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Case Comment on Shafhi Mohammad Vs. The State of Himachal Pradesh [SLP(Crl.) No. 2302 of 2017]

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ABSTRACT

"To espouse an alliance between law and science is to advocate solution of a fundamental dilemma: Science cannot resolve the legal conflicts it engenders, and law cannot understand scientifically its own method." – Thomas Crowen

Today, virtually every crime has an electronic component in terms of computers and electronic technology being used to facilitate the crime. Computers used in crimes may contain a host of evidence related to the crime, whether it is a conventional crime or a terrorist act. In light of this, judicial officers should not become complacent with individuals or their environment simply because the crime may involve a computer. Judiciary should provide assurance to litigants, empowerment to law enforcement agencies and deterrence to criminals. The law should be stringent as its enforcement. The influence of electronic media has been spread over all branches of society including law and the judiciary. Maintaining the integrity of electronic evidence throughout the process of investigation and trial presents different problems (from the handling of traditional physical or documentary evidence), that are not posed by their physical counterparts. Electronic data is easy to create, copy, alter, destroy, and transfer from one medium to another. In short, by their very nature, electronic records can be easily manipulated. Consequently, their accuracy and reliability are frequently suspected. This creates a conflict between the relevancy and admissibility of electronic evidence, an issue that has been acknowledged by jurisdictions across the world."

This article seeks to gauge the development in the attitude of the court to modernize Indian evidentiary practices and help our courts deal with the advances in technology by analysing and critiquing the landmark apex court judgement of Shafhi Mohammad v. The State of Himachal Pradesh, decided by a division bench comprising of Hon'ble Justice U.U Lalit and Hon'ble Justice A.K. Goel by stating the facts as it is in the first segment, followed by the relevant laws and rules used by the court to conclude the judgement in the succeeding segment and finally stating the judgement and author's critical analysis along

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with the conclusion in the final segment.

Keywords: Admissibility, Computer, Electronic evidence, Technology.

I. FACTS

Dr. While reflecting upon the significance of utilizing videography of the scene of crime during investigation as a vital technique of evidence, in concurrence with the possibility of application of procedural requirements under Section 65B (4)[2] of the Indian Evidence Act, 1872 (Act), *vide* its interim decision dated 30 January, 2018 in *Shafhi Mohammad vs. The State of Himachal Pradesh*[3]*, the Hon'ble Supreme Court (Apex Court),* observed that the concerned party, who does not have the possession of an electronic device which has produced an electronic document, is not obligated to under Section 65B (4) of the Act to produce a certificate. The apex court further enunciated that the criterion of producing a certificate can be relaxed by the court, in cases where it is justified in the interest of justice. In effect, the matter stood adjourned to 13 February 2018 for the finalisation of the road-map for use of videography in the crime scene and the Standard Operating Procedure (SOP). The relevant acts/rules/orders used in this case include Section 7, Section 10, Section 22 A, Section 27, Section 30, Section 61, Section 62, Section 63, Section 64, Section 65 of the Indian Evidence Act, 1872 and the Information Technology Act, 2000.

II. PRECEDENTS REFERRED TO IN THE CASE:

The apex court referred to a number of cases in the above judgement out of which the researcher will be focusing on the landmark judgements. The legal position regarding the question of admissibility of the tape-recorded conversation illegally collected or obtained was no longer res integra in view of the decision of Court in *R.M. Malkani v. State of Maharashtra.*[4] It was clarified that a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible as res gestae under Section 7 of the Evidence Act, 1872. The test for admissibility

[2] Section 65 (4) of the Indian Evidence Act, 1872 states that- 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.

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[4] 1973 CriL J228

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under Section 65B[5] was considered for the first time in 2003 in *State v. Mohd. Afzal*[6] *('Mohd. Afzal')*, also known as the Parliament Attack case. The Division Bench of the Delhi High Court was called upon to determine whether the call records in evidence had been admitted in accordance with Section 65B. On an examination of the provisions under Section 65B, the Court noted that, "compliance with Sub-sections (1) and (2) of Section 65B is enough to make admissible and prove electronic records". They agreed with the prosecution that the certificate under Section 65B (4) was merely an "alternative mode of proof". In *Tukaram S. Dighole vs. Manikrao Shivaji Kokate*[7], the Apex Court observed that new techniques and devices are order of the day and though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. In *Tomaso Bruno and Another vs. State of Uttar Pradesh*[8], the Apex Court observed that advancement of information technology and scientific temper must pervade the method of investigation and scientific and electronic evidence can be a great help to an investigating agency. The above-stated position remained the law of the land till 2014, when a full bench of the Supreme Court revisited the position pertaining to the need of electronic evidence certificate under Section 65B of the Act, in the case of *Anvar PV v. PK Basheer*[9]. In that case, the Court adopted the *stricto sensu* approach and rectified the error committed. by expressly overruling the same to extent of the statement of law on admissibility of secondary evidence pertaining to electronic evidence. It held that the requirement of giving an electronic certificate under Section 65B pertaining to any electronic evidence or electronic record is mandatory for treating such an evidence as admissible in law. It is to be noted that the dilemma was revived in the case of *Shafhi Mohammad v. State of Himachal Pradesh*[10], wherein a Division Bench of the Supreme Court differed from the *Anvar PV case* and held that the requirement of certificate under Section 65B is not always mandatory and can be dispensed with, in the interest of justice.

III. JUDGEMENT OF THE CASE:

The apex court in the given case held that "Electronic evidence is admissible under the Act. Section 65A and 65B are clarificatory and procedural in nature and cannot be held to be a complete code on the subject. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to

[5] Indian Evidence Act, 1872
[6] (2003) 107 DLT 385
[7] (2010) 4 SCC 329
[8] (2015) 7 SCC 178
[9] (2014) 10 SCC 473
[10] SLP(Crl.) No. 2302 of 2017

adducing secondary evidence under the other provisions of the Indian Evidence Act, 1872, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65. A person who is in possession of authentic evidence but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure, will lead to denial of justice." It unequivocally held that even if the requirements under Section 65B (4) were not satisfied, evidence could be produced under Sections 63 and 65 of the Indian Evidence Act, 1872".

IV. Analysis Of The Judgement: (Judge's Reasoning)

The above judgement resulted in significant relaxation of standards for admissibility of electronic evidence whereby the two-division bench focused more on the statutory interpretation of the law than the statutory requirements. As per Section 65 B (4), a certificate 'must' be produced. In other words, it means that in the absence of a certificate, the electronic evidence will be inadmissible. However, it was enunciated by the court that it is not a pronouncement reinforced by the plain reading of the provision. On the contrary, the language of Section 65B (4) simply specified that an authorized certificate which conformed with any of the pre-requisites mentioned in sub-clauses (a), (b) or (c), 'shall be evidence' of that content. It was nowhere mentioned that a certificate 'is required to be mandatorily produced' to confirm the validity of any electronic evidence or that 'all' alternative modes of authentication were barred. One of the pivotal arguments of the given case were in relation to the 'genuineness' of the electronic evidence. It was argued that genuineness could not be dealt with at the stage of admissibility itself.[11] The question of 'Genuineness' should ideally be addressed after the admission of evidence. The court while dealing with the issue enunciated that analysis of the Indian Evidence Act, 1872 made it evident, that "the act had not separated the process of splitting evidence into stages of admissibility, weight and relevance. The only indication to the stages of admissibility and relevance is under Section 136"[12]. It states that "*if the judge thinks a fact is relevant, he 'shall' admit it.*" Therefore, it seems that the Act has not differentiated between admissibility and relevance as different stages. Rather both of them are said to appearing in concurrence. The objective of Section 65B (2) was to ensure the genuineness of the electronic evidence. For example, according to Section 65B (2), a person seeking to

[11] https://rmlnlulawreview.com/2017/08/25/pv-anvar-v-pk-basheer-a-critique/ (Lat visited: 06th April, 2020)
[12] Indian Evidence Act, 1872

introduce computer output as evidence must ensure "*that throughout the material part of the said period, the computer was operating properly*". If the computer in issue was not working properly during the specific time, it is highly likely that the evidence was not generated properly. It was submitted by the court that Section 22A was one of the avenues to establish this genuineness of electronic evidence. Section 22A of the Indian Evidence Act, 1872 explicitly barred the use of oral evidence for admission as to the contents of the electronic evidence. However, it made an important point of distinction. According to the court, even though, it disapproved the use of oral evidence to prove the contents of the electronic evidence, it made an exception for cases where there was a question as to the 'genuineness' of the electronic record. There seemed to be no reason as to why the four conditions stipulated under Section 65B (2) could not be fulfilled by oral evidence as per Section 22 A of the Indian Evidence Act, 1872.[13] Consequently, the court allowed to adduce oral evidence to meet the conditions under Section 65B (2) and declared the certificate to not be the only possible method of authentication envisaged under Section 65B.

V. CRITIQUE:

The points of criticism for the judgement can be based on the legal purview. The Information Technology Act, 2000 brought about the addition of Sections 65A and 65B in the Indian Evidence Act, 1872. Section 65B (1) serves two purposes: *Firstly*, it creates an exception to the "best evidence rule" by providing that a 'computer output' shall be admissible in law without the proof or production of the original. *Secondly*, it enables an electronic record which is either available in physical form, or stored in some audio-visual/electromagnetic form, to be "*deemed to be a document*" for the purpose of the Evidence Act upon the satisfaction of the conditions mentioned in the Section 65B (2). However, Section 65B (4) adds a requirement of a certificate to be attached with this deemed document if the same is to be submitted as evidence. The 'Best evidence rule'[14] issues arise only when a party seeks to prove the contents of a writing, recording, or photograph. When a party seeks to prove the contents of a writing, unless some exception to the rule applies, the party must produce the original writing. The disappearance of a piece of electronic evidence will often effectively eliminate the best evidence rule as a matter of concern. Even if the original exists, if it cannot be obtained through judicial process or procedure, its contents may be proved without regard to the best evidence rule. The best evidence rule is similarly ignored when the party against whom the evidence is offered has control of the original and was on notice that it would be the subject of proof or

[13] See supra note 13.
[14] 19 Willamette L. Rev. 427 (1983)

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when the evidence is relevant only to a collateral matter in the case.[15] Because the best evidence rule ordinarily requires production of the original, for convenience's sake common-law courts created an exception to the rule when the original documents were voluminous. This exception seems particularly attuned to the age of computers and hence electronic evidence have been accepted as secondary evidence and are admissible in the court of law.[16] A hearsay problem arises only when a party offers an out-of-court statement for the truth of the matter asserted. But the "statement" must be made by a person. Information generated automatically by machines is ordinarily not considered a "statement", and so cannot be hearsay. This distinction carries into the world of electronic evidence. Distinguishing between computer-stored and computer-generated evidence eases the analysis. Computer-stored evidence consists of data that a person inputs into the system. Computer-generated evidence consists of data that the system automatically generates. For example: E-mails contain the date and time when the e-mail is sent. It is not because the author personally noted them, but because the computer system automatically generated them. Since the time and date on an e-mail are computer-generated evidence, they are not statements and are not considered hearsay.[17] Traditionally, the fundamental rule of evidence is that direct oral evidence may be adduced to prove all facts, except documents.

The hearsay rule suggests that any oral evidence that is not direct cannot be relied upon unless it is saved by one of the exceptions as outlined in Sections 59 and 60 of the Evidence Act dealing with the hearsay rule. However, the hearsay rule is not as restrictive or as straightforward in the case of documents as it is in the case of oral evidence.[18] This is because it is settled law that oral evidence cannot prove the contents of a document, as the document speaks for itself. Therefore, where a document is absent, oral evidence cannot be given as to the accuracy of the document, and it cannot be compared with the contents of the document. This is because it would disturb the hearsay rule (since the document is absent, the truth or accuracy of the oral evidence cannot be compared to the document). In order to prove the contents of a document, either primary or secondary evidence must be offered. Therefore, the provision for allowing secondary evidence in a way dilutes the principles of the hearsay rule and is an attempt to reconcile the difficulties of securing the production of documentary primary evidence where the original is not available.

[15] *ibid*
[16] Vivek Dubey, "Admissibility of Electronic Evidence: An Indian Perspective" 4, FRACIJ (2017).
[17] Steven Goode, The Admissibility of Electronic Evidence, 29 Rev. Litig. 1 (2009).
[18] Sydney R. Mertz, "Evidence: Use of Scientific Books under the Hearsay Rule" Article 8, Marquette. L. Rev. 26 (1941).

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When an electronic record is presented to the judge as primary evidence and with no Section 65B certificate, the judge cannot simply view it and admit it in the proceeding, because the moment the judge sees that evidence on some device capable of translating the media, he himself becomes a certifier to the fact that the hard disk had this data which was viewed on his computer on a particular operating system and using a particular media player. This information about the configuration of the computer is precisely what the Section 65B (4) certificate demands. Therefore, by using this provision, the judge is escaped from taking the responsibility of the configuration, authenticity and working condition of the device, and by extension, the electronic evidence itself. Waiving of the certification requirement may lead to fraudulent and fabricated evidences being presented in the proceedings or removal of data from the servers before being presented in the court. Moreover, the court should have followed the legal maxim of *Generalia specialibus non derogant* which suggests that courts prefer specific provisions over provisions of general application where the provisions are in conflict. The requirement of authentication of secondary evidence by a certificate under Section 65 B (4) is a special provision and thus should be deemed a mandatory requirement.

In the above judgement the court has failed to recognize the '*fruit of the poisoned tree'* doctrine[19] in case of illegally obtained electronic evidence whereby it should have taken into account that if the source of the evidence is tainted, then the evidence itself and anything gained from it is tainted as well[20] and thus illegally obtained electronic evidence should not be admitted. Overall the researcher feels that although the *Shafhi* judgement was a progressive step taken by the apex court to address the admissibility of electronic evidence, there still remains some lacunae in the provisions relating to the legality of electronic evidence such as how should the authentication certificate be acquired if the electronic device is in possession of a third party and how search and seizure of their electronic device may infringe the third party's 'Right of Privacy' and equivalent questions which needs to be addressed by the judiciary. The judicial pronouncement in the *Shafhi Mohammad case* lost the sight of the well-settled doctrine of *stare decisis* as laid down by the Supreme Court in various judgments. The larger issue for consideration which arises in the *Shahfi Mohammad case* is whether a ruling of a Division Bench of the Supreme Court is against or in contravention to the judgment rendered by a larger bench of that very Court.

[19] Margaret Rouse, 'fruit of a poisonous tree', February 2015 - http://whatis.techtarget.com/definition/fruit-of-apoisonous-tree (Last visited: April 01, 2020)

[20] James Fitzjames Stephen, "The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence" (Macmillan & Co., 1872)

VI. CONCLUSION:

The author has critically analysed the landmark judgement of *Shafhi Mohammad v. The State of Himachal Pradesh,*[21] wherein the question of admissibility and authentication of secondary electronic evidence was analysed in depth by the apex court. The court upheld the admission of electronic evidences as well as oral evidence in the absence of an authenticating certificate. The author humbly and respectfully is of the opinion that the observation of the Apex Court does not reflect the correct legal position because this judgement of the apex court created unnecessary flexibility in Section 65 B and it disregarded the statutory requirements and the provisions for uniformity and certainty in evidentiary principles.

[21] SLP(Crl.) No. 2302 of 2017

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