

Secondary Evidence : Scope and Admissibility Under BSA 2023

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Abstract: *The law of evidence plays a crucial role in ensuring fair adjudication by determining what facts may be proved before a court. Among the various forms of evidence, documentary evidence holds significant importance, and the distinction between primary and secondary evidence forms the foundation of its admissibility. The Bharatiya Sakshya Adhiniyam, 2023 introduces a modern framework for dealing with evidence, especially in light of technological advancements and the increasing use of electronic records.*

This study focuses on the concept of secondary evidence, examining its scope and admissibility under the new legislation. It analyzes the circumstances under which secondary evidence may be admitted, the legal safeguards attached to its use, and the shift from the provisions of the Indian Evidence Act, 1872. The paper also evaluates the role of courts in ensuring the authenticity and reliability of such evidence, while addressing the challenges posed by digital documentation.

The objective of this study is to provide a comprehensive understanding of secondary evidence under the BSA 2023, highlighting its relevance in contemporary legal practice and its impact on the administration of justice..

Keywords: Secondary Evidence, Primary Evidence, Admissibility, Documentary Evidence, Electronic Evidence, Best Evidence Rule, Burden of Proof, Bharatiya Sakshya Adhiniyam, 2023, Indian Evidence Act, 1872, Digital Records

I. INTRODUCTION

The law of evidence forms the backbone of the judicial system, as it governs the manner in which facts are presented and proved before a court of law. Without proper rules of evidence, the administration of justice would become arbitrary and unreliable. Evidence ensures that judicial decisions are based on logical reasoning, credible materials, and legally acceptable proof.

In legal proceedings, evidence may broadly be classified into oral and documentary evidence. Among these, documentary evidence is often considered more reliable because it provides a permanent record of facts. However, not all documents are always available in their original form. This is where the concept of secondary evidence becomes significant.

Traditionally, the law prefers primary evidence, which refers to the original document itself. This preference is based on the **Best Evidence Rule**, which requires that the best available evidence be presented before the court. However, practical realities such as loss, destruction, or unavailability of documents make it necessary to rely on secondary evidence in certain circumstances.

The introduction of the Bharatiya Sakshya Adhiniyam, 2023 marks a significant shift in the Indian law of evidence. Replacing the colonial-era Indian Evidence Act, 1872, the new legislation aims to modernize evidentiary rules, particularly by accommodating electronic and digital forms of evidence. This transformation reflects the growing importance of technology in legal processes.



Secondary evidence, under the BSA 2023, assumes even greater importance due to the increasing reliance on digital documents, copies, and electronic records. The law now recognizes that strict insistence on original documents may not always be practical in a digital age.

This paper seeks to examine the scope and admissibility of secondary evidence under the BSA 2023. It explores the conditions under which such evidence may be admitted, the safeguards against misuse, and the role of courts in ensuring fairness and reliability. The study also compares the new provisions with the earlier law, highlighting key developments and challenges.

II. OVERVIEW OF THE BHARATIYA SAKSHYA ADHINIYAM, 2023

The Bharatiya Sakshya Adhinyam, 2023 was enacted as part of a broader effort to reform India's criminal justice system and replace outdated colonial laws. It substitutes the Indian Evidence Act, 1872, which had governed evidentiary rules for over a century.

One of the primary objectives of the BSA 2023 is to align the law of evidence with contemporary technological developments. The earlier framework, although robust, did not adequately address the complexities of electronic records, digital communication, and modern documentation methods. The new Act seeks to bridge this gap.

A key feature of the BSA 2023 is the explicit recognition of electronic and digital evidence as valid forms of proof. In today's world, where transactions, communications, and records are increasingly stored in digital formats, the importance of such recognition cannot be overstated. This change directly impacts the concept of secondary evidence, as digital copies often function as substitutes for original documents.

The Act also simplifies and clarifies various evidentiary principles, making them more accessible and practical. It retains the fundamental structure of the earlier law while introducing necessary reforms to meet present-day requirements.

In relation to secondary evidence, the BSA 2023 expands its scope and provides clearer guidelines for admissibility. It acknowledges that strict adherence to the requirement of producing original documents may not always serve the ends of justice. At the same time, it incorporates safeguards to prevent misuse and ensure the authenticity of evidence.

Thus, the Bharatiya Sakshya Adhinyam, 2023 represents a significant step towards modernizing the Indian legal system, balancing the need for flexibility with the requirement of reliability.

III. MEANING AND DEFINITION OF SECONDARY EVIDENCE

Secondary evidence refers to evidence that is not the original document but is used to establish the contents of the original. It serves as a substitute when primary evidence is unavailable or cannot be produced before the court.

Under the Bharatiya Sakshya Adhinyam, 2023, secondary evidence includes various forms of copies and representations of the original document. These may include certified copies, mechanical copies, counterparts of documents, and oral accounts of the contents of a document given by a person who has seen it.

The essence of secondary evidence lies in its derivative nature. Unlike primary evidence, which directly proves a fact, secondary evidence relies on the existence of an original document and seeks to prove its contents indirectly.

Secondary evidence may take several forms. Certified copies issued by public authorities are commonly used in legal proceedings. Similarly, copies made through mechanical processes such as photocopying or scanning are also recognized. In some cases, oral testimony regarding the contents of a document may be admissible as secondary evidence.

It is important to distinguish secondary evidence from primary evidence. While primary evidence is considered the best and most reliable form of proof, secondary evidence is accepted only under specific conditions. The law imposes strict requirements for its admissibility to prevent fraud and ensure accuracy.

Despite its limitations, secondary evidence plays a crucial role in the administration of justice. Without it, many cases would fail due to the unavailability of original documents. The BSA 2023 acknowledges this necessity and provides a structured framework for its use.



IV. CONCEPT OF PRIMARY EVIDENCE (FOR COMPARISON)

Primary evidence refers to the original document itself produced for the inspection of the court. It is considered the most reliable form of documentary evidence because it directly establishes the contents of the document without any risk of alteration or misinterpretation.

Under the Bharatiya Sakshya Adhiniyam, 2023, primary evidence retains its traditional importance and continues to be the preferred mode of proof. The law emphasizes that whenever possible, the original document must be produced before the court.

The preference for primary evidence is based on the well-established **Best Evidence Rule**, which requires that the best available evidence be presented. This rule ensures accuracy, minimizes the chances of fraud, and enhances the credibility of judicial proceedings.

Primary evidence includes:

The original document itself

Documents executed in several parts (each part is primary evidence)

Documents executed in counterparts (each counterpart is primary evidence against the party who executed it)

However, in many practical situations, producing the original document may not be feasible. Documents may be lost, destroyed, or in the possession of another party. In such cases, the law allows the use of secondary evidence as an exception.

Thus, primary evidence forms the foundation of documentary proof, while secondary evidence acts as a substitute under specific conditions.

V. SCOPE OF SECONDARY EVIDENCE

The scope of secondary evidence has significantly expanded under the Bharatiya Sakshya Adhiniyam, 2023, particularly due to the increasing reliance on digital and electronic records.

Secondary evidence is not merely a substitute for primary evidence; it is a necessary tool to ensure that justice is not denied due to technical limitations. The scope of secondary evidence includes all situations where the original document cannot be produced for valid reasons.

In civil cases, secondary evidence is frequently used in disputes involving contracts, property documents, and financial transactions. In criminal cases, it may be used to prove documents that are crucial to establishing guilt or innocence, provided the conditions for admissibility are satisfied.

The emergence of electronic records has further widened the scope of secondary evidence. Emails, digital files, scanned documents, and electronic communications are often relied upon in modern litigation. These forms of evidence may not always have a traditional “original,” making secondary evidence indispensable.

The courts have also played an important role in expanding the scope of secondary evidence through judicial interpretation. They have recognized that rigid adherence to the requirement of primary evidence may lead to injustice in certain cases.

Therefore, the scope of secondary evidence under the BSA 2023 is broad and flexible, allowing courts to adapt to changing circumstances while maintaining the integrity of the judicial process.

VI. ADMISSIBILITY OF SECONDARY EVIDENCE UNDER BSA 2023

The admissibility of secondary evidence is governed by specific rules designed to ensure that only reliable and authentic evidence is accepted by the court.

As a general rule, the law requires that primary evidence must be produced. Secondary evidence is admissible only as an exception to this rule. The party seeking to rely on secondary evidence must establish that the case falls within one of the recognized exceptions.

Under the Bharatiya Sakshya Adhiniyam, 2023, secondary evidence becomes admissible only when certain conditions are fulfilled. These conditions are intended to prevent misuse and ensure that the evidence presented is trustworthy.



The admissibility of secondary evidence depends on:

The existence of the original document

The reason for non-production of the original

The authenticity and accuracy of the secondary evidence

The burden of proof lies on the party who seeks to produce secondary evidence. They must satisfy the court that the original document cannot be produced despite reasonable efforts.

Courts exercise caution while admitting secondary evidence. They carefully examine the circumstances and ensure that the conditions prescribed by law are strictly complied with.

Thus, admissibility is not automatic; it is subject to judicial scrutiny and procedural safeguards.

VII. GROUNDS FOR ADMISSIBILITY OF SECONDARY EVIDENCE

This is one of the most important aspects of the topic. Secondary evidence is admissible only under specific circumstances recognized by law.

The major grounds include:

1. Loss or Destruction of Original

When the original document has been lost or destroyed, secondary evidence may be admitted. However, the party must prove that the loss or destruction was not due to their own fault or negligence.

2. Original in Possession of Opposite Party

If the original document is in the possession of the opposing party and they fail to produce it despite notice, secondary evidence may be given.

3. Original Not Easily Movable

Certain documents, such as inscriptions on walls or large public records, cannot be physically produced in court. In such cases, copies or photographs may be admitted as secondary evidence.

4. Public Documents

Certified copies of public documents are admissible as secondary evidence. These copies are considered reliable because they are issued by authorized officials.

5. When Certified Copies are Permitted by Law

In certain cases, the law expressly permits the use of certified copies instead of original documents.

6. Electronic Records

With the advancement of technology, electronic records have become a major category of secondary evidence. Emails, digital documents, and electronic data are admissible subject to compliance with legal requirements.

These grounds ensure that secondary evidence is used only when genuinely necessary and not as a means to bypass the requirement of producing original documents.

VIII. SECONDARY EVIDENCE IN ELECTRONIC FORM

The recognition of electronic evidence is one of the most significant features of the Bharatiya Sakshya Adhiniyam, 2023.

In the digital age, most transactions and communications take place electronically. Documents are often stored in digital formats rather than as physical originals. This has blurred the distinction between primary and secondary evidence.

Electronic records such as emails, text messages, digital files, and cloud-stored data are now widely used in legal proceedings. These records may exist in multiple identical copies, making it difficult to identify a single "original."

The BSA 2023 addresses this issue by recognizing electronic records as valid evidence and providing guidelines for their admissibility. It ensures that digital evidence is treated on par with traditional documentary evidence, subject to necessary safeguards.



However, electronic evidence also poses challenges, such as the risk of tampering, hacking, and manipulation. Therefore, courts require proof of authenticity, integrity, and reliability before admitting such evidence. The inclusion of electronic records has significantly enhanced the scope and relevance of secondary evidence in modern legal practice.

IX. PROCEDURE FOR PRODUCING SECONDARY EVIDENCE

The production of secondary evidence involves a specific procedure that must be followed to ensure its admissibility. First, the party must establish the existence of the original document. Without proof of the original, secondary evidence cannot be admitted.

Second, the party must provide a valid reason for the non-production of the original. This may include loss, destruction, or possession by another party.

In cases where the original is in the possession of the opposite party, a **notice to produce** must be given. If the party fails to produce the document, secondary evidence may be allowed.

Third, the authenticity of the secondary evidence must be proved. The court must be satisfied that the copy or representation accurately reflects the contents of the original document.

Finally, the court exercises its discretion in deciding whether to admit the secondary evidence. This decision is based on the facts and circumstances of each case.

Thus, the procedure ensures that secondary evidence is admitted only after careful scrutiny.

X. EVIDENTIARY VALUE OF SECONDARY EVIDENCE

Admissibility and evidentiary value are two distinct concepts. Even if secondary evidence is admitted, its weight depends on its reliability and credibility.

Courts generally consider secondary evidence to be less reliable than primary evidence. Therefore, it is scrutinized more carefully.

The evidentiary value of secondary evidence depends on:

The nature of the document

The method of preparation of the copy

The credibility of the witness

The circumstances of the case

If the court finds the secondary evidence to be authentic and reliable, it may assign significant weight to it. However, if there are doubts regarding its accuracy, the court may reject it or give it lesser importance.

Thus, the value of secondary evidence is determined on a case-by-case basis.

XI. IMPORTANT CASE LAWS ON SECONDARY EVIDENCE

Judicial decisions play a crucial role in shaping the principles governing secondary evidence. Even under the Bharatiya Sakshya Adhinyam, 2023, courts continue to rely on established precedents developed under the Indian Evidence Act, 1872.

1. M. Chandra v. M. Thangamuthu (2010)

The Supreme Court held that secondary evidence cannot be admitted unless the non-production of the original is properly explained. Mere filing of a copy is not sufficient. The party must establish the existence and execution of the original document.

2. H. Siddiqui v. A. Ramalingam (2011)

The Court emphasized that secondary evidence is admissible only when foundational facts are established. The party must prove the circumstances justifying the admission of secondary evidence.



3. J. Yashoda v. K. Shobha Rani (2007)

It was held that secondary evidence cannot be admitted as a matter of right. The conditions prescribed by law must be strictly fulfilled.

4. Kaliya v. State of Madhya Pradesh (2013)

The Supreme Court reiterated that the court must be satisfied about the genuineness of the document before admitting secondary evidence.

5. Anvar P.V. v. P.K. Basheer (2014)

This landmark case laid down important principles regarding electronic evidence. The Court held that electronic records must satisfy specific conditions to be admissible, highlighting the importance of authenticity and certification. These cases collectively establish that secondary evidence is not freely admissible and must meet strict legal requirements.

XII. COMPARISON WITH INDIAN EVIDENCE ACT, 1872

The Bharatiya Sakshya Adhinyam, 2023 largely retains the structure of the Indian Evidence Act, 1872 but introduces significant improvements.

Under the 1872 Act, the concept of secondary evidence was already well defined. However, it was primarily designed for a paper-based system and did not fully address modern technological realities.

The BSA 2023 updates the law by:

Recognizing electronic and digital records explicitly

Expanding the scope of admissibility

Simplifying procedural aspects

Aligning the law with current technological practices

While the fundamental principles remain unchanged, the new Act provides greater clarity and flexibility, especially in relation to electronic evidence.

Thus, the transition from the 1872 Act to the BSA 2023 reflects a shift from a traditional framework to a modern, technology-oriented approach.

XIII. CHALLENGES AND ISSUES

Despite its advantages, the use of secondary evidence presents several challenges.

One of the major concerns is the risk of fraud and manipulation. Copies of documents can be easily altered, making it difficult to verify their authenticity.

Another issue is the reliability of electronic evidence. Digital records are susceptible to hacking, tampering, and unauthorized access. Ensuring their integrity is a significant challenge for courts.

There are also practical difficulties in proving the existence and contents of the original document. In many cases, the absence of the original may weaken the evidentiary value of secondary evidence.

Additionally, there is a risk that parties may misuse secondary evidence to suppress the original document or present misleading copies.

These challenges highlight the need for strict safeguards and careful judicial scrutiny.

XIV. ROLE OF COURTS IN ADMITTING SECONDARY EVIDENCE

Courts play a vital role in ensuring that secondary evidence is used appropriately.

They exercise judicial discretion in deciding whether to admit such evidence. This involves examining:

The reason for non-production of the original

The authenticity of the secondary evidence

The possibility of fraud or manipulation



Courts also ensure that the conditions laid down by law are strictly followed. They act as gatekeepers, preventing the misuse of secondary evidence.

In cases involving electronic evidence, courts adopt additional safeguards to verify the integrity and reliability of digital records.

Thus, the judiciary plays a crucial role in balancing flexibility with reliability.

XV. CRITICAL ANALYSIS

The Bharatiya Sakshya Adhiniyam, 2023 represents a progressive step in modernizing the law of evidence.

One of its major strengths is the recognition of electronic evidence, which reflects the realities of the digital age. This has significantly expanded the scope of secondary evidence.

However, certain challenges remain. The risk of misuse and the difficulty of verifying digital evidence continue to pose problems. The law must evolve further to address these issues effectively.

Another concern is the lack of awareness and technical expertise among legal professionals in handling electronic evidence. Proper training and infrastructure are necessary to ensure effective implementation.

Overall, while the BSA 2023 marks a positive development, continuous reforms are required to keep pace with technological advancements.

XVI. CONCLUSION

Secondary evidence plays an essential role in the administration of justice by providing an alternative means of proving the contents of documents when primary evidence is unavailable.

The Bharatiya Sakshya Adhiniyam, 2023 has significantly enhanced the scope and applicability of secondary evidence, particularly by recognizing electronic records. It strikes a balance between flexibility and reliability, allowing courts to adapt to modern realities while maintaining strict safeguards.

However, the admissibility of secondary evidence is subject to rigorous conditions, and courts must exercise caution to prevent misuse. The success of the new law depends on its effective implementation and the ability of the legal system to address emerging challenges.

In conclusion, secondary evidence under the BSA 2023 is a vital tool that ensures justice is not hindered by technical limitations, while also safeguarding the integrity of the judicial process.

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