

Electronic Evidence under Evidence Act, 1872

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Introduction

Section 65A and 65B have been added by the Information Technology Act, 2000. Section 65A lays down the contents of electronic records may be proved with the provisions laid in the Section 65B.

Section 65B (Admissibility of electronic records) says that any information contained in electronic records which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be also deemed to be a document if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without any further proof or production of the original.

The conditions of Section 65B are-

- a. Information was produced during the regular course of activities by the person having a lawful control over the computer's use .
- b. Information has been regularly fed into the computer in the ordinary course of said activities .
- c. Throughout the material part of said period, the computer was operating properly or the improper operation as not such as to affect the electronic record or the accuracy of its contents.
- d. Information contained in the electronic records reproduces or is derived from such information fed into the computer in the ordinary course of activities .

The primary purpose is to sanctify proof by secondary evidence. This facility of proof by secondary evidence would apply to any computer output, such output being deemed as a document . A computer output is a deemed document for the purpose of proof.

Where the information was processed or fed into the computer on inter linked computers or one computer after the other in succession all the computers so used shall be treated as one single computer.

Section 65B also lays down that for the purpose of evidence, a certificate identifying the electronic records containing the statement and describing the manner in which it was produced by a computer and satisfying the conditions mentioned above and signed by an officer in charge of the operation or management of the related activities shall be the evidence of any matter stated in the certificate it shall be sufficient for the matter to be stated to the best of the knowledge and belief of the person stating .

Any information to be taken to be supplied to a computer , if it is done in any appropriate form whether directly with or without human intervention by means of any appropriate equipment , or any information is supplied by any official in the course of his activities with a view of storing or processing it even if the computer is being operated outside those activities .

Audio C.D.

In a matrimonial proceedings for dissolution of a marriage, the wife was alleged to have abused and threatened her husband on the cell phone and the same was recorded on it . The matter was recorded by the husband in an Audio C.D . The cell phone was not produced . Only the C.D was exhibited . The wife objected alleging fabrication . The court ordered the C.D to be marked as an exhibit subject to the condition that whenever it was played, opportunity for cross examination should be given to the wife. Where the petitioner (election petition) had himself admitted that he was not aware as to how and in what manner the C.D was prepared , it was held to be not admissible in evidence. It was of no help to the petitioner in proving the charge of corruption against the returned candidate .

Video –Conferencing

An evidence related to electronic record. A prayer was made for producing it by means of video conferencing . The court said that there was no bar on examination of a witness through video conferencing . This is natural part of electronic method therefore the prayer was therefore , allowed with usual safeguards . It was a claim for pendente lite maintenance . The husband was permanently living in America . His statement was allowed to be recorded by the the electronic device.

The facility of recording evidence by video conferencing has been already accorded in criminal cases . The court said that there cannot be any plausible objection to adopting the same

procedure in civil cases also. But necessary precautions must be taken both as to identify witness and accuracy of the equipment used for the purposes .

Family Courts Act (Section 10(3))

For the purpose of recording evidence with utilization of video conferencing technology , discretion has been vested in the family court itself to record evidence through such process . By virtue of Section 10(3) , family courts are empowered to adopt their own procedure to arrive at a settlement or to get truth of the matter.

Due to enormous growth in e-governance throughout the Public & Private Sector, Electronic Evidence have involved into a fundamental pillar of communication, processing and documentation. These various forms of electronic evidence are increasingly being used in both Civil & Criminal Litigations. During trials, Judges are often asked to rule on the admissibility of electronic evidence and it substantially impacts the outcome of civil law suit or conviction/acquittal of the accused. The Court continue to grapple with this new electronic frontier as the unique nature of e-evidence, as well as the ease with which it can be fabricated or falsified, creates hurdle to admissibility not faced with the other evidences. The various categories of electronic evidence such as website data, social network communication, e-mail, SMS/MMS and computer generated documents poses unique problem and challenges for proper authentication and subject to a different set of views.

Effects of Considering Electronic Evidence as Primary and Direct Evidence

Blurring the Difference between Primary and Secondary Evidence

By bringing all forms of computer evidence into the fold of primary evidence, the statute has effectually blurred the difference between primary and secondary forms of evidence. While the difference is still expected to apply with respect to other forms of documents, an exception has been created with respect to computers. This, however, is essential, given the complicated nature of computer evidence in terms of not being easily producible in tangible form. Thus, while it may make for a good argument to say that if the word document is the original then a print out of the

same should be treated as secondary evidence, it should be considered that producing a word document in court without the aid of print outs or CDs is not just difficult, but quite impossible.

Making Criminal Prosecution Easier

In light of the recent spate of terrorism in the world, involving terrorists using highly sophisticated technology to carry out attacks, it is of great help to the prosecution to be able to produce electronic evidence as direct and primary evidence in court, as they prove the guilt of the accused much better than having to look for traditional forms of evidence to substitute the electronic records, which may not even exist.

Risk of Manipulation

While allowing all forms of computer output to be admissible as primary evidence, the statute has overlooked the risk of manipulation. Tampering with electronic evidence is not very difficult and miscreants may find it easy to change records which are to be submitted in court. However, technology itself has solutions for such problems. Computer forensics has developed enough to find ways of cross checking whether an electronic record has been tampered with, when and in what manner.

Opening Potential Floodgates

Computers are the most widely used gadget today. A lot of other gadgets involve computer chips in their functioning. Thus, the scope of Section 65A and 65B is indeed very large. Going strictly by the word of the law, any device involving a computer chip should be admissible in court as evidence. However, practical considerations as well as ethics have to be borne in mind before letting the ambit of these Sections flow that far. For instance, the Supreme Court has declared test results of narco-analysis to be inadmissible evidence since they violate Article 20(3) of the Constitution.

Leading Case Laws on Electronic Evidence

1. *Anvar P.V. v. P.K. Basheer And Others* (2014 10 SCC 473)

In this significant judgment, the Supreme Court has settled the controversies arising from the various conflicting judgments as well as the practices being followed in the various High Courts and the Trial Courts as to the admissibility of the Electronic Evidences. The Court has interpreted the Section 22A, 45A, 59, 65A & 65B of the Evidence Act and held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate U/s 65 B(4) of Evidence Act. It has been elucidated that electronic evidence without certificate U/s 65B cannot be proved by oral evidence and also the opinion of the expert U/s 45A Evidence Act cannot be resorted to make such electronic evidence admissible.

The judgment would have serious implications in all the cases where the prosecution relies on the electronic data and particularly in the cases of anticorruption where the reliance is being placed on the audio-video recordings which are being forwarded in the form of CD/DVD to the Court. In all such cases, where the CD/DVD are being forwarded without a certificate U/s 65B Evidence Act, such CD/DVD are not admissible in evidence and further expert opinion as to their genuineness cannot be looked into by the Court as evident from the Supreme Court Judgment. It was further observed that all these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic records sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

In the anticorruption cases launched by the CBI and anticorruption/Vigilance agencies of the State, even the original recording which are recorded either in Digital Voice Recorders/mobile phones are not been preserved and thus, once the original recording is destroyed, there cannot be any question of issuing the certificate under Section 65B(4) of the Evidence Act. Therefore in such cases, neither CD/DVD containing such recordings are admissible and cannot be exhibited into evidence nor the oral testimony or expert opinion is admissible and as such, the recording/data in the CD/DVD's cannot become a sole basis for the conviction.

In the aforesaid Judgment, the Court has held that Section 65B of the Evidence Act being a 'not obstante clause' would override the general law on secondary evidence under Section 63 and 65 of the Evidence Act. The Section 63 and Section 65 of the Evidence Act have no application to the secondary evidence of the electronic evidence and same shall be wholly governed by the Section 65A and 65B of the Evidence Act. The Constitution Bench of the Supreme Court overruled

the judgment laid down in the **State (NCT of Delhi) v. Navjot Sandhu alias Afsan 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 required to be overruled.

The only options to prove the electronic record/evidence is by producing the original electronic media as Primary Evidence court or it's copy by way secondary evidence U/s 65A/65B of Evidence Act. Thus, in the case of CD, DVD, Memory Card etc. containing secondary evidence, the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

2. **Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke SC/0040/2015**

The Hon'ble High Court of Delhi, while deciding the charges against accused in a corruption case observed that since audio and video CDs in question are clearly inadmissible in evidence, therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with co-accused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question.

3. **Jagjit Singh v. State Of Haryana (2006) 11 SCC 1**

The speaker of the Legislative Assembly of the State of Haryana disqualified a member for defection. When hearing the matter, the Supreme Court considered the digital evidence in the form of interview transcripts from the Zee News television channel, the Aaj Tak television channel and the Haryana News of Punjab Today television channel. The court determined that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview when reaching the conclusion that the voices 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 comments in this case indicate a trend emerging in Indian courts: judges are beginning to recognize and appreciate the importance of digital evidence in legal proceedings.

4. *Abdul Rahaman Kunji v. State of West Bemgal (WB/0828/2014)*

The Hon'ble High Court of Calcutta while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of Section 65B r/w Section 88A of Evidence Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication

5. *State (NCT of Delhi) v. Navjot Sandhu (AIR 2005 SC 3820)*

There was an appeal against conviction following the attack on Parliament on December 13 2001. This case dealt with the proof and admissibility of mobile telephone call records. While considering the appeal against the accused for attacking Parliament, a submission was made on behalf of the accused that no reliance could be placed on the mobile telephone call records, because the prosecution had failed to produce the relevant certificate under Section 65-B(4) of the Evidence Act. The Supreme Court concluded that a cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken was sufficient to prove the call records.

Conclusion :

The admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent judgment of the Apex Court and various other High Courts as discussed above. The proposition is clear and explicit that if the secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the deposition of the witness in the court of law cannot be looked into by the court. However, there are few gaps which are still unresolved as what would be the fate of the secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act cannot be taken and the accused cannot be made witness against himself as it would be violative of the Article 19 of the Constitution of India.

