

Electronic Evidence–Admissibility and Authentication: A Judicial Perception of Apex Court of India

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Abstract

We are living in the digital era. Disputes and crimes are inevitable in this era of technology. The investigation and judgment of the courts are highly dependent on the electronic evidence. The recent judgment of the Indian Apex Court has opined on the subject matter of admissibility of Digital Evidence under Section 65-B [Indian Evidence Act, 1872] in the Arujn Panditrao Khotkarcase. The Apex Court of India had confirmed the decision of P.V. Anvar case and overruled the decision of Shafhi Mohammad case . The Arjun Panditrao case is the most up-to-date development in India regarding the admissibility of electronic evidence in India. The researchers examine the recent judgments on the admissibility of electronic evidence by using the doctrinal method of research. The researchers reflect the issues of admissibility of electronic evidence which are resolved by the Apex Court of India. The researchers also reveal the challenges for the admissibility of Electronic Evidence under Section 65-B of Evidence Act post- Arjun Panditrao case. The researchers also suggest future expectation from the Hon'ble Legislators and Judiciary to resolve the challenges for the admissibility of Electronic Evidence.

Key words: *Digital Evidence, Electronic Device, Electronic Evidence, Electronic Records*

Introduction

We are living in the digital world. The reliance on the digital device and digitalization is part of the modern day life and it generates electronic evidence. It is useful to resolve the disputes which may be of the civil or criminal nature. There are so many investigation be dependent on the electronic evidence. It is challenge to collect the electronic evidence and it is more challenging to place it for the admissibility during the court trial. The validity and reliability of electronic evidence are challenged before the Hon'ble court during the trial. The prosecution has to prove the authenticity of the electronic evidence and its source. It is possible

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that technical issues will be raised regarding the admissibility of electronic evidence and the whole trial proceeding may be wreck. In the recent time the Apex Court of India had pronounced judgments on the admissibility of electronic evidence. Hon'ble Apex Court of India has not opined with consistency regarding the admissibility and authenticity of the electronic evidence. Hon'ble Apex Court had endeavored to give justice on the different occasion by giving their judicial opinion on the basis of the legal scheme of electronic evidence. It is necessary to study the legal position and judicial perception on the admissibility and reliability of electronic evidence in India. The admissibility of electronic evidence is a vital issue and it cannot be put as the hanging flower pot in the balcony of the justice. Domain and Page Authority is a search engine ranking score out of 100 that predicts how well a website will rank on search engine. (Chudasma, Bhatt, & Trivedi, 2019)³

Legislation on electronic evidence in India

India has made necessary changes in the legislation related to electronic evidence keeping in mind the United Nations Commission on International Trade Law (UNCITRAL) model law on electronic commerce.⁴ The legal recognition of the electronic records is provided under the Information Technology Act, 2000⁵ Electronic records are defined under the Information Technology Act, 2000 and it means data, record, image, sound stored received or sent in the electronic form.⁶ The definition of the document is given under the Indian Evidence Act and it says that electronic records are also considered as document within the meaning of that definition.⁷ All facts except the electronic records may be proved by oral evidence in India.⁸ Section 65 (A) and 65 (B) of the Indian Evidence Act, 1872 are speaking about the admissibility of electronic evidence in India. The electronic evidence is admissible before the court proceedings subject to the production of the certificate as per the requirement provided under the Indian Evidence Act.⁹ The certificate is not required if the original document (electronic device) itself is produced before

³ Chudasma, Pradipsinh; Bhatt, Atul; and Trivedi, Dharmendra, "Application of Cloud Computing in University Libraries: Case Study of Selected University Libraries in Gujarat" (2019). Library Philosophy and Practice (e-journal). 2744. <https://digitalcommons.unl.edu/libphilprac/2744>

⁴ Model Law on electronic commerce adopted by the United Commission of International Trade Law adopted by the General Assembly on the report of the Sixth Committee (A/51/628) recalling its resolution 2205 (XXI) on 17 December 1996.

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⁶ Section 4, Information Technology Act, 2000

⁷ Section 2(1) (t), Information Technology Act, 2000.

⁸ Section 3, Indian Evidence Act, 1872.

⁹ Section 59, Indian Evidence Act, 1872.

¹⁰ Section 65 (B) (4), Indian Evidence Act, 1872.

the Hon'ble Court and the person who is operating the electronic device give the statement before the court that he is the owner of the device or operated the device.

Judicial Perception of Apex Court of India:

The Hon'ble Apex Court of India had produced his opinion and decision on the admissibility of electronic evidence in the Ram Singh case in the year 1986 and after that there were so many time it is place before the Hon'ble Apex Court of India to give their judicial opinion and decision on the issue of admissibility of electronic evidence. The Hon'ble Apex Court had changed his opinion and interpretation of the law on admissibility of electronic evidence frequently. The judicial perception of Apex Court of India on the admissibility and authenticity of electronic evidence is discussed below:

3.1. Ram Singh v. Col. Ram Singh [AIR 1986 SC 3]

The Apex Court of India had put the following guidelines for the admissibility of tap recorded conversation:

3.1.1 The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. It requires strict proof that it is voice of the speaker.

3.1.2 The accuracy of the recording shall be proved by strict proof of evidence.

3.1.3 There shall not be any tempering or erasure of the recording otherwise it is inadmissible.

3.1.4 The relevant evidence is only admissible.

3.1.5 The admissible evidence must be preserved properly.

3.1.6 The quality of the recording shall be clearly audible.

3.2. State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru [(2005) 11 SCC 600]

The inadmissibility of the electronic records (mobile phone call records) was raised by the defense side in the absence of the certificate issued under Section 65 (B) (2) of the Indian Evidence Act. The defense side challenged the validity of the mobile phone call records. The prosecution failed to produce the certificate for the admissibility of the electronic evidence. The Apex Court of India concluded that competent witness were examined and cross-examined who are involved at the time of taking print out of the records. It proves that records are authenticate and valid.

3.3. Tukaram S. Dighole v. Manikrao Shivaji Kokate [(2010) 4 SCC 329]

The Apex Court of India had observed that we are in the era of technology and technological developments. High-tech developments are happening fast. It is necessary to keep prudent watch while admitting electronic evidence because there may be tampering with the evidence. It is not possible to make exhaustive rule

because it may not work in the vibrant era of technological development. The new techniques and tools are arising in this era of technology so it is necessary to take into the consideration while admitting electronic evidence.

3.4. *P.V. Anwar v. P.K. Basher* [(2014) 10 SCC 473]

The case was an election petition which related to an allegation of corrupt practice against Respondent 1 under Section 100 (1) (b) and Section 123 (4) of the Representation of the People Act, 1951 on the ground that Respondent 1 had made certain speeches, songs and announcements to prejudice the prospects of the appellant and it had materially affected his election results. The evidence of the said speeches, songs etc. was produced in CDs by feeding the content into computer and thereafter making the copies.

The Apex Court of India opined that CDs (electronic evidence) put without a certificate as per the provision of Section 65 (B) of the Indian Evidence Act are inadmissible. It did not specify as to whether the said certificate has to be filed with the charge-sheet or if it can be supplied at a later stage, during the trial.

The Apex Court of India held that opinion of an examiner of electronic records under Section 45 – A could only be obtained once the secondary electronic evidence has been produced in compliance with Section 65-B. Also, no oral proof of the secondary electronic evidence can be allowed to be given in the absence of compliance with Section 65-B.

3.5. *Tomas Bruno v. State of U.P.* [(2015) 7 SCC 178]

The Apex Court of India opined that generally the appeal court has not to interfere in the judgment and decision of the lower court until it found that there is lack of chain in the evidence produced before the Hon'ble court. It is necessary when the issue is decided on the basis of the circumstantial evidence then it is necessary that prosecution shall prove it beyond the reasonable doubt.

The Hon'ble Court observed that when the whole issue is dependent on crucial issue then we have not to ignore that important evidence. According to the facts of the case before the Hon'ble Court 'CCTV' footage were deciding factors. It is found that there was chain in the gap of the circumstantial evidence also. The Hon'ble Court also observed that 'CCTV' footage were very important and it is unfortunate to ignore it.

'CCTV' footage is electronic evidence so it is governed by the Section 65 (A) and 65 (B) of the Indian Evidence Act. According to the Hon'ble Court Section 65 (A) and 65 (B) of the Indian Evidence Act are procedural requirement. A certificate requirement under Section 65 (B) may not be compulsory in each and every case if the Hon'ble Court find that the evidence which is produced before them are authentic and reliable. It is necessary that Hon'ble Court should be satisfied with

the electronic evidence which is produced before them and it should be collected in the proper manner.

3.6. *Sonu v. State of Haryana* [(2017) 8 SCC 570]

The Apex Court of India had upheld the conviction of the accused although a crucial part of the evidence that is CDRs are produced before the court without a certificate requirement as per Section 65 (B) of the Indian Evidence Act. The Hon'ble Court had not taken into consideration the ratio laid down by the three judge bench in the Anvar Case. The division bench had not put reliance on the three judge bench judgment and ignored the accused arguments that the evidence produced against him are inadmissible because it do not fulfil the requirement of the law. The objection was not raised by the accused at the time of trial is unfortunate but the Hon'ble Apex Court had opportunity to correct the mistake which was missed by the Apex Court of India.

3.7. *Shafi Mohammad v. State of H.P.* [(2018) 2 SCC 801]

The Apex Court of India had observed that a certificate under Section 65 (B) (4) is not required for a person who is not in possession of a device which has produced an electronic document. The Hon'ble Court further observed that the requirement of a certificate under Section 65 (B) (4) can be relaxed in the interest of justice. The Apex Court of India had ignored the ratio of the P.V. Anvar case and give liberal interpretation for the admissibility of electronic evidence. The Apex Court of India had put more emphasis on the delivering justice rather than following the strict procedure of law. The Apex Court of India had opined that Section 65 (B) (4) of the Indian Evidence Act requirement is procedural requirement and it may be interpreted liberally if the Hon'ble Court deemed it fit that electronic evidence produced before the court are reliable and authentic.

3.8 *Arujn Panditrao Khotkar v. Kailash Kushnrao and Ors.* [(2020) 3 SCC 216]

Mr. Arjun Panditrao Khotkar is one of the strong leaders of Shiv Sena.¹⁰ He had won the election Jalna Legislative Assembly Constituency, Maharashtra, in the year 2014. He had won the election with a margin of 296 votes. He was the petitioner in the case and the respondent was the opposite candidate.

The Petitioner had filed the four nomination forms with the returning officer of the Election Commission. The Respondent had challenged two of the nomination forms were filed with the Returning Officer after the stipulated time. The Respondent

¹⁰Mohammed Akhef, Min Arjun Khotkar Case: Apex Grants Stay To He Order, Schedules Final Hearing For March 18, TOI, Sep Dec. 9, 2017. http://timesofindia.indiatimes.com/articleshow/61990557.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

Patel, Sandip S. and Bhatt, Atul, "The Application of Web 2.0 Tools in University Libraries of India" (2019). Library Philosophy and Practice (e-journal). 2984. <https://digitalcommons.unl.edu/libphilprac/2984>

made a complaint to the returning officer, which was rejected on the same day. The Respondent had approached the Mumbai High Court. He wanted to rely upon CCTV recording of the returning officer of the Election Commission office.

The Mumbai High Court had asked to produce the electronic record (CCTV camera footage) of the Election Commission office. It is produced without the necessary certificate under Section 65-B, Indian Evidence Act by the Election Commission before the Mumbai High Court. The Mumbai High Court rejected it. The returning officer of the Election Commission had given his statement on oath regarding the validity of the records. The Mumbai High Court had declared the election procedure as null and void. The Petitioner challenged it before the Apex Court of India. The Apex Court of India had decided the Civil Appeal No. 20825-26 of 2017 on 14.07.2020 and dismissed the Appeal with costs as proposed.

3.8.1 Outcome of Arjun Panditrao Khotkar case:

Arjun Panditrao Khotkar case was decided by three judge bench of the Apex Court of India.¹¹ It was decided on 14.07.2020.¹² The Apex Court of India had on July 26, 2019 had observed that Shafi Mohammad case¹³ may require reconsideration by a larger bench after taking into consideration the Anvar P. V. Case.¹⁴

The Hon'ble Supreme held as below in the Arjun Panditrao Khotkar case:

The Apex Court of India had decided that a certificate issued as per the requirement of Section 65-B of the Indian Evidence Act is compulsory for the admissibility of secondary electronic (digital) evidence is before the Hon'ble Court. The Apex Court of India had upheld the decision of Anvar P.V. case.¹⁵ The statement recorded before the Hon'ble Court regarding the validity of the electronic (digital) evidence cannot be considered valid in lieu of the certificate requirement.

The primary¹⁶ evidence are not required to follow the conditions in Section 65-B of the Indian Evidence Act. It means when the document itself is produced for the inspection of the court then a certificate is not required as per the procedural requirement of Section 65-B of the Indian Evidence Act. The Apex Court of India had declared the law decided by Tomas Bruno case¹⁷ as incorrect. Shafi Mohmaad Case¹⁸ had referred the Tomas Bruno case and decided that the certificate requirement as per Section 65 (B) (4) of the Indian Evidence Act is procedural

¹¹ [The three-judge bench of R F Nariman, S. Ravindra Bhat and V. Ramasubramanian, JJ]

¹² Supra Note 1.

¹³ Supra Note 3.

¹⁴ Supra Note 2.

¹⁵ Supra Note 2.

¹⁶ Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original; they are not primary evidence of the contents of the original.

¹⁷ (2015) 7 SCC 178.

¹⁸ Supra Note 3.

requirement and can be let go by the court in the interest of justice where party is not in the possession of the electronic (digital) evidence. The Apex Court of India had overruled the Shafi Mohammad case. The Apex Court of India said that an application can be made before the Hon'ble Court regarding the production of a certificate from the concerned authority or person according to the prescribed procedure of law. When the appropriate certificate is not produced by the concerned person or denied to provide the certificate as per the requirement of Section 65 (B) (4), the Hon'ble Court may issue summons to the concerned person or authority.

When the original documents¹⁹ like laptop, computer, tablet and mobile phone etc. (primary evidence)²⁰ is produced then requirement under Section 65 (B) (4) is not mandatory.

When it is not possible to produce the original documents (electronic device or system or server) then the copy shall be prepared from the original documents and it shall be produced with a requisite certificate as per the procedural requirement mentioned under Section 65 (B) (4) of the India Evidence Act.²¹

It is mandatory to supply a certificate as per the requirement of Section 65 (B) of Indian Evidence Act for the admissibility of secondary electronic (digital) evidence and in lieu of that it is not allowed to accept oral evidence by a person who is in charge of the electronic (digital) evidence.

The Apex Court of India said that in the criminal cases the certificate as per the requirement of Section 65 (B) (4) can be produced before the trial came to an end. In the Civil cases, the appropriate discretion will be exercised by the court.

It is necessary for the telephone companies and internet service providers to preserve call records as per the direction of the Apex Court of India if such call details or electronic records are vital and seized by the investigator. During the trial after issuing the summons the records have to be produced by the concerned person or authority before Hon'ble Court. It can be cross-examined. The internet service providers and telephone companies have to maintain their data for the period of

¹⁹ Original documents means that constitutes the records and it is master copy of the documents which is not facsimile or copy.

²⁰ A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

²¹ A certificate which identifying the electronic record containing the statement and describing the manner in which it was produced. It is also giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer. It is also dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

one year as per the direction of the Apex court of India.

The Apex Court of India had directed the Govt. of India to outline the rules and directions under the Information Technology Act, 2000 for the protection and conservation of the electronic records. The Chief Justice Conference held in April 2016 had also shown their concerned for the same. Govt. of India has to frame the rules under Section 67 (c) of the Information Technology Act regarding the preservation and production of the electronic evidence.

3.8.2 Lacuna of Arjun Pandit Rao Case:

The Apex Court of India had repeated the same mistake which was done in the Anvar Case. It is mandatory to produce a certificate as per Section 65 (B) of the Indian Evidence Act for the admissibility of secondary electronic evidence. The oath of the witness who is operating and handling the device is not considered valid in lieu of a certificate requirement. It is sine qua non to produce a certificate as per the requirement otherwise the electronic evidence will not be considered as valid evidence. It is very difficult to produce a certificate when you are not in possession of the device or third party is operating that device or mechanism. The Hon'ble Court has to open some window otherwise there will be suffocation and the fresh air will not come. It is important to find out practical solution for the admissibility of electronic evidence with all precaution and authentication so in the era of digital world, the justice shall not be denied in the absence of a certificate. It is really difficult to get the certificate as per the requirement of Section 65 (B) of the Indian Evidence Act when the system or data is controlled by third party. If you filed the application for the production of a certificate from the concerned court or authority then it may take time and it will delay the trial. The Hon'ble court had an opportunity to find out practical solution by making liberal interoperation of Section 65 (B) of the Indian Evidence Act.

The Apex Court of India had increased the burden on the trial court because it will take more time during the trial if the prosecution or complainant filed an application for the production of the certificate and the dense side will oppose it on the technical ground or other grounds. The trial court has to hear each and every application and has to decide it and it may result in to another trial before the court and actual trial may be derailing. The Apex Court of India had missed the golden opportunity to settle the position completely in this era of technology. The technological development is happening with light speed. The crimes have changed his pattern and the technology is also helping to find out the real accused. The digital evidence is become vital to decide truth. The digital evidence and the

admissibility of digital evidence are crucial for the prosecution to prove their case and if it is difficult to do then it is almost impossible to prove the case beyond the reasonable doubt in the absence of strong evidence against the accused.

Conclusion:

The Hypothesis is partly proved true. The Apex Court of India had put efforts to resolve the issue of the admissibility of electronic (digital) evidence but unfortunately it is not yet resolved completely. The compulsory requirement of a certificate will result into the delay of the trial proceedings. The Arjun Panditrao case has made clarity on the issue on the admissibility of electronic evidence after the conflicting judgments of the Hon'ble Supreme Court in the recent time. The Hon'ble Court had also given clarification about the stage of the production of a certificate as per the requirement under Section 65 (B) of the Indian Evidence Act and the certificate can be produced before the Hon'ble Court before the Court pronounced to the final judgment. The Hon'ble Court had also made clarification about the way the complainant or prosecution can produced the certificate (as per the requirement of Section 65 B of the Indian Evidence Act) when they are not in a possession of the device or system which has generated the electronic records or documents.

Way forward:

As per the direction of the Hon'ble Supreme Court in the Arjun Panditrao case, the Government has to frame appropriate rules and directions by exercising powers under Section 67 C of Information Technology Act, 2000. We strongly believe that there is need to re-look the Section 65 B of the Indian Evidence Act and it may be amended as per the need of an hour. Whenever the appropriate opportunity will come in future related to admissibility of electronic evidence, the Apex Court of India may give more clear view regarding the delay tactics weapon which may be misused by litigants on the admissibility of electronic evidence.

It is necessary that the law should follow the development of science and the progress in the society. The present and future era is dominating by the data and digital technology. It is duty of the state to come with a vibrant legislation to protect the interest of the people at large. It is essential to make strong unique legislation on electronic evidence to protect the civil society against the fraud/dispute/crime which is dealing with the electronic (digital) device/documents.