
Relevancy and Admissibility of Electronic Evidence

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INTRODUCTION: - The Indian Evidence Act, 1872 earlier had enacted keeping in view only the physical World, but later it was suitably amended to include the concept of electronic evidence. The proliferation of computers, the social influence of information technology and the ability to store information in digital form have all required Indian law to be amended to include provisions on the appreciation of digital evidence. In 2000, Parliament enacted the Information Technology act, 2000, which amended the existing Indian statutes to allow for the admissibility of digital evidence. The Information Technology Act is based on the United Nations Commission on International Trade Law Model Law on Electronic Commerce and, together with providing amendments to the Indian Evidence Act, 1872. It recognize transactions that are carried out through electronic data interchange and other means of electronic communication. It is the hypothesis that Indian Evidence Law was highly inadequate to deal with challenges of the 21st century. However there has been a good attempt by the legislatures to amend it suitably. Much have been done but much more

remains to be done, for some areas are still left at the mercy of the exercise of discretion by the Indian Courts.

The digital evidence means any information created or stored in digital form that is relevant to a case. This includes, but is not limited to emails, text documents, spreadsheets, images and graphics, database files, deleted files and data back-ups. Electronic Evidence may be located in floppy disks, zip disks, hard drives, CD-ROMs or DVDs, as well as portable electronic devices such as cellular phones servers.

ELECTRONIC RECORD: - The definition of Electronic records was amended by the Information Technology Act, 2000. “Electronic records” have been included in the definition of evidence of the second category of evidence, namely, documents produced for the inspection of the court. Section 2(1)(f) of the Information Technology Act, 2000 defines as “electronic record” as follows:

“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 micro fiche.”There is a genuine concern about reliability of digital evidence as it can be easily manipulated or altered, therefore, pieces of evidence may include evidence - of the author of e-message; of the sender of the e-message [if different from author]; proof to show that the message was sent by the originator; to prove email address

RELEVANCY AND ADMISSIBILITY OF ELECTRONIC EVIDENCE:- The definition of ‘admission’ has been changed to include a statement in oral, documentary or electronic form which suggested an inference to any fact at issue or of relevance. New Section 22-A has been inserted into the Evidence Act to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question. The section 4 of IT Act, 2000 lays down legal recognition of electronic records, where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is

- (a) Render or made available in an electronic form.
- (b) Accessible so as to be usable for a subsequent reference.

The rationale behind the second requirement is that electronic data is intangible and by its very nature transient, so it is expedient to require it to be available for future reference. Sec. 3 of IEA deals with admissibility of evidence and Sec. 136 of the same act empowers a judge to decide as to the admissibility of evidence. .

In order that the proof may be confined to relevant facts and may not travel beyond the proper limits of the issue at trial, the judge is empowered to ask in what manner the evidence tendered is relevant. The judge must then decide its admissibility. It is the duty of the judge to see that evidence brought on the record is relevant. When either party proposes to give evidence of any fact, the judge may ask the party adducing the evidence to demonstrate the relevancy of the alleged fact, if proved, and the judge can admit evidence only if it is considered by the judge that the fact, if proved, would be relevant, and not otherwise.

If the admissibility of the proposed fact depends upon proof of some other fact, the other fact must be proved before evidence is given of the fact first mentioned, unless the

party undertakes to give proof of the other fact, and the judge is satisfied with such an undertaking. However, if the relevancy of the first fact depends upon the admission of a second fact, it may be necessary for the second fact to be proved before evidence is given of the first fact.

New Sections 65-A and 65-B are introduced to the Evidence Act under the Second Schedule to Information Technology Act. Section 5 of the Evidence Act provides that evidence can be given regarding only facts that are at issue or of relevance. Sec. 136 empowers a judge to decide on the admissibility of the evidence. New provisions Sec. 65-A of the Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of Sec. 65-B of the Evidence Act.

In the recent judgment of Delhi H.C., **Jagdeo Singh vs The State and Ors.(2015)** the Hon'ble H.C, while dealing with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate u/s 65B of IEA, the court observed that the secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever.

VIDEO & TAPE RECORDING- Tape recorded conversations can't fall in the category of oral evidence therefore for obvious reasons, it is considered as a kind of documentary evidence though not exactly a document, as is generally understood by us. Indian courts had recognized the contents of tape recording as admissible evidence for some time before the introduction of the IT Act, subject to certain conditions being satisfied. The Supreme Court of India in the case of **Ziyauddin Burhanuddin Bukhari vs Brijmohan Ramdass Mehra and Others (AIR 1975 SC 1788(1))** It is laid down that the tape recorded speech were documents as defined by sec. 3 of the Evidence Act which stood on no different footing than photographs. It is though, not a typical paper document but it has been the general endeavour of experts to evolve a technology which should allow satisfying legal requirements of a paper based document by an electronic record.

PROOF AND CONTENTS OF CD: 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. In the case of **Jagjit Singh vs. State of Haryana (2006) 11 SCC 1,**

court determined that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded reaching the conclusion that the voices interview when 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 hon'ble Supreme Court in **Anvar P.V. versus, P.K. Basheer and Others, in Civil Appeal No.c4226 OF 2012 decided on Sept., 18, 2014,** it was held that the Computer Output is not admissible without Compliance of S. 65B. It overruled the judgment laid down in the State (NCT of Delhi) v. Navjot Sandhu alias Afzal 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 is required to be overruled". This judgment has put to rest the controversies arising from the various conflicting judgments and thereby provided a guideline regarding the practices being followed in the various High Courts and the Trial Court as to the admissibility of the Electronic Evidences. The

legal interpretation by the court of the following Sections 22A, 45A, 59, 65A & 65B of the Evidence Act has confirmed that the stored data in CD/DVD/Pen Drive is not admissible without a certificate u/s 65B (4) of Evidence Act and further clarified that in absence of such a certificate, the oral evidence to prove existence of such electronic evidence and the expert view under section 45A Evidence Act cannot be availed to prove authenticity thereof.

DIGITAL CAMERA-PHOTOGRAPH: As per section 2(t) 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,

UTILITY OF VIDEO CONFERENCING IN TAKING EVIDENCE : "A video conference is a televised telephone call whereby two or more parties can speak in real time and also see each other in real time. It necessarily involves a camera, one or more monitors, and microphones for each participant, audio speakers and other necessary equipment. The most important thing needed is a high-speed internet connection or the video and audio will be choppy. In addition, before the video conference begins, documents can be downloaded to each participant's personal computer. The materials then can be presented

in can also be used to give evidences. (see 2006 Cri.LJ, JOURNAL Sec.at page.18)

Video conferencing is a great tool that can be used to take evidence. It can be used in various situations.

1. In a case where the witness resides abroad and it is necessary to have his evidence, for the end of justice
2. Video conferencing can be used in the cases where the witness is unable to attend the court due to his health.
3. It can also be used, where the court, on facts and circumstances, do not want the witness to personally attend the court and answer. It can happen in cases where the witness (victim) is a child, who has been sexually exploited or in case if the child has suffered from unnatural offences against him.
4. On many occasions, criminal trials get adjourned for absence of the under-trials in the Courts for want of security and avoidable adjournments. escorts from jail resulting in unnecessary an avoidable adjournments. Here again application of video conferencing facility, from the Court to the prison where the under- trials are housed, will be able to take care of the problem.

5. In cases where situation so warrants.

In the case of State of Maharashtra vs Dr. Praful B. Desai, 2003 Cri. LJ 2033, where the attendance of a witness can not way of video be procured without an amount of delay, expense or inconvenience the court could consider issuing a commission to record the evidence by means of a video conference.

ELECTRONIC MESSAGE, EMAIL AND OBSCENE SMS SENT THROGONEU MOBILE PHONE:- It includes emails, sms, mms etc. of messages sent via social networking sites, like what's ap, twitter etc. under the provisions of section 88a, there is a presumption as to such messages. sections 88, 88a, 114(f) of the evidence act with section 26 of the general clauses act are relevant sections for sending and receipt of email and its proof.

Electronic mail or e-mail is simply data, whether it be text or images sent via an electronic system which performs essentially the same functions as an ordinary postal service.

As per section 2(t) 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. **In Shreya Singhal vs. Union Of India (2015) AIR (SC.) 1553.** Hon'ble the Apex Court declared Section 66A of IT Act unconstitutional and held that Section 66 A creates an offence which is vague and overbroad, and therefore, unconstitutional under Article 19 (1) (a) and not saved by Article 19 (2). It has also been held that the wider range of circulation over the internet cannot restrict the content of the right under Article 19 (1) (a) nor can it justified its denial.

OPINION OF EXAMINER OF ELECTRONIC EVIDENCE: As per the provisions of S. 79-A IT ACT, the central government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the official gazette, any dept, body or agency of the central government or a state government as an examiner of electronic evidence,

Thus an accurate printout of computer data always satisfies the best evidence rule. Now days we cannot confine ourselves to the best evidence. We admit all relevant evidence. The

goodness or badness of it goes only to weight, and not to admissibility. Thus the Indian Evidence Act prescribes clear legal rules that are expected to guide the Judge objectively to decide the relevancy and admissibility of evidence and rule out any unpredictability associated with subjective assessment. -Sec-65 B (IEA) has overcome all problems of original vs copy, deeming electronic documents (manifested in a particular type of output) to be sufficient for proof of what the original could have legally proved (without actually requiring production or proof of the "original"). Through Sec-65B, the problem of primary v secondary evidence with regard to electronic records is solved.

CONCLUSION:- In the end, the discussion on electronic evidence can be briefly sum up by saying that strict compliance with section 65B of IEA is now mandatory for persons who intend to rely upon e-mails, web sites or any electronic record in a civil or criminal trial before the courts in India. The Indian Evidence Act could be further amended to rule out any manipulation - at least for the purposes of presuming prima facie authenticity of the evidence of the electronic record - by adding a condition that the record was created in its usual way by a person who was not a party to the proceedings and the proponent of the record

did not control-the making of the record. By ensuring that the record was created by a party who was adverse in interest to the proponent of the record, and the record was being used against the adverse party, the risk of the manipulation of the records would be reduced significantly. This is because, it is argued, no disinterested party would want to certify the authenticity of the record which to his knowledge had been tampered with. The law also needs to creatively address the requirement of the burden being on the proponent to provide testimony as to the author of a document to determine whether there was any manipulation or alteration after the records were created, the reliability of the computer program that generated the records, and whether the records are complete or not. The courts also have to be mindful that data can be easily forged or altered, and section 65B of the Evidence Act does not address these contingencies. For instance, when forwarding an e-mail, the sender can edit the message. Such alterations are often not detectable by the recipient, and therefore a certificate of a third party to the dispute may not always be a reliable condition to provide for the authenticity of the document. Serious issues have been raised in the digital world due to malpractices such as falsification of information and impersonation, in relation to the

authenticity of information relied upon as evidence. Perhaps, it may be prudent for the courts or the government to set up a special team of digital evidence specialists who would assist the courts and specifically investigate the authenticity of the electronic records.

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