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| LL.B IV th Sem 2020 LAW OF EVIDENCE               By Dr Subodh K Singh  Associate professor of law H.CPG college (Ex Prosecution officer ,visiting professor Rani Durgawati University Jabalpur) For any queries contact on my email I’d : [bodhs14@gmail.com](mailto:bodhs14@gmail.com)  Burden of proof: The normal law relating to the Burden of Proof and its onus is given under the provisions of the Indian Evidence Act, 1872. Under Indian law, until and unless an exception is created by law, the burden of proof lies on the person making any claim or asserting any fact. Reference should be made to the following provisions of the Indian Evidence Act, 1872 with some illustrations to understand the proposition. Generally, describes the standard that a party seeking to prove a fact in court must satisfy to have that fact legally established.  There are different standards in different circumstances. For example, in criminal cases, the burden of proving the defendant’s guilt is on the prosecution, and they must establish that fact beyond a reasonable doubt.  In civil cases, the plaintiff has the burden of proving his case by a preponderance of the evidence. A "preponderance of the evidence" and "beyond a reasonable doubt" are different standards, requiring different amounts of proof. The burden of proof is often said to consist of two distinct but related concepts: the burden of production, and the burden of persuasion. Standards Depending on the jurisdiction and type of action, the legal standard to satisfy the burden of proof in U.S. litigation may include, but is not limited to: Yes  beyond a reasonable doubt clear and convincing evidence preponderance of the evidence probable cause reasonable belief reasonable indications reasonable suspicion some credible evidence some evidence substantial evidence Section 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. Section 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. Section 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. Illustration 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. Section 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 railway without a ticket. The burden of proving that he had a ticket is on him The Supreme Court has developed a presumption of fact known as the doctrine of last seen which is based on circumstantial evidence. The statutory authority for this presumption can be found in section 167 of the Evidence Act. It is important to warn that the doctrine cannot be applied where the appellant was the last person to be seen with the deceased but there is no other circumstantial evidence. In Ismail v The State, (2011) Mukhtar JSC (as she then was) explained the doctrine,  “In a case of culpable homicide, as in this present one where the doctrine of last seen has been applied, the law presumes that the person last seen with the deceased before his death was responsible for his death, and the accused is expected to provide an explanation of what happened.” In Igabele v The State,(2006) the appellant was convicted for murder. The case of the prosecution was that the appellant motor driver and the deceased conductor, both went out with their vehicle but did not return home. The vehicle was later returned by another driver about four days later and the next day the owner of the vehicle reported the matter to the police. The body of the deceased was discovered about one month later with vital organs missing and the appellant was arrested about two months later. The appellant claimed that the deceased got off the vehicle somewhere to see his brother but did not say where. Later, he said that the deceased fell off the vehicle somewhere and died. The Supreme Court affirmed the conviction of the appellant. Oguntade JSC said, after asking the following questions; Are the facts of this case compatible with the innocence of the appellant? Are the facts capable of explanation upon any other reasonable hypothesis than the guilt of the appellant?  “I agree that in a criminal trial the burden is always on the prosecution to prove the guilt of the accused person beyond all reasonable doubt. Generally speaking therefore, there is no duty on the accused to prove his innocence. However, where circumstances arise, as in this case, some explanation may be required from the accused person as the facts against him are strong. Where he fails to offer such explanation as happened in this case, his failure will support an inference of guilt against him.” In The State v Ogbubunjo, (2001) the appellants were charged with murder. The deceased was last seen in the company of the appellants and her body was found buried on their farm. There was no eye witness to the murder and the available circumstantial evidence was not sufficient to lead to a compelling and irresistible inference that the appellants committed the offence. Onu JSC said,  “In the instant case, there is no evidence of surrounding circumstances which by undesigned coincidence is capable of proving the proposition that the respondents committed the offence of murder with the accuracy of mathematics. Rather what we have from the prosecution is evidence of mere suspicion against the respondents, evidence of equivocation, of uncertainties, of hearsay and rumours, which in a criminal court cannot suffice to establish any offence beyond reasonable doubt. It is trite law that it is not sufficient to say “if the respondents are not the murderers, I know of no one else who is. There is some evidence against them and none against anyone else. Therefore, they must be found guilty.” Such line of reasoning is unsound.”  In Adepetu v The State, (1998) the appellant convicted for the offence of murder. The case of the prosecution was that the appellant was the last person to be seen alone in the company of the deceased. Two days later the appellant reported that she was dead and her corpse was in the mortuary. He denied responsibility for her death but was unable to account for her whereabouts from the time he was last seen with her until the time of her death. The facts found by the trial Judge as circumstantial evidence include the fact that; (i) the appellant and the deceased together left the hotel where they had been drinking, to an unknown place on foot leaving the appellant’s vehicle behind; (ii) the appellant later returned to the hotel alone without the deceased to pick up his vehicle; (iii) the appellant told lies about the whereabouts of the deceased and tried to implicate other people. The Supreme Court upheld the conviction of the appellant. Ogundare JSC said, “The law is clear on the point; where, as in the instant case, direct evidence of eyewitness is not available, the court may infer from the facts proved the existence of other facts that may logically trend to prove the guilt of a defendant. In drawing an inference of guilt of a defendant from circumstantial evidence, however, great care must be taken not to fall into serious error. It follows therefore, that circumstantial evidence must always be narrowly examined, as this type of evidence may be fabricated to cast suspicion on innocent persons. Before circumstantial evidence can form the basis for conviction the circumstances must clearly and forcibly suggest that the defendant was the person who committed the offence and that no one else could have been the offender. …….. Generally there is no duty on the defendant to prove his innocence. Circumstances may, however, arise where some explanation may be required from the defendant such as where apparently damning circumstances are established against the defendant.” In Archibong v The State, (2006) the appellant was convicted for murder. The case of the prosecution was that the deceased and the appellant went to a hotel for drinks after which they checked into a room. About two hours later the waiter knocked on the door of the room but there was no response. He opened the door and found that the appellant was no longer in the room but the deceased lay naked and motionless on the floor with foam around her mouth and nose. The Supreme Court applied the doctrine of last seen and convicted the appellant. Ogbuagu JSC said,  “In view of the said doctrine, it is settled that it is the duty of the accused person to give an explanation as to how the deceased met his or her death. In the absence of any explanation by the appellant as to how the deceased met her death, surely and certainly, the trial court was perfectly justified in drawing the inference that the appellant killed the deceased.”  Presumption under sections 107 n 108:  This takes us to Section 107 of the Evidence Act which says that: "Whew the question is whether a man is alive or dead, and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it." In other words Section 107 raises a presumption that a person is alive if it is proved that he had been alive within 30 years from the date when the question of his death is put into issue. In the instant case admittedly Irappa was alive within 30 years from the date of the adoption. Hence the plaintiff cannot get any assistance from the presumptions flowing from Section 114 of the Evidence Act This leads us on to Section 108 of the Evidence Act which reads: "Provided that when the question is whether a man is alive or dead, and it is proved that he has not bean heard of for 7 years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it." Section 108 is an exception to Section 107. If a case comes within the four corners of Section 108 it is taken out of the purview of Section 107. The present case undoubtedly comes within the scope of Section 108. But then the question arises as to what is the scope of the presumption arising from Section 108. On this point there is serious clevage of judicial opinion. All courts are agreed that the presumption available from Section 108 is only of assistance for the purposes of proving the factum of death and not the time or the date of death. If time or date of death becomes material in any particular case, that fact will have to be proved as any other fact, no assistance being available from Section 108. Some Courts have taken the view that though Section 108 is of no assistance in establishing whether the death in question has taken place at any time between the period of 7 years mentioned in Section 108 or at the end of that period, the assistance of that section can be availed of to prove that the person concerned was dead at the end of that period, though the date and time of his death remains unestablished. But some other Courts have taken the view that on the basis of the presumption arising from that section all that the Court can. hold is that the concerned person was dead on the date of the suit If the latter view is the correct view of the law, then the plaintiff must necessarily be out of Court because that presumption is of no assistance to him to prove that Irappa was dead prior to 1955. This latter view had commended itself to the first appellate Court and that was the reason for dismissing the suit. We have now to see whether that view is correct. The language of Section 108 does not lend any assistance for the view taken by the first appellate Court. That section nowhere says that the presumption would. be that the person concerned was dead on the date of the suit. Section 108 merely deals with the procedure to be followed, when a question is raised before a Court as to whether a person is alive or dead. That section does not lay down any presumption, as to how long the person concerned must be deemed to . have been alive or at what time he died. See Band Veeramma v. Gangala Chinna Reddi, AIR 1914 Mad 505. In my opinion the relevant point of time at which the presumption Under Section 108 is available is when the factum of the death of the person concerned becomes material. In the present case the question whether Irappa was alive or dead became material in 1955. If Irappa had not been heard of by persons who should have heard of him if he was alive for 7 years prior to 15-8-1955 then the presumption would be that he was dead on or before 15-8-1955. It may be remembered that Section 108 of the Evidence Act has its origin in the English law. The law in England was authoritatively laid down in Re. phene's Trust, (1870) 5 Ch A 139. In that decision it was observed : "If a person has not been heard of for 7 years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the 7 years lies upon the person who claims a right to the establishment of which that fact is essential." The law in England on this point is set out in Halsbury's Laws of England (Simonds' Edition) Vol. 15 at paragraphs 623 and 624. In paragraph 623 it is stated : "There is no presumption of law by which the fact that a particular person was alive on a given date can be established, it being in every case a question of fact for the jury or judge sitting alone." In. paragraph 624 we find the following statement: "There is no legal presumption either that the person concerned was alive up to the end of the period of not less than seven years, or that he died at any particular point of time during such period, the only presumption being that he was dead at the time the question arose, if he has not been heard of during the preceding seven years. If it is necessary to establish that a person died at any particular date within the period of seven years, this must be proved as a fact by evidence raising that inference.................." The view expressed in Halsbury's Laws of England has been reiterated in Chipchase v. Chipchase 1939-3 All ER 895 and in Watkins v. Watkins, 1953-2 All ER 1113. Though these decisions relate to matrimonial cases, the Judges in those cases did not proceed on the basis of any special rules of evidence relating to matrimonial cases. They proceeded on the basis of the general law of evidence as laid down in 1870-5 Ch A 139. If the English decisions are of any assistance in finding out the true meaning of Section 108, there can be no doubt that the material date for finding out the factum of death of Irappa is 1955 and not the date of the suit. If we accept the contention of Sri Mahajan, the learned counsel for the respondent that the relevant date is the date of the suit that would lead to considerable difficulties, if that should be held to be the true view of the law, then there can be no question of any valid adoption by a lady whose husband's whereabouts are not known for years together, even though he was not heard of for more than 7 years. The difficulty would be all the more in the case of second marriages. If the husband or wife is not heard of for more than seven years by those who should have heard of him or her, he or she could not marry again because the law would only presume that that person is dead on the date of the suit. Further, the view canvassed by Sri Mahajan would lead to considerable difficulties in the case of inheritance, survivorship and joint family management. As mentioned earlier there is no justification for cutting down the scope of Section 108 on the basis of the language of the section. Further the public interest will not be advanced by accepting the view contended by Sri Mahajan. In the final analysis justification for any law is the advancement of public interest. Whatever the canon of interpretation I may apply, I find no justification for the view pressed on us by Sri Mahajan. It is true that Sri Mahajan's contention is amply supported by several decided cases. We shall now proceed to consider them. As early as 1911 a Full Bench of the Allahabad High Court in Muhammad Sherif v. Bande Ali, ILR 34 All 36 upheld the view taken by Mookerjee, J. in Srinath Das v. Probodh Chunder Das, 11 Cal LJ 580 to the effect that the only presumption which is enacted by Section 100 of the Indian Evidence, Act, is that the party is dead at the time of the suit, but there is no presumption as to the precise time of his death. Quite naturally this view of the Full Bench was followed by a later Bench of the Allahabad High Court in Rekhab Das v. Mt. Sheobai, ILR 45 All 466 : (AIR 1923 All 495). The view taken by the Allahabad High Court found its echo in the decision of the Bombay High Court in Jeshankar Revashankar v. Bai Divali AIR 1920 Bom 85 (2) wherein Macleod Chief Justice and Heaton J. accepted the view of the law as propounded by the Allahabad High Court. In 1921 the Madras High Court struck a different note in Bal Naicken v. Achama Naicken, AIR 1921 Mad 285, wherein their Lordships Oldfield and Ramesam, JJ. held: "in a case where the point of time to which the death has to be referred, may be placed in differently either wherein the seven years or after the lapse of the seven years (it not being necessary to show that the person. lived during the seven years), there is a presumption after the lapse of the seven years in favour of the death and it is for the other side to displace the presumption and the party relying on the presumption is entitled to succeed if no evidence is offered by the other side". (As summarised in the head note). I am in respectful agreement with the view taken by their Lordships in the said case. Then came the decision of the Privy Council in Lal Chand v. Ramrup Gir, AIR 1926 PC 9. This decision instead of ending the controversy that was existing became the starting point of another controversy. The Courts are divided as to the true effect of that decision. But, to my mind there appears to be room for that controversy. Dealing with Sections 107 and 108 of the Evidence Act, this is what their Lordships observed (at page 11) "Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the Law of England Range Balaji v. Mudiyeppa ILR 23 Bom 296 and searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from in 1870-5 Ch A 139 run as follows : If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of , evidence; and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to establishment of which that fact is essential. Following these words it is constantly assumed -- not perhaps unnaturally -- that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This, of course, is not so. The presumption, is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years".  Section 112..Legal Presumption Legitimacy of child:  Section 112 of the Indian Evidence Act, relates to the legitimacy of a child born during wedlock. The law presumes that if a child is “born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty (280) days after its dissolution, the mother remaining unmarried…it is conclusive proof of its legitimacy unless it can be proven that the parties to the marriage did not have any access to one another. The legislative spirit behind this section seeks to establish that any child born during a valid marriage must be legitimate. The law does not presume dishonourable or immoral actions unless conclusive proof can be produced for the same. Therefore, section 112 is based on the presumption of public morality and public policy Loopholes in Section 112 of the Evidence Act The establishment of paternity under both, civil and criminal law, is extremely important. The law presumes the legitimacy of a child born during a valid marriage as conclusive. The only exception under the law is non-access between the parties. This “non-access” refers to the non-existence of opportunities for sexual intercourse. This creates a legal lacuna with respect to cases where paternity may be disputed even when the parties had “access” to each other, for example, in cases of adultery. In such a case, due to the standard of “conclusive proof”, a party with a legitimate case trying to dispute paternity will find themselves without remedy due to the inability to produce evidence. The exception to this law, i.e. “non-access” is not wide enough to cover all possible situations under the ambit of this law. Thus, the law is a draconian law based on morality with no relevance in the modern era. “CONCLUSIVE PROOF” Section 4 of the Act, lays down three degrees of presumption – ‘May presume’, ‘Shall presume’, and ‘Conclusive proof’. It must be noted that section 112 of the Act uses ‘conclusive proof’ and thus section 4 and section 112 must be read together. Therefore, if the two requirements of section 112 are proven, it shall be considered as conclusive proof of legitimacy, which means that further evidence to disprove said fact may not be given. The legitimacy of such a child cannot be rebutted unless non-access can be proved. This creates problems for the party disputing the paternity of the child. The section is based on the presumption of morality and may, in certain circumstances, hold the party disputing paternity unjustly accountable. Since the question of legitimacy is an extremely important one in cases of custody, maintenance etc., it is impractical for the section to provide such a limited exception. EXCEPTION OF “NON-ACCESS” Section 112 of the Act provides a very limited exception to the presumption of legitimacy. A valid marriage may not be conclusive proof if it can be shown that the parties to the marriage had no access to each other during time of conception. This has to be proved beyond reasonable doubt and not just mere balance of probabilities As previously stated, the section is based on a presumption of moral behavior. However, one cannot completely disregard the possibility of such behavior, in which case the party disputing the paternity is being held unjustly accountable. The purpose of law is to provide justice in a fair and efficient manner. When moral principles become the basis for a law, it defeats this basic purpose. This can be illustrated with the help of an example. When two people are getting a divorce, one of the parties may be unjustly compelled to pay child support even though there is no biological relation between the party and the child. Thus, the scope of this exception is too restrictive and limited for the proper implementation of law. SEPARATION OF LAW AND MORALITY Justice A.M. Khanwilkar recently said that “Social morality cannot violate the rights of even one single individual” Morality has no place in Law. Law may reflect the moral principles of the time, but it cannot be solely based on them. Law is a mechanism which governs society through rules and sanctions. These rules facilitate the peaceful existence of society by maintaining law and order. Morality on the other hand, is a subjective concept about ‘good’ and ‘bad’ which differs from person to person. Some may argue that law is the protection of the ‘good’ and punishment of the ‘bad’. But this is a very narrow understanding. The Law does indeed protect the good and punish the bad, but not always. For the simple reason that one cannot define this ‘good’ or ‘bad’. What may be good for some may be bad for others. Taking the contemporary example of homosexuality, many oppose it as immoral but even so, sexual orientation is an individual right and morality cannot be allowed to outweigh any person’s rights. Similarly, Section 112 of the Act violates the right of the party disputing paternity to a fair trial by not allowing them to present evidence for the same. And since moral considerations cannot be put above the rights of people or fairness in the justice system, it stands to reason that the section must be amended. DNA TESTING TO ASCERTAIN PATERNITY DNA Tests are conclusive evidence admissible under the Indian Legal System. The introduction of DNA technology, however, has faced extensive criticism and has been said to violate Article 21 (Right to Privacy) and Article 20(3) (Right Against Self-Incrimination) of the Indian Constitution. Right to Privacy – Article 21 In Govind Singh v. State of Madhya Pradesh the Supreme Court held that a fundamental right must be subject to restriction on the basis of compelling public interest. Thus, Right to Life and Liberty, which includes Privacy, is not absolute. And it is on this basis that the constitutionality of the laws affecting Right to Life and Personal Liberty are upheld by the Supreme Court which includes medical examination. Right Against Self-Incrimination – Article 20(3) To be entitled to the protection of Article 20(3), it was held by the Supreme Court that “Self-Incrimination means conveying information based upon personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which do not contain any statement of the accused based on his personal knowledge”[8]. Since medical tests which involve giving blood do not involve any exchange of ‘personal’ knowledge and are a mechanical process, they do not violate Article 20(3). The Indian Evidence Act was passed in the year of 1872 and since then, section 112 has neither been amended nor revised. At the time, there was little knowledge of forensic techniques and the concept of DNA had not yet been discovered. Further, legislators could not foresee the existence of such scientific techniques as DNA Testing. Thus, at the time, section 112 was a valid section which protected a woman’s chastity and ensured that legitimate children may not be labelled as ‘bastards’. However, science and morality both have changed by leaps and bounds since then and in today’s day and age, section 112 is no longer valid. The section must be revised to allow DNA testing when a prima facie case can be made to dispute paternity. PRESENT LEGAL SCENARIO Before the law is criticized for not allowing DNA tests under section 112 of the Act when there exists a valid marriage, a question must be answered. Can the Court direct one of the parties to submit himself for the DNA test? The answer to this question can be traced through a series of judicial decisions. Gautam Kundu v. State of West Bengal The Supreme Court held in this case that (a) Courts cannot order a blood test as a matter of course,   (b) There should exist a prima facie case in that the husband must establish ‘non-access’ in order to dispel the presumption arising under section 112 before a test can be ordered, and (c) The Court should carefully analyze with respect to what might be the outcome of requesting the blood test; whether it will have the impact of marking a child as a bastard and the mother as an unchaste woman. Sharda v. Dharmpal A three Judge bench of the Supreme Court held that (a) A matrimonial court has the authority to direct a person to submit to medical tests, (b) Such an order of the Court will not violate a person’s Right to Personal Liberty under Article 21 of the Indian Constitution, and (c) The Court must exercise this authority only if the applicant has a strong prima facie case and there is sufficient material before the Court.The Court also stated that if despite the order of the Court, the respondent does not submit himself to medical examination, the court will be entitled to draw an adverse inference against him. Thus, presently, the Court has the power to demand a person to undergo medical tests. However, under section 112 of the Act, the Court can only give such orders if non-access is proved. From the language of the judgement in the case of Gautam Kundu, we can see the moral driving force behind this section which is no longer applicable in the modern era. SECTION 115 : Estoppel. —When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. Illustration A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title Estoppel is based on the principle that it would be most inequitable and unjust that if one person , by a representation made, or by conduct amounting to a representation, had induced another to act as he would not otherwise have done, the person who made the representation should not be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. The section says words, estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change  his/her position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is, however, only applicable in cases where the other party has changed his position relying upon the representation thereby made. For application the doctrine following conditions have to be satisfied- 1) There must be a representation made by one person to another person. 2) The representation must have been made as to fact and not as to law. 3) The representation must be as to an existing fact. 4) The representation must be intended to cause a belief in another. 5) The person to whom the representation is made must have acted upon that belief and must have altered his position. In the case of Chowdhury ...Appellant Versus Kalpana Mukherjee & Anr. ...Respondents 2014 AIR S.C It needs to be understood, that the rule of estoppel is a doctrine based on fairness. It postulates, the exclusion of, the truth of the matter. All, for the sake of fairness. A perusal of the above provision reveals four salient pre conditions before invoking the rule of estoppel. Firstly, one party should make a factual representation to the other party. Secondly, the other party should accept and rely upon the aforesaid factual representation. Thirdly, having relied on the aforesaid factual representation, the second party should alter his position. Fourthly, the instant altering of position, should be such, that it would be iniquitous to require him to revert back to the original position. Therefore, the doctrine of estoppel would apply only when, based on a representation by the first party, the second party alters his position, in such manner, that it would be unfair to restore the initial position. In our considered view, none of the ingredients of principle of estoppel contained in Section 115 of the Indian Evidence Act, can be stated to have been satisfied, in the facts and circumstances of this case. Herein, the first party has made no representation. The second party has therefore not accepted any representation made to her. Furthermore, the second party has not acted in any manner, nor has the second party altered its position. Therefore, the question whether the restoration of the original position would be iniquitous or unfair does not arise at all. Even if consideration had passed from Kalpana Mukherjee to Pratima Chowdhury, on the basis of the representation made by Pratima Chowdhury, we could have accepted that Kalpana Mukherjee had altered her position. In the facts as they have been presented by the rival parties, especially in the background of the order passed by the Arbitrator, that no consideration had passed in lieu of the transfer of the flat, and especially in the background of the factual finding recorded by the Co-operative Tribunal and the High Court, that passing of consideration in the present controversy was inconsequential, we have no hesitation whatsoever in concluding, that the principle of estoppel relied  upon by the Co-operative Tribunal and the High Court, could not have been invoked, to the detriment of Pratima Chowdhury, in the facts and circumstances of the present case. Insofar as the instant aspect of the matter is concerned, the legal position declared by this Court fully supports the conclusion drawn by us hereinabove. In this behalf, reference may be made, firstly, to the judgment rendered by this Court in Kasinka Trading vs. Union of India, (1995) 1 SCC 274, wherein this Court noticed as under:- In order to operate as estoppel under the aforesaid section, three conditions must be fulfilled : (1) there must be a representation made by the opposite party with a view to cause belief (2), the representation should have been believed under circumstances that its falsity could not be ascertained in spite of due diligence and (3) actions arising out of such belief. There can be no estoppel where truth is accessible. Again, there can be no estoppel in the absence of representation or conduct amounting to such. Further, there can be no estoppel where a party is not misled and has not been induced to do something detrimental to his interest owing to the action of the other party. Later it was held detriment is not essential ingredient for law of estoppels and applicability of doctrine of promissory estoppels necessitates striking a balance between individual rights and larger public interest ,like in the case of Motilal Padampat Sugar Mills v. State of U.P. is a trendsetter regarding the application of the doctrine of promissory estoppel against the Government. In this case the Chief Secretary of the Government gave a  categorical assurance that total exemption from sales tax would be given for three years to all new industrial units in order them to establish themselves firmly. Acting on this assurance the appellant sugar mills set up a hydrogenation plant by raising a huge loan. Subsequently, the Government changed its policy and announced that sales tax exemption will be given at varying rates over three years. The appellant contended that they set up the plant and raised huge loans only due to the assurance given by the Government. The Supreme Court held that the Government was bound by its promise and was liable to exempt the appellants from sales tax for a period of three years commencing from the date of production. PROMISORY ESTOPPEL The doctrine of promissory estoppel is an equitable doctrine. Like all equitable remedies, it is discretionary, in contrast to the common law absolute right like right to damages for breach of contract. The doctrine has been variously called ‘promissory estoppel’, ‘equitable estoppel’, ‘quasi estoppel’ and ‘new estoppel’. It is a principle evolved by equity to avoid injustice and though commonly named ‘promissory estoppel’, it is neither in the realm of contract nor in the realm of estoppel. The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the  promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it. It is not necessary, in order to attract the applicability of the doctrine of promissory estoppel that the promisee acting in reliance of the promise, should suffer any detriment. The only thing necessary is that the promisee should have altered his position in reliance of the promise. The ingredients for the application of the doctrine are: • That there was a representation or promise in regard to something to be done in the future, • That the representation or promise was intended to affect the legal relationship of the parties and to be acted upon accordingly, and, • That it is, one on which, the other side has, in fact, acted to its prejudice. Lord Denning in Central London Properties Ltd. v. High Trees House Ltd., [1947] K.B. 130, who asserted: “A promise intended to be binding, intended to be acted upon, and in fact acted upon is binding.” Exceptions: 1.The doctrine of promissory estoppels is not available against the legislative functions of state. 2. The doctrine of estoppel does not apply to statutes. In other words, a person who makes a statement as to the existence of the provisions of a statute is not estopped, subsequently, from  contending that the statutory provision is different from what he has previously state. 3. When an officer of the government acts outside the scope of the authority , the plea of promissory estoppels is not available. Kinds of estoppel: 1. Estoppel by record: Under this kind of estoppel, a person is not permitted to dispute the facts upon which a judgment against him is based. It is dealt with by (i) Ss. 11 to 14 of the Code of Civil Procedure, and (ii) Ss. 40 to 44 of the Indian Evidence Act. 2. Estoppel by deed: Under this kind of estoppel, where a party has entered into a solemn engagement by deed as to certain facts, neither he, nor any one claiming through or under him, is permitted to deny such facts. 3. Estoppel by conduct: Sometimes called estoppel in pais, may arise from agreement, misrepresentation, or negligence. Estoppel in pais is dealt with in Ss. 115 to 117. (Estoppel in pais means “estoppel in the country” or “estoppel before the public.”) If a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others  to do that from which they otherwise might have abstained from doing, he cannot question the legality of the act to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. 4. Equitable Estoppel: The Evidence Act is not exhaustive of the rules of estoppel. Thus, although S. 116 only deals with the estoppel that arises against a tenant or licensee, a similar estoppel has been held to arise against a mortgagee, an executor, a legatee, a trustee, or an assignee of property, precluding him from denying the title of the mortgagor, the testator, the author of the trust, or the assignor, as the case may be. 5. Estoppel by Negligence: This type of estoppel enables a party, as against some other party, to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or representation or by a holding out of ostensible authority. 6. Estoppel on benami transactions: If the owner of property clothes a third person with the apparent ownership and a right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who has taken it in good faith and for value. (Li Tse Shi v Pong Tse Ching, (A.I.R. 1935 P.C. 208)  SECTION 116: Estoppel of tenant; and of licensee of person in possession.—No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given. Section 116 provides for estoppels of a tenant as against his landlord and of a licensee as against his licensor. The section provides that a person who comes into an immovable property taking possession from a person whom he accepts as to the landlord , is not permitted to say as against his landlord that he had no title to the property at the commencement of the tenancy. So long the relation of landlord and tenant stands and by which the tenant remains in possession of tenancy the principle of estoppel is applicable against the tenant. The rule applies “during the continuance of the tenancy.” After the expiry of the period of tenancy or the tenancy is surrendered by the tenant there is no application of estoppel. But the tenancy is obtained by fraud etc. the tenant cannot be estopped. The estoppel of the tenant is natural consequence, on proof of relationship of landlord and tenant remains bound by it irrespective of any change in the line of succession in the landlord’s family. Defendant categorically admitted in written statement that his father was a tenant of the plaintiff-society. After death of father  the defendant became tenant. Tenant once having admitted tenancy is estopped from challenging title of landlord. Once the defendant tenant had acknowledged the title of the plaintiff landlord, the case may not strictly fall under section 116, but the general principle of estoppel would apply. A tenant due to ignorance of law paid rent to a third person will not stand as estoppel against tenant from denying derivative title of third party and from retendering rent to real landlord. In Kuldeep Singh vs Shrimati Balwant Kaur ,AIR 1991 P & H. 291, when the tenant become wealthy of the property portion of which was let out to him, under the sale deed registered prior to one registered in favour of other, denied by him of relationship of tenant and landlord between him and subsequent vendor. It was held that tenancy right is not extinguished. SECTION 117: Estoppel of acceptor of bill of exchange, bailee or licensee.—No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorese it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such licence. Explanation 1.—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn. Explanation 2.—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.  Section 117 deals with estoppel in respect of movable property. An estoppel under this section is based on agreement. The section is supplemented by Sections 41 and 42 of the N.I. Act. It is applicable to: (i) Against the acceptor of a bill of exchange. (ii) Against the bailee, and (iii) Against a licensee. Acceptor of a bill of exchange: An acceptor of a bill of exchange is not permitted to deny that the drawer had authority to draw or to endorse it. But there is an exception laid down in Explanation-I which provides that the acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn. Bailee: A bailee of goods cannot be permitted to say that at the time of commencement of the bailment, the bailor has no authority to bail or to take them back. Under the Explanation-II, if a bailee delivers the goods bailed to a person other than the bailer, he may prove that such person had a right to them as against the bailor. A garage owner receiving a car for repairs is estopped from challenging the title of the person from when the car was received. License: Same rule is applicable here as applied in bailment.  SECTION 118 : Who may testify. —All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. This section discuses about the competence of all witness provided there statement is permitted as per evidence act.(already discussed in previous semester llb 5th\_ section 3). SECTION 119 :Dumb witnesses.—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence The dumb witness is one who is unable to speak due to physical deformity. Section 119 applies only to those cases when the witness is deaf and mute or a person who has taken a religious van of silence. In case of such witness the evidence may be taken by means of written questions-answers techniques or by recording signs. The evidence given shall be deemed to be oral evidence. “The reception of the evidence of such person rests on the ground of expediency.”  The court while recording the evidence of dumb witness, must record both signs as well as the interpretations of the interpreter and then only it becomes admissible under the Indian Evidence Act. Section 120 and s. 122 read together. SECTION 120 : Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. SECTION 122: "No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative-in-interest, consents, except in suits between married persons, or proceedings in which on married person is prosecuted for any crime committed against the other." A privileged communication is a private statement that must be kept in confidence by the recipient for the benefit of the communicator. Even if it is relevant to a case, a privileged communication cannot be used as evidence in court barring certain exceptions. A prohibition against the disclosure of any communication between spouses made during the subsistence of marriage unless the person who made it or his  representative-in-interest consents to the same. The bar is not only against a spouse being compelled to disclose the same but also extends to cases where the spouse may be inclined or willing to disclose the same. In the latter case, the disclosure can be permitted if the other spouse, who made the same, agrees to the disclosure. In M.C. Verghese Vs. T.J. Poonan and Anr. Rathi, daughter of M. C. Verghese, was married to T. J. Poonan. Poonan wrote from Bombay, letters to Rathi who was then residing with her parents at Trivandrum, which as it was claimed contained defamatory imputations concerning Verghese. Verghese then filed a complaint in the Court of the District Magistrate, Trivandrum, against Poonan charging him with offence of defamation. Poonan submitted an application raising two preliminary contentions – (1) that the letters which formed the sole basis of the complaint were inadmissible in evidence as they were barred by law or expressly prohibited by law from disclosure; and (2) that uttering of a libel by husband to his wife was not "publication" under the law of India and hence cannot support a charge for defamation, and prayed for an order of discharge, and applied that he may be discharged.In this case hence, Poonan’s contention that the letters addressed by him to his wife are not except with his consent-admissible in evidence by virtue of Section 122 of the Indian Evidence Act, and since the only publication pleaded is publication to his wife, and she is  prohibited by law from disclosing those letters, no offence of defamation could be made out were accepted.,hence, Poonan’s contention that the letters addressed by him to his wife are not except with his consent-admissible in evidence by virtue of Section 122 of the Indian Evidence Act, and since the only publication pleaded is publication to his wife, and she is prohibited by law from disclosing those letters, no offence of defamation could be made out were accepted. SECTION 121: Judges and Magistrates.—No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any question as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting. Illustrations (a) A, on his trial before the Court of Sessions, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court. (b) A is accused before the Court of Sessions of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.  (c) A is accused before the Court of Sessions of attempting to murder a police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred. Under this section a judge or a magistrate is a competent witness. A judge or a magistrate cannot be compelled to answer questions except: (i) upon the special order of the court to which he is subordinate or (ii) as to his conduct in court as such judge or magistrate in relation to a case tried by him.This section makes it clear that privilege granted to the judge or magistrate cannot be extended to the other kinds of witnesses. So long he or she is acting or has acted as a judge or a magistrate no question is permitted to be asked as to his or her conduct or judicial function. But the superior court by virtue of the section has right to question as to his or her conduct. The Supreme Court has extended the privilege to arbitrators also. According to the Supreme Court in no case an arbitrator can be summoned to explain how he came at his award.The privilege given by this section is the privilege of the witness, i.e., the judge or magistrate of whom the question is asked. If he waives such privilege or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege. A session judge while trying a case cannot compel a committing magistrate, except under the special orders of the court to which he is subordinate. SECTION 123:. Evidence as to affairs of State.—No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the  permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. This section is based on the principle that disclosure of any unpublished document would not be in the public interest. Basically this section is founded on the maxim salus populi est suprema lex, which means that regard for public welfare is the highest law. This section lays down that no person shall be permitted to give any evidence derived from unpublished public records relating to affairs of state. Such an unpublished record can be had of from the official head of the department concerned, who may also withhold the permission in case of necessity. The section also prohibits the disclosure of any evidence derived from unpublished official records. Under the section unpublished official records of the state are protected from being disclosed. Only exception laid down is that such unpublished document may be disclosed with express permission of the head of the department. “The court is also bound to accept without question the decision of the public officer.” In order to claim immunity from disclosure thereof the document must be unpublished state documents and must relate to affairs of the state and the disclosure thereof must be against interest of the state or public interest. An objection against the disclosure of a public document was raised on the ground that it would be against the interest of the state or public service and it is such class of documents which being public interest ought not to be disclosed. In S.P. Gupta v President of India, overruling its  earlier decision the Supreme Court Observed that the injury to public interest which is likely to result from their disclosure would be far less than the injury which would arise from suppression of such information SECTION 124: Official communications.—No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure. This section is designed to prevent the knowledge of official papers beyond the circle which would obtain knowledge of them in confidence whether the confidence was express or implied.In the case of K.M. Sugatha Prasad And Ors. vs State Of Kerala And Ors. on 24 May, 1963 wherin the petitioner in O. P. No. no of 1962 in particular has filed an application C. M. P. No. 1366 of 1963 for directing the State Government and the other respondents to disclose the machinery used for the purpose of verification and the report obtained by verification relating to his character and antecedents. That application has been opposed by the State Government. In particular, the Home Secretary to the State Government has filed a counter- affidavit in the same application claiming privilege under Sections 123 and 124 of the Indian Evidence Act. No such application has been filed in O. P. Nos. 497 and 532 of 1962. As a similar application has been filed in O. P. No. 309 of 1962 also,  I will advert to this petition a little later. . Here again, the petitioner has filed C. M. P. No. 1399 of 1963 for directing the respondents to disclose the machinery used for verifying the character and antecedents of the petitioner and the material or report of such verification. This application is opposed on behalf of the respondents and here again the Home Secretary to the Stare Government has filed a counter affidavit claiming privilege under Sections 123 and 124 of the Indian Evidence Act. A supplementary affidavit has been filed by the State Government in this writ petition in C. M. P. No. 1399 of 1963 on 19th March 1963. In particular, the said affidavit deals with the scope of the Memorandum No. 8419/D1/62/ Home dated 15-3- 1962 which has been relied upon by this petitioner as well as the petitioner in O. P. No. 119 of 1962 as imposing a permanent ban against their aspiring for Government Service. As mentioned earlier, on behalf of the State the Home Secretary has filed counter-affidavits claiming privilege under Sections 123 and 124 of the Indian Evidence Act. The Home Secretary has stated that the Government's conclusion in regard to the character and antecedents was based on the report of the Dy. Inspector General of Police, C.I.D. and Railways, Trivandrum. It is also mentioned in the affidavit by the Home Secretary that no irrelevant or extraneous considerations have weighed with the Government in coming to the conclusion regarding the character and antecedents of the petitioners. It is also stated  that the petitioners cannot compel the Government to disclose the reasons in the report on the strength of which Government came to the conclusion regarding, the petitioners' character and antecedents. The Home Secretary further states that he has carefully examined the report and other relevant documents relating to the verification of the character and antecedents of the petitioners and according to him, those documents and reports form unpublished public records relating to the affairs of the State and he is entitled to claim privilege against their production under Section 123 of the Evidence Act. The Home Secretary also states that the report of the Deputy Inspector General of Policy on the strength of which Government have come to the conclusion, is a report made in official confidence and he considers that it would pot be in public interest to disclose the contents of the report and he is of the view that public interest would suffer by such disclosure. But it is also stated by the Home Secretary, that without prejudice to the claim or privilege under Sections 123 and 124 of the Evidence Act Government is prepared to make available to this Court, the file relating to the report of the Deputy Inspector General of Police, on the basis of which the Government's conclusions regarding character and antecedents of the petitioners were arrived at. . The learned Advocate General has quite naturally relied upon the decision of the Supreme Court reported in State of Punjab v. S. S. Singh, AIR  1961 SC 493 wherein their Lordships have, if I may say so with respect, very elaborately considered and laid down the various principles which have to be borne in mind in dealing with a claim for privilege under Sections 123 and 124 of the Indian Evidence Act. SECTION 125. Information as to commission of offences.—No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue Explanation.—"Revenue officer” in this section means an officer employed in or about the business of any branch of the public revenue. Section 125 on the basis of public policy protects the information given to magistrates or to police officers about the commission of offences. In M/S M.D. Overseas Ltd. vs Director General Of Income-Tax ... on 4 February, 2011 it was held that the information in possession of the dit(i)-kanpur is within the ambit of section 125 of the Evidence Act. The Department can neither be compelled to say from where the information was received, nor can it be divulged. Section 125 of the Evidence Act would bar the disclosure of source of information but this  does not bar the content or nature of the information or the reasons to believe for authorising the search. In State Of Himachal Pradesh vs Chandan Lal on 14 December, 1954The learned Sessions Judge has commented on the fact that the information was conveyed to the S. H. O. at 6 A. M. He has also pointed out that the name of the informer has not been disclosed because Section 125, Evidence Act, gives such protection which lays that no Magistrate or police officer shall be compelled to disclose the name of an informer. SECTION 126 :Professional communications.—No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure— (1) Any such communication made in furtherance of any 1[illegal] purpose(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, 2[pleader], attorney or  vakil was or was not directed to such fact by or on behalf of his client. Explanation.—The obligation stated in this section continues after the employment has ceased. Illustrations (a) A, a client, says to B, an attorney—“I have committed forgery, and I wish you to defend me”. As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure. (b) A, a client, says to B, an attorney—“I wish to obtain possession of property by the use of a forged deed on which I request you to sue”. This communication, being made in furtherance of a criminal purpose, is not protected from disclosure. (c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A’s account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure. SECTION 127 :The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.  SECTION 128.: If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such barrister, [pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.—If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such barrister, 1[pleader], attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose. SECTION 129.: No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.  Sections 126 to 129 of the Act deal with privileged communication that is attached to pro  Attachments area   |  |  | | --- | --- | |  | ReplyForward | |  |  |