Amendment of the Law of Evidence in Bangladesh

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Abstract

Evidence is a part of information that supports a conclusion. Evidence includes everything that is used to determine or demonstrate the truth of an assertion. Giving or procuring evidence is the process of using those things either that are presumed to be true or which were proved by evidence, to demonstrate an assertion's truth Evidence is the currency by which one fulfills the burden of proof. Over the immediate past decade's technological development has put an important role on the legal proceedings. Societies have become complex and complex problems are arising in it. To solve complex problem the law of Evidence must be up to the mark. It must have the capability to solve the problem. This capability can be acquired by it only through amendments. Over century old Evidence Act fails to meet the necessity of the time owing to various weakness and inadequacies that are prevailing in the law. In this persistence The Evidence Act, 1872 also can be updated with little bit amendments.

Key terms: Evidence Act; law amendment

Introduction

Law is the backbone for the standing of peaceful and conscious society. It survives and changes with the change in the society. The object of the rules of evidence is to help the Court to ascertain the true meaning, to prevent protracted inquiries, and avoid confusion in the minds of judges, which may result from the admission of evidence in excess. In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lies. One must realize that if every circumstance, which might through light on the main issues were to be let in, trails would be protracted to an intolerable length. Thus the main of object of the law of evidences is to restrict the investigation made by the Court within the bounds prescribed by general convenience .The present law of evidence fails to achieve this goal due to some of its lacking. This problem can be solved by bringing necessary amendments to the Evidence Act, 1872.

Objectives of the Study

The general objectives of the study are to examine and analyze the necessity for amendment of the Evidence Act of 1872. However, the special objectives may be as follows:

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- To clarify modern concept of evidence.
- To introduce with the modern technological instruments those are related to evidence.
- To earmark the weakness or inadequacies of the Evidence Act 1872, in present context of Bangladesh and suggest which sections of the Act may be amended and to specify the nature of amendments thereof.

Rationale of the Study

Society is not static; it is changing and will continue to change in an endless continuous process. Law is the product of time; it has been originated owing to necessity. The Evidence Act 1872 is also a product of time which dates back in 1872.We have obtained many things as the legacy of British rule in India. Same is in respect of Evidence Act 1872 that we have received as the legacy of the British in this subcontinent. About one and half century has elapsed since its inception in 1872.With the passage of time numerous changes has taken place in the orbit of our society. In fact, many changes have occurred in our legal system excepting the Evidence Act of 1872, which needs be changed in the light of changes that occurred in our socio cultural arena. Present study is designed to earmark its weakness and suggest the nature of amendments that deem to have been found necessary in the present context of Bangladesh due to a number of reasons. This Act is of paramount importance in the administration of justice and judicial system since its inherent importance. But unfortunately no significant efforts have been taken for its amendment up till now in Bangladesh. It is therefore suggested that this act should be amended without killing time. Vital and pertinent issues of this Act have been carefully studied in the paper that attracts intellectual attention of key provisions associated with this field. This humble study may serve the purpose of amendment and help enthusiastic readers and lawmakers to grasp the matter why to make necessary amendment. In addition, there lies the significance of the study. And here lies the importance of the study.

In Case of Definition

The word 'evidence' has been derived from the Latin word 'evidere' which implies to show distinctly, to make clear to view or sight, to discover clearly, to make plainly certain, to certain, to ascertain, to prove (Jhavala, 2007). Therefore, the definition of the term 'evidence' is incomplete. Evidence, as defined, is not the only medium of proof; in addition to it, there are a number of other matters like the demeanor of witness, which the Court has to take into consideration when forming its conclusion. The definition of 'evidence' has to be read with the word 'proved' when determining what 'evidence' within the Act is. If the word 'evidence' includes electronics evidence such as electronic document or information generated, sent, receive or stored in magnetic, optical, computer memory, micro film, computer generated microchip, such

as: audio, video, DVD, records of CCTV, records from cell phone, hardware, software, electronic records, electronic message, electronic agreement, digital signature and any evidence with electronic form, it will be a recognition of modern technology [ICT ACT 2006]. The electronic form of evidence will be applied cautiously in some specific issues as oral admissions. We know oral admission is a vital part of testimony. Oral admissions as to the content of electronic records may be considered as irrelevant, unless the genuineness of the electronic record produced is beyond question. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (referred to as the computer output) shall be deemed to be a document. In case of keeping accounts, entries in the books of account, we can also include those accounts as evidence e which are kept in an electronic form as in most cases computer or such other sophisticated electronic equipment have become a very common phenomenon.

In Case of Presumption

Every fact, on the basis of which a party to a proceeding wants to take judgment, must prove. No court can, in deciding a case, rely on a fact unless and until it has been proved according to the rules laid down in the Evidence Act, 1872.

The term 'Presumption 'derived from the Latin word 'Presumere' in its widest and most comprehensive sense, may be defined to be an inference, affirmative or disaffirmative, of the truth of falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted. In law a presumption means a rule of law that the Court and judges shall draw a particular inference from particular fact, or from particular evidence, unless or until the truth of such conclusion is disproved. (The Free Dictionary, n.d.) Presumptions are either presumption of law or presumption of fact. The former may be again sub-divided into (i) rebuttable, and (ii) conclusive presumption. The latter are always irrebuttable.

Amendment of Section 9

In section 9 of the Evidence Act, for the words "Facts necessary to explain", the words, "Facts which are necessary to explain", should be substituted. (Indian Evidence Amendment (Bill) 2003)

Amendment of Section 12

In section 12 of the principal Act, for the word "damages "in both the places where it occurs, the words "compensation or damages", should be substituted. (Indian Evidence Amendment (Bill) 2003)

In Case of Custodial Injuries

Custodial violence leading to injuries, rape or death of suspects or accused has become very common in our country. Human Rights organizations in their reports have also been referring to custodial deaths and expressing concern over their increasing number. But, even after all the observations and developments, the incidents of custodial deaths are containing unabated. According to the report of a Human Rights organization (Odhikar, 2016), 178 people have been reportedly extra judicially killed by the law enforcing agencies in 2016 and of them at least 51 killed by RAB and 118 by Police. It is not secret that while in police custody all kinds of the third degree methods are used by the police officers also extract information from the accused which, in many a time, lead to custodial death. The Supreme Court of Bangladesh has issued several guidelines for police in order to prevent the custodial death and torture, but they are observed more in breach. (BLAST Vs Bangladesh, 2003 & Saifuzzaman Vs Bangladesh, 2004).

In case of prosecution of police in custodial deaths, it is very difficult to find out any eyewitness. Besides, any other policeman never comes forward to give evidence against his colleague policeman accused of custodial death. Therefore, it is very difficult to implicate a policeman in the absence of evidence. Under the circumstances, it may be appropriate if the courts while trying a police officer accused of custodial death should presume that it has been caused by the police officer and the onus of proving innocent is fixed on the police officer. It is therefore, necessary that changes in the Evidence Act be made regarding presumption by the court if the death of a person takes place while he was in police custody. Such an amendment will definitely serve a deterrent to the police officer and reduce the incidents of custodial deaths. If death takes place in police custody or in jail it is difficult to prove by the relations of the victim as to who caused the death. In many cases, this court has decided that when a wife dies while in custody of the husband, the husband shall explain how the wife met her death. Similar principle may be applied when a person dies in police custody or in jail. To give a legal backing to the above principle, we like to recommend that a section in the Evidence Act (after section 106) or a clause may be added in section 114 of that Act incorporating the above principle. (BLAST Vs Bangladesh, 2003).

After section 114 of the principal Act, the following section should be inserted namely-

114 B. (1) In a prosecution of a police officer for an offence committed by an act alleged to have caused bodily injury to a person, if there is evidence that the injury was caused during a period when that person was in the custody of the police, the Court may presume that the injury was caused by the police officer having custody of that person during that period.

(2) The Court, in deciding whether or not it should draw a presumption under sub-section (1), shall have regard to all the relevant circumstances including, in particular,

(a) the period of custody;

(b) any statement made by the victim as to how the injuries were received, being a statement admissible in evidence;

(c) the evidence of any medical practitioner who might have examined the victim; and

(d) evidence of any magistrate who might have recorded or attempted to record the victim's statement ."

(3) For the purpose of this section, the expression 'police officer' includes officers of the para-military forces and other officers of the revenue, who conduct investigation in connection with economic offences." [The Indian Evidence Amendment (Bill) 2003& Law Commission Final Report, Bangladesh]

Electronic Record

It is noted that in any proceeding involving a secured electronic record, the Court shall presume, unless contrary is proved, that the secured electronic record has not been altered since the point of time to which the secure status relates. Tape recorded conversation can be admitted as evidence, provided the conversation is relevant to the matters in issue, the voice can properly identified, and the possibility of erasing parts of the tape is eliminated. (Proshanti, 2016)

According to Information and Communication Technology Act, 2006 if any case is tried by Cyber Tribunal only then the tribunal uses Electronic record and evidence as mode of proof but not in cases under Penal Code or other Special law prevailing in our country save and except cases under the Law and Order Disruption Offence (Droota Bichar) Act, 2002 and cases tried by Tribunal under Droota Bichar Tribunal Act, 2002. We are badly needed of that sort of amendment in Evidence Act, 1872 but no such leadership comes forward.

Whereas, India changed their evidence Act, by amending and adding new provisions as per contemporary requirements, 16 long years back. They have changed the definition of 'document', added provisions regarding admissibility of e-evidence and a provision regarding experts' opinions. Presuming that, Bangladesh is no less advanced technologically; adding provisions regarding electronic evidence will not only better our legal system, but also give a better understanding of admissibility of e-evidence to the lawyers, law enforcement agencies and the overall judicial system of Bangladesh.

Presumption as to Electronic Messages

Due to enormous growth in e-governance throughout the Public & Private Sectors and e-commerce activities Electronic Evidence have involved into a fundamental pillar of communication, processing and documentation. The government agencies are opening up to introduce various governance policies electronically and periodical filings to regulate and control the industries are done through electronic means. These various forms of Electronic Evidence/ Digital Evidence are increasingly being used in the judicial proceedings. At the stage of trial, Judges are often asked to issue rule on the admissibility of electronic evidence and it substantially impacts the outcome of civil law suit or conviction/acquittal of the accused. The Court continues to grapple with this new electronic frontier as the unique nature of e-evidence, as well as the ease with which it can be fabricated or falsified, creates hurdle to admissibility not faced with the other evidences. The various categories of electronic evidences such as CD, DVD, hard disk/ memory card data, website data, social network communication, e-mail, instant chat messages, SMS/MMS and computer generated documents pose unique problem and challenges for proper authentication and subject to a different set of views. (Neeraj, 2015)

The Court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent. Presumption as to electronic records is five years old. Where any electronic record, purporting or proved to five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the digital signature which purports to be digital signature of any person was so affixed by him or any person authorized by him in this behalf.

Presumption as to Electronic Agreements

Day by day electronic agreement becomes popular. But there is nothing about electronic agreement in present law of evidence. The Court shall presume that every electronic record purporting to be an agreement containing the digital signature of the parties was so concluded by affixing the digital signature of the parties.

In Case of Expert's Opinion

Opinion of a person not a party to the suit is not important. However, there may be some cases where, due to technicality involved, the court cannot form a correct opinion of its own. In such situations, it becomes necessary to take the opinion of an expert in that field. An expert is a person who is especially skilled on those points on which he is asked to state his opinion. In case of fixing, the legitimacy of a child or

identifying the criminals and victims DNA test can be most reliable means. In such cases, the court can seek help from the scientists or doctors.

Determining Legitimacy of a Child

In Bangladesh, chastity of woman and paternity of child hold much value and are issues of honour. No person would like to be called a bastard nor will a woman like to be called unchaste. Section 112 of Evidence Act, 1872 deals with the legitimacy of a child. It is to be borne in mind that Section 112 of this Act was enacted at a time when the modern scientific advancements such as deoxyribonucleic acid (DNA), Ribonucleic acid (RNA) tests, sperm bank or cry bank, in vitro fertilization, surrogacy etc. were not even in contemplation of the legislature and therefore, this section should be amended. (Priyanka, 2016)

There still lies an ambiguity in the contents of the section 112. Here the section states that if a child born within 280 days , after dissolution of marriage (the mother remaining unmarried), is conclusive proof that it is the legitimate child of that man, unless it can be shown that the parties to the marriage had no access to each other at the time when he could have been begotten. Here, it seems that the law is a step ahead then the medical science, as the point regarding exact days of childbirth is not settled in medical arena, till date. It is an issue of medical science, which has to be dealt with sincere scientific aptitude and by Laws of Nature. This section was formulated in 1872, nearly 145 years ago. But, in last three decades, there is an unpredictable growth of scientific temperament. And, even the legal community is showing the impression of the same. The Courts readily admits the scientific evidences in case of theft, rape, murder and what not. But it is far beyond the reasonable understanding as why the issue of legitimacy is left open, to be decided by the legal interpretations and not by scientific techniques. (Dharma, 2016)

Identifying Criminals and Victims

Forensic scientists can use DNA in blood, semen, skin, saliva or hair at a crime scene to identify a perpetrator. This process is called genetic fingerprinting, or more accurately, DNA profiling. In DNA profiling, the lengths of variable sections of repetitive DNA, such as short tandem repeats and mini satellites, are compared between people. This method is usually an extremely reliable technique for identifying a criminal. However, identification can be complicated if the scene is contaminated with DNA from several people. People convicted of certain types of crime may be required to provide a sample of DNA for a database. This has helped investigators solve old cases where only a DNA sample was obtained from the scene. DNA profiling can also be used to identify victims of mass casualty incidents. Ashoka (2008)

In Case of Rape Victims

Despite constitutional provisions guaranteeing equality and special protection for women, there still exist few discriminatory provisions under different laws. Section 155 (4) of the Evidence Act, 1872, provides that: "When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character." The archaic and unethical provision of this section is affecting victims of rape.

I think this portion of this section should be deleted. It is common for defense counsels to refer to prior sexual conduct of the complainant in their pleadings for demolishing her testimony that she does not consent, thus tarnishing the reputation and chance of marriage of the complainant. The amendment can protect the individual honor and dignity of woman.

It is noted that in 2003, India deleted that clause and inserted a provision in Section 146 after clause (3) as "Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character."

Birth during Marriage: Conclusive Proof of Legitimacy except in Certain Cases

For section 112 of the principal Act, the following section should be substituted, namely-

112 The fact that any child was born during the continuance of a valid marriage between its mother and any man, or within two hundred and eighty days,

(i) after the marriage was declared nullity, the mother remaining unmarried, or

(ii) after the marriage was avoided by dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate child of that man, unless

(a) it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten; or

(b) it is conclusively established, by tests conducted at the expense of that man, namely,

(i) medical tests, that, at the relevant time, that man was impotent or sterile, and is not the father of the child; or

(ii) blood tests conducted with the consent of that man and his wife and in the case of the child, by permission of the Court, that that man is not the father of the child; or

(iii) DNA genetic printing tests conducted with the consent of that man and in the case of the child, by permission of the Court, that that man is not the father of the child; and

Provided that the Court is satisfied that the test under sub-clause (i) or sub-clause (ii) or sub-clause (iii) has been conducted in a scientific manner according to accepted procedures, and in the case of each of these sub-clauses (i) or (ii) or (iii) of clause (b), at least two tests have been conducted, and they resulted in an identical verdict that that man is not the father of the child.

Provided further that where that man refuses to undergo the tests under sub clauses (i) or (ii) or (iii), he shall, without prejudice to the provisions of clause (a), be deemed to have waived his defense to any claim of paternity made against him.
Explanation I: For the purpose of sub clause (iii) of clause (b), the words 'DNA genetic printing tests' shall mean the tests conducted by way of samples relatable to the husband and child and the words "DNA" mean 'Deoxyribo-Nucleic Acid'. (Roy, 2012)

Explanation II: For the purposes of this section, the words 'valid marriage' shall mean a void marriage till it is declared nullity or a voidable marriage till it is avoided by dissolution, where, by any enactment for the time being in force, it is provided that the children of such marriages which are declared nullity or avoided by dissolution, shall nevertheless be legitimate."[Indian Evidence Amendment (Bill) 2003]

Jury System

The Evidence Act was enacted in the year of 1872. At that time Jury system was prevailing in the Indian legal system. But after the independence of India & Pakistan jury system was abolished. But still the option of jury system remains unchanged in the Evidence Act. This section should be omitted.

In case of Judge's Power to Ask Questions

A judge may, in order to discover or to obtain proper proof or relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, of any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties or their agents shall be entitled to take any objection to any such question or order, nor without the leave of the Court, to cross-examination any witness upon any answer given in reply to such question.

To such a wide power rightly conferred on a Judge, there are certain restrictions or checks. Firstly, his judgment must be based upon facts declared by the Act to be relevant, and duly proved. Secondly, the Judge cannot compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 120 to 131, if the question were asked or the document were called for by the adverse party. Nor can the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor

can he dispense with primary evidence of any document except in the case hereinbefore exempted under section 165. (Sudhansu, 2016)

Conclusion

The enactment of the Evidence Act 1872 was a milestone judicial measure in this subcontinent, which changed the entire system of concepts to admissibility of evidences in the courts of law. It is well accepted fact that law has to grow in order to satisfy the need of the fast changing society and keep abreast with the scientific developments taking place. It is noted that the rules of evidence were based on the traditional legal systems of different social groups and communities of this subcontinent. Besides, while enacting the act the law makers kept in mind the customary practice of the people of the region. About after 145 years it is necessary to sophisticate the Act to ensure justice. However administration of justice needs to be modified by remaining in the existing framework to the effect that one can be effectively utilize the benefits of modern and technical advancements. Law is dynamic not static. With the changes of the society and development of the technology law of evidence also should be changed in according with necessity.

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