ANDHRA LEGAL DECISIONS

2003 (2) JOURNAL ALD

LAW OF EVIDENCE AND CIVIL PROCEDURE — WITH REFERENCE TO APPLICATION OF SECTIONS 3 TO 167 INDIAN EVIDENCE ACT TO ORDER 18 RULE 4 R/W ORDER 26 RULE 4 CPC

By

—B. SHIVA SHANKARA RAO
Addl. Director
A.P. Judicial Academy,
Secunderabad

I. Law & Justice:

Justice is truth in action. Truth implies reality. Regarding truth/reality the two special terms in Sanskrit are

(a) (1) *Paramartha* and (2) *Yathartha*

(1) *Paramartha* is to account for eternal truth which is a contemplate conviction based on facts, thoughts and convictions from subjective appreciation of the unchanging. The consistency which, transcends time, space and clime is thus given the status of ultimate or eternal truth.

(2) *Yathartha* is for factual truth - discerned with the testimony of immediate perception in the here and now world, where subject-object duality is persistent.

We are now concerned with the 2nd concept of truth *i.e.,* Yathartha.

(b) The greatest legal engine is ever invented for discovery of truth from the well-known saying that "Trial is a voyage of discovery in which truth is the quest." Trial is thus in search of truth.

II. Classification of Laws:

(a) The laws are mainly classified as

(i) Substantive or material by which rights, duties and liabilities are defined;

(ii) Procedural or adjectival laws the process by which rights and liabilities conferred by substantive laws are applied, *i.e.,* Procedural Laws facilitate in results to be obtained;

(iii) There is further distinction by clarification of adjective law as Rules of Evidence and Rules of Procedure besides Rules of pleadings.

(b) The Indian Evidence Act, Civil Procedure Code and Criminal Procedure Code are the three comprehensive codifications of our adjectival or procedural laws introduced with the object of enabling the Courts to correctly ascertain truth and reality of those facts, which determine rights and liabilities defined by the substantive laws.

III. Difference between Rules of Evidence and Rules of Procedure:

(i) The C.P.C. is mainly intended to regulate the procedure in Civil Courts. It mostly deals with (a) Rules of Pleadings to

know the nature of exact dispute and (b) Procedure to conduct proceedings, bringing before Court, persons either parties or witnesses and documents or things for proof of facts for adjudication and decision by Court. As per *M.C. Setalwad* "The CPC is based on the theory that there must be a full disclosure by each party of his case to the other, that rival contentions must be reduced as quickly as possible to the form of clear and precise points or issues for decision and there must be a prompt adjudication by the Court on those points."

(ii) The Indian Evidence Act which is applicable both to civil and criminal proceedings, mainly deals with (a) Rules of Evidence *i.e.* what facts may be proved, how and by whom that are to be proved and what is the nature and extent of proof from nature of cause and person respectively; (b) Rules of procedure for taking evidence and for appreciation.

That is broadly the distinction between Rules of Evidence and other portions of adjectival law though in some areas CPC also speaks about some rules of evidence for example Order 18 R 4, Order 26 Rule 10 r/w R-4A, Order 19, Rules 1& 2 CPC and Section 30(c) CPC.

IV. Importance of Law of Evidence:

(a) The Law of Evidence is as old as the human civilization. The Indian Evidence Act, 1872 is in fact a legislative master-piece which we owe to the brilliance of Sir *James F. Stephen*, wherein even a single sentence so far not deleted but for Section 2 repealed in 1938 and Section 155(4) in 2002 by amended Act 4/2003 dated 31.12.2002. There are no doubt several additional provisions regarding presumptions and provisions to cover Information Technology and the like are incorporated. Coming to law of Evidence relating to appreciation of evidence, the Rules of Evidence and procedure in the Evidence Act is the general guiding piece to apply *commonsense*, experience and logic (from where appreciation differs from Judge to Judge at least to a little extent), for no axiomatic line of guidance for each and every case be possible as to whether and how far the Court ought to believe each individual witness but for bringing to the categorizations more particularly on oral evidence to decide whether a fact is proved true or not.

(b) The logic behind appreciation of evidence is - A Judge who know nothing about the cause outside the four walls of the Court, but for what is brought to his notice by pleadings and evidence in proof of facts under controversy, can reason and decide well. (It is also in fact the logic behind the bane of justice)

(c) The Rules of Evidence laid down in the Evidence Act have thereby special value to a judge, furnishing him with solid, systematic and well considered tests to arrive at truth. If the Evidence Act has no application, one has to necessarily follow the incidence of the Evidence Act as a law of evidence, else it is a difficult task to a judge to arrive at truth, for no systematic and definite alternative guidance to arrive at truth from other adjectival laws.

(d) The whole exercise is by trial and in civil proceedings the object is to ascertain some right or property or status or right of one party and liability of other, to some form of relief by judgment which must not be based on surmises or conjectures, but upon facts relevant and duly proved by correct application of law.

V. Functions of a Court of justice:

The functions of a Court of Justice are two fold *viz;* 1) to ascertain the existence or non-existence of certain facts and the method used to bring them before Court of law (evidence) and 2) to apply substantive law to the ascertained facts and declare the rights,

liabilities and duties *etc.* of parties in so far as they are effected by such facts. Unless the facts be correctly ascertained, however accurate be the application of substantive law, the result cannot be free from error. The Rules which guide and assist in appreciation of evidence that are contained in the Indian Evidence Act thereby are of great value.

VI. Law of Evidence - Reception of affidavit in evidence:

(a) Section l Evidence Act says that the Indian Evidence Act applies to all Judicial Proceedings in or before any Court but not to affidavits presented to any Court or officer not to proceedings before an arbitrator. So application of the Indian Evidence Act does not extend to affidavits.

(b) (i) In Section 3 Evidence Act; 'definition' of evidence is an inclusive definition. It is in fact not an exhaustive definition. It says evidence means and includes.

1. All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry: such statements are called oral evidence.

2. All documents including electronic records (as per amendment Act 2000) produced for the inspection of the Court, such documents are called documentary evidence.

(ii) Now coming to Section 3(1) oral evidence, as per Section 60 Evidence Act it must be direct or original and not unoriginal or hearsay. Oral Evidence is in fact the oral testimony of a person. In AIR 1995 SC 28 at 33 it was held that affidavit is normally understood as a written statement on oath. As per General Clauses Act Section 3, it includes legally allowable affirmation and declaration instead of swearing. Thus, affidavit is the oral testimony or statement on oath of a person. Section 3 Evidence Act while defining fact, facts in issue and relevant fact stated in the explanation that whenever, under the provisions of law relating to civil procedure in force, any Court records an issue of fact, the fact to be asserted or denied in answer to such issue is a fact in issue.

(c) *Co-relation between Order 18 and Order26:*

(i) Order 18 Rule 4 says that (i) In every case the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him (for evidence) provided, proof and admissibility of documents filed and relied, with affidavit shall be subject to the orders of the Court.

(ii) The evidence in cross examination and re-examination of the witness whose evidence (examination-in-chief) by affidavit taken by the Court or Commissioner and while recording evidence by the Commissioner, he may record such remarks as it thinks material respecting the demeanor of the witness and any objection raised during recording of evidence before Commissioner, shall be recorded by the Commissioner and be decided by the Court at the stage of arguments. {The commissioner shall submit his report within 60 days from the date of issue of the commission}. For recording of evidence by commissioner by execution of commission warrant, the provisions of Order 26, Rules 16, 16A, 17 and 18 shall apply.

(iii) The Order 18 Rule 4 starts with wording that "in every case the examination in chief of a witness shall be on affidavit". Its literal meaning clearly indicates only to the effect that "the chief examination of a witness shall be on affidavit". This wording got its own importance to a reasonable conclusion that the affidavit by itself is not evidence in chief examination. It is only when the affidavit filed in Court is taken by

Court as chief examination the statement of facts contained in the affidavit amounts to evidence in chief examination. It is also because, though the heading of Order 18 Rule 4 speaks about recording of evidence out of the 8 sub-rules to the Rule 4 neither in Order 18 Rule 4(1) nor in the proviso to it there is any mention or whisper of the word evidence since affidavit by itself is not evidence. The Order 18 Rule 4 Sub-rule (2), (3), (4 proviso), (6) have mention of the word evidence. It got its own significance. It is from the close reading of Order 18 Rule 4 sub-rules 1 to 8; it clearly indicates that the affidavit by itself is no evidence even it is filed in Court by party deponents or by any other deponents as witnesses to support the respective case of the parties. Once affidavit is filed, the Court has to receive whether the Court is bound to take the entire affidavit contents despite some irrelevant and inadmissible portions therein is another debatable point.

(iv) Coming to the interpretation of the word shall in Order 18 Rule 4(1) the Apex Court in the *Salem Advocates Bar Association* Case in AIR 2003 SC 189 at paras 17 to 19 observed that from the reading of Order 18 and Order 16 together, it is evident that Order 18 Rule 4(1) applies to a case where a party to a suit without applying for summoning brings any witness to give evidence or produce any document, examination in chief of such witness not to be recorded in Court but shall be in the form of an affidavit. Whereas a witness is summoned the Court can direct to file affidavit or can give option to the witness either to file affidavit or to be present in Court for his examination and the Court can even record evidence in part and direct Court commissioner to record in part.

(d) *Contentions - Clarifications:*

(i) From the above reading of Section 1 Evidence Act and Order 18 Rule 4 it may be easy to contend that (a) since the Indian Evidence Act and Civil Procedure Code being procedural laws, the provision in Order 18 Rule 4 CPC prevails over Section 1 of Evidence Act, as such, the Evidence Act when it is not applicable the procedure laid down to Order 18 Rule 4 there is no need to consider Section 1 of Evidence Act. (b) It may also be easy to say that Evidence Act is only a sort of guidance for appreciation of evidence and appreciation of evidence is not confined to provisions of the Indian Evidence Act, since there are other Acts on substantive and procedural aspects in appreciation, as such, even Evidence Act doesn't extend to affidavits, the affidavits as per Order 18 Rule 4 filed in Court for chief examination by that enabling provision is the material on record as form part of Court record to appreciate without aid of or guidance from the provisions of Indian Evidence Act.

(ii) The above contentions if raised are untenable for the reasons that (1) There is no wording in Order 18 Rule 4 (1) to say that chief examination by affidavit is evidence. It is not even stated as affidavit is part of Court record to read. The provisions further speak about cross examination and re-examination after a deponent's affidavit became his chief examination. It is to mean affidavit can be taken as chief examination evidence by Court, for that, law of evidence guided by Evidence Act has to apply. After that for cross examination Evidence Act automatically applies, Apart from it. (2) the affidavit for chief examination filed as per Order 18 Rule 4, for no express bar though taken as part of Court record to read as evidence, it shall not have that sanctity, like a commissioner's report for the fact that commissioner is an officer of the Court and Order 26 Rule 10 and Rule 8 r/w Order 26 A (by A.P. Amendment) says report and evidence taken by Commissioner be read as evidence. (3) Further it is not like arbitration proceedings to say Evidence Act and CPC despite made not applicable specifically by Section 19(1) of the Act 1996, the Arbitration

proceedings can contain recording of evidence for appreciation and to pass reasoned award. There in fact Section 19(2) & (3) enable the parties to agree to the procedure to be followed or an Arbitrator can follow his own appropriate procedure to conduct proceedings. In Order 18 Rule 4 there is no such provision. Thus, the above contentions will not - solve the practical and real problems in appreciation of evidence with a balanced approach for affidavit to take as chief examination - without guidance from the provisions of Sections 3 to 167 Evidence Act - regarding (a) admissibility (b) relevancy (c) probability (d) competency and credibility of a witness and proof and probative value of a document *etc*. For example - without aid and guidance from Section 112 and 4 Evidence Act how practically one can come to a conclusion of proof on legitimacy without roving enquiry, but for DNA technology. It is no doubt - unnecessary to state here the findings in (1) *Kamti Devi's* case (2001) 5 SCC 311 that the conclusiveness of presumption under Section 112 read with 4 Evidence Act, cannot be rebutted even by a positive DNA test result. Apart from it, the very Order 18 Rule 4 provision speaks about cross examination of the deponent based on his affidavit in chief examination and remarks about demeanor *etc.* which are the incidence of evidence covered by the Evidence Act provisions one way.

(iii) Thus the conclusion from the above is, without guidance and aid from the provisions of Indian Evidence Act, there will be a lot of practical difficulty in reality in appreciation of evidence - as such application of Indian Evidence Act provisions are necessary in reality and that is also thereby taken care of to some extent in Order 18 Rule 4(2).

(e) Now from this point in view, coming to Section 1 Evidence Act and Order 18 Rule 4 CPC, though Section 1 Evidence Act says application of Evidence Act doesn't extend to affidavits, (i) whether for affidavit filed in Court once the Court taken - the affidavit as chief examination while implementation of Order 18 Rule 4 CPC, is the character of affidavit changes to the character of chief examination evidence and if so, is it not that the bar under Section l Evidence Act ceases from that movement, to apply the provisions of Evidence Act Section 3 to 167? (ii) If not, is it not that, Section l Evidence Act requires amendment at least by adding an explanation to Section 1 Evidence Act to the effect that an evidence affidavit once taken as chief examination, the character of affidavit ceases and assumes the character of chief examination evidence? To decide the same it is necessary to some extent to dwell into the scope of Order 19 Rule 1 to 3 CPC, Section 30(c) CPC, the Civil Rules of Practice Chapter IV and similar provisions in other enactments and decided cases on the aspects, for sufficient guidance.

VII. Study of similar provisions in C.P.C and Cr.P.C. with reference to decided cases:

(a) In AIR 1988 SC 1381 = 1988(3) SCC 366; AIR 1964 Bombay 38; AIR 1944 Nagpur 436 ; AIR 1974 Rajasthan 31; AIR 1983 AP 114 = 1983 (1) ALT 39 - it was held that, affidavits are not included in the definition of Evidence under Section 3 Evidence Act. Affidavits can be used as evidence only if for sufficient reason Court passes an order.

(b) In 1968 AIR Calcutta 532 at 537 relying on AIR 1939 Cal. 657; AIR 1949 Mad. 689 at 690; AIR 1953 Nag. 169 & AIR 1964 Bom. 38 held that-Affidavit *perse* does not become evidence in the suits but it can become evidence only by consent of the parties or where it is specifically authorized by a particular provision of law (through a particular procedure)

(c) In AIR 1989 SC 705 at page 710 para 11 it was held in a Criminal Case on admissibility of affidavit of defence witness, that Section 3 Evidence Act contemplates oral and documentary evidence. In case of living persons, evidence in judicial proceedings must be tendered by calling the witness to witness box and cannot be substituted by affidavit, (i) unless law permits it or (ii) the Court by order expressly allows it. (The power of the Court to take an affidavit as evidence)

(d) Coming to Order 19 Rules 1 to 3 and Civil Rules of Practice (Chapter -IV)

(i) In 1995(1) ALT 305 at page 306 and at paras 15 & 16 in *Gaddipati Sambrajyam's* case by following AIR 1982 Karnataka page 81 and AIR 1978 A.P.103, the distinction between Order 19 Rule 1 & 2 laid down. The reading of the judgment with reference to Order 19 Rules 1 to 3 clearly indicates that an affidavit by itself is no evidence since it is not included in Section 3 Evidence Act and specifically excluded by Section 1 Evidence Act. But, the Courts may permit proof of any fact or facts by means of affidavit evidence under Order 19 Rule 1&2.

(ii) The proof used in Order 19 Rule 1 is in the sense to mean final proof and not *prima facie* proof. Whenever any fact or facts permitted by Court to be proved by means of an affidavit of a witness of a party, if the opposite party desires presence of deponent to cross examine, the Court should not accept the affidavit as evidence under Order 19 Rule 1 CPC as per its proviso.

(iii) As per Order 19 Rule 2 for proof *prima facie* (and not final proof on merits) upon application of party to give evidence by affidavit filed in Court, when the Court not using the affidavit as evidence, the party may produce the deponent for cross examination by opposite party or the Court can, call the deponent's presence for cross examination by opposite party at the instance of either party.

(iv) If we read in this contest the Order 19 Rule 3 for the above distinction between Order 19 Rule 1 and Order 19 Rule 2, it makes the scope further clear, since as per Order 19 Rule 3, the scope of facts that can be confined in the affidavit of a deponent are for final proof, such facts to state which the deponent is able to prove from his personal knowledge and for *prima facie* proof in interlocutory applications the statements of the deponent's belief are also admissible provided the grounds thereof are stated.

(v) The Civil Rules of Practice, Rules 34 to 52 (Chapter IV) deals with affidavits for use in judicial proceedings to read in support of an application so also counter affidavits in reply to affidavit contents and the Court got power to direct the deponents for cross examination.

(e) In AIR 1973 Punjab 210 it was held that the ordinary rule is that, a decision on facts of a case must be decided on evidence recorded *viva voce* in Court as provided by Order 18 CPC. This procedure can be dispensed with where either party agree or any law permits or the Court makes an order to decide the case on affidavits evidence with opportunity to opposite parties for cross examination. In this contest it can also be verified AIR 1967 A.P. 202 at part (D).

(f) From this legal position the areas where law permits evidence by affidavit for proof which may either for final proof or for *prima facie* proof as the case may be are:

(i) Section 295 Cr.P.C. permits evidence by affidavit in proof of conduct of a public servant.

(ii) Section 296 Cr.P.C. (old Section 510A) permits evidence of formal character by affidavit. See AIR 1972 SC 2639 (para 44)

(iii) Section 16 of the Family Courts Act permits evidence of formal character to prove by affidavit.

(iv) Section 30(c) CPC says Court may order any fact to be proved by affidavit.

(v) Order 19 Rule 1 to 3 as detailed above in para 4 (d), says that any Court may at any time order that a particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such condition as the Court thinks reasonable.

(vi) Sections 32 & 33 Evidence Act also speaks admissibility with evidentiary value as relevant even statement of a living person under certain contingencies *viz,* who cannot be found, who has become incapable of giving evidence or whose evidence cannot be procured without an amount of unreasonable delay or expense.

(vii) In AIR 1966 SC 1072 it was held that deposition of a previous proceeding is admissible in evidence in a subsequent judicial proceeding by consent of the parties [Infact like any previous statement it can be used for contradiction or to impeach the credit of the witness as per Section 145 and 155(3) Evidence Act]

(g) In AIR 1987 Bombay 87(B) M/s *Mangilal's* Case- it was held that proof of facts of whole suit, irrespective of nature of the suit, by affidavit under Order 19 Rule 1 & 2 CPC, not impermissible, holding otherwise would be too unrealistic and too technical a view, of the law of procedure resulting into great waste of public time and money and would through unnecessary burden on our already over burdened legal machinery.

VIII. (a) The above provisions and propositions, to a considerable extent are exception to the general rule in Section 1 Evidence Act that Evidence Act does not extend to affidavits. These provisions require order of the Court permitting (i) any party to prove any facts by affidavit. Unless such an order is passed to take the affidavit contents as evidence, (subject to cross examination if any), the affidavit contents by itself not evidence. (ii) In AIR 1964 SC 962 it was held that facts in the affidavit uncontroverted by opposite party can be deemed as admitted to rely.

(b) Thus affidavit by itself not covered by Evidence Act applicability to treat the statements therein as evidence; however once the Court accepts it, it is evidence subject to opportunity for cross examination of the deponent by opposite party if desires. When such is the case, to the evidence affidavit taken as chief examination of party or witness by way of oral evidence defined in Section 3, all the provisions of Evidence Act Sections 3 to 167 and incidence of evidence are applicable including the provisions of Chapter X covered by Sections 135 to 166 Evidence Act for appreciation of evidence as to relevancy, admissibility, competency and credibility of a witness whose affidavit is accepted and taken as Chief examination by Court permitting for cross examination, since no statement of a witness can be affectively and as substantive evidence used in appreciation of evidence under Section 3 Evidence Act unless and until opportunity to opposite party to sublimate and refine it by test of cross examination if the opposite party desires as per Section 138 Evidence Act.

(c) The recording of evidence as per Evidence Act, more particularly from Section 137, during trial consists of a) Chief examination of a witness by the party who called {either being taken by affidavit or being recorded by Court directly or through Court Commissioner as per Order 18 Rule 4 CPC}, b) Cross-examination by the opposite

party {being recorded by Court directly or through Court Commissioner as per Order 18 Rule 4 CPC}, which is the safeguard for testing the value of the human statements in chief examination of a witness, more particularly under Section 146 Evidence Act, and (c) re-examination to clarify and explain any ambiguity in evidence or to bring a new matter with permission of Court subject to right of opposite party to further cross-examine that witness, under Section 138 Evidence Act.

(d) It is from this concept in mind if we read Order 18 CPC which deals with the subject of hearing of the suits and examination of witnesses, the Order 18 Rule 4 Amended C.P.C. is no way inconsistent to the provisions of Section l or 3 of Evidence Act.

IX. Whether Order18 Rule 4 is applicable to appelable cases :

Regarding application of Order 18 Rule 4 (as to Order18 Rule 4 prevails over Order 18 Rule 5) concerned

(a) Order 18 Rule 4 to be read with reference to Order 18 Rule 9, to understand the impact of Order 18 Rule 5 & 13. Order 18 Rule 5 says that in 'appelable cases, the evidence of each witness shall be (a) taken down in the Court language (i) in writing by or in the presence and under the personal direction and superintendence of the Judge or from dictation of Judge directly on a typewriter or to record mechanically in Court language on direction and in the presence of the Judge'. Thus in appelable cases evidence (which phrase includes as per Sections 135 to 139 & 141 Evidence Act, chief, cross and re-examination and leading questions subject to admissibility), to be recorded by the Court.

(b) Order 18 Rule 13 says in unappealable cases the procedure in Rule 5 not necessary. Originally before (2002 Amendment) Order 18 Rule 4 also speaks about recording of evidence of a witness present in open Court. The above referred Order 18 Rule 4, 5 & 13 provisions were previously amended by CPC 1976 Amendment.

(c) Now as per Order 18 Rule 19, Amended by 1999 CPC Amendment [Section 27 (iv) with effect from 1.7.2002 in force] notwithstanding anything contained in these Rules 1 to 18 of Order 18, the Court may, instead of examining witnesses in open Court, direct their statements to be recorded on Commission. After 1999 CPC Amendment by Section 29 to Order 26 Rule 4A, Order 26 Rule 4A CPC reads that - notwithstanding anything contained in the rules under Order 26, any Court may issue commission in any suit for examination, interrogation or otherwise of a person resident of the Courts jurisdiction and the evidence so recorded shall be read in evidence.

(d) Order 26 Rule 1 to 4 & 8 speaks of- cases in which Court may issue by order commission to examine witness and to read the deposition in evidence and Rules 3 & 5 covers examination by commission of a witness within Courts jurisdiction and of a witness not within India. Order 26 Rule 15 to 18 B & 21 are general rules as to expenses, powers of Court, questions objected to before Court.

(e) Now by virtue of Order 18 Rule 19, the Order 18 Rule 5 has no any overriding effect, otherwise Order 18 Rule 5 is shadowed by Order 18 Rule 19 & Rule 4.

(f) Thus Order 18 Rule 4 procedure as per amended C.P.C. is applicable even to appelable cases because of Order 18 Rule 19, irrespective of what is contained in Order 18 Rule 5.

(g) The amended CPC thus empowers the Court or Commissioner appointed by a Court as officer of the Court, to take evidence

in all cases in chief examination of any witness by affidavits (with equal enabling provision to the parties to file affidavits in lieu of chief examination) and right of cross-examination of such witness by an opposite party and also for re-examination and recording of any remarks including in respect of demeanor of such witness during cross examination and re-examination.

X. Interpretation of statutes :

It is an undisputed fact that 'Statutes operate through interpretation by Courts. The Judge is an essential constituent of Court, to examine and decide truth, declare law and administer justice from his erudite pen. Law is a letter and the spirit lies on the person (Judge) who administers it (No doubt it must be purposive).

(a) The general rule from the well-known dictum of *Parke, v.* is that the statutes should be literally interpreted.

(b) The general difficulty however is that the drafting of statutes is very often far from being clear and definite rather ambiguous.

(c) Lord *Champbell* commented that 'An illpenned enactment, like too many others, putting judges in embracing situation of being bound to make a sense and reconcile what is reconcilable'.

(d) On the other side what *A.G.Gardiner* in his educative essay " with the bus conductor "stated is that society requires law, but also requires persons to handle the same with imagination, commitment to do justice and beneficial outlook towards men and matters (purposive construction).

(e) No doubt, language, like other things human, is imperfect; and how great so ever be the precision with which it is chosen, however superior be the skill of the draftsman, the language of every code needs to be supplemented by the knowledge just described, and the mind of the reader to be trained by this study thereof.

(f) In AIR 1977 SC 265 at 274 (*Swaran Singh's* Case) It was held that this statutory interpretation have no conventional protocol. The object and purpose of a legislation assumes greater relevance if the language is obscure and ambiguous.

(g) *Austin* said that 'The end purpose of statute must not only be ascertained but must be interpreted as reasonably as possible' *i.e.* when the words are of doubtful significance, the intention of the legislature must be interpreted.

(h) The leading principles on sure and true interpretation of statutes summarized in *Heydon's* case says that four things are to be considered 1) What was the law before making of the Act, (2) What was the mischief or defect for which the law did not provide previously, (3) What remedy the Parliament has resolved, to prevent the mischief or to cure the defect, (4) the true reason of the remedy, and

Then the Courts have to construct the statute to prevent the mischief or to cure the defects and add force and life to the cure and remedy according to the time, the intent of the makers of the Act *prebono publico.*

(i) In interpreting an Act the proper course is in the first instance to examine the language of the statute and to ask what is the natural meaning influenced by the consideration derived from the previous state of the law and, not to start with enquiry how the law previously stood, and then assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear an interpretation in conformity with the law.

(j) In AIR 1966 SC 1678, it was held that the well known rule of construction is

to make the section or law workable (*i.e.,* purposive interpretation).

(k) In AIR 1976 SC 997 - it was held that the general rule of construction is not only to look at the words but also to look at the context, the connection and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning that is intended to be conveyed by use of the words under the circumstances.

(1) In this contest and to the conclusion it is apt to state here the famous quote of Lord *Denning* in the book "Land Marks in the Law" page 62 that "The Judges may Judge after the mind of the makers, so far as the latter may suffer. A Judge must not alter the material of which it is woven, but he can and should iron out the creases."

(m) As a matter of principle, if it is said that Evidence Act has no application to the affidavit of a witness even after the same was taken by the Court, as chief examination for permitting cross examination and re-examination and to appreciate the evidence on record from the acid tests of admissibility, relevancy, competency and credibility *etc.,* it causes serious hardship besides mischief in appreciation of evidence properly.

(n) <u>The conclusion therefore is,</u> Though Section 1 Evidence Act excludes application of Evidence Act to affidavits when once statement of facts in the affidavit of a deponent taken by Court as evidence in chief-examination by Court as per Order 18 Rule 4, the bar under Section 1 Evidence Act is no way coming in the way and thereafter there is not any provision in the Evidence Act Section 3 to 167 either prohibiting or inconsistent with the concept contained in Order 18 Rule 4. Thus the Court is empowered to apply the provisions contained in Evidence Act Section 3 to 167 to the affidavit evidence covered by Order 18 Rule 4.

XI. <u>Contents of affidavit - relevancy and admissibility - whether and when can be decided:</u>

Now the aspect, that arise to resolve the practical difficulty is on the contents of the affidavit of a witness filed for taking it by Court as chief examination.

(a) If an affidavit contents contain some irrelevant and inadmissible facts, is the Court bound to take the entire contents of the affidavit, which includes those irrelevant and inadmissible portions and pass order taking the same as chief examination evidence? Regarding documentary evidence the conflict and controversy is resolved by the Apex Court saying to left open while marking any objection for consideration at the final decision. Now coming to the admitting of oral evidence from contents of the affidavit, the legal position is clear that an affidavit by itself is not evidence unless taken as such by the Courts.

(b) The Evidence Act nowhere contemplates that evidence which is inadmissible, irrelevant, unconnected or unnecessary for the point or question at issue has still to be admitted by Courts. Thus, while taking by a Court contents of a statement of fact or facts *etc.* in the form of an affidavit of any witness as chief examination, under Section 136 Evidence Act, the Court can decide relevancy and admissibility to receive as chief examination.

(c) In AIR 1936 Lahore 114 following 23 (Indian Appeals) page 106 (privy council) year -1897, it was held that it is the duty of the Court to exclude all irrelevant or inadmissible evidence.

(d) In *Ramdeo v. State of Rajasthan* 1964 RLW page 264, it was held that a

judge should not be haunted by the idea that there was no ruling or precedent to guide him in estimating from the material produced before him, the evidence to admit for appreciation.

(e) The Court can even under Section 151 CPC eschew or exclude or expunge or strike out or shun the unworthy, irrelevant or inadmissible portion if any in the contents of the statement in the affidavit and take into consideration the rest of the contents of the statement in the affidavit to admit as chief examination, since the affidavit by itself is not evidence, unless taken as such by Court, for that it requires no more authority.

(f) Infact in AIR 1966 Allahabad page 84 (F.B.) in *R.N.Saxena v.Bhimsen* at page 87 it was held following the full bench judgment in *Nursing Das* case ILR 5 Allahabad page 163, that Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by any law. It was further held following the Privy Council judgment in 39 Indian Appeals page 218 in *Shamoo Pattar* case that "every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties" even in the absence of any provision in the Code.

(g) The above power of Court under Section 151 CPC to eschew or exclude or expunge or strike out or shun the unworthy, irrelevant or inadmissible portion if any in the contents of the affidavit is without prejudice to the rights and contest of any party on admissibility and relevancy *etc.*, in appreciation of entire evidence on record ultimately, to ignore or leave- out of consideration, any inadmissible, irrelevant, untrue or unreliable evidence from the affidavit contents taken as chief examination, while deciding any facts in issue are proved or not proved for giving any findings thereon from merits.

(h) The Apex Court in AIR 1976 SC 1152 - Held that inherent power has its roots in necessity and its breadth is too exhaustive with the necessity.

(i) The A.P.High Court in the Full Bench judgment 2002(1) ALD 296 while discussing the scope of Section 151 CPC held that the inherent power is inherent in the Courts itself regarding procedural aspects to do justice between parties.

(j) In AIR 1977 SC 1348 it was held that since every Court is constituted to render justice every Court must be deemed to possess the necessary and inherent powers in its very constitution to exercise all or such powers as may be necessary to do the right and to undo the wrong.

(k) In fact in the statement of objects and reasons for the CPC Amendments by the Acts 1999 & 2002 it is stated that it is in the effort to expedite the disposal of civil proceedings, so that justice may not be delayed.

(1) If we resort to the eschewing of portion of statement from the affidavit while taking as evidence by elaborate hearing before taking the affidavit contents as evidence and to pass orders with reasons for so doing in each of affidavit of deponents filed in Court it consumes huge time of Court which is sacrosanct, no doubt the Court in receiving the evidence has to apply its mind thereby, to strike a balance it is better to mark the portions subjected to objection for receiving in evidence from the contents of affidavit to decide ultimately during final decision, which saves the

time of Court and prevents the possibilities of the parties agitating against any observations giving finality, either by attacking in revision or under Article 227 Constitution, in almost every matter regarding every evidence affidavit which stalls there from the proceedings in trial Courts leading to procrastination of the litigation by giving length to the period of litigation.

(m) (i) This view is supported by the Apex Court observations in *Bipin S.Panchal* case AIR 2001 SC 1158 = (2001) 3 SCC 1, wherein it was held that during trial while taking evidence when any objection is raised regarding admissibility of any material or any item of oral evidence, the practice of passing detailed orders allowing or rejecting the objection and then giving time by suspending trial to enable the parties to move the Higher Court against such interlocutory orders held not proper. Instead, the Court should make a note of such objection and decide at the later stage of the final judgment, except where the objection relates to deficiency in stamp duty on a document.

(ii) The Apex Court held in this regard at pages 13 to 15 that "It is an archaic practice that during the evidence collecting stage whenever any objection is raised regarding admissibility of any material in evidence the Court doesn't proceed further without passing order on such objection, such practice infact impede speedy and swift progress in trial. The better substitute for it is to make note of such objection to decide at the last stage in the final judgment *i.e.* if the objection is sustainable, to keep such evidence excluded from consideration; The advantages of it are - (i) the Court can continue to examine witnesses who need not wait for long hours or days. (ii) Even the Appellate Court can consider the objection and its tenability to give disposal without need of remand for fresh disposal."

XII. From the above,

(i) The changing trends in the provisions and precedents are to simplify the trial process and to get expeditious disposals.

(ii) By this trend, there will not be any Surprise, even further changes to the prevailing Indian adjectival legal system being brought in near future to shorten the trial procedure, to save time of the Court, to protect the interest of the litigant public, to regulate and to control the lengthy and prolonged testing of a witness under guise of Cross-Examination in the *viva voce* beating around the bush, a specific provision obligating the parties or their lawyers to submit to the Court before cross-examination (in advance) the questions and the grounds on which such questions are proposed, at least for such questions which reflect on the credit and character of a witness to enable the Court under Section 136 Evidence Act to decide relevancy and admissibility before bringing such evidence on record in the deposition of a witness in cross-examination. It is apt to quote in this context the words of Justice *V.R. Krishna Iyer* in his book "Law and the People" that if the Indian length of *viva voce* beating around the bush, between lawyer and witness during trial, were to suffer preventive task prescribed by Lord *Delvin* by imposing small fine for every question, to which every one in the Court knows what the answer will be, a large pond may be built up rapidly.

XIII. Therefore from the above discussion, though I got my apprehension that I have covered a small field that can be fitted into the study, I am clear that Section 1 Evidence Act much less Section 3 Evidence Act does not require amendments for application of rules contained in Section 3 to 167 Evidence Act in implementation of Order 18 Rule 4 CPC amended by Section 12(b) of the amended Act 22/2002.