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# E-evidence: Moving parallel with Today's World

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## ABSTRACT

*“The Internet is becoming the town square for the global village of tomorrow.”- Bill Gates*

*As we all know that we live in an era where everything is digitalising and shifting toward electronic means and internet-based like E-mail, E-court & E-contract and many more. Just like that there is E-evidence which means electronic evidence or digital evidence a not so recognized term in the legal field but getting pace and usage with every new case coming up. So, through this paper, I will be discussing what is E-evidence?, its two subforms and its admissibility with reference to Indian Evidence Act 1872 and IT Act 2000.*

*I will be taking help from some case laws and judgment related to E-evidence and as well as focusing on the authentication of it and the concept of E-evidence in India.*

**Keywords-** *Electronic, evidence, admissibility and India*

## I. INTRODUCTION

Human development has, with the progression of time, gained enormous ground and therefore brought about various creations and revelations. Probably the best innovation of humankind is the advancement of PCs and the internet which prompted the improvement of cyberspace. Like some other improvement in science and technology, the advancements in computers and internets are additionally not liberated from perils. This is on the grounds that internet cyberspace being one of the simplest and quickest media to spread data, there is a probability of its abuse by deceitful people. The cyberspace as a result of its assorted variety of substance, data, posts, pictures, conclusions, ease availability and wide reach, represent a few perils to the society.

During the most recent couple of years, the investigation agency in various places of the country have been presented to different Cyber Crimes and an ever-increasing number of cases are being enrolled for the investigation. For a viable examination of these cyber-crimes and its arraignment requires evidence got from computers, the Internet and different gadgets. Such evidence got from computers, the Internet and different gadgets is for the most part named as digital evidence. The recognizable proof and assortment of digital evidence is a huge

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assignment as it requires ability in cyber technology. In this setting Cyber forensics, the workmanship and science of applying software engineering to gather digital evidence have developed as a significant guide to the criminal arraignment of cyber-crimes. In any case, this new technique for examination has raised a few huge legitimate issues. This paper looks to analyze one of the most significant legitimate issues in cyber forensics, for example, the acceptability of digital evidence in India.

## **II. WHAT IS E-EVIDENCE?**

Any type of relevant information stored or transmitted in digital form that a party may use in a court for trial is called an E-evidence. Before accepting digital evidence a court will decide whether the evidence is significant, regardless of whether it is true in the event that it is gossip and whether a duplicate is worthy of the original is required. There has been an increase in the use of digital evidence as the courts have allowed nowadays the use of various E-evidence like digital photographs, e-mails, ATM transaction logs, message history, internet browser history, databases, computer printouts, computer backups and digital audio and video files.

“E-evidence consist of two sub-forms:

- Analog
- Digital Evidence”

## **III. WHY AND WHEN IS DIGITAL EVIDENCE EXAMINED?**

Digital evidence can be used in any cognizable or non-cognizable crime investigation like murder, stalking, rape, child abuse, burglary, piracy, extortion, gambling and terrorism. Before and after crime information is very relevant, for example, if a criminal was using an online program like any messaging app for communicating to accomplice any crime or using of Google maps or any other street viewing app to case a property before wrongdoing. Whereas, some crimes are done completely with the help of digital means like computer hacking, identity theft and economic fraud.<sup>2</sup>

In these situations, any evidence is left behind for the investigation team that they can recognize, seize and exploit. Likewise with any proof social occasion, following legitimate methods is significant and will yield the most important information. Not following legitimate strategies can bring about lost or harmed proof, or rendering it prohibited in court.

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<sup>2</sup>A Simple Guide to Digital Evidence, <http://www.forensicsciencesimplified.org/digital/why.html>, last seen on 15/05/2020.

#### **IV. CONCEPT OF E-EVIDENCE IN INDIA**

Due to enormous development in e-governance all through the Public and Private Sector and e-commerce activities Electronic Evidence have involved in a fundamental mainstay of correspondence, processing and documentation. The government agencies are opening up to introduce different governance policies electronically and periodical filings to regulate and control the industries are done through electronic means. These different types of Electronic Evidence/Digital Evidence are increasingly being used in judicial proceedings. At the stage of the trial, Judges are often asked to rule on the acceptability of electronic evidence and it considerably impacts the outcome of a civil claim or conviction/vindication of the accused. The Court continued to grapple with this new electronic frontier as the unique nature of e-evidence, just as the ease with which it tends to be fabricated or falsified creates a hurdle to tolerability not faced with the other evidence. The different categories of electronic evidence, for example, CD, DVD, hard disk/memory card information, website information, interpersonal organization correspondence, e-mail, messages, SMS/MMS and computer-generated documents poses a unique problem and hurdles for proper authentication and subject to a different set of views.

Section 65A and 65B have been included by the Information Technology Act,2000. Section 65A sets out the substance of electronic records might be demonstrated with the arrangements laid in Section 65B. Section 65B (Admissibility of electronic records) expresses that any information contained in electronic records which are imprinted on a paper, put away, recorded or duplicated in optical or attractive media created by a PC will be additionally considered to be an archive if the conditions referenced in this section are fulfilled corresponding to the information and PC being referred to and will be acceptable in any procedures, with no additional evidence or creation of the first.

##### **Few conditions of Section 65B are:**

1. Information was created during the ordinary course of activities by the person having legitimate command over the computer's use.
2. The information has been consistently taken care of into the computer in the normal course of said activities.
3. All through the material piece of the said period, the computer was working appropriately or the inappropriate activity as not such as to influence the electronic record or the exactness of its contents.

4. Information contained in the electronic records reproduces or is gotten from such information took care of into the computer in the customary course of activities.

The main role is to purify confirmation by auxiliary evidence. This office of confirmation by auxiliary evidence would apply to any computer output, such output being esteemed as a document. Computer output is a regarded document with the end goal of evidence.

Where the data was prepared or taken care of into the computer on interlinked computers or one computer after the other in progression all the computers so utilized will be treated as one single computer. Section 65B likewise sets out that for the purpose of evidence, a certificate recognizing the electronic records containing the announcement and portraying the way where it was created by a computer and fulfilling the conditions referenced above and marked by an official accountable for the activity or the executives of the related exercises will be the evidence of any issue expressed in the certificate it will be adequate for the issue to be expressed to the best of the knowledge and conviction of the person expressing.

Any information to be taken to be provided to a computer, in the event that it is done in any proper structure whether straightforwardly with or without human intercession by methods of any appropriate equipment or any information is provided by any authority over the span of his exercises with a perspective on putting away or preparing it regardless of whether the computer is being worked outside those exercises

### **Audio C.D.**

In a matrimonial proceeding for dissolution of a marriage, the wife was alleged to have abused and threatened her husband on the mobile and the equivalent was recorded on it. The issue was recorded by the husband in an Audio C.D. The mobile was not produced. Just the C.D was exhibited. The wife objected claiming fabrication. The court ordered the C.D to be marked as a show subject to the condition that at whatever point it was played, fair Chance for cross-examination should be given to the wife. Where the candidate ( election appeal ) had himself admitted that he didn't know with respect to how and in what way the C.D was prepared, it was held to be not admissible in evidence. It was of no assistance to the applicant I demonstrating the charge of corruption against the returned candidate.

### **Video-conferencing**

Evidence identified with an electronic record. A petition was made for creating it by methods for video conferencing. The court said that there was no bar on the assessment of a witness through video conferencing. This is a characteristic piece of electronic technique thusly the supplication was, consequently, permitted with common protections. It was a case for pendente

light maintenance. The husband was for all time living in America. His statement was permitted to be recorded by the electronic device.

As the facility of recording evidence with the help of video conferencing as been already granted in Criminal Court. The court said that there can't be any conceivable issue with receiving a similar procedure in civil cases moreover. But necessary precaution should be taken for both identifying the witness as well as for checking the accuracy of the equipment that was used for the purpose.

### **Family courts Act**

To record evidence with the use of video conferencing technology, tact has been vested in the family court itself to record evidence through such procedure. Section 10(3) powers the family court to adopt their own procedure to know the truth of the matter and to arrive at a settlement.

Electronic evidence has involved in a fundamental pillar of communication, processing and documentation, which is due to extensive growth in e-governance all round the public and private sector. These different types of E-evidence are being used in both civil and criminal litigation to an increasing extent. During trials, Judges are often asked to rule on the suitability of electronic evidence and it generously impacts the outcome of a civil lawsuit or conviction/absolution of the accused. The Court continued to grapple with this new electronic frontier as the unique nature of e-evidence, just as the ease with which it very well may be fabricated or falsified creates a hurdle to suitability not faced with the other evidence. The different categories of E-evidence like social network communication, e-mail, SMS/MMS and website data contains unique problem and challenges for proper validation and subject to a different set of views.

## **V. SOFTENING THE DIFFERENCE BETWEEN PRIMARY AND SECONDARY EVIDENCE<sup>3</sup>**

By adding all types of E-evidence into the list of primary evidence, the statute has validly softened the difference between Primary and Secondary forms of Evidence. While there is some difference that is still expected to apply with respect to different forms of documents, the only exception is computers. This however we know that computer evidence is not easily producible in tangible form due to its complex nature. Hence, while it might make for a decent argument to state that in the event that the word document is the first, at that point a print out

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<sup>3</sup>Roopali Lamba, Electronic Evidence under Indian Evidence Act, 1872, Latestlaws, <https://www.latestlaws.com/articles/electronic-evidence-under-indian-evidence-act-1872-by-roopali-lamba/>, last seen on 16/05/2020.

of the equivalent ought to be treated as secondary evidence, it ought to be viewed as that creating a word document in court without the guide of print outs or CDs isn't simply troublesome, however very unthinkable.

### **Risk of Manipulation**

While allowing all types of e-evidence to be admissible as primary evidence, the statute has failed to notice the risk of manipulation. Tampering with E-evidence is not very difficult and criminals may find it easy to change records which are to be submitted in court. However, everything has a solution and for this also computer forensic has developed enough ways for cross-checking whether any e-evidence has been tempered or not and if yes then in what way.

### **Making Criminal Prosecution Easier**

Considering the ongoing spate of terrorism in the world, including terrorists utilizing exceptionally advanced technology to do assaults, it is of incredible assistance to the prosecution to have the option to deliver electronic evidence as immediate and primary evidence in court, as they demonstrate the blame of the accused far superior to searching for conventional types of evidence to substitute the electronic records, which may not exist.

## **VI. CASE LAWS ON E-EVIDENCE**

### **1. *Anvar P.V. Vs. P.K. Basheer And Others (2014)*<sup>4</sup>**

In this important judgment, the Supreme Court of India has settled the controversies emerging from different conflicting judgment as well as the practices being followed in the different High courts and the Trial courts as to the admissibility of the E-evidence. The court has interpreted the Section 22A, 45A, 59, 65A & 65B of the Evidence Act and came to decision that secondary data in CD/DVD/PEN DRIVE are not admissible without a certificate U/S 65 B(4) of Evidence Act. It has been made clear that E-evidence cannot be proved by oral evidence without certificate U/S 65B and also even the expert's opinion U/S 45A of Evidence Act cannot be restored to make such E-evidence admissible. The judgment has serious implications in all the cases where prosecution relies on the electronic data and especially in the cases of anti-corruption where the dependence is on the audio-video recordings which are being forwarded in CD/DVD to the court. And in all such cases, where the CD/DVD are being forwarded without a certificate U/S 65B of Evidence Act, such CD/DVD are not admissible as evidence and if further expert opinion is given for its genuineness then also it cannot be looked into by

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<sup>4</sup>Natansh jain, PV Anvar v. PK Basheer: A Critique, RMLNLU law review (2017), <https://rmlnlulawreview.com/2017/08/25/pv-anvar-v-pk-basheer-a-critique>, last seen on 16/05/2020.

the court as evident from the Supreme Court judgment. It was further noticed that all these safeguards are taken to ensure authenticity and source, which are considered as two of the important element for an electronic record to be used as E-evidence. As E-evidence being more likely susceptible to tampering, excision, alteration, transposition etc. And without such safeguards, the whole trial based on E-evidence can lead to the travesty of justice.

In the anti-corruption cases launched by the CBI and anti-corruption agencies of the state, even the original recording which is recorded either in mobile phones or in any digital voice recorder is not been protected and thus, if the original recording is destroyed then there cannot be any query of issuing the certificate U/S 65 B(4) of the Evidence Act. Therefore, in such cases neither CD/DVD are admissible & cannot be exhibited as evidence nor the expert opinion or oral testimony is admissible and such recording in the CD/DVD's cannot be the sole basis for conviction.

In the aforementioned judgment, the Supreme Court has held that Section 65B of the Evidence Act as a "non-obstante clause" as it overrides the general law on secondary evidence under Sec. 63 and 65 of the Evidence Act. The only way to prove the E-evidence is by presenting the original electronic media as the primary evidence in the court or its copy as secondary evidence U/S 65A & 65B of the Evidence Act. Thus, in case of secondary evidence which is contained in CD, DVD, Memory Card etc., the same shall be accompanied by the certificate which is obtained at the time of taking the document under Sec. 65B without which the secondary evidence is inadmissible.

### **2. *Abdul Rahaman Kunji Vs. State of West Bengal (2014)***

In this case, the Hon'ble High Court of Calcutta decided the admissibility of E-mail and while deciding it held that a downloaded e-mail and printed from the e-mail account of the person can be proved under Section 65 B r/w Section 88 A of the Evidence Act. To prove the electronic communication the testimony of the witness to carry out such procedure of downloading and printing the same is sufficient.

### **3. *Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke (2015)***

In this case, the Hon'ble High Court of Delhi, observed while deciding the charges against the accused in a corruption case that since audio and video CD's being referred to are unmistakably inadmissible in evidence, along these lines the trial court has mistakenly depended upon them to conclude that a solid doubt emerges in regards to petitioners criminally conspiring with co-accused to commit the offence being referred to. In this way, there is no material based on which, it very well may be sensibly said that there is a solid doubt of the complicity of the

petitioners in the commission of the offence being referred to.

#### 4. *State (NCT of Delhi) Vs. Navjot Sandhu (2005)*

This case dealt with the admissibility and proof of mobile call records as an appeal was filed against conviction following the attack on the Parliament that happened on December 13, 2001. While looking after the appeal which was against the accused/attacker, a submission was made in the interest of the accused that no dependence could be placed on the mobile call records because the prosecution didn't produce the certificate under section 65 B(4) of the Evidence Act. The Supreme Court presumed that cross-examination of the able witness familiar with the working of the computer during the pertinent time and the way in which the printouts of the call records were taken was adequate to demonstrate the call records.

### **VII. CONCLUSION**

With the technological evolution, the suitability of E-evidence has to be determined within the parameters of Sec. 65B of Evidence Act and the recommendation of the law settled in the recent judgments of the Supreme Court and various High Courts as discussed above. The argument is clear and unequivocal that if the secondary E-evidence is without a certificate under section 65B of Evidence Act, it isn't acceptable and any assessment of the forensic expert and the testimony of the observer in the courtroom can't be investigated by the court. However, still, there are few gaps that are unresolved as what might be the destiny of the Secondary E-evidence seized from the accused wherein, the certificate U/S 65B cannot be taken.

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