



## Electronic evidence evidentiary value

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### Abstract

Electronic Evidence has become a central cornerstone of correspondence, delivery, and reporting as a result of the tremendous increase of e-governance in the public and private sectors, as well as e-commerce operations.

Government bodies are opening up to electronic filings to enact different governance measures, and annual filings to oversee and monitor businesses are also performed electronically.

Electronic Evidence/Digital Evidence in different formats is constantly being used in court trials.

At this point in the proceedings, Judges are often called to comment on the admissibility of electronic proof, which has a significant effect on the result of civil cases or the prosecution or acquittal of criminal defendants.

The Court continues to wrestle with this emerging technological frontier, as the peculiar existence of e-data, as well as the simplicity with which it may be distorted or falsified, poses a barrier to admissibility that is not present in other types of evidence.

The numerous types of electronic information, such as CDs, DVDs, hard disk/memory card data, website data, social network correspondence, e-mail, instant messenger messages, SMS/MMS, and computer generated records, all pose particular problems and challenges for proper security and are subject to a variety of different standards.

**Keywords:** electronic evidence, admissibility, electronic record, digital record, certificate

### Introduction

The question of electronic evidence evidentiary Value and admissibility as the evidence Started, In case of Mahavir Prasad Varma vs Dr. Surinder Kaur <sup>[1]</sup> in this case supreme court held that it can be relied upon as corroborative evidence of conversation deposited by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape recorded conversation is indeed no proper evidence and cannot be relied upon.

Sections 65A and 65B of the Indian Evidence Act, 1872 were amended exactly twenty years earlier on October 17, 2000, prescribing the protocol for proving electronic documents as secondary evidence.

These laws established a clear yet vague path to how an electronic document would be admissible in court. The challenge of proving an electronic record, or in effect adducing the electronic record as a primary or secondary evidence, became pangs and toils for the Prosecution and the Defense in no time, and was also well beyond their endurance.

These pangs and toils of proving an electronic record began in 2002 with the Apex Court's decision in State v. Navjot Sandhu <sup>[2]</sup>, and have now reached a climax on July 14, 2020, with the Apex Court's decision in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal <sup>[3]</sup>.

This article aims to illustrate the conundrum that has arisen over the last two decades in relation to the advancement of Certificate jurisprudence under Section 65B(4) of the Act, and why we think there is an eerie similarity with one of Jane Austen's most famous works, 'Pride and Prejudice.

People nowadays use electronic communication and data to exchange business transactions, such as banking, insurance, consumer goods, manufacturing, engineering, and telecommunication.

Website info, social network correspondence, e-mail, SMS/MMS, surveillance video, audio, ATM transaction logs, and computer generated documents all pose specific problems and challenges for proper authentication and are subject to varying sets of perspectives.

In 2020, the Supreme Court put an end to a legal saga involving the need for a credential before providing electronic proof under Section 65B of the Indian Evidence Act.

The protocol for admissibility of electronic documents is engrafted in Section 65B of the Act.

Section 65B, subsection 4, imposes the requirement of having a certificate before using electronic proof, which has resulted in inconsistent Supreme Court decisions.

In light of the controversy between Anvar PV v. PK Basheer & Ors <sup>[4]</sup>, a two-judge Bench comprising Justices Ashok Bhushan and Navin Sinha had referred the issue.

State of Himachal Pradesh v. Shafhi Mohammad <sup>[5]</sup> A three-judge Bench issued its decision in this case, holding that the provision of a credential is a pre-condition to the admissibility of proof by way of electronic record under Section 65B of the Act.

In doing so, the Court upheld the law established in Anvar's case (supra), which said that "Sections 65A and 65B being a full code as to admissibility of electronic documents, the "baggage" of Primary and Secondary Evidence found in Sections 62 and 65 of the Evidence Act should not be at all referred to."

Section 65B(4) of the Evidence Act requires a certificate before electronic evidence can be admitted: Supreme Court After the passage of the Information Technology Act of 2000, Sections 65A and 65B were added to Chapter V of the Act, which deals with documentary evidence.

It took the Supreme Court 20 years to put an end to the

stalemate formed by differing rulings from separate benches on the issue of the provision of a credential as a pre-condition for the admissibility of an electronic document.

According to Section 61 of the Act, the substance of records can be proved by either primary or secondary testimony, and an electronic report is nothing more than a text that can be proven using Section 65B.

### 1. What is a digital evidence or electronic document?

The Information Technology Act of 2000 and its amendments are based on the model law on electronic commerce established by the United Nations Commission on International Trade Law (UNCITRAL).

The Information Technology (IT) Act of 2000 was amended to make multimedia evidence admissible.

The Indian Evidence Act, 1872, and the Indian Penal Code, 1860, have been amended to include the legal basis for electronic transactions.

Two meanings are included in the Oxford English Dictionary (second edition), both of which help to clarify the context of "digital":

'Relating to or working with distinct numeric values of a physical quantity such as voltage or magnetic polarisation (commonly expressed by the digits 0 and 1); designating a signal or information of this kind. I'm not a fan of analogue.' 'Any machine data (other than programmes or device files) that is meant to be used in its computerised form without being printed (although printing is normally possible),' according to Wikipedia. The Information Technology Act of 2000 defines "electronic records" as "any data, archive, or data produced," "any image or sound recorded, obtained, or transmitted in an electronic medium," or "micro film or computer generated micro fiche." Emails, digital photo graphs, ATM transaction logs, word processing, documents, instant message histories, files saved from accounting programmes, spreadsheets, internet browser histories databases, contents of computer memory, computer backups, computer printouts, GPS tracks, logs from a hotel's electronic door locks, and digital video or audio files are all examples of proof.

Digital evidence is typically larger, more difficult to delete, more easily manipulated, duplicated, theoretically more expressive, and more widely accessible.

### 2. Indian evidence act and electronic documents

By virtue of Section 92 of the Information Technology Act of 2000, the Indian Evidence Act has been amended (Before amendment). The term "all documentation produced for the inspection of the Court" was replaced by "all documents including electronic data produced for the inspection of the Court" in Section 3 of the Act. In the case of photographic documentation, the term "content of papers" have been replaced by "content of documents or electronic archives" in Section 59. Electronic evidence is documentary evidence, according to amended Section 3(2) of the Evidence Act.

"(2) Documentary evidence" refers to all documentation, including electronic archives that are created for the Court's examination. "(t) 'electronic archive' means "data, record, or data produced, image or sound stored, obtained, or transmitted in an electronic medium, micro video, or computer generated micro fiche," according to Section 2(t) of the Information Technology Act 2000. Consider: A digital charging sheet is considered a paper that can be used as an electronic archive. [Thana Singh vs. Central Bureau of

Narcotics <sup>[6]</sup>, In addition, Section 4 of the Information Technology Act states that if the text is in electronic form, i.e.

CDs, DVDs, and other similar media are

(a) in an electronic form rendered or made available; and It would be adequate enforcement if (b) was available so that it could be used for future reference.

"Oral testimony as to the contents of electronic documents is not relevant, unless the genuineness of the electronic record created is in question," according to Sec.22A.

### 3. The electronic evidence proof

The words "text or substance of records" have not been replaced by the words "Electronic documents or content of electronic documents" in Sections 61 to 65 of the Indian Evidence Act.

In light of the underlying clause of Section 65B of the Act, the absence of the term "Electronic Records" in the scheme of Section 61 to 65 denotes the plain and express statutory purpose, namely, not to expand the applicability of Section 61 to 65 to electronic records.

The Indian Evidence Act, section 65B, is solely concerned with the admissibility of electronic records.

It's worth noting that Section 65B begins with a non-obstante clause.

Thus, despite something in the Evidence Act, any material found in an electronic record that is written on paper, preserved, registered, or replicated in optical or magnetic media created by a computer is only considered to be a document if the requirements set forth in subsection (2) are met, and no further proof or production of the original is required.

Section 65B has four requirements (2).

#### Following are the specified conditions under Section 65 B(2) of the Evidence Act

1. The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
2. The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
3. During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
4. The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Section 65B (3) provides following computers shall constitute as single computer.

1. By combination of computers operating over that period, or
2. By different computers operating in succession over that period, or
3. By different combinations of computers operating in succession over that period, or
4. In any other manner involving the successive operation

over that period, in whatever order, of one or more computers and one or more combinations of computers.

Under Section 65B (4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- a. There must be a certificate which identifies the electronic record containing the statement;
- b. The certificate must describe the manner in which the electronic record was produced;
- c. The certificate must furnish the particulars of the device involved in the production of that record;
- d. The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
- e. The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

Most notably, where an electronic document such as a computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, or any device relating to which a declaration is sought to be given in evidence is created in evidence, such a certificate shall accompany it.

The author of 'Generic criteria for maintaining electronic documents over time: Defining the characteristics for authentic data' xxxi, for example, claims that authenticity can only occur if the three characteristics of durability, credibility, and accessibility are met.

BS ISO 15489-1:2001 'Information and documentation; Records management; General' lays down the rules. *GRT Shipmanagement Pvt. Ltd. vs. Ark Shipping Co. Ltd* [7].

The Hon'ble Bombay High Court addressed the need of a certificate under section 65B of the Evidence Act and issued a sample certificate, which is reproduced below:

1. I declare that I worked in the chartering division of Sahi Oretrans (Pvt) Ltd. (hereinafter referred to as Sahi for brevity), a corporation headquartered at 30 Western India House, 3rd Floor, Sir. P.M. Road, Mumbai 400 001.  
I assert that Sahi served as the ship broker in the above-mentioned charter-party between the petitioners and respondents.
2. As a member of Sahi's chartering division, I declare that I was directly interested in the deal.  
I state that as ship brokers, I forwarded all emails to the petitioners and respondents via computer terminals in Sahi's office.  
In fact, nearly all of the email correspondence includes my name.
3. I state that I was allowed to use the computer terminals in Sahi's office as a result of my work.  
Furthermore, the computer terminals I used were in perfect working order at all times.  
Furthermore, since I was directly interested in the transaction, I personally authored/saw the petitioners' and respondents' email correspondence.
4. I hereby produce hard copies of the emails that serve as evidence of the parties' agreement.  
The aforementioned emails are attached as Exhibit "A" to this document.  
If required, I would like permission to refer to and depend on typed/clear copies of the same during the

hearing.

5. I certify that the contents of the hard copies of the emails correspond to the emails exchanged using my computer terminals.

I further note and affirm that the contents of the hard copies of the emails at Exhibit "A" match the hard copies of the emails filed before the arbitrator, which I have reviewed.

6. As a result, I am signing this affidavit to attest that the hard copies of the emails attached as Exhibits "A" to "A4" hereto are a "real copy"/reproduction of the electronic record that was routinely fed into/transmitted through my computer terminal in Sahi's office in the ordinary course of business.

I further state that the computer terminals I used were operational at all times and that the contents of the hard copies of the emails were accurate at all times.

"The evidence relating to electronic record is a special clause, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same," the Hon'ble Supreme Court held in *Anwar P.V. Vs. P.K. Basheer* [8].

Specific legislation will still prevail above common law, according to the principle of *generalia specialibus non derogant*.

The court seems to have overlooked Sections 59 and 65A, which deal with the admissibility of electronic records.

Sections 63 and 65 do not apply to indirect information in the form of an electronic record; this is entirely regulated by Sections 65A and 65B.

To that point, the declaration of law in the *Navjot Sandhu* case [9] on admissibility of secondary evidence relating to electronic records does not represent the correct legal position.

It necessitates overruling, which we do.

#### **4. Admissibility of Electronic Records Position before the year 2000,**

Before the year 2000, courts used Sections 61 to 65 of the Act to decide whether electronic documents were admissible.

Without a doubt, an electronic report is a text, and the substance of such a document can be proven using either primary or secondary evidence. According to Section 62 of the Act, primary evidence is when the original text is produced before the Court for review.

The authenticity of an original document must be established by presenting the document itself.

In the event that the original record is not available, supplementary documentation must be produced.

What qualifies as secondary proof is specified in Section 63 of the Act.

Section 63 (2), which states that "Copies produced from the original by mechanical processes which in themselves insure the authenticity of the copy, and copies compared with such copies" are used for electronic documents.

If the original document/primary proof is not available to the party who wishes to introduce it as evidence, or if obtaining the original document is impossible, secondary evidence is used to prove its substance in accordance with the provisions set out in Section 65 of the Act.

To put it another way, in the case of an electronic database, There is no need to seek action under Section 65 of the Act

if a group may provide the original record themselves.

If it becomes difficult for a party to produce the original document/record, so Section 65 of the Act must be followed in order to produce supplementary documentation to show the contents of the original record.

In the mode of TAPE RECORDS, the first question before the court occurs.

Then came the issue of whether the tape recordings were electronic evidence.

The proof was historically documented on tape recorders.

And the fact that they were not labelled as "electronic documents,"

Despite the fact that they were, they did not face the challenges that we do now as a result of the revised clauses.

A quick analysis of the rulings will shed light on the case.

It was held in Mahavir Prasad Varma vs. Dr. Surinder Kaur<sup>[10]</sup> that it can be used as corroborative proof of a communication deposed by either of the parties to the conversation, but that in the absence of such evidence, the tape recorded conversation is not proper evidence and cannot be relied upon.

In the case of S. Partap Singh vs. State of Punjab<sup>[11]</sup>, it was decided that such testimony is not inadmissible solely because it might be tampered with. "Because tape recordings are vulnerable to tampering, the time, location, and authenticity of the recording must be proven by a qualified witness," the Hon'ble Supreme Court said in Yusufalli Esmail Nagree vs. State of Maharashtra<sup>[12]</sup>. It is important that such evidence be treated with caution.

The Court must be convinced that the evidence has not been tampered with beyond a reasonable doubt." The tape, on the other hand, was held to be principal and clear proof of what was said and reported in R.M. Malkani Vs. State of Maharashtra<sup>[13]</sup>.

The tape recordings of speeches were "documents," as specified by Section 3 of the Proof Act, that were admissible in evidence if they met the following conditions:

- a. The voice of the individual alleged to be speaking must be correctly identified by the producer of the record or by those who knew it.
- b. The author of the document had to prove the accuracy of what was actually reported by clear or circumstantial testimony.
- c. To rule out the possibility of messing with the record, he had to be there.
- d. The subject matter recorded had to be seen to be relevant in accordance with the Evidence Act's rates of relevancy [see Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdass Mehra and ors<sup>[14]</sup>. & the State of Maharashtra vs. Prakash Vishnurao Mane<sup>[15]</sup>. In Ram Singh vs. Col. Ram Singh, 1985 Supp<sup>[16]</sup>.] It was held that the proper authority must, by himself Written declarations made under oath is said to be a safer choice in any way. Chandrakant R. Mehta vs. The State<sup>[17]</sup> is a case where the plaintiff is Chandrakant R. Mehta. It was found that if it is to be legal for a period of time, it must be sealed as soon as possible and not opened except by court order. Failure to deliver on the grounds that audibility has deteriorated due to time and temperature, and that piece of proof was useless, no adverse conclusion can be made unless the failure is explained.

A previous argument made by an individual and preserved

on video may be used not just to corroborate but also to refute the testimony provided by the witness, as well as to verify the witness's veracity and impeach his impartiality [Ram Singh and others vs. Ram Singh<sup>[18]</sup>,

There are now guidelines for considering tape recording testimony in paragraph 24 of Chapter 6 of the Criminal Manual. The condition of sealing the recorded communication would apply in criminal cases but not in civil cases, it was decided. [Mrs. Havovi Kersi Sethna Vs. Mr. Kersi Gustad Sethna<sup>[19]</sup>,

### Immediately after the year 2000

Section 65A states that the contents of an electronic document, which were previously proved in accordance with Sections 61 to 65 of the Act, can now be proven in accordance with Section 65B.

The long-running controversy now centres on Section 65B of the Act, which has perplexed courts when it comes to determining the admissibility of electronic proof during a trial.

Any information found in an electronic record that is written on paper, saved, registered, or copied in optical or magnetic media generated by a computer is considered to be a document under this section, provided the requirements outlined below are met.

This segment has been completed.

In other words, the legislature has made a machine production a document/primary evidence by means of a considered fabrication, provided the provisions set out in Section 65B of the Act are met.

It was regarded as secondary evidence prior to the year 2000, but now that Section 65B has been enacted, it can be treated as a document/primary evidence in order to show the contents of the original.

Chapter 65B, subsection 4 of the A

When a party wishes to use secondary evidence as primary evidence under Section 65B (1) of the Act, the party must produce a certificate saying all of the items mentioned under Section 65B (4) of the Act.

When a party produces a certificate that is needed in relation to a device production, it is regarded as a document/primary proof.

A legal quandary emerged as to who was to blame.

A legal question emerged as to whether Section 65B (4 provision)'s of a credential is a required pre-condition for providing secondary evidence as a document/primary evidence.

The first case in which this question emerged was Navjot Sandhu v. NCT Delhi<sup>[20]</sup>, in which a two-judge Supreme Court Bench held that electronic proof is not per se inadmissible even though a certificate is not provided as required under Section 65B (4) of the Act.

It can also be proven as indirect evidence under Section 63 and Section 65 of the Act.

The problem with this stance was that, by providing such a broad reading, the Supreme Court had presumptively defeated the statutory purpose behind Section 65B of the Act.

The law established in Navjot Sandhu's case was enforced throughout the country for nearly a decade.

The problem with such a stance was that it seemed that the Supreme Court had defeated the statutory purpose behind Section 65B of the Act by providing such a broad reading.

The rule in Navjot Sandhu's case was pursued around the

world for almost a decade. The law that was established in Navjot Sandhu's case was followed throughout the country. In Anvar's case <sup>[21]</sup>, a three-judge Supreme Court bench ruled that Section 65B is a special clause that overrides Section 65, which is a general provision.

The Court also held that all photographic documentation in the form of an electronic report must be accompanied by a certificate as required by Section 65B. (4).

Secondary proof of electronic records/computer output is inadmissible in evidence in the absence of such a permit.

As a result, the applicability of Sections 63 and 65 to machine performance, which is secondary testimony, is rendered obsolete by Sections 65A and 65B.

Despite relying on the decision in Anvar's <sup>[22]</sup> case, the Court in Sonu v. State of Haryana <sup>[23]</sup> held that Sections 65A and 65B apply to the mode of evidence of an electronic document, not its admissibility.

The provision of a credential is simply a procedural flaw that can be remedied if a party raises an objection when the paper is adduced as testimony during the course of the trial and not at any other time, according to the court.

The said status should also be reconsidered in light of Section 65B's title, which begins with the term "admissibility" of electronic documents rather than "evidence."

In Shafhi Mohammed's case <sup>[24]</sup>, a two-judge bench disagreed with Anvar <sup>[25]</sup> and held that the provision of a certificate under Section 65B (4) is procedural and that the court should relax it in the interest of justice.

If a group is unable to deliver it, such a provision is not necessary.

Furthermore, according to Sections 63 and 65 of the Act, a party can generate a computer output as secondary evidence. In the case of Panditrao Khotkar v. Kailash Kushanrao Gorantyal <sup>[26]</sup>, the Supreme Court ultimately acknowledged the contradictory views expressed in Anvar's <sup>[27]</sup> and Shafhi Mohammed's <sup>[28]</sup> cases and remanded the case to a larger bench for further consideration.

Although upholding the law laid down in Anvar's <sup>[29]</sup> case, the Supreme Court in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal <sup>[30]</sup> on 14 July 2020 finally held that the provision of a certificate is a pre-condition to the admissibility of evidence by way of electronic record under Section 65B of the Act.

In the event that such a certificate is not accessible, According to Section 65B of the Act, a group cannot admit electronic proof unless it is per se inadmissible.

### Conclusion

The proliferation of machines and digitalisation has been one of humanity's best and most innovative technologies. Cyberspace, like other aspects of human culture, has not been immune to threats and criminal activity. This is due to the variety of material and resources available, as well as the ease of access and broad scope. However, as cyberspace has grown in popularity, there has been a significant uptick in its abuse. Given how easily e-documents can be tampered with, their validity has often been questioned. The admissibility of such electronic information is becoming more problematic for law enforcement authorities. Since electronic evidence, unlike conventional or traditional evidence, necessitates specialised and specialist cyberspace preparation, the procedure used to examine and analyse data stored on or obtained from electronic media for the purposes of

presentation in a court of law is critical.

The use of electronic documents of court cases has progressed significantly with the passage of the IT Act and subsequent Amendments to the Evidence Act. Despite many judicial precedents emphasising the value of the diploma, it has devolved into a mere formality. It would be fascinating to see how the Supreme Court clarifies the provision of a credential under Section 65B of the Evidence Act, which was weakened by the Supreme Court's Shafhi Mohammed decision. And after that, the Supreme Court in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal on 14 July 2020 finally held that the provision of a certificate is a pre-condition to the admissibility of evidence by way of electronic record under Section 65B of the Act.

As a result, it is clear that a party cannot introduce any electronic proof unless it is supported by a certificate as required by Section 65B of the Act.

That mins law relating to admissibility of electronic evidence clear, if any party want to used any electronic evidence in that court of law the he must produced with the 65B Certificate as prescribed by Indian evidence act 1872.

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