



Critical Analysis of Admissibility of Digital Evidence

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One of the most innovative and radical changes in humanity has been the proliferation of computers and digitalisation. As in other areas of human life, cyber space has never been free of risks and the transmission of crime. This is due to the diversity of content and information available as well as easy access and wide accessibility. However, with the increase in the cyber environment, there has been a significant increase in its misuse. The authenticity of e-texts has always been discussed, considering how they are prone to distortion. Investigative agencies also continue to face issues regarding the validity of such electronic evidence.

Since electronic evidence, compared to conventional or traditional evidence, requires specialized training and expertise in the field of cyberspace, the method used to investigate and analyze information stored or obtained from the media electronically for presentation in a court of law is extremely important.

The article analyzes and evaluates the validity of electronic evidence in a court of law in the light of declarations of judgment and legal purpose.

Information Technology Act, 2000 and Evidence Act, 1872

The concept of "electronic evidence" was introduced by the Information Technology Act, 2000 ("IT Act") and related amendments to the Evidence Act, 1872 ("Evidence Act") and the Indian Penal Code ("IPC")⁴. IT law

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and its amendments are based on the UNCITRAL⁵ Law on Electronic Commerce. In terms of Section 2 (1) (t) of the IT Act, the term "electronic record" means data, record or data generated, image or audio stored, received or sent in electronic form or small film or computer-generated computer fiche. Section 4 of the IT Act⁶ clearly recognizes the legitimacy and use of electronic records instead of standard paper-based records.

The Evidence Act was amended as a result of Section 92 of the Digital Technology Act and the term "evidence" was amended to include "electronic record", thus allowing for the adoption of digital evidence. Prior to the legal recognition provided by electronic evidence, sections 63 and 65 of the Evidence Act were very active and provided the conditions for the admissibility of electronic evidence. As with these provisions, electronic evidence collected in various ways using cyber forensics was regarded as a "document" and printed products were considered as second proof, requiring professional confirmation from a competent signer who could not be questioned on the verified document.

However, the omission of the term, "Electronic Records" in the provisions of Sections 61 to 65 of the Evidence Act; and the exclusion of an electronic record under Section 59 of the Evidence Act clearly demonstrates the clear and explicit purpose of the law not to extend the application of sections 59 and 61 to 65 of the Evidence Act to electronic records, subject to the provisions of Section 65B of the Evidence Act.

Acceptance of Electronic Records

Section 65A of the Evidence Act provides that the contents of electronic records may be verified in accordance with the provisions of Section 65B of the Evidence Act. Therefore, any written record of an electronic record can only be proved in accordance with the procedure set out in Section 65B of the Evidence Act. Section 65B of the Evidence Act provides that anything contained in the Evidence Act, any information contained in an electronic record, whether the contents of a document or a document published, or stored, recorded, copied from optical or magnetic media, is as a document and is accepted as evidence without any further proof of the original production, subject to the satisfaction of the conditions set out in section 65B (2) - (5) of the Evidence Act.

Technical conditions and non-technical reasons

Section 65B of the Evidence Act provides for both technical and non-technical reasons for the acceptance of electronic evidence. Subsection (2) of Section 65B of the Evidence Act lists the technical circumstances in which a duplicate (including printed) copy of an electronic record may be used. These are:

- a) At the time of the electronic record, the computer that produced it must have been used regularly;

⁵ United Nations Commission on Electronic Commerce

⁶ 2000

- b) The type of information contained in the electronic record must be regularly entered and usually entered into a computer;
- c) The computer was working properly; and
- d) A duplicate copy must be a reproduction of the original electronic record.

As can be proven the above scenarios are related to the authenticity of the data. Circumstances have a double impact as they

- i) ensure that there is no unauthorized use of data; and
- ii) the device was efficient, ensuring the accuracy and reliability of the extracted data.

Subsection (3) of Section 65B of the Evidence Act defines and ensures that if a user has used a networked device to store or process data, all connected devices will be regarded as a single device.

Authentication Certificate

Section 65B (4) of the Evidence Act provides for non-technical conditions such as certification requirements. The purpose of this certificate is to satisfy the requirements set out in subsection (2) of the previous Section 65B of the Evidence Act. The certificate must be used / signed by the person in charge of the device from which the data is made. The certificate must identify the record in question, describe how it was produced and provide details of any material involved in the production of the electronic record as appropriate for the purpose of proving that the electronic record was computer generated. The certificate must also deal with any issues that comply with the eligibility criteria. The whole point of the certificate is also to ensure the authenticity of the source and the accuracy of the information, so that the Court can place its confidence in it. This is important because electronic data is prone to interference and modification.

Certificate requirements

The relevant question that arises in this context is whether the certificate under Section 65B of the Evidence Act is compulsory? This has been answered with the consent of the High Court in the case of Anwar PV v PK Basheer and Others [(2014)⁷]. However, this was not the first view of the problem. Earlier, in the case of the State (NCT of Delhi) v Navjot Sandhu @ Afzal Guru, [(2005) 11 SCC 600], the High Court responsible for the admission and proof of technical evidence for the first time held, notwithstanding compliance with the requirements of Section 65B of the Evidence Act. electronically, there is no limit to adding secondary evidence under other provisions of the Evidence Act, namely Sections 63 and 65. It further states that, even if a certificate containing the information under subsection (4) of Section 65B of the Evidence Act is not included,

⁷ 10 SCC 473

that does not mean that secondary evidence cannot be provided even if the law allows such evidence to be given in the circumstances specified in the relevant provisions, namely Sections 63 & 65 of the Evidence Act. Consequently, the Supreme Court did not give Section 65B of the Evidence Act the necessary importance as contemplated by the legislature. Apart from the passing of IT law in 2000 and amendments to the Evidence Act, the Supreme Court for the first time in the Anwar PV case held that electronic documentary evidence could only be proved in accordance with the procedure set out in Section 65B of the Evidence Act. It was in this context that the significance of Section 65B of the Evidence Act was fully recognized and appreciated by the Supreme Court.

The decision of the High Court in Anwar PV, that a certificate under Section 65B of the Evidence Act is compulsory on the receipt of electronic evidence, has overturned its previous decision in the Navjot Sandhu case, respectively. The Supreme Court noted that Section 65B of the Evidence Act begins with a 'non-problematic law' and would violate the general law in the second evidence, as set out under Sections 63 and 65 of the Evidence Act. Section 65B of the Evidence Act is specialized in the proof of electronic records. The very title of Section 65A of the Evidence Act read with sections 59 and 65B of the Evidence Act is sufficient to assume that the special provisions for evidence relating to electronic recording will be governed by the procedures set out in Section 65B of the Evidence Act. This is a complete code of conduct and is a special law, the general law under sections 63 and 65 of the Evidence Act must provide in accordance with the maxim *generalia specialibus non derogant*.

However, following the decision of the Anwar PV High Court, the requirement to comply with the provisions of Section 65B of the Testimony Act in cases where such electronic record is produced by an organization that does not have the device is now free. The High Court while dealing with the same issue held that the application of the procedure required under Section 65B (4) of the Evidence Act for the issuance of a certificate should only be used when such electronic evidence is produced by the person in charge to issue such a certificate and the Court may agree.⁸ In the absence of certainty as a result of the aforementioned decision, the two-judge panel of the Supreme Court referred it to a larger bench, so that he could legislate with greater certainty.⁹

Completion of the certificate in Court

It is also worth noting that the original concept of the certificate to be submitted and the reproduction of the electronic record and not after that, has been changed. The Delhi¹⁰ High Court has ruled that a certificate under Section 65B of the Evidence Act may be attached thereafter and is not obliged to be accompanied by the

⁸ Shafhi Mohammed v. State of Himachal Pradesh 2018 (2) SCALE 235

⁹ Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal & Ors 2019 SCC OnLine SC 1553

¹⁰ Kundan Singh v The State 2015 SCC OnLine Del 13647.

production of particulars. It was also maintained that the non-submission of a certificate under Section 65B of the Evidence Act is not a permanent and irreversible matter.¹¹ Similarly, the Hon'ble Orrisa High Court has ruled that in considering bail, it is not necessary at all to ask the prosecutor to satisfy all the requirements for completing the certificate. under Section 65B of the Evidence Act, prior to consulting the Forensic Voice Examination Report as well as the CD.¹²

The courts have yet to decide fully whether the objection to non-compliance with Section 65B of the Evidence Act can be removed or allowed. However, if the opposing party consents to the reproduction of the data and does not object, in such a case, the consent serves as the issuance of evidence and compliance with Section 65B of the Evidence Act to prove the same is not required. Disputes about the method of evidence may be removed if they are not taken in the appropriate category.¹³ In this regard, the High Court has ruled that such a dispute over the method or method of evidence should be raised at the time of marking the document as exhibit and not later. A critical test, as confirmed by the High Court, was whether the error could have been cured in the document marking phase.¹⁴

It is worth noting that Section 65B of the Evidence Act deals with the conditions that precede the acceptance of electronic evidence. However, a certificate under Section 65B of the Evidence Act does not fully substantiate the facts contained in the electronic record and does not state the fact. Compliance with Section 65B of the Evidence Act only allows the Court to read / view this document. The Court still has to consider its suitability, validity, and credibility. It needs to be independently determined whether or not the document has a real impact on the case and how much, if any, the weight to which it should be attached.

The value, validity, authenticity and reliability of electronic records

Although the value of electronic records is clear about the facts and circumstances of each case, the accuracy, validity and reliability of digital evidence are some of the major challenges that courts must face when judging the validity of electronic evidence. It is, therefore, important for the Courts to ensure that the records are not used, altered or corrupted, during the period in which they were created and prioritized in the courts. Over time, various courts in India have ruled in favor of the use of alternative technologies.

¹¹ Paras Jain and Others. v State of Rajasthan 2015 SCC OnLine Raj 8331.

¹² Pravata Kumar Tripathy v Union of India 2014 SCCOnLine 407

¹³ Shamsher Singh Verma v State of Haryana (2016) 15 SCC 485

¹⁴ Union of India and Others v CDR Ravindra V Desai (2018) 16 SCC 272

E-mail

Email or email is one of the most widely used electronic media to transmit information. Through formal communications through e-mail, Indian courts have allowed such e-mails to be accepted as proof in the submission of a printed e-mail form and certificate under Section 65B of the Evidence Act.¹⁵

The Certificate under Section 65B of the Evidence Act must state that the computer at the appropriate time was in the official control of the e-mail witness and that the information was regularly entered into the computer where the normal activities were performed. In addition, it is important to mention that the computer was efficient and that the printed content of the paper is derived from the information that is entered into the computer where the normal operations are performed.

Once the above criteria have been met, e-mails may be read as evidence under consideration under Section 88A of the Evidence Act regarding the authenticity of the content of the electronic message, until it is directly contradicted.¹⁶ However, this Section does not provide any consideration for the e-mail sender. . Therefore, as long as the team knows who sent it, email printing cannot be given very important.

SMS / instant messaging applications like WhatsApp

Unlike emails, which are often used for official communications, the use of short messaging service (SMS) or instant messaging apps such as WhatsApp are common for both formal and informal communications. However, unlike the issue of traditional computers, a mobile phone can be guided by evidence. Therefore, in cases where a device containing a message and / or instant messaging exchanges on WhatsApp or other such program is led to proof, there will be no requirement to file a certificate under Section 65B of the Evidence Act. However, in such cases, it is important to ensure that there is no dispute regarding device retention or any changes to the content.

The Telangana High Court in Telangana while comparing between a computer and a cell phone held that the very definition of computer and computer network as defined in the IT Act, a mobile phone is a computer programmed to, among others, accept digital audio signals, will be considered computer¹⁷. Therefore, in cases where a mobile phone containing SMS or WhatsApp will not be charged for proof, a Section 65B certificate will need to be attached by the person who received, received or sent the SMS / WhatsApp message. While the Indian courts are yet to independently judge the acceptance of WhatsApp messages as evidence, it is prudent to ensure proper storage of mobile phones. Since such messages will be subject to legal action, it is

¹⁵ Abdul Rahaman Kunji v. The State of West Bengal 2014 SCC OnLine Cal 18816

¹⁶ M/s. Xact Studio International v M/s. Liwona SP. Z.O.O 2018 SCC OnLine Del 9469

¹⁷ Syed Asifuddin v State of Andhra Pradesh 2005 SCC OnLine AP 1100

also important to ensure that there is no data interference, which may otherwise undermine the value of the evidence for these messages.

Hard disk

Computer hard disk is the basic source of all information. Therefore, while recognizing its value as an electronic evidence, the Hon'ble Delhi Supreme Court has ruled that as long as there is nothing written on the hard disk and it cannot be replaced, it will be as repository as any other computer hardware. However, if the hard disk is under any change, then even if it is restored by modifying the change, the details of the two steps, i.e., the change and its restoration will be stored in the hard disk memory and can be accessed through software designed for that purpose.

Therefore, any hard disk that has been overwritten or inserted into any modification itself is an electronic record even if it does not currently have access to information. In this regard, the courts have recognized that there may be valid data available on the hard disk that can be accessed and converted into other types of data and that can be transferred to other technologies. Practical information can also create an electronic record

Call Records

Many criminal investigations often begin with an analysis of the suspect's telephone records. Such telephone records are often useful as a starting point for conspiracy with other people. While recognizing that telephone records are kept on large portable servers and produced in court, the Hon'ble Supreme Court has ruled that printouts are taken from computers / servers by computer system and certified by the service officer - talk about facts based on personal information. In addition, notwithstanding the requirements of Section 65B of the Evidence Act, there is no restriction on adding secondary evidence under sections 63 and 65 of the Evidence Act¹⁸.

Tape Recording

Often groups record interviews with others, in order to use the same and evidence in trials. Although the courts have always held that the record will be a 'document' under Section 3 of the Evidence Act, it is important that the voice of the alleged speaker be properly identified by the record holder or by others who know it, should be in place to prevent the record from being compromised.

¹⁸ State (NCT of Delhi) v Navjot Sandhu (2005) 11 SCC 600

However, in the case of the recording of the transcripts of the interviews, the courts have made it clear that without the actual recording of the audio being made available for inspection, no reliance can be placed on the recording of audio recordings¹⁹.

Photos

In most cases, the digital camera itself is not produced before the court and the group takes the help of printed or other sources such as CDs, USB Drives, etc. The camera that also took the photo and transferred it to the storage media needs to verify how to print or save. This has also been clarified by the Hon'ble Delhi High Court stating that when the party removed that he had taken photographs of himself, he made them into court; the inclusion of negatives cannot be the basis for rejection, especially if the images rely heavily on digital photography.

Compact Disc (CD)

Courts while dealing with the acceptance of a compact disc containing the record have seized that amended definition of "evidence" in Section 3 of the Evidence Act read with the definition of "electronic records" in section 2 (1) (t) IT Act, insert compact disc²⁰. Therefore, when you submit a Section 65B certificate, the CD is accepted as proof. However, in the absence of such evidence, the CD cannot be read as evidence.

The Hon'ble Delhi High Court has ruled that in the event that a CD is a copy obtained by a computer / electronic system for the first computer-assisted transcription from the first electronic record and then copied to the CD, it must form a second proof under section 63 of the Act. Evidence, therefore, may only be used to produce the first record of this discussion recorded under section 65B of the Evidence Act.²¹ Similarly, the High Court of Hon'ble Punjab and Haryana held that in a case where there was no connection between the CD and the memory chip it was said to be a source of duplication of information on the CD; if the CD is unable to test the authenticity against its hash value and source, then the audio recordings will be empty.

Statement of Account

Statement of Accounts is governed by Sections 2 (8), 2A and 4 of the Proof of Bankruptcy Act, 1891 ("Banker Book Act"). Section 2 (8) (c) of the Banking Act also provides that the printing of the transcript of a bank account must ensure the accuracy of the printout and contain a certificate in accordance with the provisions of Section 2A Banking Act. The Reserve Bank of India ("RBI") has no order. RPCD.CO.RF.BC.No. 100/07.38.03 / 2008-09 dated 24 April 2009 also directed all State and Central Co-operative Banks to comply

¹⁹ Sanjaysinh Ramrao Chavan v Dattatray Gulabrao Phalke (2015) 3 SCC 123

²⁰ K.K. Velusamy v N. Palanisamy (2011) 11 SCC 275

²¹ Havovi Kersi Sethna v Kersi Gustad Sethna 2011 SCC OnLine Bom 120

with the provisions of the Bank Accounts Act while providing certified copies and computer printing to the courts²². Therefore, computer-assisted electronic printing as provided under Section 2A of the Banking Act would not be a certified copy in terms of Section 2 (8) of the Banking Act and will not be accepted at that time as the original entry itself under Section 4 of the Banking Act. In addition, any dispute with the person showing the stated account statements, i.e. the dispute over the evidence method and not the admissibility, must be taken into account during the presentation of the documents.

Interestingly, the printing of a statement of account, officially certified by a bank official and a certificate under Section 65B of the Evidence Act have also been accepted by the courts as sufficient evidence to lead such statements to evidence. It is further clarified that because the print is included as a second proof and the required certificate, it does not make it so legal. In the case of Bank statements, a certificate issued by an authorized representative of a bank under Section 65B of the Evidence Act is sufficient and supports a reliable bank statement.²³

Guessing under the Evidence Act

The Evidence Act also provides for certain assumptions to facilitate the use of an electronic record. Subject to Section 85A of the Evidence Act, the court shall rule that all electronic records referred to in the agreement (containing the electronic signature of the parties) are held by the electronic signature of the parties. Similarly, Section 85B of the Evidence Act allows the Courts to assume that a secure electronic record has not been altered from a period of time in which the protected status is related, until proven otherwise. In addition, Section 85C of the Evidence Act provides for the accuracy of the information contained in the electronic signature certificate, while Section 81A of the Evidence Act provides for that consideration in respect of Gazette forms of electronic forms.

Use of Technology Media in other adjudication processes

In addition to the electronic records that lead to evidence, there has also been an increase in reliance on technical resources for other purposes in judicial proceedings. While recognizing the benefits of technical resources such as emails, WhatsApp messages, etc., the Supreme Court encouraged its parties / attorneys to use the opposition party via email, in addition to the usual forms of service²⁴ in litigation and commercial courts where temporary worship is prayed for. A similar view was taken by the Hon'ble Bombay Supreme

²² <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=4954&Mode=0>

²³ M/s ICICI Bank Limited v Gurdev Singh, 2018 SCC OnLine Del 6934

²⁴ Central Electricity Regulatory Commission v National Hydroelectric Power Corporation Ltd. & Ors. (2010) 10 SCC 280

Court²⁵. In recent times, even WhatsApp service has been observed by the Hon'ble Delhi²⁶ High Court and the Hon'ble Bombay²⁸ High Court.

The conclusion

With the passing of the IT Act and subsequent Amendments to the Evidence Act, the use of electronic records in judicial proceedings has come a long way. However, although various judicial slogans emphasize the importance of certification, certification has become a standard practice. With the need for a certificate under Section 65B of the Evidence Act to be overturned by the decision of the High Court Shafhi Mohammed, it would be interesting to see that the same is clarified by the High Court. Even then, with the continued emergence of cyber space, it would be good for the courts to keep pace with changes in the cyber space, to promote confidence in the use of electronic records, while looking at all the functional aspects.



²⁵ Dr. Madhav Vishwanath Dawalbhakta v M/s. Bendale Brothers 2018 SCC OnLine Bom 2652

²⁶ Tata Sons Limited & Ors. v John Doe(s) & Ors 2017 SCC OnLine Del 8335