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Exploring the Judicial Trend in Addressing the Legal Conundrum in the Law of Electronic Evidence under Section 65B of the Indian Evidence Act, 1872

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ABSTRACT

The legal ambiguity about the nature of Section 65B of the Indian Evidence Act primarily arises from conflicting judicial opinions on the subject matter over the last few years. These conflicting judicial opinions leave one with a question as to whether the production of the certificate is a mere procedural regularity or whether it is at the root of the admissibility of electronic records. Understanding the nature of Section 65B itself and placing the constitutional values of natural justice would aid in addressing such legal ambiguities. Different concepts and perspectives on the law of evidence will help in understanding whether requiring such mandatory production of certificate would prevent the production of tampered evidence in legal proceedings or instead add unnecessary procedural roadblocks, leading to delay in the judicial process and potentially excluding important pieces of evidence.

Keywords: Evidence, fair trial, admissibility, electronic evidence.

I. INTRODUCTION

After the enactment of the Information Technology Act, 2000, at a time when information technology and digital evidence were making inroads into the law, sections 65A and 65B were added under Chapter V of the Indian Evidence Act 1872, which deal with documentary evidence. This provision sought to admit copies of electronic records as documentary evidence while ensuring the authenticity of such records. To understand this, the legal theory involving the law of evidence needs to be examined. J.L Montrose proposes three conditions to be satisfied with regard to the production of evidence in legal proceedings i.e., relevance, materiality and admissibility. Of the three, relevant to the legal problem in question is the

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condition of admissibility.² Generally, the courts will refuse to receive evidence if it is irrelevant or immaterial. But, importantly, the court also excludes evidence for reasons other than irrelevance and immateriality. There are legal rules that prohibit evidence from being presented at a trial even though it is relevant to a factual proposition that is material and in the issue. These rules render the evidence to which they apply “inadmissible” and require the judge to exclude it. Here, a difference between admissibility and relevance has to be made since admissibility presupposes the relevance of the evidence to which they apply.

II. SECTION 65B- THE PROVISION FOR ADMISSIBILITY OF ELECTRONIC EVIDENCE

Sections 65A and 65B³ are self-contained codes with Section 65-B having a non-obstante rule. It is concerned with the admissibility of digital documents. This section has caused a lot of doubt when it comes to the admissibility of an electronic document. Any material found in an electronic report that is printed or stored by a computer is considered to be text, according to Section 65-B sub-section (1). If the conditions set out in section 65-B are satisfied, an electronic document can be used as evidence in any proceeding without further proof.

The amendment to Section 2 of the Evidence Act states that terms “electronic form”, “electronic records”, “information”, shall have the same meaning as assigned by the Information Technology Act, 2000 (IT Act). The judicial decisions that were delivered to justify or elucidate the provision have further contributed to the ambiguity. Many members of the bar and bench are not technical and therefore lack the required basic knowledge of how electronic records are created, as well as the continuous shift in modes of development, generation, and preservation of such documents.

III. INTERPRETATION OF THE TERM ‘ELECTRONIC RECORD’

Electronic records are those that may be accessed by a computer. Computer-generated archives, as well as material stored on visual and aural devices such as voicemail networks, DVDs, and microforms such as microfiche and microfilm, are both examples. To put it another way, an 'Electronic Document' is "any mixture of text, images, records, audio, pictorial, or other material representation in digital form that is processed, modified, archived in a database system.”

The aim of the IT Act, according to the Statement of Objects, was to enable the electronic record, or material accessible on any electronic medium, to be used as evidence alongside

² Ho, Hock Lai, *The Legal Concept of Evidence, The Stanford Encyclopedia Of Philosophy*, (2015).

³ The Indian Evidence Act, 1872.

paper-based or oral evidence. As a result, it is clear that print-outs are not included in the concept of electronic records. But sub-section (1) of Section 65-B also includes the electronic records translated into a paper print-out. In other words, for the purpose of Section 65-B, the legislators, while dealing with the electronic records, have also added within it, its non-electronic format i.e., print-outs of the electronic records. In other words, when dealing with electronic documents, lawmakers have also included their non-electronic format, i.e., print-outs of electronic records, under Section 65-B. This blending of two formats seems to have resulted in a liberal interpretation of the term "electronic archives" by the courts, which now includes "print-outs".⁴ But that is not correct on the face of the definition of 'electronic record' in the IT Act or otherwise in general parlance.

Section 65-B deals with an 'electronic record' which is printed on paper, stored, recorded or copied in an optical or magnetic media produced by a computer, which has been referred to as the 'computer output'. 'Computer Output' means "data generated by a computer". This includes data produced at a software level, such as the result of a calculation, or at a physical level, such as a printed document.

IV. PRE-CONDITION FOR ADMISSIBILITY OF ELECTRONIC RECORD

A certificate is contemplated by Section 65B, both in terms of the details and the generation and output unit. To be admissible in evidence, an electronic document must satisfy the pre-conditions set out in Section 65B, sub-section (2) read with sub-section (5). Along with the electronic record, a certificate signed by a properly authorized person certifying precise information relating to the origin of the said data, the unit, the manner in which it was made, and so on must be filed. Subsection 4 also allows an authorized official to sign a certificate containing the required material. Despite the section's plain language, questions regarding the necessity of such a certificate, the consequences of its non-production, the necessary components of such a certificate, the point in which such a certificate is produced, and so on continue to arise.

V. THE OBJECT OF REQUIRING A CERTIFICATE UNDER SECTION 65B

The key goal of Section 65B, which mandates that electronic documentation be preceded by a stamp, is to ensure that the computer and the registered materials tendered in evidence are genuine. The Supreme Court held in *Tukaram S. Dighole v. Manikrao Shivaji⁵ Kokate* that

⁴ Tejas Karia, Akhil Anand, *The Supreme Court of India re-defines admissibility of electronic evidence in India*, (available at) <https://journals.sas.ac.uk/deeslr/article/download/2215/2149/>.

⁵ 2008 (3) BomCR 141.

tapes/cassettes are vulnerable to tampering and modifications through transposition, excision, and other methods that may be difficult to identify and that such facts should be viewed with caution. The court has said that in order to rule out any chance of interfering with the video, the level of proof for its validity and accuracy must be higher than for other documentary evidence.

VI. JUDICIAL TREND

The Supreme Court dealt with Section 65B of the Proof Act for the first time in the parliament attack case of *State (NCT of Delhi) v. Navjot Sandhu*.⁶ The point was that without a certificate given under subsection (4) of Section 65-B of the Evidence Act, the material found in the electronic report could not be used as evidence. In this case, even secondary evidence as required under section 63 secondary testimony is inadmissible in the absence of a qualified witness familiar with the use of the machines at the appropriate time and the manner in which the print-outs were taken.

The Division Bench of the Apex Court held that section 63 of the Act defines secondary evidence as those including copies made from the original by mechanical processes that in themselves guarantee the authenticity of the reproduction and copies contrasted with those copies.⁷ If the original of a text is of a sort that makes it difficult to move, Section 65 allows supplementary documentation of its contents to be presented. Print-outs obtained from machines by a mechanical process and approved by a competent official of the service-providing organization will be provided in court by a witness who may recognize the certifying officer's signatures or otherwise talk of the evidence-based on their own experience.

There is no bar to adducing secondary facts under the other provisions of the Evidence Act, including, Sections 63 and 65, regardless of whether or not the conditions of Section 65-B are met. It is possible that the certificate containing the information set forth in sub-section (4) of Section 65-B was not filed in this case, although it does not preclude secondary facts from being presented in the conditions set forth in the applicable provisions, including Sections 63 and 65. In this case, it appears that the Hon'ble Court erred in reading clause (d) of Section 65 to consider electronic data (in this case, cell phone call records) as secondary evidence under Section 63 of the Act, and hence erred in concluding that the inability to include the appropriate certificate did not make the evidence inadmissible.

While the transcripts of internet transactions were extensively relied upon by the prosecution

⁶ 2005 11 (SCC) 600.

⁷ *Ibid.*

to prove the guilt of the accused in *Mohd. Ajmal Amir Kasab v. State of Maharashtra*⁸, the matter of non-compliance with section 65-B did not even appear in this case. The court in *Anvar P.V. v. P.K. Basheer*⁹ addressed the essence the manner of electronic record entry. In light of Sections 59 and 65A, the bench held that any documentary evidence by way of an electronic record under the Act can only be proven in line with the process specified under Section 65-B. Despite relying on the decision in *Anvar's*¹⁰ case, the Court in *Sonu v. State of Haryana*,¹¹ held that Sections 65A and 65B apply to the mode of evidence of an electronic document, not its admissibility. As a consequence, the provision of a certificate was held to be simply a procedural error and can be remedied only if a party raises an objection when the paper is adduced as testimony during the course of the trial, not at any other time. In *Shafhi Mohammed's case*¹², a two-judge bench held that the provision of a certificate under Section 65B(4) is procedural and can be relaxed by the court in the interest of justice, in contrast to *Anvar's* case. If a party is unable to produce it, such a provision was not necessary. Furthermore, a party could also generate a computer output as secondary evidence as under sections 63 and 65 of the Act.

*Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*¹³ is the most recent case in the series. The court explores the legal conundrum surrounding the necessity of a certificate before providing electronic proof under Section 65B of the Act, which seems to leave room for further ambiguity about the provision's existence. It also claimed that the special provisions of Sections 65-A and 65-B of the Evidence Act are a full code in and of themselves and that a written certificate under Section 65-B (4) is a prerequisite precedent to the admissibility of such evidence. To that point, the court determines the correct legal framework. The Supreme Court also correctly ruled that “secondary evidence” of the document's contents may be submitted under Section 65 of the Act. It also ruled *Shafhi Mohd.* to be bad in law because it contradicted *Anvar P V.*

VII. FAIR TRIAL DENIED

India is well-known for its excessive delays in criminal and civil courts. The fact remains that mechanical technologies quickly become outdated, and technology evolves at a rapid pace. In contrast to the amount of time it takes for a case to be settled, the individuals who control the

⁸ AIR 2012 SC 3565.

⁹ *Anvar P.V v. P.K Basheer*, AIR 2015 SC 180.

¹⁰ *Ibid.*

¹¹ AIR 2017 SC 3441.

¹² *Shafhi Mohammad and Ors v. The State of Himachal Pradesh and Ors.*, 2018 (5) SCC 311.

¹³ Civil Appeal Nos 20825-20826 of 2017, 2407 and 3696 of 2018.

machines shift regularly. The Supreme Court has taken judicial note of the fact that electronic documents are vulnerable to tampering in a number of cases, including *Anvar P. V.* As a result, the level of proof for its reliability and accuracy must be higher than for documentary evidence.¹⁴ In today's world, adulterating any electronic records, even indirectly, is a simple task. As a result, the courts have consistently stressed the importance of maintaining the authenticity of both the information and the source. There is a possibility of the accused being treated unfairly and a consequent mistrial as a result of *Arjun Panditrao's* broad and liberal view that no such certificate is needed if the electronic record is primary evidence and that the certificate can be granted at any time before the end of the hearing. The office of the returning officer in *Arjun Panditrao* made a concerted effort to avoid filing the appropriate certificate on record. Such an effort cannot be allowed to proceed, without a doubt. This would be a violation of the legal system.

VIII. CONCLUSION

One could say that we might have to wait a little while for the courts to take a firm stance on the reading in Section 65B, irrespective of the circumstances in each case, bearing in mind the importance and intent of combining sections 65A and 65B into a single clause. As technology has become more pervasive in daily life, the processing of electronic proof is gradually being used to determine the accused's guilt or the defendant's responsibility. The approach of the Indian judiciary in restricting the means of authentication to certificates might go against the principles of statutory interpretation and such harsh measures to prevent any manipulation come at the expense of depriving the citizens of their right to a fair trial.

¹⁴ *Contractual Interpretation in Indian Evidence Act Jurisdictions: Compatibility with Modern Contextual Approach*-Yihan GOH (available at) https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3338&context=sol_research.