Electronic Devices - Electronic Evidence (Changing trends)

by

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The Indian Evidence (Amendment) Act, 2000 brought certain changes, such as expanding the definition of documentary evidence to include electronic records. In **Arjun Panditrao Khotkar Vs Kailash Kishanrao Gorantyal (2020) 7 SCC 1)** the Hon'ble Apex Court has highlighted the difference between Primary and Secondary Evidence with regard to electronic record. The original information contained in the 'computer' is considered as Primary Evidence, whereas the computer output containing such information is considered to be Secondary Evidence. While adducing secondary evidence of electronic record, certificate as contemplated under sec.65 B (4) of Indian Evidence Act, is required to be submitted by the person occupying official position in relation to the operation of the relevant device. Submission of such a certificate is held mandatory in the above referred ***Arjun Panditrao Khotkar's*** case, which is still hold the field.

Major changes introduced by Bharatiya Sakshiya Adhiniyam (BSA), 2023:

The Bharatiya Sakshiya Adhiniyam (BSA), 2023 introduces significant changes in the existing definition of document; it includes "electronic and digital records" such as e-mails, server logs, documents on computers, laptops or smartphones, websites, locational evidence and voice mail messages stored on digital devices. And electronic evidence is now classified as Primary Evidence. As per BSA, 2023, electronic evidence is now classified as Primary Evidence; each stored copy of electronic or digital records, produced from

proper custody is to be considered as Primary Evidence. Sec.63 (4) of BSA, 2023 mandates a certification process similar to sec.65 B (4) of Indian Evidence Act. Such certificate is to be issued by any person incharge of the communication device or management of the relevant activities, as well as an expert. As per BSA, 2023 where primary electronic evidence is admissible *per se,* but secondary electronic evidence is only admissible when accompanied by a certificate as contemplated under sec.63 (4) of BSA, 2023, so also ruled by the Hon'ble Apex Court in ***Arjun Panditrao Khotkar's*** case.

As per BSA, 2023 where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed. The schedule of the BSA, 2023 contains the format of the certificate to be produced under Sec.63 (4) of BSA, 2023 by the party and the expert. And recording the hash value of the electronic evidence is mandatory at the time of submission of the certificate.

As per BSA, 2023 oral evidence now includes any statements given electronically by the witnesses. It helps the witnesses to give their evidence through audio video without physically appearing before the court.

It is pertinent to note that, there is no clarity in BSA, 2023 on what electronic evidence would constitute primary versus secondary evidence, but only the secondary evidence requires certificate as contemplated under sec.63 of BSA, 2023.

Sec.90 of BSA, 2023 creates a presumption that an electronic message, forwarded by the originator through an 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; but, the court shall not make any presumption as to the person by whom such message was sent. The court

may presume that the contents of an electronic message are accurate, but the presumption cannot be drawn as to the identity of the sender.

Sec.93 of BSA, 2023 creates a presumption as to electronic record of five years old, when it is produced from any custody which the court in particular case considers proper, the court may presume that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or any person authorized by him. Where the court considers that the five year old electronic record is produced from proper custody, it may presume that the electronic signature thereon was affixed by the person it purports to be of or the person authorized by him.

INVESTIGATION AND TRIAL THROUGH ELECTRONIC MEANS UNDER BNSS, 2023:

Sec.173 of the Bharathiya Nagarik Suraksha Sanhitha, 2023 says that information relating to the commission of a cognizable offence, may also be given by electronic communication to the officer incharge of a police station; when such information is given by electronic communication, it shall be taken on record by the officer incharge of the police station, and being signed the same within three days by the person giving it. And the substance thereof shall be entered in a book to be kept by such officer in such form as prescribed by the rules.

Sec.105 of BNSS, 2023 says that the process of conducting search of a place or taking possession of any property or thing , including preparation of the list of all things seized in the course of search and seizure and signing of such list by witnesses, shall be recorded through any audio-video electronic means preferably mobile phone and the police officer shall without delay

forward such recording to the District Magistrate, Sub Divisional Magistrate or Judicial Magistrate of the First Class.

Sec.530 of BNSS, 2023 says that all trials, inquiries and proceedings under BNSS, including issuance, service and execution of summons and warrant; examination of complainant and witnesses; recording of evidence in inquiries and trials; and all appellate proceedings or any other proceedings, may be held in electronic mode, by use of electronic communication or use of audio-video electronic means.

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