

E-EVIDENCE - MANAGING THE CHALLENGES

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Due to enormous growth in e-governance throughout the Public & Private Sector and e-commerce activities Electronic Evidence have involved into a fundamental pillar of communication, processing and documentation. The government agencies are opening up to introduce various governance policies electronically and periodical filings to regulate and control the industries are done through electronic means. These various forms of Electronic Evidence/ Digital Evidence are increasingly being used in the judicial proceedings. At the stage of trial, 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 CD, DVD, hard disk/ memory card data, website data, social network communication, e-mail, instant chat messages, SMS/MMS and computer generated documents poses unique problem and challenges for proper authentication and subject to a different set of views.

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*”. Regarding the documentary evidence, in Section 59, for the words “Content of documents” the words “Content of documents or electronic records” have been substituted and Section 65A & 65B were inserted to incorporate the admissibility of electronic evidence.

Under the provisions of Section 61 to 65 of the Indian Evidence Act, the word “Document or content of documents” have not been replaced by the word “Electronic documents or content of electronic documents”. Thus, the intention of the legislature is explicitly clear i.e. not to extend the applicability of section 61 to 65 to the electronic record. It is the cardinal principle of interpretation that if the legislature has omitted to use any word, the presumption is that the omission is intentional. It is well settled that the Legislature does not use any word unnecessarily. In this regard, the Apex Court in *Utkal Contractors & Joinery Pvt. Ltd. v. State of Orissa*^[1] held that “...*Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily.*”

The intention of the legislature is to introduce the specific provisions which has its origin to the technical nature of the evidence particularly as the evidence in the electronic form cannot be produced in the court of law owing to the size of computer/server, residing in the machine language and thus, requiring the interpreter to read the same. The Section 65B of the Evidence Act makes the secondary copy in the form of computer output comprising of printout or the data copied on electronic/magnetic media admissible. It provides:-

Section 65B - Admissibility of Electronic Records

Sec. 65B(1): Notwithstanding anything contained in this Act, any information contained in an electronic record -

- which is printed on a paper, stored, recorded or
 - copied in optical or magnetic media
 - produced by a computer
- shall be deemed to be also a document, if the conditions mentioned in this section are satisfied
- in relation to the information and

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- computer in question and
- shall be admissible in any proceedings, without further proof or production of the original,
- as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Sec. 65B(2):

- The **computer** from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used;
- **Information** was fed in computer in the ordinary course of the activities of the person having lawful control over the computer;
- The **computer** was operating properly, and if not, was not such as to affect the electronic record or its accuracy;
- **Information** reproduced is such as is fed into computer in the ordinary course of activity.

Sec.65B(3):

The following computers shall constitute as single computer-

- by a combination of computers operating over that period; or
- by different computers operating in succession over that period; or
- by different combinations of computers operating in succession over that period; or
- in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

Sec. 65B(4):

Regarding the person who can issue the certificate and contents of certificate, it provides the certificate doing any of the following things:

- identifying the electronic record containing the statement and describing the manner in which it was produced;
- giving the particulars of device
- 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.

This contention is further strengthened by the insertion words “Notwithstanding anything contained in this Act” to Section 65A & 65B, which is a non-obstante clause, further fortifies the fact that the legislature has intended the production or exhibition of the electronic records by Section 65A & 65B only. A non-obstante clause is generally appended to a Section with a view to give the enacting part of the Section, in case of conflict, an overriding effect over the provision in the same or other act mentioned in the non-obstante clause. It is equivalent to saying that despite the provisions or act mentioned in the non-obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs.^[2]

The aforesaid principles of interpretation with respect to the non-obstante clause in form of “Notwithstanding anything contained in this Act” is further supported by the Hon’ble Apex Court in Union of India and Anr., v. G.M. Kokil and Ors.^[3] observed “*It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.*” Further, the Hon’ble Apex Court in the case cited as Chandavarkar Sita Ratna Rao v. Ashalata S. Guram^[4], explained the scope of non-obstante clause as “*...It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation...*”

Anvar P.V. Versus P.K. Basheer & Ors. ^[5]

With this significant judgment in the year 2014, the Supreme Court has settled the controversies arising from the various conflicting judgments as well as the practices being followed in the various High Courts and the Trial Courts as to the admissibility of the Electronic Evidences. The Court has interpreted Section 22A, 45A, 59, 65A & 65B of the Evidence Act and held 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 elucidated that electronic evidence without certificate U/s 65B cannot be proved by oral evidence and also the opinion of the expert U/s 45A Evidence Act cannot be resorted to make such electronic evidence admissible.

The judgment would have serious implications in all the cases where the prosecution relies on the electronic data and particularly in the cases of anticorruption where the reliance is being placed on the audio-video recordings which are being forwarded in the form of CD/DVD to the Court. In all such cases, where the CD/DVD are being forwarded without a certificate U/s 65B Evidence Act, such CD/DVD are not admissible in evidence and further expert opinion as to their genuineness cannot be looked into by the Court as evident from the Supreme Court Judgment. It was further observed that all these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic records sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

In the anticorruption cases launched by the CBI and anticorruption/Vigilance agencies of the State, even the original recording which are recorded either in Digital Voice Recorders/Mobile Phones are not been preserved and thus, once the original recording is destroyed, there cannot be any question of issuing the certificate under Section 65B(4) of the Evidence Act. Therefore in such cases, neither CD/DVD containing such recordings are admissible and cannot be exhibited into evidence nor the oral testimony or expert opinion is admissible and as such, the recording/data in the CD/DVD's cannot become a sole basis for the conviction.

In the aforesaid Judgment, the Court has held that Section 65B of the Evidence Act being a ‘not obstante clause’ would override the general law on secondary evidence under Section 63 and 65 of the Evidence Act. The Section 63 and Section 65 of the Evidence Act have no application to the secondary evidence of the electronic evidence and same shall be wholly governed by the Section 65A and 65B of the Evidence Act. The Constitution Bench of the Supreme Court overruled the judgment laid down in the State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru[(2005) 11 SCC 600 by the division bench of the Supreme Court. The court specifically observed that the Judgment of Navjot Sandhu supra, to the extent, the statement of the law on admissibility of electronic evidence pertaining to electronic record of this Court, does not lay down correct position and required to be overruled.

The only options to prove the electronic record/evidence is by producing the original electronic media as Primary Evidence court or it’s copy by way secondary evidence U/s 65A/65B of Evidence Act. Thus, in the case of CD, DVD, Memory Card etc. containing secondary evidence, the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

Other Important Judgments

Relying upon the judgment of Anvar P.V. supra, while considering the admissibility of transcription of recorded conversation in a case where the recording has been translated, the Supreme Court held that as the voice recorder had itself not subjected to analysis, there is no point in placing reliance on the translated version. Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for electronic evidence. **Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke** ^[6]

The 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. **Ankur Chawla Vs. CBI**^[7]

The Hon'ble High Court of Calcutta while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of Section 65B r/w Section 88A of Evidence Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication. **Abdul Rahaman Kunji Vs. The State of West Bengal**^[8]

In the recent judgment pronounced by Hon'ble High Court of Delhi, while dealing with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate u/s 65B Evidence Act, the court observed that the secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever. **Jagdeo Singh Vs. The State and Ors.**^[9]

In the another important judgment of Delhi High Court in the matter of **Dharambir Vs. CBI**^[10] has held that compliance to Section 65B is mandatory and the accused is entitled to the active accessible information as well as subcutaneous memory thus, mirror image of the electronic media where the data is originally stored.

Section 65B of Indian Evidence Act and Section 69 of The Police and Criminal Act, 1984 of U.K. have substantially the same effect. The Law Commission in England reviewed the law relating to computer generated evidence and observed in its report that Section 69 fails to address the major causes of inaccuracy in computer evidence and Section 69 has been repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. and common law presumption "in the absence of evidence to the contrary the court will presume that mechanical instruments were in order at the relevant time", operates with full force. **State Vs. Mohd. Afzal and Ors.**^[11] Similar situation has been emerged in India requiring the necessary amendments in the provision relating to the Digital Evidence.

Conclusion

With the technological advancement, the admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B of Evidence Act and the proposition of the law settled in the recent judgment of the Apex Court and various other High Courts as discussed above. The proposition is clear and explicit that if the secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible and any opinion of the forensic expert and the deposition of the witness in the court of law cannot be looked into by the court. However, there are few gaps which are still unresolved as what would be the fate of the secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act cannot be taken and "No person accused of any offence shall be compelled to be a witness against himself" as per Article 20(3) of the Constitution of India.

1. Utkal Contractors & Joinery Pvt. Ltd. v. State of Orissa reported as AIR 1987 SC 1454
2. See 'Principles of Statutory Interpretation, 9th Edition by Justice G.P. Singh - Chapter V, Synopsis IV at pages 318 & 319
3. Union of India and Anr., v. G.M. Kokil and Ors. [(1984)SCR196]
4. Chandavarkar Sita Ratna Rao v. Ashalata S. Guram [(1986)3SCR866]
5. Anvar P.V. Versus P.K. Basheer & OrsA [MANU/SC/0834/2014]
6. Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke [MANU/SC/0040/2015]
7. Ankur Chawla v. CBI [MANU/DE/2923/2014]
8. Abdul Rahaman Kunji v. The State of West Bengal [MANU/WB/0828/2014]
9. Jagdeo Singh v. The State and Ors. [MANU/DE/0376/2015]
10. Dharambir Vs. CBI, [148(2008)DLT289]
11. State Vs. Mohd. Afzal and Ors. [MANU/DE/1026/2003]

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