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# **ADMISSIBILITY OF ELECTRONIC RECORDS AS EVIDENCE WITH SPECIAL REFERENCE TO THE INDIAN EVIDENCE ACT, 1872**

Authored By - Mayank Dagar

## **ABSTRACT:**

This research paper states the concept and meaning of electronic records. Further, the principles of the Indian Evidence Act have been explained with amendments in regard to electronic records and their admissibility. Several decisions of the Indian Supreme Court and other Courts have been cited in reference to the admissibility of electronic records. The drawbacks of the admission of electronic records as evidence have also been stated in this research paper. Finally, the complexity of electronic records and the difficulty faced by the Indian judiciary in handling electronic evidence are stated in the conclusion.

## **INTRODUCTION:**

The e-commerce sector in India has modernized drastically in the past decade. With the advancements in e-commerce reaching new heights, electronic evidence has also come to become more accurate and reliable. Nowadays, e-commerce has become part of our daily lives including communication and documentation. With such robust use of electronic gadgets and software, it has become almost impossible for the Indian courts to ignore evidence submitted to them in electronic form. All sorts of documentation and entries are done in electronic form. Take an example, even the attendance taken in the classrooms is recorded electronically rather than through the usage of pen and paper. But a problem arises when we start admitting electronic records as evidence in judicial proceedings. Doubts begin to arise concerning the authenticity of the electronic evidence submitted. The party against whom the electronic evidence is submitted mandatorily challenges the admissibility of the electronic evidence and this creates a whole new burden for the judicial bench to judge the admissibility of the electronic evidence. The admissibility of electronic evidence has the

power to completely change the outcome of the ongoing civil suit or trial. Electronic evidence carries the burden of being very easy to fabricate and falsify and anyone with sufficient computer knowledge can use the electronic records according to his or her own advantage. Overwriting CDs and DVDs, erasing hard disk memory, falsifying website addresses, and sending fake emails or SMS are all sorts of misdeeds that can be undertaken to fabricate and falsify electronic records.

## **MEANING OF ELECTRONIC EVIDENCE:**

An electronic record is any kind of information that can be stored and transmitted in a digital form. Electronic evidence is any electronic record that is valid to be submitted in court by a party to support their claim in a suit or a trial. Though the parties are free to submit any electronic record as evidence in the court, it is the court that decides whether the record is admissible as evidence by checking the authenticity of the same.

Section 92 of the Information Technology Act, 2000 amended Section 3 of the Indian Evidence Act. The phrase “All documents produced for the inspection of the Court” was amended and replaced with “All documents including electronic records produced for the inspection of the Court”. Another amendment that took place was in Section 59 of the Indian Evidence Act. The term “Content of documents” was substituted with “Contents of documents or electronic records” in Section 59 and two entirely new legislations were introduced in the form of Sections 65A and 65B that discuss the admissibility of electronic evidence in the court of law.

Though amendments have been made to incorporate electronic records as evidence in the court, still it has not been put on the same stature as that documentary evidence in Section 61 to 65 of the Indian Evidence Act which discusses the ways in which documentary evidence will be termed to be admissible were not amended to include electronic documents.

## **ELECTRONIC RECORDS AND THEIR ADMISSIBILITY AS STATED UNDER DOCUMENTARY EVIDENCE:**

The two main legislations governing the admissibility of electronic records are Section 65A and 65B of the Indian Evidence Act.

*“Section 65A. Special provisions of electronic records.*

The contents of electronic records may be proved in accordance with the provisions of Section 65B.”

***“Section 65B. Admissibility of electronic records.”<sup>1</sup>***

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record that is printed on 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 subsection (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 subsection (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

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<sup>1</sup> Indian Evidence Act, 1872, Section 65B, Acts of Parliament, 1872 (India).- Admissibility of electronic records.

(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.]

## **EVIDENCE RELATING TO ELECTRONIC RECORDS:**

Section 65A gives mere directions to Section 65B by stating that for an electronic record to be admissible in a court of law, its contents must be proved and authenticated in accordance with the provisions of Section 65B.

Section 65B states the way in which the contents of the electronic record can be proven to be authentic and in the process be termed admissible in a court of law. The authenticity of the electronic record can be proven by presenting secondary evidence that supports the claim of the authenticity of the electronic record in question. A distinct feature introduced in Section 65B is that any information that is part of the electronic record is printed on paper or stored, recorded, and copied in a digital form that can be produced by a computer will be termed to be a computer output and this computer output will be termed to be as a document under the Indian Evidence Act.<sup>2</sup> Section 65B provides for certain requirements that need to be fulfilled in order for the electronic record to be termed as evidence admissible in the court. Once the electronic record is termed as admissible there is no further need to prove its authenticity at any point of time in the trial or suit.

### **REQUIREMENTS AS TO RELEVANCY OF COMPUTER OUTPUT {S. 65-B(2)}:**

The conditions which have to be satisfied so as to make a computer output as primary evidence are stated in sub-section (2) of Section 65B. They are as follows: -

1. The computer output which contains the relevant information must be produced by the same computer which has been regularly used to store or process the same information.
2. The storage or processing of information by the computer must be undertaken by a person in a legal way and no unlawful activity must be carried out pertaining to the storage or processing of such computer output.

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<sup>2</sup> Vivek Dubey, Admissibility of Electronic Evidence: An Indian perspective, Volume 4, Issue 2, FRCIJ, 2017

3. The information should be the type of information that is computed into the computer during the ordinary course of the activities undertaken by the person in charge of doing the same.<sup>3</sup>
4. The computer in which the data or information is fed must be functioning properly while the data was being entered into it for storage and processing.
5. If the computer was not working properly then, the period of non-operation must not be such that it would affect the accuracy of the storage and processing of the electronic record in question.
6. The electronic record must only contain the information that was fed into the computer during the ordinary course of operations.

If the information was fed into several inter-linked computers or in several computers one after the other, then all these computers will be treated as a single computer during the judicial proceedings. [Section 65B (3)<sup>4</sup>]

A certificate of authentication should be presented to the court of law along with the electronic record in question. The certificate should state the manner in which the e-record is being produced, from which device it was obtained, and whether it satisfies the requirements stated in Section 65B(2).<sup>5</sup>

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<sup>3</sup> P. Padmanabh v. Syndicate Bank Ltd., A.I.R 2008 Kant 42, 2008 (1) KarLJ 153, bank attempted to recover money withdrawn from Savings Bank A/c through ATM because the withdrawal was affected at a time when there was not sufficient balance in the account of the customer, bank admitted malfunctioning of ATM. The claim was on the basis of ledger entries. The court did not accept the claim because ledger entries were not independent of ATM entries.

<sup>4</sup> Indian Evidence Act, 1872, Section 65B(3), Acts of Parliament, 1872 (India).- 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.

<sup>5</sup> Indian Evidence Act, 1872, Section 65B(4), Acts of Parliament, 1872 (India)

## **ADMISSIBILITY OF AUDIO C.D. AS ELECTRONIC EVIDENCE**

The admissibility of Audio C.D. as electronic evidence was discussed in the case of G. Shyamala Ranjini v. M.S. Tamizhnathan<sup>6</sup>. The case was pertaining to the dissolution of marriage where the husband alleged that he was abused and threatened by his wife. The evidence for the same was recorded on an Audio C.D. and the C.D. was termed as evidence by the Court subject to the condition that the wife will be given an opportunity for cross-examination whenever the C.D. is presented in the court as evidence.

## **ADMISSIBILITY OF VIDEO CONFERENCING AS ELECTRONIC EVIDENCE:**

The case of Amitabh Bagchi v. Ena Bagchi<sup>7</sup> was a case for claim of pendente lite (while a suit is pending) maintenance, video conferencing with the husband to record his statement was allowed since the husband was living in America. The Court was of the view that there was no law that barred the examination of a witness through video conferencing. The husband's statement was allowed to be admitted in the trial as an electronic record.

## **ELECTRONIC EVIDENCE AND THE SUPREME COURT OF INDIA:**

In the case of Som Prakash vs. State Of Delhi<sup>8</sup>, the Supreme Court has rightly observed 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.”* Also, the court reiterated its stance on the admissibility of electronic records as evidence in the case of State vs. Mohd. Afzal and Ors<sup>9</sup> held that electronic records generated through a computer will be termed to be admissible in a court of law if the electronic record is proved to be genuine in the manner prescribed under Section 65B of the Indian Evidence Act, 1872.

<sup>6</sup> G. Shyamala Ranjini v. M.S. Tamizhnathan, A.I.R. 2008, C.R.P.(PD)No.2657 of 2007 and M.P.No.1 of 2007

<sup>7</sup> Amitabh Bagchi v. Ena Bagchi, A.I.R. 2005 Cal. 11, (2004) 3 CALLT 263 HC

<sup>8</sup> Som Prakash vs. State of Delhi, A.I.R 1974 SC 989, 1974

<sup>9</sup> State vs. Mohd. Afzal and Ors, 2003 VIIAD Delhi 1, 107 (2003) DLT 385, 2003 (71) DRJ 178, 2003 (3) JCC 1669

The Indian Evidence Act is very stringent in allowing printed copies of electronic information to be accepted as evidence in court. This is because printed copies of any evidence are extremely vulnerable to being manipulated by somebody for their own benefit during a trial. To prevent such manipulation of the evidence and the court trial, electronic evidence is only allowed to be admitted in the court if it strictly adheres to all the provisions of Section 65B. Any electronic record without a certificate of its authenticity will not be admissible as electronic evidence in any trial as specified by the Delhi High Court in the case of Jagdeo Singh vs. The State and Ors<sup>10</sup> since not having a certificate goes against the provisions specified in Section 65B.

### **CONCLUSION:**

Indian judiciary has been very specific in not giving any leniency to any electronic evidence that is presented before the court without following the proper procedure as mandated under the Indian Evidence Act, 1872. Anyone who intends to submit emails, SMS or any other electronic record as evidence will have to strictly comply with the provisions of the 1872 Act. Right now, the Indian Evidence Act either accepts or rejects the electronic evidence on the basis of whether the evidence follows the pre-requisite requirements of Section 65B of the Indian Evidence Act. Computer generated electronic records are treated in a more critical manner as compared to documentary evidence. This scenario needs to be shifted towards treating both on the same platform since electronic records being presented as evidence has become the norm in today's modern digitalized world. With the recent advancements in technology, it has now become possible for the courts to analyze and judge whether the evidence is credible or not even if it deviates a bit from the pre-requisite requirements listed under Section 65B of the 1872 Act. If the courts can have a more open approach towards acceptance of electronic evidence, then surely it will be of great help in deciding cases in a faster manner.

The admission of electronic evidence along with its advantages can also be complex at the same time. It is and will be upon the courts to see whether the evidence fulfills the three essential legal requirements of authenticity, reliability, and integrity.<sup>11</sup>

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<sup>10</sup> Jagdeo Singh vs. The State and Ors. MANU/DE/0376/2015

<sup>11</sup> Tejas Karia, Akhil Anand & Bahaar Dhawan, The Supreme Court of India Re-Defines Admissibility of Electronic Evidence in India, 12 DIGITAL EVIDENCE & ELEC. Signature L. REV. 33 (2015).