



ELECTRONIC EVIDENCE : COLLECTION, PRESERVATION AND APPRECIATION

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THE NEED OF ELECTRONIC EVIDENCE

- **Rapid increase in Cyber Crimes**
- **Proof of Electronic Footprints**
 - Call Detail Report
 - CCTV Video Footages
 - Agreements in Electronic Forms
 - Facebook, Whatsapp Posts etc.
 - Video Records in Mobile Phones
 - Computer generated Invoices etc.

WHAT IS AN ELECTRONIC RECORD?

- The Indian Evidence Act, 1872
 - Section 3
 - Evidence means and includes
 - All documents including electronic records for the inspection of the court
 - *P. Gopalkrishnan v. State of Kerala*, 2019 SCC OnLine SC 1532
 - The video footage/clipping contained in such memory card/pen-drive being an electronic record as envisaged by Section 2(1)(t) of the 2000 Act, is a "document" and cannot be regarded as a material object

WHAT IS AN ELECTRONIC RECORD?

- The Information Technology Act, 2000
 - Section 2(1) (t)
 - Electronic Record
 - Data record or data generated - Image or sound stored - Received or sent in electronic form or microfilm or computer generated microfiche
 - Section 4
 - Legal Recognition of Electronic Records
- The Bankers' Book Evidence Act
 - Section 2(3) read with Section 2(8)
 - Bankers' books"include ledgers, day-books, cash-books, account-books and all other records used in the ordinary business of the bank, whether these records are kept in written form or stored in a micro film, magnetic tape or in any other form of mechanical or electronic data retrieval mechanism, either onsite or at any offsite location including a back-up or disaster recovery site of both;

PECULIAR CHARACTERISTICS OF ELECTRONIC EVIDENCE

- Generally not limited to the place of the offence
- Can be easily tampered with, altered or even destroyed
- Time is of essence in collection and preservation of electronic evidence
- Requires special tools and knowledge
- Expert opinion become relevant

SEARCH AND SEIZURE

- Section 93 CrPC – When Search Warrant may be issued

(1) (a) Where any Court has reason to believe that a person to whom a summons or order under section 91 or a requisition under sub- section (1) of section 92 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

(b) where such document or thing is not known to the Court to be the possession of any person, or

(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search- warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.

- Section 80, Information Technology Act

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any police officer, not below the rank of a Deputy Superintendent of Police, or any other officer of the Central Government or a State Government authorised by the Central Government in this behalf may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any offence under this Act. Explanation.-For the purposes of this sub-section, the expression "public place" includes any public conveyance, any hotel, any shop or any other place intended for use by, or accessible to the public.

(2) Where any person is arrested under sub-section (1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or before the officer-in-charge of a police station.

(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, subject to the provisions of this section, apply, so far as may be, in relation to any entry, search or arrest, made under this section.

CHAIN OF CUSTODY

- It indicates the collection, sequence of control, transfer, and analysis. It also documents each person who handled the evidence, the date/time it was collected or transferred, and the purpose for the transfer.
- Important to maintain the chain of custody to preserve the integrity of the evidence and prevent it from contamination, which can alter the state of the evidence. If not preserved, the evidence presented in court might be challenged and ruled inadmissible.

PROVISIONS OF THE INDIAN EVIDENCE ACT RELATED TO ELECTRONIC EVIDENCE

- 65A – Special provisions as to evidence relating to electronic record
- 65B – Admissibility of electronic records
- 67A – Proof as to Electronic signature
- 73A – Proof as to verification of Electronic signature
- 81A – Presumption as to Gazettes in electronic forms
- 85A – Presumption as to electronic agreements
- 85B – Presumption as to electronic records and Electronic signatures
- 85C – Presumption as to Electronic Signature Certificates
- 88A – Presumption as to electronic messages
- 90A – Presumption as to electronic records five years old
- 131 – Production of documents or electronic records which another person, having possession, could refuse to produce

PROOF AND ADMISSIBILITY OF ELECTRONIC EVIDENCE

- Sections 65A, 65B and 136
- Section 65A
 - How an electronic evidence is to be proved
 - As per Section 65B
- Section 65B
 - any information contained in an electronic record is deemed to be a document and is admissible in evidence without further proof of the original's production, provided that the conditions set out in Section 65B(2) to (5) are satisfied.

STANDARD OF PROOF

- *Tukaram S. Dighole v. Manikrao Shivaji Kokate*, (2010) 4 SCC 329
 - “Standard of proof” in the form of electronic evidence should be “more accurate and stringent” compared to other documentary evidence

APPRECIATION OF ELECTRONIC EVIDENCE

- Relevance of Section 65B (4)
- *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* AIR 2005 SC 3820.
 - Irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65 of the Evidence Act, of an electronic record.

- *Anvar P.V. v. P.K. Basheer and Others* (2014) 10 SCC 473.
 - Overruled *Navjot Sandhu's* case
 - Special provision under section 65A and 65B will prevail over the general law on secondary evidence under sections 63 and 65 of the Indian Evidence Act, 1872.
 - Therefore, for an electronic record to be admissible as secondary evidence in the absence of the primary, the mandatory requirement of section 65B certification is required to be complied with

- *Shafhi Mohammad v. State of H.P.* (2018) 2 SCC 801.
 - Requirement of the certificate under Section 65B of the Evidence Act as per the judgment of *Anvar* (supra) is not required in the following two cases :-
 - A party who is not in possession of device from which the document is produced cannot be required to produce certificate under Section 65-B(4) of the Evidence Act
 - The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies.
- *Arjun Panditrao Khotkar V. Kailash Kushanrao Gorantyal and Others*, Civil Appeal No(s). 2082520826 of 2017.
 - Issue referred to a larger bench

WHEN IS THE CERTIFICATE NOT REQUIRED

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STAGE OF FILING THE CERTIFICATE

- *State by Karnataka Lokayukta, Police Station, Bengaluru v. M.R. Hiremath* (2019) 7 SCC 515.
 - The failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet is filed is not fatal to the prosecution.
 - The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

- Who can issue the certificate?
 - *Kundan Singh v. The State* 2015 SCC OnLine Del 13647.
 - A person primarily responsible for the management or the use, upkeep or operations of such device
- When can the objections related to the certificate be raised?
 - *Sonu alias Amar v. State of Haryana* (2017) 8 SCC 570.
 - The challenge on the ground of electronic evidence can be related to its inadmissibility or its mode of proof. In the former case, the objection can be raised at any stage. However, in the latter case, the objection cannot be raised at Appellate stage, if the same was not raised at the time of trial. Since, the non-production of certificate under Section 65B falls under the category of “mode of proof”, therefore, the same cannot be raised at the Appellate stage, if the same had not been raised at the trial stage.

POINTS TO REMEMBER

- The electronic evidences have peculiar characteristics
- The integrity of the evidences must be maintained at all level as they are highly susceptible to alterations and damage.
- The Court must be extra cautious while dealing with electronic records and evidences
- Ultimate goal for the truth in any kind of evidence including electronic evidence is to ensure its relevance, admissibility and credibility and to extract truth therefrom.

THANK YOU