



REQUIREMENTS FOR ADMISSIBILITY OF ELECTRONIC EVIDENCE

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ABSTRACT: With the advent of technology our day-to-day lives have undergone enormous changes. The 21st century has been nothing less of a technological revolution and the tremendous rise and development in the field of technology have transposed the means of communication and modes of storing information. While earlier letters and postcards were the only means of communication and written materials were the modes of data storage, increasing reliance is now being placed on electronic means of communication and data storage such as emails, mobile phones, computers, tape recorders, etc. This advancement in technology has led to changes in the legal system especially in the law of evidence as new materials have been generated in the form of electronic evidence which need to be considered as valid evidence admissible in a Court of law. Thus it resulted in the culmination of the Information Technology Act, 2000¹ and subsequent changes in The Indian Evidence Act, 1872².

KEYWORDS: Electronic evidence, admissibility, IT Act, Computer system

INTRODUCTION:

The 21st century has seen a technological revolution that captivated the entire world just as India. The emergence of the IT Industry opened gates to a digital world in which Internet offers each individual equivalent chances to acquire data, store information, investigate etc. with innovative applications. This increased dependence on electronic modes of data storage, online communications and data capacity in advanced structures has certainly led to a change in Indian Legislations. E-Evidence can now be found in text messages, electronic documents, call logs, computerized pictures, account databases, emails, tape records etc. With the goal to streamline the evidentiary practices and empower the Indian Courts to manage the enhancements in

¹ The Information Technology Act, 2000 (Act 21 of 2000)

² The Indian Evidence Act, 1872 (Act 1 of 1872)

innovation the Indian Evidence Act, 1872 was modified by way of introducing The Information Technology Act, 2000. By virtue of the introduction of the 2000 Act, sections 3 and 59 of the Evidence Act were revised and sections 65A and 65B were inserted to in order to consolidate the admissibility of electronic evidence. With the advancements in law, the courts in India have also set precedents regarding validity and admissibility of electronic evidences in a court of law.³ Likewise, Indian Judges have started to recognise the intrinsic 'electronic' nature of proof, which includes understanding the tolerability of such evidences, and the need of change in the law of the such that electronic proof can be produced and recorded under the steady gaze of the court.⁴

ELECTRONIC EVIDENCE & THE INDIAN EVIDENCE ACT 1872:

Section 2(t) of the Information Technology Act 2000⁵, defines electronic record as, “data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated microfiche”.

The electronic form of evidence has been defined in the Explanation to Section 79A of the Information Technology Act, 2000 as, “any information of probative value which is stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.”⁶ The incorporation of the Information Technology Act, 200 led to some major changes in the Indian Evidence Act, 1872, and electronic form of evidence was recognized under the act.

Section 3 of the Indian Evidence Act, 1872 was amended and electronic records were incorporated under 'documents' produced for the inspection of the Court and thus can be interpreted as 'evidence'. The meaning of 'Admission' has been explained in section 17 of the Indian Evidence Act and was later changed to, “a statement, oral or documentary or contained in electronic form which suggests an inference to any fact at issue or of relevance” thus acknowledging the admissibility of electronic evidence.

A new section 22A was inserted in the Evidence Act by the Information Technology Act which states, “Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic records produced is in question.” Hence none of the corroborative is valid in a court of law until and unless the genuineness of the electronic record is in question. Facts relating to the content of documents or electronic records cannot be proved by means of oral evidence and can be either by primary evidence that is the document itself or secondary evidence such as certified copies of the said document.⁷

³ Vivek Dubey, “Admissibility of Electronic Evidence: an Indian Perspective” 4 *Forensic Research & Criminology International Journal* (2017).

⁴ Tejas Karia, Akhil Anand, Bahaar Dhawan, “The Supreme Court of India re-defines admissibility of electronic evidence in India” 12 *Digital Evidence and Electronic Signature Law Review* (2015)

⁵ The Information Technology Act, 2000 (Act 21 of 2000) s.2(t)

⁶ The Information Technology Act, 2000 (Act 21 of 2000) s. 79

⁷ The Indian Evidence Act, 1872 (Act 1 of 1872), ss 59, 61,62,63

SECTION 65 OF INDIAN EVIDENCE ACT

The IT Act of 2000 inserted section 65A and 65B in The Indian Evidence Act,1872 as evidentiary rules for electronic records. Section 65B predominantly provides for the admissibility of electronic records. Subsection (1) of 65B states that, “Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.”⁸ Subsection (2) enlists the conditions for admissibility of a computer output, as follows:

- i. “The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used;
- ii. Information was fed in computer in the ordinary course of the activities of the person having lawful control over the computer;
- iii. The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy;
- iv. Information reproduced is such as is fed into computer in the ordinary course of activity.”⁹

Which computers shall be considered as a single computer has been dictated in subsection (3) of section 65B as follows:

- i. “By a combination of computers operating over that period; or
- ii. By different computers operating in succession over that period; or
- iii. By different combinations of computers operating in succession over that period; or
- iv. In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.”¹⁰

Subsection 4 of the section mandates that in order to submit an evidence by virtue of the said section a certificate must be issued doing the following:

- i. “identifying the electronic record containing the statement and describing the manner in which it was produced;
- ii. giving the particulars of device;
- iii. dealing with any of the matters to which the conditions mentioned in subsection (2) relate, and shall be signed by a person occupying a responsible official position in relation to the

⁸ The Indian Evidence Act,1872 (Act 1 of 1872), s. 65B (1)

⁹ The Indian Evidence Act,1872 (Act 1 of 1872), s.65B (2)

¹⁰ The Indian Evidence Act (Act 1 of 1872), s.65B (3)

operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.”¹¹

The intention of the Legislature regarding the enforceability of Section 65B can be fortified by the insertion of the non obstante clause “Notwithstanding anything contained in this Act” to 65B, which ensures that production or exhibition of electronic forms of evidence should strictly comply with the provisions of the said section.

ELECTRONIC EVIDENCE AND THE INDIAN COURTS

The Supreme Court and other High Courts in India have time and again attempted to structure the practical implications of acknowledging electronic records as evidence under Section 65B. There is no doubt that the Indian Evidence Act, 1872 is, by its very nature, is an ‘ongoing Act’.¹²

In **Som Prakash vs. State Of Delhi**,¹³ it was appropriately noted by the Supreme Court that “in our technological age nothing more primitive can be conceived of than denying discoveries and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific aids to prove guilt.” Judicial changes are essential to curate an efficient and advanced problem solving approach and proper justice delivery.

In **SIL Import, USA vs. Exim Aides Exporters, Bangalore**,¹⁴ the Supreme Court ruled that “Technological advancement like facsimile, Internet, e-mail, etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.”

In **State V. Mohd Afzal**¹⁵ the court was of the opinion, “Computer generated electronic records is evidence, admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act.” However, the Delhi High Court also noted, “The certificate under section 65B (4) was merely an alternative mode of proof and compliance with section (1) and (2) of section 65B is sufficient to make admissible and prove electronic records..... oral evidence was equally sufficient and the lack of certificate was not an automatic bar.”¹⁶

In **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru**¹⁷, the prosecution placed reliance on intercepted calls as evidence to prove the accused’s involvement in the conspiracy. To this the accused contented that no reliance can be placed on such evidence due to the absence of certificates required under section 65B (4) of

¹¹ The Indian Evidence Act (Act 1 of 1872), s.65B(4)

¹² (1990) 2 SCC 481

¹³ AIR 1974 SC 989

¹⁴ (1999) 4 SCC 567.

¹⁵ (2003) 107 DLT 385.

¹⁶ ibid

¹⁷ (2005) 11 SCC 600.

the Evidence Act. The Division bench of the Supreme Court in its judgement held “call records of cellular phones are admissible in evidence under section 7 of the IEA and there is no specific bar against the admissibility of the call records of telephones or mobiles.” Further the bench noted that such calls can also be relied upon as secondary evidence under sections 63 and 65 of the Indian Evidence Act:

“Irrespective of the compliance with the requirements of Section 65B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub section (4) of section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, sections 63 and 65.”¹⁸

In the said case the Supreme Court also opined, “requirement of certificate under Section 65B is not always mandatory and irrespective of the compliance of the requirements of Section 65B, there is no bar to adducing secondary evidence under other provisions of the Evidence Act, namely Section 63.” This judgement is in congruence with the well settled established legal doctrine, “All the rules of procedure are the ‘handmaids of Justice’. The language employed by the draftsmen of procedural law may be liberal or stringent but the fact remains that the object of prescribing procedure is to advance the cause of Justice.”¹⁹

The Supreme Court took a withdrawal from the above understanding in the case of **Anvar P.V. Vs. P.K. Basheer**²⁰. It observed, “An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”²¹ The court specifically mentioned, “The Judgment of *Navjot Sandhu*²², to the extent, the statement of the law on admissibility of electronic evidence pertaining to electronic record of this court, does not lay down correct position and is required to be overruled.”²³ Printouts and hardcopies of electronic records are susceptible to manipulation, misuse and exploitation and hence the Indian Evidence Act, mandates a special procedure to prove admissibility of such evidence. The apex court examined this possibility and ultimately concluded that certificate under Section 65B is an essential condition to prove the legality and admissibility of evidence via electronic record in a judicial proceeding.

The above ruling was further thinned out in the case of **Shafhi Mohammad v. State of Himachal Pradesh**²⁴ where the court was of the opinion, “electronic evidence is admissible under the Act. Sections 65A and 65B

¹⁸ ibid

¹⁹ Sambhaji and Others vs. Gangabai and Others, (2008) 17 SCC 117

²⁰ (2014) 10 SCC 473

²¹ ibid

²² Supra note 9

²³ Supra note 12

²⁴ (2018) 2 SCC 801

are merely clarificatory and procedural in nature and cannot be held to be a complete code on the subject. A party, who is not in the possession of a device which has produced an electronic document, cannot be required to produce a certificate under section 65B of the IEA.....The requirement of producing a certificate under section 65B can be relaxed in the interest of justice by the court.” However in a recent judgement of **Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal**²⁵ the Supreme Court overruled the above acumen and held that the above law is incorrectly stated and is in teeth with the *Anvar Case* and clarified that to consider secondary evidence as admissible in a proceeding it must go through the drill under section 65B.

The Delhi High Court while deciding a matter regarding the evidentiary aspect of computer discs observed in the case of **Dharambir vs. Central Bureau of Investigation**²⁶, “While there can be no doubt that a hard disc is an electronic device used for storing information, once a blank hard disc is written upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programs, it is possible to find out the precise time when such changes occurred in the hard disc. To that extent even a blank hard disc which has once been used in any manner, for any purpose will contain some information and will, therefore, be an electronic record.” While discussing whether tape records are electronic evidence the apex court in **R.M Malkani vs. State of Maharashtra**²⁷ held, “Tape is primary and direct evidence of what has been said and recorded. Electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation.... a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence.” In **State of Maharashtra vs. Dr. Praful B Desai**²⁸ the Supreme Court opined, “Video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence.” In the said case a witness was examined through video conferencing with due permission of the Court wherein it was concluded that there is no justification for not considering examination of a witness by video conferencing as a significant part of electronic evidence.

In a recent case of **Jagdeo Singh vs. The State and Ors**²⁹, where admissibility of a CD and CDR containing intercepted phone call and presented without a certificate u/s 65B of the Evidence Act was in question, the court observed, “Secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and

²⁵ 2020 SCCOnLine SC 571

²⁶ 148 (2008) DLT 289.

²⁷ AIR 1973 SC 57

²⁸ AIR 2003 SC 2053.

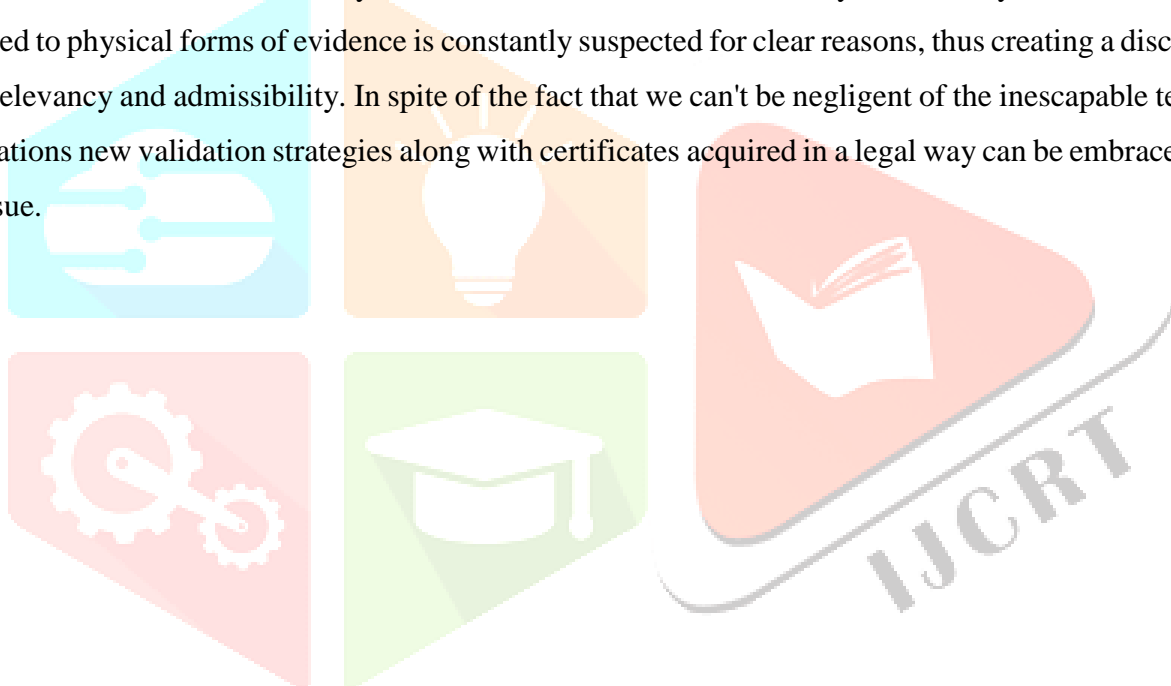
²⁹ MANU/DE/0376/2015.

cannot be looked into by the court for any purpose whatsoever.” In **Jagjit Singh v State of Haryana**³⁰ the Supreme Court considered interview transcripts from various news channels such as Zee News, Aaj Tak and Haryana News of Punjab Today as valid digital evidence and determined that the evidence placed on record was admissible in proving the contents of a CD .

Thus, it may be evidently noted that Indian Courts and judges are placing greater reliance on electronic and digital evidence given that they are unadulterated and starting to perceive and value the significance of such evidence in legal proceedings.

CONCLUSION:

By the introduction of The Information Technology Act, 2000, subsequent changes in The Indian Evidence Act, 1872, further amendments and the precedents set by the Indian Courts, the law regarding the admissibility of electronic forms of evidence is clear that valid certificate u/s 65B of the Evidence Act, is of utmost importance to be admissible in any court of law. However, the factuality and validity of electronic records, as opposed to physical forms of evidence is constantly suspected for clear reasons, thus creating a discord between their relevancy and admissibility. In spite of the fact that we can't be negligent of the inescapable technological innovations new validation strategies along with certificates acquired in a legal way can be embraced to address the issue.



³⁰ (2006) 11 SCC 1.