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# Electronic Evidence: An Enticing Trail

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TANISHA THAKUR<sup>1</sup>

## ABSTRACT

*As a result of technology growth and development, daily life has changed enormously. Technology that increasingly relies on electronic communications, business, and information storage in digital form can be used to communicate easily. Such technological upsurge and development have a major system on legal rules, particularly in the field of evidence. This modern technology has produced and developed evidence in the courts. It resulted in the necessity of transforming the information technology law and electronic evidence admissibility rules in both civil and criminal matters. This paper seeks to revise the laws of digital evidence and its admissibility and relevance while appreciating different issues relating to jurisprudence. In addition, with amendments to electronic evidence, the principles of the evidence act were explained. In relation to the admissibility of electronic evidence, several decisions of the Indian Supreme Court have been cited. Finally, safeguards and procedures for processing electronic procedure which should be adopted by the Indian judiciary.*

**Keywords:** Evidence, Electronic, Information Technology Act, Evidence Act.

## I. INTRODUCTION

The previous manual activities are now automated or implemented — allegedly more efficiently<sup>2</sup> — through digital or computer processes. In fact, the digital dimension has gone into society. While it is easy to create or adapt substantive legislation to address laws of the Internet age, it is frequently the case that procedural and evidence frameworks are left behind. This creates a peculiar situation in which substantive rights and duties exist in the age of the Internet, but where the civil or criminal procedural framework is not flexible or dynamic enough to meet its effective implementation.<sup>3</sup>

The e-EVIDENCE may be found in emails, digital photos, ATM transaction logs, word processing, documents, Instant Message history, files that are saved by accounting programmes, spreadsheets, databases of computer browser history, computer memory content,

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<sup>1</sup> Author is a student at Law College Dehradun, Uttaranchal University, India.

<sup>2</sup> Roberts, *A Practitioner's Primer on Computer-Generated Evidence* (1974) 41(2) University of Chicago Law Review 254, 254

<sup>3</sup> T. Krishnakumar, *The Legal Recognition of Electronic Evidence in India with a Focus on the Authorship Requirement*, (2014) C.T.L.R., Issue 2, 13-24, 13

computer backups, printouts, global positioning System tracks, hotel electronic door locks, and digital<sup>4</sup>. Digital evidence tends to be bigger, harder to delete, easier to change, easier to duplicate, more expressive, and more readily available.<sup>5</sup>

A wide range of modern technology (including computers and electronic messages) has its legal recognition and regulatory framework in India under the Information Tech Act 2000<sup>6</sup>. The Act also sets out the legal framework for regulating, inter alia, the use of electronic signatures<sup>7</sup> and the electronic governance<sup>8</sup> and certification authorities to treat electronic documents in accordance with written, printed or typed records<sup>9</sup>. This legislation also underwent amendments to the Indian Evidence Act through its Second Schedule, which made electronic records admissible.

To be presented in court, certain standards of legal admissibility which enable the court to receive and examine the evidence must be respected. Generally speaking, its relevance to the matter at issue is one of the main considerations before evidence is considered admissible. Simply put, any proof relevant enough to a matter before the court is admissible and all that is irrelevant or inadequately significant should be excluded. This principle is expressed in Ch. II of the Indian Evidence Act, which lists the facts considered relevant to a proceeding between ss. 6 and 55. Ss. 22A and 47A of the Evidence Act<sup>10</sup> are particularly relevant in the context of electronic proof. Section 22A provides that, unless the very true nature of the record is at issue, oral admissions regarding the content of the electronic record are not relevant. In the same way, the opinion of the certifying authority which issued a digital signature is interpreted as a relevant fact as per s.47A when a question is related to a digital signing person. Sections 34<sup>11</sup>, 35<sup>12</sup> and 39<sup>13</sup> are also covered by sections of the Evidence Act. Evidence Act also includes presumptions about gazettes<sup>14</sup>, electronic agreements<sup>15</sup>, electronic records and digital

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<sup>4</sup> Prashant Mali, *Electronic Evidence & Cyber Law*, CSI Communications, September 2012, p.30 available at [http://www.csi-india.org/c/document\\_library/get\\_file?uuid=d817e5eb-ca5a-40c2-b8aa-d6302c26443a](http://www.csi-india.org/c/document_library/get_file?uuid=d817e5eb-ca5a-40c2-b8aa-d6302c26443a)

<sup>5</sup> *Ibid*

<sup>6</sup> Information Technology Act 2000 (Act 21 of 2000)

<sup>7</sup> "Section 3A and Chapter V of Information Technology Act, 2000

<sup>8</sup> Chapter III of Information Technology Act, 2000

<sup>9</sup> Section 4, Information Technology Act, 2000

<sup>10</sup> "Inserted by Act 21 of 2000 (Information Technology Act), section 92 and Schedule II (w.e.f. 17-10-2000)

<sup>11</sup> Entries in books of accounts including those maintained in an electronic form are relevant but not sufficient.

<sup>12</sup> Entry in public [record or an electronic record] made in performance of duty is relevant.

<sup>13</sup> Evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers."

<sup>14</sup> Section 81 A of the Evidence Act, 1872 (Act 1 of 1872)

<sup>15</sup> Section 85 A of the Evidence Act, 1872 (Act 1 of 1872)

signatures<sup>16</sup>, messages<sup>17</sup> and electronic records (over the age of five years)<sup>18</sup>. Section 131 concerns the circumstances in which a third person with electronic records and documents may refuse to present them in court.

### **(A) Objective of the Amendments**

The Evidence Act, under the Second Schedule of the IT Act, contains New Articles 65-A and 65-B. For the electronic records, Article 65A of the Evidence Act has the same role as Section 61 for documents: “creates a separate procedure, different from the simple oral evidence procedure, for ensuring that electronic records comply with the hearsay rule. Section 65A of the Evidence Act. It also ensures the authenticity of the technology and the sanctity of the procedure of recuperation of information. But Section 65A is further distinguished by its special law, which is distinct in Sections 63 and 65<sup>19</sup> from the evidence documentary procedure. Section 65-A provides, according to the provisions of Section 65-B, that contents of electronic records can be proved. Unlike the evidence law, any information in an electronic form is considered to be a document and, unless otherwise provided, is eligible as evidence without further proof of the original's production, provided it satisfies the terms and conditions of Section 65-B”.

Section 65-B(1) provides that if any information included in a computer-generated electronic log was copied to an optical or magnetic media (known as computer output), then the electronic record copied "shall be considered also a document" is complied with subject-matter set out in section 65-B(2). Such a document "shall be admissible for further demonstration or production of the original as proof of all contents or facts of the original which are stated in that document, or of any fact of which direct proof is permissible" both in relation to the information and to the computer in question.

## **II. CONDITIONS FOR ADMISSIBILITY**

Section 65-B (2) sets out the following conditions:

1. Firstly, during the time the computer was regularly used for storing or processing information for all activities carried out by a person having legal control of the

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<sup>16</sup> Section 85 B of the Evidence Act, 1872 (Act 1 of 1872)

<sup>17</sup> Section 88 A of the Evidence Act, 1872 (Act 1 of 1872)

<sup>18</sup> Section 90 A of the Evidence Act, 1872 (Act 1 of 1872)”

<sup>19</sup> Bhairav Acharya, *Anvar v. Basheer and the New (Old) Law of Electronic Evidence*, The Centre for Internet & Society blog, September 25, 2014, available at <http://cis-india.org/internet-governance/blog/anvar-v-basheer-new-old-law-of-electronic-evidence>, (Visited on April 18, 2021)

computer, the computer's computer output containing the information should have been produced by the computer.

2. The second requirement is that it be established that during this period, information 'regularly fed to the computer in the ordinary course of this activity' was of the kind included within the electronic record or of the kind from which the information was derived.
3. A third condition is that the computer should operate properly during the material part of that time period and that the break, although it did not operate properly for a while, does not affect its record or the accuracy of its contents.
4. The fourth requirement is the reproduction of or the derivation of the information in the record in the course of that activity from the information filed on the computer.

In accordance with Section 65-B (4), the certificate that identifies the electronic record that contains the declaration and explains the way in which the electronic record is produced with the details of the instrument involved in making such document and addresses the conditions referred to in Section 65-B (2), signed by an officer responsible for the operation of the rel.

### III. CASE LAWS AND ANALYSIS

#### (A) **Amitabh Bagchi vs. Ena Bagchi**<sup>20</sup>

*[Sections 65-A and 65-B of Evidence Act, 1872 were analyzed.]*

The court held that for the purpose of proof, physical attendance in court cannot be required, and the same can be done by means of videoconferences. Provisions 65-A and 65-B provide provision for electronic records evidence and electronic records eligibility, including video conferencing as the definition of electronic records.

#### (B) **State of Maharashtra vs. Dr. Praful B Desai**<sup>21</sup>

*[The question involved whether a witness can be examined by means of a video conference.]*

The Supreme Court observed that video conferencing is a scientific and technological facility that allows visitors, listeners and conversation with people who are not physically present and who are as physically present as physically present.

The legal obligation to have the witness is not a true physical presence. The Court allowed a witness to be examined by video conferencing and determined there was no reason for not being an essential part of electronic evidence to consider a witness by video conferencing.

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<sup>20</sup> AIR 2005 Cal 11

<sup>21</sup> AIR 2003 SC 2053

**(C) Bodala Murali Krishna vs. Smt. Bodala Prathima<sup>22</sup>**

The Court held that “the modification of Articles 65-A and 65-B of the Evidence Act relates to the electronic record. In the field of proof and verification of digital signatures, Sections 67-A and 73-A were introduced. With regard to the presumption of records such as 85-A, 85-B, 85-C, 88-A and 90-A, it has been added. These provisions are only intended to demonstrate that, as evidence admissible, the current emphasis is on recognising electronic records and digital signatures.

**(D) Dharambir vs. Central Bureau of Investigation<sup>23</sup>**

The Court found that when Section 65-B talks of an electronic record generated by a computer called the computer output, a hard disc in which information was stored or previously saved or still remains would also be included. There are two levels of an electronic record that distinguished it.

One is the hard disc that once used becomes an electronic record regarding the information concerning the changes that the hard disc is subjected to and which information can be obtained using a software programme from the hard disc. The other level of the electronic record is the active accessible information in the form of text files,” sound files or video files, etc. recorded on the hard disc. Such accessible information may be converted or copied as a magnet or electronic device to another device, such as a CD, pen drive etc. In addition, a copy can also be carried out by producing a cloned or mirror-image, even a blank hard disc with no information but once used to record information.

**(E) State (NCT of Delhi) vs. Navjot Sandhu<sup>24</sup>**

“Following the assault on Parliament on 13 December 2001, there was an appeal against conviction. In this case, proof and admissibility of mobile call records was examined. 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 held that the computer operation during the relevant time and how printed call records were printed was sufficient to prove the call records for an examination of the competent witness. *Anvar v. Basheer* now modifies this position.

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<sup>22</sup> 2007 (2) ALD 72

<sup>23</sup> 148 (2008) DLT 289

<sup>24</sup> AIR 2005 SC 3820

**(F) Jagjit Singh vs. State of Haryana<sup>25</sup>**

A Member for defection was disqualified by the speaker of the Haryana State Legislative Assembly. The Supreme Court took the digital evidence into consideration when hearing the matter by interviewing transcriptions from TV channels Zee News, the Aaj Tak TV channels and the Haryana Nachrichten from the TV channel Punjab Today.

The court found the electronic evidence on the record to be admissible and reaffirmed the speaker's confidence in the recorded interview in concluding that the voices recorded on the CD are the voices of the persons acting. In relying on digital evidence and the findings he has reached, the Supreme Court found no infirmity. The comments in this case show a trend in Indian courts: judges are beginning to recognise the importance of digital evidence in the proceedings.

**(G) Twentieth Century Fox Film Corporation vs. NRI Film Production Associates (P) Ltd.<sup>26</sup>**

Certain conditions for the video recording of evidence have been established in this case:

1. Before an audio-video-link witness is examined, the witness must file an affidavit or a properly verified undertaking before a notary or a judge that the person being shown to be the witness is the same person that is going to be deposited. The other side should have a copy available. (Affidavit identifier).
2. The person examining the witness on the screen is required to make an affidavit/company before the witness is examined by copy of the identification on the other side.
3. During working hours of Indian Courts the witness shall be examined. Oath shall be managed via the media.
4. No discomfort owing to the time difference of India and the USA should be argued by a witness.
5. A set of complaints, written declarations and other documentation must be submitted before the exam of the witness so that the witness knows the documents and a recognition must be presented to the Court in that respect.
6. The learned judge must record on the screen any comments that are material about the witness' demur.

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<sup>25</sup> (2006) 11 SCC 1

<sup>26</sup> AIR 2003 KANT 148

7. The learned judge shall note and decide at the time of arguments on the objections raised during recording the witness.
8. The same is to be sent to a witness after recording the evidence and its signature is to be obtained in a notary public's presence and is subsequently recorded in the action against it.
9. The visual should be recorded and the record should be recorded at both ends. The witness is also to be alone during the visual conference and to be certified by a notary.
10. Another conditions that are necessary in a set of facts can also be imposed upon the learned judge.
11. The applicant who wants this facility shall bear the expenses and arrangements.

**(H) Anvar v. P. K. Basheer<sup>27</sup>**

The Drivers Bench rejected an appeal to P.K. Basheer, MLA from P.V. Anvar which had lost the Ernad electoral district in Kerala during the previous assembly. Mr. Anvar argued that his adversary tarnished her picture with the use of songs and CDs by character murder.

It was held that the same should be accompanied by a certificate, in the case of a CD, VCD, chip, etc., pursuant to Section 65B of the Evidence Act, obtained at the time the document was taken, without which the electronic record secondary proof is inadmissible. The Supreme Court observed that "electronic records may be more likely to manipulate, alter, transpose and excision, and the whole trial on proof of electronic records may lead to judicial transition without adequate protection."

#### **IV. CONCLUSION**

The Supreme Court said this in Navjot Sandhu, when the lack of a proper certificate on the authenticity and completeness of the evidence had been indicated:

“Whatever the requirements of Section 65B - an admissibility provision for electronic registrations - there is no bar to adducting secondary evidence pursuant to the other provisions of the Evidence Act, namely Articles 63 and 65. It may be that a certificate with details in Section (4) of Section 65B is not filed immediately. However, this does not include the case for secondary evidence to be filed even if the law permits such evidence to be provided in the circumstances set out in the relevant provisions, namely Articles 63 and 65.”

In Anvar, India's electronic evidence legislation was unambiguously referred back by the Supreme Court to a special process established pursuant to Section 65B. He has done so with

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<sup>27</sup> MANU/SC/0834/2014; Civil Appeal 4226 of 2012, Decided on 18 September 2014, Supreme Court of India



the Maxim generalia specialibus non derogant, which is a re-establishment of the principle *lex specialis derogat lawi generali* ("special law repeals general law") (the "special law does not detract from the specific"). The Supreme Court held that Article 65a and Article 65B of the Evidence Act established special law that transgressed the general law of provisions of evidence:

“Electronic record evidence is a special provision in the IT Act amending different provisions of the Act on Evidence. It can be held that the special evidence provisions in Section 65A of the Act, as set out in Articles 59 and 65B, are governed by the proceeding prescribed under Section 65B of the Evidence Act. This is an all-embracing code. Under Articles 63 and 65, the general law must give rise to a special law.”

Thus, the oral proof offered to attest secondary evidence was disqualified: "The proof act shall not allow oral proof to an electronic record if the requirements of section 65b of the Evidence Law are not complied with as is now law in India." The Evidence Act disclosed oral proof.

“If the original electronic record is contested, only oral proof of its originality is permitted under section 22A of the Evidence Act. Note that Section 22A disclaims oral evidence of the contents of the electronic record, it is only possible to discuss the genuineness of the record. In this connection, the Examiner of Electronic Evidence, an expert witness appointed under section 45A of the Evidence Act pursuant to Section 79A of the IT Act can present relevant oral evidence as to the genuineness of the record.”

Indian law on evidence has withstood technology and cyber world challenges by incorporating appropriate amendments. However, there is still much to do to ensure that all related challenges are fully met. Judiciary e-governance would change the entire system of delivery of justice.

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