Can the Court Refuse to Mark A (Relevant and Admissible) Document, For (i) There is No Formal Proof or (ii) it is A Photocopy?

(By Saji Koduvath, Advocate, Kottayam)

Abstract

- Section 58, Evidence Act – Admission is a mode of proof; 'Facts admitted need not be proved'.
- Section 136, Evidence Act permits to furnish a fact before proving it formally, if "the *party undertakes* to give proof of such fact, and the *Court is satisfied* with such undertaking".
- Order XIII Rule 3 CPC speaks as to rejection of irrelevant and inadmissible documents. (It does not deal with mode of proof).
- Whenever a relevant and admissible document is tendered in evidence, otherwise than through its executant (or otherwise than through a person who can prove signature or handwriting) but through a person who can depose as to its contents, the Courts in India exhibit it 'subject to proof' or 'subject to objection'. Same is the case, as to marking a copy without 'foundational evidence'.
- Where no objection (to the opposite side) to marking a document and the court sees deficiency (e.g.: insufficiency of stamp), the court should bring notice of it to the counsel.

Documents Marked Without Objection as to its MODE OF PROOF – Effect

The law prevails in India is the following –

• If a document is marked *without objection as to its **mode of proof,*** it is not open to the other side to object its admissibility afterwards.

Following leading decisions predicate the legal basis in this matter as under:

P.C.Purushothama Reddiar v. S.Perumal (1971 KLT OnLine 1088 (SC) = (1972) 1 SCC 9) (Three Judge Bench – **A.N.Grover**, K.S. Hegde, A.N. Ray, JJ.)	Police reports were marked, *without examining the Head Constables* who covered those meetings, without any objection. Hence it was not open to the respondent to object to their admissibility.	Relied on: *Bhagat Ram v. Khetu Ram* (AIR 1929 PC110).
R.V.E. Venkatchalla Gounder v. Arulmighu Viswesaraswamy and V.P. Temple, (2004 (1) KLT OnLine 1227 (SC) = (2003) 8 SCC 752) (R.C.Lahoti, **Ashok Bhan**, JJ.)	*Photo copies* were admitted in evidence 'without foundation'; but, without objection. They cannot be held inadmissible for originals were not produced. Failure to raise a timely objection amounts to waiver.	Relied on: *Padman v. Hanwanta*, (AIR 1915 PC 111 P.C., *Purushothama Reddiar v. S. Perumal*

Smt.Dayamathi Bai v. K.M. Shaffi, (2004 (2) KLT OnLine 1242 (SC) = AIR 2004 SC 4082)	Copy of sale deed was marked *without examining the executant* or the donor; but, without objection. It was argued that mode of proof was insufficient. Held: Objection as to the mode of proof falls within procedural law. It could be waived.	Relied on: *Gopal Das v. Sri Thakurji R.V.E. Venkatachala Gounder; Gopal Das v. Sri Thakurji* (AIR 1943 PC 83); Sarkar on Evidence, 15th Edition, page 1084.
P.C.Thomas v. P.M.Ismail, (2009 (3) KLT 972 (SC) = AIR 2010 SC 905); (2009)10 SCC 239 (R.M.Lodha, **D.K. Jain**,JJ.).	If no objection on '*mode of proof*' (for, *non-examination of the author* and absence of "proof of acknowledgment" by him), it will be too late (in appeal) to raise objection.	…
Neeraj Dutta v. State (Govt.of NCT of Delhi), (2023 (1) KLT SN 28 (C.No.28) SC = (2023) 4 SCC 731) (**B.V. Nagarathna**, v. Ramasubramanian, A.S.Bopanna, B.R.Gavai, S. Abdul Nazeer, JJ.)	*If no objection as to mode of proof* (*secondary evidence*) when marked, no such objection could be allowed to be raised at any later stage.	…
Rafia Sultan v. Oil and Natural Gas Commission (I.C. Bhatt, S.B.Majmudar, JJ.), (1986 ACJ 616; 1986 Guj LH 27; 1985-2 Guj.LR 1315)	No objection as regards the ***truth*** *of contents* of Ex.32. The witness of the defendant accepted the contents. Therefore, too late in the day to canvass that contents of Ex. 32 were not proved.	…

Who Should Object FIRST – Court or Opposite Side?

There is divergence of judicial opinion as to saying 'NO' by court to marking a document with formal defect, beforehand it is objected by the other side. Eg.Tendering copy of a document without furnishing the 'foundational evidence' to admit secondary evidence.

First view *Court is under an obligation to exclude inadmissible materials*.	*H.Siddiqui v. A.Ramalingam* (2011 (1) KLT SN 107 (C.No.151) SC = AIR 2011 SC 1492) (Followed in: *U.Sree v. U.Srinivas* (2012 (4) KLT Suppl. 38 (SC) = AIR 2013 SC 415) *Yeshoda v. Shoba Ram* (AIR 2007 SC 1721)

Second view *The court cannot object first. If no objection for other side, Court cannot refrain from marking* a document on its own volition or choice (on the ground of formal defect).	*R.V.E. Venkatchalla Gounder v. Arulmighu Viswesaraswamy and V.P. Temple* (2004 (1) KLT OnLine 1227 (SC) = (2003) 8 SCC 752) *Smt.Dayamathi Bai v. K.M. Shaffi* (2004 (2) KLT OnLine 1242 (SC) = AIR 2004 SC 4082). (This view is generally followed in India.)

First View: Court is under an Obligation to Exclude

In *H.Siddiqui v. A.Ramalingam*: (2011 (1) KLT SN 107 (C.No.151) SC = AIR 2011 SC 1492), it is held:

• "Mere admission of a document in evidence does not amount to its proof. … The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon." (Followed in: *U.Sree v. U.Srinivas* (2012 (4) KLT Suppl.38 (SC) = AIR 2013 SC 415).

In *Yeshoda v. Shoba Ram* (AIR 2007 SC 1721), it is held:

• "In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. .. The conditions laid down in the said Section (Section 65) must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section."

Second View – Failure to Raise Objection, Amounts to Waiver

In *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami* (2004 (1) KLT OnLine 1227 (SC) = AIR 2003 SC 4548: (2003) 8 SCC 752) it is laid down that *"failure to raise timely objection" as to the irregularity of mode* adopted for proving the document *"amounts to waiver".*

• Therefore it is clear that 'objection' is a matter that primarily remains in the realm of the opposite party; rather than the court.

It is typically followed in India, after *R.V.E.Venkatchalla Gounder v. Arulmighu Viswesaraswamy and V.P. Temple* (supra).

• *Note:* **1**. If the deficiency is pertaining to non-registration of a compulsory registrable document (as it falls under the head, inadmissible document) the court can desist the marking of the document.

• **2**. By virtue of the decision, *G.M.Shahul Hameed v. Jayanthi R.Hegde* (2024 KLT OnLine 1808 (SC) = AIR 2024 SC 3339), unless the court has not applied its mind to the insufficiency of stamp, and unless there is a 'judicial determination', the objection thereof can be raised at any time.

In *RVE Venkatachala Gounder* (supra), our Apex Court held as under:

• "Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:

• (i) an objection that the document which is sought to be proved is itself *inadmissible in evidence*; and

• (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be *irregular or insufficient.*

• In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. …. Out of the two types of objections, referred to hereinabove, ***in the later case***, *failure to raise a prompt and timely objection amounts to* ***waiver of*** the necessity for insisting on ***formal proof*** of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."

Proof of Document is, normally, Proof of (both) Execution and Contents

When existence of a document is proved (either by admission or by proof), normally, contents thereof are also taken as proved.

• In most cases, 'proof of execution' may lead the court to presume 'proof of truth'. But, it is not a rigid rule, for it falls under the caption, "appreciation of evidence".

• Evidence Act does not expressly proffer anything as to "TRUTH of contents" of documents. It is left to the **discretion** (Section 3) of the court. In proper cases court is expressly authorised to **presume** (Section 114) truth.

Therefore, by virtue of our procedure-laws (especially, Section 3 and 114 Evidence Act) and the law handed down by our Apex Court, the Courts are free to appraise a "marked" document as under:

• 1. Contents and 'Truth of its Contents' stand proved, or

• 2. Mere marking does not amount to proof of contents (even), or

• 3. Admission of contents; not truth of contents (especially when truth is in issue), or

• 4. Admission of contents and truth of contents; but, its *probative value* is small or nil.

Admission by the Other Side, Proves Contents – No Blindfold Application

Court has wide powers under Section 165 of Evidence Act to require, evidence to prove a document marked on 'admission'. Besides the powers under Section 165, the Procedural Acts show that the courts have jurisdiction to require the party concerned to prove admitted-documents. It is evident from the 'Provisos' of –

• Section 58 of Evidence Act

• Order XII, Rule 2A Proviso, C.P.C. and

• Section 294 of the Cr.P.C.

The Courts are free to refrain from acting upon any document, in the *particular nature of a case,* especially when the Court feels that injustice will be resulted by the blindfold application of this principle (admission of a document by the other side, proves its contents also), for it falls under the sphere, "appreciation of evidence". It is the reason why the courts deviate from the general principles in certain cases, in the peculiar circumstances of those cases, saying –

- **(i)** Contents are 'not proved' (Though signature Proved).
- **(ii)** Truth of contents are 'not proved' (Though contents Proved).
- **(iii)** Probative value is small or nil (Though contents and truth Proved).

Proof must be by one who can Vouchsafe for Truth – Not Beseem in All Cases

The normal rule as to proof of execution is made clear in *Narbada Devi Gupta v. Birendra Kumar Jaiswal* (2003 (3) KLT OnLine 1272 (SC) = (2003) 8 SCC 745), under the following words –

- "Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can **vouchsafe for the truth** of the facts in issue".
- See: *Assistant Commissioner of Customs v. Edwin Andrew Minihan* (2024 (1) KLT 24 = ILR 2024 (1) Ker.596).

This "normal principle" (that proof must be by one who can vouchsafe for truth), is not invariably followed – e.g., a letter or a deed obtained by a witness in 'due/common course'. In such cases, if only '**truth**' as to the contents of the documents **is in dispute**, this rule is insisted.

Relevancy of Evidence

Section 5 and 136 of the Evidence Act stipulate that evidence can be given only on 'facts in issue' or 'relevant facts'. Relevant facts are enumerated in Section 6 onwards.

Section 5 Evidence Act, 1872 deals with Relevancy

Section 5 of the Indian Evidence Act, 1872 stipulates that evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Section 136, Evidence Act – Permits Evidence on Undertaking of the Party

Section 136, Evidence Act permits to furnish a fact before proving it formally, if "the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking".

Court can Reject 'Irrelevant' or 'Inadmissible' Document At Any Stage

Order 13 Rule 3 C.P.C. speaks as to rejection of irrelevant and inadmissible documents, at any stage of the suit. It does not deal with probative value of a document, or marking/exhibiting the same in evidence. The courts can adjudicate the matters before it only on the basis of the substantive evidence.

Court Cannot Discard Documents, Straight Away. It has to be Marked 'Subject to Proof'

When a 'relevant' and 'admissible' document is tendered in evidence, otherwise than through its executant (or a witness to the document) –

- Can it be discarded outright by the Court, pointing out – no 'formal proof'?
- What will be the situation if the opposite side does not raise objection (or expressly say – they have no objection) to such marking?
- Can a copy of a document be marked without 'foundational evidence', on admission from other side?

It is definite –

• The court cannot discard such documents, straight away.

• It has to be marked 'subject to proof' or 'subject to objection', as it is the practice followed. The law also supports it.

Marking Documents "Subject to Objection or Proof"

In *M.Siddiq v. Mahant Suresh Das*, (Ayodhya case) (2019 (4) KLT OnLine 3190 (SC) = (2020) 1 SCC 1), the practice of marking documents "subject to objection and proof" was referred to as under:

• "539. On 7 February 2002, counsel for the plaintiffs in Suit 5 filed a report dated 3 February 2002 before the High Court of Dr.K.V.Ramesh, pertaining to the "Ayodhya Vishnu Hari temple inscription". The documents were taken on record "subject to objection and proof" as required by the provisions of the Evidence Act 1872. …."

The practice of exhibiting documents 'subject to proof and relevancy' is also referred to in –

• *Jarnail Singh v. State of Punjab* (2022 (4) KLT OnLine 1134 (SC = AIR 2022 SC 3350 = (2022) 10 SCC 451).

• *Uttaradi Mutt v. Raghavendra Swamy Mutt* (2018 (4) KLT OnLine 3055 (SC) = AIR 2018 SC 4796 = (2018) 10 SCC 484).

• *Ameer Minhaj v. Dierdre Elizabeth (Wright) Issar*, (2018 (3) KLT OnLine 3023 (SC) = (2018) 7 SCC 639),

• *State of Bihar v. P.P.Sharma*, (1991 (2) KLT OnLine 1025 (SC) = AIR 1991 SC 1260 = 1992 Supp.1 SCC 222).

• *Nilavarnisa v. M.M.F*aizal (2019 (1) KLT 652).

• *Nandkishore Lalbhai Mehta v. New Era Fabrics Pvt. Ltd.* (2015 (3) KLT Suppl.154 (SC) = AIR 2015 SC 3796 = (2015) 9 SCC 755.

Admission is a Mode of Proof; 'Facts Admitted Need Not be Proved'

Usually, a document is proved through its author, or through a witness to its execution or a person acquainted with handwriting. Concession or admission by the opposite side is an acceptable form of proving documents in evidence (under Section 17, 21, 58, 59 Evidence Act).

Section 58, Evidence Act says that no fact need be proved in any proceeding in three circumstances:

1. the parties or their agents agree to **admit at the hearing**
2. before the hearing, they agree to admit by any writing under their hands
3. by any rule of pleading they are deemed to have admitted by their pleadings.

Admissions at Hearing

Admissions at 'hearing' (by the advocate) may be made at the evidence-stage (while the witnesses are examined) and at the time of 'final hearing'. Admissions of advocate are to be deciphered from Order-sheet or Judgment.

Once NO Objection to Mode of Proof, NOT Legitimate to Refrain Marking

From the above it is clear that it would not be legitimate for the court to refrain from exhibiting a relevant document which could be received in evidence on the (express or implied) concession or admission of the opposite side (as regards **mode of proof**), in the scheme of Evidence Act.

Our Procedure Codes (C.P.C., Cr.P.C.) also declare this principle.

Does Marking Documents without Objection Proves Truth of its Contents?

When a document is marked without objection, our courts take two (divergent) views:

- First, both Contents and '*Truth of its Contents'* stand proved.
- Second, *contents alone* stand proved; and, **not 'Truth'** of its Contents.

Those who support the first view , point out Section 56, 57 and 58 of the Evidence Act, and argue that when a document is admitted, or marked without objection, separate proof as to '*truth of contents'* is not warranted. Similarly, separate proof need not be required when presumptions (Section 114, Evidence Act) can be invoked also (e.g. document in ordinary course of business, a letter obtained in reply or a public document).

Those who stand for the second proposition demonstrate that the following two things are different processes –

- (i) admission or *exhibiting* of a document in evidence; and
- (ii) proving the '*truth of its contents*' (or veracity of the same).

Divergent Views Taken by Our Courts

First view Proof (Contents) stands established. It cannot be questioned afterwards. **Truth also:** See: *Rafia Sultan v. Oil And Natural Gas Commission* (I.C.Bhatt, S.B.Majmudar, JJ.), (1985 2 Guj. LR 1315 = 1986 ACJ 616 = 1985-2 Guj.LR 1315).	*RVE Venkatachala Gounder v. Arulmigu Viswesaraswami*: (2004 (1) KLT OnLine 1227 (SC) = AIR 2003 SC 4548). *Neeraj Dutta v. State (Govt. of Delhi)* (2023 (1) KLT SN 28 (C.No.28) SC = (2023) 4 SCC 731) (*If no objection as to mode of proof* (secondary evidence) when marked, *no such objection could be allowed to be raised at any later stage*.)
Second View Even if no objection, it does *not dispense with proof* (as to, both, existence of the document and its truth). In such a case the document will not be taken as proved. (Note: It may not be legitimate to apply this principle *literatim*)	*LIC v. Ram Pal Singh Bisen*: (2010 (2) KLT Suppl.94 (SC) = (2010) 4 SCC 491) (*Domestic enquiry report*); *H.Siddiqui v. A.Ramalingam*, (2011 (1) KLT SN 107 (C.No.151) SC = (2011) 4 SCC 240) (Copy of a power of attorney alone was shown to the respondent during cross-examination and he *admitted his signature thereon only*, and not its contents); *Mal Singhvi v. Anand Purohith*: (1988 (2) KLT OnLine 1122 (SC) = 1988 (Supp) SCC 604) (*date of birth*).

Third view If *truth is in issue,* mere proof of contents, or marking without objection, is not proof of truth.	See: *Narbada Devi Gupta v. Birendra Kumar Jaiswal*, (2003 (3) KLT OnLine 1272 (SC) = (2003) 8 SCC 745); *Ramji Dayawala v. Invest Import*: (1980 KLT OnLine 1071 (SC) = AIR 1981 SC 2085).
Fourth view Admission of contents, and dispenses with proof and truth; but its *probative value* will be a matter for appreciation by court.	See: *State of Bihar v. Radha Krishna Singh*, (1983 KLT OnLine 1241 (SC) = AIR 1983 SC 684) (Admission and probative value – different); *Rakesh Mohindra v. Anita Beri*: (2016 (1) KLT SN 38 (C.No.36) SC = 2015 AIR (SCW) 6271); *Kaliya v. State of M.P.* (2013 (3) KLT OnLine 1113 (SC) = 2013 10 SCC 758); *H.Siddiqui v. A. Ramalingam* (2011 (1) KLT SN 107 (C.No.151) SC = AIR 2011 SC 1492).
Fifth view Admission of contents, and dispenses with proof and truth; but Court should *require* (in proper cases) the party producing the document to adduce proper evidence, and to cure formal defects, invoking – • Section 165 of Evidence Act • Section 58 of Evidence Act • Order XII, Rule 2A Proviso, C.P.C.and • Section 294 of the Cr.P.C.	*Rasiklal Manikchand v. MSS Food Products*: (2012 (1) KLT SN 4 (C.No.6) SC = (2012) 2 SCC 196).See: *Harkirat Singh v. Amrinder Singh*, (2005 (4) KLT OnLine 1164 (SC) = (2005) 13 SCC 511); *Umesh Challiyil v. K.P.Rajendra*, (2008 (2) KLT 47 (SC) = (2008) 11 SCC 740); *K.K.Ramachandran Master v. M.V.Sreyamskumar* (2010 (3) KLT 189 (SC) = (2010) 7 SCC 428 = AIR 2015 SC 3796).

1. (a) Once no Objection to Mode of Proof, Right to Objection Stands Waived

It is trite law that "admission" is a **mode of proof**, inasmuch as 'facts admitted need not be proved' (Section 58, Evidence Act). Once a document is marked as no objection to the **mode of proof** on account of lack of original, then the right to raise objection (on this score) stands waived. It is the position of law accepted by our legal system. See:

- *Sk.Farid Hussinsab v. State of Maharashtra* (1981 KLT OnLine 1117 (Bom.) (F.B.) = 1983 Cr.L.J. 487 (Quoted in *Sonu @ Amar v. State of Haryana*, (2017 (3) KLT OnLine 2062 (SC) = AIR 2017 SC 3441 = (2017) 8 SCC 570).
- *Rafia Sultan v. Oil And Natural Gas Commission* (I.C.Bhatt, S.B.Majmudar, JJ.), (1986 Guj. LH 27 = 1985 2 Guj LR 1315) (relied on: *P.C.Purushottamman v. S.Perumal* (1971 KLT OnLine 1088 (SC) = AIR 1972 SC 608);
- *Pandappa v. Shivlingappa* (47 BLR. 962); and
- *Gopaldas v. ShriThakurli* (AIR 1943 PC 83).

  See also:
- *Lachhmi Narain Singh v. Sarjug Singh* (2021 (4) KLT OnLine 1140 (SC = AIR 2021 SC 3873);
- *Oriental Insurance Co v. Premlata*: ((2007) 8 SCC 575).

- *Dayamathi Bai v. KM Shaffi* (2004 (2) KLT OnLine 1242 (SC) = (2004) 7 SCC 107 = AIR 2004 SC 4082);
- *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P.Temple* (2004 (1) KLT OnLine 1227 (SC) = (2003) 8 SCC 752);
- *Narbada Devi v. Birendra Kumar* (2003 (3) KLT OnLine 1272 (SC) = (2003) 8 SCC 745.
- *Thimmappa Rai v. Ramanna Rai* ((2007) 14 SCC 63).

Effect of marking document without objection is precisely laid down in the following two recent decisions of the Supreme Court. In both these cases, it is seen, the Apex Court has taken the view that the 'truth' is also stood proved.

Neeraj Dutta v. State (Government of NCT of Delhi)

The Constitution Bench (**B.V.Nagarathna,** V. Ramasubramanian, A.S.Bopanna, B.R.Gavai, S.Abdul Nazeer, JJ.) of our Apex Court laid down in *Neeraj Dutta v. State (Government of NCT of Delhi),* (2023 (1) KLT SN 28 (C.No.28) SC = AIR 2023 SC 330 = (2023) 4 SCC 731), as under:

• Section 61 deals with ***proof of contents*** of documents which is by either ***primary or by secondary evidence.***

• When a document is produced as primary evidence, it will have to be proved in the manner laid down in Sections 67 to 73 of the Evidence Act.

• *Mere production* and marking of a document as an exhibit by the court *cannot be held to be due proof of its contents.* Its execution has to be proved by admissible evidence. On the other hand, ***when a document is*** produced and ***admitted by the opposite party*** and is marked as an exhibit by the court, … (sic – ***no objection*** *can be raised at any later stage* with regard to ***proof of its contents***).

• The contents of the document must be proved either by the production of the original document i.e., primary evidence or by copies of the same as per Section 65 as secondary evidence.

• So long as an original document is in existence and is available, its contents must be proved by primary evidence.

• It is only when the primary evidence is lost, in the interest of justice, the secondary evidence must be allowed.

• Primary evidence is the best evidence and it affords the greatest certainty of the fact in question.

• Thus, when a particular fact is to be established by production of documentary evidence, there is no scope for leading oral evidence.

• What is to be produced is the primary evidence i.e., document itself. It is only when the absence of the primary source has been satisfactorily explained that secondary evidence is permissible to prove the contents of documents.

• Secondary evidence, therefore, should not be accepted without a sufficient reason being given for non-production of the original.

• *Once a document is admitted, the contents* of that document *are also admitted* in evidence, though those contents may not be conclusive evidence.

• Moreover, once certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence.

• There is a prohibition for any other evidence to be led which may detract from the conclusiveness of that evidence and the court has no option to hold the existence of the fact otherwise when such evidence is made conclusive.

It is held further as under:

• "44. Section 64 of the Evidence Act states that documents must be proved by primary evidence except in certain cases mentioned above. ….. Thus, ***once a document has been properly admitted****, the contents of the documents would stand admitted in evidence, and* ***if no objection*** has been raised with regard ***to its mode of proof*** at the stage of tendering in evidence of such a document, ***no such objection*** *could be allowed to* ***be raised at any later stage*** of the case or in appeal vide *Amarjit Singh v. State (Delhi Admn.*) (1994 (2) KLT OnLine 1174 (Del.) = 1995 Cr LJ 1623 (Del) ("*Amarjit Singh*"). But the documents can be impeached in any other manner, though the admissibility cannot be challenged subsequently when the document is bound in evidence."

Objection as to non examination of the author is ***too late in the day***

In *P.C.Thomas v. P.M.Ismail* (2009 (3) KLT 972 (SC) = AIR 2010 SC 905 = (2009) 10 SCC 239), it is observed that the objection as to non examination of the author is ***too late in the day*** . It is held as under:

• "No objection on pleas of "inadmissibility" or "mode of proof" was raised at the time of their exhibition or any time later during trial, when most of the witnesses, produced by the parties were confronted with these, as duly exhibited, bearing stamp marking with particulars, prescribed under Order XIII Rule 4 of the Code of Civil Procedure, 1908 and duly signed as such.

• *In our opinion, it is* ***too late in the day*** *now to object to their exhibition on the ground of "prescribed procedure" i.e.* ***mode of proof.***

• Moreover, we also find that it was nobody's case that the said documents were got printed by John K. or distributed amongst voters by him. Absence of proof of acknowledgment by him because of ***non production of John K. as a witness, in the circumstances, in our view, is inconsequential.***

• Admittedly, John K. was a well known leader of high stature, recognized as such by Christian/Catholic voters including those mentioned in Para.17 (supra) and, therefore, there is no question of drawing an adverse inference against the election petitioner for not examining him, as strenuously urged on behalf of the appellant, particularly when the *printing and circulation of offending material (Exts.P1 and P2) has been proved by the election petitioner beyond reasonable doubt."*

(b) *Document* ***marked without objection*** *– Contents ('****TRUTH also****) proved*
Objection as to Truth of Contents, First Time In Appeal – Effect – Too late in the day

In *Rafia Sultan v. Oil And Natural Gas Commission* (I.C.Bhatt, S.B.Majmudar, JJ.), 1986 ACJ 616 = 1986 Guj. LH 27 = 1985-2 Guj. LR 1315) it is observed as under:

• "It was never the case of the Commission that report which was submitted in a sealed cover was not the genuine and true report of the committee appointed by the Commission itself. Thus *in short no objection about the truth of contents* of Ex.24/1 i.e.Ex.32 was ever put forward before the trial Court …. …. In fact both the sides have relied upon different parts of Ex. 32 in support of their rival contentions on the aspect of negligence and contributory negligence. It is therefore ***too late in the day*** for Miss Shah for the Commission to canvass for the *first time before us in appeal* that contents of *Ex.32 were not proved in accordance with law* and hence the document was required to be taken off the record. It is now well settled that *objection about mode of proof can be waived* by a party and that such objection is raised by the party at the earliest opportunity in the trial Court such objection will be *deemed to have been waived* and cannot be permitted to be raised for the first time in appeal (vide *P.C.Purushottamman v. S.Perumal* (1971 KLT OnLine 1088 (SC) = AIR 1972 SC 608); *Pandappa v. Shivlingappa* (47 BLR.962); and *Gopaldas & Anr. v. Shri Thakurli*, (AIR 1943 PC 83) at page 87). In view of this settled legal position the objection raised by Miss Shah against admissibility of Ex.32 viz. that its contents were not proved in accordance with law has to be repelled."

When a document is marked without objection, no doubt, the presumption in Section 114 of the Evidence Act is wide enough to presume that (i) the "contents" of the document and (ii) its 'truth' stand 'proved'. Therefore, it is the duty of the other side to express its disapproval – that it does not accept the 'contents' and/or 'truth' (if it is so).

The dissent thereof can be placed by the opposite side by-

• Raising 'objection' at the time of its marking, or

• Placing the protest by way of 'suggestion' to the witness or by proper questions.

(c) TRUTH is left to Discretion (Section 3) & Presumption (Section 114) of Court

Section 67, Evidence Act lays down the fundamental principles as to the proof of documents. Section 67 reads as under:

• "67. **Proof of signature and handwriting of person alleged to have signed or written document produced**—If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."

Section 67 says as to 'proof of signature and handwriting' alone. Neither Section 67 nor any other Section of the Evidence Act says about 'proof as to truth' of contents of documents.

Inferences as to "TRUTH of contents

• Evidence Act does not expressly proffer anything as to "TRUTH of contents" of documents.

• It is left to the **discretion** (Section 3) of the court. In proper cases court can **presume** (Section 114) truth.

• In most cases, 'proof of execution' leads the court to presume 'proof of truth'.

• It is more so, when a document is admitted (by the other side) without objection.

• But, when proof as to 'truth' is in issue, or in dispute, the party in whom the burden thereof rests has to discharge it.

(d) Legal Position on 'Waiver' of Mode of Proof, Reprised

It appears that the legal position can be summed-up as under –

• If a document is *marked without objection,* the right of objection (vested with the other side) stands *waived.* And the entire contents of the document will be admissible in evidence.

• However, if (i) there is any intrinsic infirmity to the document, or (ii) specific proof as to truth is required in the nature of the case of the parties, or it is marked through a witness who is incompetent to prove it (and the opposite party does not expressly or impliedly accepted it), the court can say – it is not ready to act upon it, for **truth** or correctness of contents is not established.

In *Dibakar Behera v. Padmabati Behera* (AIR 2008 Ori.92), it is pointed out that (in such a situation) there must be some evidence to support the contents of such document.

The following decisions also lay down the proposition that 'mere marking of a document' as an 'exhibit' may amount to proof of contents, but not its 'truth'.

• *Mohindra v. Anita Beri* (2016 (1) KLT SN 38 (C.No.36) SC = 2015 AIR (SCW) 6271).

• *Kaliya v. State of Madhya Pradesh* (2013 (3) KLT OnLine 1113 (SC) = (2013) 10 SCC 758);

• *Sait Khimchand v. Yelamarti Satyam* (AIR 1971 SC 1865);

• *Nandkishore Lalbhai Mehta v. New Era Fabrics* (2015 (3) KLT Suppl.154 (SC) = AIR 2015 SC 3796) ("Mere identifying the signature of Mr. Pathak (by a witness) does not prove the contents of the said letter which is being relied upon by the appellant.");

It is apposite to note – in *RVE Venkatachala Gounder v. Arumlmigu Viswesaraswam* (2004 (1) KLT OnLine 1227 (SC) = AIR 2003 SC 4548), the question as to 'truth' of contents did not specifically come for consideration. It is dealt with as under:

• "Since documents A30 and A34 were admitted in evidence without any objection, the High Court erred in holding that these documents were inadmissible being photo copies, the originals of which were not produced."

Standard of Proof in Civil Cases – Preponderance of Probability

It is noteworthy that the standard of proof required in civil cases is different from that of criminal cases; since, civil court proceeds on a preponderance of probability, whereas criminal court insists 'proof beyond reasonable doubt'. In *Miller v. Minister of Pensions*, ((1947) 2 All ER 372), Lord Denning, described preponderance of probability as "more probable than not". It is said in picturesque as 'likelihood of 51%'.

2. MERE MARKING, DOES NOT PROVE THE CONTENTS – *NOT AN UNQUALIFIED PROPOSITION*

This Proposition is Not to be Applied "Literatim".

It is disgraceful that several courts in India apply this proposition (*Mere Marking Does Not Prove the Contents*) ineptly.

This proposition is not attracted–

- when a document is marked on **'admission'** by the opposite side.

This proposition is attracted–

- (i) when it is evident that the document is marked only for 'identification', or
- (ii) when the objection raised by the other side is sustained and the document is marked 'subject to proof/objection'.

Each Case under this Head Requires Distinct Consideration

As this proposition (*Mere Marking Does Not Prove the Contents*) is **not** to be applied "literatim", each case (which referred to this proposition) requires distinct consideration. (Some of these decisions mentioned this proposition, merely to show that such an argument was placed before it; but those decisions were quoted (subsequently) by some Courts as if those earlier decisions laid down a *'ratio decidendi*'.)

Following are the often-cited cases on this subject.

The Proposition – *Mere Marking Does Not Prove the Contents* – was NOT applied in the following decisions.

Decision	Did the Documents Mark without Proper Proof was accepted in evidence?	Reason for NOT Appling the Proposition *Mere Marking Does Not Prove the Contents*
Narbada Devi Gupta v. Birendra Kumar Jaiswal, 2003 (3) KLT OnLine 1272 (SC) = (2003) 8 SCC 745	Yes. *The **rent receipts** were **received** in evidence. (without formal proof)*	*The rent receipts were **'not disputed'** by the other side.*
Kaliya v. State of Madhya Pradesh, (2013 (3) KLT OnLine 1113 (SC) = (2013) 10 SCC 758)	Yes. *The **secondary evidence** of dying declaration produced in this case was **accepted** by the Court.*	***Secondary evidence** was adduced with **foundational evidence** (for producing copy; not original)*

The Proposition - Mere Marking Does Not Prove the Contents – was ***applied in the following decisions; but, not unreservedly.***

Decision	Did the proposition – *Mere Marking Does Not Prove the Contents* – ***unreservedly*** apply?	Reason for **NOT** applying the Proposition *Mere Marking Does Not Prove Contents*, ***unreservedly***
Ramji Dayawala v. Invest Import: (1980 KLT OnLine 1071 (SC) = AIR 1981 SC 2085)	No. ***Truth** of contents of a letter and two **telegrams** were not taken. (though marked)*	***Truth** of the facts in the document **was "in issue"***

M.Chandra v. M.Thangamuthu, (2010 (4) KLT Suppl. 65 (SC) = (2010) 9 SCC 712)	No. Validity and Genuineness of the **Photocopy** (of the Caste *Certificate*) was **not** accepted (***though marked***)	**Validity** and Genuineness of the Caste *Certificate was* ***very much in question***
H.Siddiqui v. A.Ramalingam, (2011 (1) KLT SN 107 (C.No.151) SC = (2011) 4 SCC 240)	No. ***Contents*** *of the* ***Photocopy*** *was* ***not*** *received as proof (though marked*)	***Photocopy*** *was shown to the witness during* ***cross-examination*** **alone**, and Signature alone was admitted by the witness.
Tarajee Khimchand v. Yelamarti Satyam (1971 KLT OnLine 1060 (SC) = AIR 1971 SC 1865)	No. **Accounts** of the Plaintiff was **not** received as proof (*though marked*)	The **accounts of the Plaintiff** would not be proved by itself

Conclusion

Inasmuch as Indian law expressly declares –

• (i) 'admission' is a mode of proof, inasmuch as 'facts admitted need not be proved' (Section 58, Evidence Act);

• (ii) Section 136, Evidence Act permits to use a fact before proving it formally on "the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking"; and

• (iii) it is the trite law accepted by the courts in India that –

• the court has jurisdiction to require the party concerned to prove a document in spite of marking it (under Section 58 of Evidence Act, Order XII, Rule 2A Proviso, C.P.C. and Section 294 of the Cr.P.C.), and

• the probative value of the document is the matter for the court,

it is not at all proper for the court to vociferously thwart the copy of a document totally disregarding the rights of the parties conferred by the Evidence Act.