

ethically acceptable may change over time and view of what is acceptable may be radically different between different nations or communities within the same nation.

Though regulation of ART is difficult, for well being of the people and for future

generations regulation of any system including advanced medical treatment for infertility by sovereign power is inevitable and acceptable. In India the struggle for making law to regulated ART started in the year 2005 but even today it was not fulfilled.

EVIDENCE RELATING TO ELECTRONIC RECORD – CHALLENGES IN ADMISSIBILITY

By

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Introduction :

The last few years of the 20th Century saw rapid strides in the field of information and technology. The expanding horizon of science and technology threw new challenges for the ones who had to deal with proof of facts in disputes where advanced techniques in technology was used and brought in aid. Storage, processing and transmission of data on magnetic and silicon medium became cost effective and easy to handle. Conventional means of records and data processing became out dated. Law has to respond and gallop with the technical advancement. He who sleeps when the sun rises, misses the beauty of the dawn. Law did not sleep when the dawn of information and technology broke on the horizon. World over, statutes were enacted. Rules relating to admissibility of electronic evidence and it's proof were incorporated¹.

In India, the Information and Technology Act, 2000 was enacted showing the stand of India to the accept Technology within its legal framework. Apart from the principal statute in form of Information and Technology Act, 2000, several necessary amendment by inserting new provisions in the Indian Penal Code, 1860, the Indian Evidence

Act, 1872, the Banker's Books Evidence Act, 1891, the Reserve Bank of India Act, 1934, were enacted by virtue of Sections 91 to 94 of the Information and Technology Act, 2000, in order to make the Indian laws keep pace with changing technology.

The fact that every second case now requires appreciation of electronic evidence on the part of the Judge, it thus becomes imperative that a Judge need to wear a hat of technocrat as well! Applying technology and getting desired results is one thing, but appreciating the value of the evidence is another. One may lose evidence not because of 'lack of technology', but because of 'lack of appreciation of technology'².

Indian Evidence Act, 1872 – Techno Savy Amendments:

More than a century old statute, the Indian Evidence Act, 1872 was amended by virtue of Section 91 of the Information and Technology Act, 2000. These amendments to the Indian Evidence Act, 1872 has given a techno savy look to Evidence Act by including "electronic record, digital signature, certifying authority, etc., within it. The term document under Section 3 of the Act include the electronic record. The meaning assigned to

1. *State v. Mohd. Afzal and others*, 107 (2003) Delhi Law Times 385 (DB)

2. Information Technology Law and Practice, *Vakul Sharma* Fourth Edition Page No.361

the terms relating to electronic record inserted in the Indian Evidence Act, 1872 were same as appearing in the Information Technology Act, 2000. Therefore, one need to fall back to Information Technology Act, 2000 for understanding the meaning of the terms such as certifying authority, electronic signature, electronic signature certificate, electronic form, electronic records, information, secure electronic record, secure electronic signature and subscriber which appear under Section 3 of the Indian Evidence Act, 1872.

Several sections under the Indian Evidence Act, 1872 were amended, for instance “electronic record” is incorporated within meaning of document appearing under Section 3, electronic form is found in Section 17, Section 22-A is inserted which deal with oral admission as to content of electronic records, electronic form is included under Section 34, electronic record is inserted under Sections 35 and 39, Section 47-A deal with opinion of certifying authority as to electronic signature where relevant, electronic records is included under Section 59, proof as to electronic signature is dealt under Section 67-A which is inserted after Section 67, Section 73-A is inserted which deal with proof as to verification of digital signature, electronic record, electronic signature, electronic signature certificate, electronic message are included under presumption appearing in Sections 81, 85-A, 85-B, 85-C, 88-A, 90-A. Section 131 dealing with production of documents which another person, having possession, could refuse to produce is amended by including electronic record. A special provision as to evidence relating to electronic read and its admissibility are incorporated by way of insertion of Sections 65-A and 65-B which is now the focus of present paper.

Understanding the term “Electronic record”:

Before venturing to understand the term “electronic record” as defined under Section 2(1)(t) of Information and Technology Act, 2000, it is necessary to look at some of other connecting terms defined under Act

which have significant bearing in understanding the term “electronic record”.

The term “data” is defined under Section 2(1)(o) of the Information Technology Act, 2000 as, “data means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being process or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer”

The term “computer” is defined under Section 2(1)(i) as “computer means any electronic, magnetic, optical or other high speed data processing device or system which performs logical arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses and includes all input, output processing storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network”.

Under Section 2(r) “electronic form” is defined as “electronic form, with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.” Whereas “information” is defined under Section 2(1)(v) to “include data, message, text, images, sound voice, code, computer programmes, software and database or micro film or computer generated micro fiche.”

The term electronic record is defined under “2(t) which reads as “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.”

The Information and Technology Act, 2000 provides very comprehensive definition of terms “Data”, “Computer”, Electronic form, information, Electronic record *etc.*, showing

that legislators have taken into consideration the nature of evolving technology while enacting the Act. The definition of “data” included tangible and intangible form by stating that data may be present in any form including computer printouts, magnetic or optical storage media, punched cards, punched tapes or stored internally in the memory of the computer. While computer has been defined as device, or system performing logical, arithmetic and memory functions, the requirement is memory function manipulation. In fact definition of term computer is the most significant as several provisions deal with computer and its application in some forms.

The definition of Electronic form with reference to information include audio, video, data, text or multimedia files generated, sent, received or stored in media, magnetic, optical, computer memory, micro film computer generated micro fiche or similar device. As such, emphasis is laid on storage devices. Whereas, definition of information covers both tangible and intangible forms.

The term “electronic record” refer to “data” which is defined under Section 2(1)(o). As stated, Data definition is wide in its scope and application covering both tangible and intangible form. Therefore, any data or information in electronic form found in computer or other device shall be construed as electronic record. It is relevant to note that electronic record does not distinguish between the term data or information stored within a computer or other device as primary or secondary as is the case with documents which are primary or secondary as defined under the Indian Evidence Act, 1872. Therefore, an understanding that need to be evolved out of above discussion would be that “electronic record” does not restrict its meaning to any original data or information being fed into computer or other device. In a way, electronic record could be understood as any data or information stored in any medium/computer or other device, the data or information under such computer or

device cannot be distinguished as primary or secondary in nature and such enquiry is needless exercise considering Sections 65-A and 65-B which relate to admissibility of evidence relating to electronic record.

Special Provision as to evidence relating to Electronic record and its admissibility :

The amendment relating to electronic evidence made to the Indian Evidence Act, 1872 are significant directing the Court in admitting and appreciating the electronic evidence. Of all the amendment, the insertion of Sections 65-A and 65-B relating to special provision as to evidence relating to electronic record and its admissibility has generated much debate in light of judgments of apex Courts.

In *State v. Navjot Sandhu*³, the Hon’ble Supreme Court while dealing with electronic evidence observed that irrespective of the compliance with the requirements of Section 65-B, which is provision dealing with admissibility of electronic evidence, held that there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 and 65.

The decision in *State v. Navjot Sandhu* is overruled by *Anvar P.V. v. P.K. Basheer and others*⁴ in Civil Appeal No.4226 of 2012 decided on September 18, 2014. In this judgment, the Hon’ble Supreme Court has held that Section 65-B of the Evidence Act being a ‘non-obstante clause’ would override the general law on secondary evidence under Sections 63 and 65 of the Evidence Act. Sections 63 and 65 of the Evidence Act have no application to the secondary evidence of the electronic evidence and same shall be wholly governed by Sections 65-A and 65-B of the Evidence Act. The only alternative to prove the electronic record/evidence is by producing the original electronic media as primary evidence to the Court or it’s copy by way of secondary evidence under Sections 65-A and 65-B of Evidence Act. If an electronic record as such

3. (2005) 11 SCC 600

4. (2014) 10 SCC 473

is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65-B of the Evidence Act. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

However, later in *Shamsber Singh Verma v. State of Haryana*⁵, the Hon'ble Supreme Court held the Compact Disc (CD) as document in view of Section 3 of Indian Evidence Act, 1872. After analyzing the precedent law on tape record admissibility⁶ and interpreting Section 294 Cr.P.C., the apex Court came to conclusion that compact disc in criminal proceedings are admissible as document. In this decision, discussion which is made in *Anwar's case* regarding electronic evidence and its admissibility in view of Sections 65-A and 65-B of Indian Evidence Act, 1872 was not taken up.

Analysis of Section 65-B of Indian Evidence Act, 1872:

"Electronic record" is included within definition of document under Section 3 of Indian Evidence Act, 1872. The amendment by way of insertion of Sections 65-A and 65-B provide special provision relation to admission of evidence relating to electronic record. There is special procedure prescribed for admitting evidence relating to electronic record though electronic record is included within definition of document under Section 3 of the Indian Evidence Act, 1872. Therefore, the normal rule for admitting documentary

evidence which is found under Sections 62 to 65 cannot be applied to evidence relating to electronic record.

The admissibility of evidence relating to electronic record is found under Section 65-A of the Indian Evidence Act, 1872 which relate to special procedure as to evidence relating to electronic record. Section 65-A state that "the contents of electronic records may be proved in accordance with the provision of Section 65-B". Therefore analysis of Section 65-B of Indian Evidence Act, 1872 is required for understanding as to how the evidence relating to electronic evidence be received by the Courts.

"Section 65-B: Admissibility of electronic records-(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be a also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible"

It may be noted that the Section 65-B started with a non-obstante clause, thus, notwithstanding anything contained in the Indian Evidence Act, any information contained in 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 65-B(2)⁷. On careful analysis of Section 65-B(1) it is observed that electronic

5. 2015 ALL MR (Cri) 4923, 2016 Cri. LJ 364, 2015 (4) Crimes 353 (SC)

6. Referred to decision in *R.M. Malkani v. State of Maharashtra*, (1973) 1 SCC 471 = 1973 (2) SCR 417, where the Supreme Court has observed that tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of these tape recorded conversation is proved by eliminating the possibility of erasing the tape record.

7. *P.V. Anwar v. P.K. Basbeer*, CA No.4226 of 2012 dated 18.9.2014.

record though included under definition of document but Section 65-B does away with "original" document by not making any distinction as to primary and secondary electronic record. Any information or data which is stored in any device shall be deemed to be document and same would be admissible if the conditions under Section (2) are satisfied and such electronic record hold direct evidentiary value.

(2) The conditions referred to in sub-section (1) in respect of a *computer output* shall be the following, namely:

(a) the computer output containing the information was produced by the computer during that period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of 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;

(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 intend behind enactment of conditions under clause (2) in respect of the computer output is to ensure that the information received from the computer in question is properly processed, stored and reproduced. Therefore, the conditions mentioned under clause (2) of Section 65-B is to identify the computer in question by the person who is in lawful custody of such computer during relevant period when the information was fed into it and state that

such information was fed in the regular course and at such relevant time computer was functioning normally.

(3) Where over any period, the function of storing or processing information for the purpose of any activities regularly carried on over the period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combination of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for the purpose during that period shall be treated for the purposes of this section as constituting a single computer; and the references in this section to a computer shall be construed accordingly.

Where the information is generated by number of computers in combination or succession, all such computers used for generating information are treated as single computer. While sub-section (2) contemplate the circumstance when the information is fed into single computer whereas sub-section (3) extends the scope of sub-section (2) by including computer in combination or succession by stating that information generated by combination or succession of computer shall deem that such information is generated by a single computer.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced.

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the

purpose of showing that the electronic record was produced by computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be 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; and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

The sub-section (4) deal with the ways to certify a statement given in an electronic record. In order to admit an electronic record in any proceedings, such electronic record must be accompanied by certificate to be issued by person occupying a responsible official position in relation to the operation of the relevant device or by the person who has management of the relevant activities.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation – For the purposes of this section any reference to information being derived from other information shall be reference to its being derived therefrom by calculation, comparison or any other process.

Sub-section (5) contain three clauses, clause (a) deals with norms for supplying information in the form of ‘inputs’ to a computer. The information may be provided with or without assistance of human intervention. Clause (b) deals with situation as to how the information is fed into computer in course of official activities.. Clause (c) state that computer output may be produced by computer directly or by means of any appropriate equipment.

Conclusion:

The admissibility of evidence relating to electronic record is specially dealt under Section 65-A which commence with “*non-obstante*” clause showing that admissibility and proof of evidence relating electronic record is dealt with Section 65-B of Indian Evidence Act to the exclusion of other provision of the Indian Evidence Act. The evidence relating to electronic record need to be read with definition appearing under the Information Technology Act, 2000. The “electronic record” as defined under the Information Technology Act, 2000 does not restrict its meaning to any *original data or information* being fed into computer or other device. In a way, electronic record could be understood as any data or information stored in any medium/computer or other device, the data or information under such computer or device cannot be distinguished as *primary or secondary in nature and such enquiry pales into insignificance* considering Sections 65-A and 65-B which relate to admissibility of evidence relating to electronic record.

On keen analysis of *Section 65-B(1) with reference with Information and Technology Act, 2000*, it is observed that *electronic record though included under definition of document but Section 65-B does away with the concept of “original” document by not making any distinction as to primary and secondary electronic record. Any information or data which is stored in any device shall be deemed to be document and same would be admissible if the conditions under sub-section (2) of Section 65-B are satisfied and such electronic record hold direct evidentiary value. Therefore, it need to be understood that evidence relating to electronic record must mandatorily be accompanied by Certificate under Section 65-B of Indian Evidence Act, 1872 irrespective of nature of such electronic evidence as being primary or secondary evidence.*