

Section 59: Proof of facts by oral evidence

- “All facts”
- “Except contents of documents or electronic records” – see section 91
- Principle: the document or the electronic record being in writing, such document primarily, or its copy secondarily, is a superior, more reliable source of evidence when compared with oral evidence regarding their content.

Exclusion of Hearsay Evidence

- **Section 60: Oral Evidence Must be direct**
 - “must”, “in all cases whatever”, be direct
 - Specific instances
 - Proviso 1: expert opinions expressed in treatises – production of such treatises/books etc – if author is dead, can’t be found, become incapable of giving evidence, or unreasonable delay and expense involved
 - Proviso 2: any material thing other than a document is involved, the Court may require the production of such material thing for its inspection



Section 91: Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

- Section 91 lays down the rule of the exclusion of oral evidence by documentary evidence
- Exclusivity of documentary evidence – i.e., if the terms of S. 91 are fulfilled, then only documentary evidence is to be provided
- Eg of a “contract” – a sale deed; e.g. of a “grant” – gift deed; and e.g. of “any other disposition” – a mortgage or an exchange of properties.
- If the ‘terms’ of the above transactions are reduced to writing, then only the document can be adduced to prove such terms.
- So what could be these terms of transactions? The subject-matter of the transaction; the consideration of the amount; the mode of performance; the time of performance where time is of an essence; etc.
- But this exclusivity is not general – only for such “terms”. Hence, if any other fact is to be proved, such as, whether the contract took place or not, whether a particular payment was made or not, then the prohibition of S. 91 would not apply as these are not the “terms” of the contract / document.



Section 91: Evidence of terms of contracts, grants and other dispositions of property reduced to form of document (contd.)

- But, see the exceptions...specific cases where the transaction is necessarily required by law to be reduced in writing – in such cases, a presumption is made that it was, in fact, reduced in writing. And hence, needn't be proved by documentary evidence.
- NB – within documents, primary evidence should be produced first. S. 65 governs the cases where secondary evidence (photocopies, etc. may be produced)
- Ills (a) and (b) correspond to Explanation 1
- Ill. (c) corresponds to Explanation 2
- Illustration (d) corresponds to explanation 3. Also: ill (e)



Section 92: Exclusion of evidence of oral agreement



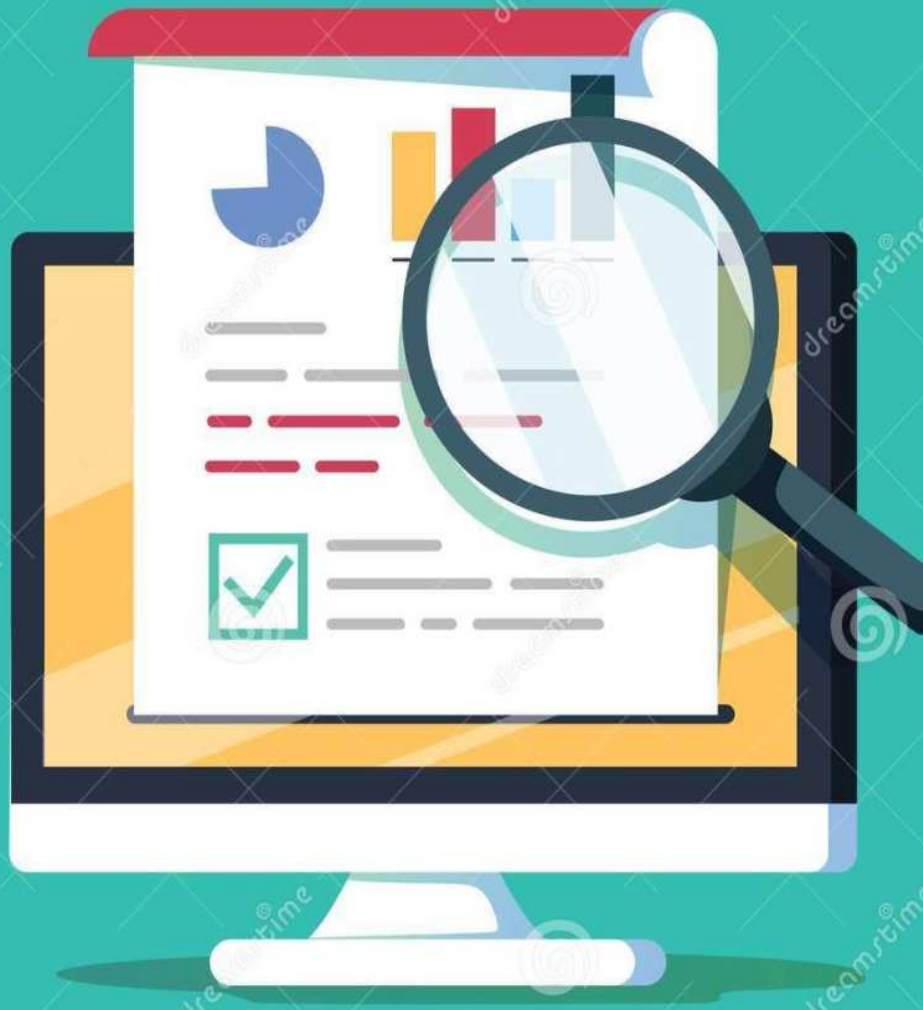
- Here, we are concerned with some form of alteration of the terms of the document
- S. 92 lays down that once the terms of a document are proved by documentary evidence as per S. 91, then no oral evidence can be given to prove the alteration of such terms – or of anything “contradicting, varying, adding to, or subtracting from” such terms. That can only be done by some other documentary evidence.
- The underlying purpose here is to specify that if the C/G/D is put into writing, then any alteration to such C/G/D shall also be in writing.
- But S. 92 only mentions parties or their representative in interests. Hence, the prohibition u/S. 92 does not apply to third parties.
- NB: six provisos.

Section 92 – Provisos

Proviso 1

- “invalidate”; “fraud”; “illegality” etc.
- Not concerned with a mere variation, but something that goes to the very root/existence/fundamentals of the contract
- Example: A enters into a contract with B, and the same is reduced to writing. When A sues for performance, B claims that while a contract was indeed entered into, the same became frustrated due to a supervening circumstance, illegality etc as per the Indian Contract Act, 1872. Now, this claim affects the very existence of the contract, and not a mere variation of it. Hence, oral evidence can be given by B to prove these facts.
- See illustrations (d), (e)





Proviso 2

- “a separate oral agreement”
- “on which a document is silent” + “not inconsistent with its terms”
- Illustration (f)

Proviso 3

- “a separate oral agreement, constituting a condition precedent”
- Example: A agrees in writing that they will sell their house to B. There is a separate oral agreement between the two that A will first have to get their house painted before B would buy it. Here, the oral agreement for A to have his house painted is the condition precedent for the sale. Hence, evidence can be given of the oral agreement to paint the house.
- Illustration (g)



Proviso 4

- “the existence of any distinct subsequent oral agreement” – oral agreement made after the documentation – distinct, separate
- “Subsequent”, not ‘parallel’, after a break, after the completion of the original transaction/contract.
- “rescind or modify”
- “except in all cases where such C/G/D of property is by law required to be in writing”
- Or registered as per the law on registration for the time being in force.

Proviso 5

- Usages and customs of trade; not repugnant to express terms
- Example: oral evidence may be given of the fact that a two-month credit is customarily given in trading in a particular kind of goods. However, if the contract has an express term on this matter (say, only 1 month credit shall be given), then such term shall prevail.

Proviso 6

- “any fact”
- “in what manner the language of a document is related to existing facts”
- For an ambiguous document, oral evidence of surrounding circumstances of the transaction may be given in order to elucidate what the parties intended. However, when the document is clear and so is the intention of the parties, then neither of the parties can prove the surrounding circumstances to alter the intention of the parties at the time of entering into the contract.

