

*** SUMMARY / GIST ***

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GROUP : CRIMINAL

**SUBJECT - APPRECIATION OF DIGITAL EVIDENCE
IN CRIMINAL CASES AND ITS ADMISSIBILITY**

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APPRECIATION OF DIGITAL EVIDENCE IN CRIMINAL CASES AND ITS ADMISSIBILITY

INTRODUCTION AND OBJECT :-

1. In the digital era of 21 century, the new type of evidence is emerged. Initially the facts prove on the basis of oral and documentary evidence only. The digital evidence is a best evidence to prove the fact and plays vital role than oral evidence. But after the digital revolution in the world, the new challenges of proving the facts by electronic evidence have been the vital issues. The electronic evidence is fragile type of evidence and can be easily succumbed to the tampering. For this purpose, certain changes were necessary in the law relating to evidence. So, with the enactment of the Information Technology Act, 2000, some important amendments are made in Indian Evidence Act, 1872. Electronic record is considered as documentary evidence. There has been conundrum about admissibility of electronic

evidence. To clear the law as it is stand as on today this workshop.

2. The Indian Evidence Act, 1872 (as amended by the Information Technology Act, 2000) defines evidence as follows;

“Evidence” means and includes;

(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence,

(2) all documents including electronic records produced for the inspection of the court, such documents are called documentary evidence.

3. **“Electronic Record”** Section 2(t) of Information Technology Act 2000 defines electronic record as, data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

4. So, the electronic record in the form of such data is the evidence as per amended definition of evidence. In this back-ground digital evidence or

electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial.

5. **“Electronic Evidence”** As per the Explanation to Section 79A of the IT Act, electronic form of evidence means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines. Courts can thus permit the use of digital evidence such as e-mails, digital photographs, word processing documents, instant message histories, spread sheets, internet browser histories, data bases, contents of computer memory, computer backup, secured electronic records and secured electronic signatures, Global Positioning System tracks, Logs from a hotel’s electronic door, Digital video or audio etc., during the course of trials of a civil or criminal case.

6. **Characteristics of the Electronic Evidence:**

- 6.1. It is in the form of data, information, image, sound, audio, video, text etc.;

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6.2. It can be stored, received or sent in electronic form;

6.3. It can be easily copied.

6.4. It is sensitive and it can be altered, tampered or manipulated easily. So electronic evidence is subject to tampering and damaged. Therefore it must be properly collected and preserved before producing it in the court.

Admissibility of Electronic Evidence:-

7. Section 65-A and 65-B of the Evidence Act are the special provisions deals with the admissibility of electronic evidence. The definition of evidence has been amended to include electronic records. The definition of documentary evidence is also amended to include all documents including electronic records produced for the inspection of the court. Two new sections i.e., section 65-A and 65-B are introduced in the Evidence Act.

8. **Section 65-A** provides that, the contents of electronic record may be proved in accordance with provisions of section 65-B.

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9. **Section 65-B** provides that, electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document. It also provides that, the electronic record is admissible as evidence in any proceeding without further proof or production of original, if the conditions mentioned in section 65-B are satisfied in respect of information and computer in question.

Conditions to be satisfied :-

10. The conditions specified in section 65-B (2) are,
- a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store and process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer.
 - b) during the said period, the information of the kind contained in the electronic record

or of the kind from which information contained is derived was regularly fed into the computer in the ordinary course of the said activities.

- c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents, and
- d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

11. The above-mentioned conditions are relating to the veracity of the data. The conditions ensure that there is no unauthorised use of the data and the device was functioning properly ensuring the accuracy and genuineness of the reproduced data.

12. Sub-section (3) of Section 65-B provides that, if the user has been using a networked device either to store or process the information, all the connected devices will be considered to be a single device.

CERTIFICATE OF ELECTRONIC EVIDENCE:-

13. Sub-section (4) of Section 65-B provides for the requirement of a certificate of authenticity. The purpose of the certificate is to satisfy the conditions laid out by sub section (2) of Section 65-B. The certificate is to be signed by a person occupying a responsible position in relation to the device through which the data is produced. Further, the certificate must:

- 13.1. identify the electronic record containing the statement, describe the manner in which it was produced,

- 13.2. give such particulars of any device involved in the production of the electronic record as may be appropriate for the purpose of showing that the

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electronic record was produced by a computer.

13.3. the certificate must also deal with any of the matters to which the conditions for admissibility relate.

The entire idea behind the certificate is to ensure the integrity of the source and authenticity of the data, so that the court may be able to place reliance on it. Certificate is most important because the electronic data is more prone to tampering and alteration.

WHO MAY PRODUCE ELECTRONIC EVIDENCE

CERTIFICATE:-

14. A question may arise who has to generate the certificate required under Section 65-B of the Indian Evidence Act, 1872? A Person making a certificate under Section 65-B must be a competent and capable person. As per the wordings of Section 65-B, i.e., "occupying a responsible official position," it clarified that the person offering the certificate is providing in its

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"official capacity." If a person offering the certificate has left the organization, and another person holds that "official capacity," then that another person in the organization can be compelled to give a deposition in a Court instead of insisting the person who had generated the certificate when he was a part of that organization.

15. The data is stored and processed in multiple computers, servers, etc. For example, a bank account statement. The output of the bank account statement is generated from a single computer. Still, the data used to create that bank account statement is not only stored in that computer only from which it is created. It involves data from multiple computers and servers to produce that bank account statement. So certificate from owners of all those computers is required to certify the contents of that bank account statement generated from a single computer? No, as the intention of the legislature is limited to the "process of creating computer output" and not the "process of creating the

electronic record which is the subject matter of computer output" as per the wordings of Section 65-B of Indian Evidence Act. Therefore, this provision entirely applies to the process of generating the computer output, which is being produced to the Court for admission. Hence, it can be done by any person who is observing an electronic record in his computer and wants it to be produced as a piece of evidence before the Court.

16. Moreover, it is not necessary that any Information on Instagram has to be certified by the Instagram server administrator only. It can be certified by any person who has seen that Information on his computer. It is to be observed that there is a thin line difference between "content viewer" and "content owner." The Instagram server administrator is the "content owner," and any other individual being "a content viewer" is merely providing a certificate as to a faithful reproduction of the electronic record.

17. In *State (NCT of Delhi) Vrs. Navjot Sandhu* the Hon'ble Supreme Court held that, secondary evidence of electronic record was admissible under section 63 and 65 without compliance of certificate under section 65-B(4). But in *Anvar P.V. Vrs. P.K. Basheer and others* view on the aforesaid point is overruled. The Hon'ble Supreme Court held that, the proof of electronic record is a special provision introduced by the Information Technology Act, 2000, amending various provisions under the Evidence Act. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65-B are satisfied.
18. Recently in *Arjun Panditrao Khotkar Vrs. Kailash Kushanrao Gorantyal and others (2020) 7 Supreme Court Cases 1*, the Three Judge Bench of Hon'ble Supreme Court held that, the law laid down in *Anvar P.V. Vrs. P.K. Basheer and others* is correct and reiterated that, An electronic record by way of secondary evidence shall not be admitted in evidence unless

the requirements under section 65-B of the Evidence Act are satisfied. Without which, secondary evidence pertaining to that electronic record is inadmissible. Thus in the case of CD, VCD, Chip etc., the same shall be accompanied by a certificate in terms of section 65-B obtained at the time of admitting the documents in evidence.

19. In *Shradha Shipping Co. Pvt. Ltd. Vrs. Adhithri Trading Company (2014 SCC OnLine Bom 2273)* : It is held that 'certificate must be signed by a person occupying a responsible official position in relation to the computers'.
20. In *State of Maharashtra Vrs. Ramesh V. Darandale and others (2019 SCC OnLine Bom 4988)* : Once certificate under section 65-B stands proved, it carries **presumption of correctness.**
21. In *Union of India and others Vrs. CDR. Ravindra V. Desai (2018) 16 SCC 273* : It considered the stage of producing the certificate under section 65-B of the Evidence Act holding

that it can be considered at later point of time and the same is a **curable defect**.

Fresh Certificate under Section 65-B can be produced

22. It has been held by Hon'ble High Court in the judgment *Ignatius Topy Pereira Vrs. Travel Corporation (India) Pvt. Ltd., and others, reported in 2016 SCC Online Bom. 97* that, if the certificate under Section 65-B which was produced in rejected as not compliance with the section, fresh certificate may be produced.

23. In *State by Karnataka Lokayukta Vrs. M. R. Hiremath (2019) 7 SCC 515* : Honourable Supreme Court has considered the stage of producing the certificate. It is observed that the need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

24. **Tape recordings** :- It is settled that, tape

recordings shall constitute a document under section 3 of Evidence Act. However, it is important that the voice of the person alleged to be speaking is duly identified by the maker of the record or by others who know it. Chapter 6 Para 24 of the Criminal Manual rules are framed as to the production of tape record evidence in the court. Moreover, In *R. M. Malkhani Vrs. State of Maharashtra (1973) 1 SCC 471* the Hon'ble Supreme Court held that, tape recorded conversation is admissible provided that, first, the conversation is relevant to the matter in issue, secondly there is identification of the voice, and thirdly the accuracy of tape recorded conversation is proved by eliminating the possibility of erasing the tape record.

25. **Statement of account** :- A printout of statement of account, duly certified by a responsible official of the bank along with a certificate under section 65-B of Evidence Act, has also been recognised by courts as sufficient proof to lead such statements into evidence. In the case of *M/S ICICI Bank Limited Vs. Gurudev Singh [(2018)]*

SCC Online Del 6934] the Hon'ble Delhi High Court held that, in case of bank statements, the certificate given by the authorised representative of the bank under section 65-B is adequate and supports the statement of account relied upon by bank.

26. In view of Sections 59 and 65-A documentary evidence in electronic form can be proved only in accordance with the procedure prescribed under Section 65-B which deals with the admissibility of the electronic record. Section 65B of the Indian Evidence Act is pari materia to Section 2A of the Act⁵ as both relate to laws on the same matter and therefore must be construed with reference to each other. Further, owing to the principle that a special law will always prevail over the general law, Section 2A of the Act will prevail over Section 65-B of the Evidence Act in cases of bank records maintained in electronic form.

27. P. Gopalkrishnan alias Dileep Vrs. State of Kerala and others 2019 SCC OnLine SC 1532 :

Hon. Supreme Court considered the question **whether a clone copy of electronic record can be given to an accused.** In answer to this the Hon'ble Court held that, the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. **However**, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides.

28. Regarding preservation of electronic record produced in evidence, relevant case law is **Om Prakash Verma Vrs. State of West Bengal and Ors. [2017(4) CALCRILR 61; 2018 CRLJ 640]** it is held that when electronic devices like mobile phone, laptop, tablet, etc. are seized as stolen

property and are required to be produced and identified during trial, interim custody of such devices pending investigation, enquiry or trial shall not be granted till the IMEI number or other unique identification number, and its brand/product number and manufacturing details is ascertained and noted in the case records for identification of such device during trial.

29. In *Vikram Sing alias Vicky Walia and another Vrs. State of Punjab (2017) 8 SCC 518* : If an electronic record is used as primary evidence, the same is admissible in evidence, without compliance with the conditions in Section 65-B. Certificate is not needed if original is produced.
30. Though as per Section 65-B of Evidence Act the certificate under Section 65-B(4) is mandatory to make secondary electronic evidence admissible, it has one exception of Section 46 of UAPA Act under which evidence collected through interception of communication is admissible. Section 46 of UAPA Act provides that evidence

collected through interception of wire electronic or oral communication is admissible notwithstanding provisions of evidence act and other laws. It has given break through to the requirement of certificate under section 65-B of the Evidence Act.

Electronic evidence family Court proceeding-

31. Section 14 of the Family court act provides for discretion for receiving evidence. Hence no strict rule of S 65-B may be imported for family court proceedings. (*Relied on Pramod E.K. Vrs. Louna V.C., 2019 SCC OnLine Ker 165 : AIR 2019 Ker 85.*)

Bail Application and Filing of S 65-B certificate -

32. In Pravata Kumar Tripathy vs Union Of India (CBI) on 20 October, 2014 Bail Application No. 18388 of 2014, Hon'ble Orissa High Court held that at the time of consideration of the bail application, it is not at all necessary to ask the prosecution (CBI) to first satisfy the fulfillment of all the criteria laid down in case of Anvar P.V.

Vs P.K. Basheer before taking into account the Forensic Voice Examination Report as well as transcription of the CD.

33. **Oral Evidence as to the contents of electronic record** :- Section 22-A of Evidence Act, provides that, oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.

34. If question arise as to genuineness of electronic record after it is duly produced in terms of Section 65-B of the Evidence Act, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence. It reads as follows :-

“45-A. Opinion of Examiner of Electronic Evidence.—When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in Section 79-A of the Information Technology Act, 2000 (21 of 2000), is a relevant fact.

Explanation.—For the purposes of this section, an

Examiner of Electronic Evidence shall be an expert.”

For proper appreciation of electronic evidence one must know the presumptions as to electronic record which are as follows :-

35. Section 81-A – Presumption as to Gazettes in electronic forms : The Court shall presume the genuineness of every electronic record :-

- a) purporting to be official gazette, or
- b) purporting to be electronic record directed by any Law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody.

36. Section 85-A – Presumption as to electronic agreements : Electronic form of agreement containing electronic signature of parties, Court shall presume that the agreement was concluded by affixing electronic signatures of parties.

37. Sec. 85-B – Presumption as to electronic record and electronic signatures : Secure electronic record if produced in any proceeding

shall be presumed to have not been altered unless contrary is proved.

38. **Sec. 85-C Presumption as to Electronic Signature Certificate** : Such certificate and information therein shall be presumed to be correct.

39. **Sec.88-A : Presumption as to electronic message** : Court may presume that electronic message forwarded by the originator through electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission.

40. **Sec. 90-A** – It is presume that, electronic signature is affixed by the said person or by any person authorized by him on electronic records of five years old produced from proper custody. Presumption relates to electronic signature.

Conclusion

41. To conclude the paper, as on today the law in respect of appreciation of electronic evidence

explained by Hon'ble Supreme Court in Arjun Khotkar's case is last word on this subject. In this case, Hon'ble Supreme Court held that,

- a) The requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him.
- b) In cases where “the computer”, as defined, happens to be a part of a “computer system” or “computer network” (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the court, then the only means of proving information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4).

- c) An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.
- d) The word “and” between knowledge and belief in Section 65-B(4) must be read as “or”, as a person cannot testify to the best of his knowledge and belief at the same time.
- e) The certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. [Anvar P.V. v. P.K. Basheer]
- f) Depending on the facts of each case and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial the court may in appropriate cases allow the prosecution to produce such certificate at later in time.

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g) It is further held that, law laid down in *Tomaso Bruno and another Vrs. State of UP (2015) 7 SCC 178* and *Shafhi Mohammad Vrs. State of H.P., (2018) 2 SCC 801* is not correct and overruled.

Submitted with respect.

Yours faithfully,

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*** Thank You. ***