SNAG OF ELECTRONIC EVIDENCE

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Abstract — Post Anvar P.V. v. *P.K. Basheer, it was well settled that electronic evidence can be proved either by primary or superior evidence due to doctrine of best evidence or under Sections 65A and 65B. The certificate required for application of Section 65B is not possible to obtain all the time. Say for example the primary is with opposite party and it is protected under Article 20 of the Constitution. You could have obtained the secondary evidence but without certificate of opposite party which has no legality under Section 65B of Indian Evidence Act. However, Supreme Court in Anvar P.V.* v. *P.K. Basheer, declares that electronic evidence by secondary means can only be placed before court only if it fulfills the requirements of Section 65B. Thus Section 65B blocks the secondary electronic evidence mostly, when primary is not achievable. This article identifies the legal obstacle in application of electronic secondary evidence.*

Keywords: Electronic Evidence, Electronic Record, Indian Evidence Act, Non-Applicability, Documentry Evidence

I. INTRODUCTION

The rise and popularization of electronic communication have much more than stimulate a revolution concerning most of us have to do with our own professional and certainly personal life, however along with that

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inside the legislative climate and particularly regarding cyber law. Expeditious intake of electronic data unlocked the opportunities to cyber-crimes so that placed mammoth stress on electronic evidences. Contemporary world is watching the swift increase of significance and inclination upon electronic evidence, in any legal system. Social media posts, video, tik tok, instant messaging, emails, online classes, etc. are only a few examples to understand the sprouting of cyber-crimes and difficulty in obtaining the electronic evidence towards conviction.

Keeping up the trustworthiness of electronic evidence all through the cycle of investigation, examination and trial presents various issues from the treatment of customary physical or narrative proof. Some normal issues are significantly exacerbated by the intricacy of computer networks.

Nonetheless this huge assortment of resources of electronic evidence ought to have admission to the legal processes by way of many of the legally administered method of evidence. Keeping the integrity of electronic evidence, during the process of investigation and trial, lays out different issues from the managing of conventional physical or documentary evidence. Some usual issues are greatly intensified by the intricacy of networked computers. This article will attempt to analyze obstacles in application of the provisions of electronic evidence.

II. MEANING OF ELECTRONIC EVIDENCE

Section 3 of Indian Evidence Act, 1872 defines the evidence as, "Evidence means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

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

such documents are called documentary evidence."

Similarly, Section 3 of Indian Evidence Act, 1872 defines "the document as, 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."

What is electronic record that is defined under Section 2(t) of Information Technology Act 2000, 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;"

Section 3 of the Indian Evidence Act was amended and "the phrase, All documents produced for the inspection of the Court was substituted by All documents including electronic records produced for the inspection of the Court". "Regarding the documentary evidence, in Section 59, for the words Content of documents the words Content of documents or electronic records have been substituted and Sections 65A & 65B were inserted to incorporate the admissibility of electronic evidence."

III. ACQUISITION, AUTHENTICATION, AND ADMISSIBILITY OF ELECTRONIC EVIDENCE

Acquisition and Admissibility of electronic evidence is greatly affected by reliability and authenticity. New techniques and devices are the order of the day. "Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence."[1] "Advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency."[2]

It is going to be wrong to deny towards the law of evidence advantages of be achieved by new practices and new contraptions, given the accuracy along the account may well be been confirmed. These kinds of evidence ought to be thought to be using some prudent and evaluated in the light of all the scenarios for every situation. If the electronic evidence is trustworthy and significant exactly the same can definitely be permitted dependent upon the Court remaining satisfied relating to its credibility.

The process of determining whether evidence is worthy is called authentication. Authentication means satisfying the court that (a) the contents of the record have remained unchanged, (b) that the information in the record does in fact originate from its purported source, whether human or machine, and (c) that extraneous information such as the apparent date of the record is accurate. To achieve all the above said, Sections 65A and 65B are incorporated by amendment in Indian Evidence Act, 1872.

Authentication is actually a two-step process, with an initial examination of the evidence to determine that it is what its proponent claims and, later, a

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[1] *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*, (2010) 4 SCC 329.
[2] *Tomaso Bruno* v. *State of U.P.*, (2015) 7 SCC 178.

closer analysis to determine its probative value. In the initial stage, it may be sufficient for an individual who is familiar with the digital evidence to testify to its authenticity. For instance, the individual who collected the evidence can confirm that the evidence presented in court is the same as when it was collected. Alternately, a system administrator can testify that log files presented in court originated from the system.

Electronic evidence appeared to be wedged to relevant dependant upon safety measures implemented by the Court regarding the credibility of the same. Durability of the part of evidence is surely an issue to be identified in the circumstances and facts of an undeniable circumstance. "All the 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."[3]

IV. PRIMARY AND SECONDARY EVIDENCE

"Primary evidence is the document produced before the Court and the expression document is defined in Section 3 of the Evidence Act to mean 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".[4]

It is worthy to mention that under the regulation of Sections 61 to 65 of the Indian Evidence Act, which deals with primary and secondary evidences, "the word Document or content of documents have not been replaced by the word Electronic documents or content of electronic documents while amending the provisions. Thus, the intention of the legislature is explicitly clear i.e. not to extend the applicability of Sections 61 to 65 to the electronic record." It happens to be the primary rule of interpretation when legislators overlooked any terminology, the premise would certainly that omission was planned.

"Hence electronic records are documents and thus under Section 61 of Evidence Act, the contents of documents may be proved either by primary or by secondary evidence,"[5] "if not by legislature then by virtue of best evidence rule. Furthermore, Primary evidence means the document itself produced for the inspection of the court."[6]

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[3] *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473.
[4] S. 3, Indian Evidence Act, 1872.
[5] S. 61, Indian Evidence Act, 1872.
[6] S. 62, Indian Evidence Act, 1872.

V. BEST EVIDENCE RULE

Proving a case to a court often requires using written, recorded or photographic evidence. When written, recorded or photographic evidence is needed for a trial, the Rules of Evidence provide that the "original writing, recording, or photograph must be provided to prove its content unless the original is lost, destroyed, or otherwise unobtainable." This undergirding principle of evidentiary law is called the Best Evidence Rule, also referred to as the original writing rule.

"The rule which is the most universal, namely, that the best evidence the nature of the case will admit shall be produced, decides this objection. That rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it."[7]

The foundation of the Best Evidence Rule is that the original writing, recording or photograph is the 'best' way to prove the actual content of the evidence. This is because requiring best evidence ensures that litigants provide evidence that will best facilitate a court's task of accurately resolving disputed issues of fact.

"It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 are based on this rule."[8]

VI. NON-APPLICABILITY OF TRADITIONAL APPROACH

Now the due to cardinal principle of best evidence rule, the primary source must be produced before the court. In a situation when you are require producing information received into your smart phone in the court, although reluctantly, a few will submit their smart phone in the court. The content in the smart phone being the primary are required to be proved by the primary evidence under the doctrine of best evidence rule.

Further, "***Generalia specialibus non derogant***, special law will always prevail over the general law". It seems, "Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same

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7 *J. Yashoda* v. *K. Shobha Rani*, (2007) 5 SCC 730.

8 *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374.

shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."[9]

But think of a situation where the information in lying in the servers of technical conglomerate like google, facebook or Jio. It would not be practical to ask for servers to be submitted in the court. Here application of best evidence rule is not possible. Sections 65A and 65B comes to rescue the judicial process.

VII. SECTIONS 65A AND 65B

Primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Electronic Records under section 65A of the Evidence Act set up the way that the electronic records may be proved under Section 65B, consequently a different strategy for the electronic evidence emerges. Section 65B (2) features the conditions under which a secondary evidence of an electronic record might be presented before the court.

"Notwithstanding anything contained in this 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 (hereinafter referred to as the computer output) shall be deemed to be 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."[10]

"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."[11]

"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:

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[9] *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374.

[10] S. 65-B, Indian Evidence Act, 1872.

[11] *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473.

(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."[12]

"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."[13] Dependability of the proof is unquestionably an issue to be resolved in current realities and conditions of a reality circumstance. All the safeguards are taken to ensure the source and authenticity.

"Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(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 65-B(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."[14]

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[12] *Ibid.*

[13] *Supra* note 10.

[14] *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473;

However, "It seem reasonable that the applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party."[15] It is least probable to seek certificate along with electronic evidence from the opposite party, when you don't have either primary or secondary copy.

"The two judge bench in *Shafhi Mohammad v. State of H.P.*, held that in a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(4) is not always mandatory."[16]

"The admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced poses most complex situation. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."[17]

However, the provisions of Sections 61 to 65 of the Indian Evidence Act, which deals with primary and secondary evidences, the word "Document or content of documents" have not been supplanted by the word "Electronic documents or content of electronic documents" while while revising the arrangements. Along these lines, the aim of the legislature is expressly clear not to expand the relevance of Sections 61 to 65 to the electronic record.

However, three judge bench in *Anvar P.V. v. P.K. Basheer,* "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."[18]

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[15] *Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801;

[16] *Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801.

[17] *Ibid.*

[18] *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473;

Due to best evidence rule, you should only bring the superior or primary evidence to the court. In case that primary document of opposite party, being servers, networks etc., not particle to place before the court. Further, opposite party is protected to that, "No person accused of any offence shall be compelled to be a witness against himself,"[19] as per Article 20(3) of the Constitution of India. The option left to prove that fact by secondary evidence, and per se secondary document. Any document qualifies to be a document, in case of electronic evidence only it fulfills the requirements of Section 65 B(4), which requires the certificate from that opposite party, which is very less likely to be obtained.

Thus, even the two judge bench permits the non-production of such certificate, but the three judge bench requires that certificate in order to that secondary evidence qualify as document.

However, Section 65B(1) clearly differentiates between the original document, which would be original "electronic record" contained in the "computer" in which the original information is first stored and the computer output containing such information, which then may be treated as evidence of the content of the "original" document. All this necessarily shows that Section 65B differentiate between the original information contained in the "computer" itself and copies made there form the former being primary evidence and the latter being secondary evidence.

In fact, in *Vikram Singh* v. *State of Punjab*,[20] a three-Judge Bench of this Court followed the law in *Anvar P.V.*, clearly stating that where primary evidence in electronic form has been produced, no certificate under Section 65B would be necessary.

Very recently SC observed in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*, that the requisite certificate in Section 65B(4) is unnecessary if the original document itself produced.[21] This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him.[22]

VIII. CONCLUSION

Taking into consideration the technology extension, the admissibility of the secondary electronic evidence must be adjudged by way of characteristics of Section 65 B of Evidence Act and the recommendation considering the law

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[19] Art. 20(3) of the Constitution of India.

[20] (2017) 8 SCC 518.

[21] (2020) 7 SCC 1 : 2020 SCC OnLine SC 571.

[22] *Ibid.*

endorsed inside the latest decision of the Supreme Court as clarified recently referenced. The suggestion is comprehensible and accurate that "the required certificate under Section 65B(4) is unnecessary if the original document itself is produced."[23]

"Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption."

However, there is no denial form the fact that it runs out the options to prove fact, when primary is not achievable or lying with the opposite party. It seems logical to exempt certain cases but not legal after *Anvar P.V.* v. *P.K. Basheer*. Legal process is stalled because of oblique application of Section 65B. It requires the immediate attention of legislature and judiciary to amend the law to break the impasse.

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[23] *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*, (2017) 8 SCC 518.