

Positive Response of Indian Judiciary to Electronic Evidences

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Abstract – The innovation of computers and digitalization is one of the greatest achievements of mankind. In the age of the digitalized world, governments of many countries have adopted digitalization in their administration. Few years back, the Indian government has started the ‘Digital India’ campaign to promote the use of digitalization in our day to day life too, which would certainly help to speed up the development of our country. The enormous growth of digitalization in governance, commerce, and private well as business activities has made it the fundamental pillar of documentation, processing and communication. The evidentiary value of an electronic record totally depends upon its quality. The Indian Evidence Act, 1872 has widely dealt with the evidentiary value of the electronic records. E-mail is recognized as a valid and authentic source of evidence. Generally, e-mails are submitted through print outs attached with the Certification of u/s 65B of the Indian Evidence Act, 1872. Nowadays, Mobile phones are very useful electronic device and very resourceful. The Researcher in through this Article wants to aware all about the laws dealing with electronic evidences and what type of electronic evidences are admissible and recognized by the law as well as accepted by the Judicial persons too.

Key Words – Computer, Electronic Evidence, Indian Evidence Act, 1872, E-mail, Mobile Phones, Digitalization

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INTRODUCTION

Electronic means have created huge value to the life of human beings. Indian judiciary has appreciated and accepted the electronic records as evidence if it has complied with the provisions contained under the Indian Evidence Act. Though electronic records provide convenience, it also has created unique problems and challenges with regards to proper authentication and catering the different views on it. As rapid growing cyberspace, there has been a simultaneous tremendous increase in the misuse of cyberspace; the danger of cybercrimes has evolved. Because of this investigating agencies as well as judiciaries are facing challenges with regard to the admissibility of electronic records (greater chances of manipulation). During the trial stage electronic records substantially impact the outcome of civil, criminal and other judicial proceedings. So, it is really crucial to understand the electronic records, types, admissibility & evidentiary value and their role of evidence.

NEW ERA OF INFORMATION TECHNOLOGY

The new era of Information technology has brought new methods and modes of commission of crime. Each time a crime is committed whether in physical

form or in cyber space, the success of prosecution largely depends on the quality of evidence presented at the trial. With the sophistication in Information technology the weapons of commission of crime are changing thereby posing a serious challenge before the investigation agencies to collect and preserve the evidence. A conviction or acquittal largely depends on the quality of evidence produced by the prosecution.

The Indian Evidence Act, 1872 and Information Technology Act, 2000 grants legal recognition to electronic records and evidence submitted in form of electronic records. According to section 2(t) of the Information Technology Act, 2000 “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. The Act recognizes electronic record in a wide sense thereby including electronic data in any form such as videos or voice messages. The Information technology has made it easy to communicate and transmit data in various forms from a simple personal computer or a mobile phone or other kinds of devices.

The Information Technology Amendment Act, 2008 has recognized various forms of communication devices and defines a “communication device” under section 2 (ha) of the Act “communication device” means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image. The Indian IT Act 2000 lays down a blanket permission for records not to be denied legal effect if they are in electronic form as long as they are accessible for future reference. The Act amends the definition of ‘Evidence’ in Section 3, the interpretation clause of the Indian Evidence Act 1872, to state: ‘Evidence’ means and includes all documents including electronic records produced for the inspection of the Court. Further, in Section 4, the IT Act 2000 provides:

Legal recognition of Electronic records-Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is:

- a) Rendered made available in an electronic form; and
- b) Accessible so as to be usable for a subsequent reference.

The evidentiary value of an electronic record totally depends upon its quality. The Indian Evidence Act, 1872 has widely dealt with the evidentiary value of the electronic records. According to section 3 of the Act, “evidence” means and includes all documents including electronic records produced for the inspection of the court and such documents are called documentary evidence. Thus the section clarifies that documentary evidence can be in the form of electronic record and stands at par with conventional form of documents.

The evidentiary value of electronic records is widely discussed under section 65A and 65B of the Evidence Act, 1872. The Sections provide that if the four conditions listed are satisfied any information contained in an electronic record which is printed on paper, stored, recorded or copied in an optical or magnetic media, produced by a computer is deemed to be a document and becomes admissible in proceedings without further proof or production of the original, as evidence of any contents of the original or any facts stated therein, which direct evidence would be admissible. The four conditions referred to above are:

- (1) The computer output containing such information should have been produced by the computer during the period when the computer was used regularly to store or process information for the purpose of any activities regularly carried on during that

period by the person having lawful control over the use of the computer.

- (2) During such period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of such activities.
- (3) Throughout the material part of such period, the computer must have been operating properly. In case the computer was not properly operating during such period, it must be shown that this did not affect the electronic record or the accuracy of the contents.
- (4) The information contained in the electronic record should be such as reproduces or is derived from such information fed into the computer in the ordinary course of such activities.

It is further provided that where in any proceedings, evidence of an electronic record is to be given, a certificate containing the particulars prescribed by 65B of the Act, and signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities would be sufficient evidence of the matters stated in the certificate.

The apex court in **State v Navjot Sandhu** while examining the provisions of newly added Section 65-B, held that in a given case, it may be that the certificate containing the details in sub- Section 4 of Section 65B is not filed, but that does not mean that secondary evidence cannot be given. It was held by the court that the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65 of the Indian Evidence Act 1872. Paragraph 150 of the judgment which is apposite, reads as under:

According to Section 63, secondary evidence means and includes, among other things, “copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Indian Evidence Act 1872, namely, Section 63 and 65.

It is pertinent to note herein a recent development, that as per the IT Amendment Bill 2008 (passed by both houses of Indian Parliament and yet to be enforced), Section 79-A empowers the Central Government to appoint any department, body or agency as examiner of electronic evidence for providing expert opinion on electronic form evidence before any court or authority. 'Electronic form of evidence' herein 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.

Further as per Section 85-B of the Indian Evidence Act, there is a presumption as to authenticity of electronic records in case of secure electronic records (i.e records digitally signed as per Section 14 of the IT Act, 2000). Other electronic records can be proved by adducing evidence and presumption will not operate in case of documents which do not fall under the definition of secure electronic records. It is pertinent to point out herein that with the passage of the Information Technology Amendment Act 2008, India would become technologically neutral due to adoption of electronic signatures as a legally valid mode of executing signatures. This includes digital signatures as one of the modes of signatures and is far broader in ambit covering biometrics and other new forms of creating electronic signatures.

The position of electronic documents in the form of SMS, MMS and E-mail in India is well demonstrated under the law and the interpretation provided in various cases. In **State of Delhi v. Mohd. Afzal & Others**, it was held that electronic records are admissible as evidence. If someone challenges the accuracy of a computer evidence or electronic record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it must prove the same beyond reasonable doubt. The court observed that mere theoretical and general apprehensions cannot make clear evidence defective and inadmissible. This case has well demonstrated the admissibility of electronic evidence in various forms in Indian courts.

The basic principles of equivalence and legal validity of both electronic signatures and hand written signatures and of equivalence between paper document and electronic document has gained universal acceptance. Despite technical measures, there is still probability of electronic records being tampered with and complex scientific methods are being devised to determine the probability of such tampering. For admissibility of electronic records, specific criteria have been made in the Indian Evidence Act to satisfy the prime condition of authenticity or reliability which may be strengthened by means of new techniques of security being introduced by advancing technologies.

The advent Information technology has brought into existence a new kind of document called the electronic

record. This intangible document is of new species has certain uniqueness as compared to conventional form of documents. This document can preserve in same quality and state for a long period of time through encryption processes reducing the chance of tampering of evidence. This document can be in various forms like a simple e-mail or short message or multimedia message or other electronic forms.

The Indian Evidence Act, 1872 (Sec. 3) defines evidence as to oral or documentary. Oral evidence can be said the statements which are made by witnesses before the Hon'ble Court and Documentary evidence is one which is produced before the court for its inspection which includes electronic records. If it is further seen in detail then we find more about the type of evidence for the court of law purpose. However, Evidence could be divided as follows:

- Oral, or Documentary
- Primary, or Secondary

PRIMARY AND SECONDARY EVIDENCE

Primary Evidence: Primary evidence means Production of the original electronic record means the production of the document itself.

Secondary Evidence: Production of computer-output of the contents of the electronic record; Secondary evidence is a certified copy or counterparts of documents which the party is unable to produce in the court and statement of an expert or person who has himself seen that document. It is a recognized principle of law that if Primary Evidence is available, it has to be given priority over Secondary Evidence. Many of the times it is practically impossible to produce primary evidence in the court because of their storage on hard disks, cloud, big servers and other electronic data storages, hence, the apex court has permitted secondary evidence. That secondary evidence can be taken to the court through print out on paper, copying or storing on any magnetic or optical media produced by an electric device. But, secondary evidence is only admissible if it satisfies the conditions preceded u/s 65B Indian Evidence Act.

ELECTRONIC RECORDS AS EVIDENCE

The Indian Evidence Act Section 65 specifies the admissibility of secondary evidence in particular cases. Section 65-B specifies the procedure of proving the contents of electronic records which have been laid down under Section 65-B.

Admissibility of electronic records mentioned as per Section 65-B of Indian Evidence Act specifies that the printed any information of electronic records on a paper, or created a copy of that record on any optical or magnetic media shall also be deemed to be

secondary evidence document if it satisfies the conditions mentioned under section 65-B and original source of that information i.e. electronic device shall also be admissible without any further proof in any proceeding of the court of law. Essentially elements of the electronic evidence as per the Indian Evidence Act are as follows:

1. Such produced information of electronic records should be produced by the person having legally authorized to have control over that electronic device.
2. That storage of information must take place during the day to day general course of the act of that person.
3. That stored information has been stored on that electronic device during the day to day general course of action of that person.
4. While storing or copying of that material information, the said electronic device must be in a functioning state, to avoid any possible negative impact on its operation or distort the accuracy & authenticity of its material contents.
5. Any kind of storage or copying or making counterpart of the information required for the production in the court of law as electronic evidence should be free from any kind of distortion or manual edit or manipulation, it must be the authentic and trustworthy information, which may get admitted as evidence in the court of law.

DIFFERENT TYPES OF ELECTRONIC RECORDS

Information Technology Act, 2008 defines electronic records; it covers a wide range of formats in which data can be produced. DVD, CD, pen drives, telephonic recordings, hard drives, e-mails, pictures, video recordings, sound recordings, etc. are a few of them. Each of the above electronic records formats deals with a variety of different conditions relating to their evidentiary value and admissibility in a court of law.

Evidence in the form of as DVD, CD, Hard-Drive, chip, Memory Chip, Pen Drive:

Above electronic records are admissible as primary as well as secondary evidence. The value evidence depends on how and in what manner the electronic records have been submitted to the court i.e. if these electronic records are submitted as it is then those have more value without any doubt but if you want to submit their copied version on other similar or different device then you have to comply with the conditions precedent under Section 65-B of the Indian Evidence

Act and get the certificate for its admission in the court.

Audio and Video Recordings:

These electronic records are admissible if they are submitted in original i.e. original audio or video recordings are the valid and authentic source of electronic evidence and not the copied version. Their copied version records on other similar or different device have to comply with the conditions precedent under Section 65-B of the Indian Evidence Act and get the certificate for its admission in the court.

Evidence generated through mobile phone in the form of media, calls and email:

Email: It is recognized as a valid and authentic source of evidence. Generally, e-mails are submitted through print outs attached with the certification of u/s 65-B of the Indian Evidence Act.

Media and calls generated through mobile phone:

Nowadays, Mobile phones are very useful electronic device and very resourceful. It helps from tracing location, capturing videos & pictures, recording calls to many other electronic resources which aid the judicial and investigating system to get valuable evidence. Mobile phone's electronic records are admissible if they are submitted in original i.e. mobile itself which contains the primary source of media and calls. Their copied version records on other similar or different device have to comply with the conditions precedent under sec. 65B of Indian Evidence Act and get the certificate for its admission in the court.

LEADING CASE LAWS

Arjun Pandit Rao v. Kailash Kushanrao⁹ Apex court, in a recent judgment, ruled that u/s 65B Indian Evidence Act's compliance is essential to admit the electronic record as evidence. The certificate submitted under this provision constitutes particulars of that electronic records and identity inclusive of authorized signature of a person having official responsibility in relation to the management and operation of the relevant device.

Anvar P.V. v. P.K. Basheer And Others¹⁰ The Apex Court has given a landmark judgment in this case. It had ruled and helped to resolve the conflicts judgments of various High Courts on the manner of the admissibility of the Electronic (record) evidence.

The Supreme Court ruled that secondary data in CD/DVD/Pen Drive are admissible only with certificate under Section 65-B (4) of the Indian Evidence Act. Oral evidence cannot prove the electronic evidence, certificate U/Sec. 65-B is

⁹ July 2020(2005) 11 SCC 600

¹⁰ 2014 2003 (3) JCC 1669

essential to prove that. Also, the opinion of the expert under Section 45-A Indian Evidence Act is not an escaping gate to bypass the procedure of under Section 65-B. Producing the original or its copy or counterpart attached with certificate under Section 65-B are the only optional to prove the electronic evidence as primary or secondary evidence respectively.

CONCLUSION

With advent in Technology, it was necessary to enact a new law and amend the old law to deal with the issue of cybercrime. Hence by enacting the IT Act, 2000 and amending the Statutes such as Indian Evidence Act, 1872, IPC, 1860 and Banker's Book Evidence Act, 1891, certain provisions are provided to ascertain standard of proof and appreciation of electronic evidence, i.e., evidence in electronic form. For the purpose of admissibility of electronic record, a three prong test is important for Prosecution: 1. Document in question is an electronic record, 2. Produced by a computer, and accompanied by a certificate, fulfilling the conditions laid down S.65 (B)(2)-(B)(4) of the IT Act or proven by way of secondary evidence. While deciding various cases, Courts have recognized the electronic evidence in various form such as CD's, emails, tape records, IP address, telephone records etc., So also certain steps are required to be followed and care should be taken while collecting the e-evidence. Although the present law of evidence has been amended, the law will have to be amended as and when required with new technological development. Admissibility and evidentiary value of electronic records have to be adjudged within the ambit of Section 65-B Indian Evidence Act, 1872. The Supreme Court through its various landmark judgments made it clear about the manner in which the electronic records shall be admissible and their evidentiary value in the trial of civil, criminal and other judicial proceedings. It is now crystal clear and fact that any electronic evidence if it is secondary evidences then it has to be complying with the provision of 65-B of the Indian Evidence Act; it is generally not admissible in the court of law without a certificate. Electronic devices can play a very crucial role in the investigation but the value of that electronic evidence is dependent on its compliance with provisions of the Indian Evidence Act, 1872.

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