

Electronic Evidence

INTRODUCTION:

The Rapid development of information and communication technologies over the past decade has revolutionized both business and individual practices. Advancement of science and technology has brought the creation of Computer, Debit card, credit card, ATM, PayTm, Mobile, SMS, WhatsApp, Facebook, online transaction, card swapping at shop, etc. Much business transaction in today's world takes place through electronic modes. The worldwide explosion of electronic commerce and the developments in the computer and telecommunications sectors are deeply changing the delivery and availability of information, acts, transactions and services.

Most electronic records are, in practice, being admitted as evidence in court of law. However courts have struggled with the traditional rules of evidence, with inconsistent results. The common term "reliability" has caused confusion between the principles of authentication, best evidence and hearsay.

EVIDENCE:

Definition of 'Evidence' in Section 3, the interpretation clause of the Indian Evidence Act 1872, states:

'Evidence' means and includes –

- (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
- (2) All documents including electronic records produced for the inspection of the Court

Such documents are called documentary evidence.

ELECTRONIC RECORD:

According to section 2(1)(t) of the Information Technology Act, 2000 "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated microfiche.

ELECTRONIC EVIDENCE:

Data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system, that has the potential to make the factual account of either party more probable or less probable than it would be without the evidence

WHICH PROVISIONS DEALS WITH THE ELECTRONIC EVIDENCE?

65A – Special provisions as to evidence relating to electronic record

65B – Admissibility of electronic records.

67A – Proof as to digital signature

73A - Proof as to verification of digital signature

81A – Presumption as to Gazettes in electronic forms

85A – Presumption as to electronic agreements

85B – Presumption as to electronic records and digital signatures

85C – Presumption as to Digital Signature Certificates

88A – Presumption as to electronic messages

90A - Presumption as to electronic records five years old

131 – Production of documents or electronic records which another person, having possession, could refuse to produce.

HOW TO PROVE THE DOCUMENT BY MEAN OF ELECTRONIC?

- Regarding the documentary evidence, in Section 59, for the words “Content of documents” the words “Content of documents or electronic records” have been substituted and Section 65A & 65B were inserted to incorporate the admissibility of electronic evidence.
- Section 65B of the Evidence Act details this special procedure for adducing electronic records in evidence. Sub-section (2) lists the technological conditions upon which a duplicate copy (including a print-out) of an original electronic record may be used:
 - At the time of the creation of the electronic record, the computer that produced it must have been in regular use,
 - The kind of information contained in the electronic record must have been regularly and ordinarily fed in to the computer,
 - The computer was operating properly; and,
 - The duplicate copy must be a reproduction of the original electronic record.
- Section 65B of the Evidence Act makes the secondary copy in the form of computer output comprising of printout or the data

copied on electronic/magnetic media admissible. It provides. 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 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.

Electronic Messages:

It includes emails, SMS, MMS etc. of messages sent vial social networking sites, like WhatsApp, twitter etc. Under the provisions of Section 88A, there is a presumptions as to such messages, Section 88, 88A, 114(f) of the Evidence Act with section 26 of the General Clause Act are relevant sections for sending and receipt of email and its proof.

E-mails:

To admit emails into evidence, the proponent must show the origin and integrity of emails. He must show who or what originated the email and whether the content is complete in the form intended, free from error or fabrication. In discovery, the proponent needs to prove that the hard copy of the email evidence is consistent with the one in the computer and includes all the information held in the electronic document.

Email is a computer output of electronic record and therefore, it is to be proved in the manner prescribed in Section 65B of the Indian Evidence Act, which requires a certificate to be given by a person occupying responsible position in management of the computer.

Proof of contents of C.D:

The person intending to prove C.D. is required to prove whether the disputed C.D. was prepared by a combination of a computer operating therein or different computer operating in succession over that period or of different combination of computers. It is not necessary to examine the computer expert for the proof of C.D. in addition to the compliance of provisions of section 65B.

Proof of a photograph taken from digital camera:

As per section 2T of Information Technology Act, 2000, a photograph taken from a digital camera is an electronic record and it can be proved as per section 65B of the Indian Evidence Act.

Proof of Sms sent through mobile phone:

As per section 2T of Information Technology Act 2000, 'Mobile' is a computer and SMS in the mobile is an electronic record. So, it is to be proved as per section 65B of the Indian Evidence Act which requires a certificate issued by a person, occupying responsible position in relation to operation of that device or management of the relevant activities.

Video Conferencing:

Before a witness is examined in terms of the Audio Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen. A copy is to be made available to the other side.

IMPORTANCE OF ELECTRONIC EVIDENCE:

The use of Electronic evidence has increased in the past few decades as courts have allowed the use of e-mails, digital photographs, ATM transaction logs, word processing documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser histories, databases, the contents of computer memory, computer backups, computer printouts etc.

These various forms of Electronic evidence/ digital evidence are increasingly being used in the judicial proceedings.

Electronic evidence has played vital role in both civil and criminal cases. In civil cases also the transactions and communication of business mostly takes place through electronic and internet. All the records of the transactions and communications are recorded and stored in the electronic devices and these can be used as evidence in future when any dispute arises from those business transactions.

In criminal cases these electronic devices helps to identify the criminals and prove the charges against them. For instances, if any robbery takes place in ATM, through CCTV it can be easily identify who has done the robbery. In any criminal cases like murder, with the help of Call details records, CCTV footage, his chats with any person, audio recording, video recording etc. makes the works of investigating officer easy to find out the accused.

CASE LAWS:**1. Anvar P.V. v. P.K. Basheer And Others (2014 10 SCC 473)**

In this significant judgment, the Supreme Court has settled the controversies arising from the various conflicting judgments as well as the practices being followed in the various High Courts and the Trial Courts as to the admissibility of the Electronic Evidences. The Court has interpreted the Section 22A, 45A, 59, 65A & 65B of the Evidence Act and held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate U/s 65 B(4) of Evidence Act. It has been elucidated that electronic evidence without certificate U/s 65B cannot be proved by oral evidence and also the opinion of the expert U/s 45A Evidence Act cannot be resorted to make such electronic evidence admissible.

The judgment would have serious implications in all the cases where the prosecution relies on the electronic data and particularly in the cases of anticorruption where the reliance is being placed on the audio-video recordings which are being forwarded in the form of CD/DVD to the Court. In all such cases, where the CD/DVD are being forwarded without a certificate U/s 65B Evidence Act, such CD/DVD are not admissible in evidence and further expert opinion as to their genuineness cannot be looked into by the Court as evident from the Supreme Court Judgment. It was further observed that all these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic records sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

In the anti corruption cases launched by the CBI and anticorruption/Vigilance agencies of the State, even the original recording which are recorded either

in Digital Voice Recorders/mobile phones are not been preserved and thus, once the original recording is destroyed, there cannot be any question of issuing the certificate under Section 65B(4) of the Evidence Act. Therefore in such cases, neither CD/DVD containing such recordings are admissible and cannot be exhibited into evidence nor the oral testimony or expert opinion is admissible and as such, the recording/data in the CD/DVD's cannot become a sole basis for the conviction.

In the aforesaid Judgment, the Court has held that Section 65B of the Evidence Act being a 'not obstante clause' would override the general law on secondary evidence under Section 63 and 65 of the Evidence Act. The Section 63 and Section 65 of the Evidence Act have no application to the secondary evidence of the electronic evidence and same shall be wholly governed by the Section 65A and 65B of the Evidence Act. The Constitution Bench of the Supreme Court overruled the judgment laid down in the **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru[(2005) 11 SCC 600** by the two judge Bench of the Supreme Court. The court specifically observed that the Judgment of Navjot Sandhu supra, 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 required to be overruled.

The only options to prove the electronic record/evidence is by producing the original electronic media as Primary Evidence court or it's copy by way secondary evidence U/s 65A/65B of Evidence Act. Thus, in the case of CD, DVD, Memory Card etc. containing secondary evidence, 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.

2. **Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke SC/0040/2015**

The Hon'ble High Court of Delhi, while deciding the charges against accused in a corruption case observed that since audio and video CDs in question are clearly inadmissible in evidence, therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with co-accused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question.

3. **Jaajit Singh v. State Of Haryana (2006) 11 SCC 1**

The speaker of the Legislative Assembly of the State of Haryana disqualified a member for defection. When hearing the matter, the Supreme Court considered the digital evidence in the form of interview transcripts from the Zee News television channel, the AajTak television channel and the Haryana News of Punjab Today television channel. The court determined that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview when reaching the conclusion that the voices recorded on the CD were those of the persons taking action. The Supreme Court found no infirmity in the speaker's reliance on the digital evidence and the conclusions reached by him. The comments in this case indicate a trend emerging in Indian courts: judges are beginning to recognize and appreciate the importance of digital evidence in legal proceedings.

4. **Abdul Rahaman Kunji v. State of West Bemgal (WB/0828/2014]**

The Hon'ble High Court of Calcutta while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of Section 65B r/w Section 88A of Evidence

Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication

5. **State (NCT of Delhi) v. Navjot Sandhu (AIR 2005 SC 3820)**

There was an appeal against conviction following the attack on Parliament on December 13 2001. This case dealt with the proof and admissibility of mobile telephone call records. While considering the appeal against the accused for attacking Parliament, a submission was made on behalf of the accused that no reliance could be placed on the mobile telephone call records, because the prosecution had failed to produce the relevant certificate under Section 65-B(4) of the Evidence Act. The Supreme Court concluded that a cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken was sufficient to prove the call records.

Conclusion

The admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent judgment of the Apex Court and various other High Courts as discussed above. The proposition is clear and explicit that if the secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the deposition of the witness in the court of law cannot be looked into by the court. However, there are few gaps which are still unresolved as what would be the fate of the secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act cannot be taken and the accused cannot be made witness against himself as it would be violative of the Article 19 of the Constitution of India.