

Admissibility of Electronic Evidence

Defining Electronic Evidence

- **Section 3** of the Evidence Act, 1872 defines evidence as under:
"Evidence" – Evidence means and includes: all documents **including electronic records** produced for the inspection of the court. Such documents are called documentary evidence
- **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.

Admissibility of Contents of Electronic Record - Oral Evidence when relevant

- **Section 22A. When oral admission as to contents of electronic records are relevant**

Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question

- **59. Proof of facts by oral evidence**

All facts, except the contents of documents or electronic records may be proved by oral evidence.

Admissibility of Electronic Records.

Section 65A Special provisions as to evidence relating to electronic record The contents of electronic records may be proved in accordance with the provisions of section 65B.

Section 65B, Admissibility of electronic records

65B(1): Any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also 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 further proof or production of the original.

65B(4) For the purpose of admissibility of evidence, a certification shall have the following matters as necessary:

- Identifying the relevant electronic records relating to the certificate and describing the manner in which it was produced
- Details of the device producing it.
- Satisfying the conditions of 65B(2) i.e. the computer from which the output was produced was used regularly to store or process information during its regular course of activities and throughout the material part of the said period, the computer was operating properly.
- Certification of matters are to be stated to the best of the knowledge and belief of the person signing the certificate i.e the officer in charge of the operation or management of the related activities

SECTION 46 OF UAPA Act

Evidence collected through interception of wire electronic or oral communication admissible notwithstanding provisions of evidence act and other laws.

Cases on 65B-Certification in India

State (NCT of Delhi) V. Navjot Sandhu (2005) 11 SCC 600:

- Even if the certificate containing the details mentioned in Section 65B is not provided, secondary evidence can be given if it complies with the provisions under section 63 and 65 of the Act

Anvar P.V v. P.K Basheer (2014)10 SCC473:

- Overrules Navjyot Sandhu
- Electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Since 65A and 65B are special provisions they will be given precedence over general laws in Sections 63 and 65 (*Generalia specialibus non derogant*)
- Notwithstanding Sections 59, 65A and 65B of the Evidence Act, an electronic record used as primary evidence under Section 62 is admissible in evidence, without complying Section 65B of the Evidence Act. (Para 22)
- Makes all of the conditions under Section 65B (4) imperative

**Sanjaysinh Ramrao Chavan V. Dattatray Gulabrao Phalke
&Ors. (2015)3SCC 123**

- Without source there is no authenticity for the translation. Source and authenticity are the two key factors for electronic evidence.

**Abdul Rahaman Kunji V. State of West Bengal [2016 CLRJ
1159]**

High Court of Calcutta while deciding admissibility of email held that an email downloaded and printed from email account of the person can be proved by sec. 65B r/w Sec 88A. Testimony of witness to carry out such procedure to download and print the same is sufficient to prove communication.

Vikram V. State of Punjab (2017) 8 SCC 518:

- Tape recorded conversation in this case was held to be primary evidence and not secondary evidence which required certificate under 65B
- Reference to *Anvar* case: If an electronic evidence is used as primary evidence the same is admissible in evidence, without compliance with the conditions in Section 65 B.

Sonu V State of Haryana (2017) 8 SCC 570

- A CDR without any certification under Section 65B is not inherently inadmissible. Such certification pertains to the mode and method of proof and objection thereto must be raised at the earliest stage. In the event of failure objection cannot be raised at an appellate stage.
- Comments on necessity of prospective overruling and leaves the question of retrospective application of *Anvar* open for an appropriate bench as *Anvar* was a larger bench.

Shafhi Mohammad V. State of U.P (2018) 1 SCC (Cri) 860

- Requirement of certificate being procedural can be relaxed by the court wherever the interest of justice so justifies. (Example; Bills generated in shops, electronic tickets etc.)
- Procedural requirement under Section 65B(4) of Evidence Act of furnishing certificate is to be applied only when electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device.
- When the party is not in possession of such a device, applicability of Section 63 and 65 of the Evidence Act cannot be held to be excluded.
- Refers *P.V.Anwar* to larger bench.

**State of Karnataka Lokayukta Police Station, Bengaluru
V. R. Hiremath, [Criminal Appeal No. 819 of 219; 2019
SCCOnLine SC734]**

- Certificate under 65(B) can be supplied subsequent to filing of charge sheet. Production of such a certificate is required when the electronic record is sought to be produced in evidence at the trial.

Preservation of Evidence

**Om Prakash Verma V. State of West Bengal and Ors.
[2017(4) CALCRILR 61; 2018 CRLJ 640]**

- When electronic devices like mobile phone, laptop, tablet, etc. are seized as stolen property and are required to be produced and identified during trial, interim custody of such devices pending investigation, enquiry or trial shall not be granted till the IMEI number or other unique identification number, and its brand/product number and manufacturing details is ascertained and noted in the case records for identification of such device during trial.

Preservation of Evidence

Subhendu Nath V. State of West Bengal

[MANU/WB/0500/2019; 2019(2) RCR (Criminal) 112]

- A breach in the chain of custody or improper preservation of such evidence renders electronic evidence vitiated unreliable in judicial proceedings.
- Necessary certification under Section 65B of IT Act is also a prerequisite for admissibility of such evidence. Even in case of certification, reliability of electronic evidence depends on proper collection, preservation and production in court and any lacuna in that regard would render such evidence vulnerable with regard to its probative value.

Presumptions for Electronic Evidence

- **Section 81A Presumption as to Gazettes in electronic forms**
- **85A. Presumption as to electronic agreements**
- **85C. Presumption as to Electronic Signature Certificates**
- **88A. Presumption as to electronic messages**
- **90A Presumption as to electronic records five year old**

