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EVIDENTIARY VALUE OF ELECTRONIC EVIDENCE UNDER INDIAN EVIDENCE ACT,1872

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ABSTRACT

The idea and definition of electronic evidence are addressed at the introduction of this article. The evidence act's principles have also been clarified with relation to changes made for electronic evidence. The admissibility of electronic evidence has been discussed in relation to a number of judgements of the Indian Supreme Court. Finally, the protections and protocol that the Indian judiciary must use while handling electronic evidence.

INTRODUCTION

The use of technology tools like computers, smartphones, and other technologies is at the heart of the digital world. There are many possibilities to perpetrate crimes in the digital age. A significant fact or an in-question fact may be supported or refuted using such information in electronic form. Evidence is described as "**anything that tends to prove or deny the existence of an alleged fact**" in the Black's Law Dictionary. As a response, the Information Technology Act, 2000 (often known as the IT Act), was enacted. Electronic evidence is now admissible in both criminal and civil proceedings due to amendments proposed to the Evidence Act. In an Indian court of law, only oral evidence and documentary evidence are acceptable forms of proof. Event of changes, electronic records are now included under the Evidence Act's definition of "evidence." Electronic records are those that are "data, record or data generated, image or sound stored, received or transmitted in an electronic form or micro film or **computer-generated** micro fiche," according to the IT Act. Electronic evidence can be any data that has been kept or transferred electronically and has some value as evidence. So, after the certain amendment made section 65b and many other provisions was inserted in the Indian Evidence ACT, 1872 which tell about the admissible of electronic evidence in courts. The requirements for the admissibility of electronic records, such as eSignatures & digital documents, as evidence in legal proceedings are outlined in Section 65B of the Evidence Act. *State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru*: - In this instance, the issue of admissibility revolved around the printouts provided in support of the call logs and the accuracy of the statement made by a non-expert describing the computer's operational state. The phone records, which are a significant piece of evidence because it was a high-profile case of terrorism, need to be thoroughly examined. The defence attorney for the accused argued that the standards of section 65B (4) of the IEA had not been met and that the witnesses who attested to the computer's functionality could not be relied upon

because they lacked relevant expertise.¹

¹ 65B. Admissibility of electronic records. —

(1) 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

- (2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: —
- (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer; (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—
- (a) by a combination of computers operating over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) by different combinations of computers operating in succession over that period; or
 - (d) 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, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, —
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the 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 sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.
- (5) For the purposes of this section: -
- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
 - (b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
 - (c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation. — For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

EVOLUTION OF ADMISSIBILITY OF ELECTRONIC RECORDS AS EVIDENCE IN INDIA

Only tape recording and videography could be considered electronic records in the 1950s. In the case *State of Maharashtra v. Prakash Vishnurao (1979)* Mane, electronic records were accepted as proof in 1960. In this decision, the Supreme Court established guidelines for the admissibility of electronic records. The guidelines provide that the recording must be played in the courtroom, the voice must be examined by a professional, and the person who recorded the incident and the person whose voice was captured must be separated. Prior to 2000, the courts did not generally accept the electronic record as evidence. Although a certificate under Subsection 4 of Section 65B of the Indian Evidence Act, 1872 was made optional by the Court in *Archana Rastogi v. Vivek Rastogi (2007)*, the Court began accepting electronic evidence after 2000 in accordance with the procedure outlined in Section 65 of the Indian Evidence Act. Nowadays, practically all types of electronic records—including CCTV video, ATM receipts, bank statements, e-forms, government orders, digital signatures, etc.—are accepted as electronic proof.²

THE LEGAL SITUATION PRIOR TO THE YEAR 2000

Before the year 2000, courts would apply Sections 61 to 65 of the Act when determining whether electronic records were admissible in court. Electronic records are unquestionably documents, and they can have their contents verified using either primary or secondary evidence. According to Section 62 of the Act, main evidence occurs when the original document is presented to the court for review. An original document must be produced in order to demonstrate its contents. The necessity to provide secondary evidence arises if the original document is not available. *In Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, a larger bench of the Supreme Court has finally resolved this confusion (2020). where it was decided that the process outlined in Sections 65A and 65B constitutes a code in and of itself and supersedes any general principles pertaining to the admissibility of electronic evidence. Therefore, in order to introduce electronic

² TOMASO BRUNO & ANR. V. STATE OF UTTAR PRADESH

The present case dealt with the death of a foreigner who came along with other foreigners, being charged for his murder but were acquitted as the CCTV footages being the best evidence were not shown which could have easily proven the guilt of the accused persons, instead of beating around the bush on the prosecution side. The judgment delivered in Tomaso Bruno case degraded the position of law with respect to the admissibility of secondary electronic evidence and this brings a direct conflict between this case and the Anvar P.V. case

evidence, the provisions of Rules 65A and 65B shall be observed. One could wonder who is responsible for producing the certificate required by Section 65B of the Indian Evidence Act of 1872. A competent and capable person must issue a certificate under Section 65B. 16 It is made clear that the individual delivering the certificate is doing so in their "official capacity" by the language of Section 65B, which states that they must be "occupying a responsible official position." Instead, then insisting on the person who created the certificate when he was a member of the organization, if the person providing the certificate has left the organization and someone else possesses that "official capacity," that person can be forced to give a deposition in court. Some of the amendments done in the Indian Evidence Act which defines the admissibility of electronic in different manner and they are as follow:-

Section 65a of Indian Evidence Act defines: -Special rules regarding electronic record evidence are contained in section 65A. Electronic records' contents may be proven in compliance with section 65B's rules.

Section 67A of the Indian Evidence Act. Proof of a digital signature:- If a subscriber's electronic signature is claimed to have been added to an electronic record, it must be proven that it is that subscriber's electronic signature, with the exception of secure electronic signatures.

Section 85A of the Indian Evidence Act provides the following presumption regarding electronic agreements: "The Court shall presume that every electronic record purporting to be an agreement³ and containing the electronic signature of the parties was so concluded by affixing the electronic signature of the parties⁴." This is stated in Section 85B of the Indian Evidence Act. Except in the case of a secure electronic record or a secure 15 electronic signature, nothing in this section shall create any presumption relating to the authenticity and integrity of the electronic record or any 1 electronic signature. The secure 15 electronic signature is attached by the subscriber with the intent of signing or approving the electronic record.

Section 85C Presumption regarding Electronic Signature Certificates: If the certificate was accepted by the subscriber, the court will presume, absent evidence to the contrary, that the information listed in the certificate is accurate, with the exception of any subscriber information

³ Ins by Act 21 of 2000, s. 92, and the Second Schedule (w.e.f. 17-10-2000).

⁴ Subs by Act 10 of 2009, s. 52(e), for "digital signature" (w.e.f. 27-10-2009).

that has not been verified.

Proof relating to the verification of a digital signature under Section 73A of the Indian Evidence Act:-The Court may order one or more of the following in order to determine whether a digital signature is authentic: (a) that person, the Controller, or the Certifying Authority must produce the Digital Signature Certificate; (b) any other person must use the public key listed in the Digital Signature Certificate in order to verify the authenticity of the digital signature that is purported to have been applied by that person.⁵

Indian Evidence Act Section 90A: Five-year presumption regarding electronic records:- The court may assume that the electronic signature that purports to be the electronic signature of any specific person was so applied by him ⁶or any person he or she authorised in this behalf when any electronic record that purports to be five years old is produced from any custody that the court in the particular case considers proper.⁷

In *Anvar P.V vs. P.K.Basheer & Ors (2014)*, the Supreme Court overturned this position by ruling that Sections 65A and 65B are codes in and of themselves, and that the procedure outlined in those Sections should be followed in order to introduce electronic evidence. In *Shafhi Mohammad v. The State Of Himachal Pradesh, (2018)*, the Supreme Court overturned this position once more by ruling that Sections 65A and 65B's procedural requirements do not always have to be met because they are simply procedural in nature.

In case of Arjun vs. Kailash the Hon'ble Supreme Court observed that section 65B distinguishes between the primary electronic record, or the device where the information was originally saved, and the secondary copies that are made from that primary electronic record in the Arjun v. Kailash case. In this instance, the Court has ruled that when a secondary copy of a primary electronic record is produced in front of the court, the requirement of a certificate under section 65B must be satisfied. If an original electronic record is produced, the criteria for a certificate under section 65B don't have to be fulfilled.

⁵ Ins by Act 21 of 2000, s. 92 and the second Schedule (w.e.f. 17-10-2000).

⁶ Ins. by Act 21 of 2000, s. 92 and the Second Schedule (w.e.f. 17-10-2000). ⁷ Subs. by Act 10 of 2009, s. 52, for Digital Signature (w.e.f. 27.10.2009).

COMPARISON OF LEGAL POSITION BETWEEN UNITED KINGDOM AND INDIA OF ELECTRONIC EVIDENCE

Famous judges Justice Nariman and **Justice V. Ramasubramanian** noted that section 65B of the Indian Evidence Act was a duplication of section 5 of the U.K. Civil Evidence Act, 1968, with a few minor alterations. In 1995, the provision 5 of this law was repealed. Thus, when section 65B was added to the Evidence Act in 2000, the Indian judiciary embraced a clause that had already been eliminated in the United Kingdom.

Following a recommendation from the Law Commission, section 5 of the U.K. Civil Evidence Act was repealed. The Law Commission noted that the constant advancement of computer technology is the framework under which section 5 is being considered out of date and that there is no need for a separate area regarding computer-generated documents. India shared the same perspective and took the same action to solve issues more effectively.

The digital evidence was previously labelled as hearsay because there were no scientific testing to verify its veracity. However, with the widespread adoption of technology in the modern era and crime driven by the use of technology, digital evidence has become more common⁷. There have been more exceptions to the rule against using digital evidence or electronically stored material in court in the United States as it has become more prevalent.⁸ In order for some types of data to be considered acceptable, the US has established two criteria: (a) Background evidence, and (b) Foreground evidence. Information retrieved from network devices like routers, authentication records like physical access systems, classification engines, etc., and audit information like system, application, and security logs are all examples of electronically or digitally stored information/evidence that have been created as part of routine business operations and are used to establish facts and conclusions during an investigation. As well as any electronic and digitally stored information that has been created which result to object which support the investigation to identify perpetrators.

Whereas in India it should be highlighted that unlike oral or physical evidence, the hearsay rule⁹ does not apply with the same rigour or clarity to documentary evidence in India. This is so that

⁷ Article 20(3), Constitution of India, 1950

⁸ Paul Roberts, Adrian Zuckerman, (2004). Criminal evidence. Oxford Univ. Press.

⁹ Prashant Mali, Electronic Evidence/Digital Evidence & Cyber law in India,

the document can speak for itself because it is established law that spoken evidence cannot establish a document's contents¹⁰. As a result, oral testimony regarding the veracity of a document cannot be offered in its absence, nor can it be compared to the document's contents. Although the document itself serves as the document's primary evidence, it was recognised that there would be circumstances where primary evidence isn't available.

CAN INSTAGRAM CHAT BE COUNTED AS AN EVIDENCE?

In recent years, courts have accepted social media posts as admissible evidence. The courts must adhere to strict procedures when analyzing the authenticity and reliability of various chats or messages and contents in various social media platforms, chatting platforms, and electronic mails because electronic evidence can be handled, edited, exploited, or influenced in some cases. The court can refuse to admit evidence items that are still available on chats and other electronic media as evidence if there is any dispute about the trustworthiness or authenticity of the evidence. Screenshots can be taken of the talks that take place on online message platforms and used to document them. The onus of proving the veracity of these evidences rests with the party contesting it, even if in this method these chats or dates are recorded as photographs that can be readily altered or tampered with. The information from Instagram Chat can now be submitted as evidence in court under section 65B of the Indian Evidence Act. In a case, the court also received information from Instagram's parent corporation. It demonstrates that they can be used in court in a certain sense.¹¹

In other decisions, judges noted that if WhatsApp messages meet certain requirements under Section 65B of the Evidence Act, they may be accepted as evidence. The Hon'ble Supreme Court alluded to the WhatsApp messages that were presented as evidence during the hearing of a petition appealing an injunction order in the matter of *Ambalal Sarabhai Enterprise Ltd v KS Infraspace LLP Limited and Another*.

In a recent case involving *Chirag Dipakbhai Sulekha v. the State of Gujarat*, the court issued a ruling that referred to WhatsApp messages as remarks on granting bail that might be considered

¹⁰ May, Richard, and Steven Powles. 2007. Criminal evidence. London: Thomson/Sweet & Maxwell

¹¹ Largent v. Reed 24, the plaintiff claimed that a recent accident had made her life rather complicated, despite the defendant producing Facebook posts and images of the event that proved she had gone to the gym and was in a good mood while going about her daily activities. She was ordered to provide the court with her Facebook login information so that it can conduct additional research on the issue.

prima facie. Additionally, the Commercial Court of Delhi has used WhatsApp communications to support a judgement in a case under section 65B. There have recently been reports concerning using WhatsApp messages in divorce proceedings.

In the Rakesh Kumar case, the Punjab and Haryana High Court also noted that WhatsApp conversations have no admissible evidence until they are provided with a certificate in accordance with section 65B of the Indian Evidence Act. When deciding on a bail request for an NDPS case, Justice Jayshree Thakur's one-judge bench made such observation. When arguing against the application, the NCB emphasized a few of the claimed WhatsApp conversations of the accused and provided screenshots of those that were allegedly related to the petitioner's possession of contraband.

To recap, we can argue that the usefulness of electronic records as evidence is debatable because they can occasionally be altered or fabricated, necessitating a very thorough examination by the courts before relying on them. In actuality, the WhatsApp talks should be saved for improved dependence on them in the future together with certification and an expert's counsel to check their credibility.

CONDITION

The following requirements must be satisfied before an electronic record is acceptable as evidence under Section 65B Evidence Act:

- A certificate identifying the electronic record containing the statement must be included with it.
- The certification must explain how the electronic record was created
- The certificate must include information on the device used to create that record
- The certificate must show that the data or electronic record offered as evidence was created by a computer or other electronic device.

(That was commonly utilized in the course of business to store or process such information;)

- at the moment that was relevant & was functioning properly, the certificate must be signed by a person holding a position of authority over the operation of the device,
- If any information contained in an electronic record that is printed in paper, stored, recorded, or copied in optical or magnetic media, produced by a computer, shall be

deemed as a document.

- Such documents shall be admissible as evidence without further proof or production of the original if the owner or person responsible for the computer, who recorded the evidence gives a certificate under Section 65B(4) of Indian Evidence Act, 1872 stating
- The working condition of the computer during the recording of evidence.
- It's lawful use by the owner or operator.
- A description of the regular use of computers.
- If the information is fed into another computer in the ordinary course of activity, a description about it.

REQUIREMENT OF A CERTIFICATE UNDER SECTION 65B (4)

In this case, it was held that the condition precedent under section 65B (4)¹² is procedural in nature, which need not be satisfied when the person who is responsible to produce the certificate under section 65B (4)¹³ doesn't have access to the electronic device. This confusion which was created by these judicial pronouncements on the scope and ambit of section 65B was clarified in the case *Arjun v Kailash. The Shahfi Mohammad Case* was likewise rejected by the Supreme Court in this instance. The Evidence Act, the Civil Procedure Code, and the Criminal Procedure Code all contain provisions that give the Court the authority to order the production of any document during a trial¹⁴. Accordingly, it was determined in *Arjun v. Kailash* that if a person is unable to get a certificate under section 65B (4), they may submit an application with the judge asking for an order directing the production of the certificate. The Court came to the conclusion that "the requirement imposed by Section 65B (4) was mandatory, and not voluntary, and is a condition precedent before secondary copies of an electronic record can be admitted." The prerequisites listed in sections 65B (2) and 65B (4) must all be met.

¹² the Honorable Supreme Court has expressed opposing opinions over how to read Section 65B. It was made clear what section 65B included in the case of *Arjun v. Kailash*

¹³ The Supreme Court's earlier decisions, *Anvar P V v. P K Basheer* [hereinafter referred to as *Anvar v. Basheer*], *Shahfi Mohammad v. State of Himachal Pradesh* [hereinafter referred to as *Shahfi Mohammad Case*], and *Tomaso Bruno v. State of Uttar Pradesh* [hereinafter referred to as *Tomaso Bruno Case*] [hereinafter referred to as *Tomaso Bruno Case*].

¹⁴ The Hon'ble Supreme Court in the *Tomaso Bruno Case* didn't refer to the earlier judgment of *Anvar v Basheer* and held that "section 65B was not a complete code". The view taken by the Supreme Court in the *Shahfi Mohammad Case* created more confusion on the issue whether the requirement of a certificate under 65B (4) is mandatory or not.

CONCLUSION

Every action result in the creation of an electronic record as society moves more and more toward the virtual world, which is a larger version of the real world. The most important piece of evidence in every crime today is now electronic records. As a result, there should be no room for doubt regarding whether such a piece of evidence is admissible. The original electronic record and the computer output can be brought before the Court as evidence, according to a position that has occasionally been defined by Indian courts.

