under the same rules, admissibility of foreign records has also been mentioned[46], which specifies the foreign officers who have the authority to sign the documents, unlike the Indian provision under Section 86, which only makes use of the term "representatives" without defining it.

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[42] THE CROWN PROTECTION, https://www.cps.gov.uk/legal-guidance/computer-records-evidence (last visited, 29th July 2024).

[43] Evidence Act, 1938, §4, Ch. 28, 1& 2 Geo. 6., Acts of Parliament, 1938 (United Kingdom).

[44] Federal Rules of Evidence, U.S.C., Rule 902(1), 2019.

[45] Federal Rules of Evidence, U.S.C., Rule 902(2), 2019.

[46] Federal Rules of Evidence, U.S.C., Rule 902(3), 2019.

4. Comparison with the United States provides an accurate position of India against a developed first-world nation.

RECENT DEVELOPMENTS

As stated earlier, the **Bharpur Singh**[47] judgement has been criticised owing to its narrow interpretation of Section 90 of the Indian Evidence Act. Moreover, another reason for the criticism that the judgement has attracted over the years can be attributed to the fact that it concerns a two-judge bench, while a contradictory judgement in the past, **K.V. Subbaraju**[48], had a three-judge bench. **Justice G.R. Swaminathan**, in his commentary on the proof of will and presumption under Section 90, critically reviewed various judgements in this light. In his commentary, he particularly praised the **2018 judgement in the case of Radhakrishna Menon v. Narayanan Sukumara Menon**[49]**,** which adopted the aforementioned criticism of the Bharpur Singh case.

It is, however, also important to note that as far as recent developments in this regard are concerned, barring the **Radhakrishna case**[50]**,** most recent cases[51] have followed the approach followed in Bharpur Singh.

The most recent judgement in this line was the 2020 case of **Choudhari v. Ramkaran**[52]**,** wherein it was held that Section 90 could not have application in the matters of will, owing to the strict requirement that has been prescribed under Section 63(c) of the Indian Succession Act, along with Section 68 of the Evidence Act.

This contradiction between judgements has created a bone of contention within an aspect pertaining to the applicability of Section 90 of the Evidence Act.

[47] (2009) 3 SCC 687.

[48] K.V. Subbaraju v. C. Subbaraju, AIR 1968 SC 947.

[49] Radhakrishna Menon v. Narayanan Sukumara Menon, (2018) 2 KLT 553.

[50] *Ibid*.

[51] Prem Devi v. Bholanath Gattani, AIR 2015 Raj. 200; State of Haryana v. Shanthi Devi, (2013) 122 AK 407.

[52] Choudhari v. Ramkaran, 2020 SCC OnLine Chh 1015.

CONCLUSION & SUGGESTION

All in all, it can be said that presumption, in itself, is an essential part of the evaluation of evidence and thus forms an important segment of the Indian Evidence Act since it makes evaluation and scrutiny more efficient.

Considering the fact that documents carry a major evidentiary value, it is crucial to investigate documents properly. If presumptions are allowed to be made in such respects, the task of the judiciary is easier. Therefore, presumptions as to documents – both discretionary and mandatory are important for the judiciary to function as far as documentary evidence is concerned.

Nevertheless, the provisions in the Indian Evidence Act concerning presumptions pertaining to documentary evidence cannot be said to be perfect in their construction. The interpretations of these provisions can thus, at times, be said to leave room for further inspection concerning suggestions that can be given and applied in this regard.

For this purpose, the **69th Law Commission Report on the Indian Evidence Act** can be referred to, which underlines certain suggestions that can be incorporated within the provisions so discussed[53].

The following suggestions are a combination of the author's analysis as regards the provisions in question, along with the suggestions as recommended under the 69th Law Commission Report:

- As far as **Section 86** is concerned, as can be seen from the Federal Rules of Evidence, the "representatives" who can sign the foreign judicial records need to be well-defined within Section 86 since there is less clarity on the term.
- A recommendation concerning **Section 87** was given under the 69th Law Commission Report, to which the author agrees as well. The recommendation concerns the inclusion of the term "plans" in Section 87, as is also mentioned under Section 36 of the Act. Another suggestion is that there should be more clarity as to what "relevant facts" and "statement of facts" within the provision refer to.
- A suggestion regarding **Section 90** can be that since there is ongoing confusion as to two schools of interpretation concerning the "wills" aspect of the Section, there needs to be an

[53] Law Commission of India. (1977). Report No. 69 – The Indian Evidence Act, 1872.

amendment in the Section that clarifies whether or not wills shall be covered under the Section.

- As per the 69th Law Commission Report, it was suggested that **Section 90** should be divided into two sub-sections, with the first consisting of the current section 90 and the second sub-section consisting of a provision similar to that of the UP Amendment, so as to cater to the need to presume with regard to certified copies of documents. This would allow a certified copy that is more than 20 years old to fall under sub-section 2 and would not have any impact on the first sub-section per se.

To conclude, in the author's opinion, although the provisions pertaining to presumptions regarding documentary evidence are effective and have been efficient over the years, certain loopholes exist within these sections, which can be resolved if the aforementioned suggestions are taken into consideration.

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