

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN INDIA

Sonam Jain Bajpai*

Abstract

Due to gigantic development in e-governance all through the Public and Private Sector, Electronic Evidence have included into a central mainstay of correspondence, handling and documentation. These different types of electronic confirmation are progressively being utilized as a part of both Civil and Criminal Litigations. Amid trials, Judges are regularly solicited to lead on the acceptability from electronic proof and it generously impacts the result of common claim or conviction/vindication of the accused. The Court keep on grappling with this new electronic outskirts as the exceptional idea of e-confirm, and in addition the straightforwardness with which it can be manufactured or misrepresented, makes obstacle to acceptability not looked with alternate confirmations. The different classifications of electronic confirmation, for example, site information, interpersonal organization correspondence, email, SMS/MMS and PC created reports postures one of a kind issue and difficulties for appropriate validation and subject to an alternate arrangement of perspectives.

Cybercrimes are submitted in a virtual space where the proof would be in impalpable and doesn't exist in changeless shape. Gathering any confirmation with no making harm it is a major assignment and requires great aptitude. The second trouble in this procedure is getting the proof allowable in official courtroom. Evidence act manages a wide range of substantial evidence and it isn't of much importance of cybercrimes. To meet the requirement some amendments are made in evidence Act.

Keywords: *Evidence, Admissibility, Electronic Evidence, Indian Law perspective*

* Asst. Professor @ Career College of Law, Bhopal (M.P.); Email: advocatesonamjain@gmail.com

INTRODUCTION

Certain inquiries which are imperative from the point of view of confirmation in the disconnected world are similarly critical for electronic confirmation purposes., including the base necessity for suitability of proof of an electronic Evidence, the onus of verification, the procedural prerequisite to be satisfied identifying with the examination of electronic confirmation, the principles to be received while storing, protecting and recovering electronic evidence. The legislative framework of any jurisdiction needs to analyze these issues in detail and set down sensible criteria for legal recognition of electronic evidence.

Are electronic documents permitted to be produced in a court of law as proof of a fact? The answer is in the affirmative. Presumption in law will only apply if electronic records and signatures are admissible or in other words secure electronic record invoke presumptions and are admissible because they meet the minimum criteria of authenticity. This does not mean that only secure electronic records are admissible. The authenticity of an electronic document indicates that the document is what it appears to be. A document that is proved authentic is admissible as evidence in court proceedings. To achieve this, two parameters need to be satisfied, that is, the document originated from the actual sender and the integrity of the information contained therein is maintained. In electronic records, the person who may sign an electronic document could be a representative of a person, and for electronic records attribution is to the person who has sole and exclusive control over the information system irrespective of whether he has in fact sent the message.¹

PRESUMPTION OF LAWS

The law likewise presumes that in any procedures including secure advanced mark, the court might assume, unless the opposite is demonstrated, that the protected computerized mark is attached by the supporter with the expectation of marking of affirming the electronic record.²

By Virtue of arrangement of Section 65A, the substance of electronic records might be demonstrated in confirm by parties as per section of 65B.

Sub section (1) of section 65B makes acceptable as an document, to paper print out of electronic records put away in optical or magnetic media created by a PC subject to satisfaction of

¹ McCormick, C., Handbook of the Law of evidence, 3rd Edition, E Cleary, 1984, 99. 684-686

² Societe Des products Nestle SA case 2006 (33) PTC 469 & State v Mohd Afzal, 2003 (7) AD (Delhi) 1

conditions determined in subsection 2 of section 65B.

DIFFERING APPROACHES TO THE ADMISSIBILITY OF ELECTRONIC EVIDENCE

Different jurisdictions may have different laws to determine the admissibility of electronic evidence in legal proceedings. According to civil law approach, the principles of 'free introduction' and 'free evaluation' of evidence applies. All types of evidence are considered by the courts and the weight age to be given to each kind of evidence is analyzed. In the legal system based on civil law, computer records are commonly accepted as evidence. The statements made by the witness are verified through cross examination. Any information derived from other persons or records are considered hearsay evidence which is inadmissible as evidence. According to the best evidence rule, the originals are required to be produced as evidence instead of copies which are more credible and reliable and constitute primary evidence.

THE ONUS OF PROOF

The burden of proving that the computer from which an electronic record is produced was not working properly or malfunctioned generally lies with the defense. In case a computer system malfunctions, it needs to be proved that such malfunction had affected the data or electronic record which was being produced as electronic evidence. In case the defense is able to prove that the computer did in fact malfunction, the burden to prove that the malfunctioning did not affect the electronic evidence sought to be adduced should be with the prosecution. It is well settled in many jurisdictions that electronic evidence ought not to be denied legal validity only because it is electronic in form.³

POSITION UNDER INDIAN LAW

Under IT⁴ Act, 2000, section 4 grants legal acceptance to electronic records. Wherever any law require information to be hand written or in type written or in printed form, then such requirement is deemed to be satisfied if such information is made available in electronic form and accessible for use for a subsequent reference. Section 3 of the evidence Act, 1872 defines 'evidence' and includes 'all document including electronic records produced or inspection of the court. Such documents are called documentary evidence'. The provisions of section 65A

³ UNICTRAL model law, Article 9

⁴ Information Technology Act, 2000

elucidate that the electronic records can be proved in evidence by the parties in accordance with the provisions of section 65B (which will be considered as secondary evidence).

Section 65B of the Indian Evidence Act, 1872 gives that any data' contained in an electronic record which is imprinted on a paper, put away, recorded or duplicated in optical or magnetic media delivered by a PC might be regarded to be additionally a report'. On the off chance that it meets the conditions said in section 65B might be acceptable in any procedure without additionally demonstrating the first as confirmation or any substance of the first or truth expressed in it for which direct evidence would be allowable. Section 65B (2) gives the conditions required to be fulfilled for suitability of electronic record.

The IT Act, 2000 read with sections 65A and 65B of the Indian Evidence Act, 1872 provides the procedure for proving electronic evidence.⁵

The Computer from which the record is produced was consistently used to store or process data in regard of movement frequently carried on by individual having legal control over the period, and identifies with the period over which the PC was routinely utilized,

- a) Information framework was encouraged in the PC in the normal course of the exercises of the individual having legal control over the PC.
- b) The PC was working legitimately, and if not, was, for example, to influence the electronic record or its precision.
- c) Information reproduced is such as is fed into computer in the ordinary course of activity.

Sec 65B of Indian Evidence Act represents the status of acceptability of electronic evidence, which was revised through IT act. In any case, electronic evidence is delicate and one can undoubtedly control it. Henceforth courts in India are reluctant to join significant weight age to electronic evidence. Courts for the most part demand validating confirmation before arriving at a conclusion. Police division isn't prepared legitimately to deal with cyber evidence. Because of their ignorance valuable information is lost and as consequence of which despite the fact that numerous crimes are being committed each day, not very many case just are going to courts for trial.

Section 65B (4) provides the method to prove electronic evidence. Whenever a statement is to

⁵ Section 65A and 65B, Indian Evidence Act, 1872. The second schedule of IT Act, 2000 provided amendments to the Indian Evidence Act, 1872

be produced in evidence, a certificate identifying the electronic record that contains the statement and explaining the manner in which it was produced is required to be submitted to the court. The certificate should also contain details of any device used for production of electronic record. That indicates that the electronic record was produced by computer. The certificate should also contain the statements required by section 65B (2) and signed by person occupying position for the operation of the computer concerned or management of the relevant activity. It further provides that it shall be sufficient for a matter to be explained to the ‘best of knowledge and belief’ of the person who makes the statements.

JUDICIAL RESPONSES

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”. Accordingly, the oversight of, “Electronic Records” in the plan of Section 61 to 65 connotes the reasonable and unequivocal administrative expectation, i.e. not to broaden the pertinence of Section 61 to 65 to the electronic record in perspective of superseding arrangement of Section 65-B Indian Evidence Act overseeing just with the admissibility of the electronic record which in context of the persuading inventive reasons can be surrendered just in the path demonstrated under Section 65-B Indian Evidence Act.

*Union of India & Anr v. G.M. Kokil & Ors*⁶ observed “It is outstanding that a non obstante proviso is an legislative device which is typically utilized to give abrogating impact to specific arrangements over some opposite arrangements that might be discovered either in a similar enactment or some other enactment, in other words, to maintain a strategic distance from the activity and impact of every single contrary provision..”

*Chandavarkar Sita Ratna Rao v. Ashalata S. Guram*⁷ explained the extent of non-obstante proviso as “... It is comparable to stating that regardless of the provisions of the Act or some other Act specified in the non obstante condition or any agreement or document said the enactment following it will have its full activity...”

*Anvar P.V. v. P.K. Basheer & Ors.*⁸ In this critical judgment, the Supreme Court has settled the discussions emerging from the different clashing judgments and also the works on being

⁶ (1984) SCR 196

⁷ (1986) 3 SCR 866

⁸ MANU/SC/0834/2014

followed in the different High Courts and the Trial Courts with regards to the admissibility of the Electronic Evidences. The Court has deciphered the Section 22A, 45A, 59, 65A and 65B of the Evidence Act and held that auxiliary information in CD/DVD/Pen Drive are not allowable without an endorsement U/s 65 B(4) of Evidence Act. It has been explained that electronic evidence without declaration U/s 65B can't be demonstrated by oral confirmation and furthermore the conclusion of the master U/s 45A Evidence Act can't be depended on make such electronic evidence acceptable.

The judgment would have genuine ramifications in every one of the situations where the prosecution depends on the electronic information and especially in the instances of anticorruption where the dependence is being set on the audio video accounts which are being sent as CD/DVD to the Court. In every single such case, where the CD/DVD are being sent without a certificate U/s 65B Evidence Act, such CD/DVD are not allowable in evidence and further expert opinion as to their validity can't be investigated by the Court as clear from the Supreme Court Judgment. It was additionally watched that every one of these shields are taken to guarantee the source and validness, which are the two trademarks relating to electronic records looked to be utilized as evidence. Electronic records being more powerless to altering, modification, transposition, extraction, and so forth without such shields, the entire trial in light of verification of electronic records can travesty of justice.

In the anticorruption cases propelled by the CBI and anticorruption/Vigilance offices of the State, even the first recording which are recorded either in Digital Voice Recorders/cell phones are not been safeguarded and consequently, once the first account is crushed, there can't be any inquiry of issuing the endorsement under Section 65B(4) of the Evidence Act. In this way in such cases, neither CD/DVD containing such accounts are acceptable and can't be shown into prove nor the oral declaration or master supposition is permissible and all things considered, the recording/information in the CD/DVD's can't turn into a sole reason for the conviction.

In the previously mentioned Judgment, the Court has held that Section 65B of the Evidence Act being a 'not obstante proviso' would supersede the general law on optional proof under Section 63 and 65 of the Evidence Act. The Section 63 and Section 65 of the Evidence Act have no application to the auxiliary proof of the electronic confirmation and same might be completely administered 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 @ Afsan Guru*⁹ by the two judges Bench of the Supreme Court. The court particularly watched that the Judgment of *Navjot Sandhu*, to the degree, the announcement of the law on suitability of electronic confirmation relating to electronic record of this Court, does not set down right position and required to be overruled.

The main alternatives to demonstrate the electronic record/confirm are by delivering the first electronic media as Primary Evidence court or it's duplicate by way auxiliary proof U/s 65A/65B of Evidence Act. In this manner, on account of CD, DVD, Memory Card and so on containing auxiliary confirmation, the same might be joined by the declaration regarding Section 65B got at the season of taking the report, without which, the optional proof relating to that electronic record, is unacceptable.

*Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke*¹⁰, Depending upon the judgment of *Anvar P.V.*¹¹, while considering the admissibility of interpretation of recorded discussion for a situation where the recording has been translated, the Supreme Court held that as the voice recorder had itself not subjected to examination, there is no reason for putting dependence on the translated version. Without source, there is no validness for the interpretation. Source and validness are the two key components for electronic confirmation.

*Ankur Chawla v. CBI*¹², The Hon'ble High Court of Delhi, while deciding the charges against accused in a corruption case watched that since sound and video CDs being referred to are obviously forbidden in confirm, consequently trial court has wrongly depended upon them to reason that a solid doubt emerges in regards to petitioner criminally contriving with co-accused to perpetrate the offense being referred to. Hence, there is no material based on which, it can be sensibly said that there is solid doubt of the complicity of the petitioner in commission of the offense being referred to.

*Abdul Rahaman Kunji v. The State of West Bengal*¹³, The Hon'ble High Court of Calcutta while choosing the admissibility of email held that an email downloaded and printed from the email record of the individual can be demonstrated by virtue of Section 65B r/w Section 88A of Evidence Act. The testimony of the witness to complete such system to download and print the

⁹ (2005) 11 SCC 600

¹⁰ MANU/SC/0040/2015

¹¹ *Supra* note 8

¹² MANU/DE/2923/2014

¹³ MANU/WB/0828/2014

same is adequate to prove the electronic evidence.

*Jagdeo Singh v. State (NCT of Delhi) & Ors.*¹⁴ In the current judgment articulated by Hon'ble High Court of Delhi, while managing the suitability of captured phone bring in a CD and CDR which were without a certificate u/s 65B Evidence Act, the court watched that the auxiliary electronic proof without certificate u/s 65B Evidence Act is unacceptable and can't be investigated by the court for any reason at all

CONCLUSION

The law of evidence relating to computer evidence has evolved with the passage of time. The conventional principles of admissibility of evidence, namely, integrity, traceability of source and its weightage principles and presumptions in law for secure electronic records continue to play a vital role in proving electronic evidence in a court of law. Different legal systems have laid down minimum requirements to be satisfied to prove an electronic record is reliable. The admissibility of the auxiliary electronic proof must be pronounced inside the parameters of Section 65B of Evidence Act and the recommendation of the law settled in the current judgment of the Apex Court and different other High Courts as talked about above. The suggestion is clear and unequivocal that if the optional electronic confirmation is without a certificate u/s 65B of Evidence Act, it isn't acceptable and any assessment of the legal master and the statement of the observer in the courtroom can't be investigated by the court.

Nonetheless, there are few holes which are as yet uncertain as what might be the destiny of the secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act can't be taken and the charged can't be made witness against himself as it would be violative of the Article 19 of the Constitution of India. In a nutshell, a technology develops, collection, preservation a retrieval of electronic evidence will become more scientific and adapt to withstand the test of admissibility will itself require changes with the dynamic of information Technology.

¹⁴ MANU/DE/0376/2015