

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN THE LIGHT OF I.T. ACT, 2000

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Introduction

Due to boom in the industry of e-commerce and tremendous increase in e-crimes, electronic evidence gained its importance. It has involved into a fundamental pillar of communication and documentation. The various form of evidence has increasingly being used in civil and criminal litigations. The Information Technology Act, 2000 and its amendment are based on the United Nations Commission on International Trade Law (UNCITRAL) model Law on Electronic Commerce. The Information Technology (IT) Act,2000 was amended to allow for the admissibility of digital evidence. An amendment to the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker's Book Evidence Act 1891 provides the legislative framework for transactions in electronic world. Digital evidence or electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial. Before accepting digital evidence it is vital that the determination of its relevance, veracity and authenticity be ascertained by the court and to establish if the fact is hearsay or a copy is preferred to the original. Digital Evidence is "information of probative value that is stored or transmitted in binary form". Evidence is not only limited to that found on computers but may also extend to include evidence on digital devices such as telecommunication or electronic multimedia devices. Electronic Evidence have involved into a fundamental pillar of communication, processing and documentation. These various forms of electronic evidence are increasingly being used in both Civil & Criminal Litigations. During trials, Judges are often asked to rule on the admissibility of electronic evidence and it substantially impacts the outcome of civil law suit or conviction/acquittal of the accused. The Court continue to grapple with this new electronic frontier as the unique nature of e-evidence, as well as the ease with which it can be fabricated or falsified, creates hurdle to admissibility not faced with the other evidences. The various categories of electronic evidence such as website data, social network communication, e-mail, SMS/MMS and computer generated documents poses unique problem and challenges for proper authentication and subject to a different set of views.

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The Electronic Evidence can be found in e-mails, digital photographs, ATM transaction logs, word processing, documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser histories databases, Contents of computer memory, Computer backups, Computer printouts, Global Positioning System tracks, Logs from a hotel's electronic door locks, Digital video or audio files. Digital Evidence tends to be more voluminous, more difficult to destroy, easily modified, easily duplicated, potentially more expressive and more readily available.

Evidence and Electronic Evidence

"Evidence" means and includes-

- (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
- (2) All documents produced for the inspection of the Court; such documents are called documentary evidence².

The Indian Evidence Act has been amended by virtue of Section 92 of Information Technology Act, 2000 (Before amendment). Section 3 of the Act was amended and the phrase "All documents produced for the inspection of the Court" were substituted by "All documents including electronic records produced for the inspection of the Court". And as per information technology Act electronic record' means, "data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche³;" So, if we refer above mentioned definitions in the light of the provisions incorporated u/s65-A & 65-B of evidence Act; Electronic Evidence is one another type of documentary evidence which is if duly proved in the manner provided in sec 65-B, can be considered as strong evidence. Before elaborate discussion of Electronic evidence it is required to be get a flash back up on the structure of evidence Act and also the principles of law for adducing, relying and considering evidence.

² S.3 of Indian Evidence Act,1872

³ S.2(t) of Information Technology Act 2000

The definition of 'admission' has been changed to include a statement in oral, documentary or electronic form which suggests an inference to any fact at issue or of relevance⁴. New Section 22-A has been inserted into Evidence Act, to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question⁵. The definition of 'evidence' has been amended to include electronic records. The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court. New sections 65-A and 65-B are introduced to the Evidence Act, under the Second Schedule to the IT Act. the contents of electronic records may be proved in accordance with the provisions of Section 65-B. Section 65-B provides that notwithstanding anything contained in the Evidence Act, any information contained in an electronic, is deemed to be a document and is admissible in evidence without further proof of the original's production, provided that the the conditions set out in Section 65-B are satisfied⁶. An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact⁷.

Amendments in Evidence Act to introduce Electronic Evidence; to consider relevancy of fact of electronic evidence there is Section 22A, which is included in Act. That is similar to sec. 22 in which is embargo on producing oral evidence so as to consider the contents of document, oral evidence as to the contents of electronic records are not relevant, unless the genuineness of electronic record produced as in the question⁸. Entries in books of account, including those maintained in electronic form, An entry in any public or other official book, register or by a public servant in the discharge of official duty in the performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept are the relevant facts as per Sec 34 and 35 of evidence Act.

⁴ S.17 of Indian Evidence Act,1872

⁵ S.22(A) of Indian Evidence Act,1872

⁶ S.65(A) of Indian Evidence Act,1872

⁷ S.17 of Indian Evidence Act,1872

⁸ S.22(A) of Indian Evidence Act,1872

Opinion of examiner of electronic evidence; as it is already laid down provision u/s45 regarding the relevancy of expert opinion referred to in Sec.79A of I.T Act, the opinion given by an examiner of electronic evidence regarding any information transmitted or stored in any computer resource or any other electronic or digital form is also relevant fact⁹. As like other expert opinions, court may rely up on the opinion of an examiner who has given in the manner prescribed u/s79A of I.T.ACT. Further, when the court has to form an opinion as to the electronic signature of any person, the opinion of the certifying Authority which has issued the electronic Signature Certificate is also relevant¹⁰.

Provisions for the Proof of Electronic Evidence; proof of the evidence Act following provisions has been included to cover electronic evidence.

- Special provisions as to evidence relating to electronic record¹¹
- Admissibility of electronic records¹²
- Proof as to digital signature¹³
- Proof as to verification of digital signature¹⁴
- Presumption as to Gazettes in electronic forms¹⁵
- Presumption as to electronic agreements¹⁶
- Presumption as to electronic records and digital signatures¹⁷
- Presumption as to Digital Signature Certificates¹⁸
- Presumption as to electronic messages¹⁹
- Presumption as to electronic records five years old²⁰
- Production of documents or electronic records which another person, having possession, could refuse to produce²¹

⁹ S.45(A) of Indian Evidence Act,1872

¹⁰ S.47A of Indian evidence Act,1872

¹¹ S.65(A) of Indian Evidence Act,1872

¹² S.65(B) of Indian Evidence Act,1872

¹³ S.67(A) of Indian Evidence Act,1872

¹⁴ S.73(A) of Indian Evidence Act,1872

¹⁵ S.81(A) of Indian Evidence Act,1872

¹⁶ S.85(A) of Indian Evidence Act,1872

¹⁷ S.85(B) of Indian Evidence Act,1872

¹⁸ S.85(C) of Indian Evidence Act,1872

¹⁹ S.88(A) of Indian Evidence Act,1872

²⁰ S.90(A) of Indian Evidence Act,1872

²¹ S.131 of Indian Evidence Act,1872

Classification of Electronic Evidence; Electronic records have been defined in the Information Technology Act, 2000 as any data, record or data generated, any image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche²². An electronic record can be safely included under such a definition because matter is recorded on the computer as bits and bytes, which are the digital equivalent of figures or marks. Computer records were widely considered to be hearsay statements since any information retrieved from a computer would consist of input provided by a human being. Thus, be it a word document containing statements written by one party, or an image of a missing person generated by the computer based on the inputs given to it, all such records will be hearsay.

An electronic document would either involve documents stored in a digital form, or a print out of the same. What is recorded digitally is a document, but cannot be perceived by a person not using the computer system into which that information was initially fed. Electronic documents were admitted as real evidence, that is, material evidence, but such evidence requires certification with respect to the reliability of the machine for admission. Being both hearsay as well as secondary evidence, there was much hesitation regarding the admissibility of electronic records as evidence. In India, the change in attitude came with the amendment to the Indian Evidence Act in 2000. Sections 65A and 65B were introduced in to the chapter relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. Section 65B provides that shall be considered documents, thereby making it primary evidence, if the computer which produced the record had been regularly in use, the information fed into the computer was part of the regular use of the computer and the computer had been operating properly. It further provides that all computer output shall be considered as being produced by the computer itself, whether it was produced directly or indirectly, whether with human intervention or without. This provision does away with the concept of computer evidence being hearsay. Thus, with the amendments introduced into the statute, electronic evidence in India is no longer either secondary or hearsay evidence, but falls within the best evidence rule.

²² S.2(t) of Information Technology Act 2000

Electronic Evidence Is Primary and Best Evidence in India; We have well established rule of evidence Act in which hearsay evidence is not considered in evidence. Even documentary evidence also been classified in primary and secondary evidence. Moreover the evidence Act legislation has laid down guideline for admission of secondary evidence²³. But after implementation of amendments regarding electronic evidence drastic change occurred in the application of evidence.

A. Blurring the Difference between Primary and Secondary Evidence; By bringing all forms of computer evidence into the fold of primary evidence, the statute has effectually blurred the difference between primary and secondary forms of evidence. While the difference is still expected to apply with respect to other forms of documents, an exception has been created with respect to computers. This, however, is essential, given the complicated nature of computer evidence in terms of not being easily producible in tangible form. Thus, while it may make for a good argument to say that if the word document is the original then a print out of the same should be treated as secondary evidence, it should be considered that producing a word document in court without the aid of print outs or CDs is not just difficult, but quite impossible.

B. Making Criminal Prosecution Easier; In light of the recent spate of terrorism in the world, involving terrorists using highly sophisticated technology to carry out attacks, it is of great help to the prosecution to be able to produce electronic evidence as direct and primary evidence in court, as they prove the guilt of he accused much better than having to look for traditional forms of evidence to substitute the electronic records, which may not even exist. As we saw in the Ajmal Kasab case, terrorists these days plan all their activities either face-to-face, or through software. Being able to produce transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru²⁴, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

²³ S.65 of Indian Evidence Act,1872

²⁴ (2005) 11 SCC 600

C. Risk of Manipulation; While allowing all forms of computer output to be admissible as primary evidence, the statute has overlooked the risk of manipulation. Tampering with electronic evidence is not very difficult and miscreants may find it easy to change records which are to be submitted in court. However, technology itself has solutions for such problems. Computer forensic has developed enough to find ways of cross checking whether an electronic record has been tampered with, when and in what manner.

D. Opening Potential Floodgates; Computers are the most widely used gadget today. A lot of other gadgets involve computer chips in their functioning. Thus, the scope of Section 65A and 65B is indeed very large. Going strictly by the word of the law, any device involving a computer chip should be adducible in court as evidence. However, practical considerations as well as ethics have to be borne in mind before letting the ambit of these Sections flow that far. For instance, the Supreme Court has declared test results of narco-analysis to be inadmissible evidence since they violate Article 20(3) of the Constitution. It is submitted that every new form of computer technology that is sought to be used in the process of production of evidence should be subjected to such tests of Constitutionality and legality before permitting their usage.

Judicial Approach; in State of Maharashtra V. Dr. Praful Desai case, the police had recorded evidence by video conferencing. With the enactment of Information Technology Act, 2000, the law of evidence was amended to incorporate several provisions governing admissibility and proof of the electronic evidence²⁵. Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke²⁶The Hon'ble High Court of Delhi, while deciding the charges against accused in a corruption case observed that since audio and video CDs in question are clearly inadmissible in evidence, therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with co-accused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question. In Anvar Vs. Basheer²⁷ case Supreme court held that An electronic records by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65 B

²⁵ AIR 2003 S.C. 2053,

²⁶ (2015) 1 MLJ (CrI) 308 (SC)

²⁷ (2014) 10 SCC 473

are satisfied. The Hon'ble supreme court has held that admissibility of secondary Evidence of Electronic Record depends upon satisfaction of condition as prescribed under section 65-B.

However, if the primary evidence of the Electronic Record is produced i.e. original electronic record itself is produced in court under section 62, then the same is admissible in evidence without compliance with conditions in section 65-B. and It is further held that producing copy of statement pertaining to Electronic Record in evidence not being the original electronic record, such statement has to be accompanied by a certificate as specified in section 65-B (4). Such certificate must accompany electronic record like C.D., VCD, pen drive etc., which contains the statement which is sought to be given as secondary evidence, when the same is produced in evidence. In absence of such certificate .secondary evidence of electronic record cannot be oral evidence is not permissible, if requirements under section 65-B are not complied with. Hon'ble S.C. in *Tomaso Bruno and Anr. V. State of U.P.*²⁸. held that the computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by section 65 B of the Evidence Act. Sub-section (1) of section 65 B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of section 65-
*Jagdeo Singh Vs The State*²⁹ Delhi high court held that in case of CD VCD chip etc. the same shall be accompanied by the certificate in term of section 65B at the time of taking the document, without which the secondary evidence pertaining to that electronic recorded is inadmissible.

²⁸ ILC 2015 SC Cr1

²⁹ 11 February, 2015

Conclusion: Electronic communications will continue to revolutionize how the world does business and how individuals instantly engage with friends and family. E-evidence is undeniably a critical new evidentiary frontier which has left both judges and attorneys struggling to understand how the admissibility of this new information fits into existing legal paradigms. Despite this uncertainty, one thing is clear: the use of e-evidence will continue to play an ever-increasing critical role in both civil and criminal litigation. Because e-evidence can have a substantial impact at trial, it is vitally important for attorneys and the court to stay in touch with ongoing legal and technological developments. It is strongly recommended that admissibility issues involving electronic evidence be raised and discussed with the court prior to commencement of trial. Electronic evidence is admissible when it fulfills condition of section-65A and 65B of Indian Evidence Act, 1872 but it does not mean that these provisions are sufficient to handle all problems about admissibility of electronic evidence. So a special law should be enacted by our parliament regarding electronic evidence.

In India, all electronic records are now considered to be documents, thus making them primary evidence. At the same time, a blanket rule against hearsay has been created in respect of computer output. These two changes in the stance of the law have created paradigm shifts in the admissibility and relevancy of electronic evidence, albeit certain precautions still being necessary. However, technology has itself provided answers to problems raised by it, and computer forensics ensure that manipulations in electronic evidence show up clearly in the record. Human beings now only need to ensure that electronic evidence being admitted is relevant to the fact in issue and is in accordance with the Constitution and other laws of the land.