

# **Bharatiya Sakshya Adhiniyam From Bird's Eye View**



**Dr. Makarand S. Deshpande, Additional Director, MJA Utan,  
Mumbai.**

# Humble appeal

## “Judicial Truism”

Bail me out!!  
from the abysmal depths,  
the Truth cries.

It's for you,  
the Judges.

Find out where the truth “lies”

Credit : late Adv.H.R.Seetharam

**Manoj & others vs. State of M.P.**

**(2023) 2 SCC 353**

**“Judges must play proactive role during entire trial”**

**“Duty of Judges in appreciating evidence”**

**“They must ensure disclosure of documents, statements, material objects, exhibits and information, though not relied on by Investing Agency / Prosecution to the accused in the interest of fairness, and to find out truth.”**

**“Right to Fair Trial” \*\*\***

# Prologue

**Dr. M. S. Deshpande, Additional Director, Maharashtra Judicial Academy, Uttan, Mumbai.**

# Law of Evidence

	Corpus Juris	
<b>Substantive Laws</b>	<b>Adjective Laws</b>	<b>Procedural Laws</b>
Deal with protection of <b>“legal rights”</b> and performance of <b>“obligations”</b>	Set principles for fact finding and aim to seek - <b>“Truth”</b>	Govern process of litigation and aim to have <b>“Fair Trial”</b>

# Law of Evidence

- The law of evidence is an “**Adjective Law**”,
- It does not define, create or take away substantive rights or liabilities,
- It prescribes methods to **produce** evidence,
- It prescribes methods to **prove, adjudicate & establish** legal rights, duties, liabilities and obligations, etc.
- It provides for the “**methodology**” to put into operation the **substantive laws** with the help of **procedural laws**.
- **Murder mystery** – Circumstantial evidence, last seen +, CCTV footage, CDR, Cell phone data, Locational evidence.
- **Trafficking case** – usual evidence, electronic evidence, Escorting adds, exchange of SMS, Whatsapp messages - nude pictures, Cell phone data, Locational evidence, CDR, Seizure of cell phones, extraction of data.

# Word “Evidence” : origin

Derived from Latin word –

***“Evidera”***

lucidity, clarity in presentation

and

ability to

**prove “facts” in “question”**

# Evidence : meaning

When a “principal” fact  
is asserted or denied;  
and needs to be established;  
“Evidentiary” facts  
tend to establish it -  
by using standard  
“methods of proof.”



# Need of Law of Evidence


In absence of “**standard methods**” of proof,  
no case ever be decided.

If everything is left to the **discretion** of Court,  
**Conscience** of judicial officer will **prevail**.

There will be **no** uniformity.

It will **result** into

**Inconsistent and contradictory decisions.**



**Law of Evidence : Aims**  
to establish legal rights  
and  
**Guilt**  
and  
corresponding duties, liabilities,  
obligations  
by maintaining  
**“Rule of Law” and “Fair Trial.”**

# Indian Evidence Act, 1872 (“old Act”)

- Earlier, Evidence Acts of 1835, 1855, 1859, 1861 and 1869 were passed.
- Certain rules of evidence were in practice at various settlements and Princely States.
- **Indian Evidence Act** came into force on 01.09.1872,  
**Preamble** - to consolidate, define and amend the law of evidence, on which Court could come to a conclusion about the facts of the case and to pronounce judgment.
  - **Existed and used for more than 150 years.**
- however, it lacks in addressing the technological development in the country with relation to the legal process.



**Intention of Legislature  
to enact  
Bharatiya Sakshya Adhiniyam,  
2023**

**To consolidate and provide for  
general rules and principles of  
evidence for  
“Fair Trial”**

## Claim of the Legislature

Indian Evidence Act was not sufficient to address -

### “Technological Advancement”

undergone in the country during last few decades.

**Toll post robbery and assault case** - CCTV footage, CDR, Locational evidence, computer data, individual computers with centralized system.

**Palghar Sadhu Murder Case** – CCTV footage, video recording.

**S.T. driver Murder Case** – GPF - fraudulent withdrawal, CCTV footage etc – presence and participation of accused.

# Application of the New Act – 1

## Section 170(2) – Repeal & savings

- Date of commencement of the New Act : **01.07.2024**
- Date of repeal of the Old Act : **01.07.2024**
- **Notification** no. SO 849(E), dated **23.02.2024**
- The New Act will **not apply** to any trial, application, inquiry, investigation, proceeding or appeal **pending on 01.07.2024.**
- The New Act will **apply** only **to fresh** trial, application, inquiry, investigation, proceeding or appeal **commenced on or after 01.07.2024.**

**“No retrospective effect”**

# Application of the New Act - 2

## Section 1(2) - It will apply -

- to Judicial proceedings before **any Court**,
- to **Court-martials** -
- certain **exceptions** made under Army Act, Naval Discipline Act, Indian Navy Act and Air Force Act relating to application of old Act to **Courts martial** are **removed**,
- **It will not apply** to **affidavits** presented to **any Court** or officers, or proceedings before an **arbitrator**.
- **Sudha Devi vs. M. P. Narayanan AIR 1988 SC 1381**

**Affidavits are not evidence u. s. 3, except if allowed under Order XIX of CPC.**

## Application of the New Act - 3

- **Term “Evidence”** – does not include an affidavit,
- **An affidavit** – is a sworn statement made before a person authorised to administer oath,
- **An exception** – is made under Order 19 of CPC – allowed to prove facts on affidavit – with opportunity to cross examine,
- **Mere Affidavit** – **no opportunity to cross** examine the deponent,
- **Proceeding before Arbitrator** – application of principles of natural justice – no strict rules of evidence – no authority to administer oath – need not examine witnesses – **S.C. – an arbitrator should not admit inadmissible evidence.**
- **Therefore, Evidence Act is not applicable to such affidavits presented to any Courts or officers;**
- **or to the proceedings before an Arbitrator irrespective of their nature – pursuant to arbitration clause, agreement or sec.18 of Micro, Small & Medium Enterprises Development Act, 2006.**



# Nature of the New Act

- New Act is **simplified, streamlined and modernised** version of the old Act
- Definition clause - **Section 2 (1) (a) to (l)**, arranged systematically and alphabetically – **is introduced – easy to search - find out.**
- Interpretation clause - Section 3 and 4 of old Act are **omitted.**
- **No provision** for its **extension** to whole of India - probably to meet with any **question about admissibility of evidence digitally generated outside India. \*\*\***
- **No territorial barriers to accept evidence generated out of India.**

## The New Act basically provides -

- Evidence includes **any information** given **electronically**.
- The scope of term **“Evidence”** has been enlarged.
- Appearance of witness, accused, expert and victim is permitted through **“electronic means.”**
- **(Paperless transactions - disputes – paperless evidence)\*\*\***
- This will **save time** of all **stake holders, viz.-**
- Investigating Machinery, Prosecution, Defence Advocate, Accused, Victim, Witnesses, Medical Officers, Experts and Courts involved in an inquiry, investigation and trial.

## New Act also provides for

### **Admissibility of an “electronic record”**

(made by using computers or communication devices. They are dynamic. **Born & exists solely within computer system.** Users can interact with them by processing, analysing or manipulating the data within e.g. e-mails, websites, word/excel documents, text messages, social media postings, digital images etc.)

### **or “digital record”**

(data generated, stored & processed in positive “**i**” and non-positive “**o**” states - electronically and can be viewed on screen. They are more static. They may also be digitized versions of physical documents. Used for viewing or sharing – pdf, e-books, scanned documents, digital audio/video files, digital artwork etc.)

### **as an “evidence”,**

**having the same legal effect, validity and enforceability  
as any other “document.”**

**points of difference -Accessibility, collaboration, cost saving**

# Outline of the Changes brought by the New Act - 1

- Admissibility of **electronic / digital** records,
- Addition in kinds of **secondary evidence**,
- Addition to judicially noticeable facts and deletion of such obsolete facts,
  
- Addition of statutory term **“Advocate”** to replace terms barrister, pleader, attorney or vakil,
- Addition of explanations, illustrations below certain provisions,
- Insertion of term **“Coercion”** in **Section 22**.

# Outline of the Changes brought by the new Act - 2

- Omission of obsolete terms, provisions,
- Expansion of scope of some provisions,
- Expansion of scope of principle of “**estoppel**” relating to tenant – section 122,
- Addition of term “person of “**unsound mind**” to replace term “**Lunatic**,” – explanation to section 124,
- Simplification of provision to rely on corroborated testimony of an “**Accomplice**” - section 138. \*\*\*\*  
See sections 133 & 114(b) of old Act – gray area - removed
- Introduction of **Schedule** prescribing **format of certificate** to be filed with electronic or digital record.



# Changes at a Glance in Tabulated form

**Dr. M. S. Deshpande, Additional Director, Maharashtra Judicial Academy, Uttan, Mumbai.**

Sr. No.	Changes	Sections
1	Changes related to Electronic and Digital Record	Sections - 2(1)(d), 2(1)(e), 31, 32, 54, 57, 61, 63, 66, 73, 81, 85, 86, 90, 93.
2	Expansion of the scope and bringing clarity in the concept of “Secondary Evidence”	Section 58.
3	Other Changes – i)Change in section numbers, ii)Addition/deletion of matter, iii)Clubbing of sections etc.	Sections 2(1)(f), 2(2), 6, 3 to 20, 21, 22, 23, 24 to 27, 35, 39, 41, 48, 52, 57, 74, 77, 78, 80, 92, 93, 94 to 103, 104 to 120, 122, 124, 132 to 134, 138, 146, 152 to 154, 165.
4	Use of term “Advocate” by replacing similar other terms	Sections - 21, 64, 132, 133, 134, 152, 153.
5	Being obsolete - Omitted	Sections - 22A, 57(2 to 6)69, 77, 78, 80, 82, 86, 113, 166, 73A.
6	Date of application of BSA	<b>Matters filed on and after 01/07/2024.</b>
8	Introduction of Schedule	Format of Certificate to be issued under section 63(4)(a to c).

Dr. M. S. Deshpande, Additional Director, Maharashtra Judicial Academy, Uttan, Mumbai.

## Changes related to Electronic, Digital Record - 1

### **Document**

**Section 2 (1)(d)** :- scope of definition of “**Document**” is enlarged by adding – “otherwise recorded” – “by any other means” - “**electronic and digital records,**”

with *illustration (vi)* -

**An electronic record** - on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence - CDR, voice mail messages stored on digital devices etc. **are documents.**

**Section 2(8) BNS – Document – includes electronic and digital records,**

- **e.g.- data** on any kind of storage device, cards, disks, etc.
- Electronic records are susceptible to tampering, alteration transposition etc. and therefore,
- **(i)integrity of data, (ii)software, (iii)hardware, (iv)security of system and (v)access only to authorised persons, etc. aspects play important role.**



## Changes related to Electronic, Digital Record- 2

### **Document**

- Thus, now it is **not** necessary that matter be **expressed** or **described** upon any physical substance by means of letter, figures or marks only **to qualify** it as document or documentary evidence.
- Matter which is “**otherwise recorded**” on any substance by “**any other means**” will be a “**document**” or “**documentary evidence**”
- e.g. **video recording on mobile phone, spy camera, CCTV Footage, data on drives, CD, DVD, USB, memory cards, magnetic tapes etc.**\*\*\*\* supply cloned copy – to avoid tampering.
- (PITA Case, Madras HC Bar-Police riot case – location of CP, Karnataka abetment to suicide case – screen shots - added)
- Electronic / digital record would be “**primary evidence**” as per **Explanation 6** to **Section 57** – **unless disputed.**

## Changes related to Electronic, Digital Record- 3 **Evidence - Oral**

- **Section 2(1)(e)(i)** :-  
Scope of definition of “**Evidence**” is enlarged by adding “**Statements given electronically**”. Such statements made by witnesses relating to matters of fact under inquiry, will be called as “**oral evidence**”.
- It corresponds to **Section 530 (ii)(iii) of BNSS** relating to the examination of complainant and witness; recording of evidence in inquires and trials – may be held in electronic mode by **using electronic communication or by audio – video electronic means**.
- **Also see definitions of -**
- **Audio–video electronic means - u.s. 2(1)(a) of BNSS**
- **Electronic communication - u.s. 2(1)(i) of BNSS**



## Changes related to Electronic, Digital Record- 4

### **Evidence - Documentary**

- Section 2(1)(e)(ii) :-  
Scope of definition of “**Evidence**” is enlarged by adding “**Electronic or Digital Records**” produced for inspection of Court – “**documentary evidence**”
- e.g. **what we can see on computer screen** – desktop, laptop, tablet, cell phone – examples – emails, database, purchase receipts, text messages, social media postings, information stored on SharePoint sites, content management system etc.
- **Rule of the Best Evidence – is not changed by introduction of new Act – Primary, if not – then secondary**  
**J. Yashoda vs. K. Shobharani, (2007)5 SCC730 –**  
**rule of best evidence – degree – civil / criminal cases.**

## Changes related to Electronic, Digital Record- 5

- **Section 31** :- existence of any fact of public nature made in “Central / State Act / Official Gazette” in electronic or digital form is a relevant fact, though not conclusive.
- **Section 32** :- statements as to law of any country or ruling of court published in electronic or digital forms are made relevant.
- **Section 54** :- Though, reference of “Electronic Records” in section 59 of old Act is omitted, it makes no difference, as the definition of “Document” under section 2(1)(d) includes “Electronic Records.”

## Changes related to Electronic, Digital Record-6

- **Section 57 :- “Primary Evidence”**

**The document itself produced for inspection of the Court.**

- **New *explanations* (4 to 7) are added.**

- **Explanation 4**

It clarifies that where an electronic or digital record is **created or stored**, and such storage occurs **simultaneously or sequentially** in multiple files, each such file is **primary evidence**.

- **e.g.** – a video clip or video recording posted / forwarded on any social media like facebook, instagram, whatsapp group, messenger etc. and is stored on such platform or cell phone of every member of group. Then such video file on such social media or cell phone of every member will be primary evidence of each other.

## Changes related to Electronic, Digital Record-7

- Section 57 - “Primary Evidence”
- Explanation 5

It clarifies that where an electronic or digital record is produced from “**proper custody**”, it is primary evidence **unless it is disputed.**

- **e.g.** – original video graph / recording or digital photograph produced from possession of the videographer or photographer or original CCTV footage produced from the possession of owner / occupier of the premises or surveillance camera of government / local / other authority, police etc. will be primary evidence and deemed to be genuine.
- However, **explanation 5** can not be read to assume that “**output**” of **electronic or digital record** produced from proper custody will be a primary evidence.

## Changes related to Electronic, Digital Record - 8

### Section 57 - “Primary Evidence”

- **Explanation 6**

It clarifies that a video recording **simultaneously** stored in electronic form and **transmitted** or **broadcast** or **transferred** to another, each of the stored recordings is **primary evidence**.

- **e.g.** – video recording and transmission of live event on television, live telecast of events on OTT platforms, YouTube live, Instagram live, facebook live, etc., or telecasting or recording and transferring of a live event so telecast, or broadcast of any live speech, lecture and its transmission, etc. will be primary evidence of such event.
- Recording of telecast of live event on PC / Laptop etc. will also be primary evidence of such event.

## Changes related to Electronic, Digital Record - 9

### Section 57 - “Primary Evidence”

#### Explanation 7

It clarifies that where an electronic or digital record is **stored** in multiple storage spaces in a computer resource, **each** such automated storage, including temporary files, is **primary evidence**.

- **e.g.** – temporary files, automatic backup files, files in trash, Google backup, cloud storage, drives typically stored extra copies of data etc.
- **Hash value** – Data mapping of original data – **to ensure integrity** – no alteration or manipulation in data extracted – **presumption – no two files having same hash value.**
- Hash value is data mapping size – it is done by obtaining numeric / alphabetic string by applying **“hash function”** to a **“data.”**



## Case laws which led to reforms in admissibility of Electronic evidence

- **State (NCT of Delhi) vs. Navjot Sandhu (2005) 11 SCC 600 – Afzal guru** held that secondary evidence of electronic records could be given by examining witness familiar to operations of computers, regardless of compliance of section 65 B(4). – **over ruled in Anvar's case.**
- **Anvar P.V. vs. P. K. Basheer (2014) 10 SCC 473** held that electronic or digital record shall have the same effect of any physical document. Admissibility of secondary evidence of electronic records depends upon satisfaction of conditions u.s.65B. Proof in absence of certificate u.s.65(B)(4) is not permissible. **Also see directions for production of certificate u.s. 65B.** Whether it has prospective operation – question is left open in case of Sonu.
- **Sonu vs. State of Harayana (2017)8 SCC 570** held that objection as to admissibility of electronic record per se inadmissible can be taken at appellate stage. Objection as to mode or method of proof being procedural can not be taken at appellate stage as party relying on that document will not have opportunity to rectify the deficiency.

## Case laws which led to reforms in admissibility of Electronic evidence

- **P. Gopalkrishnan @ Dileep vs. State of Kerala**

**(2020) 9 SCC 161 –**

**held** that memory card / pen drive are “**material objects**”, whereas their contents are “**documents.**” Its “**cloned copy**”(exact and **uncompressed replica** of entire data including its file allocation table, boot records and other information. Not a disk image) must be supplied to the accused u.s. 207 of CrPC.

Also read 2018 SCC OnLine Kerala 3244 – same parties.

- **Arjun Khotkar vs. Kailash Gorantyal (2020) 7 SCC 1**

**held** that where primary evidence - original electronic record is not produced, but secondary evidence is led, then production of **certificate u.s. 65 B (4) is mandatory.** Oral admission of such evidence is not sufficient. Accepted “**complete code theory**” as to section **65B** propounded in Anvar’s case.

- **Section 136** – whether accused can claim privilege and refuse production of his device containing incriminating electronic record ?
- **Article 20 (3)** – production will not amount to testimonial compulsion.
- Accused can’t resist production or object a witness to produce it.
- Court will first see admissibility and then relevancy.

## Changes related to Electronic, Digital Record- 10

### **Electronic or Digital record = Paper record**

- **Section 61** :- **new section** - subject to admissibility under section 63, **electronic or digital record shall have the same legal effect, validity and enforceability as paper records.**
- Admissibility of an electronic or digital record in evidence can not be denied on the ground that it is an electronic or digital record.
- **Section 62** :- **Proof of electronic record** - as provided under section 63 ( complete Code theory ).
- **Section 63** :- **Admissibility of electronic records** - It uses the words **“computer or any communication devices”** for word **“computer.”** \*\*\*\*
- Both these sections provide for -  
**“proof of information contained in electronic record.”**  
Data on device = Primary evidence  
Printout = Secondary evidence

## Changes related to Electronic, Digital Record- 11

### **Admissibility of electronic records.**

**Section 63 (1)** extends scope of section 65 B(1) of the old Act – it relates to admissibility of electronic record.

- Now, **any information** contained in an electronic record copied in semiconductor memory (a device to store data – RAM-short term memory / ROM – memory for permanent data), **or**
- in any communication device, e.g. smart phone, **or**
- otherwise stored, recorded or copied in any electronic form →

### **“computer output”**

shall be **deemed** to be a **document and is admissible in evidence, if**  
-

- **conditions mentioned** in section **63 (2) (3)** are **satisfied.**
- **computer output may be a -**  
**“stored” or “copied” version or a “print out.”**



## Changes related to Electronic, Digital Record-12

### Admissibility of electronic records.

Conditions referred to in **section 63 (1)** are given in -

**Section 63 (2)(a to d)** :- any computer output shall be deemed to be a document and is admissible, if,

- **firstly**, it is produced by the person having **lawful control** over the use of computer or communication device;
- **secondly**, the information was **regularly fed** into computer or communication device in **ordinary course of activities**;



## Changes related to Electronic, Digital Record-13

### Admissibility of electronic records.

Conditions referred to in **section 63 (1)**

**Section 63 (2)(a to d)** :- any computer output shall be deemed to be a document and is admissible, if,

- **thirdly**, through out the **material period** the computer or communication device was **operating properly** such as not to affect electronic record or its accuracy;
- **fourthly**, the information contained in electronic record reproduced or derived from such information fed into computer or communication device **in ordinary course of activities**.

## Changes related to Electronic, Digital Record-14

### Admissibility of electronic records.

Conditions referred to in **section 63 (1)**-

**Section 63 (3)** :- provides that where during the **material period** - the **creation, storing or processing of information** for the purpose of activity mentioned in sub section 2 (a) was **regularly** performed by means of one or more computers or communication devices, whether –

- in stand alone mode, or
- on a computer system, or
- on a computer network, or
- on a computer resources, or
- through an intermediary,
- **all the computers or communication devices** used for that purpose **during** that **material period** shall be **treated** as constituting a **single computer or communication device**.

## Changes related to Electronic, Digital Record-15

### Admissibility of electronic records – certificate of authenticity.

Section 63 (4) :- provides that in any proceeding where it is desired to give a statement in evidence, a **certificate about** –

- (a) **identifying** the electronic record containing that statement and **describing** the manner in which it was produced;
- (b) giving such **particulars** of **any device involved** in production of that electronic record and it was produced by a computer ;
- (c) **dealing** with any of the **matters** to which the **conditions** mentioned in section **63 (2) (a to d)** relate,
- and purporting to be signed by **person in charge** of computer or communication device or management of relevant activities (**Part A**), and an **expert** (**Part B**)
- shall be **evidence** of any matter stated in the certificate stated to the **best of knowledge and belief of the person stating it.**



## Changes related to Electronic, Digital Record-16

### Admissibility of electronic records – certificate of authenticity

- The format of **certificate** under section 63 (4) to be accompanied with evidence of electronic record is given in the **Schedule** newly added to the new Act.
- In the old Act no such format was provided for certificate under section 65 B (4).
- It will **bring uniformity**. It will **clear anomaly** in the form and contents of said certificate created by absence of authorised format. It will **lessen scope of different interpretations**.
- **Union of India vs. Ravindra (2018)16 SCC 273**  
**held** that non production of certificate u. s. 65 B at on an earlier occasion is a curable defect.
- **State of Karnataka vs. T. Naseer 2023 SCC OnLine 1447**  
**held** that Certificate u.s. 65 (B)(4) can be produced at any stage of trial – fair trial to all parties – will cause no prejudice to accused – will get opportunity to cross examine.

## Changes related to Electronic, Digital Record-17

### Admissibility of electronic records - authenticity.

Section 63 (5) :- provides that – for purpose of this section

- **firstly**, the information shall be taken to be supplied to a computer or a communication device, if it is so supplied in any appropriate form, directly (with / without human intervention) or by means of any appropriate equipment,
- **secondly**, a computer output shall be taken to have been produced by a computer or communication device whether it was produced directly (with / without human intervention) or by means of appropriate equipment or by electronic means referred in section 63 (3) (a) to (e).
- Thus, it refers to a situation where the relevant device from which the data is extracted and produced as evidence, might itself get it fed from another device.

# Changes related to Electronic, Digital Record-18

## Admissibility of electronic records - authenticity.

### Section 63 (5)

- **e.g.**- Mr. A sends a document - an electronic agreement(X<sub>1</sub>) created in his device to Mr. B – an intermediary, who returns its version(X<sub>2</sub>) to Mr. A. Now, Mr. A wants to produce the document (X<sub>1</sub>) in evidence, however, it is in a format which is not easily readable. Thus, production of its converted version (X<sub>2</sub>) is necessary.
- There may be a question of integrity of document(X<sub>2</sub>), for which certificate of assurance from Mr. B that evidentiary integrity of document (X<sub>1</sub>) has not been altered in document(X<sub>2</sub>) might be required.
- The solution would be in section 63(5), which avoids the need for the certificate of Mr. B – an intermediary. It provides a solution to the problem of obtaining a certificate of assurance from a sub processor, when the computer output is produced in evidence is taken from multiple computers owned by different persons. (credit : Naavi.org)
- You may face questions like :-
- How to ascertain “integrity or authenticity” of video in first place?
- How to ensure integrity during transmission or broadcast?

## Special terminologies are used relating to Electronic Record

- Section 57 – explanation – 5 - **proper custody,**
- Section 63(2)(a) – **lawful control,**
- Section 63 (4) – **Person in charge of,**
- Section 81 – explanation – **proper custody,**
- Section 136 – **document in possession or electronic record under his control,**
- **All these persons can give section 63 (4) – Part A certificate and depose.**
- **Part B certificate will be filed by the “Expert” – he will be an expert u.s. 39(1) and his opinion will be relevant u.s. 39 (2)**

## **Admissibility of an electronic record is dependent on :-**

- The device on which it is created or recorded,
- The manner by which it is seized during investigation,
- The form in which it is produced before the Court,
- Whether the original device containing electronic record is seized, analysed and produced, or
- How electronic record / data is collected / extracted from device and output produced before the Court,
- How the data is analysed by the expert,
- How the data is preserved,
- How the data is brought before the Court and led in evidence.

## **Kinds of Electronic Evidence and their proof - 1**

- Whatsapp messages / chats / posts / pictures / videos
- A particular message, chat, post, picture, image, video can be proved by either producing primary evidence i.e. - the mobile phone containing the data itself, or
- by taking print out of the screenshot or extracting and copying data on a pen drive, CD etc. coupled with certificate under section 63 (4).
- SMS / MMS
- Can be proved by producing the mobile phone containing the SMS / MMS, or
- by taking print out of the screenshot or extracting and copying data on a pen drive, CD etc. coupled with certificate under section 63 (4).

## **Kinds of Electronic Evidence and their proof - 2**

- **Electronic mails - emails**
- It is web based communication method that uses electronic devices to deliver computer created / stored messages from user to user across the computer network or through intermediaries like Gmail, Hotmail {**section 2(w) I.T.Act**}.
- Transmission or receipt of email can be proved by producing device containing message, or its printout or screenshot coupled with certificate u.s. 63(4).
- By using email forensics (study of source, contents) the source system domain, IP address, sender, date, time of sending, its contents can be traced out.
- Email on web with intermediaries (service providers) can be proved by presenting header (information of sender, recipient, subject)with certificate u.s. 63(4) to ensure its genuineness.
- Court may raise presumption u.s. 90 as to message received as fed into computer, **but such presumption can not be raised as to “sender” of message.**

## **Kinds of Electronic Evidence and their proof – 3**

- Photographs / Video recording – film, clip etc.
- Data on memory card (electronic data storage device – flash card) of a digital camera and data on secure digital card (SD card) of a mobile phone, are primary evidence relating to the images snapped by using such cameras.
- If such cards containing such photographs / video recording are produced, the same being primary evidence, do not require certificate.
- If internal memory of camera or mobile phone is used to store such images, such data on device itself would be primary evidence.
- If print-outs of images; or data of images, video recording extracted from device etc. are produced on CD or pen drive the same should be supported by certificate u.s. 63(4).



## Kinds of Electronic Evidence and their proof - 4

- Call Details Record(CDR) - Locational Evidence
- By use of cell phones, CDR are automatically created and stored on server of the service provider.
- CDR captures information relating to names, cell phone numbers of the caller and called persons, their unique identity, the date and time of call started and ended, duration of the call, call type(voice/SMS), call result (missed, connected-answered, busy, termination), call cost, any fault condition, identification of cell phone server, location of cell towers which routed the network event etc.
- In short, it is **digital stamping of usage of cell phone**.
- Geographical position – **location of the cell phone and not the subscriber** can be traced out by using CDR. It would be a corroborative piece of evidence.

## **Kinds of Electronic Evidence and their proof – 4**

### **Call Details Record(CDR) – Locational Evidence**

- Print outs of CDR are to be produced with certificate u.s. 63(4), as it is highly difficult to produce server.
- Data of CDR extracted by nodal officer of service provider, taking its print-outs by police and its analysis at cyber cell would be chain of custody to reach the same in the Court in the form of secondary evidence.
- The nodal officer, police official, cyber cell officer shall file different certificates u.s. 63(4).
- CDR is useful for proving use of cell phone, tracing out location, proving identity and establishing nexus between victim-accused, co-accused, witness-accused victim-witness, etc.

## **Kinds of Electronic Evidence and their proof – 5**

- Cellular phone – Mobile phone – Smart Phone
- It is nothing but a computer system alike palm top.
- Its inbuilt memory is hard disk.
- SD card is used for external storage.
- Video / audio recordings, snapped photographs, created or received images, documents, posts, messages etc. in dispute may be required to be proved by seizure and / or production of cell phones and analysis of data.
- If original device containing data is produced it does not require certification.
- If data is analysed, extracted by expert and produced through police, certification u.s. 63(4) is necessary.

## **Kinds of Electronic Evidence and their proof – 6**

### **Closed-circuit television – CCTV Footage**

- It is a combination of video camera, lens, monitor and digital / network video recorder – video surveillance technology.
- When the camera is on and properly connected with hard disk, the recording and storage of events, activities within the range of camera is done suo motu and automatically.
- An activity so captured - footage gets stored on the hard disk of computer by creation of files with self generated serial numbers, date, time and identification marks.
- Original hard disk containing data- footage of an activity is primary evidence.
- An extraction of data from hard disk and its production in the Court on CD or pen drive, certification u.s. 63(4) is necessary.

# Kinds of Electronic Evidence and their proof – 7

## Contents of Website

- Website is a place on internet where one can keep certain information about his business, activities, topics of interest for others to see and use for shopping, studying, chatting, entertainment etc.
- All websites are identified by a unique address to show their location which can be found by browsing.
- Information on website can be retrieved by using technology **http** (hyper text transfer protocol) and **ftp**(file transfer protocol).
- Contents of website may be proved by producing print out of site, contents or printout of their screen shots.
- Certification u. s. 63(4) is necessary.



## Edmond Locard's (Sherlock Holmes of France) Exchange Principle

- Basis of forensic science.
- Every contact by a criminal leaves behind a **trace**.
- When a person comes into contact with an object or a person, a cross transfer of physical evidence can occur.
- **It is equally applicable to electronic / digital evidence, as person handling it leaves his foot stapes on the same.**

**“Digital footsteps”**

(credit : H.S.Bahrwat, D.J.Bhopal)

## Changes related to Electronic, Digital Record-19

- Section 66 :- proof of **electronic signature** – except secure electronic signature - reintroduction of section 67A of the old Act,
- Section 73 :- proof of verification of **digital signature**-reintroduction of section 73A of the old Act,
- Section 81 :- presumption as to **Gazettes in electronic form** – reintroduction of section 81A of the old Act,



## Changes related to Electronic, Digital Record-20

- Section 85 :- presumption as to **electronic agreements** reintroduction of section 85A of the old Act, by adding the term “**digital signature**”, to keep pace with modern times,
- Section 86 :- presumption as to **electronic record and electronic signature** – reintroduction of section 85B of the old Act,



## Changes related to Electronic, Digital Record-21

- Section 90 :-presumption as to **electronic messages** - reintroduction of section 88A of the old Act, by **omitting** explanation as it has become redundant in view of section 2(2) of new Act and meaning of “addressee” & “originator” in section 2(1)(b)(za) of the I.T. Act,
- Section 93 :- presumption as to **five years old electronic records** – reintroduction of section 90A of the old Act.

## Changes related to “Secondary Evidence”

Section 58 (vi), (vii), (viii) and section 60, 63 conditions-

Scope of “**Secondary Evidence**” is expanded

it will include -

- **Oral admissions** (may be given during cross exam in different matter),
- **Written admissions** (may be given in pleading/document filed in different matter),
- Evidence of a person who has examined a document, the original of which consists of numerous accounts or other documents which cannot conveniently be examined in the Court, and who is **skilled examiner** of the document.
- **Dhanpat vs Sheo Ram (2020) 16 SCC 209** – application to lead secondary evidence is not necessary if sufficient foundation is made in pleading and evidence.
- No litigant should be denied opportunity to prove his case, for want of sound legal provision – **fair trial**

## Other Changes brought by the New Act-1

- **Section 2 (1)(f)** - definition of “**fact**”, “illustration (e)- **that a man has certain reputation**” is **omitted** – psychological / mental fact – covered by illustration (iv) – certain opinion.
- **Section 2(2)** – New provision - words and expressions defined in BNSS, BNS, IT Act - used in BSA but not defined shall have **same** meaning.
- **Section 4** - facts closely connected to **relevant facts (newly added)** forming part of the same transaction, are relevant- **Vasai murder case**.



- Other Changes brought by the New Act- 2

- **Section 6** – in illustrations (d)advocates (*vakils*), (e)provided(**proved**), (f) gender neutral-person (**man**), (j) clarity - raped(**ravished**) are used – to avoid anomaly – using apt words - gender neutral -
- **Section 22** - term “**Coercion**” is added to cover more instances of irrelevant confessions – **fair trial**.



## Other Changes brought by the New Act- 3

- The terms “**Barrister, Pleader, Attorney or Vakil**” used in sections 23, 66, 126, 127, 128, 149, 150, of the old Act being obsolete are replaced by the word “**Advocate**” in order to bring uniformity and avoid anomaly in interpretation of these terms in section 21, 64, 132, 133, 152, 153 of the new Act.
- **Section 134** - The term “**legal professional adviser**” in section 129 of old Act is replaced by “**Legal adviser**”



- Other Changes brought by the New Act- 4

- The sections 5 to 22 of the old Act are **renumbered** as Sections 3 to 20 of the New Act by maintaining the same provisions relating to the **Facts, Facts in Issues, Relevant Facts, Admissions and their proofs** etc.
- The Section 22A of the old act relating to **relevancy of Oral Admissions as to contains of Electronic Records** etc which was inserted after introduction of the Information Technology Act has been **omitted**.



## Other Changes brought by the New Act- 5

- **Section 22** - the Sections 24, 28 and 29 of old Act about **relevancy of such extra judicial confessions** made to a person in authority after full removal of inducement, threat, coercion, or promise are clubbed together in sec.22 with first and second proviso.

- **Mohtesham vs Spl. Director E.D.**

(2007)8 SCC 254

such confession would require a closer scrutiny and corroboration from independent sources.

Such confession would not be made foundation of conviction as it was not treated as evidence in ordinary sense. It would only be used in support of other evidence.



## Other Changes brought by the New Act- 6

- **Section 23** - The sections 25, 26, 27 of old Act are consolidated and introduced in the form of section 23 (1)(2) and its proviso.
- The “**explanation**” to old section 26, being obsolete, has been **omitted**,
- The celebrated **section 27** of the old Act, which was in the form of “proviso” to section 25 and 26 has been re introduced in the form of “**proviso**” to section 23 of the new Act.



## Other Changes brought by the New Act- 7

- **Section 24** - A new explanation II - is added for the purpose of making applicable - a proved confession made by one accused, against another accused; by **deeming the trial to be joint**, if such accused is absconded and fails to comply with a proclamation issued against him(section 355 BNSS )
- **Section 35** -A judgment or order of Tribunal is also made relevant.
- **Section 39** - The Section 45 and 45A of the old Act relating to relevancy of an opinions of **experts** in foreign law, art, science, handwriting, finger impressions, **electronic evidence** are reintroduced under sub sections(1) and (2). Added expert **“any other field”**.



## Other Changes brought by the New Act- 8

- **Section 41** - The section 47 and 47A of the old Act relating to relevancy of an opinion as to handwriting and electronic signature are reintroduced under sub sections (1) and (2).
- **Section 48** - The section 53 A of old Act relating to non relevancy of evidence of character or previous sexual experience is reintroduced.
- **Section 52** - Judicially noticeable new facts are added (sub clauses b, c, d, e) and facts related to British reign in section 57 (2, 3, 4, 5, 6, 7) of the old Act, being obsolete are **omitted**.
- **Section 69** - A reference of a document executed in U.K. being obsolete is **omitted**.



## Other Changes brought by the New Act- 9

- **Section 74** - The provisions regarding public and private documents given respectively under sections 74 and 75 of the old Act are now reintroduced under sub sections (1) and (2) by adding word – Union territory and by omitting obsolete word – Commonwealth,
- **Sections 77 & 78** - A reference of certain terms relating to British reign or State of Jammu and Kashmir, being obsolete are **omitted**.
- **Section 80** - A reference of certain gazettes relating to British reign, being obsolete are **omitted**.



## Other Changes brought by the New Act-10

- The section 82 of the old Act relating to presumption as to documents admissible in England, Ireland without proof seal and signature, judicial, official character etc being obsolete is **omitted**.
- **Section 88** - A reference of certain terms relating to British reign, being obsolete are **omitted**.
- The section 88 of the old Act relating to presumption as to telegraphic messages, being obsolete is **omitted**.

## Other Changes brought by the New Act-11

- **Section 92 & 93** - The explanations to sections 90 and 90A of the old Act relating to proper custody of documents are omitted by applying explanations under sections 80 and 81 to avoid repetition.
- The sections **91 to 100**, **101 to 114**, **115 to 117** of the old Act are renumbered as sections **94 to 103**, **104 to 120**, **121 to 123** of the New Act by maintaining the same provisions relating to exclusion of oral by documentary evidence, burden of proof, estoppel etc.
- The section 113 of the old Act relating to proof of cession of territory being obsolete is **omitted**.

## Other Changes brought by the New Act-12

- The scope of principle of **estoppel** available against a **tenant** under section 116 of the old Act during the continuance of tenancy is expanded under the new Act even anytime thereafter, i.e. after termination of tenancy also.
- Reference of a “**Lunatic**” under explanation of section 118 of the old Act is replaced with reference to “**Person of Unsound Mind**” to include more persons of similar mental diseases who could be witnesses competent to depose, if not prevented by unsoundness to understand question put to him and answer rationally.

## Other Changes brought by the New Act-12

- Section 131 – information as to commission of offence
- Old section 125 – “whence” – source and time
- New section 131 – “when” – time
- Therefore, no protection is available for non-discloser of “secret source” of information under new Act.
- Under old Act protection was for both - source and time

## Other Changes brought by the New Act-13

- **Section 138** - The language of provision relating to testimony of an accomplice, and conviction based thereon is simplified by clarifying that if the conviction is based on “corroborated testimony” of an accomplice, it will not be illegal. Fair trial – to avoid misuse.
- **Section 146** - sections of 141, 142 and 143 of the old Act relating to leading questions, and granting permission when they should be asked are reintroduced under sub section (1) to (4).





## Other Changes brought by the New Act-14

- **Section 165** – A proviso is added which prohibits the production of any privileged communication between ministers and the President of India. **There would be controversy, if vires such communication itself will be in dispute,**
- **Section 165 (3)** – basis - could find in the Constitution
- The section 166 of the old Act relating to power of Jury or assessors to put questions, being obsolete is **omitted.**

## Other Changes brought by the New Act-15

- **Section 170** – the new Act – no retrospective effect – it will be applicable to fresh matters filed on and after 01/07/2024.
- **Schedule** – {section 63(4)(a to c)}
- **“Certificate of Authenticity”** of Electronic Record

to be filled in formats

Part –A (by Party) and Part –B(by Expert)

- These certificates shall be **evidence** of the matter stated therein.



# Law of Evidence in Nut Shell

(Credit : Justice SShri. M.T. Joshi)

Dr. M. S. Deshpande, Additional Director, Maharashtra Judicial Academy, Uttan, Mumbai.

Sr. No.	Questionnaire	Answers as per New Act
1	Why to produce/adduce evidence ?	To prove or disprove existence or non existence of a right or liability.
2	On what matters such proof depends ?	On certain facts.
3	What are those certain facts?	Any thing physical or perceivable by senses like a document or state of mind like intention, motive etc.
4	What are those facts, which can be proved or disproved ?	Facts in issue, Relevant facts, Admissible facts.
5	Which are relevant facts?	<b>Described under sections 4 to 50, and 159 to 161.</b>

Sr. No.	Questionnaire		Answers as per new Act
6	Who has to prove the relevant facts?		By the party setting claim, and in the circumstance provided by “burden of proof” under sections 104 to 120
7	Which relevant facts need to be proved ?		All, except – those which need not be proved, which shall not be proved, which may or may not be proved
8	Which facts need not be proved?		Under sections 25, 53, 69 as explained by sections 21 to 23- admissions & confessions. As stated under sections 51, 52, 78 to 84, 108, 115, 118, 120.
9	Which facts may or may not be proved?		As stated under sections 88 to 90, 92, 93, 117 & 119.

Dr. M. S. Deshpande, Additional Director, Maharashtra Judicial Academy, Uttan, Mumbai.

Sr. no.	Questionnaire	Answer as per new Act
10	Which facts shall not be proved?	<p>As stated under sections 116 (conclusive proof)</p> <p>As stated under sections 121 to 123 (estoppel)</p> <p>As stated under sections 127 to 137 (Privileges)</p>
11	How to prove relevant facts?	<p>By oral and / or documentary evidence, via primary, secondary evidence as stated under sections 54 to 56, 57 to 64, 65 to 68, 70 to 77, 94 to 101, 102 and 103.</p>
12	Who shall prove relevant facts?	<p>Competent witness/es as stated in section 124 or part of their examination as excepted by privileges provided under chapter IX, Section 26 etc.</p>

<b>Sr. No.</b>	<b>Questionnaire</b>		<b>Answer as per new Act.</b>
13	In what manner witness/es shall be examined ?		As provided under sections 140 to 158, 162 to 164, subject to power of the Court under section 168.
14	Notice to produce documents and its effect?		As provided under sections 64, 165 to 167.
15	Effect of mistake committed by the Court in accepting or refusing to accept evidence ?		As provided under section 169.



**Equally important to read**  
**High Court of Bombay Rules for Video Conferencing for Courts, 2022**

- I. Definitions**
  - II. General principles**
  - III. Procedure for V. C.**
  - IV. General procedure**
  - V. Miscellaneous**
- Schedules - I and II**





**Equally important to read  
e-Filing rules of the High Court of Bombay, 2022**

- I. Definitions**
- II. Frame of Pleadings**
- III. Scanning of documents**
- IV. Digital Signatures**
- V. Electronic Document / Data**
- VI. Separate labeling and encryption**
- VII. Storage and retrieval of e-Filed documents and pleadings.**

# Epilogue

- **Deep and meaningful reading of the new Act is necessary,**
- **Proper implementation of the new Act is necessary,**
- **Timely and repetitive sensitization about the new Act is the need of the day.**



Dr. M. S. Deshpande, Additional Director,  
Maharashtra Judicial Academy, Uttan, Mumbai.



Dr. M. S. Deshpande, Additional Director,  
Maharashtra Judicial Academy, Uttan, Mumbai.



# Thank You

**Dr. M. S. Deshpande, Additional Director, Maharashtra Judicial Academy, Uttan, Mumbai.**