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Relevancy and Admissibility of Digital Evidence: A Comparative Study

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ABSTRACT

There has been a massive change in everyday life due to growth and technological development. Communication through technologies that increase reliance on digital means of communication, e-commerce, and storing of data in electronic form is extremely easy. This rise and development of technology has an extreme impact on legal standards, especially in the field of proof, in the legal system. This modern technology has created and manufactured materials that are considered proof in the courts. This prompted a need to reform the legislation on information technology and the standards of digital proof admissibility, both in criminal and civil matters. This paper is an effort to reconsider electronic evidence law and its own admissibility and meaning, thus discussing a number of concerns in India, the United States and the United Kingdom in accordance with the assistance of case laws and interpretations.

I. INTRODUCTION

Digital devices of the modern world are used everywhere. This allows people to connect locally and globally without difficulty. Because of that, the emphasis on digital communication, e-commerce and data storage in digital form is increasing rapidly. This created a need to reform the law on information technology and the standards of digital proof admissibility in both criminal and civil matters. Digital evidence is defined as useful data and data for an examination that is stored, distributed or obtained through an electronic device. It is any probative material that a party to a court situation may use at trial that is transmitted or stored in electronic form. "It is" probative meaning information that is stored or transmitted in binary form. It is not only limited to computer locations, but may also extend to include data on mobile devices such as telecommunications or interactive multimedia devices. E-evidence is contained in e-mails, electronic images, ATM transaction records, word processing, reports, instant message histories, accounting programme documents, spreadsheets, databases of web browser history, and PC memory material, computer backups,

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computer scans, tracks of the global positioning system, digital door locks of a resort, digital video or sound files. Digital evidence would become more voluminous, more difficult to kill, easy to modify, easy to reproduce, probably more articulate and much easier to view.²

This definition has three elements-

First, the term is intended to include each and every form of evidence generated, manipulated or held in an object that can be considered as a computer in its broadest sense, excluding the individual mind for the time being.

Secondly, it also aims to integrate all kinds of devices from which any information, including analogue devices that produce an output, can be retained or transmitted.

Thirdly, the element restricts to information relevant to the process by which a dispute is to be decided. However, this last condition limits the definition of electronic proof, as part of the fact finding procedure, to those things offered by the parties.

II. DIGITAL EVIDENCE IN INDIA

The Corona-virus situation has made it crystal clear as to how the electronic form of communication has become fundamental pillar of public and private sector both. Therefore, for both civil and criminal cases, documents and different forms of digital evidence are increasingly used. A case-law development and further regulatory development to integrate digital evidence have therefore been developed. An provision to provide electronic evidence was included in the Information Technology Act , 2000. In addition, to include the legal basis for electronic transactions, the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker 's Book Evidence Act 1891 were amended.

Section 2(t) of Information Technology Act 2000³ defines electronic record as; “*data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche*”

- ***Electronic Evidence & the Indian Evidence Act 1872***⁴

Electronic evidence is dealt in the following sections of Evidence Act, 1872:

Section 3 offers a description of proof that includes oral evidence and photographic evidence that also includes electronic documents created for the court's inspection. The amendment

² Vivek Dubey, “Admissibility of Electronic Evidence: An Indian Perspective”⁴,FRACIJ (2017).

³ The Information Technology Act, 2000, No. 21, Acts of Parliament 2000.

⁴ Indian Evidence Act, 1872 , No. 1, Acts of Parliament 1872.

replaced the term "All documents produced for the inspection of the Court" with "All documents produced for the inspection of the Court, including electronic records."

The meaning of 'admission' has been modified pursuant to Section 17 to include a statement in oral, documentary or electronic form indicating an inference to some fact at issue or of significance.

A new Section 22-A, which allows for the relevance of oral evidence concerning the content of electronic documents, has been introduced. Under Section 34, entries are included in the books of accounts, including those held in electronic form. Further, **Section 35, Section 39, Section 45A, Section 47A, Section 67A, Section 65B, Section 73A, Section 81A, Section 85A, Section 85B, Section 85C, Section 88, Section 88A, Section 90A, Section 131** also includes the provisions related to the digital evidence in India.

- *Amendments in Evidence Act 1872 & Its Objective*

In the *ANVAR CASE*⁵, the Supreme Court noted that *"there is a revolution in the way that evidence is produced before the court. In India before 2000, electronically stored information was treated as a document and secondary evidence of these electronic 'documents' was adduced through printed reproductions or transcripts, the authenticity of which was certified by a competent signatory. The signatory would identify her signature in court and be open to cross examination. This simple procedure met the conditions of both sections 63 and 65 of the Evidence Act."*

The word "Document or content of documents" are not replaced by the word "Electronic documents or content of electronic documents" under the provisions of Section 61 to 65 of the Indian Evidence Act, 1872. This makes it clearly clear that the legislature did not wish to apply to electronic documents the applicability of sections 61 to 65. It is the cardinal principle of interpretation that the assumption is that the omission is deliberate if the legislature has failed to use any term. It is well settled that no term is overly used by the Legislature.⁶

Further the Hon'ble Supreme Court in the matter of *UTKAL CONTRACTORS & JOINERY PVT. LTD. V. STATE OF ORISSA*⁷ 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*

⁵ (2014) 10 SCC 473.

⁶ Vivek Dubey, "Admissibility of Electronic Evidence: An Indian Perspective"⁴, FRACIJ (2017).

⁷ AIR 1987 SC 1454.

what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily.”

Section 59 of the Evidence act was amended to exclude to exclude electronic records from the probative force of oral evidence. However, for the documentary evidence to test the secondary evidence is in section 63 and 65, new section 65A and 65B is added for evidentiary rules of electronic records. Since, due to the size of computer/server, the evidence in electronic form can not always be presented in the court of law, these section were introduced the provision for technical nature of it requiring the interpreter to read the same.⁸

Section 65A is added to the special law for digital evidence and further proof of the quality of digital documents should be given in compliance with the rule set out in section 65B. Sections 65A and 65B perform the same electronic evidence roles as Section 61 does for documentary evidence. To ensure that the adduction of electronic documents complies with the hearsay rule under these clauses, a different protocol is established. It also safeguards other rights, such as the validity of the programme and the credibility of the information retrieval process. But section 65A is further differentiated because it is a special law which, in sections 63 and 65, stands apart from the documentary evidence procedure.

III. RELEVANCY & ADMISSIBILITY OF VARIOUS ELECTRONIC EVIDENCE IN INDIA

- ***Tape Records: Whether Electronic Device?***

Tape records are deemed as a direct and primary evidence. The Hon'ble Supreme Court held that the tape was primary and direct evidence of what was said and recorded in the case of *R.M Malkani v. State of Maharashtra*⁹. The judgement made it clear that digitally captured testimony is admissible if the tape interaction is important to the matter and the speaker's audio / voice may certainly be established as preventing any risk of erasure, addition or manipulation. Furthermore, this Court held that 'a contemporaneous electronic recording of a conversation in question is a material fact equivalent to a photograph of an event in question and admissible as evidence under Section 8 of the Act.'*Supplying Copy of Digital Record*

There can be an issue when the data is in a hard disk or digital as seizure of such data can't be signed and sealed off as it can be done in documentary evidence. In the matter of *State of Punjab v. Amritsar Beverages Ltd*¹⁰, due to the same issue a copy of hard disk was taken but there has been no seal and signatures where the hon'ble court held that in such cases, the

⁸ Vivek Dubey, “Admissibility of Electronic Evidence: An Indian Perspective”4,FRACIJ (2017).

⁹ AIR 1973 SC 57.

¹⁰ AIR 2007 SC 590.

data must be copied or hard disk must be taken, a hard copy is to be made and the seal and signature should be affixed on the hard copy and a copy of it must be given to the person it is seized from. Thus, the procedure relating to the seizure of electronic evidence is provided.

- **Video Conferencing**

The next question that comes into picture is about the evidence through video conferencing, whether it can be allowed under the statute or not. In the case of *In Amitabh Bagchi v. Ena Bagchi*¹¹, the Hon'ble Supreme Court ruled that a person's physical presence is not needed for the purpose of adducing evidence and that the same can be achieved via video conferencing media. Sections 65-A and 65-B include provisions for facts relating to electronic records and the admissibility of electronic records, and video conferencing is included in the concept of electronic records.

However, the question that whether a witness can be examined through video conferencing was dealt in the matter of *State of Maharashtra v. Dr Praful B Desai*¹², where Supreme Court observed that *Video conferencing is an innovation in science and technology that enables those with the same facility and ease to see, hear and speak with someone who is not physically present as if they were physically present. The legal requirement that the witness be present does not indicate actual physical presence. The court allowed the witness to be present through video conferencing on this basis and claimed that there is no justification to prohibit a witness from being present through video conferencing.*

In *Twentieth Century Fox Film Corporation v. NRI Film Production Associates (P) Ltd*¹³ certain conditions have been laid down for video-recording of evidence:

- a) Before the witness is questioned in relation to the Audio-Video Link, the witness must present an affidavit or an assurance properly confirmed before a notary or a judge that the person shown to be the witness is the same person as the person who is to be deposited on the screen. The other side should be made available with a copy. (Affidavit for Identification)
- b) The person who examines the witness on the screen shall also file an affidavit / undertaking with a copy of the identification before examining the witness with respect to the identification.

¹¹ 2005 Cal. 11.

¹² AIR 2003 SC 2053.

¹³ AIR 2003 KANT 148.

- c) The investigation shall be performed during the working hours of the Indian Courts. The Oath must be enforced by the media. No inconvenience should be pleaded for difference in time zone if the witness is in another country.
- d) A collection of grievances, a written statement and other documentation must be submitted to the witness prior to the review, so that the witness is familiar with the documents and, in this respect, an acknowledgment must be lodged with the Court.
- e) It is the responsibility of the Judge, when on the screen, to remember such findings as are information about the demur of the witness.
- f) The objections should also be recorded at the time of the recording of the testimony and determined at the time of the arguments in the case.
- g) The testimony of a witness shall be registered, his signature shall be taken in the presence of a notary, and shall form part of the record of the proceedings.
- h) The recording shall be made available to all parties in respect of the matter. Although video conferencing and a notary certificate should be made to this effect, the witness needs to be alone.
- i) According to the facts and circumstances of the matter at hand, the Judge has the right to add further conditions if it considers appropriate.
- j) The expenses and the arrangements of the video conferencing is the liability of party who wants the facility of video conferencing.

- ***Proof of the Digital Signature of a Person***

According to the Section 67A, in case there is any objection regarding the digital signature of any subscriber, it must be proved that the digital signature affixed is the digital signature of the subscriber as per the provisions of Section 65 B.¹⁴

In the matter of ***Bodala Murali Krishna v. Smt. Bodala Prathima***¹⁵ the court held that, “...the amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A 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.”

¹⁴ The Information Technology Act, 2000, No. 21, Acts of Parliament 2000.

¹⁵ AIR 2007 (2) ALD 72.

- **Electronic Messages - Email**

In the matter of *Som Prakash v. State Of Delhi*¹⁶, the hon'ble court observed that “*in our technological age nothing more primitive can be conceived of than denying discoveries and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific aids to prove guilt.*” There is a huge need of change in the provisions of law in a completely problem-solving approach to deal with heavy workload on the investigators and judges.

Further, about the admissibility of email, Hon'ble Supreme Court held in the matter of *SIL Import, USA v. Exim Aides Exporters, Bangalore*¹⁷, that “*Technological advancement like facsimile, Internet, e-mail, etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.*”

Thus the electronic messages and emails are admissible as evidence at the trial but it should conform to the Section 65B of the Indian Evidence Act.

- **Call Records**

In the Landmark case of *State (NCT of Delhi) v. Navjot Sandhu*¹⁸, the case about the 2001 attack on parliament, the conviction was appealed and this case further dealt with the question of admissibility of the telephone call records in detail. The accused based his case on the argument that the call records can't be taken into consideration for the conviction as the prosecution has clearly failed to produce the relevant certificate under Section 65-B(4) of the Evidence Act. The Hon'ble court held that “*the cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken was sufficient to prove the call records.*” It was further observed that only because the certificate containing the details in sub-Section (4) of Section 65B is not filed in the instant case, there can't be denial of it as a secondary evidence.

- **Proof of Contents of C.D**

In 2006, a landmark case on the reliance of the proof of CD can be referred where the Speaker of the Haryana Legislature disqualified a member for defection. While hearing the

¹⁶ AIR 1974 SC 989.

¹⁷ AIR (1999) 4 SC 567.

¹⁸ AIR 2005 SC 3820.

matter of *Jagjit Singh v. State of Haryana*¹⁹, the Hon'ble supreme court admitted the electronic evidence in the form of interview transcripts from the Aaj Tak television channel, Zee News television channel and the Haryana News of Punjab Today television channel. In the matter the hon'ble court heavily depended on the digital evidence produced and held that the decision taken by the speaker was based on the voices recorded on the CD and these voices are proved to be of the member, the conversation is relevant and hence the conclusion reached by him regarding the disqualification is correct.

This case proved to make the Indian Judiciary one step closed in accepting the digital evidences and did show that the courts are inclined to appreciate and recognize the essence of digital evidence in the present technological developing world.

After this matter, there was a wide acceptance of printed versions of CDRs that were admitted and certified properly by an officer of telephone company as per the provisions of sections 63 and 65 of the Evidence Act.

However, this led to the ignorance of special procedure given in Section 65B of the Evidence Act and led to a lot of confusions and counter-claims. Recently, in the matter of *RATAN TATA v. UNION OF INDIA*²⁰, a CD was produced before the Supreme Court without following any process mentioned in the Indian Evidence Act.

However in 2014, Hon'ble Supreme Court in the matter of *ANVAR P.V. v. P.K. BASHEER & OTHERS*²¹, held that *Computer Output is not admissible without Compliance of 65B*, and Evidence Act clearly overrules the observation made in the *State (NCT of Delhi) v. Navjot Sandhu alias Afzal Guru*²².

Furthermore, in the case of *Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke*²³ hon'ble court relied on the judgement of the Anvar and held that there is no point in relying on the translated version if the voice recorder itself is not subject to analysis. Without the source, the translation does not have authenticity. The two main variables for electronic proof are source and authenticity.

In the recent judgement of the Hon'ble High Court of Delhi, *Jagdeo Singh v. The State and Ors*,²⁴ in dealing with the admissibility of intercepted telephone calls on a CD and CDR without a certificate u/s 65B Evidence Act, the court noted that the secondary electronic

¹⁹ (2006) 11 SCC 1.

²⁰ Ratan Tata v. Union of India Writ Petition (Civil) 398 of 2010.

²¹ Anvar P.V. v. PK Basheer & others, in civil appeal no. 4226 of 2012.

²² (2005) 11 SCC 600.

²³ MANU/ SC/0040/2015.

²⁴ MANU/DE/0376/2015.

evidence without certificate u/s 65B Evidence Act is inadmissible and can not be checked by the court for a certificate.

IV. EFFECTS OF CONSIDERING ELECTRONIC EVIDENCE AS PRIMARY AND DIRECT²⁵

There are many effects of considering the electronic evidence as primary and direct, which are dealt in this section.

It blurs the difference between Primary and Secondary Evidence

There is a very thin line between the primary and secondary evidence, which the legislature has effectually blurred by considering all kinds of computer evidence as the primary evidence. However, there will be a difference in primary and secondary evidence in the matter of documentary evidence, the computer or digital evidence are made an exception to this.

But because, all forms of computer evidence is complicated in nature and is very difficult to produce in the tangible form, this is an essential step taken by the legislature. Though, it is quite a good argument to say the the printouts or conversion into CD of a digital document should be considered as a secondary evidence but it must also be taken into consideration that production of a word document in court on the same computer is not just difficult but also impossible in nature and hence the printouts and CD's should be admissible as a primary evidence.

Making Criminal Prosecution Easier

The world has developed and the technologies have taken a greater form. The terrorists use highly sophisticate technologies to attach and if the prosecution is made to produce the evidence in documentary and oral form only, then the terrorist will never get the punishment. Thus, it is of huge help to the prosecution, if they are allowed to present the digital evidences as primary evidence in the court, as they can prove the guilt conveniently through the technology. The case of Ajaml kasab is of great importance to understand the essence of having digital evidence as primary as the attack was planned eiter face to face or via software and producing transcript of internet transactions helped the prosecution case a great deal in proving the guilt of the accused.

²⁵ Relevancy and admissibility of electronic evidence <https://www.lawteacher.net/.../relevancy-and-admissibility-of-electronic-law-essays.ph...>

Risk of Manipulation

However, there are advantages of having digital evidence as primary evidence, there are disadvantages too. Since the statute allowed all kinds of computer output to be admissible as primary evidence, it has left out the possibility of manipulation of the digital records. Tampering of digital evidence is very easy and may mislead the courts in any matter. However, technology can check if the digital evidence is tampered or not, the computer forensics in India is not much developed yet.

Opened Potential Floodgates

Strictly by the word of the statute, any system that includes a computer chip should be adducible as proof in court. However, before allowing the breadth of these parts to flow so far, practical considerations as well as ethics must be taken into account.

V. CONCLUSION

Because of growth and advancement in technology there has been tremendous shift in day to day life. It's extremely simple to communicate through technologies that increasing reliance on digital way of communicating, e-commerce and storage of data in electronic form. This increase and evolution of technology has extreme effect on legal principles in legal system particularly within the area of evidence. This modern technologies has created and generated materials which are considered evidence in courts. It triggered a necessity to change the law concerning information technology and principles of admissibility of digital evidence both in criminal and civil issues.

Various kinds of digital evidences are being used presently in the court of law, and judges are also being asked to make rules and guidelines about the admissibility of electronic evidence as it highly impacts the outcome of both the civil and criminal proceedings. Over the years, court has also ruled towards the admissibility and has taken into consideration all forms of computer related evidence, however, the computer forensics needs to be developed in for tracing if the digital evidence is fabricated or falsified, creates hurdle to admissibility not faced with the other evidences.

India still has a long way to go to keep pace with developments globally in the challenges related to the admissibility and appreciation of electronic evidence. While the changes have been implemented to reduce the burden of the records proponent, it can not be said that they are without limits. It is clear that India has not yet established a system to ensure that the contents of electronic documents, which are open to manipulation by any party, are deleted

by gaining access to the server or the space where they are kept.