BURDEN OF PROOF AND ONUS OF PROOF

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1. **Outline of Burden of Proof**

**Meaning**

Burden of proof refers to the duty of a party making a claim to prove that the claim is true. The phrase is most commonly used in the context of criminal trials, where the defendant (the party charged with a crime) is presumed *innocent until proven guilty*.

The expression means two different things. (Prasad, 2013)

Firstly, it means sometimes that a party is required to prove an allegation before the judgement can be given on its favour;

Secondly, it also means that on a contended or disputed issue one of the two contending party has to introduce evidence.

The burden of proof is of importance where the party who alleged the fact is unable to give any proof which validates the allegation, May eventually fails.1

1. Section 101 of the Indian Evidence Act 1872

The section reads, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof2 lies on that person.

Illustrations:

1. A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime.
2. A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

Exposition of the section

The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. The rule of convenience has been adopted in practice, not because it is impossible to prove negative, but because the affirmative is capable of proving easily. And it is also reasonable and just that the suitor who relies upon the existence of a fact, should be call upon to prove his own case.

Exception to the section

The general rule that a party who desires to move the Court must prove all facts necessary for that purpose (ss. 101-105) is subject to two exceptions:-

1. He will not be required to prove such facts as are especially within the knowledge of the other party (s. 106); and
2. He will not be required to prove so much of his allegations in respect of which there is any presumption of law (ss. 107-113), or in some cases of fact (s. 114) in his favour.
3. Narayan v. Gopal AIR 1960 SC 100; the court said: “The expression ‘burden of proof’ has two distinct meanings, (1) the legal burden i.e., the burden establishing the guilt, and (2) the evidential burden i.e., the burden of leading evidence.
4. Taylor, 12th Edn., S.364, p.252

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2. Section 102 of the Indian Evidence Act 1872

On whom burden of proof lies.—The Section reads that, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations:

1. A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B’s father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A.
2. A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B.

Exposition of the section

The term Burden of Proof is used in two difference senses –

1. The burden of proof as a matter of law and pleading,
2. And the burden of proof as a matter of adducing evidence also called as onus. There is a subtle distinction between burden of proof and onus of proof, which was explained in the case of (Ranchhodbhai vs Babubhai AIR 1982).
3. The first one is the burden to prove the main contention of party requesting the action of the court, while the second one is the burden to produce actual evidence.
4. The first one is constant and is always upon the claimant but the second one shifts to the other party as and when one party successfully produces evidence supporting its case.

For example, in a case where A is suing B for payment of his services, the burden of proof as a matter of law is upon A to prove that he provided services for which B has not paid. But if B claims that the services were not up to the mark, the onus of burden as to adducing evidence shifts to B to prove the deficiency in service. Further, if upon providing such evidence, A claims that the services were provided as negotiated in the contract, the onus again shifts to A to prove that the services meet the quality as specified in the contract.

The burden must be strictly discharged; In other words, the plaintiff, in order to succeed, must put the court in possession of legal and satisfactory evidence and it will not enough to point to matters of suspicion or even to plausible presumption.3

In a criminal complaint for unauthorised construction, it was held that the onus was on the complaining authority to prove that the land belonged to it and the accused put up construction on it.4

In a divorce case, it was shown that a letter was written by the wife’s advocate to the husband making allegation that he was living in adulterous life. The wife pleaded that such part of the letter was written without her instruction. It was held that burden of proof was on her to prove this fact.5

1. Sir Sobha Singh v. Bihari lal Beni Prasad, (1956) Pun 1247
2. Special Development Area v. Pooranmal. (1997) Cr LJ 3484 (MP)
3. Adlino Santos Briganza v. Marle Dos Santos Braganza AIR 2008 NOC 2090 (Bom).

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3. Section 103 of the Indian Evidence Act 1872

Burden of proof as to particular fact.— The section reads that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration:

A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission. B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.6

Exposition of the section

The section amplifies the general rule laid down in s. 101. It differs from s. 101. By s.101 the party has to prove the whole of the facts which he alleges to entitle him to judgement when the burden of proof on him. The section provides for the proof of someone particular fact. If the accused wishes to prove a particular fact, his *alibi* for instance, he must prove it.

If the prosecutor wishes to prove a particular fact, not by independent oral testimony, but by the isolated fact of accused’s admission. Or if he wishes to throw that is as an additional fact, he must prove it.7

A person who claimed that his license could not have been revoked without notice, the burden was held to be upon him to prove that fact.8 Onus to prove payment of rent lien on the tenant and mere oral testimony is not sufficient for discharging the onus.9

Examination of Party.—the plaintiff categorically averred10 in his plaint that the mortgage amount had been tendered to the defendant as also to her husband. The defendants denied it. The Court said that having regard to the peculiar facts and circumstances of the case she should have supported her denial by getting herself testifying or examined.11

Proof of Alibi.—the burden of proving the plea of *alibi* is on the accused person. His evidence in this case was contradictory and also not supported by any reasoning. The order rejecting the plea of *alibi* was held to be proper.12

In a Case13 before the House of Lords under the Fatal Accidents Act, 1846 the allegation was that the plaintiff’s husband met his death owing to the negligence of the railway company. The only evidence offered was that the body was found lying by the side of the railway line near a level crossing. This was held to be not sufficient. The plaintiff must prove positively that the death in question was due to the defendant’s negligence.

1. Plea of alibi Plea of alibi taken by accused, it is he who has to prove it; State of Haryana v. Sher Singh, AIR 1981 SC 1021: 1981 SC Cr R 317: 1981 Cr LJ 714: (1981) 2 SCC 300.
2. Barney NORTON v. STATE of Arkansas CR 81-16 618 S.W. 2d 164
3. Sri Upendra Mandal v. Sri Bhajahari Mandal AIR 1991 NOC 107 (Gau)
4. Raghubir Prasad v. Rajendra kumar Gurdev AIR 1993 All 326
5. To verify or prove to be true in pleading a cause, as defined by Merriam Webster Dictionary.
6. Tulsi v. Chandrika Prasad AIR 2006 SC 3359 (2006) 8 SCC 322
7. Amir Hussain v. State , 1998 Cr LJ 4315 (Gau)
8. Wakelin v. London & South Western Rly Co., (1886) 12 App Cas 41

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4. Section 104 of the Indian Evidence Act 1872

Burden of proving fact to be proved to make evidence admissible.—the section says that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustration:

A wishes to prove a dying declaration by B. A must prove B’s death.

Exposition of the section

Whenever it is necessary to prove any fact, in order to render evidence of any other fact admissible. The burden of proving the fact is on the person who wants to give such evidence.

The illustration explain the meaning of the section. A person seeking to recover possession has to prove that he was dispossessed within 12 years.14

**Doctrine of Res Ipsa Loquitur.--**It literally means Things speak for itself. Prima facie it appears to be a simple and easy maxim to understand and apply. However it is not as simple as it appears to be.15

Res Ipsa Loquitur is a maxim, the application of which shifts the burden of proof on the defendant. Generally, in a case it is the plaintiff who has to provide evidence to prove the defendant’s negligence.

The illustration explain the meaning of the doctrine. Where the vehicle suddenly went off the road, overturned and killed the victim, doctrine of res ipsa loquitur was attracted and onus was shifted from the claimant to the driver to prove his non-negligence or vigilance.17

This section should be read with clause 2 of s. 136 and with illustrations attached to that section.

5. Section 105 of the Indian Evidence Act 1872

Burden of proving that case of accused comes within exceptions. — The section reads that When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustration:

1. A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.
2. A, accused of murder, alleges, that by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A.

Exposition of the section

In criminal cases the burden of proof, using the phrase in its strictest sense, It always upon the prosecution and never shifts whatever the evidence may be during the progress of the case. When sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilty party, then the burden of proof, in another and quite different sense, namely in the sense of introducing evidence in rebuttal of the case for the prosecution is laid

1. Kalooram v. Mangilal , AIR 1984 MP 147.
2. Meaning of “res ipsa loquitur” as defined in Black’s Law Dictionary.
3. Contended from http://www.legalserviceindia.com/articles/Res\_Ipsa\_Loquitur.htm
4. Sumati Debnath v. Sunil Kumar Sen, AIR 1994 Gau 59.

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upon him.18 The onus of establishing an exception shifts to the accused when he pleads an exception.19

Section 105 has a special characteristic. It is only applicable to criminal cases when an accused is interested to take benefit of ‘the general exceptions of the Indian Penal Code or of any of the special laws. The general principles relating to burden of proof are:

1. the accused is always presumed to be innocent, and
2. it is prosecution to prove the guilt of the accused. It is only after the prosecution to discharge its initial traditional burden establishing the complicity of the accused. Under section 105 the burden lies on the accused.

Once the prosecution has been successful to prove the guilt beyond reasonable doubt that the accused had committed offence. It is immediately shifted to the accused who, if he so desires, may set up a defense of bringing his case within general exceptions of I.P.C. or within special exception or proviso contained in any part of the same code or any other law.

Where the accused has led no evidence in defence to support the plea of legal insanity, it is open to an accused to rely upon the material brought on record by the prosecution to claim the benefit of the exception. Evidence in defence may be a Surplusage in cases where the defence can make out a case for the acquittal of the accused based on the evidence adduced by the prosecution.20

The burden on the accused to prove his defence stands discharged by showing preponderance21 of probability in his favour.22

**Standard of proving defense**

Under section 105 if an accused claims for the benefits of exceptions the burden of proving the case must fall within exception and it lies upon him. But the onus of proof by the accused is not exactly the same as that of the prosecution. An accused is not required to adduce leading evidence to prove his case beyond reasonable doubt. “The Evidence Act does not contemplate that the accused should prove his case with the same strictness and vigour as the prosecution is required to prove in a criminal charge.

It is sufficient if he is able to prove his case by the standard of preponderance of probabilities envisaged by Section 105 of the Evidence Act.” Thus, the law requires that the onus of proof placed on the accused claiming the benefit of exceptions and must be tested by the standard of

“preponderance of probability.” While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability.

The Supreme Court has made it clear if the evidence is not sufficient to discharge the burden under section 105 it may raise a reasonable doubt as regards the one or other of the necessary ingredients of the offence itself in which case the accused would be entitled to be acquitted.

In a Case23 where the probability that the accused had caused death in self-defense was held to be sufficient even though he had not taken his defense in the committal proceedings. Again the Supreme Court held that the burden of proving that the case comes within any of the general exceptions can be discharged by showing a preponderance of probability. Under section 105 of the Evidence Act the burden of proof is on the accused, who sets up the plea of self-defense, and in the absence of proof, it is not possible for the court to presume the truth of the plea of self defence.

1. The question of the accused being called upon to explain his defence arises only when the prosecution crosses the barrier of innocence. Bai Ramilaben v. State of Gujrat, 1991 Cr LJ 2219 (Guj)
2. The Court never presume the existence of the circumstances while entitles the accused to his defence. Subodh Tiwari v. State of Assam 1988 Cr LJ 223 (Gau)
3. Elavasaram v. State, (2011) 7 SCC 110
4. “a superiority or excess in number or quantity; abundance”, defined by Merriam Webster Dictionary.
5. Kusum v. State of Chhattisgarh, 2003 Cr LJ 1227; AIR 2003 SC 976
6. Pratap v Stare of U.P., AIR (1973) SC 786

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**Special Exception.—**

Special exceptions are those which are restricted to a particular crime.

Section 113A raise a presumption as to abetment of suicide by a married woman by her husband or his relatives. Similarly section 114A raises presumption of absence of consent in a rape case. Several statutes also provide for putting evidential burden on the accused.24

**Presumption of innocence**

In criminal trial it is a general principle that a person accused of crime is always presumed to be innocent and the prosecution on whom burden lies is to prove the guilt of the accused beyond reassemble doubt. In criminal trial the degree of probability of guilt has been very much higher. Though this standard is a higher standard, there is no absolute standard.

In Woolmington v. Dpp25, the accused was charged with the murder of his wife by shooting her. His defence was that the gun had gone off accidentally. VISCOUNT SANKEY LC expressed the relevant rule in striking words which have become justly celebrated (at pp., 481-82): “*Throughout* *the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt…If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out of the case and the prisoner is entitled to acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to rip it down can be entertained.”26*

No man can be convicted of an offence where the theory of his guilt is no more likely than the theory of his innocence. “If there is the slightest reasonable or probable chance of innocence of an accused, the benefit of it must be given to him.” Where the presumption of innocence is reversed by a statutory provision, the burden is on the accused person. Where an assault rifle is found in innocent possession of a person, the Supreme Court held that such burden should not be heavy as that of the prosecution but even so should be greater probability.

6. Section 106 of the Indian Evidence Act 1872

Burden of proving fact especially within knowledge.—the section reads, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations:

1. When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
2. A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Exposition of the section

This section applies only to parties to a suit.27

Section 106 lays down the principle that where any fact is especially within the knowledge of any person the burden of proving the fact lies on that person. The fact may be of affirmative or negative character. *For example*, when a person is charged with travelling without ticket the burden lies on him that he purchased ticket.

Where the knowledge of the subject matter of an allegation is peculiarly within the province of one party to a suit the burden of proof must lie there also. Thus, for example, sales of consignments entrusted to commission agents and particulars of those sales are matters which lie especially

1. P.N Krishna Lal v. Govt. of Kerela, 1995 Supp (2) SCC 187
2. 1935 AC 462 at 481, 482.
3. See also Mancini v. DPP, (1942) AC 1 per VISCOUNT SIMON LC at 11.
4. Mahabir Singh v. Rohini Ramanadhwaj Prasad Singh, (1933) 35 Bom LR 500 (PC)

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within their knowledge.28 Similarly in a case of a servant charged with the misappropriation of goods of his master, if the failure to account was due to an accidental loss, the facts being within the servant’s knowledge, it is for him to explain the loss.29 The principle underlying Section 106, which is an exception to the general rule governing burden of proof, applies only to such matters of defense which are supposed to be especially within the knowledge of the defendant. It cannot apply when the fact is such as to be capable of being known also by persons other than the defendant. Under section 9 of the Foreigners Act burden lies on person who claims to be or not to be foreigner.

**Facts especially within knowledge**

Section 106 is an exception to general principles laid down in Section 101 of the Evidence Act. There is apparent contradiction between the two sections, because burden of proof lies on the prosecution under section 101, whereas Section 106 burden lies on the accused or adverse party in criminal cases under exceptional cases regulated by I.P.C. or by any special law. If any person claims contrary under section 106 the burden of proving the fact would be upon him since that is within the special knowledge.

It was held that the fact as to who the boy was, was especially within the knowledge of the accused and the burden was on him. If facts within the special knowledge of the accused are not satisfactorily explained by the accused it would be a factor against him, though by itself it would not be conclusive about his guilt.30

**Burden of proving negligence and *res ipsa loquitur***

It has been considered by the Privy Council that the burden of proving negligence always rests with the plaintiff, even when the maxim *res ipsa loquitur* applies.31

Once the initial burden of showing the setting of mishap is discharged, the maxim will relieve the plaintiff of showing further evidence of negligence.

In cross on Evidence32 the effect of the maxim is stated that, “*Where the plaintiff suffers damage in* *consequence of one or more things which were under the exclusive control of the defendant on his servants, getting out of control, reliance may be placed on the maxim res ipsa loquitur in lieu of further evidence of negligence”.*

Acting upon this maxim and following the decision of the Supreme Court in Sayeed Akbar v. State of Karnartaka33 the Kerela High Court held that where a live wire was hanging on the road from an electric pole, it must be presumed that it must have been due to negligent management creating liability to the dependents of the pedestrian who was electrocuted.

In Municipal Corporation of Delhi v Subliagwanti34, due to the collapse of the Clock Tower situated opposite the Town Hall in the main Bazar of Chandi Chowk. Delhi, where a number of persons died. The Supreme Court held that the fall of Clock Tower tells its own story in raising an inference of negligence on the part of the defendant. Since the defendant could not prove absence of negligence on their part they are held liable.

**Inference under section 106 can be drawn**

It is ultimately a matter of appreciation of evidence and, therefore, each case must rest on its own facts. Deceased was found dead in her bedroom in matrimonial home. The acquittal of husband was reversed by the High Court. It was held that on appreciation of evidence it cannot be said that it is a case where two views are possible. Evidence of witnesses was duly corroborated by medical

1. Maven v. Alston, (1893) 16 Mad 238, 245
2. Krishan kumar v. Union of India, AIR 1959 SC 1390
3. State of T.N v. Radhakrishnan 1989 Cr LJ 1161 Mad
4. Ng Chun Pui v. Lee Chuen Tat, The Times, May 25, 1988 PC; 1988 CLY 1582.
5. 108-9 (1958)
6. AIR 1979 SC 1848; 1979Cr LJ 1374
7. 1966 AIR 1750; 1966 SCR (3) 649

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evidence which opined death due to compression of neck. The plea of alibi of husband was also found to be false. The conviction recorded by the High Court was upheld.

7. Section 107 and 108 of the Indian Evidence Act 1872

Sec. 107 reads, Burden of proving death of person known to have been alive within thirty years.— when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Sec 108 reads, Burden of proving that person is alive who has not been heard of for seven years.— the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it.

Exposition of the section

Section 107 and 108 must be read together because the latter is only a provisio to the rule contained in the former, and both constitute one rule when so read together.35

There is no presumption in law that a person was alive for seven years from the time when he was last heard of. These section deal with the procedure to be followed when a question is raised before a Court, as to whether a person is alive or dead, but do not lay that the Court could make a presumption that a person was alive for seven years after, and the onus he was last heard of, it depends on the circumstances of each case, whether the Court could draw such a presumption or not.36

**Presumption of Survivorship—Burden of proving death (S. 107)**

This action provides that if it appears that a person, whose present existence is in question, was alive within 30 years, and nothing whatever appears to suggest the probability of his being dead, the Court is bound to regard the fact of his still being alive as proved.

**Presumption of Death (S. 108)**

If a person has not been heard of for seven years, there is a presumption of law that he is dead37 and the burden of proving that he is alive is shifted to the other side.38 But at what time within that time he died is not a matter of presumption but of evidence, and the onus of proving that the death look place at any particular time within the seven years lies upon the person who claims a right to establishment of which that fact is essential.39

**The Inference of both sections are:**

1. After the lapse of seven years, only and only death could be presumed by the court.
2. There is no presumption of the time of death under Section 108 of Indian Evidence Act, 1872.
3. Time of death has to be proved by independent evidence.
4. State of Punjab v. Bachan Singh, (1956) Pun 1232
5. Veeramma v. Chenna Reddi, (1021) 37 Mad 440. Saroop Singh v. Banto, AIR (2005) SC 4407: The Court held that there is no presumption that such person died seven years ago.
6. Ramrati Kuer v. Dwarka Prasad, AIR 1967 SC 1134.
7. H.I Bhagat v. LL Corporation, AIR 1965 Mad 440
8. Mukunda Behera v. Suharna Bewa, AIR 1962 Orissa 3.

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8. Section 109 of the Indian Evidence Act 1872

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.—The section reads, When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Exposition of the section

According to this section when a person stands a relationship of partners of a firm or landlord and tenant or principal and agent it is presumed that such relationship continues unless the contrary is proved.

When certain persons have been shown to be related to each other, the presumption is that the relationship continues and if one of them says that they are no more related, he must prove the non-existence of relationship. The burden of proving sub-letting is on the landlord but if the landlord proves that the sub-tenant is in exclusive possession of the suit premises, then the onus is shifted to the tenant to prove that it was not a case of sub-letting.

**A. Partners**

Partnership once shown to exist is presumed to continue until the contrary is proved.40

**B. Landlord and Tenant**

Where the relationship of landlord and tenant is admitted or proved to exist it will be presumed to continue until it is shown by affirmative proof that it has ceased to exist. Mere non-repayment of rent, though for many years, is not sufficient to show that such relationship has ceased.41 The Landlord claimed possession of property stating that the tenant had orally surrendered the same.

The burden to prove relationship of landlord and tenant and denial of ownership of alleged landlord lies on the party who denies the relationship and ownership.

**C. Principal and agent**

Where an authority to do an act is once shown to exist, it is presumed to continue until the contrary is proved. Sec 182-23842 of Contract Act deal with the relationship of principal and agent.

9. Section 110 of the Indian Evidence Act 1872

Burden of proof as to ownership.—the section reads, when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Exposition of the section

According to this section when a person is shown to be in possession of any property, the presumption is that he is the owner of that property. If anybody denies his ownership, burden lies on him to prove that he is not the owner of the property.

This section gives effect to the principle that possession is *prima facie* evidence of complete title; anyone who intends to oust43 the possessor must establish a right to do so.44 This is so presumed from lawful possession until the want of title or a better title is proved.45 In a suit for possession based on title the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant. It is for the defendant to discharge his onus and in the absence thereof the

1. Liladhar Ratanlal v. Holkarmal, (1958) 60 Bom LR 203.
2. Rungo Lal Mundul v. Abdool Guffoor, (1878) 4 Cal 314
3. Indian Contract Act 1872
4. to remove from or dispossess of property or position by legal action, by force, or by the compulsion of necessity, as defined in Merriam Webster Dictionary.
5. Churharmal v. CIT, AIR 1988 SC 1384; 1988 Tax LR 1205.
6. Jadh Singh v. Sundar Singh, (1882) PR No. 122 of 1882 (Civil)

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burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff’s title.

1. Section 111 and 111A46 of the Indian Evidence Act 1872

S.111: Proof of good faith in transactions where one party is in relation of active confidence. — the Section reads, where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustration:

* 1. The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.
  2. The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

1. 111A: Presumption as to certain offences.— the section reads, 1) Where a person is accused of having committed any offence specified in sub-section (2)in:-
2. any area declared to be disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or
3. any area in which there has been, over a period of more than one month, extensive disturbance of the public peace,

and it is shown that such person had been at a place in such area at a time when firearms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

1. The offences referred to in sub-section (1) are the following, namely –
   1. an offence under section 121, section 121-A, section 122 or Section 123 of the Indian Penal Code (45 of 1860);
   2. Criminal conspiracy or attempt to commit, or abatement of, an offence under section 122 or section 123 of the Indian Penal Code (45 of 1860).

Exposition of the section 111.

This section provides that where a person is so related to another in a position of active confidence, the burden of proving good faith of any transaction between them lies on the person in good faith. According to Section 111 an active confidence is imposed upon a person in good faith. The active confidence means and indicates “the relationship between the parties must be such that one is bound to protect the interest of other.” A relationship of active confidence stands between the contracting parties when one imposed the duty of good faith upon another who occupies position of trust and confidence.

The principle of the rule embodied in this section which was called “the great rule of the Court” is he who bargains in a matter of advantage with a person placing confidence in him is bound to show, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or anyone else.47 A person who claims to have acted under a *bona fide* belief must himself appear as witness to establish his claim. The version of other person in that respect may not be sufficient.48

1. Ins. by Act 61 of 1984, sec. 20 (w.e.f. 14-7-1984).
2. Gibson v. Jeves, (1801) 6 Ves Jun 266, followed in Nisar Ahmed Khan v. Mohan Manucha (1940) 43 Bom LR 465, 469 (PC)
3. Jawahar Lal Wali v. State of J&K, (1993) Vol.2 SCC 381.

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**Proof of Active Confidence**

Section 111 applies to the circumstances where there is valid transaction between the parties and one of them is accruing benefit from the transaction without acting in good faith or is taking advantage of his position. In such cases the burden of proving good faith of the transaction is on the transferee or beneficiary and the relationship of active confidence must be proved. The burden of proving good faith in transaction would be on defendant, dominant party i.e. the party who is in position of active confidence.

“Active confidence indicates that the relationship between the parties must be such that one is bound to protect the interests of the other”.49

**Fiduciary relationship**

Where a confidence is imposed by one party to another during the course of transaction, the fiduciary relationship may arise if there arises conflict of interests between the parties. “*Where a* *fiduciary or quasi--fiduciary relationship exists, the burden of sustaining a transaction between the parties rests with the party who stands in such relation and is benefited by it*.”

When Director issuing additional shares has no fiduciary duty to inform the current shareholders about the benefit and the question of burden of proving bona fide of director does not arise. In a transaction entered into by a *pardanashin* lady in favour of her managing agent, every onus in upon the agent to show conclusively that the transaction was honest and bona fide.

1. Section 112 of the Indian Evidence Act

Birth during marriage, conclusive proof of legitimacy.—the section reads, The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Exposition of the section

The section is based on the principle that when a particular relationship, such as marriage, is shown to exist, then its continuance must *prima facie* be presumed.50 Under the section the fact that any person was born—

1. During the continuance of a valid marriage between his mother and any man, or
2. Within two hundred and eighty days after its dissolution, the mother remaining unmarried.

Shall be conclusive proof that he is the legitimate son of that man unless the parties had no access to each other at any time when he could have been forgotten.

Evidence that a child is born during wedlock is sufficient to establish the legitimacy, and shifts the burden of proof to the party, seeking to establish the contrary.

**‘Conclusive evidence’ and ‘conclusive proof’ not different**

In a Case51, it was held that, there is no difference between ‘conclusive evidence’ and ‘conclusive proof’, the aim of both being to give finality to the establishment of the existence of a fact from the proof of another.

**DNA Test**

In a Case52, The DNA test cannot rebut the conclusive presumption envisaged under section 112 of the Indian Evidence Act. The parties can avoid the rigor of such conclusive presumption only by proving non-access which is a negative proof.

1. Raghunathji v. Varjiwandas, (1906) 43 Bom LR 525
2. Bhurma v. Dhulappa, (1904) 7 Bom LR 95
3. Somwanti v. State of Punjab, AIR 1963 SC 151

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The DNA Test for proving paternity of the child can be ordered in exceptional and deserving cases only if it is in the interest of child. DNA Test cannot be ordered as a matter of course in every case. It is permissible in exception case. The use of DNA test can be resorted to only if such test is eminently needed. Order for DNA Test by the Women’s Commission is proper.

**Gestation**

The period of gestation mentioned is this section is 280 days. It does not mention any maximum period of gestation. If a child born after 280 days and after dissolution of marriage, “the effect of the section being merely that no presumption in favour of legitimacy is raised, and the question must be decided simply upon the evidence for and against legitimacy.” A child born within 280 days of the husband’s death is a legitimate child.

If we go through the case laws, on this point, it is led enough that different Courts have different views regarding this issue. If we look into ‘Medical Jurisprudence and Toxicology’53 , under heading, ‘The Maximum Period of Pregnancy’, various periods have been mentioned, starting from 315 days to a period of about 349 days. Another jurisprudential authority by Dr. Lyon in ‘Medical Jurisprudence for India’, it is stated that;

‘What is the longest period, which in natural human gestation, may be:

1. That this may be 296 days.
2. Most authorities agree in considering that the interval may be as long as 44 weeks or 308 days; but it might also extend to 311 days.

Some of the authorities consider that the interval may extend to 46 weeks-315 to 322 days.

1. Section 113, 113A, and 113B of the Indian Evidence Act 1872

Section 113: Proof of cession of territory.—the section reads, A notification in the Official Gazette that any portion of British territory has before the commencement of Part III of the Government of India Act, 1935 ((26 Geo. 5, ch. 2)), been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Exposition of the section

This Section was enacted to exclude inquiry by Court of Justice into the validity of the acts of the Government so far as cession of territory to any Indian State was concerned.

Section 113A54: Presumption as to abetment of suicide by a married woman.— the section reads, When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation. -- For the purposes of this section, “cruelty” shall have the same meaning as in section

498A of the Indian Penal Code (45 of 1860).

Section 113-A deals with the question of abetment of woman’s suicide by her husband or any of his relatives. In such cases, a presumption arises that such a suicide has been abetted by the husband or his relative, if the following two conditions are satisfied:

a) The suicide was committed within a period of seven years from the date of her marriage; and

1. Shaik Fakruddin v. Shaik Mohammed Hasan,AIR 2006 AP 48.
2. Modi’s Medical Jurisprudence and Toxicology, LexisNexis
3. Ins. By the Criminal Law (2nd Amendment) Act, 1983 (Act 46 of 1983) S.7 (w.e.f. Dec 26, 1983)

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(b) Her husband, or his relative, has subjected her to cruelty (as the term is defined in S. 498-A of the Indian Penal Code).

Such a presumption must, however, be drawn by the Court after having regard to all the other circumstances of the case.

Before the provisions of S. 113-A can be applied; it should be shown that the deceased woman had committed suicide. If it is not a case of suicide, but of accidental death, the presumption of abetment by the husband or his relative does not arise.55

The words “*having regard to all the other circumstances of the case*” in this section give wide powers to the Court to appraise evidence and come to conclusion whether there was some extraneous cause for a woman to commit suicide.56

The words “all other circumstances of the case” require that a cause and effect relationship between the cruelty and suicide has to be established before drawing the presumption. Therefore, the presumption is not of mandatory nature.57

Likewise, it must also be shown that the wife had been subject to cruelty within the meaning of that term as defined in S. 498-A of the I. P.C. Thus, it has been held that mere consumption of wine and coming home in the late hours of the night, much against the will of the wife, would not per se amount to “cruelty”.58

But, if such acts are coupled with regular beating of the wife, demanding dowry, and harassing her to bring more and more money, the case would be one of “cruelty”.59

In one case, where the wife’s suicide took place more than a month-and-a-half after the demand for dowry was met, and matters were settled, it was held that it would be both unsafe, as well as unjust, to invoke the presumption of guilt under S. 113-A of the Act.60

Sec. 113B61: Presumption as to dowry death. — When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.—for the purposes of this section, “dowry death” shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860)

No Presumption where charge under s. 302 of IPC

Where the accused was charged under s. 302 of Indian Penal Code, 1860 the presumption under section 113A of Indian Evidence Act 1872, is not available. In such a case conviction and sentence has to be based on cogent and reliable evidence.62

1. Suresh v. State of Maharashtra, 1992 Cri. L.J., 2455
2. Krishan Lal v. Union of India (FB), 1994 Cr LJ 3472 (P&H)
3. Ramesh Kumar v. State of Chhattisgarh, 2001 Cr LJ 4724 (SC), in the case High Court held that the cause of cruelty and beating as indicated in the deceased woman’s letters and the statements of witnesses was forgetful nature and not dowry, presumption not applicable.
4. Jagdish Chander v. State of Haryana, 1988 Cri. L.J. 1048
5. P.B. Pathiv v. State of A.P., 1989 Cri. L.J. 1186
6. Samir v. State of West Bengal, 1993 Cri. L. J. 134
7. Ins. By Act No. 43 of 1986, s. 12 (w.e.f. Nov 19, 1986)
8. P. Mani v. State of T.N., AIR 2006 SC 1319

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1. Section 114 of the Indian Evidence Act 1872

Court may presume existence of certain facts. —the section reads, The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events63, human conduct64 and public and private business65, in their relation to the facts of the particular case.

Illustration: The Court may presume—

1. That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;
2. That an accomplice is unworthy of credit, unless he is corroborated in material particulars;
3. That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
4. That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;
5. That judicial and official acts have been regularly performed;
6. That the common course of business has been followed in particular cases;
7. That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
8. That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavorable to him;
9. That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

Exposition of this section

Under section 114 the court may presume the existence of certain facts. According to this section if a fact is likely to have happened:

1. In common course of natural events;
2. According to general human conduct;
3. According to public and private business;
4. Due to the relation to the facts of the particular case, — the court may presume the existence of such fact. “Section 114 of the Evidence Act shows the way to the court in its endeavor to discern the truth and to arrive a finding with reasonable certainty.”

**Presumption as to existence of certain facts**

This section has given enough discretionary power to the court to draw certain inference from the facts. The presumption under the section is discretionary and not mandatory. Presumption can be drawn only from certain set of facts and not from other presumptions. A presumption can be drawn only from facts, and not from after presumption by a process of probable and logical reasoning. The presumptions are ‘may presume’ in nature and “rebuttable.” This is the final conclusion to be drawn from the facts.

The term of the section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustrations.66

1. Lichhamadevi v. State of Rajasthan, 1988 Cr LJ 1812
2. Krishna Lal v. State of Haryana, AIR 1980 SC 1252
3. Alka Grewal v. State of M.P., 2000 Cr LJ 672 (MP)
4. Stephan’s Introduction to Evidence Act. (Courtesy: Google Books, Pg. 1138 para 4)

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**Common course of natural events**

This expression signifies that an event can take place only when certain circumstances become favourable or unfavourable. What is most common depends upon the facts and circumstances. For example, period of gestation, continuance of life etc.

**Human conduct**

Human conduct means the conduct found only in human being who can judge what is right and wrong. The expression of such conduct may either be positive or negative and that can be determined by his actions. Example: if a man and woman are living as husband and wife for a longtime, the presumption is they are married.

**Public and private business**

In order to presume certain fact the court under section 114 of the Evidence Act, has to have regard to the common course of natural events, human conduct and public and public business. “It is necessary that the common course of natural events, human conduct and public and private business in so far as it relevant to the facts in issue in particular case must be established.”

A catalogue which embodies a statement of the firm regarding the price at which it is prepared to sell its articles is not hearsay and is admissible in evidence in proof of the price.67 There is a presumption that every person in his private character does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done.68

**Presumption of *Mens rea*.**

There is a presumption that *mens rea* or guilty intent is an essential ingredient of offences created by law maker. But the legislature may create an offence with absolute liability requiring neither *mens rea* nor any other state of mind.69

1. Section 114A70 of the Indian Evidence Act 1872

Presumption as to absence of consent in certain prosecutions for rape.— The Section reads, In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause

(g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Explanation.—In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses

(a) to (d) of section 375 of the Indian Penal Code (45 of 1860).

Exposition of this section

The newly-added S. 114-A deals with cases of prosecution for rape under clauses (a), (b), (c), (d),

(e) or (g) of S. 376(2) of the Indian Penal Code, where sexual Intercourse by the accused is proved, and the question before the Court is whether such intercourse was with or without the woman’s consent. In such cases, if the woman, in her evidence, states before the Court that she did not consent, the Court must presume that she did not so consent.

Formerly, the rule was that corroboration of the victim’s version was not essential for a conviction, but as a matter of prudence, it would have to be established if the mind of the judge, unless circumstances were strong enough to make it safe to convict the accused without such corroboration. As observed by the Supreme Court, although the victim of a rape cannot be treated as an accomplice, her evidence is to be treated almost like accomplice evidence, requiring corroboration.71

1. Hansanali v. Darashah, (1948) Nag 922
2. Zeenat v. Prince of Wales Medical College, AIR 1971 Pat 43
3. State v. Jagdish Chandra Jena, 1998 Cr LJ 1806
4. Subs. By the Criminal Law (Amendment) Act, 2013 (13 of 2013), S. 26 (w.e.f. Feb 2, 2013)
5. Sk. Zakir v. State of Bihar, 1983 Cri. L.J. 1285

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Now, of course, the position is different, and S. 114-A raises a presumption in favour of the rape victim.

The following three conditions must be satisfied before the presumption contained in S. 114-A can be raised:

1. It should be proved that there was sexual intercourse.
2. The question before the court should be whether such intercourse was with or without the consent of the woman.
3. The woman must have stated, in her evidence before the court that she had not consented to the intercourse.

This presumption would apply not only to rape cases, but also to cases of attempted rape, as for instance, when the victim was disrobed and attempts were made to rape her, which, however, could not materialize because of intervening circumstances.72

Lastly, it may be noted that the presumption under S. 114-A can be drawn only when the accused says that he indulged in sexual intercourse with the consent of the girl. If the case of the accused is not that such intercourse was had with her consent, no presumption can be drawn under the section.73

**2013 Amendment**

This section was amended vide the Criminal Law (Amendment) Act, 201374 on the basis of recommendations given by the Justice J.S. Verma Committee, constituted in the aftermath of December 2012 NIRBHAYA RAPE INCIDENT, were made in s. 376(2) of Indian Penal Code. By making necessary amendment in this section, the new classified offence under upto clause (n) of s. 376(2) has also been brought within the bracket of statutory presumption of non-consensual intercourse prescribed in this section.

Case.—There was oral testimony of the victim that the three accused persons forcibly took her away to a forest and subjected her to sexual intercourse for the whole day and two nights. Medical examination, showed injuries and signs of forcible sexual intercourse. The Court presumed that there was no consent. The accused were punished under s. 376(2)(g) of IPC.75

1. Fagnu Bhai v. State of Orissa, 1992 Cri. L.J. 1808
2. Ravindranath v. State of U.P., 1991 Cri. L.J. 31
3. Ibid  [20](#page21) footnote  [7](#page21)0
4. Dev Kishan v. State of Rajasthan, 2003 Cr LJ 1118 (Raj)

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1. **RULES AND ISSUES IN THE GOVERNING OF BURDEN OF PROOF**

There are some rules and issues which governed the Onus, They are following rules and issues:

1. Beyond Reasonable Doubt Rule.
2. Reasons for the Rule.
3. Issues That Should Be Governed By the Rule.
4. Presumptions As Burden-shifting Devices

1. Beyond Reasonable Doubt Rule

“Beyond reasonable doubt”, the well-known principle of common law has acted like a savior for the guilty. Anybody who is capable of hiring a witty lawyer can go scot-free just by raising a smallest possible doubt.

What might be reasonable for one might be totally absurd for others. Maximum criminal justice systems of the world follow the principle that the guilt of an accused should be proved beyond reasonable doubt. Indian criminal justice system also works on the same lines and it is for the prosecution to prove beyond reasonable doubt that the accused has committed an offence with requisite mens rea.

There is no straight jacket formula on the basis of which the guilt of the accused is said to be proved beyond reasonable doubt. Moreover, there is no way to determine objectively, the reasonability of the doubt that the judge might have. So it depends solely on the Judge to say whether he is convinced by the arguments of the prosecution or that there still remains a degree of reasonable doubt so as to impart the judgment in the favor of the defense.

**Difference between “Onus” and “Burden”**

High court in Abdulla Mohammed v. State76 explained the difference between “Burden” and “onus” it was held that “Burden of proof lies upon the person who has to prove a fact and it never shifts, but the Onus of proof shifts”. Such a shifting of Onus is a continuous process in evaluation of evidence. So basically the burden lies on the Prosecution but there are times when the accused is called upon to prove that his case falls under an exception. Then the onus is on the accused and it is considered as discharged if the accused person succeeds in proving the preponderance of probability in his favor and he need not prove his stand beyond reasonable doubt.

2. Reasons for the Rule

First, the rule is meant to reduce the likelihood of erroneously convicting an innocent defendant. It puts a thumb on the defendant's side of the scales of justice to implement "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free" 77

Second, the rule symbolizes for society the great significance of a criminal conviction by singling out criminal convictions as peculiarly serious among the adjudications made by courts. The rule reaffirms the special opprobrium that attaches to criminal convictions, and the special importance of protecting individuals against the state's power to convict.

761980 SCC (3) 110

77 Winship, p. 372, Justice Harlan concurring

(24)

3. Issues That Should Be Governed By the Rule

At one extreme, the rule might apply to every issue, without exception, governing the proof of every fact that the criminal law makes relevant to a criminal conviction. At the other extreme, the rule might apply only to those issues for which the legislature has made no explicit exception.

First, and least controversial, is the view that the Constitution permits an exception for issues in a criminal case that do not directly relate to guilt or innocence. In the course of a criminal prosecution, it may be necessary to decide whether the case is properly before the court, whether particular items may be admitted into evidence, or whether the defendant is mentally competent to stand trial.

A second, more controversial proposal is an exception for issues that present special problems of proof. It is suggested that the defendant should bear the burden of proof on an issue if the defendant has better access than the prosecution to the evidence. The rationale is that a defendant with control over the relevant evidence has a great incentive to withhold the evidence, mislead the jury, and prevail because of the prosecution's inability to meet its burden of proof. This strategy could be prevented by a rule shifting the burden of proof to the defendant. On this theory, the burden of proof might be assigned to the defendant on the issue of insanity or of intent.

A third proposed criterion for identifying exceptions to the reasonable doubt rule has become the center of a major debate. This controversy raises basic questions about the relationship between substantive law and procedure, as well as about the relationship between state legislatures and the federal Constitution on matters of criminal law. Some commentators have argued that the reasonable doubt rule should not apply to any fact that the legislature could constitutionally have omitted from its substantive criminal law.

4. Presumptions As Burden-shifting Devices

These rules come in many variations, but they all instruct the fact finder to infer one fact from evidence that directly proves some other fact.

the Court78 upheld an instruction that "upon proof of the presence of the machine gun and the hand weapons, you may infer and draw a conclusion that such prohibited weapon was possessed by each of the defendants who occupied the automobile at the time when such instruments were found" (p. 161, n. 20). That instruction, in a prosecution for criminal possession of a weapon, was held to be merely permissive and not burden-shifting, because it left the jury free to credit or reject the inference.

From these and earlier cases, several principles emerge. If the reasonable doubt rule applies to an issue, then the rule cannot constitutionally be circumvented by a presumption. Both the issue of intent in *Sandstrom* and the issue of possession in County Court were clearly subject to the reasonable doubt rule. For such issues, there can be no mandatory presumptions, even if they are rebuttable, because such presumptions are burden-shifting. The state may, however, use presumptions that merely authorize a permissible inference or invite the fact finder to consider it.

78 County Court v. Allen, 442 U.S. 140 (1979)

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1. **LEADING CASES RELATED TO BURDEN OF PROOF (WITH NOTES)**

Following are the Cases we going to Perusal:

1. P.N. Krishna Lal and Ors. Etc. vs Govt. Of Kerala on 17 November, 1994
2. Areva T & D India Ltd vs Mr. R. Govindrajan & Ors on 10 February, 2010
3. Union Of India (Uoi) vs Hari Narayan Gupta And Anr. on 15 November, 2006
4. Anil Rishi vs Gurbaksh Singh on 2 May, 2006
5. **P.N. Krishna Lal and Ors. Etc. vs Govt. Of Kerala on 17 November, 1994**
6. The scheme of the Act and the Amendment Act is a consistent whole regulating production, manufacture, possession, transport, purchase or sale of intoxicating liquors. The Amendment Act was enacted to prohibit mixing or permitting to mix methynol in arrack or intoxicated drug or failure to take reasonable precautions to prevent acts or omissions, of mixing methynol in arrack or intoxicated drug or to be in possession thereof with knowledge of its adulteration or to prevent deleterious effect on the health of the consumers to prevenc grievous hurt to human beings or their death. As a part of it, the burden of proof of the ingredients of the offence being within the special knowledge of the accused has also been laid on the accused person. Therefore, though incidentally it trenches into some of the provisions of the Evidence Act. the Indian Penal Code and the Code, in its pith and substance, it is an integral scheme of the Act, which falls within Entry 8 read with Entry 64 and 65 of Schedule II of the 7th Schedule of the Constitution. Under Article 246(3), the State Legislature was competent to enact the Amendment Act. Therefore, the assent of the President is not necessary. Even assuming that some of the provisions incidentally trespass into the field of operation of the central provisions falling in the Concurrent List, which empower both the Parliament and the State Legislature to enact the law, the assent given by the President made Sections 57A and 57B valid. The gazette notification of the Amendment Act has been placed before us which shows that the President has given his assent to the Amendment Act on December 1, 1984. Therefore, by operation of proviso to clause (2) of Article 254, the Amendment Act prevails over the relevant provisions in the Indian Evidence Act, IPC and the Code in relation to the State of Kerala.
7. Sub-section (4) deals with grant of bail. In view of the constitution bench decision of this Court upholding the constitutional validity of similar provision of TADA in Kartar Singh v. Union of India, [1994] 3 SCC 569, the validity of sub-section (4) is no longer res Integra and that, therefore, its validity no longer remains assailable. The need to elaborately discuss its validity is obviated. Therefore, it is accordingly held valid and so upheld.
8. It is true and indisputable, as contended by Sri A. Raghuvir, the learned senior counsel that the golden rule that runs through the web of all the civilized criminal jurisprudence is that the accused is presumed to be innocent unless he is found guilty of the charged offence. The burden to prove all the facts constituting the ingredients of the offence against the accused beyond reasonable doubt rests on the prosecution. If there is any reasonable doubt the accused gets the benefit of acquittal. But the rule gets modulated with the march of time. Whether the legislature could step in and provide exceptions, create offences and also place part of the burden of proof on the accused, where the facts are within his special knowledge or intention is locked up in the mind of the accused to prove the said facts is unconstitutional and violates fundamental human rights.

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1. **Areva T & D India Ltd vs Mr. R. Govindrajan & Ors on 10 February, 2010**
2. The Petitioner contends that the burden of proof is on the party who desires a particular judgment as to the legal right which the party claims. Mr.Presswala on behalf of the Petitioner, therefore, argued that it is for Respondent No.2 to prove those facts alleged by Respondent No.2 to show that the Petitioner is in unauthorized occupation consequent upon the burden of proof.
3. Therefore, the burden of proof is on A.

A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore, the burden of proof is on B.

1. In this case, upon the admitted aforesaid facts, if Respondent No.2 leads no evidence (assuming that it has the right to begin and must be called upon to lead evidence first) in the absence of any other evidence, Respondent No. 2 would be entitled to succeed upon showing that the lessee is not the same as the occupant, but if upon the admission of those facts as in illustration (b) above, the Petitioner does not lead evidence to prove how only the name of the lessee has changed from time to time and how the Petitioner is the same Company under a different name, the Petitioner would never be entitled to succeed. Consequently, then In this case, the Petitioner would not be able to show cause against the notice and the Estate Officer would be enjoined to pass an order of eviction under Section 5 of the PP Act.
2. It was further observed in paragraph 22 thus:

What must, therefore, be appreciated is the distinction between the burden and the onus of proof. The burden of proving authorized occupation is upon the noticee under the express mandate of the PP Act. Therefore, he has to discharge that burden. That cannot shift. For discharging that burden he must necessarily lead evidence first. If he shows the authorization of his occupation, the onus would then shift to the landlord / public authority to show how the authorized occupation ceased to be authorised and how and when it became unauthorized. That is how the judgments in the cases of Nusli Neville Wadia (supra) and Nandini J. Shah (supra)laid down who would lead evidence followed by whom. The evidence in rebuttal would be required if the onus (not the burden) were to shift to prove something further.

1. The extent of importance that has to be put on the onus of proof that is on a party consequent upon the burden that lies on such party to prove its claim came to be considered by the Supreme Court in the case of State of Madhya Pradesh vs. Bhopal Sugar Industries Ltd., AIR 1964 SC 1179. That was a case in which a tax was levied only upon persons carrying on agricultural operation in Bhopal region. It was challenged as discriminatory. The Petitioner alleged differential treatment as a similar tax was not levied upon similar agricultural operations outside Bhopal region. It was observed that the legislation can be challenged as arbitrary only if the unequal laws cannot be justified on geographical grounds imputing unequal treatment upon the applicant making out not only that he had been treated differently from others, but that he had been so treated from persons similarly circumstanced without any reasonable basis and unjustifiably. The Court also observed that the Petitioner was singularly deficient in furnishing particulars justifying the infringement. Similarly the State argued only a demurrer and did not place before the Court the evidence which would, in the very nature of things, be in its possession (upon the law in Section 106 of the Evidence Act). It was under these circumstances, observed that the Court would not be justified in dismissing the Petition on a technical view of the burden of proof. Parties were given an opportunity to lead requisite evidence which has a bearing on the issue.

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1. **Union Of India (Uoi) vs Hari Narayan Gupta And Anr. on 15 November,**

**2006**

1. The appellant, Union of India, has challenged the order dated 30-5-1997 passed by the Railway Claims Tribunal Jaipur Bench, Jaipur (henceforth to be referred to as 'the Tribunal', for short) whereby the learned Tribunal has granted a compensation of Rs. 2,00,000/- along with an interest of 12% per annum to the claimants.
2. Briefly, the facts of the case are that on 21-12-1994 one Devendra Kumar Gupta was travelling by Agra Shuttle, from Kota to Sawai Madhopur, with a valid second class ticket. One of his friends, Mr. Anil Kumar Gupta, came to the Railway Station with Devendra Kumar Gupta, bought a ticket for him for Sawai Madhopur and handed over the same to him. Despite the heavy rush in the train Devendra Kumar Gupta boarded the train. But he never reached the destination. Since he never reached home, his parents, the claimants, made inquiries about his whereabouts. They were informed that someone had fallen from the running train and had died near Sumerganj Mandi. To their shock, the person was none other than their son. Therefore, they filed a claim petition before the learned Tribunal. The appellant submitted their written statement and denied the averments made in the claim petition. According to the appellant, burden of proof lies on the claimants to establish the fact that their son was a bona fide passenger. However, the claimants had not discharged this burden. Moreover, according to them, the case is not covered under the definition of "untoward incident" as given under Section 123(c) of the Railways Act, 1989 (henceforth to be referred to as 'the Act', for short).
3. In order to prove their case, the claimants filed an affidavit of claimant No. 1 and of Mr. Anil Kumar Gupta. They also filed a number of documents. The appellant neither examined any witness nor filed any document. After going through the oral and documentary evidence, the learned Tribunal decided the claim petition in favour of the claimants as aforementioned. Hence, this appeal before this Court.
4. Mr. S. C. Purohit, the learned Counsel for the appellant, has vehemently argued that the burden of proof lies on the claimant to establish that the deceased was a bona fide passenger. But, they have failed to do so. Therefore, the learned Tribunal has erred in holding that the burden of proof lies on the Railway Administration to establish that he was not a bona fide passenger. Secondly, that the case does not fall within the definition of "untoward incident" as defined under Section 123(c) of the Act. In order to support his first contention, the learned Counsel has relied on a large number of cases decided by the various Hon'ble High Courts namely Geetha v. Union of India 2005 (1) TAC 207 : ; Union of India v. S. Yadagiri alias Yadaiah 2005 (1) TAC 490 : AIR 2005 AP 28; Sanjay Sampat Rao Gaikwad v. Union of India with Anand Soma Menge v. Union of India ; Ashok Punjab Roachincholkar v. Madhukar Nagorao Sambare 2005 (2) TAC 245, Union of India v. Lakhinmnni 2005 (2) TAC 121; South Central Railway, Secunderabad v. K. Narayana Rao , Muhammed Kunhju v. Union of India 2005 (2) TAC 698 and Union of India v. Smt. Meera Kumari 2005 (2) TAC 873.
5. On the other hand, Mr. Deepak Goyal, the learned Counsel for the respondent-claimants, has relied upon the case of Raj Kumari v. Union of India, a case decided by the Madhya Pradesh High Court to argue that the burden of proof lies not on the claimant, but on the Railway Administration to prove that the passenger was not a bona fide passenger. According to the learned Counsel, the Railways has failed to discharge this burden. Therefore, the learned Tribunal has validly granted the compensation in favour of the claimants. Hence, he has supported the impugned order.
6. In the case of Raj Kumari (supra) their Lordships of the Madhya Pradesh High Court were seized of the same issue as in this case. Although the said case arose under the Railways Act, 1890 but Sections 68, 130, 122 of the Act of 1890 are pari materia with the provisions of the Railways Act, 1989. In that case, their Lordships categorically held that the burden of

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proof lies on the Railway Administration to establish that the passenger was not a bona fide passenger. Moreover, the Division Bench of this Court, in the case of Smt. Bhagwani Girl v. Union of India 2004 (4) WLC 573: AIR 2005 Raj 54, relying upon the judgment in Raj Kumari (supra) case and has categorically held that it is for the Railways to establish that a passenger was not a bona fide passenger, Considering the fact that a Division Bench of this Court has answered the issue before us, any contrary view taken by another High Court automatically becomes irrelevant. After all, under judicial discipline, the single Bench is bound by the decision of the Division Bench of this Court. Therefore, this Court has no hesitation in holding that the burden of proof to establish that the deceased was not a bona fide passenger lies on the Railway Administration.

1. **Anil Rishi vs Gurbaksh Singh on 2 May, 2006**
2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."
3. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.
4. The learned trial Judge has misdirected himself in proceeding on the premise "it is always difficult to prove the same in negative a person/party in the suit."
5. Difficulties which may be faced by a party to the lis can never be determinative of the question as to upon whom the burden of proof would lie. The learned Trial Judge, therefore, posed unto himself a wrong question and arrived at a wrong answer. The High Court also, in our considered view, committed a serious error of law in misreading and misinterpreting Section 101 of the Indian Evidence Act. With a view to prove forgery or fabrication in a document, possession of the original sale deed by the defendant, would not change the legal position. A party in possession of a document can always be directed to produce the same. The plaintiff could file an application calling for the said document from the defendant and the defendant could have been directed by the learned Trial Judge to produce the same.

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**IV. Conclusion**

Most people as young children appear to have a “commonsense” understanding of the burden of proof. When young people hear a claim being made and it is, in their minds and experience, an extraordinary claim being made, quite often the response is one of asking for something to support the claim. The most common retorts are along the line of “Prove it”, “What makes you say that”, “Sow me” or something like “Oh, yeah?

” Somewhere along the way too many humans lose that sense and too often suspend their inclination to accept the principles underlying the “Burden of Proof”.

The take of the Supreme Court in the recent case Rangammal v. Kuppuswami and Ors. CIVIL APPEAL NO. 562 OF 2003 that burden of proof lies on the person who first asserts the fact, and not on the one who denies that fact to be true. The responsibility of the defendant to prove a fact to be true would start only when the authenticity of the fact is proved by the plaintiff. This case is related to a property issue, where it is alleged by the appellant that he was minor at the time when the sale deed of his property was executed, and that he cannot be made bound by that sale deed. Before getting into the main issue of this article i.e. Burden of Proof, it would be better to know the sections which makes a sale deed invalid executed at the time, when the person whose property is being sold is a minor. Section 54 of the Transfer of Property Act, 1882 states that "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Section 7 of the same act provides the competency of a person to transfer, and it specifically mentions that every person competent to contract, which is relevant for the purpose of present case. And under Section 11 of the Indian Contract Act, every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. It can be concluded that a minor is not eligible to contract with another person, and the sale made by a minor would be void ab initio.

Shifting of Burden of Proof:

The burden of proof is always on the person making an assertion or proposition. Shifting the burden of proof, a special case of argumentum ad ignorantium, is the fallacy of putting the burden of proof on the person who denies or questions the assertion being made. The source of the fallacy is the assumption that something is true unless proven otherwise.

The person making a negative claim cannot logically prove nonexistence. And here's why: to know that an X does not exist would require a perfect knowledge of all things (omniscience). To attain this knowledge would require simultaneous access to all parts of the world and beyond (omnipresence). Therefore, to be certain of the claim that X does not exist one would have to possess abilities that are non-existent. Obviously, mankind's limited nature precludes these special abilities. The claim that X does not exist is therefore unjustifiable. As logician Mortimer Adler has pointed out, the attempt to prove a universal negative is a self- defeating proposition. These claims are "worldwide existential negatives." They are only a small class of all possible negatives. They cannot be established by direct observation because no single human observer can cover the whole earth at one time in order to declare by personal authority that any “X” doesn't exist.

THANK YOU