CHAPTER - III

EVIDENTIAL VALUE OF THE ORDEAL

The Dh.writers stressed the importance of using a proper type of proof for deciding any dispute that is admitted in a court. Accordingly, they have discussed the evidential value of the various proofs. After admitting the case, the court should summon the respective parties for hearing. The judge has to decide on which side the onus of proof lies. After conducting the preliminary inquiry, the judge should ask the concerned party to produce the necessary proof in support of the claim made by it, and should declare the judgment. Before we go through the rules discussing the evidential value of the various proofs or the provisions under which the ordeal is recommended it is preferable to know in general how the onus of proof is decided.

Four kinds of Uttara and the onus of the proof :

Pūrvapakṣa (Plaint), Uttara (Reply), Kriyā(Evidence) and Nirṇaya(Judgment) are the four stages of the judicial procedure. In the first stage we find that the plaintiff submits his plaint to the court. Detailed rules are given in the Dh.works, which point out how a valid or a technically correct plaint should be.[67] After the plaint is admitted, the court should summon the respective party.

The defendant should submit his reply to the plaint of the plaintiff. This reply can be of four types i.e. (i) Saṁpratipatti or Satya(confession). (ii) Mithyā(denial) (ii) Pratyavaskandana or Kārana (special plea) and (iv) Prāṅnyāya or Pūrvanyāya(former judgment).

67. Vide Hist.of Dh. Vol.III p.292ff.

If the plaihtiff says that the defendant owes me a hundred rupees and if the defendant replies 'yes, it is true, I owe plaintiff one hundred rupees', it is Sampratipatyuttara. If a man says, 'you owe me a hundred rupees' and the other says that 'I do not owe you' it is the Mithyottara. If a man says that the defendant took one hundred rupees from me, and the defendant replies, 'surely, I took one hundred rupees but I returned them or they were gifted to me,' this is Pratyavaskanda-nottara. If the defendant points out that the plaintiff was formerly defeated in this matter, it is Prāṅnyāya.[68] It will appear that in Mithyottara the whole of the statement of the plaintiff is denied, while in Pratyavaskandanottara only a portion of the matter stated in the plaint is accepted and causes are pleaded why inspite of such acceptance the plaintiff must be non-suited. Now there can be a blending together of several kinds of Uttaras. What we are concerned here is about the next stage i.e. adducing proof for the dispute that has come upto the stage of Uttara filed by the defendant.

It will appear that when the reply is one of denial(Mithyā) the burden of proof lies on the plaintiff, in the case of the reply of special plea(Pratyavaskandana) or former judgment (Prāṅnyāya), the burden of proof lies on the defendant and when there is a reply of confession(Sampratipattyuttara) there is no

---

68. तत्र सत्योत्तरं यथा- शतकं मह्यं धारयतीत्युक्ते सत्यं धारयामीति। मिथ्योत्तरं तु नाहं धारयामीति। प्रत्यवस्कन्दनं नाम सत्यं गृहीतं प्रतिदत्तं प्रतिग्रहेण उद्धामिति वा। प्राङ्न्यायोत्तरं तु यत्राभियुक्त एवं ब्रूयादस्मिन्नर्थे अनेनाहमभियुक्तस्तत्र चायं व्यवहारमार्गेण पराजित इति।
Mit. on Yāj. II.7.

necessity to adduce proof.[69]

Pratyākalita :

When the defendant files his reply, the next stage is of the consideration as who should begin and on whom the burden of proof lies. This is called Pratyākalita and the actual adducing of proof is Kriyā. According to some however, Pratyākalita is the last stage of the judicial procedure, in which the judge and the members of the court tray to evaluate the evidence produced and reach at the judgment. There is a divergence of opinion amongst the Dh.writers whether Pratyākalita should be regarded as a regular stage of the judicial procedure. Mitākṣarā opines that since the Pratyākalita has no direct relation to the litigents and that it is more or less a mental process on the part of the judge and his collegues, it does not form a regular part of the judicial procedure.

The third stage of the judicial procedure is thus the Kriyāpāda in which the concerned party is supposed to produce evidence in support of his claim.

Proofs sanctioned by the Dh.writers :

The word Kriyā is a very wide term. It means any activity which would help the court in achieving its end. The principal

---

69. यस्य साध्यमस्ति स प्रतिज्ञातार्थसाधनं लेखयेदित्युक्तं, अतश्च प्राङ्न्यायो-
-त्तरे प्राङ्न्यायस्यैव साध्यत्वात्प्रत्यर्थेनार्थी जात इति स एव साधनं लेखयेत्।
कारणोत्तरेऽपि कारणस्यैव साध्यत्वात्कारणवाद्येवार्थीति स एव लेखयेत्।
मिथ्योत्तरे तु पूर्ववाद्येवार्थी स एव साधनं निर्दिशेत्. संप्रतिपत्त्युत्तरे
साध्याभावेन भावोत्तरादीनो द्वयोरप्यर्थित्वाभावात्साधननिर्देश एव नास्तीति
तावतैव व्यवहारः परिसमाप्यत इति गम्यते।

Mit. on Yāj. II·7

aim of the judge is to investigate the truth and declare judgment for the dispute that is admitted in the court of law. The court is thus free to utilise any instrument that will help it in its task of investigating the truth. The Dh.writers have mentioned many such methods e.g. (i) Cross-examination(Praśna) (ii) Inference (Anumāna or Yukti) (iii) Legal proofs (Pramāṇa i.e. witness, document and possession) (iv) Divine methods.

Out of these (i) and (ii) can be included in (iii), since they work more or less as helping factors for any of the proofs comming under (iii). Āpastamba uses the word Praśna for (i) to (iii) which could be contrasted with the (iv) termed as Daiva.(Ap.D.S.II.11.3). The word Kriyā used by the later writers in its general sense as pointed out above, can be divided into two - the Mānuṣī Kriyā and the Daivī or Daivikī Kriyā[Former consists of proofs like document or ~~writ~~ witness while the latter has methods like Dhaṭa and others- points out Nār.[70] The former has three varieties witness,document and inference while the latter has nine varieties from Dhaṭa to Dharmaja. The witness has 12 varieties, document has 10, while the Anumāna has 2. The Daivikī Kriyā has 9 varieties - says Br.[71]- co-relating with the Praśna and the Daiva division of Āpastamba.

Law of Evidence - an evolution :

In primitive society, it will appear that, the disputes were decided in small social group and when proof was required, it was the divine testimony that helped the matter. Ordeal was thus ancient. Human proofs were developed later on.

70. Nār. II.28
71. Br. 1-3.

'Law of evidence, like law of procedure, grew with time. The earliest law contains very little about evidence, but as litigation in the king's court increases, the need for rules of determining truth is felt and law of proof tends to grow out of growing usage....

'when the king starts deciding disputes, his function at the start is only to determine penalty. Facts are either known or admitted or found by Competent Authority, failing that divine testimony of some form or other is sought. It is gradually that human testimony comes to be recorded and with it, the need for weighing evidence.....

'probably, the evidence of the first form of human testimony is the text of Āpastaṁba when a king is enjoined in case of doubt to ascertain the truth by Liṅga or by Daiva (Ap.II.29.6) and then is instructed to question a person described as 'Sarvānumato mukhyaḥ' which seems to imply that the king does not examine any witnesses cited by either party but calls a person of eminence holding a leading position by common consent and asks him about facts. In an early stage of society where communities were small and matters of litigation comparatively simple, facts of such disputes would be generally known, so that when the community itself is judge, no question of fact would normally rise. When after this, the king becomes judge, he might ascertain facts by simply calling one of the leading members of the community as in this rule of Āpastaṁba. In this respect, this particular rule of Āpastaṁba probably represents an earlier state of affairs than one that is found in Gautama. Gautama(13.1) contemplates the determination of the truth by examining witnesses.

Qualifications of witnesses as prescribed by Gautama (13.2) do not indicate however that any person who knows facts can be a witness but only those that are worthy to be trusted by the king. This apparently is reminiscent of the earlier requirement in Āpastaṁba of a Sarvānumato Mukhyaḥ. But this is no longer one and we find that many witnesses are examined instead....

As a natural evolution, after this, witness comes to be cited by the parties and gradually elaborate rules for the testimony of witnesses appear. Documents as evidence are not contemplated either in Gautama or in Āpastaṁba. It however appears in Vasiṣṭha who not only refers documentary evidence but goes further to distinguish different kinds of documents.

As documentary and oral evidence rise in importance and practical rules for testing such evidence are evolved, the divine testimony recedes to background.'[72]

We can thus see how the various proofs are gradually developed. It is rather important to note that the Dh.works in general begin with the law that is advanced one. Even the earliest Dh.works describe king as the dispenser of justice. Proofs like witness and document are born and concept of a legal dispute is much clear. Under these circumstances, if ordeal is to be evaluated it must be done from the legal point of view only. Explaining the Gautama (13.3), the commentator makes a clear distinction between a legal oath and an ordinary or a popular oath. It must be pointed out that only legal oath comes under the perview of the Dh. writers. There are no fixed

---

72. N.C.Senagupta : Evolution of ancient Indian law. p.61

rules for the popular oaths. They do not become the topic of discussion for these writers and are best known through the practice of the people.

The Dh.writers have taken a realistic view in evaluating the ordeal. They recognise the merits contained in it, though they are fully aware of the weaknesses of the method.

We shall firstly see how ordeal as a means of proof is being recommended by these writers.

These writers have accepted ordeal mainly as a popular method. As a social custom it was nearer to the people. It was full of practical utility and possessed psychological merit. A legal dispute should ideally be settled by means of legal proofs, but when it was not possible to proceed with the seen proofs, it was preferable to solve it through any other satisfactory means and the ordeal which possessed many merits was naturally found to be most suitable. Gautama thus pointed out to the view of some thinkers who believed that the truth could be established even by means of oath.[73] Āpastamba also points out that a king should thoughtfully consider the cases of doubt through various means such as cross-examination and the ordeal.[74] Manu points out that the truth must be reached at even by oaths(Śapathenāpi) if the dispute between two litigating parties could not be settled through witnesses.[75]

It will be observed that these rules only give a sanction to the use of ordeal. They do not recommend the ordeal.

---

73. शपथेनैके सत्यकर्म । GDS 13.13

74. संदेहे लिङ्गतो दैवेनेति विचित्य । Āp.D S. II.29.6

75. Manu : VIII.109.

Viṣnu recommends that in very serious matters like treason (Nṛpadroha) and heinous action (Sāhasa), a king can use ordeal according to his free will, but in all other disputes based on money (i.e. Civil disputes), he can use it in accordance with the gravity of the offence which must be measured in terms of gold.[76]

Here we find the use of ordeal being channalised. Ordeal was getting recommended in most serious or in all criminal cases. In civil cases however it was accepted with obvious limitations.

Yāj. points out that document, possession and the witnesses are the proofs. Ordeals can be used only when any of these are not available.[77] For the first time thus, we find that a positive statement or a definite rule is made regarding the use of ordeal. The rule given by Yāj. is accepted ~~by~~ widely. It is the basic condition which is to be observed before resorting to the ordeal. Later writers have elaborated this rule. When no witness is available in the dispute of the litigating parties, that dispute should be investigated by various types of oaths and ordeals - points out Nār.[78] Nār. specifies certain cases which are either of very confused nature or in which no evidence is generally available e.g. the instances taking place in deep forests, in lonely places, in the interior of the house, or the case questioning the chastity of woman and so on. All these cases are discussed by us elsewhere(Ch.IV). These should be investigated by divine proofs. Kāt. also says that the divine proof cannot be available when the human proof can do the job. He also gives specific cases in which free use of ordeal is recommended.[79]

---

76. ~~Manu~~ Viṣnu, IX.2-3.
77. Yāj. II.22
78. Nār. 247
79. Kāt. 218,229.

Br. and Pit. also have mentioned the general rule regarding the use of ordeal.[80]

Commentators and Digest-writers have explained this rule in all its aspects. Explaining the word 'api' in Śapathenāpi in Manu VIII.109(quoted above), Vyavahāramātṛkā thus points out that 'the case not having witnesses' should be taken only as illustrative. It should include all the human proofs in general. The word 'api' signifies that the ordeal should be taken as a last resort.[81]

Explaining Yāj.II.22, Viśvarūpa points out that 'if the truth is established by the seen proofs like documents etc., everything is alright, but when these proofs are not proper, sufficient or satisfactory, ordeal should be resorted.[82]

Rule of using ordeal in the absence of other proofs is thus found amended in due course. (i) 'Absence of proof' is extended to the cases having insufficient or unsatisfactory proofs. (ii) Certain cases(mostly criminal) are sorted out in which no proof is generally available. Ordeal is recommended in such cases. (iii) Free use of ordeal is recommended - even if the other(human) proofs be available - in highly criminal cases concerned with the life and death of the person. These are the cases which form exceptions to the general rule.[82A.]

---

80. Pit.1.

81. असाक्षिकेष्विति सकलदृष्टप्रमाणाभावार्थम्। 'शपथेनापि' इत्यपिशब्देन गत्यन्ताभावाद्दिव्यमिति दर्शयति। Vyavahāramātṛkā quoted by DK p.435

82. यदा हि दृष्टैरेव लिखितादिभिस्तत्त्वावगतिस्तदा सर्वं सुस्थमेव। अथ तु तानि व्यस्तानि समस्तानि वा न सान्ति, विद्यमानान्यपि न पारितोषक्षमाणि तदा वक्ष्यमाणदिव्यानामन्यतमेन तत्त्वावगमादाविरोधः। Vis. on Yāj. II.22

82A. मानुषाभावे एव दिव्येन निर्णयः इत्यौत्सर्गिकम्।
अस्य चापवादो दृश्यते प्रक्रान्ते इति। Mit. on Yāj. II.22.

Evidential value of the various proofs :

(I) Need for using a powerful proof -

Kāt. points out that one should always try to use powerful means and let go the weaker one. If that is not done, justice might be withheld since the weaker one might not be able to do its job, while the former one would not be available as it is already discarded.[83]

Kāt. lays down certain rules about preference ~~of~~ among the several means of proof e.g. (i) Conventional usages of the associations of traders, of guilds(of artisans) and of groups(of Brāhmaṇas) can be best proved by documents and not by ordeals nor by witnesses. (ii) Enjoyment (or possession) is weightier in making(the use of) door and ways as well as in the cases of watercourses and alike(i.e. in the cases of easements) and not writing nor witnesses. (iii) In the cases of things promised to be given but not given, or the disputes of the servants with masters or in the matters of taking back a thing after it is sold or when a person having purchased a thing does not pay the price, in gambling and prize-fighting - the means of proof should be witnesses and not documents nor ordeals.[84] Mārīcī states that as regards to the sale, mortgage, gift or partition of immovable property a document(should be executed as it) enables the person (in whose favour it is executed)to acquire clear title and freedom from doubt(even after the lapse of years)[85].

83. Kāt.221. This practically propounds the same rule as that of constructive res judicata contained in explanation 4 to section 11 of the Indian Civil Pro.Code(of 1908)-Hist.of Dh.Vol.III p.306.

84. Kāt.225-228.

85. स्थावरे विक्रयाधाने विभागे दान एव च ।।लेखितेनानुषा।सिद्धिमाविसंवाद एव च ।।
quoted by VP. p.141

It is in consonance with this that the Indian Legislature(in the Transfer of Property Act IV of 1882)requires writing and registration as regards to sale,mortgage and gift of immovable property. Hist.of Dh.Vol.III p.306.

Nār. points out special characteristics of each Pramāṇa as follows : A document is always strong, witnesses are strong as long as they are alive, possession becomes stronger as the time passes.[86] The comparative strength of the several kinds of evidence is well put by Br. 'Witnesses are superior to inference(circumstantial evidence), a document is superior to witnesses, and undisturbed possession for three generations is superior to all these.[87]

(II) Ordeal not on par with the human proof :

(i) Ordeal is a weaker proof. It is never given preference to the human proofs.

(a) Kāt.(218) says- If one party produces the human proof and the other asks for the divine one, one should always accept the human proof and not the divine one.

Aparārka explains this as follows - If A says that he can prove by human proof that B owes him a hundred rupees and if B says that he can disprove the claim by ordeal, the judge should accept A's stand.[88]

(b) If the human proof proves only a part of the claim and the divine proof proves the whole of it, one should prefer and resort

---

86. लिखितं बलवन्नित्यं जीवन्तश्चैव साक्षिणः । काक्षातिहरणाद्भुक्तिरिति धारिकाविनिश्चयः ॥
Nār. IV·75.

87 अनुमानाद्धरः साक्षी साक्षिभ्यो लिखितं गुरु। अध्याहृता त्रिपुरुषी भुक्तिरेभ्यो गरीयसी ॥
Br quoted by Vyavahāramātṛkā (DK p 410)

88. यदा प्रथमवादी ब्रूते 'सुवर्णसहस्रं मे धारयतेऽयमिति मानुषेण प्रमाणेन साधयामीति, उत्तरवादी तु ब्रूते 'नाहं सुवर्णसहस्रं धारय' इति दिव्येन विभावयामीति.....
Apar. on yāj. II·22

to the former only, but never the latter. (Kāt.219).

If A claims that B has not returned him one hundred ruppes which he has taken from him on loan with interest and that he can prove the claim by producing witnesses, and if B points out that he would not accept it since there is no proof regarding the amount of money or the rate or the condition of interest on it and that he can disprove the whole of the transaction claimed by A by means of ordeal, the judge should accept the human proof even if it proves only a part of the claim.[89]

It should however be pointed out that the part of the claim to be proved by the human proof must be a substantial part of the whole claim and not the trifling one.[90]

(ii) Ordeal is never considered on par with the human proof :

(a) Though the Dh.writers have included the divine means of proof along with the other proofs and have enlisted them together, this should not lead us to believe that both the types of proofs are equal in importance, points out VN. Ordeal does not form an equal option to the human proofs. It is always to be used in the absence of the human proofs.[91]

---

89. यद्यपि प्रधानैकदेशसाधनं मानुषं संभवति तथापि न दैवमाश्रयणीयम् । यथा रूपकशतमनया वृद्ध्या गृहीत्वायं न प्रयच्छति-इत्याभियोगापह्नवे ग्रहणसाक्षिणः सन्ति । नो संख्यायां वृद्धिविशेषे वा अतो दिव्येन भावयामीत्युक्ते तत्रैकदेश-विभावितन्यायेनापि संख्यावृद्धिविशेषसिद्धेर्न दिव्यस्यावकाशः ।
Mit. on Yāj. II-22

90 Kāt, 222

91 दैविकी नेति न पूर्वोक्तेषु सुल्याविकल्पः । किंतु पूर्वप्रमाणाभाव एव / VN p 73

(b) A very subtle distinction is made between the human proofs and the divine ones. It will appear that the human proofs are termed as Pramāṇas(the legal proofs), while the divine trials are termed as methods(Kriyā). The word Kriyā, as we have seen above, is a general term denoting any means that would help the decision. Ordeal is in general referred to as Daivī or Daivikī Kriyā. In contrast with this daivikī kriyā, the human proofs are also called as Mānusī kriyā no doubt, but they are in addition Pramāṇas also. Pramāṇa is a technical term which denotes the legal proofs which are three in number i.e. witness,document and possession. Dh.writers have constantly kept in mind this distinction between a Pramāṇa and a Kriyā. Divya is a kriyā but technically it is not a pramāṇa (i.e. a legal proof).

(i) Yāj. has very clearly brought out this distinction between the Pramāṇa and Divya in his famous stanza : Pramāṇam Likhitam etc.(II.22).

(ii) We have seen above that Nār. and Bṛ. have brought out characteristic feature of each of the pramāṇas. They have not referred to the Divya in this list.

(iii) Vyāsa has given 8 means to decide a case. These are (1) Legal proofs (Pramāṇas) (2) Inference(Hetu) (3) Previous character of the accused person or the convention of the country (Carita) (4) Oath(Śapatha) (5) Royal order (Nṛpājñā) and (6) Compromise between the parties (Vādisampratipatti)[92]. VP here points out that you must take the word Pramāṇa in this stanza equal to the three Pramāṇas. This would make the number of the means eight as mentioned by the writer. This means that the

92. Vyāsa.1.

number and the kinds of the Pramāṇas were fixed. Ordeal was not a Pramāṇa.[92A]

(iv) Divya could of course be taken as legal when the legal proofs were not available. 'Dṛṣṭapramāṇasyābhāvanirṇaye sati evam divyam pramaṇī-kartavyam', observes Subodhini explaining Mit. on Yāj.II.22. We should like to stress the Cvī form (Pramāṇīkartavyam) used by the commentator, which shows that Divya is really not a Pramāṇa.

(c) A distinction is made between the judgement derived from the divine proofs and the one derived from the legal proofs. The former is known as Dharmanirṇaya and the latter as Vyavahāranirṇaya. It has been pointed out that the latter is powerful than the former one.(Vide Br. 41).

(III) We thus find that Dh.writers have stressed in various ways the superiority of the human proofs. The merits contained by the divine method are however not overlooked.

We have seen above that the ordeal was a deep-rooted custom. It was nearer to the people. It was a useful means forwards practical justice. As a means of proof, Dh.writers brought out following characteristic features of the ordeal.

92A. (i) प्रमाणत्रयं सतर्कोपबृंहणमनुमानं चारितादिचतुष्टयमित्यष्टविध-हेतुकत्वान्निर्णयस्याष्टविधत्वम्। VP p.87

(ii) प्रमाणैरित्यत्र लेखितसाक्षिभुक्तीनां प्रत्येकं विवक्षा।
Vyavahāracintāmaṇi quoted by DK p.235.

(i) One cannot decide a case when no evidence is available or when the judicial investigation gets withheld because of conflicting evidence. Under such circumstances, ordeal becomes inevitable since there is no way left out, points out Vyavahāramātṛka (vide f.n.81).

(ii) A characteristic feature of the ordeal according to Mit. is that it proves the positive aspect of the proposition and at the same time disproves the negative of it.[93]

(iii) As a result we find that it can freely be used by either of the party i.e. the plaintiff or the defendant-any of the two can willfully undergo the trial. We can thus relax the rigid rules regarding the onus of proof(-in cases of Mithyā, Pratyavaskandana and Prāṅnyāya types of Uttaras) which sometimes bring undue limitations in the judicial proceeding and can decide the case in a free atmosphere of the ordeal.[94]

(iv) Human proofs have their own limitations i.e. they could be twisted according to the desire or the vision of the person, while the divine proof cannot be twisted and can give objectively right results.[95]

---

93 न मानुषप्रमाणवद्दिव्यं प्रमाणं भावैकगोचरमपि तु भावाभावावविशेषेण गोचरयति। Mit. on yāj. II·96.

94. अतश्च मिथ्योत्तरे प्रत्यवस्कन्दने प्राङ्न्याये वाऽर्थिप्रत्यर्थिनोरन्यतरस्येच्छया दिव्यं भवतीति। Mit. on yāj. II·96.

95 B- 33

(v) Ordeal is full of psychological merit. It helps bringing out the inner mind of the person undergoing the trial.[96]

...ooOoo...

मानुषप्रमाणानां परिशुद्धानां सद्भावेऽपि आशयदोषोद्भावनद्वारा तेषां मूलशैथिल्य-
माधाय दिव्याङ्गीकारैः निर्णेतृभिः सभ्यैः प्राड्विवाकेन व्यवहारस्य सोत्तरत्व-
माधायावष्टम्भेन निर्णयः कर्तव्यः। SV. p 218