

## ELECTRONIC EVIDENCE AND JUDICIAL APPROACH

### Evidence

- The Indian Evidence Act, 1872 earlier had enacted keeping in view only the physical World, but later it was suitably amended to include the concept of electronic evidence. The IT Act, 2000 provides for amendment in the Indian Evidence Act, 1872, these amendments contained in the Schedule II of the Act. The amendments made are:
- In Section 3, (a) In the definition of "Evidence", for the words "all documents produced for the inspection of the Court", the words "All documents including electronic records produced for the inspection of the Court" have been substituted; (b) after the definition of "India", the following have been inserted, namely: 'the expressions "Certifying Authority", "digital signature", "Digital Signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" with the meanings respectively assigned to them in the Information Technology Act, 2000
- In Section 17, for the Words "oral or documentary", the words "oral or documentary or contained in electronic form" have been substituted.
- After Section 22, section 22A has been inserted which says that "Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question".
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- In Section 34, for the words "Entries in the books of account", the words "Entries in the books of account, including those maintained in an electronic form" have been substituted.
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- In Section 35, for the word "record", in both the places where it occurs, the words "record or an electronic record" have been substituted.
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- For Section 39, the following section has been substituted, namely:  
What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers". When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made."
- After Section 47, section 47A has been inserted, which talks about, Opinion as to digital signature where relevant. In Section 59, for the words "contents of documents" the words "contents of documents or electronic records" have been substituted.
- After Section 65, section 65A and 65B have been added laying down the provisions about Admissibility of electronic records.
- Sec-65 A- The contents of electronic records may be proved in accordance with the provisions of section 65B. After Section 67, section 67A has been inserted, which talks about Proof as to digital signature. After Section 73, section 73A has been added which talks about Proof as to verification of digital signature.
- After Section 81, section 81A has been added which talks about Presumption as to Gazettes in electronic forms.
- After Section 85, the following sections have been inserted, namely:
- (i) 85A which talks about Presumption as to electronic agreements,

- (ii) 85B which talks about Presumption as to electronic records and digital signatures and
- (iii) 85C which talks about Presumption as to Digital Signature Certificates.
- After Section 88, section 88A has been inserted which talks about Presumption as to electronic messages.
- After Section 90, section 90A has been added which talks about Presumption as to electronic records five years old.
- For Section 131, the following section has been substituted, namely: Production of documents or electronic records. which another person, having possession, could refuse to produce.

"131. No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession or control, unless such last-mentioned person consents to their production

## **Digital Evidence**

-any information created or stored in digital form that is relevant to a case.

•This includes, but is not limited to –emails, text documents, spreadsheets, images and graphics, -database files, deleted files and data back-ups

**Electronic Evidence** may be located in -

- floppy disks,
- zip disks,
- hard drives,
- CD-ROMs or DVDs,

as well as portable electronic devices such as cellular phones servers

## **Concerns of Reliability of Digital Evidence**

- **Digital Evidence** is perceived to get easily manipulated or altered and hence creates concerns about reliability.

**Hence - Pieces of evidence may include**

- **Evidence**

- Of The author of e-message
- Of The sender of the e-message [if different from author]
- Proof to show that the msg was sent by the originator
- To prove email address of addressee
- To prove receipt of msg
- To prove email address of the originator
- User logs maintained by NSP

Other corroborative evidences. [direct / circumstantial]

## **ELECTRONIC DOCUMENT**

- 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

- As per amended provision Sec 3(2) of evidence Act electronic evidence is documentary evidence. “All documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.”
- Section 2(t) of Information Technology Act 2000 provides that ‘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 fiche;”
- Section 4 of the Information Technology Act also provides that if the document in electronic form i.e. CD/DVD etc., is (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference, then it would be sufficient compliance.
- Sec.22A declares that “oral evidence as to the contents of electronic records are not relevant, unless the genuineness of electronic record produced is in the question.
- A digital charge sheet was held to be a document and it can be accepted as an electronic record. Hon'ble Supreme court directed to supply of charge sheet in electronic form additionally [**Thana Singh Vs. Central Bureau of Narcotics, (2013) 2 SCC 590**].

## Types of evidence-

- Evidence can be classified under various categories, such as **oral and documentary, direct and indirect, primary and secondary, hearsay and circumstantial, scientific and expert, paper based and digital**. Any form of evidence may be sufficient to have a fact proved before the court, depending upon the facts and circumstances of the case.
- Section 59 of the Evidence Act provides that all facts except the contents of documents or electronic records, may be proved by oral evidence. Documentary evidence, on the other hand, is evidence produced in the form of documents.
- **Electronic Evidence-**
- Electronic evidence is any probative information stored or transmitted digitally and a party to a judicial dispute in court can use the same during the trial. Courts permit the use of digital evidence such as e-mails, digital photographs, word processing documents, instant message histories, spread sheets, internet browser histories, data bases, the contents of computer memory, computer backup, secured electronic records and secured electronic signatures, Global Positioning System tracks, Logs from a hotel’s electronic door, Digital video or audio etc.
- As per explanation under Sec-79A(Chapter XIIA) of the IT Act, 2000, ‘electronic form of evidence’ means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.
- Sec-79A of IT Act ,2000 provides that “The Central Government may, for the purpose of providing expert opinion on electronic form of evidence before any court or other authority specify, by notification in the official Gazette, any department, body or agency of the Central Government or State Government as an Examiner of Electronic Evidence.
- Secure communications on internet are possible by using encryption techniques and electronic signatures that authenticate the origin and integrity of an electronic record. The electronic records and signatures are generally recognized as legally valid under Sec-4 and 5 of the IT Act,2000.
- Under Sec-6 of the IT Act, 2000, electronic records and electronic signatures can be used in Government and its agency. Hence they are admissible in a court of law. Whenever a dispute regarding online contracts or e-crimes is to be adjudicated by a court, production of admissible evidence becomes a focal point of determination of merit of the case.

## Admissibility

**Sec-4 IT Act, 2000-** Legal recognition of electronic records-Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

- (a) rendered or made available in an electronic form; and
- (b) accessible so as to be usable for a subsequent reference.

The rationale behind the second requirement is that electronic data is intangible and by its very nature transient, thus it is expedient to require it to be available for future reference. Section 136 of the Evidence Act empowers a judge to decide as to the admissibility of evidence, and s 3 of the Evidence Act deals with admissibility of evidence. In order that the proof may be confined to relevant facts and may not travel beyond the proper limits of the issue at trial, the judge is empowered to ask in what manner the evidence tendered is relevant. The judge must then decide its admissibility.

It is the duty of the judge to see that evidence brought on the record is relevant. In a suit or proceeding, evidence can be given only of those facts which are either facts in issue or are relevant, and of no others. (**Emperor v. Panch Kari Dulla AIR 1925 Cal 587**).

When either party proposes to give evidence of any fact, the judge may ask the party adducing the evidence to demonstrate the relevancy of the alleged fact, if proved, and the judge can admit evidence only if it is considered by the judge that the fact, if proved, would be relevant, and not otherwise.

- If the admissibility of the proposed fact depends upon proof of some other fact, the other fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the other fact, and the judge is satisfied with such an undertaking. However, if the relevancy of the first fact depends upon the admission of a second fact, it may be necessary for the second -fact to be proved before evidence is given of the first fact. The Supreme Court of India in the case of **State of Bihar v Sri Radha Krishna (1983) 2 SCR 808**, observed that admissibility of a document is one thing and its probative value quite another these two aspects cannot be combined.
- According to the S. 65A which provides that the contents of an electronic record may be proved in accordance with provisions of S. 65B of the Evidence Act, new provisions introduced into the Evidence Act, which provides that notwithstanding anything contained in the Evidence 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 (computer output) shall be deemed to be a document, provided the conditions specified in S. 65B(2) are satisfied in relation to the information and computer in question. Such a document is 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. Before a computer output is admissible in evidence, the conditions as set out in S. 65B(2) must be fulfilled.

Retention of records section 7(1) and relate to:

**1. Accessibility** - The technical issues with legal implications relating to accessibility include ease of alteration and physical deterioration.

Thus S.7(1)(a) provides for making records, "accessible so as to be usable for a subsequent reference".

**2. Format Integrity** -The integrity of the format in which the information was originally generated is important because changes in format can affect the material characteristics of the record.

S.7(1)(b) prescribes that, even if there is a change in format, the electronic record shall be "in a format which can be demonstrated to represent accurately the information originally generated, sent or received".

**3. Identification** - the details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record.

## **Hard Disk-**

As to whether a hard disk of a computer can be considered as documentary evidence, the High Court of Delhi in **Dharambir v Central Bureau of Investigation {148 (2008) DLT 289 }** has observed that:

"While there can be no doubt that a hard disc is an electronic device used for storing information, once a blank hard disc is written upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programmes it is possible to find out the precise time when such changes occurred in the hard disc. To that extent even a blank hard disc which has once been used in any manner, for any purpose will

contain some information and will therefore be an electronic record ....."

So, once the hard disc is subject to any change, then even if it restored to the original position, by reversing that change, the information can be retrieved by using software designed for that purpose. Given the wide definition of the words "document" and "evidence" in the amended Section 3 the Evidence Act, read with Sections 2(o) and (t) IT Act, there can be no doubt that an electronic record is a document.

Data copied from hard disk to CD

Hyderabad Cyber Forensic Lab – confirmed that the recorded data [call conversation] on CD as true copies of the originals + hard disk was in working condition.

Hard Disc is a storage devise. If written, then it becomes electronic record under Evidence Act. Under section 65B it has to be proved that the computer during the relevant period was in the lawful control of the person proving the email [**Babu Ram Aggarwal & Anr. Vs. Krishan Kumar Bhatnagar & Ors. 2013 IAD (Delhi) 441**].

## CALL RECORDS

- In the case of **Rakesh Kumar and Ors. V State, the High Court of Delhi**, (Criminal Appeal No. 19/2007 decided on 27.08.2009), while appreciating the reliance placed by the prosecution upon the call records, observed that 'computer generated electronic records is evidence, admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act.
- Video/Audio Tape Recordings- Indian courts had recognized the contents of tape recording as admissible evidence for some time before the introduction of the IT Act, subject to certain conditions being satisfied. The Supreme Court of India in the case of **Ziyauddin Burhanuddin Bukhari v Brijmohan Ramdass Mehra and Others** {AIR 1975 SC 1788 (1)} observed that tape-recorded speeches are a 'document', as defined by s 3 of the Evidence Act, which stands on no different footing than photographs, and they are admissible in evidence on satisfying certain conditions. The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act.
- The determination of movement of a person on the basis of mobile phone was discussed in **Mohd Arif @ Ashfaq Vs.Stateof NCTcof Delhi (2011) 13 SCC 621**.

## Proof of contents of C.D.

- The person intending to prove C.D. is required to prove whether the disputed C.D. was prepared by a combination of a computer operating therein or different computer operating in succession over that period or of different combination of computers. It is not necessary to examine the computer expert for the proof of C.D. in addition to the compliance of provisions of section 65B.
- In **Ankur Chawla Vs. CBI [MANU/DE/2923/2014]**. 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.
- In the case of **JAGJIT SINGH Vs. STATE OF HARYANA (2006) 11 SCC 1**) the speaker of the Legislative Assembly of the State of Haryana disqualified a member for defection. When hearing the matter, the Supreme Court considered the digital evidence in the form of interview transcripts from the Zee News television channel, the Aaj Tak television channel and the Haryana News of Punjab Today television channel.

- The court determined that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview when reaching the conclusion that the voices recorded on the CD were those of the persons taking action.
- The Supreme Court found no infirmity in the speaker's reliance on the digital evidence and the conclusions reached by him. The comments in this case indicate a trend emerging in Indian courts: judges are beginning to recognize and appreciate the importance of digital evidence in legal proceedings.

In **K.K. Velusamy Vs. N. Palanisamy, 2011 EQ-SC-0-158** the Hon'ble Supreme Court considered the point of electronic evidence such as – the amended definition in Section 3 of Evidence Act 1872 read with the definition of electronic record in Section 2 clause (t) of the Information Technology Act, 2000. It includes a compact disk containing an electronic record of conversation. Section 8 of Evidence Act provides that the conduct of any party or of any agent to any party, to any suit, in reference to such a suit or in a reference to any fact in issue therein or relevant thereto, is relevant if such conduct influences or influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto.

- Hence compliance with Section 65B is now mandatory for persons who intend to rely upon emails, websites or any electronic record in a civil or criminal trial to which provisions of the Evidence Act are applicable.
- Hon'ble Supreme Court in **Anvar P.V. versus, P.K. Basheer** and Others, in Civil Appeal No.c4226 OF 2012 decided on Sept., 18, 2014, it was held that the Computer Output is not admissible without Compliance of S. 65B.
- It overruled the judgment laid down in the **State (NCT of Delhi) v. Navjot Sandhu alias Afzal Guru[(2005) 11 SCC 600** by the two judge 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 is required to be overruled".
- This judgment has put to rest the controversies arising from the various conflicting judgments and thereby provided a guideline regarding the practices being followed in the various High Courts and the Trial Court as to the admissibility of the Electronic Evidences. The legal interpretation by the court of the following Sections 22A, 45A, 59, 65A & 65B of the Evidence Act has confirmed that the stored data in CD/DVD/Pen Drive is not admissible without a certificate u/s 65 B(4) of Evidence Act and further clarified that in absence of such a certificate, the oral evidence to prove existence of such electronic evidence and the expert view under section 45A Evidence Act cannot be availed to prove authenticity thereof.

### **DIGITAL CAMERA-PHOTOGRAPH]**

- As per section 2(t) of Information Technology Act, 2000, a photograph taken from a digital camera is an electronic record and it can be proved as per section 65B of the Indian Evidence Act.
  - **CDR - Call data records** Cannot be solely and directly relied upon because
    - .SIM and mobile phone can be on another's name
    - .Not always certified
    - Cloned SIM card
    - Spoofing of IMEI No.
    - Snooping of mobile no

# Video-conferencing

- **Maharashtra v. Praful Desai [AIR 2003 SC2053]**  
Examination via video-conferencing is permissible.
- The question was involved whether a witness can be examined by means of a video conference. The Supreme Court observed that video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The court allowed the examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.
- **In Amitabh Bagchi Vs. Ena Bagchi (AIR 2005 Cal 11)**, Sections 65A and 65B of Evidence Act, 1872 were analyzed.
- The court held that the physical presence of person in Court may not be required for purpose of adducing evidence and the same can be done through medium like video conferencing.
- Sections 65A and 65B provide provisions for evidences relating to electronic records and admissibility of electronic records, and that definition of electronic records includes video conferencing.
- In an interesting case dealt by the High Court of Allahabad in the matter of **Moninder Singh Pandher and Surendra Koli v State of U.P. (Criminal (Capital) Appeal No. 1475 of 2009)**, the question arose as, to admissibility of the confessional statement which was recorded in video, as there is no provision for video recording of the confessional statement. The High Court observed that, in this connection, s 4 of the IT Act provides that that information or any other matter should be in writing or in typewritten or printed form, but the requirement is deemed to have been satisfied if the information or matter is rendered or made available in an electronic form, and accessible so as to be useful for subsequent reference. The High Court further relied on S 65B of the Evidence Act and held that the confession was admissible

In *Twentieth Century Fox Film Corporation Vs. NRI Film Production Associates (P) Ltd. (AIR 2003 KANT 148)* certain conditions have been laid down for video recording of evidence:

1. The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.
2. The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.
3. The witness should not plead any inconvenience on account of time difference between India and USA.
5. Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.
6. Learned Judge is to record such remarks as is material regarding the demeanour of the witness while on the screen.
7. Learned Judge must note the objections if raised during recording of witness and to decide the same at the time of arguments.



8. After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.

9. The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.

10. The learned Judge may also impose such other conditions as are necessary in a given set of facts.

11. The expenses and the arrangements are to be borne by the applicant who wants this facility.

In **Suvarana Musale vs Rahul Musale 2015 (2) Mh.L.J. 801**, in view of section 65A and 65B of the Evidence Act it was held that recording of evidence with help of electronic method and techniques is acknowledged and recognized in judicial system. Petitioner wife was working in U.S. and has a minor daughter aged 6 yrs, travelling to India for being present physically was expensive and she may face difficulty in getting leave and hurdles in obtaining VISA . An application for recording evidence through video conferencing was allowed.

## **Presumptions**

**Section 92 of IT Act 2000 made the amendments to the Indian Evidence Act, 1872 and inserted certain presumptions of electronic evidence.**

- **S. 81-A**  
It contains presumption as to genuineness of every electronic record purporting to be the Official Gazette.
- **S. 85-A**  
There is a presumption that every electronic record purporting to be an agreement containing the digital signatures of the parties was so concluded by affixing the digital signature of the parties.
- **S. 85-B**  
Creation of a presumption of authenticity of secured digital signatures unless proven otherwise.
- **S. 85-C** Creation of a presumption of authenticity of secured DSC unless proven otherwise.
- **S. 88-A**  
Creation as to the contents of electronic messages, but not the originator of the electronic messages.
- **S. 90-A**  
Creation of a presumption as to the authenticity electronic records five years old, which is produced from the custody of a person.

### **Presumption as to telegraphic messages:**

- The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

### **Presumption as to electronic messages.**

- The Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message



was sent.

- Explanation.—For the purposes of this section, the expressions “addressee” and “originator” shall have the same meanings respectively assigned to them in clauses (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000.
- The Presumption u/s. 88- A is a rebuttable presumption.
- Court shall not make any presumption as to the person by whom such e-message is sent [law recognizes the vulnerability of fabrication of e-message].

## **Electronic Messages**

It includes emails, SMS, MMS etc. of messages sent via social networking sites, like whatsapp, twitter etc. Under the provisions of Section 88A, there is a presumption as to such messages. Sections 88, 88A, 114(f) of the Evidence Act with section 26 of the General Clauses Act are relevant sections for sending and receipt of email and its proof.

### **Mode of proof:**

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. It requires:-

- Integrity of the data: That is the data as sent or recorded was intact and not tampered with.
- Integrity of the hardware/software: The hardware and software used to reading, downloading, interpreting, seeing or storing was functioning according to set standards and there was no deviation or its corruption

Security of the system: The system used to access such electronic record was secured, and during the particular course of period it was not accessed by any unauthorized person, so as to rule out the possibility of its tampering or malfunctioning.

## **SMS & MMS**

Mere theoretical and general apprehensions cannot make clear evidence defective and inadmissible. If someone challenges the accuracy of an electronic evidence or e record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it must prove the same beyond reasonable doubt.

The normal rule of leading documentary evidence is the production and proof of the original document itself. Secondary evidence of the contents of a document can also be led under S.65 of Indian Evidence Act. Under Sub -clause "d", secondary evidence of the contents of a document can be led when the original is of such a nature as not to be easily movable. Computerized operating systems and support systems in industry cannot be moved to the court. The information is stored in these computers on magnetic tapes (hard disc). Electronic record produced there from has to be taken in the form of a print out. Sub-s.(1) of S.65B makes admissible without further proof, in evidence, print out of a electronic record contained on a magnetic media subject to the satisfaction of the conditions mentioned in the section.

The conditions are mentioned in Sub-section (2). Thus compliance with Sub-section (1) and (2) of S.65B is enough to make admissible and prove electronic records.

This conclusion flows out, even from the language of Sub-s (4). Sub-s (4) allows the proof of the conditions set out in Sub-section (2) by means of a certificate issued by the person described in Sub- s. 4 and certifying contents in the manner set out in the sub-section. The sub-section makes admissible an electronic record when certified that the contents of a computer print out are generated by a computer satisfying the

conditions of Sub- s 1, the certificate being signed by the person described therein.

Thus, Sub-section (4) provides for an alternative method to prove electronic record and not the only method to prove electronic record.

## **E-MAIL IS AN EVIDENCE**

Email is a computer output of electronic record and therefore, it is to be proved in the manner prescribed in Section 65B of the Indian Evidence Act, which requires a certificate to be given by a person occupying responsible position in management of the computer.

### **PROOF OF OBSCENE SMS SENT THROUGH MOBILE PHONE**

As per section 2(t) of Information Technology Act 2000, 'Mobile' is a computer and SMS in the mobile is an electronic record. So, it is to be proved as per section 65B of the Indian Evidence Act which requires a certificate issued by a person, occupying responsible position in relation to operation of that device or management of the relevant activities.

In **Shreya Singhal Vs. Union Of India (2015) 0 AIR (SC) 1553**, Hon'ble the Apex Court declared Section 66A of IT Act unconstitutional and held that Section 66 A creates an offence which is vague and overbroad, and therefore, unconstitutional under Article 19 (1) (a) and not saved by Article 19 (2). It has also been held that the wider range of circulation over the internet cannot restrict the content of the right under Article 19 (1) (a) nor can it justified its denial

## **Appreciation of Electronic Evidence**

**Section 92 of IT Act, 2000 made the amendments to the Indian Evidence Act, 1872 and inserted some provisions as to appreciation of electronic evidence.**

S. 22-A

The addition of a section which states that, an oral admission as to contents of electronic records are relevant, when the contents of a electronic record are in question.

S. 47-A

The section provides that the opinion of the CA as to a digital signature is relevant.

S. 65-A

The section, states that contents of an electronic record may be proved in accordance with the provisions of s. 65B.

S. 65-B

Provides for the addition of a new section pertaining to appreciation of evidence relating to electronic record. The provision inter alia, provides for, (a) admissibility of the copy of electronic evidence without a need for production of the original on the satisfaction of certain requisites in s. 65-B(1); (b) the requisites for the satisfaction for admissibility in s. 65-B(2); (c) s. 65-B(3), contains conditions for satisfaction of s. 65-B(2)(a); and (d) s. 65-B(4) specifies that any statement regarding the evidence adduced under this section will constitute evidence.

S. 67-A

The section, states that in every case where a digital signature except a secure digital signature, its veracity as to it belonging to a subscriber will have to proved.

S. 73-A

The section provides for proof as to verification of digital signature.

# **DIGITAL SIGNATURES**

## **PROOF AS TO DIGITAL SIGNATURE [SECTION 67A] :**

Except in the case of a secure electronic signature, if the electronic signature of any subscriber is alleged to have been affixed to an electronic record the fact that such electronic signature is the electronic signature of the subscriber must be proved.

As per section S.73A of the Evidence Act, For the purpose of ascertaining whether a digital signature is that of the person by whom it purports to have been affixed, the court may direct that person or the controller or the certifying authority to produce the digital signature certificate. The court may also direct any other person to apply the public key listed in the digital signature certificate and verify the digital signature purported to have been affixed by that person. For this purpose the “controller” means the controller appointed under S.17(1) of the Information Technology Act, 2000.

Section 67A of the Indian Evidence Act provides that except in the case of a secure digital signature, if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved. It is necessary to prove it in the manner of proof of electronic record. Section 65B will be applicable.

**In Bodala Murali Krishna Vs. Smt. Bodala Prathima (2007 (2) ALD 72)**, The court held that, “...the amendments carried to the Evidence Act by introduction of Sections 65A and 65B are in relation to the electronic record. Sections 67A and 73A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85A, 85B, 85C, 88A and 90A were added. These provisions are referred only to demonstrate that the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence.

## **ATM**

Automated Teller Machines (ATM) was held to be not computer by itself nor it is a computer terminal ( **2005 AIR Knt. HCR 9**).

As per the provisions of S. 79-A IT ACT, the central government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the official gazette, any dept, body or agency of the central government or a state government as an examiner of electronic evidence.

Explanation – for the purposes of this section “electronic form evidence” means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.

## **OPINION OF EXAMINER OF ELECTRONIC EVIDENCE**

- As it is already laid down, provision under section 45A to consider 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 fact. Court may rely up on the opinion of an examiner who has given in the manner prescribed under Section 79A 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 relevant U/S 47A of Evidence Act.
- When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 is a relevant fact.

- However, when there is a conflict of opinion between the experts then the court is competent to form its own opinion with regard to signatures on a document. Kishan Chand Vs. Sita Ram AIR 2005 P&H 156
- Primary or secondary evidence-
- If the document shown to be authentic, the next query for the adducer is to look into whether it constitutes primary evidence (Sec-62 IEA) or secondary evidence (Sec-63 IEA).
- Internet technology as with computer technology at every stage of the transaction transmits only a copy of the data package. There is no original.
- Primary evidence envisages the existence of a single original and this is an impossible proposition as regards computer documents.
- Since the glaring dangers of “manufactured evidence” are inherent in computer documents and the divisive benchmark between primary and secondary should not be regarded as primary evidence.
- These circumstances pose many questions of what is conventionally known as the Best Evidence Rule.

### **The Rule of Best Evidence-**

The best evidence rule means that the best evidence, of which the case is susceptible, must always be produced. It is one of the cardinal rules of law of evidence that the best evidence in possession of the party must always be given. In other words, if a fact is to be proved by oral evidence, the evidence must be of that person who had directly perceived the fact to which he testifies.

In *Omychand V Barker-Lord Harwicke* stated-that no evidence was admissible unless it was “the best that the nature of case will allow”. The general rule is that the secondary evidence, such a copy or facsimile will be not admissible if an original document is available.

- The best evidence rule states that to prove the content of writing, recording or photographs, the “Original” writing, recording or photograph is ordinarily required.
- Federal rules of evidence states that, if data are stored in a computer or similar device any printout, or other output readable by sight, shown to reflect the data accurately, is an original. Thus an accurate printouts of computer data always satisfies the best evidence rule(*Doe V United States*)

*Gartor v Hunter-Lord Denning* has stated-The Old rule, that a party must produce the best evidence that the nature of the case will allow and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available on one’s hands, one must produce it; that one cannot give secondary evidence by producing a copy. Now a days we cannot confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.

### **Best Evidence Rule in India-**

- When one party seeks to put the content of a document into evidence. The best evidence rule requires the original must be produced. The best evidence rule excludes the secondary evidence and the best evidence or original evidence means the primary evidence.(Sec-62)
- Sec-91(IEA) mainly forbids proving the contents of a writing otherwise than by the writing itself and lays down the best evidence rule.
- In *Hira Devi vs Official Assignee Bombay*, Hon’ble Supreme Court observed-sec-91 deals with the exclusion of oral by documentary evidence. The normal rule is that the contents of a document must be proved by the primary evidence which is the document itself in original.
- Sec-91 is based on what sometimes described as the ‘best evidence rule’. The best evidence about contents of a document is the document itself and it is the production of the document that is required by sec-91 in proof of its contents. In a sense the rule

enunciated by sec-91 can be said to be an exclusive rule as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act. Thus the Indian Evidence Act prescribes clear legal rules that are expected to guide the Judge objectively to decide the relevancy and admissibility of evidence and rule out any unpredictability associated with subjective assessment.

Sec-65 B (IEA) has overcome all problems of original vs copy, deeming electronic documents (manifested in a particular type of output) to be sufficient for proof of what the original could have legally proved (without actually requiring production or proof of the "original") Through Sec-65B, the problem of primary v secondary evidence with regard to electronic records is solved. All that is required that the contents of the output must be authentic and there should be reason to believe that they are authentic. This provision is meant for evidence that can be seen but not seized. A true copy can be captured in print or on a digital media, duly certified by the observer.

### **Admissibility OF Electronic records**

Section 3 of the Indian Evidence Act, 1872 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.

In Section 61 to 65, 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* 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."
- On the other hand, in Section 61 to 65 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 omission of the word, "Electronic Records" in the scheme of Section 61 to 65 signifies the clear and explicit legislative intention, i.e. not to extend the applicability of Section 61 to 65 to the electronic record in view of overriding provision of Section 65-B Indian Evidence Act dealing exclusively with the admissibility of the electronic record which in view of the compelling technological reasons can be admitted only in the manner specified under Section 65-B Indian Evidence Act.
- The main objective to introduce the specific provision 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.

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