Evolving Dynamics of Law of Evidence in India

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Abstract

The Law of Evidence in India has had its prevalence since time immemorial, making it an integral part of jurisprudence and the smooth functioning of the justice system in the country. The article aims at conducting investigative research through the doctrinal methodology of the emergence of the Law of evidence in India, mapping through ancient, medieval and colonial India. This article throws light on why there was a need for codification of the religious and customary laws that prevailed during colonial times and to come up with a defined law to administer and regulate the whole country. Thereby, The Indian Evidence Act was adopted in 1872 which eased the process of evidencing proofs and facts for speedy justice, and certainty in law-making. Further, it discusses how, with time, the provisions of this 145-year-old statute: the Indian Evidence Act, 1872 needs modernization to capture the contemporary changes in society and crimes. It highlights how the concept of Burden of Proof has, with time, become anachronous and may have severe ramifications in future if not amended in due time. It also focuses on the challenges that Electronic Evidence brings in the present times and the need to accommodate those problems by proper rectifications in the provision. This article concludes by suggesting the requisite amendments for making the law relevant to the present societal setting of India.

Keywords:

Law of Evidence, Burden of Proof, Irrelevance, Provisions, Justice.

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Introduction

The Law of Evidence is a cardinal aspect of any body of the judicial system, regardless of nation, implying that the functioning of evidence is a crucial statute in any nation. However, in terms of India, the enactment of the Indian Evidence Act, 1872 has completely transformed our judicial system as there were previously no codified laws relating to evidence. Despite the fact that the India Evidence Act is founded on British Law, it is not only elaborative, but also 'Lex *Fori*' legislation[2], which refers to the law of Land where court hearings are held.

The word "evidence" comes from the Latin word "Evident" or "Evidere" which means "to show plainly, or to discover, or to ascertain, or to prove"[3]. It covers plea, evidence, and procedure in relation to meaningful laws. It isn't a law based on procedure or substance, but is an adjective law.

Before we discuss the Law of Evidence, we must first understand the origin of this Law of evidence, how it was applied in the ancient, medieval and lastly the British system in India. While the Hindu system seemed to be more complex, the Muslim system was devoid of superstitious ordeals. I will also look at why there was a need to codify evidence law and will explain the Indian Evidence Act, 1872. I will also specify a few provisions which, with time, have become anachronistic and how there is an urgent need to address the same by making amendments to improve the effectiveness of evidence law.

[2]Diganth Raj Sehgal, *Indian Evidence Act: Extent and Applicability*, IPLEADERS (March 6, 2020), https://blog.ipleaders.in/indian-evidence-act-extent-and-applicability/ .
[3]Anushka Patel, *Dying Declaration*, LAW TIMES JOURNAL (April 20, 2019), https://lawtimesjournal.in/dying-declaration/.

Historical Background

Ancient Period (Hindu Period)

> *"In some respect the judicial system of Ancient India was theoretically in advance of our own today."- John W. Spellman*[4]

Dharmasastra

The origin of the law of evidence has been from **Dharmasastra** and thus, it regards the king as the supreme lord and bestows power on him to decide the 'Danda' of the praja.

Evidence, in its literal sense, is the state of being evident i.e, the facts. In the Hindu sphere, the source of information is brought about through Dharmasastras.Dharmasastras subscribed to *Achara-* (religious spiritual part), *Vyabhara-* (civil laws) and *Prayaschita-* (law and punishment attached to it)[5].

Manusmriti

It expresses the belief that the maintenance of law and order is only possible by the performance of duties by the people.[6] According to it, once answers are produced by the court, king who presides over the court has the responsibility to determine the true facts, evidence, and time and then pronounce the judgment.

Yajnavalkya

It also stresses on truth as the embodiment of humans and gives king the authority to decide which facts are true and which are corrupt so as to discard it. Yajnavalkya places evidence in a hierarchical manner where attested documents have been given the highest importance, followed by witnesses and lastly the five types of ordeals. It made it compulsory to add proofs.[7]

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[4]JOHN W. SPELLMAN, POLITICAL THEORY OF ANCIENT INDIA 128 (Clarendon Press 1964).
[5]Gitika Jain, *Emergence of evidence*, IPEADERS (Dec. 27, 2020), https://blog.ipleaders.in/conceptions-evidence-classical-hindu-islamic-jurisprudence/.
[6]*Id.*
[7]*Id.*

Naradasmriti

It specifies 3 types of proofs namely documents, witnesses and possessions.[8]As compared to Manusmriti and Yajnavalkya, Naradasmriti is considered as the leading text in the pronouncement of law. For proof, Narada divides the law into human evidence (documentary and oral evidence) and divine evidence (ordeals).

Katyayana

According to Katyayana, the witnesses on the fixed day had to take a sacred oath before the fire and the water to give truthful evidence to the best of their knowledge and capacity. Also, the examination of witnesses was made in the open court where the judges put questions to them and observed the authenticity of their evidence.

Katyayana presents three types of evidence[9] –

a) Documents (likhita)
b) Witnesses (sakshi)
c) Possession (bhukti)

a) Documentary evidence (likhita)

All Dharma Sastras agree that written recorded evidence should take precedence, and that all other evidence should be reviewed only if the written evidence fails.

The documentary evidence consists of- *Rajasaksika*,*Saksika* and *Asasika*.*Rajasaksika*, a document passed by the clerk of the Kings's court and is finalised by the presiding officer. This document is equivalent to a modern registered document.*Saksika*is the private evidence that is written by anyone and attested by witnessesm while*Asasika*is written by the parties and which is admissible.[10] Anything beyond these three were not permissible.

Validity of the evidence-

i) It may be written by any person except minor, lunatics, women or any other person under pressure or against his will.
ii) Documentary evidence is not considered the most important evidence as there are chances of tampering with the evidence.

[8] R. W. LARIEVIERE, THE NARADASMRITI 1-568 (Motilal Banarsidass Publication 2001).
[9]Shivaraj S. Huchhanavar, *The Legal system in ancient India*, LEGAL SERVICE INDIA, http://www.legalservicesindia.com/article/1391/The-Legal-system-in-ancient-India.html.
[10]*Id.*

iii) Handwriting of the witness was also checked so that no forgery happens.

b) Witness (Sakshi)

It means the man who himself witnesses the incident or hears directly about the incident. In Manusmriti and Yagnavakya, the literary sources refer to the declaration that has to be ascertained through the king or by learned Brahmanas. The ancient law excluded hearsay evidence. It was the king's responsibility to acquaint the witness about the consequence of saying lies, importance of truth, purpose of oath etc.

Manu felt that males who were familiar with their duties were accepted as witnesses regardless of caste, but others were not.[11] Women, Sudras, twice-born males, and lower-caste men can only provide testimony on behalf of someone from their own class. [12]

Character is a cardinal aspect of the legal position of witness.[13]Manu says, if there is a disagreement among witnesses, the king must go with the evidence provided by the majority, but if the evidence is presented before the court, the monarch must reject it. The ruler, whether he is a king or an equal number, must be able to discriminate between right and wrong. When there weren't any witnesses, the rules of both come into play. The judge might testify under oath or undergo an experience to determine the truth. An oath was thought to be a holy channel that could never be broken.[14]

c) Ordeals

Any trials that took place in ancient courts relied on witnesses and papers presented to the court. Where the parties to the case did not offer oral or documentary evidence before the court, it was passed to the jury. Ordeals or divine tests are used by both parties to prove their case. People in the past believed that divine tests were the way for determining the case's righteousness. According to people's superstitious beliefs, the torture is described in depth in the Agni Purana. [15]Except in the case of heinous crimes, taking an oath was enough to prove a case. The types of ordeals included are **ordeal by balance**, **by fire**, **by water**, **by poison** and **by sacred libation**.[16]

[11]M. N. Srinivas, The Changing Position of Indian Women, 12 RAIGBI 221, 221-238 (1977).
[12]Subhashini Ali, *The Laws of Manu and What They would Mean for Citizens of the Hindu Rashtra*, THE WIRE (Nov. 10, 2020), https://thewire.in/rights/manusmriti-hindu-rashtra-rss.
[13]Diva Rai,*Witness under the Indian Evidence Act,* IPLEADERS (March 24, 2929), https://blog.ipleaders.in/witnesses-under-the-indian-evidence-act/.
[14]4 MANU, MANU SMRITI(Gujarti Printing Press 1913).
[15]2 MN DUTT, AGNI PURANA349 (Parimal Publication 2008).
[16]GOKULESH SHARMA, ANCIENT JUDICIAL SYSTEM OF INDIA 140 (Deep & Deep Publications Pvt. Ltd. 2008).

Medieval Period (Muslim Period)

Since the inception of the 12th century, Muslim monarchs have been invading India. In mediaeval India, Muslim princes established a conflict resolution system based on Islamic law, which was based on the holy Quran.[17] Sir Abdul Rahim wrote a treatise called Muslim jurisprudence that dealt with the law of proof. In highly evolved Muslim societies, there was no true concept of evidence norms. One of the forms of God's pronouncement on the matter of justice has been the Al Quran.[18] The laws of evidence have advanced and become more modern. The evidence in Muslim law is separated into two categories: oral and documented. There are two types of oral evidence: direct and hearsay. Documentary evidence was also accepted in ancient Muslim jurisprudence.

Because certain pieces of evidence from people like women, minors, drunkards, and criminals weren't considered permissible in the court of law, oral evidence was valued above documentary proof. In addition, when documents were presented to the court, the court preferred to examine the party that presented the document. To settle the disagreements, Quajis was consulted. The substantive and procedural laws were interpreted in accordance with the Quran's, sunnah's, ijma's, and qiyas' tenets.[19] The plaintiff was compelled to proceed to the Quazi in the event of any wrongdoing. Eyewitnesses were given precedence over hearsay evidence. At least two men and one or more women testified.

The Colonial Period

When the East India Company first arrived in India, the rule of evidence was largely guided by the old legal systems of India's many social groupings. Religious and customary law issues were directed to pundits and maulvis. Royal courts were formed in three Presidency towns in 1726, specifically to safeguard Englishmen and their possessions, but they were not authorized to exert power over Indians unless it was specifically stated.

Outside of these presidency towns, Islamic law prevailed. In Presidency towns, residuary law[20] was English law, but justice, equality, and good conscience prevailed in the muffasil areas. Not only did the law in each Presidency town differ from the law in that Presidency's muffasil, but

[17]Tahera Qutbuddin, *Arabic in India: A Survey and Classification of its uses, compared with Persian*, 127 JOAOS 315, 315-358 (2007).
[18]*Id.*
[19]*Id.*
[20]J. Duncan M. Derrett. *The Administration of Hindu Law by the British*, 4 Comparative Studies in Society and History 10, 10-52 (1961).

the laws in the three Presidencies' muffasils also differed significantly. When it came to evidence, the courts in the Presidency towns followed English rules, whereas in the muffasil courts, there was a lot of doubt. In all issues except those protected by particular regulations, the Muslim law of evidence was observed occasionally, but more often it was the English law, as the latter was understood by the Company's servants.

During Cornwallis' governorship, a dramatic intervention in criminal justice, based on Muslim law, was made. He intervened in the rule of evidence as well as made significant changes in the administration of criminal justice through the Regulations of 1793. The religious impediment of witnesses was lifted by Section 56 of Bengal Regulation IX of 1793[21], which allowed non-Muslim witnesses to testify in criminal cases in Bengal. Sections XXXIII, Clause 1, Bombay Regulation IV of 1827, Section 33, and XIII of 1827 (section 35) enlarged the definition of 'witness', defining all persons as competent witnesses who have reached the age of discretion and are of sound mind. Another impediment to witnesses due to their relationship, conviction, or antagonistic or vested interest was removed by Section XXXIII, Clause2, Bombay Regulation IV of 1827.

The *First Law Commission* was established in *1833*, with *Lord Macaulay* as its *chairman*, and many enactments were passed.[22] Act 10 of 1835was the first Act of the Governor-General-in-Council dealing with the law of evidence. It extended to all Indian courts, whether they were in the Presidency towns or the moffusil. It stated that the submission of the relevant gazette might be used to substantiate acts passed by the Governor-General-in-Council. Act 5 of 1840[23] allowed Hindus and Muslims to affirm rather than swear. It further stated that a simple mistake in delivering the oath or making an affirmation had no bearing on the legal processes.

Outside the Presidency towns, an ambiguous blend of English and Muslim laws continued to reign, leaving some issues as hazy as before. As a result, it was discovered that courts outside of the Presidency towns had no definite rules of evidence other than those set forth in Acts 19 and 2 of 1855. Since 1793, the British administration has been dictating changes in the rule of evidence, culminating in the 1872 implementation of the Indian Evidence Act, which is substantially based on the principles of English rules of evidence.

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[21]Bengal Land-Revenue Regulation, 1793, §56, No. 8, Acts of Imperial Legislative Council, 1793 (India).
[22]ElizabethKolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*,23 *LHR* 631, 631-683 (2005).

[23]Indian Oaths Act, 1840, §5, No. 5, Acts of Imperial Legislative Council, 1873 (India).

There was an urgent need for the codification of rules relating to evidence because there was no set and defined law that regulated the entire country. Following that, Act X of 1835, which applied to all courts in British India, was the first Act of the Governor-General in Council dealing with evidence. In 1868, the British government drafted a code of evidence**.** Sir Henry Summer Maine introduced it after adding two additional sections to the proposed code. However, many officials objected to this draft bill, and in 1870, a new bill including 163 sections drafted by **Fitzjamen Stephan** was introduced. He reintroduced the bill, which eventually became the **Indian Evidence Act of 1872.**[24]

The Indian Evidence Act of 1872 abolished and re-enacted these statutes. The witnesses are dealt with in Section 118-134 of the Indian Evidence Act, 1872. In order to establish a fact, one needs witnesses. In the absence of witnesses, the facts can be proven through admission or by inference. The English courts created certain essential premises or considerations to prove a fact on the basis of certain broader principles on which the facts are ascertained.

Indian Evidence Act, 1872

> *"The objective of codification is to secure uniformity where you can have it, diversity where you must have it, but in all cases, certainty."* -Macauly

The Evidence Act of 1872 specifies the procedure to be followed in instances involving the production of pertinent oral, documentary, and material evidence, as well as the examination of witnesses. The evidence in the case is used to determine the outcome of a legal dispute.

The Indian Evidence Act was passed as a revolutionary piece of judicial legislation in India, revolutionising the way that evidence is seen to be admissible in legal proceedings there. Evidence laws up to that point were founded on the customary legal frameworks of India's numerous social castes and communities, and they varied for various people based on caste, community, faith, and social rank. The Indian Evidence Act created a corpus of law that was consistent and applicable to all Indians.

The Indian Evidence Act of 1872 is extensive, with numerous implications and interpretations. This act's codification and adoption were ground-breaking, transforming the entire judicial system as well as the concepts of admissibility of evidence in Indian courts of law. This Act established a uniform body of law that applied to all Indians.These laws include both process and rights, as they outline how to go to court and how to prove one's case in front of the

[24]Indian Evidence Act, 1872, No. 1, Acts of Legislative Council, 1872 (India).

judge.This Act is divided into three parts[25] and contains eleven chapters in total.All provisions of the Evidence Act can be classified into two categories:

1. **Gathering Evidence (By Court):** Theparties are only allowed to submit admissible evidence in a court of law. Admissible evidence is basically the "Fact in Issue" or "Relevant Facts" that remains safe from being adduced by any other provision of the Indian Evidence Act, 1872. Facts can be proven in two ways, according to sections 59[26] and 60[27]: verbally and documentarily (which includes electronic documents). The court can investigate whether a particular fact or all facts are proven, or whether the fact or facts can be considered to be established, by evaluating it using the aforementioned two ways.
2. **Evaluating the Evidence:** Proof (prove, deny, or not prove) and assumption (This fact has been established) are two concepts used for accessing facts (may presume, shall presume and Conclusive proof). After gathering all sorts of evidence, be it documentarily or verbally has been examined to approach towards the truth. If there is no or insufficient proof for a fact, it is called "not proved", and the second idea for evaluating it is "presumption."

Non-Relevance Of Few Provisions Of Indian Evidence Act, 1872 In Contemporary Times

SECTION 112ON BIRTH LEGITIMACY

This section talks about conclusive confirmation of legitimacy of birth. It states that if a child is born during wedlock or within 280 days after the dissolution of the marriage, and the mother of the child is still unmarried, this is irrefutable proof that the child is the mother's and her husband's legitimate child. The sole exception is if it can be proven that neither spouse to the marriage had access to another at any point throughout the potential period of conception. The validity of a child born out of wedlock is determined by the way this section of the law is written. There is no assumption of deceit on the part of a party until concrete evidence can be provided. This section is therefore based on the supposition of morality and public policy.

[25] Indian Evidence Act, 1872, § 59, No. 1, Act of Imperial Legislative Council, 1872 (India).
[26] Indian Evidence Act, 1872, § 59, No. 1, Act of Imperial Legislative Council, 1872 (India).
[27] *Id.* §60.

The decision to not submit to a DNA test was decided in the case of Dipanwita Roy vs. Ronobroto Roy.[28] It was claimed that it was acceptable to require the wife to undergo a DNA test to determine her origin in a case contesting her infidelity. Anunfavourable connotation could be drawn against the woman if she declines to get the child's paternity confirmed by a paternity test.

It is vital to remember that establishing a child's legitimacy is crucial in a number of situations. The birth of a child born out of wedlock is assumed in this section to be the conclusive proof of his or her legitimacy. The exception that has been invoked is that of non-access between the marital partners. The legal snag here is that a kid might be declared illegitimate even if both the sides to the marriage have connection with each other, such as through adultery. In such an instance, access of the parties to each other will be taken as proof for the purpose of determining the child's legitimacy, and there would be no remedy because there was no evidence to the contrary. **This rule is mostly irrelevant in today's world of research and technology.**

BURDEN OF PROOF UNDER SECTION 101- 111 AND THE ROLE OF JUDICIARY

Section 101 of Indian Evidence Act talks about Burden of Proof (BOP) where the person has to bear the responsibility to state the prevalence of the facts and taken the requisite burden to prove it.[29] The essentials of BOP are mentioned in Chapter 8 of IEA. It is peculiar how section 105 is only relevant in criminal proceedings when an accused wishes to use the general exceptions given under the Indian Penal Code, 1860 or any other special exception. So, the implication remains unclear as to what contributes BOP. Section 105 of the Indian Evidence Act deals with the burden of proof that has laid down two principles such as:

a) The accused has to prove the existence of the circumstances which qualify the case for application of the exception.

b) The court has to assume that no exception exists if not proved otherwise.[30]

Let us say that the accused has the exceptions under section 105, he also carries the responsibility to prove that it comes under such exception. Even if the accused has a burden of proof which is distinct from the prosecution, prosecution carries the burden to prove it beyond reasonable

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[29]Indian Evidence Act, 1872, § 101, No. 1, Act of Imperial Legislative Council, 1872 (India).

[30]*Id.*§ 105.

doubt. *The Evidence Act necessarily doesn't force the accused to showcase his case with the same zeal that the prosecution has to inevitably in a criminal matter.*[31]

There is a conflation of two different stages in a trial, one in which the prosecution proves the offence and the other in which the accused proves general exceptions, and more evidently, it has made the prosecution to be on the receiving end. The prosecution must now establish not only that the offence was committed beyond a reasonable doubt, but also that the act that led to the offence did not fit within the broad exceptions. The second criterion too, must be shown to the point of dispelling any "reasonable doubts" to investigate the occurrence of crime. The accused only has to raise the plea of broad exceptions and, if necessary, mention the flaws in the prosecution's evidence to demonstrate that there is a "reasonable doubt" about the crime itself.

In this case, the prosecution is on the disadvantaged side. Given the effectiveness of the investigative authorities and the different rights provided to persons by the Constitution, its already onerous duty has risen and assumed disproportionate volumes. In light of the rise in organized crime and other socio-economic offences, this additional burden on the prosecution spells doom. In view of the prosecution's onerous duty, the nation's dawn of liberalization, which threatens to usher in a new age of crimes, has significant ramifications.

Need For Changes In Certain Provisions

After independence, the Evidence Act of 1872 remained in use as the basis for the law of evidence applied by the Indian judiciary, despite the Act having been created some 145 years ago. Motives and methods of committing crime, as well as societal settings and surroundings, are all changing, and a significant shift has already occurred that was not there 145 years ago. Cybercrime has significantly increased during the last ten years. As a result, it shows the emergence of a revision to the Evidence Act of 1872 that necessitates few amendments and repeal of sections.

[31]Deoman Upadhyaya vs State, AIR 1960 All 1.

ELECTRONIC EVIDENCE AS IN SECTION 65B OF IEA, 1872

The Evidence Act of 1872, sections 65A[32] and 65B[33] were **inscribed in 2000 through Information Technology Act, 2000**[34] with the goal of establishing admission rules for electronic evidence in courts. Problems with electronic records exist with their physical equivalents. It is simple to produce, copy, edit, destroy, and transfer electronic data from one media to another. In other words, electronic records are easily altered by their very nature. As a result, their accuracy and dependability are regularly questioned. This presents a tension between the relevance and admissibility of electronic evidence, which has been acknowledged by courts all around the world. Despite the excellent intentions behind the amendment, it has sparked controversy. This is partly due to High Courts' uneven and capricious handling of electronic evidence under Section 65B.There has been a significant lack of uniformity as a result of different courts requiring different ways for meeting the standards set out in 65B(2). This disparity in practice not only inconveniences litigants, but it also raises the risk of justice being derailed.

In ***Anvar P.V v. P.K. Basheer (iAnvar)***[35], the Supreme Court attempted to put an end to all of these debates. The Court viewed 65B as necessitating one specific authentication method: a certificate as defined in 65B (4) as an essential prerequisite for acceptance of electronic evidence, in order to promote uniformity in practice.

While sections 61to 65 of the Evidence Act are wide enough to accommodate electronic evidence, this approach would have resulted in electronic evidence being handled similarly to physical evidence. This would not have taken into consideration their dependability in particular. Electronic evidence not only has the same flaws as conventional evidence, such as purposeful or inadvertent human mistake, but it also has extra issues such device failure, software faults, and the relative ease of tampering and manipulation. Traditional evidence law is incapable of comprehending these issues. Several nations have enacted particular regulations to deal with electronic evidence in acknowledgment of this.

Electronic records are only admissible into evidence under current law if accompanied by a **certificate**[36]. As a result, there are certain peculiar challenges in applying the legislation. To begin

[32]Indian Evidence Act, 1872, § 65A, No. 1, Act of Imperial Legislative Council, 1872 (India).
[33]*Id.*§65B.
[34]The Information Technology Act, 2000, No. 21, Act of Indian Parliament, 2000 (India).
[35]Anwar P.V v. P.K. Basheer &Ors, 2014 10 SCC 473.
[36]Bharat Vasani & Varun Kannan, *Supreme Court on the admissibility of electronic evidence under Section 65B of the Evidence Act*, A Cyril Amarchand Mangaldas Blog (Dec. 14, 2021, 5:24 PM), https://corporate.cyrilamarchandblogs.com/2021/01/supreme-court-on-the-admissibility-of-electronic-evidence-under-section-65b-of-the-evidence-act/.

with, Indian courts are regularly confronted with instances in which evidence has been collected inappropriately or illegally, particularly by whistleblowers, investigative agencies performing secret/unapproved searches, approvers seeking favor with authorities, and so on. Because Indian evidence law is notable for not following the 'fruit of the poisoned tree' theory, such evidence is accepted. Instead, we have taken the stance that the technique by which the evidence is gathered is immaterial.

The introduction of **65A and 65B in India**, with its detailed criteria and safeguards, was a commensurate attempt to address these distinct issues. The provisions were intended to offer direction and provide a standard process for trial courts to follow in order for them to deal with the increased problems posed by technological advancements.

Conclusion

In the Indian legal system, evidence is a broad and cardinal topic. It is critical that the rules governing evidence be revised on a regular basis to reflect changing societal and technical developments. Despite several recommendations, however, the Indian Evidence Act of 1872 has remained unchanged. In practise, several scientific development ideas have been adopted through judicial precedents, although the same is not supported by India's evidence statute.

Section 112 that deals with child legitimacy needs to consider few intricacies and few modifications needs to be brought about to provide justice in the present context. Perhaps now is the time for the judiciary to consider the matter and take steps to alleviate this unjustified and unneeded burden of proof on the prosecution through Section 101 of the Indian Evidence Act, 1872.The electronic evidence that was brought about in subsequent amendments through IT Act, 2000 needs proper changes so as to be more reliable. It would be appropriate for courts to keep up with advances in cyberspace in order to increase confidence in the use of such electronic documents while taking all practical considerations into account. The changes in the abovementioned provisions need to be brought out for speedy and fair delivery of justice.