
ADMISSIBILITY OF ELECTRONIC EVIDENCE: LAW & PROCEDURE

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ABSTRACT

The rapid growth of information and technology has brought a massive change in day to day life. The world of computers revolves around the use of information and communication through digital devices such as computers, mobiles, phones, printers etc. and at the same time this development of technology has an extreme impact in the legal principles in the field of evidence. It has created materials that are considered as evidence in the court of law. Since electronic evidence as compared to traditional evidence requires specialised and expert training in the field of cyberspace, it is therefore very crucial to understand the concept of electronic evidence.

This article analyses the law relating to electronic records, its relevancy and admissibility in the court of law through various judicial pronouncements and legislative provisions.

I. INTRODUCTION

The greatest achievement of mankind is the innovation of computers and digitalisation. The world of computers or rather virtual world revolves around the use of information and communication through digital devices such as computers, mobile phones, printers, digital cameras etc. and at the same time virtual world is not far from its misuse. It creates many opportunities for the commission of offences. These offences may include phishing, hacking, identity theft, child pornography etc. The information in the electronic form is relevant in proving or disproving a fact or fact in issue that constitutes evidence before the court of law. According to Black's Law dictionary, the meaning of evidence is "something that tends to prove or disprove the existence of an alleged fact. The term electronic evidence is said to be a piece of evidence which is generated by electronic processes like text documents, e-mails, images, database files, deleted files, data back-ups, tape drives, CD- ROMs etc. The integrity, reliability and authenticity of electronic evidence have always been a debatable issue because of the nature of being tampered with. Because of this the investigating agencies and judiciaries are facing issues with regard to the admissibility of electronic evidence. Since electronic evidence substantially impact the outcomes of any judicial proceedings and requires specialised and expert training in the field of cyberspace, it is therefore very crucial to understand the concept of electronic evidence, its relevancy and admissibility in the court of law through judicial pronouncements and legislative provisions.

II. INFORMATION TECHNOLOGY ACT, 2000 AND INDIAN EVIDENCE ACT, 1872

Prior to the amendment of the Indian Evidence Act, 1872 (hereinafter IEA), it did not have any specific provisions regarding the admissibility of digital evidence. It was also not par with the modern technological development. Therefore, to recognize these transactions carried out through electronic data interchange, amendment was needed. Thus, it led to the enactment of Information Technology Act, 2000.¹ The Information Technology Act, 2000 (hereinafter IT Act) is based on the United Nations Commission on International Trade Law (UNCITRAL) model Law on Electronic Commerce. It provided amendments to the Indian Evidence Act, 1872, the Indian Penal Code, 1860 and the Banker's Book Evidence, 1891.

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

The IT Act introduced the concept of “electronic evidence”. Section 2(1)(t) of the IT Act defines the term “electronic record” as data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.² Section 4 of the IT Act recognises the validity of electric records and section 6³ provides that electronic records and signatures can be used in the Government and its agency. Hence they are admissible in the court of law.

The explanation attached to Section 79A of the IT Act, the term “electronic form of evidence” means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.⁴ Court can therefore permit the use of digital evidence during the course of trials of a civil or criminal case.

The IEA was amended and the term “evidence” was amended to include “electronic record”, therefore allowing the admissibility of digital evidence. Prior to the amendment, Sections 63 and 65 of the IEA mainly dealt with and provided for the conditions for the admissibility of electronic evidence. Section 63 contains the various types of secondary evidence and Section 65 provides for the circumstances in which secondary evidence can be given. According to these provisions, the electronic evidence gathered through various means was deemed as “document” and their printed reproductions were considered as secondary evidence which required certification from the competent signatory. After the amendment to the IEA, Section 65-B exclusively deals with the admissibility of electronic records.

III. ADMISSIBILITY OF ELECTRONIC RECORDS UNDER INDIAN EVIDENCE ACT, 1872

According to Section 65-A of the IEA,⁵ the contents of electronic records may be proved in accordance with the provisions of section 65-B. Section 65-B 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 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

² Section 2(1)(t), The Information Technology Act, 2000.

³ Section 6, The Information Technology Act, 2000.

⁴ Section 79A, The Information Technology Act, 2000.

⁵ Inserted by Act 21 of 2000, S. 92 and Sch.II (w.e.f. 17-10-2000).

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.⁶ Section 65-B of IEA mentions certain grounds for admissibility of electronic evidence. Sub-Section (2) of Section 65-B⁷ lists the conditions in respect of a computer output. The conditions are- (a) at the time of the creation of the computer output, the computer that produced it must have been in regular use; (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) the computer was operating properly; (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of said activities.

The conditions laid down in Section 65-B (2) talk about the integrity of information and integrity of computer system. It ensures that there has been no unauthorised use of the data and the device was functioning properly, ensuring accuracy and genuineness of the reproduced data. Sub-section (4) of Section 65-B of the IEA provides for the certificate of authenticity. It allows the proof of the conditions set out in Section 65-B (2) by means of a certificate issued by the person under Section 65-B (4) and certifying the contents in the manner set out in Sub-Section. The certificate must 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 through which the data has been produced. The certificate under this provision must identify the electronic record containing the statement and describing the manner in which it was produced. It must give 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. The certificate must also deal with any of the matters to which conditions mentioned in sub-section (2) relate.⁸ The main purpose of certificate is to ensure the integrity of the source and authenticity of the data, so that the Court can rely on those evidences because electronic evidences are more prone to tampering and alteration.

Now, a very important question arises whether a certificate under Section 65-B (4) of the IEA is mandatory or not?

⁶ Section 65-B(1), The Indian Evidence Act, 1872.

⁷ Section 65-B(2), The Indian Evidence Act, 1872.

⁸ Section 65-B (4), The Indian Evidence Act, 1872.

In the case of *STATE (NCT) OF DELHI V. NAVJOT SANDHU@ AFZAL GURU*,⁹ the Supreme Court dealing with the admissibility and evidentiary value of electronic evidence, held that irrespective of the compliance of the requirements of Section 65-B of the IEA which is a provision dealing with the admissibility of electronic records, there is no bar to adducing secondary evidence under other provisions of the IEA, namely Section 63 and Section 65. It was observed in this case that even if a certificate required under Section 65(4) of the IEA is not filed, that does not mean that secondary evidence cannot be given in such circumstances under relevant provisions, namely Section 63 and Section 65. In this case, the Supreme Court did not give importance to Section 65-B as envisaged by the legislature.

For the first time the importance of Section 65-B was recognised and appreciated by the Supreme Court in the case of *ANWAR PV V. PK BASHEER*.¹⁰ In this case, the earlier decision of Supreme Court in *NAVJOT SANDHU*¹¹ was overruled. The Supreme Court held that an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Therefore, in case of CD, VCD, Chip, etc., the same shall be accompanied by the certificate required under Section 65-B obtained at the time of taking document, without which the secondary evidence is inadmissible. It was also observed in this case that Section 65-B of IEA begins with a 'non-obstante clause' and would override the general law stated under Sections 63 and 65. Section 65-B of the IEA is a special provision dealing with the admissibility of electronic records. The marginal note of Section 65-A holds that the contents of electronic records has to be proved in accordance with provisions of Section 65-B of the IEA. This observation was again reiterated in *HARPAL SINGH @ CHHOTA V. STATE OF PUNJAB*.¹²

However, pursuant to the ruling of the Supreme Court in *ANWAR PV* case, the Supreme Court dealing with a similar factual scenario held in the case of *SHAFHI MOHAMMED V. STATE OF HIMACHAL PRADESH*,¹³ the applicability of procedural requirement given under Sub-Section (4) of Section 65-B of the IEA of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and the court may relax such procedural requirement ,

⁹ AIR 2005 SC 3820.

¹⁰ (2014) 10 SCC 473.

¹¹ *STATE (NCT) OF DELHI V. NAVJOT SANDHU@ AFZAL GURU*, AIR 2005 SC 3820.

¹² AIR 2016 SC 5389.

¹³ (2018) 2 SCC 801.

whenever interest of justice so justifies. Thus, the requirement of certificate under Section 65-B(4) is not always mandatory.

Due to the dichotomy of decisions in between *ANWAR PV* and *SHAFHI MOHAMMAD* case, the matter was referred to a larger bench of the Supreme Court for clarification on the point. Finally, in the case of *ARJUN PANDITRAO KHOTKAR V. KAILASH KUSHANRAO GORANTYAL & ORS.*,¹⁴ the Supreme Court overruled its earlier decision of *SHAFHI MOHAMMAD'S* Case and held that where original electronic record is produced in Court, it is admissible without any certificate under Section 65-B (4) of the IEA; every output of electronic record is admissible in evidence without production or proof of original, provided it has satisfied the procedural requirement under Section 65-B (4); and it would be sufficient if such certificate is stated to the best of knowledge and belief of the person stating it. The observations made in this case were- the appropriate stage for the production of certificate must be produced at the time of presentation of plaint or written statement as the case may be and oral evidence in place of such certificate is not admissible.

WHETHER THE CERTIFICATE UNDER SECTION 65-B (4) MUST BE CONTEMPORANEOUS?

Initially the view was that the certificate had to be filed along with the reproduction of the electronic record and not subsequently but this view has been modified. In the case of *KUNDAN SINGH V. STATE*¹⁵ and *K RAMAJAYAM @ APPU V. INSPECTOR OF POLICE*,¹⁶ the court held that even if the certification is not obtained at the time of collection of electronic evidence, the same can be given through the person who was in charge of the Server at the time of trial. Again in the case of *LOKAYUKTA POLICE STATION, BENGALURU V. M.R. HIREMATH*¹⁷, the court held that the need for production of certificate under Section 65-B would arise when the electronic record is sought to be produced in evidence at the time of trial. It was further held that absence of certificate accompanying electronic record is a curable defect.

IV. RELEVANCY AND ADMISSIBILITY OF ELECTRONIC EVIDENCE IN INDIA

¹⁴ 2020 SCC OnLine SC 571.

¹⁵ 2015 SCC OnLine Del 13647.

¹⁶ 2016 CrLJ 1542 (Mad).

¹⁷ AIR 2019 SC 2377.

TAPE RECORDS

In the case of *R.M MALKANI V. STATE OF MAHARASHTRA*¹⁸, the Supreme Court held that tape is primary and direct evidence of what has been said and recorded. The judgment made it clear that the electronically recorded conversation is admissible if the conversation is relevant to the matter in issue and the accuracy of the recorded conversation has to be proved. It was further held by the court that the voice of the person alleged to be speaking has to be duly identified by the maker of the record or by other person who knows it.

VIDEO-CONFERENCING

Now, the question arises whether a witness can be examined by means of a video conference. This was answered in the case of *STATE OF MAHARASHTRA V. DR. PRAFUL B. DESAI*.¹⁹ The Supreme Court observed in this case that 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 court also observed that the legal requirement for the presence of the witness does not mean actual physical presence. The court allowed the examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an important part of electronic evidence.

COMPACT DISC (CD)

Whether a compact disc containing audio recordings can be admissible in evidence or not? The court while dealing with this issue held that amended definition of “evidence” in Section 3 of IEA read with the definition of “electronic record” in Section 2(1)(t) of the IT Act, include a compact disc.²⁰ A CD is admissible in evidence upon filing of certificate under Section 65-B.

V. PRESUMPTIONS UNDER INDIAN EVIDENCE ACT, 1872

After the amendment made to the Indian Evidence Act, 1872 there are certain presumptions with regard to electronic evidence which were inserted in the IEA. Section 85-A of the IEA²¹ states that the court shall presume that every electronic record purporting to be an agreement

¹⁸ AIR 1973 SC 57.

¹⁹ AIR 2003 SC 2053.

²⁰ K.K. VELUSAMY V. N. PALANISAMY, (2011) 11 SCC 275.

²¹ Inserted by Act 21 of 2000, S. 92 and Sch.II (w.e.f 17-10-2000).

containing the electronic signatures of the parties was concluded by affixing the electronic signatures of the parties. In view of Section 85-B of IEA, the court shall presume that the secure electronic record has not been altered since the specific point of time to which the secure status relates, unless contrary is proved. Similarly, Section 85-C of IEA, provides for the Presumption as to Electronic Signature Certificates. It states that the court shall presume the information listed in an Electronic Signature Certificate is correct, except for information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber, unless contrary is proved. In addition to this, Section 81-A provides for the presumption of genuineness of every electronic record purporting to be the official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody.²² Further, Section 88-A of the IEA, provides for the presumption as to electronic messages. This section enables the Court to presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person by whom such message was sent. It includes SMS, MMS etc., of messages sent through social networking sites like Twitter, Whatsapp etc.

VI. CONCLUSION

It is concluded that due to the rapid growth in the field of information and technology, there has been an extreme effect on legal principles particularly within the area of evidence. It has brought a necessity to change the law concerning information technology and principles of admissibility of electronic evidence both in the civil and criminal matters.

The use of electronic records has gone a long way with the enactment of Information Technology Act, 2000 and the amendments in the Evidence Act. There are various kinds of electronic evidence which are being used in the court of law for the admissibility purpose. Over the years, the court has taken into consideration all forms of computer related evidence, however, the computer forensics required to be developed so that the false and fabricated

²² Section 81-A, The Indian Evidence Act, Inserted by Act 21 of 2000, S. 92 and Sch.II (w.e.f 17-10-2000).

electronic evidence are made admissible and the impediments in trial procedures can be successfully overcome.

India has still a long way to go and it has to keep pace with the technological development taking place globally and new challenges posed in the area of admissibility and appreciation of electronic evidence.