

Value of Expert Opinion in the Context of Electronic Evidences in India

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Abstract – All of us know what importance does the Indian Evidence Act, 1872 hold under a trial, which also has a pre-occupied impact on the minds of lawyers or any other legal person. This Act gives a prominent existence to all the facts and pieces of evidence affiliated with the crime scene which is considered to be amongst the main components governed by the said Act. Coming to another crucial part of this Act, which is the “Opinion of Experts”. Evidence Act helps to bring in a frame the opinion of experts which may be pertinent for a case to rely on and also sticks some kind of evidentiary value to be favored from such opinions. Further opinions can be placidly divided into the experts’ like- Handwriting expert, Foreign Law, Science and Art and Electronic evidence. Such opinions are governed by the Indian Evidence Act, 1872 from Sections 45 to 51 (inclusive of Section 45-A and 47-A). In this article, the researcher will deal with all such aspects of the “Opinion of examiner of the Electronic evidence.” Who are these “Experts” and what is the value of Expert’s opinion?

Key Words – Electronic Evidences, Expert Opinion, Indian Evidence Act, 1872, Information and Technology Act, 2000, Digital Evidence

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INTRODUCTION

It is trite knowledge that world’s transactions are increasingly electronic in nature. One inevitable outcome of this proliferation is that courts have been compelled to take cognizance of electronic evidence, from CCTV footage to emails, making their contributions are crucial. However, despite their evidentiary relevance, electronic records suffer from problems that their

Physical counterparts do not. Electronic data is easy to create copy, alter, destroy, and transfer from one medium to another. In short, by their very nature, electronic records can be easily manipulated. Consequently, their accuracy and reliability is frequently suspected. This creates a conflict between the relevancy and admissibility of electronic evidence, something that has been recognized by jurisdictions across the world.²⁸ In 2000, Section 65-B was inserted

into the Indian Evidence Act, 1872²⁹ in an attempt to modernize Indian evidentiary practices and help our courts deal with the advances in technology. The provision deems computer output such as printouts, CDs, data on hard disks etc. to be ‘documents’ under the Evidence Act, thus making them admissible in court.³⁰ It simultaneously seeks to ensure the reliability and accuracy of such evidence by demanding that certain conditions listed under Section 65-B (2) be met.³¹ Despite the good intentions behind this amendment, the provision has been controversial.³² This is primarily because High Courts in their treatment of electronic evidence under Section 65-B have been inconsistent and arbitrary. Due to different courts demanding different methods for the fulfillment of the conditions laid down in Section 65B(2), there has been tremendous lack of uniformity. This variation in practice not only

²⁸ For example, South Africa, USA, Ireland, Singapore etc. See generally Murdoch Watney, Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position, 1 Int’l JL & IT. (2009); J.S. Givens, The Admissibility of Electronic Evidence at Trial: Courtroom Admissibility Standards, Cumberland Law Rev. 95 (2003-04); Law Reform Commission, Ireland, Documentary and Electronic Evidence, LRC CP 57 – 2009, 2009; Technology Law Development Group: Singapore University of Law, Computer Output as Evidence, September, 2003, available at https://www.agc.gov.sg/DATA/0/Docs/PublicationFiles/Sep_03_ComputerOutput.pdf (Last visited on February 8, 2016).

²⁹ Information Technology Act, 2000, Schedule II, Entry 9.

³⁰ See generally Indian Evidence Act, 1872, §65B.

³¹ Id

³² See Apar Gupta, How to rely upon an email in court, December 14, 2011, available at <http://www.iltb.net/2011/12/how-to-rely-upon-an-email-in-court/> (Last visited on January 20, 2016); Bhairav Acharya, Anvar v. Basheer and the New (Old) Law of Electronic Evidence, September 25, 2014, available at <http://cis-india.org/internet-governance/blog/anvar-v-basheer-new-oldlaw-of-electronic-evidence> (Last visited on January 20, 2016); Aradhya Sethia, Where do we stand on ‘secondary electronic evidence’?, October 16, 2014, available at <http://spicyip.com/2014/10/guest-post-where-do-we-stand-on-secondary-electronic-evidence.html> (Last visited on January 20, 2016)

inconveniencies litigants, it also creates possibilities for the derailment of justice. Recently, the Supreme Court sought to put to rest all these controversies in *Anvar P.V. v. P.K. Basheer* ('Anvar').³³ To create uniformity in practice, the Court interpreted Section 65-B as mandating one specific authentication method: a certificate as described under Section 65-B(4) as a necessary precondition for admissibility of electronic evidence.³⁴

This paper seeks to examine the position of law on electronic evidence in light of this decision. There is no actual definition provided for the experts under the Evidence Act but, it explains that an expert is any person who is skilled in a particular subject and has extraordinary knowledge about the same subject matter. The court seeks the opinion of such experts on the matters which are important to be referred by them.

The definition of expert and their function were laid down in the case of *State of Himachal Pradesh v. Jai Lal and Ors*, 1999, it was held by the Supreme Court, that:

1. An expert is a person who lay his or her opinion on a particular subject in which they have special knowledge or observation; or any extended study or experience.
2. The expert cannot be characterized as a witness, but a person of some advisory trait to polish the extracted information.

The real function of the expert is identified through the case of *Titli v. Jones*, 1933, in which it was held by the Court that the expert has to put together all evidence and facts; and analyze them to derive a required conclusion which will serve as an advisory character.

Expert opinion

As discussed above, the expert is any person who has specialized knowledge or experience in any particular subject matter. When such an expert is called by the Court to give their opinion on certain subject matters in which they specialize; the opinion for the same is considered as "Expert Opinion".

The opinion of the examiner of electronic evidence

Section 45A of the Evidence Act as mentioned above talks about the opinion of the examiner of electronic evidence. Before getting into the content of Section 45A let us first understand, what is the meaning of examiner of electronic evidence.

Examiner of the electronic evidence

An electronic form of evidence means any piece of evidence which is crucial for the case and is transmitted or is contained in any digital form like a digital cell, videos or audios. A person who has the required knowledge or has specialized experience in the subject of technology and who evaluates the same is considered to be the examiner of electronic evidence.

Explanation to Section 45A

Section 45A explains about the opinion of the examiner of electronic evidence. When the court has to form an opinion about any evidence which is contained in digital form like in videos or audios etc; then the examiner of the electronic evidence may be referred to, as an expert through Section 79A of the Information and Technology Act, 2000. Any information which the examiner concluded to, in the case will be considered as relevant under this section. This section can be further understood through some illustrations which are as follows;-

1. The fact that A is dead due to poison and the effects of the poison on a human body, explained by the expert is considered to be relevant.
2. The fact that B while committing some acts, was not aware of the gravity and capabilities of the committed acts, which were done under unsoundness of mind and any information explaining that "so and so" symptoms are of a person having an unsound mind which is claimed by the expert is considered to be relevant.
3. The fact that the presented document is written by C and some other document that was originally written by C. The expert explaining whether the writings are of the same person or of different person is considered to be relevant.
4. The question is, whether an obstruction to a harbour is caused by a certain sea-wall. The fact that other harbours similarly situated in other respects, but where there were no such sea walls, began to be obstructed at about the same time, is relevant.

Requirements and importance of the expert opinion

The requirements for such experts depends upon three main points for being admissible in the court which is as follows:

1. The expert must be within the renewed field of practice;

³³ *Anvar P.V. v. P.K. Basheer*, (2014) 10 SCC 473

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2. The expertise must be based on reliable disciplines;
3. The expert must be qualified in terms of experience.

Further, the reason why the expert opinion is important because in some cases the court requires extensive specialised knowledge which may not be contained with any legal person; that is why the opinion of experts forms a subjective point of view with the presence of qualified experience and practice that will serve as an advisory character in the case.

Section 79A – Information and Technology Act, 2000

The Information and Technology Act, 2000 deals with all the rules and regulations while contracting through the internet or using any type of technology. It also lays down the punishments regarding all the digital crimes committed. All the e-contracts and agreements are contracted and governed through this Act. Section 79A of the IT Act, 2000 mandates the Central government to notify the examiner of the electronic evidence of any department or authority through the official gazette to be required as an expert in the court.

A detailed scheme document is provided and all the eligible people can apply for the same through filling the form and after the selection and notifying process, an expert will be provided to the court.

Evidentiary value of the examiner as an expert

- Though the expert acts as an advisory character for the court, still the court is not bound by his opinion or the opinion does not act as a concrete wall for the case. The qualities of the opinion still remain to be on the verge of choice, whether to be adopted or not. There is no conclusive rule as to when an opinion is delivered, it must be adopted. The work of the opinion is to serve as an understanding for the court on the matters which need specialised knowledge. If any data is submitted to the court and such data contradicts the oral evidence given later on, by any witness; it still does not make the oral evidence obsolete or of no use. The opinion of the expert is always subjective which will be related to the facts and does not provide personal obedience to any party.
- The judgement of a case should not only be based upon the opinion of the experts as their opinion is based on a sense of technicality only, and a case needs to be judged from all grounds whether crucial or not. Hence, no conclusion can be solely drawn by the opinion of experts for a case. No expert can ever claim that his contention or opinion shall be accepted for deciding the case as the opinion is based on a technicality and is not fact-based.

- The court cannot declare the accused to be guilty merely because the expert felt so; until and unless the accused is not proven guilty totally by considering all the facts and evidence of the case.

Therefore, we can conclude that the evidentiary value of the expert is not like other witnesses. They play an advisory role and their opinion is not bound to the Court.

Corroboration of expert opinion

It was held in the case of *Murari v. State of Madhya Pradesh, 1979*, that nothing by the expert shall be denied on the account that it was not corroborated. If the expert claims something, the court needs to corroborate it to a certain degree. Taking the opinion in full regards is the court's own decision but a certain amount of it must be corroborated to increase the understanding of the technical part of the case.

Case laws

- *Ramesh Chandra Agrawal v. Regency Hospital Ltd & Ors, 2009*

It was held by the Court in this case that to make the expert opinion admissible, it is necessary to hear out the expert. The reason why it is crucial to hear the expert out because it is pertinent and a requirement of the case to have extended technical knowledge and specialised experience to judge some aspects of the case.

- *Raja Ram Badole v. Special Police Establishment, 2018*

It was held in this case as the electronic evidence is more susceptible to tampering, disposition or excision. The electronic document so produced firstly needs to be presented in regards to Section 65(b) of the Evidence Act. After being approved through this section, only then the electronic record can resort to the examiner or the expert.

- *Anvar P.V v. P.K Basheer, 2014*

It was held in this case that the proof of electronic evidence should not be given in an oral form and if the proof is given in the same, it shall not be sent to the examiner or expert for further opinion.

- *Kishan Chand v. Sita Ram, 2004*

It was held in this case that when there is a conflict between the opinions of experts it is not necessary for the courts to choose, the court can form its own opinion for the same. The opinion of the expert is no obligation to the court. It is up to the court whether or not it has to accept the opinion of the expert. No expert can force the court to use its opinion during the proceeding.

CONCLUSION

In this article, we got acquainted with all aspects of the examiner of electronic evidence as an expert. There is a proper and translucent system for the appointment of such an expert. Section 79A makes it mandatory for the Central Government to notify all the departments for appointing the expert. Once the expert is appointed, he examines the evidence and gives opinion accordingly. The Court is not bound to accept the opinion and use it for the final judgement or to prove the accused guilty just by the opinion of the expert. The opinion plays an advisory role and it is a subjective view for the technical portion of the case which overlooks the fact-testimony.

Though the opinion of the expert plays an important role but still not so crucial that the whole judgement will depend on their opinion only. The opinion of an expert is a subjective point of view that will be helpful for the Court as it is not jacked with favouritism for any particular party but relies upon all the technicality of the subject matter. We came to know about another important pillar of expert opinion i.e. if the electronic evidence is not admissible in the court it will not resort to the examiner for the opinion. Evidence Act thus has made it easier for us to understand the major aspects of a trial and also is a vast statute which provides various clauses to make a case decided fairly.

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