

ADMISSIBILITY OF DEVICE RECORDED EVIDENCE IN INDIA

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Abstract

The Law of Evidence is a branch of procedural law, which encompasses the rules, and legal principles of the law regulating the admissibility of Evidence in Indian courts of both civil and criminal judicature. The tools of modern technology like tape records, video films, DNA tests, Polygraph test (lie detection), etc. make the probability of arriving at the most accurate version of truth highly certain. It is a general rule in evidentiary jurisprudence that all such material shall be made admissible to make the adjudication equitable and just. Thus, device recordings can be used as evidence in a court to corroborate the statements of a person who deposes that he had specifically carried on a conversation with a particular person. A previous statement of a person who has been device-recorded can also be used to test the veracity of a witness and to impeach his impartiality. The advent of computers and the development of electronic recording technology in human lives have necessitated the need for admission of digital evidence in judicial proceedings. In this paper, we will discuss the admissibility of the device-recorded evidence in courts. We shall also discuss the various prerequisites, which need to be satisfied before making any device-recorded evidence admissible in a court of law in the eyes of civilised jurisprudence in order to prevent such evidentiary material from being negated in the process.

Keywords: Device Recorded Evidence, Electronic Evidence and Admissibility etc.

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INTRODUCTION

The Law of Evidence is a branch of procedural law, which encompasses the rules, and legal principles of the law regulating the admissibility of Evidence in Indian courts of both civil and criminal judicature. The tools of modern technology like tape records; video films, DNA tests, Polygraph test (lie detection), etc. make the probability of arriving at the most accurate version of truth highly certain. It is a general rule in evidentiary jurisprudence that all such material shall be made admissible to make the adjudication equitable and just.

Thus, device recordings can be used as evidence in a court to corroborate the statements of person who deposes that he had carried on a conversation with a particular person. A previous statement of a person which has been device-recorded can also be used to test the veracity of a witness and to impeach his impartiality. Similarly, if the court is satisfied that there is no 'trick photography' and the photograph is above suspicion, it may allow the photograph to be received in evidence. Evidence of 'dog-tracking', even if admissible, is not of much weight.¹

If a statement is relevant, an accurate tape-recorded of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voice must be properly identified. One of the features of the magnetic tape-recording is the ability to erase and re-use the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with."²

In *Mahabir Prasad v. Surinder Kaur*³, the court held that tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation. In the absence of any such evidence, the tape cannot be used as evidence in itself.

*R. M. Malkani v. State of Maharashtra*⁴, in this case, the prosecution case was based solely on the tape recorded conversation, which clearly proved the appellant's intention to obtain a bribe. The appellant's contention was that such conversation cannot be admitted under the

¹ *Abdul Razak v. State of Maharashtra* AIR 1970 SC 283

² *Yusufalli v. State of Maharashtra* (1967) Bom L.R. 76 (76) (SC)

³ AIR 1982 SC 1043

⁴ AIR 1973 SC 157

provisions of Indian Evidence Act, moreover as it was 'unlawful'. The Supreme Court held such conversation to be relevant.

The Madras High Court has in *R. Venkatesan v. State*⁵, considered the evidentiary value of a tape-recorded conversation. In that case, the conversation was not audible throughout, and was broken at a very crucial place. The accused alleged that the same has not been tampered with. The accuracy of recording was not proved, and the voices were also not properly identified. In the circumstances, the court concluded that it would not be safe to rely on the tape recorded conversation as corroborating the evidence of the prosecution witness.

As regards admissibility of tape-recordings, the Bombay High Court in *C.R. Mehta v. State of Maharashtra*⁶ has observed: "The law is quite clear that tape-recorded evidence if is to be acceptable, must be sealed at the earliest point of time, and not opened except under orders of the court."

In *Ram Singh v. Co. Ram Singh*⁷, the Supreme Court has tightened the rule as to relevance of tape to this extent that it must be shown that after the recording the tape was kept in proper custody. In that case the Deputy Commissioner had left the tape with the stenographer. The Supreme Court has laid down conditions for admissibility of voice recording of a conversation in following terms:

- 1) The voice of the speaker must be identified by the maker of the record or by others who recognise his voice. Where the voice is denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker,

⁵ 1980 Cr LJ 41

⁶ 1993 Cr LJ 2863

⁷ 1985 SCALE (2)1142, In this Case general election to the State Assembly held in 1982, the appellants and the respondents were the candidates. The respondent was declared elected to the Assembly. In their election petition, the appellants alleged that the respondent was guilty of corrupt practice and booth capturing in that he went to two polling booths along with 50 to 60 persons, armed with guns, sticks and swords, threatened and pressurized the voters and as a result of the serious threats held out by the respondent and his men the voters ran away without exercising their franchise; that the respondent and his companions entered the polling booths and terrorized the Polling Officer and polling agents, assaulted the polling agents at gun point, snatched away the ballot papers and marking them in the respondent's favour, cast the votes in the ballot boxes and thumb marked the counter foil of ballot papers. They sought a declaration that the respondent's election was void under section 100 of the Representation of the People Act 1951. A large number of witnesses were examined by both sides. The Deputy Commissioner who was the Returning Officer of the constituency recorded on a tape recorder the statements of same persons including the polling agents, the Polling Officer and the respondent and of himself.

- 2) The voice of the speaker should be audible and not distorted by other sounds or disturbances,
- 3) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence,
- 4) Every possibility of tampering with or erasure of a part of the tape recorded statement must be ruled out,
- 5) The statement must be relevant according to the rules of evidence and
- 6) The recorded cassette must be carefully sealed and kept in safe custody.

In *R.K. Anand v. Delhi High Court*⁸ the Supreme Court was considering the admissibility of recordings on some microchips and CDs. The court found in that case that the authenticity and integrity of the Sting Operation had never been doubted or disputed. It was a case where the microchip was preserved by a popular TV channel studio and the court believed that it could not have been tampered with.

REQUIREMENT FOR ACCEPTANCE OF ELECTRONIC EVIDENCE

Every piece of electronic evidence sought to be relied upon has to be accompanied by a certificate given in the manner prescribed in Section 65-B⁹. For admitting a statement contained in electronic record in evidence, a certificate doing any of the following things should be given:

- a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
- b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

⁸ (2009) 8 SCC 106

⁹ Section 65-A of the Indian Evidence Act requires that electronic evidence may be proved in accordance with the provisions of Section 65-B.

- c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
- d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

The Certificate identifies the electronic record containing the statement and describes the manner in which it was produced. The certificate 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. The deponent must swear to the best of his knowledge and belief.

Objections regarding admissibility of documents which are per se inadmissible can be taken even at appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at appellate stage because it is a fundamental issue. However, mode or method of proof is procedural and objections, if not taken at trial, cannot be permitted at appellate stage. If objections to mode of proof are permitted to be taken at appellate stage by a party, the other side does not have an opportunity of rectifying deficiencies.¹⁰

In *State of (NCT of Delhi) v. Navjot Sandhu*¹¹, one of the important pieces of evidence relied upon by the prosecution against the accused persons was the call records of the accused. The Court held that the cellular phone records of the accused were admissible in law and they would be in the nature of secondary evidence since primary evidence would be the call servers maintained by the telecom operators which would be difficult to move and produce in court. However, the Court proceeded to hold that even if the requirements of certification under Section 65-B(4) were not complied with, it would not be a bar for production of secondary electronic evidence if the evidence is otherwise admissible under the provisions of Sections 63 and 65 of the Indian Evidence Act, 1872.

¹⁰ *Sonu v. State of Haryana*, (2017) 8 SCC 570

¹¹ (2005) 11 SCC 600, This case is popularly known as Parliament Attack case which led to the conviction of the accused under the various provisions of IPC and POTA, 2002.

In *Anwar P.V. v. P.K. Basheer*¹² the appellant challenged the election of R-1 on the ground of corrupt practice under Section 123(4) of the Representation of the People Act in view of the publication in relation to the personal character and conduct of the petitioner or in relation to the candidature, the and announcement as part of the election propaganda of R-1. The appellant did not adduce primary evidence, by making available in evidence, the CDs used for announcement and songs. The speeches, songs and announcements were recorded using other instruments and by feeding them into computer, CDs were made therefrom which were produced in Court, without certification.

The Court held that Electronic record produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act'). Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record, the purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, 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 shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2).¹³

The Court also held that the evidence relating to electronic record, as noted herein before,

¹² (2014) 10 SCC 473: (2014) 4 KLT 104, It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record 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. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

¹³ Ibid

being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu case*¹⁴, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., 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. The Court further said that Safeguards provided under Section 65-B are to ensure the source and authenticity of electronic records. As electronic records are more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, whole trial based on proof of electronic records can lead to travesty of justice.¹⁵

In *Shafhi Mohammad v. State of Himachal Pradesh*¹⁶ the Court held that Sections 65-A and 65-B of the Evidence Act, 1872, cannot be a complete code on the subject. Threshold admissibility of electronic evidence cannot be ruled out on any technicality if same is relevant. Its authenticity and procedure for its admissibility may depend on fact situation such as whether person producing such evidence is in a position to furnish certificate under Section 65-B(4). If party producing electronic evidence is not in possession of device from which electronic document was produced, then such party, held, cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. Requirement of certificate under Section 65-B(4) being procedural, can be relaxed by court wherever interest of justice so justifies. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

¹⁴ Supra note 11

¹⁵ Supra note 12

¹⁶ *Shafhi Mohammad v. State of H.P.*, (2018) 2 SCC 801. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of electronic evidence cannot be ruled out on any technicality if the same was relevant.

It will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same.

In *Paras Jain v. State of Rajasthan*¹⁷, the Rajasthan High Court that : when legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form.

In *Kundan Singh v. State*¹⁸, the Section 65-B certificate pertaining to the call detail records of the accused was not submitted along with the charge-sheet and was produced by the nodal officer of the telecom agency concerned during the course of his re-examination. The Division Bench of the Delhi High Court was called upon to decide as to whether under Section 65-B, the certificate was to be submitted along with the charge-sheet or if it could be produced during the course of examination. Hon'ble Supreme Court while placing reliance of *Anvar P.V. case*¹⁹ held that Section 65-B does not require simultaneous certification of electronic record.

¹⁷ 2015 SCC OnLine Raj 8331

¹⁸ 2015 SCC OnLine Del 13647, the expression used in the said paragraph is when the electronic record is "produced in evidence". Earlier portion of the same sentence emphasises the importance of certificate under Section 65-B and the ratio mandates that the said certificate must accompany the electronic record when the same is "produced in evidence". To us, the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper printout or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to Section 65-B. This is not so stated in Section 65-B or sub-section (4) thereof. Of Course, it is necessary that the person giving the certificate under sub-section (4) to Section 65-B should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in sub-section (2), identify the electronic record, describe the manner in which "computer output" was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer.

¹⁹ Supra note 12

CONCLUSION

With the progress in the field of technology, the admissibility of secondary electronic evidence has to be looked into in the light of the principles laid down in Section 65B of the Indian Evidence Act and the proposition of law settled in the judgement of the Supreme Court in the Anwar Case which was further clarified by the judgements of the Rajasthan and Delhi High Courts as discussed above. The law now seems to be settled. If the secondary electronic device recorded evidence is not accompanied by a certificate issued in terms of Section 65-B of the Evidence Act, it is not admissible as a piece of reliable evidence. Data stored or encrypted in CDs/DVDs/Pen Drives or similar data storing devices are not admissible without a certificate under Section 65B(4) of the Indian Evidence Act. In case of computer output without such certificate, neither there can be oral evidence to prove the contents of the electronic evidence nor could the opinion of the expert under Section 45A be resorted to prove the *genuineness of the electronic evidence*. This proposition shall have serious repercussions for all those cases where the prosecution relies on the electronic data and particularly in anti-corruption cases of bribery etc. where audio-video recordings are being presented before the courts as evidence. In all such cases where the CDs/DVDs etc. are being forwarded to the courts without a certificate under Section 65B(4) of the Indian Evidence Act, such CDs/DVDs etc. shall not be admissible in evidence and further the expert opinion as to their genuineness cannot be looked into by the court. Thus, genuineness, veracity or reliability of the electronic evidence shall be seen by the court only after the stage of relevancy and admissibility. Electronic records being more susceptible to tampering, altering, transposition and excision and detection of the same being difficult, without such safeguards, the whole trial shall be antithetical to the idea of procedural fairness and justice per se.