

‘LAW OF EVIDENCE’ PROJECT

ON

RELEVANCY AND ADMISSIBILITY OF ELECTRONIC EVIDENCE

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INTRODUCTION

In the past decade or two, e-commerce has seen a huge boom. Everything from Harry Potter books to plots of land can be bought online these days. At the same time, the use of closed-circuit televisions (“CCTV”) to nab thieves and other miscreants has increased in shopping complexes and other public places, where instead of guards being posted at multiple places, one guard sits at a counter and keeps watch over the entire place through the CCTV recordings. Thus, both in civil as well as criminal matters, technology has assumed an increasingly important role to play.

In the case of electronic contracts, the proof of the transactions actually taking place is available only on e-mails, often signed with electronic signatures. In criminal proceedings, the prosecution can now use electronic evidence to prove the guilt of the accused. However, the progression from an age of no technology to its admissibility in the court of law has come gradually over a period, causing paradigm shifts in many fundamental principles of the law of evidence.

In this project, the researcher seeks to show the shift that has occurred with respect to electronic evidence within two important rules of evidence – that of hearsay and that of primary evidence. The researcher looks at the earlier position of law in this regard, the reason for subsequent change, the amendments to law, and a few possible effects of such amendment, while dealing with some leading case laws under Indian evidence Act as well as the UK position on the relevancy and admissibility of electronic evidence.

OBJECTIVES OF THE STUDY

This project seeks to give an overview of the issue of relevancy and admissibility of electronic evidence. Following are the objectives of the given project report:

- To briefly introduce the concept of electronic evidence;
- To study the position on relevancy and admissibility of electronic evidence in light of recent amendment in the Indian Law;
- To deal with relevant judgments of SC of India and UK position on admissibility of electronic evidence; and
- To analyse the effects of admitting electronic evidence by virtue of this amendment.

RESEARCH METHODOLOGY

This research is descriptive and analytical in nature. Secondary and electronic resources have been largely used to gather information and data about the topic.

Books, case laws and other reference as guided have been primarily helpful in giving this project a firm structure. Websites, articles and reports have also been referred.

Footnotes have been provided wherever necessary to acknowledge the same.

ELECTRONIC EVIDENCE

The law of evidence has long been guided by the rule of “best evidence” which is considered to have two basic paradigms – avoidance of hearsay and production of primary evidence.¹ These rules are believed to weed out infirm evidence and produce only that which cannot be reasonably be doubted. In light of the Indian Evidence Act, 1872, this can be understood as only a person who has himself perceived the fact being proved can depose with respect to it, and not someone who has received the information second hand.² Similarly, where a document is to be used to prove a point, the original should be produced in court, and not a copy or photograph or any other reproduction of the same, not even statements regarding the contents by someone who has seen it.³ For any reproduction of a statement or document is lower on the rung of authenticity than the original, giving opportunities for fraud or fabrication.⁴

Hearsay has been defined as “all the evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person”.⁵ Thus, if a person A chooses to depose in court that person B told him that he had seen person C stabbing person D, person A’s statements with respect to the act of stabbing that occurred will be hearsay, since it is not completely out of his own knowledge, but based partly on what person B told him. However, person B’s evidence will be direct evidence since he saw the act happening with his own eyes. If, on the other hand, person A’s deposition were to be in respect of whether or not person B had seen the act happen, his statements would be direct evidence, since he had himself heard person B say so. Thus, it is the purpose for which a statement is being used that qualifies it as hearsay or not.

Primary evidence is the original document being itself produced for inspection by the court.⁶ A document has been defined as any matter which has expressed or described upon any substance by means of letters, marks or figures for the purpose of recording that matter.⁷ If a copy is made

¹ Macdonnell v. Evans, 138 ER 742

² Law Teacher. November 2013, Relevancy and Admissibility Of Electronic Law Essays. Available from: <http://www.lawteacher.net/free-law-essays/commercial-law/relevancy-and-admissibility-of-electronic-law-essays.php?cref=1> [Retrieved on August 14, 2015].

³ BEST, 12th Edn., S. 215 and 216 at pg. 199, 200

⁴ L. Chharia v. State of Maharashtra, AIR 1968 SC 938

⁵ Kalyan Kumar Gogoi vs Ashutosh Agnihotri & Anr, (2011) 2 SCC 532

⁶ Section-61, Indian Evidence Act, 1872

of such a document, it will not be primary evidence since it is not the original. Copies of the original document are considered secondary evidence. Secondary evidence is acceptable in court only under certain conditions, such as when the original is in the possession of the adversary or when the original is destroyed or lost, or when the original is of such a nature that it cannot be easily moved.⁸

So long as evidence is direct and not hearsay in nature, or is primary evidence, the court may accept it, provided that the fact being proved through such evidence proves the existence or non-existence of fact in issue to be probable in the past, present or future, that is to say, it is a relevant fact.⁹ The Indian Evidence Act has set out a number of conditions under which a fact can be considered relevant. In other words, the condition for admissibility of a piece of evidence is that it should prove a relevant fact.

➤ NEW FORMS OF EVIDENCE

While there can be no limit to the forms in which evidence exists, they were so far broadly classified into oral and documentary. Documentary evidence was usually such as could be put down on paper – certificates, executed deeds, photographs, maps, caricatures, etc.¹⁰ Slowly, as records began to be made on objects such as cassettes and gramophone discs, those began being entertained as documents too.

Recently, in February 2010, the city of Pune was endangered by a terrorist attack in a much-frequented bakery. The ‘German Bakery blast’ accused were finally identified by the police on the basis of a CCTV recording. The question, therefore, arises as to whether such a recording, which is neither on paper nor on a camera negative nor on a magnetic tape, in fact, not available in any tangible form at all, can be introduced in court as evidence. The only proof available will be that recorded in the computer system controlling the CCTV unit.¹¹

This example brings into focus the very recent phenomenon of the increasing use of computers in everyday life. With the facility of writing letters over the internet being widely available now,

⁷ Section-3, Indian Evidence Act, 1872

⁸ Section-65, Indian Evidence Act, 1872

⁹ Section-5, Indian Evidence Act, 1872

¹⁰ Supra note 7

¹¹ "CCTV footage reveals vital clues in Pune blast". The Indian Express;

<http://expressindia.indianexpress.com/latest-news/CCTV-footage-reveals-vital-clues-in-Pune-blast/579947/>

more and more contracts are being entered into online. All forms of communication and contract formations which, earlier, took place face-to-face or through letters, can now happen over the internet. Thus, if any of the parties to the contract were to sue each other for breach of contract, the only adducible evidence would be the text of the emails.

➤ CLASSIFICATION OF ELECTRONIC EVIDENCE

Under the Indian Evidence Act, any substance on which matter has been expressed or described can be considered a document, provided that the purpose of such expression or description is to record the matter. Electronic records have been defined in the Information Technology Act, 2000 as any data, record or data generated, any image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.¹² An electronic record can be safely included under such a definition because matter is recorded on the computer as bits and bytes, which are the digital equivalent of figures or marks.

An electronic document would either involve documents stored in a digital form, or a print out of the same. What is recorded digitally is a *strictu sensu* document, but cannot be perceived by a person not using the computer system into which that information was initially fed. A document containing a print out of computer records, though a document *lato sensu*, can be perceived by anybody. Such print outs of documents would amount to secondary evidence going strictly by the provisions of the Indian Evidence Act.¹³

Electronic documents *strictu sensu* were admitted as real evidence, that is, material evidence, but such evidence requires certification with respect to the reliability of the machine for admission. In *R v. Wood*¹⁴, where the prosecution sought to rely on a comparison of a computer analysis of certain processed metals to that of metals found in the defendant's possession, the Court held that since the computer had been used as a calculator, the analysis could be admitted as real evidence.

Being both hearsay as well as secondary evidence, there was much hesitation regarding the admissibility of electronic records as evidence.

¹² Section- 2(1)(t), Information Technology Act, 2000

¹³ Law Teacher. November 2013, Relevancy and Admissibility Of Electronic Law Essays. Available from: <http://www.lawteacher.net/free-law-essays/commercial-law/relevancy-and-admissibility-of-electronic-law-essays.php?cref=1> [Retrieved on August 14, 2015].

¹⁴ (1982) 76 Cr App R at 27

ADMISSIBILITY OF ELECTRONIC EVIDENCE

In the United Kingdom, hearsay computer records were made admissible in 1995 through an amendment to their Civil Evidence Act, 1968 because of the lack of objections raised by parties to such evidence over a period of time, indicating its acceptance amongst the general public.

With respect to criminal cases, the position of law following the decision in *R v. Wood* changed with the decision in *Castle v. Cross*¹⁵, wherein the prosecution sought to rely on a print out from a computerized breath-testing device. The Court held that the print-out was admissible evidence.

The position of law was clarified in the leading case of *R v. Shephard*.¹⁶ In this case, records from till rolls linked to a central computer in a shop were produced to prove that items in possession of the accused had not been billed and had thus been stolen by the accused. The issue was whether a document produced by a computer can be produced as evidence. The Court held that so long as it could be shown that the computer was functioning properly and was not misused, a computer record can be admitted as evidence.

➤ **INDIAN POSITION ON ADMISSIBILITY OF ELECTRONIC EVIDENCE**

As we know the Evidence Act was drafted to codify principles of evidence and fundamental rule of evidence. As seen in sections 59 and 60 of the Evidence Act, oral evidence may be adduced to prove all facts, except documents, provided, the oral evidence is direct. The definition of 'evidence' has been amended to include electronic records. The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court.

Under section 59 of the Evidence Act, Oral evidence cannot prove the contents of documents since the document is absent, the truth or accuracy of the oral evidence cannot be compared to the document and to prove the contents of a document, either primary or secondary evidence is necessary. While more and more documents were electronically stored, the hearsay rule faced new challenges in the matter of digital documents. In *Anvar v. P. K. Basheer* ¹⁷, the Supreme Court noted that “there is a revolution in the way that evidence is produced before the court”.

¹⁵ [1985] 1 All ER 87

¹⁶ (1993) AC 380

¹⁷ MANU/SC/0834/2014

When electronically stored information was treated as a document in India before 2000, secondary evidence of these electronic ‘documents’ was adduced through printed reproductions or transcripts, and the authenticity was certified. The signatory would identify signature in court and be open to cross examination by meeting the conditions of both sections 63 and 65 of the Evidence Act. When the creation and storage of electronic information grew more complex, the law had to change more substantially.

In India, the change in attitude came with the amendment to the Indian Evidence Act in 2000. The definition of 'admission' (Section 17 Evidence Act) has been changed to include a statement in oral, documentary or electronic form which suggests an inference to any fact at issue or of relevance. New Section 22-A was inserted into Evidence Act, to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question.

Sections 65A and 65B were introduced into the chapter relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with.¹⁸ Section 65B provides that electronic records shall be considered documents, thereby making it primary evidence, if the computer which produced the record had been regularly in use, the information fed into the computer was part of the regular use of the computer and the computer had been operating properly.¹⁹ It further provides that, all computer output shall be considered as being produced by the computer itself, whether it was produced directly or indirectly, whether with human intervention or without.²⁰ This provision does away with the concept of computer evidence being hearsay.

Any probative information stored or transmitted in digital form is digital evidence or electronic evidence. Before accepting digital evidence, its relevancy, veracity and authenticity and whether the fact is hearsay or a copy is preferred to the original is to be ascertained by the court. Digital Evidence is “information of probative value that is stored or transmitted in binary form”. Evidence is not only limited to that found on computers but may also extend to include evidence on digital devices such as telecommunication or electronic multimedia devices.

¹⁸ Section-65A, Indian Evidence Act, 1872

¹⁹ Section-65B(2), Indian Evidence Act, 1872

²⁰ Section-65B(5), Indian Evidence Act, 1872

Thus, with the amendments introduced into the statute, electronic evidence in India is no longer either secondary or hearsay evidence, but falls within the best evidence rule.

➤ CASE LAW ANALYSIS OF ADMISSIBILITY OF ELECTRONIC EVIDENCE

In the landmark decision of United States District Court, for *Maryland in Lorraine v. Markel American Insurance Company*²¹, in 2007, held that when electronically stored information is offered as evidence, the following to be ascertained:

- (i) Is the information relevant;
- (ii) Is it authentic;
- (iii) Is it hearsay;
- (iv) Is it original or, if it is a duplicate, is there admissible secondary evidence to support it; and
- (v) Does its probative value survive the test of unfair prejudice?

But in *Amar Singh v. Union of India*²², all the parties, including the state and the telephone company, dispute the authenticity of the transcripts of the CDRs, and the authorisation itself and in *Ratan Tata v. Union of India*²³, a CD containing intercepted telephone calls was introduced in the Supreme Court without following any of the procedure contained in the Evidence Act.

In *Anvar v. P. K. Basheer*, to declare new law in respect of the evidentiary admissibility of the contents of electronic records, overruled the earlier Supreme Court judgment *State (NCT of Delhi) v Navjot Sandhu alias Afsal Guru*²⁴ and the application of sections 63, 65, and 65B of the Indian Evidence Act, re-interpreted the technical conditions upon which a copy of an original electronic record may be used can be seen in S. 65B(2) as:

- (i) at the time of the creation of the electronic record, the computer that produced it must have been in regular use;
- (ii) the kind of information contained in the electronic record must have been regularly and ordinarily fed in to the computer;
- (iii) the computer was operating properly; and,

²¹ 241 F.R.D. 534

²² (2011) 7 SCC 69

²³ W. P (C) 398 of 2010

²⁴ (2005) 11 SCC 600

- (iv) the duplicate copy must be a reproduction of the original electronic record.

The non-technical conditions to establish authenticity of electronic evidence in section 65B(4) requires the production of a certificate by a senior person responsible for the computer on which the electronic record was created, or is stored. The certificate must identify the original electronic record, describe manner of creation, the device created it, and certifying compliance of sub-section (2) of section 65B.

The *Anvar case* does for India, what Lorraine did for US Federal Courts. In *Anvar*, the Supreme Court set track Indian electronic evidence law to the special procedure created under section 65B of the Evidence Act by applying the maxim *generalia specialibus non derogant* (“the general does not detract from the specific”), a restatement of the principle *‘lex specialis derogat legi generali* (“special law repeals general law”). The Supreme Court held that the provisions of sections 65A and 65B of the Evidence Act created special law that overrides the general law of documentary evidence. The law in India is changing and the judicial verdicts have great role in moulding the law applicable to the country.²⁵

It is interesting to see the observations of the Court in a case, where in order to prove the charge of corrupt practice, the petitioner had filed a video CD and the court found that new techniques and devices are the order of the day. First hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence by Audio and videotape technology. At the same time, such evidence has to be received with caution as with fast development in the electronic techniques, they are more susceptible to tampering and alterations by transcription, excision, etc. which may be difficult to detect and it emphasized that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence.²⁶ Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for electronic evidence.²⁷

²⁵ Electronic Evidence- Admissibility in Indian Courts, <https://www.linkedin.com/pulse/electronic-evidence-admissibility-indian-courts-koyippally> (Retrieved on August 14, 2015)

²⁶ AIR 2010 SC 965

²⁷ Sanjaysingh Ramrao Chavan v. Dattatray Gulabrao Phalke, MANU/SC/0040/2015

In the recent judgment pronounced by Hon'ble High Court of Delhi, while dealing with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate u/s 65B Evidence Act, the court observed that the secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever.²⁸

So far discharging of burden of proof is concerned, production of scientific and electronic evidence in Court as contemplated under S. 65B of the Evidence Act is of great help. The relevance of electronic evidence is also evident in the light of *Mohd. Ajmal Mohammad Amir Kasab v. State of Maharashtra*²⁹, wherein production of transcripts of internet transactions helped proving the guilt of the accused. In *Navjot Sandhu alias Afsal Guru*, the links between terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

So on a careful analysis of the evolution of the case laws on the subject it is clear that the courts were harsh on similar evidence considering highest of tampering and foul play.

²⁸ Jagdeo Singh v. The State and Ors., MANU/DE/0376/2015

²⁹ Criminal Appeal Nos. 1899-1900 of 2011

EFFECTS OF CONSIDERING ELECTRONIC EVIDENCE AS PRIMARY AND DIRECT

With the amendment in Indian Evidence Act in 2000, electronic evidence can now be presented before the Court as primary and direct evidence. Electronic Evidence is now admissible as relevant and reliable evidence in Court of law. There are some effects of considering such evidence as primary and direct³⁰, which are briefly dealt with, as follows:

1. Blurring the Difference between Primary and Secondary Evidence

By bringing all forms of computer evidence into the fold of primary evidence, the statute has effectually blurred the difference between primary and secondary forms of evidence. While the difference is still expected to apply with respect to other forms of documents, an exception has been created with respect to computers. This, however, is essential, given the complicated nature of computer evidence in terms of not being easily producible in tangible form. Thus, while it may make for a good argument to say that if the word document is the original then a print out of the same should be treated as secondary evidence, it should be considered that producing a word document in court without the aid of print outs or CDs is not just difficult, but quite impossible.

2. Making Criminal Prosecution Easier

In light of the recent spate of terrorism in the world, involving terrorists using highly sophisticated technology to carry out attacks, it is of great help to the prosecution to be able to produce electronic evidence as direct and primary evidence in court, as they prove the guilt of the accused much better than having to look for traditional forms of evidence to substitute the electronic records, which may not even exist.

As we saw in the *Ajmal Kasab* case, terrorists these days plan all their activities either face-to-face, or through software. Being able to produce transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru*, the links between the slain terrorists and the

³⁰ Supra note 13

masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

3. Risk of Manipulation

While allowing all forms of computer output to be admissible as primary evidence, the statute has overlooked the risk of manipulation. Tampering with electronic evidence is not very difficult and miscreants may find it easy to change records which are to be submitted in court. However, technology itself has solutions for such problems. Computer forensics has developed enough to find ways of cross checking whether an electronic record has been tampered with, when and in what manner.

4. Opening Potential Floodgates

Computers are the most widely used gadget today. A lot of other gadgets involve computer chips in their functioning. Thus, the scope of Section 65A and 65B is indeed very large. Going strictly by the word of the law, any device involving a computer chip should be adducible in court as evidence. However, practical considerations as well as ethics have to be borne in mind before letting the ambit of these Sections flow that far. For instance, the Supreme Court has declared test results of narco-analysis to be inadmissible evidence since they violate Article 20(3) of the Constitution.

It is submitted that every new form of computer technology that is sought to be used in the process of production of evidence should be subjected to such tests of Constitutionality and legality before permitting their usage.

There is no doubt that the new techniques and devices are the order of the day. With the advancement of information technology there is increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant. Audio and video tape technology has emerged as a powerful medium through which first hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence.³¹

³¹ Supra note 25

CONCLUSION

It is seen that with the increasing impact of technology in everyday life, the production of electronic evidence has become a necessity in most cases to establish the guilt of the accused or the liability of the defendant. The shift in the judicial mindset has occurred mostly in the past twenty years and most legal systems across the world have amended their laws to accommodate such change.

In India, all electronic records are now considered to be documents, thus making them primary evidence. At the same time, a blanket rule against hearsay has been created in respect of computer output. These two changes in the stance of the law have created paradigm shifts in the admissibility and relevancy of electronic evidence, albeit certain precautions still being necessary. At the same time, with fast development in the electronic techniques, these tapes are more susceptible to tampering and alterations, which may be difficult to detect. Therefore, such evidence has to be received with caution. However, technology has itself provided answers to problems raised by it, and computer forensics ensure that manipulations in electronic evidence show up clearly in the record. Human beings now only need to ensure that electronic evidence being admitted is relevant to the fact in issue and is in accordance with the Constitution and other laws of the land.

With the amendment to the Indian Evidence Act in 2000, contents of electronic records may be admitted as evidence. The computer generated electronic records in evidence are admissible at a trial, if proved. S. 65B(1) makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of S.65B. Secondary evidence of contents of document can also be led under S.65 of the Evidence Act. It is the settled law that the document, contents whereof were not proved nor the maker thereof was examined, is inadmissible in evidence.

Thus, with the amendments introduced into the statute, electronic evidence in India is no longer either secondary or hearsay evidence, but falls within the best evidence rule.

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