Appreciation of Electronic Evidence: A Critique of Judicial Approach

6 RMLNLUJ (2014) 24

by
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Abstract — With the ever increasing use of cyberspace for various activities of human life, electronic evidences now form a vital part of all evidences which are sought to be presented in the courts in connection with dispute resolution. It is therefore imperative that the rules for admissibility of electronic records as evidence are recast reflecting the technological changes. At the same time, these rules ought to remain technology-neutral because changes in technology happen very fast.

In this paper, the author seeks to critically examine the rules of appreciation of electronic evidences, especially in criminal trials. The discussion is limited to the aspect of admissibility and appreciation of electronic evidence and does not extend to every aspect of electronic record viz. its authentication rules etc. The paper shall refer to leading judicial pronouncements on the appreciation of electronic evidence and shall, towards the end, make certain recommendations on the issue at hand.

Keywords: Cyberspace; electronic record; electronic evidence; primary evidence; secondary evidence; admissibility.

I. INTRODUCTION

The advent of Information and Communication Technology (ICT) has had enormous impact on the way people communicate and transact business today. The scientific and technological innovations in the realm of ICT have been a great facilitator of seamless business transactions across the border. Be it sale and purchase, auctions or business negotiations, businesses are thriving on the ICT as today cyber space is the place to be in. Nations are embracing the new challenges being posed by the ICT by enacting new legislations and fine-tuning the existing ones. India, in discharge of its obligation under the United Nations Commission on International Trade Law (UNCITRAL), enacted the Information Technology Act, 2000 (ITA) to primarily encourage and legitimize e-business and through the same Act, also amended its Indian Evidence Act, 1872 (IEA) especially on the issue of recognition, admissibility and appreciation of electronic evidence.[1] The ITA was further amended by the Information Technology (Amendment) Act, 2008 (ITAA).[2] The increased use of ICT in planning, facilitating and executing crimes has given rise to many new issues in the law of evidence.

As observed by the Division Bench of Delhi High Court in *State* v. *Mohd. Afzal*[3]:

> "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 had 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 its proof were incorporated."

In both civil and criminal matters, the courts have to consider a lot of electronic records[4] as evidences and this process not only requires viewing the older rules of admissibility of documentary evidences from a new perspective but also applying new rules to the present day challenges. In criminal trials, where the right to life and personal liberty of the accused is at stake, proper appraisal of evidence (oral and documentary) is the most important part of judicial function of a trial judge or magistrate. The correctness of findings of facts and the quality of judgment depends upon whether or not the trial judge or magistrate is familiar with the law applicable to different kinds of evidences of various sorts of witnesses. Similarly, in civil transactions which have been executed in the cyber space, appreciation of electronic evidence becomes vital. Apart from the bare provisions contained in the IEA, and various other laws to deal with the evidence adduced by the parties during trial or proceeding, various judicial pronouncements, particularly from the Supreme Court, have over the years, been guiding the trial and appellate courts in properly analyzing and evaluating the evidence led by the parties.

II. ELECTRONIC RECORD AS EVIDENCE IN UNITED STATES, ENGLAND AND INDIA

A. Position in United States and England

Admissibility of electronic record as evidence in judicial proceedings has been an issue of significant importance in the United States as well as in England.

In the United States, admissibility of evidence is governed by the Federal Rules of Evidence (FRE)[5] and a careful perusal of the same shall reveal that the rules on admissibility of electronic evidence in the United States are almost similar to those in India.[6] In the United States, a landmark decision in *Lorraine* v. *Markel American Insurance Co.*[7] delivered in 2007 by the District Court for Maryland laid down the rules regarding the discovery and production of electronic record. The court held that when an electronic record is produced as evidence, it should be tested on following counts

before it is admissible (i) is the content of the document relevant; (ii) is it genuine; (iii) is it only a hearsay; (iv) whether the document is original or duplicate and in the case of latter, is there any admissible secondary evidence to corroborate it; and (v) whether the probative value of the evidence stands the scrutiny of principles of fair treatment?

Initially, the English Civil Evidence Act, 1968 provided for admissibility of computer generated documents (electronic records) in civil proceedings, even proof of the same by secondary evidence under certain conditions.[8] This Act was replaced by the Civil Evidence Act, 1995 which has made the rule of admissibility of computer generated documents technology-neutral.

Similarly, in criminal proceedings, the Police and Criminal Evidence Act, 1984 put

severe restrictions on admissibility of electronic evidence[9], and it was realized that these restrictions often result in inadmissibility of vital evidences which are electronic in nature or generated through

computers thereby hindering the cause of criminal justice. Consequently, the Youth Justice and Criminal Evidence Act, 1999 removed these restrictions making electronic evidences admissible in most cases.[10]

B. Position in India

One major change brought about in the evidence law through the ITA was recognition of electronic documents as evidence. Though the definition of the term "document"[11] under Section 3 of the IEA does not specifically include an electronic document, but it is clear from the amended definition[12] of the term "evidence" that documents include electronic records. Evidently, for transactions taking place in cyber space and where the documents are in electronic form, as is the contemporary practice[13], it is vital that the electronic documents are recognized as evidence and made admissible as such subject to conditions of admissibility of evidences.[14] Therefore, every data in electronic form be it a text, photograph, internet or phone logs etc. shall be electronic record and as such "evidence" for the purposes of the IEA. For example-A threatens B over telephone with injury if he fails to pay him a certain sum of money. The conversation between A and B are recorded by B on his mobile phone. In A's trial for the offence, the recording of the said conversation shall be an "evidence". In this case, B's mobile phone which contains the voice recording of the conversation or a

transcript of the conversation so recorded may be inspected by the court as "evidence".

In fact, taking note of technological advances, the Supreme Court had observed in *R.M. Malkani* v. *State of Maharashtra*[15] that tape-recorded conversation is admissible in evidence provided that the conversation is relevant to the matters in issue; that there is identification of the voice and that the accuracy of the conversation is proved by eliminating the possibility of erasing the tape-recorded version. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under section 7 of the IEA.[16] It is also comparable to a photograph of a relevant incident.

The Supreme Court has also laid down conditions for admissibility of voice recording of a conversation in following terms:[17]

(1) The voice of the speaker must be identified by the maker of the record or other persons recognizing his voice. Where the maker is unable to identify the voice, strict proof will be required to determine whether or not it was the voice of the alleged speaker.

(2) The accuracy of the tape recorded statement must be proved by the maker of the record by satisfactory evidence: direct or circumstantial.

(3) Possibility of tampering with, or erasure of any part of, the tape recorded statement must be totally excluded.

(4) The tape recorded statement must be relevant.

(5) The recorded cassette/compact disk (or any other device e.g. the mobile phone, data card etc.) must be sealed and must be kept in safe or official custody.
(6) The voice of the particular speaker must be clearly audible and must not be lost or distorted by other sounds or disturbances.

However, it is to be noted that the above conditions of admissibility of tape-recorded conversations were laid down in pre-ITA period and must be understood in proper perspective.

It is also important to note that contents of an electronic record cannot be proved by oral evidence[18] and can only be proved either by primary or secondary evidence.[19] However, as per Section 64 of the IEA, documents, including electronic records, must be proved by primary evidence except in those circumstances as enumerated under Section 65 of IEA when secondary evidence of contents of a document including an electronic record may be given.[20] Sections 64 and 65 of the IEA are based on the cardinal rule of

law of evidence that the best evidence in the circumstances must be given to prove a fact in issue.[21]

Keeping in view the nature of electronic records and ease of tampering with the same, the ITA inserted more stringent conditions for admissibility of secondary evidences as to the contents of an electronic record. Thus, Sections 59-65; 64A & 65B of the IEA provide for a complete set of law on conditions of admissibility of electronic record.

In the early years of the ITA, it had been observed by the Supreme Court in *State (NCT of Delhi)* v. *Navjot Sandhu*[22] (also known as the *Parliament attack case*) that call records of cellular phones are admissible in evidence under section 7 of the IEA and there is no specific bar against the admissibility of the call records of telephones or mobiles. It further held that examining expert to prove the calls on telephone or mobile is not necessary. Interestingly, the Supreme Court in this case also held that secondary evidence of such calls can be led under Sections 63 & 65 of the IEA. In the *Parliament attack case* as the entire conspiracy theory was based on the intercepted call records of the accused persons, a submission was made on behalf of the accused that no reliance could be placed on the mobile telephone call records, because the prosecution had failed to produce the relevant certificate under Section 65B (4) of the IEA. In this case the Supreme Court concluded that a cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time

and the manner in which the printouts of the call records were taken was sufficient to prove the call records.

Unfortunately the Supreme Court did not give due consideration to Sections 65A and 65B of the IEA on the issue of admissibility of electronic records.

In *R.K. Anand* v. *Delhi High Court*[23], 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. The manner of how the CD could be admitted in evidence has been considered in *Ramlila Maidan Incident case*[24] wherein the CD containing the recording along with an affidavit in the manner required under Section 65B of the IEA was directed to be filed in court and the court had taken on record an affirmation by the Trust on affidavit that the CD had not been tampered with. In many cases the courts have denied probative value to the electronic records if the same is not in compliance with Section 65B of the IEA.[25]

Therefore, it appears that electronic record/data being more prone to alteration, change, tampering etc. must pass a more stringent test pertaining to their admissibility.

III. RECENT JUDICIAL TREND ON ADMISSIBILITY OF ELECTRONIC EVIDENCE

The critical issues pertaining to admissibility of electronic evidence remained in a state of flux till recently when in *Anvar P.V.* v. *P.K. Basheer*[26], (hereinafter "*Anvar case*") the Supreme Court seized the opportunity to crystallize the law on admissibility of electronic evidence in a judicial proceeding. What is the nature and manner of admission of electronic records was one of the principal issues for consideration in this appeal. The case relates to the Assembly elections in Kerala in 2011 where the appellant had lost and had preferred an appeal to the High Court for

setting aside the election of the opponent alleging involvement of corrupt practices under Section 100(1)(b) read with Sections 123(2)(ii) and (4) of The Representation of the People Act, 1951 which having lost the appeal to the High Court, the appellants knocked the doors of the apex court. The Supreme Court said that the evidence consisted of three parts - (i) electronic records, (ii) documentary evidence other than electronic records, and (iii) oral evidence. As the major thrust in the arguments was on electronic records, the court first dealt with the same.

The Supreme Court identified Sections 3, 22A, 45A, Section 59, Section 65A & Section 65B of the IEA as relevant for the purpose, especially Section 65B i.e. admissibility of electronic records in this regard. The Court observed:

> "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). Following are the specified conditions Under Section 65B (2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity."[27]

The Supreme Court categorically held that under Section 65B (4) of the IEA, any statement pertaining to electronic record is permissible under the following conditions:

"(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned Under Section 65B (2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device."[28]

Apparently, the above mentioned requirements pertaining to admissibility of electronic records appear to be cumbersome, however, the Supreme Court has avoided possibility of any misgiving about the requirement of such a certificate by holding 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.[29]

The Supreme Court opined that "[A]ll 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."[30] However, only if the electronic record is duly produced in terms of Section 65B of the IEA, the question would arise as to the genuineness thereof and in that situation resort can be made to Section 45A, IEA - opinion of examiner of electronic evidence.[31]

The Supreme Court categorically held that the IEA does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the IEA are not complied with, as the law now stands in India. To this extent, the *Parliament attack case* is overruled.[32]

Soon after this case, the Supreme Court had another opportunity to examine the law on admissibility of electronic evidence in *Sanjaysinh Ramrao Chavan* v. *Dattatray Gulabrao Phalke*.[33] In this case the offence of demanding bribe was sought to be proved by producing a tape-recorded conversation which the Supreme Court found to be inadmissible. In fact, the Directorate of Forensic Science Laboratories, State of Maharashtra had stated in its report that the conversation is not in audible condition and, hence, the same was not considered for spectrographic analysis. The learned counsel for the respondents submitted that the conversation had been translated and the same had been verified by the *panch* witnesses. Admittedly, the *panch* witnesses had not heard the conversation, since they were not present in the room. The Supreme Court held that as the voice recorder was itself not subjected to analysis, there was no point in placing reliance on the translated version, having no source for authenticity of the translation. Approving the decision in *Anvar case*, the Supreme Court reiterated that source and authenticity are the two key factors for electronic evidence.[34]

However, in spite of the *Anvar case* ruling, it seems that the ghost of *Parliament attack case* is still haunting the courts as is evident from the three-judge Bench decision of the Supreme Court in *Tomaso Bruno* v. *State of U.P.*[35] wherein the appellants, two Italian nationals, were convicted for murder of their friend, another Italian national and the evidences against them were largely circumstantial. As the prosecution failed to adduce the "best evidence" in the form of CCTV footage of the hotel where the alleged murder was committed, the Supreme Court acquitted the appellants drawing an adverse inference under Section 114 (g) of the IEA.[36] Though not directly

related with admissibility of electronic evidence under Section 65B of the IEA, the Supreme Court in this case erroneously quoted with approval the *Parliament attack case* proposition on the issue of admissibility of electronic record.[37] Quoting the *Parliament attack case* after the same has been expressly overruled in the *Anvar case* will only add to the confusion on the issue of admissibility of electronic records.

The High Courts have duly relied on the *Anvar case* in deciding admissibility of electronic record as evidence and decisions not in accord with *Anvar case* would have questionable authority. For example, in *Ankur Chawla* v. *CBI*[38], the Delhi High Court quashed the corruption charges framed against the petitioner on the ground that the charges were based on inadmissible audio and video CDs. Agreeing with the submissions of the petitioner that once audio and video CDs are excluded from consideration for want of mandatory certificate under Section 65B of the IEA then there is no incriminating material on record and so impugned order calling upon the petitioners to face trial deserves to be quashed. Similarly, in *Jagdeo Singh* v. *State*[39], quoting *Anvar case*, the Delhi High Court has said that the law on admissibility of

electronic evidence is now abundantly clear. If there is no certificate accompanying electronic evidence in terms of Section 65B of the IEA, such evidence is inadmissible. Consequently, as far as the present case is concerned, as the Court was satisfied that the intercepted telephone calls presented in the form of CDs before the trial court which were then examined by the forensic expert did not satisfy the requirements of Section 65B of the IEA, the net result was that the electronic evidence in this case in the form of the intercepted conversations and the CDRs cannot be looked into by the Court for any purpose whatsoever.

But there are also instances where the *Anvar case* failed to make any impact upon question of admissibility of electronic records strictly in accordance with Section 65B of the IEA. In *Abdul Rahaman Kunji* v. *State of W.B.*[40], a Division Bench of Calcutta High Court, while deciding the admissibility of e-mail, held that an e-mail downloaded and printed from the e-mail account of the person can be proved by virtue of Section 65B read with Section 88A of the IEA. The testimony of the witness who had downloaded and printed the said mails is sufficient to prove the electronic communication even in absence of a certificate in terms of Section 65 B of the IEA. It is submitted that this decision delivered in ignorance of *Anvar case* is *per incurium*.

More recently, in *Ram Kishan Fauji* v. *State of Haryana*[41], conceding that CD was electronic record as defined under the ITA, the Punjab and Haryana High Court held that as there was no link possible between digital evidence storage media, namely, CD and memory chip that was said to have been source for replication of data in CD as mentioned in the Laboratory report, if the CD could not stand test of authenticity by its comparison with its hash value with source, then transcript of what had been obtained through its audio footage or what it purports to capture could not be taken as of any value.

IV. CONCLUSION AND SUGGESTIONS

The law now seems to be settled as to the admissibility of electronic evidence. In *Anvar case* the Supreme Court has settled the controversies surrounding the issue of admissibility of electronic evidence emanating from the conflicting decisions and practices of various High Courts and trial courts. Thus, proof of electronic record is a special provision introduced by the ITA amending various provisions under the IEA. A combined reading of the title of Section 65A of the IEA, with Sections 59 and 65B is sufficient to drive home the point 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 of the IEA has to yield.[42]

The Supreme Court has interpreted Sections 22A, 45A, 59, 65A & 65B of the IEA to hold that data in CD/DVD/Pen Drives or similar devices are not admissible without a certificate under Section 65B (4) of the IEA. It is now absolutely clear that in case of computer output without such a certificate, neither there can be oral evidence to prove the contents of the electronic evidence nor the opinion of the expert under Section 45A could 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 CD/DVD etc. are being forwarded to the courts

without a certificate under Section 65B (4) of the IEA, such CD/DVD 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. These safeguards are taken to ensure the two

hallmarks-source and authenticity of the electronic records. 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.

It is a common knowledge that in several cases where electronic evidence is the most crucial piece of evidence, even the original recordings on CD/DVD/HD etc. are not being preserved properly and once the same is lost or destroyed, there cannot be any question of issuing the certificate as contemplated in Section 65B (4) of the IEA. In such cases, neither the CD/DVD/HD etc. containing the data are admissible nor the oral testimony or expert opinion undermining the case of the party relying on the electronic record. Sections 63 and 65 of the IEA have no relevance to the secondary evidence of the electronic record and the same shall be governed exclusively by Sections 65A and 65B of IEA. Due to ignorance of the rules of admissibility of electronic record as evidence, parties after recording the data on a Mobile Phone/CD/DVD/HD or Pen Drive etc. download the same in other storage medium and delete the original. Evidently, when the original is lost, the transferred/downloaded data becomes secondary evidence and cannot be proved without complying with Section 65B of the IEA.

Today, crime investigation is increasingly becoming dependent on cyber forensics. If the prosecution case is based on circumstantial evidences in the electronic form, the best option to prove it is by producing the original. However, this may not be possible in majority of cases for obvious reasons. In such eventuality, which arises as a matter of routine and not as exception, the only option left is to take recourse to Section 65B of the IEA which overrides the general rule regarding admissibility of secondary evidence; failing this the electronic evidence shall be inadmissible.

In England, the rigid requirements for admissibility of electronic evidence in both civil and criminal proceedings have been done away with and this development has been noted by the Supreme Court of India. It is widely agreed that "…Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced."[43] Apparently, such a presumption does not exist in the IEA.

It is for the Indian Parliament to follow suit and rationalize the rules pertaining to admissibility of electronic evidence. Till then, the Indian law on admissibility of electronic evidence will remain rigid in the light of *Anvar case.*

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[1] The ITA also amended the Indian Penal Code, 1860 and the Bankers' Book Evidence Act, 1891.

[2] The ITAA is often referred to as the law on cyber crimes in India. Whereas, the object of the ITA was to facilitate e-commerce, the ITAA, inter alia, defined cyber crimes of different hues and varieties and made the ITA technology-neutral. See Section 2 of the ITAA, substituting the words "digital signatures" with "electronic

signatures" and Sections 32-34 adding many new cyber crimes to the ITA. Of these, Section 66A of the ITA has been declared unconstitutional whereas Sections 79 has been read down. *See Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1.

[3] (2003) 107 DLT 385.

[4] Section 2 (t) of the ITA defines "electronic record" to mean data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

[5] Available at https://www.law.cornell.edu/rules/fre (last accessed on June 2, 2015).

[6] See Article X, Rules 1001-1006, FRE.

[7] 241 FRD 534 (D. Md. 2007).

[8] "Admissibility of statements produced by Computers"

Section 5(1): In any civil proceedings a statement contained in a document produced by a computer shall, subject to the rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it was shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

(a) that the document containing the statement was produced during a 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, whether for profit or not, by anybody whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

[9] Section 69: Evidence from computer records.

(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown—

(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;

(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and

(c) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

(2) rovision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.

[10] Section 60: Removal of restriction on use of evidence from computer records.

Section 69 of the Police and Criminal Evidence Act, 1984 (evidence from computer records inadmissible unless conditions relating to proper use and operation of computer shown to be satisfied) shall cease to have effect.

[11] "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

[12] Amended by the ITA w.e.f. 17-10-2000. The relevant portion of the definition reads thus: "Evidence" means and includes—

(1).....;

(2) all documents including electronic records produced for the inspection of the Court,

[13] See Section 4 of the ITA: "Legal recognition of electronic records—

Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is—

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.

[14] For a useful discussion on recognition of electronic document as "document", see *Jagjit Singh* v. *State of Haryana*, (2006) 11 SCC 1 : AIR 2007 SC 590; *State of Punjab* v. *Amritsar Beverages Ltd.*, (2006) 7 SCC 607.

[15] (1973) 1 SCC 471 : AIR 1973 SC 157.

[16] Section 7. Facts which are the occasion, cause or effect of facts in issue.—Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant. Illustrations

(a) The question is, whether A robbed B. The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B. Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B. The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

[17] See *Ram Singh* v. *Col. Ram Singh*, 1985 Supp SCC 611.

[18] Section 59 of the IEA says that all facts, except the contents of documents or electronic records, may be proved by oral evidence.

[19] Section 61 of the IEA provides that the contents of documents may be proved either by primary or by secondary evidence. According to Section 62, "Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document; Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original."

Section 63 defines secondary evidence thus: "Secondary evidence means and includes—

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it. Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

[20] Section 65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

[21] *Roop Kumar* v. *Mohan Thedani*, (2003) 6 SCC 595 : AIR 2003 SC 2418 at para 16.

[22] (2005) 11 SCC 600 : AIR 2005 SC 3820.

[23] (2009) 8 SCC 106.

[24] *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1. See also, *Amar Singh* v. *Union of India*, (2011) 7 SCC 69, where the printed transcripts of the CDRs were sought to be adduced as evidence.

[25] See *Dharambir* v. *CBI*, (2008) 148 DLT 289; *Wasim Khan* v. *State of Chhattisgarh*, Criminal Appeals Nos. 143 and 157 of 2008, decided on 13-12-2013 (Chh); *Manoj Kumar* v. *State*, (2013) 196 DLT 243; *Major Singh* v. *State of H.P.*, Criminal Appeal No. 127 of 2013, decided on 6-9-2014 (HP); *Pankaj Kumar* v. *State of H.P.*, 2014 SCC OnLine HP 2710;

[26] (2014) 10 SCC 473 : AIR 2015 SC 180.

[27] *Id.* at para 13.

[28] *Id.* at para 14.

[29] *Id.* at para 15.

[30] *Ibid.*

[31] *Id.* at para 16. The examiner of electronic evidence is appointed under Section 79A of the ITA.

[32] *Id.* at paras 17, 22.

[33] (2015) 3 SCC 123.

[34] *Id.* at para 16.

[35] (2015) 7 SCC 178 : 2015 Cri LJ 1690.

[36] As per Section 114(g) of the IEA, the court can draw an adverse inference against a party that is in possession of "best evidence" and fails to adduce the same or withholds it from production, even if the burden of proving the fact did not lie on him. This presumption under Section 114(g) is only a permissible inference and not a necessary inference.

[37] *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra*, (2012) 9 SCC 1, (the Mumbai attack case) has also been referred to in the same breath.

[38] 2014 SCC OnLine Del 6461.

[39] 2015 SCC OnLine Del 7229.

[40] 2014 SCC OnLine Cal 18816.

[41] 2015 SCC OnLine P&H 5058.

[42] Supra note 26 at paras 19, 22.

[43] *Id.* at para 18.