
AN ANALYSIS OF THE ADMISSIBILITY OF ELECTRONIC EVIDENCE

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ABSTRACT

In this day and age, the value of electronic evidence cannot be overstated. India being one of the fastest digitizing nation in the globe. The legal profession is likewise transitioning to digital legal work. Courts online are being created. There are two terminology which is electronic record and electronic certificate has been controversial. However, there are some requirements specified in the Indian Evidence law that must be met before such electronic evidence can be admitted. The Indian courts interpreted admissibility of electronic evidences in various cases which contradicted the literal rule of statutory interpretation and created lot of confusions which was clarified later cases but the technique used to investigate and analyse information stored or obtained from the media electronically for presentation in a court of law is extremely important and in contrast to conventional or traditional evidence, electronic evidence requires specialised training and expertise in their field. Therefore, researcher discusses in this paper brief overview of admissibility of electronic evidences and use of electronic record. And the researcher also will examine the state of the law in India and criticisms raised while interpreting the cases which created confusion to later judgments and how much weight should be given to such digital evidence in court as the judiciary moves toward digitization.

Keywords: Electronic Evidence, Digitization, Indian Evidence Act,

INTRODUCTION

As a society and as individuals, we rely more on technology nowadays. This dependence is becoming more and more per day. The nation is concentrating on the "Digital India" programme. The legal profession is likewise transitioning to digital legal work. Electronic courts are now established. The question of how much weight should be given to such digital evidence in court emerges as the court moves toward digitization. However, because they are a significant source of evidence, their admissibility cannot be outright rejected because there is a chance they were altered. Such evidence must be approved after being traced back to its precise source and having its replication verified. With the implementation of the Information Technology Act, 2000 and the corresponding revisions to the Indian Evidence Act, 1872, electronic evidence is now admissible. Supreme ¹Court clarified law on admissibility of electronic evidence without certificate under section 65B of Evidence Act, 1972², but there is an inconsistency in the judgments.

LEGAL PROCEDURE FOR ADMISSIBILITY OF ELECTRONIC EVIDENCE

According to Section 65B(1), if the requirements are met, any information contained in an electronic record that has been stored, recorded, or copied as a computer output shall also be deemed to be a "document" and shall be admissible as evidence without further justification or the production of the originals.³ The requirements that must be met for the information to be classified as a "computer output" are outlined in Section 65B (2). And the Section 65B(4), a certificate identifying the electronic record and providing specifics about the device used to make the electronic record must be produced if the electronic evidence is to be used in any court case. A person holding an official position of responsibility for the operation of the relevant device, or someone in charge of the relevant actions involved, must sign this certificate. Evidence of the authenticity of the certificate will be provided by this signature⁴.

The law pertaining to the admissibility of electronic evidence has been clarified by the Supreme Court in one of the landmark case *Anvar P.V v. P.K Basheer*⁵, it was said that before any secondary electronic evidence in the case can be entered into the record, the court has mandated

¹ The Information Technology Act, 2000

² Section 65B of the Indian Evidence Act, 1872

³ Section 65B(1) of the Indian Evidence Act, 1872

⁴ Section 65B(2) and section (4) of the Indian Evidence Act, 1872

⁵ *Anvar P.V v. P.K Basheer*, SC 180 AIR 2015

that it should be accompanied by a certificate under section 65B of the Indian Evidence Act. Primary electronic evidence does not have to satisfy this requirement. Electronic evidence is very prone to manipulation, change, and transposition. A certificate under section 65B is required to verify the electronic evidence's origin and authenticity⁶.

SECTION 65B PREVIOUSLY BEEN INTERPRETED BY THE COURTS

The Delhi High Court first reviewed the standard for deciding whether electronic evidence is admissible under Section 65B in the case *State v. Mohd. Afzal and Ors*⁷. The Division Bench of the High Court had to decide in this case whether the accused's call records had been admitted in compliance with Section 65B. Contrarily, the appellant-accused in this case asserted that the certificate required by Section 65B (4) had not been provided. The call records that the prosecution is relying on would not be admissible because this was a criteria that had to be met. The prosecution disagreed, arguing that the key witnesses' testimony satisfied the requirements of Section 65B (2). The High Court in this case agreed with the prosecution's position and noted that adherence to Sections 65B (1) and (2) was adequate justification for the admission of electronic evidence. The most important thing to remember from this case is that the necessity of a certificate, as stated in Section 65B (4)⁸, is just one of several different techniques that can be trusted to authenticate electronic evidence. In *State (N.C.T. Of Delhi) v. Navjot Sandhu*⁹, the Supreme Court further upheld the Delhi High Court's ruling in *Mohd. Afzal*. The Supreme Court in this instance accepted the testimony of the witnesses for the prosecution in order to authenticate the call records in accordance with Section 65B. The Supreme Court stated that the certificate under Section 65B (4) was not a requirement and provided its justification for the same. Additionally, the disputed electronic record could be admitted in accordance with Sections 63 and 65 even in the lack of a certificate. This led to questions about whether the Supreme Court's ruling violated the *generalia specialibus non derogate* principle¹⁰, which states that the special law must take precedence over the general law. Moving forward, the Supreme Court considered this argument in *Anvar* case.

⁶ Ibid

⁷ *State V. Mohd Afzal* 107 DLT 385 2003

⁸ *Supra* note 4

⁹ *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru* 11 SCC 600 2005

¹⁰ *Ibid*

CONFLICT OF JUDGMENTS

In the case of *Anvar P.V v. Basheer*¹¹ the Hon'ble supreme court said that, when the question of section 65B(4) of evidence law, the electronic certificate is a condition precedent for admissibility of evidence by way of electronic record. Which means that to prove any electronic evidence origin and authenticity its mandate to submit electronic certificate along with the electronic evidence. Later on after 4 year there was another case called *Shafhi Mohammad v. State of H.P*¹², the division bench had clarified that the section 65B(4) requirement of a certificate is merely a procedural, it can be relaxed by the court whenever the interest of justice so justifies and one circumstances in which the interest of justice so justifies would be where the electronic device is produced by a party who is not in possession of such device, as a result of which such party would not be in a position to secure the requisite certificate. In the latest judgment *Arjun Panditrao Kotkar v. Kailash kushanrao Gorantyal*¹³, court gave certain clarification in relation to admissibility of electronic device, the 3 judges bench said that, holding the shafi Mohammand¹⁴ judgment is to be incorrect, the Hon'ble Supreme Court said if any electronic devices is not in the person's possession he don't have the requirement to produce the electronic certificate is wholly incorrect. Supreme Court also mentioned that if the electronic device isn't in a person's possession, an application can always be made to a judge to produce the certificate in case a person refuse to give the certificate. The Supreme Court further clarified the confusion created in the *Anvar P.V* case, that it's not necessary to produce the electronic certificate if the original document itself is produced¹⁵. This can be done by the owner of a laptop, computer, tablet or mobile phone by stepping into the witness box and proving that the concerned device, on which that the original data is stored is owned and operated by him. In cases where the computer happens to be a part of a comport system or computer network and it becomes impossible to physically bring such system or network to the court the only means of providing information contained in such electronic record can be in accordance with section 65B(1), together with the requisite certificate under the section 65B(4).

ISSUES AND SUGGESTIONS

If there is a chance that the computer-generated electronic record may be hampered, it cannot

¹¹ Supra note 5

¹² *Shafhi Mohammad v. State of Himachal Pradesh* 2 SCC 801 2018

¹³ *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, SCC Online SC 571 2020.

¹⁴ Supra note 12

¹⁵ Supra note 5

be completely depended upon. Additionally, by adding a clause stating that the record was created in the usual manner by a person who was not involved in the procedures and that the record protector did not control the record production, the Indian Evidence Act could be changed to prohibit some interference—at least for the purposes of making the validity of the electronic record evidence appear to be established at first glance. The possibility of record ownership would be greatly lowered by guaranteeing that the record was recorded by a meeting that was hostile to the record supporter and that the record was used against the opposing side. The law should also creatively address the requirement for the weight of the defence to disclose to the author of a report whether the records were examined, updated, or made using reliable data by a computer programme, as well as whether they were complete or not. Section 65B of the Evidence Act does not apply to the correct generation or modification of the evidence, which is a requirement of the courts. For instance, when sending an email, the sender may change the message. A third-party witness may not always be necessary for the record to accurately reflect