

WHEN CAN ELECTRONIC EVIDENCE BE ADMITTED IN A COURT OF LAW?

Written by *Harsh Mahaseth*

Assistant Professor, Jindal Global Law School, O.P. Jindal Global University, Sonipat, India

INTRODUCTION

The law relating to evidence has undergone a massive change in the recent years with different types of evidence now being deemed admissible in a court of law. This change has also reached India with there being several amendments to the existing legislations. Under India's obligation to the United Nations Commission on International Trade Law (UNCITRAL) the Information Technology Act, 2000 (Herein referred to as the IT Act) was enacted. This Act legitimized the electronic commerce business and encouraged it in the global market and through this Act the Indian Evidence Act, 1872 (Herein referred to as the Evidence Act) was amended to include provisions regarding electronic evidence. The Evidence Act requires primary evidence to be proved under Section 64 while secondary evidence to be proved under Section 65. Primary evidence is the kind of proof which is regarded as with the greatest certainty of fact in question. All evidence that is excluded from this category is regarded as secondary evidence. The burden of proof to show the admissibility of secondary evidence lies on the party bringing forth the evidence.

Section 65A of the Evidence Act requires electronic evidence to be proved in accordance to the provision of Section 65B. Section 65B was added to the Evidence Act under the Second Schedule of the IT Act. It is a provision which relates to the admissibility of electronic evidence. It provides that any information contained in an electronic record is deemed to be a document admissible as evidence and original, provided that it fulfils the conditions set throughout Section 65B (2) to 65B (5). Thus, every piece of electronic evidence has to be accompanied by a certificate given after the checklist under Section 65B is completed.

THE THRESHOLD REQUIREMENT FOR THE ADMISSIBILITY OF ELECTRONIC EVIDENCE

The situation with regards to the admissibility of electronic evidence was first decided in the 2005 case of *State (NCT of Delhi) v. Navjot Sandhu*.ⁱ This case has also been referred to as the Parliament attack case. In this case the Supreme Court had to deliberate on whether call records of cellular phones submitted by the prosecution were admissible without a certificate which was supposed to be produced along with the evidence as given under Section 65B of the Evidence Act. The Supreme Court held that the call records of cellular phones were considered admissible. It did not consider Section 65A or 65B while dealing with the admissibility of electronic records and allowed the secondary evidence to be provided under Sections 63 and 65 without the certificate as required under Section 65B.

“150. Irrespective of the compliance of the requirements of Section 65B which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 & 65. It may be that the certificate containing the details in sub-Section (4) of Section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 & 65.”

This decision was later followed on in the case of *Rakesh Kumar and Others v. State*.ⁱⁱ In this case the Delhi High Court held that calls records were admissible under Section 63 and 65 and that there is no bar to adduce secondary evidence under the other provisions of the Evidence Act.

The position had remained the same until the landmark case of *Anvar P.V. v. P.K. Basheer* which overruled this position.

The case of *Anvar P.V. v. P.K. Basheer*ⁱⁱⁱ has been a landmark ruling in the recent times which has overruled the previous position regarding the admissibility of electronic evidence. The 3-judge bench of the Supreme Court discussed the position regarding the reliability of electronic evidence and the question of its nature being of secondary evidence while looking at the provisions of the Evidence Act and the IT Act. After a thorough evaluation the Court held that secondary data given in a CD, DVD or pen drive is not admissible without a certificate as provided under Section 65B of the Evidence Act. It is a landmark judgement which has settled

various conflicting judgements which have been followed by the lower Courts. This case has overruled the principles that were laid down in the Parliament attack case. The Anvar P.V. case also holds that if the electronic evidence is not accompanied with a certificate under Section 65B then a question relating to whether the evidence is genuine or not is raised which can then be resorted by Section 45A of the Evidence Act.

THE DISTINCTION LAID DOWN BY THE COURT IN THE ANVAR P.V. CASE

The Supreme Court in the Anvar P.V. case made a distinction between primary and secondary evidence.

“24. the situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs.”

This was an important distinction made by the Supreme Court albeit it was only given a mere reference. However, the importance of this distinction is that electronic evidence can be presented in front of the court as primary evidence under Section 62 of the Evidence Act without providing a certificate as required under Section 65B. The Court had also stated that material such as CDs which are used for announcements and songs can be considered as primary evidence however the recordings were made using other instruments and so they fell under the category of secondary evidence.

In the case of *Preeti Jain v. Kunal Jain and Another*,^{iv} the Rajasthan High Court held that a recording which was done on a pin-hole camera with a hard disk memory would be considered as primary evidence. Since Section 65B only deals with secondary evidence it will not be held applicable in this situation.

This is a major change in the admissibility of electronic evidence as the distinction between primary and secondary evidence needs to be made at the time of every hearing. Therefore, if an electronic evidence is adjudged to be primary evidence then it will be admissible without compliance to the conditions laid down under Section 65B of the Evidence Act. The Anvar P.V. judgement has had a massive impact in the area of admissibility of electronic evidence as the consequent cases have followed the principles laid down by this case.

WHEN DOES THE CERTIFICATE UNDER SECTION 65B NEED TO BE PRESENTED IN FRONT OF THE COURT?

The law regarding the admissibility of electronic evidence has been settled by the Anwar P.V. case; however, the Court did not clarify when the said certificate needs to be provided. This issue has yet to be dealt with by the Supreme Court. There are two cases in the High Court which have dealt with this. Both of the courts have given adjudged that the certificate can be provided at a later stage subsequent to the filing of a charge sheet.

In the case of *Paras Jain v. State of Rajasthan*,^v the Rajasthan High Court held that

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

In the case of *Kundan Singh v. State*,^{vi} the Delhi High Court held that

“40. The expression used in the said paragraph is when the electronic record is “produced in evidence”. Earlier portion of the same sentence emphasises the importance of certificate under Section 65-B and the ratio mandates that the said certificate must accompany the electronic record when the same is “produced in evidence”. To us, the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper printout or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to Section 65-B. This is not so stated in Section 65-B or sub-section (4) thereof. “

“48. The said certificate can be produced when the electronic record is to be admitted and taken on record i.e when the prosecution, defence or a party to the civil litigation wants the electronic record to be marked as an exhibit and read in evidence.”

In the case of *Pravata Kumar Tripathy v. Union of India*,^{vii} the Orissa High Court held that the criteria as laid down under the Anvar P.V. case does not need to be fulfilled while considering the bail application.

THE LEGAL SCENARIO POST THE ANVAR P.V. CASE

There have been several High Courts that have relied on the Anvar P.V. judgement to decide on the admissibility of electronic evidence.

In the case of *Balasaheb Gurling Todkari and Ors. v. State of Maharashtra*,^{viii} the Bombay High Court followed the Anvar P.V. judgement and ruled that CDR reports and electronic evidence are not admissible as evidence in the absence of a certificate as per Section 65B.

In the case of *Ankur Chawla v CBI*,^{ix} the Delhi High Court upheld the Anvar P.V. judgement and did not allow the use of the electronic evidence as it was not provided along with a certificate as required by Section 65B. The High Court further held that the defendant cannot be put on trial even if a strong suspicion arises against him.

In the subsequent case of *Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke*,^x the Supreme Court declared the tape-recorded conversation to be inadmissible. By referring to the Anvar P.V. case it held that the two key factors for the admissibility of electronic evidence is the source and the authenticity.

While there have been several High Courts that have relied on the Anvar P.V. judgement to decide on the admissibility of electronic evidence, there have been cases where the High Courts have taken differing opinions.

In the case of *Tomaso Bruno v. State of U.P.*,^{xi} the Supreme Court quoted the Parliament attack case with regard to the position of admissibility of electronic evidence. The Court not mentioned and disregarded the Anvar P.V. judgement.

In the case of *Abdul Rahaman Kunji v. State of West Bengal*,^{xii} the Calcutta High Court held that electronic evidence can be admitted without the certificate under Section 65B by virtue of reading Section 65B with Section 88A of the Evidence Act. The High Court further went on record to state that the case decision was given *per incurium* of the Anvar P.V. case.

In the case of *Sonu v State of Haryana*,^{xiii} despite placing reliance on the Anvar P.V case the Court held that the requisite of producing a certificate is a procedural defect which can be

corrected only during the course of the trial if an objection is put forth by a party, when the document was adduced as evidence.

Despite these differing opinions, a greater part of the jurisprudence has continued to rely on the Anvar P.V case to determine the admissibility of electronic evidence.^{xiv} However, in 2018 in the case of *Shafhi Mohammed v. State of Himachal Pradesh*,^{xv} a division bench of the Supreme Court watered down the necessity of a certificate under Section 65B through its judgement. While relying on the *Tomaso Bruno* case to determine the requirement of producing a certificate under Section 65B (4), the court stated that this requisite was not mandatory and merely procedural. The Court further stated that the section was to be applied only when the electronic evidence is produced by a person whose position avails him to be in possession of said device.

Thus, “29. ...*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 absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.*”

The judgement in the Shafhi Mohammed case created a conflicting pronouncement when compared to the Anvar P.V case. Multiple judgements arose that followed the Shafhi Mohammed case's watered-down admissibility.^{xvi} Owing to this conflict, in *Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal And Others*,^{xvii} the Supreme Court opined the necessity to lay down the law regarding electronic evidence with certainty and referred the matter to a larger bench. Proceeding this referral, in 2020, a three judge bench reinforced the requisite of producing a certificate under section 65B (4) and overruled the Shafhi Mohammed Case.^{xviii} In addition to this reinforcement the judgement also clarified multiple aspects of section 65B and laid down directives to process electronic evidence. The key aspects of the judgement are as follows-

1. The declaration of law in the Tomaso Bruno case that placed reliance on the Navjot Sandhu case was overruled. Considering the declaration was in teeth of the Anvar P.V case it was held to not be a correct statement of the law.

2. The judgment in the Shafhi Mohammad case that is in the teeth of the judgment in the Anvar P.V. case was overruled. While citing Section 165 of the Evidence Act, Order XVI of the Civil Procedure Code and Sections 91 & 349 of the Code of Criminal Procedure the major premise of Shafhi Mohammad i.e. only a person in possession of an electronic device can procure a certificate was held to be wholly incorrect. Further stating that, in a situation where such person refuses, an application can be made to a judge to procure such certificate under Section 65B(4).

3. The court highlighted that in the present case i.e. the Arjun Panditrao case, in spite of the party's efforts to procure the requisite certificate from the concerned authorities under Section 65B (4), the authorities refused to do so. In light of this predicament the Court stressed on two Latin Maxims; *lex non cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused. Owing to the applicability of these maxims the court stated that the concerned party must be afforded relief from the requisites of Section 65B (4).

4. The court conferred upon the trial court the duty to summon person(s) referred to in Section 65B to give the requisite certificate, in situations where the certificate given is either defective or where the demanded certificate is not given by the concerned person. However, the court drew a distinction between civil and criminal proceedings for the same; stating that in criminal trials all the documents the prosecution seeks to rely upon must be supplied by the accused before the commencement of the trial. This in turn allows the accused to prep for the trial before its commencement. While in civil cases it is subject to discretion as per law and in accordance "*with the requirements of justice on the facts of each case*".

5. Subject to the above caveat, the court concurred with the judgements in the Anvar P.V case and the Kundan Singh case^{xix} to state that the requisite certificate can either be directed or produced by the judge at any stage on the condition that the trial hearing is not over. The person who gives such certificate can be any of the multiple persons occupying "a responsible official position" or "the management of relevant activities" under Section 65B (4).

6. The court reiterated the requisite certificate as a condition precedent to the admissibility of electronic evidence and further stated that oral evidence instead of said certificate cannot satisfy as Section 65B (4). Owing to this view the court overruled Madras High Court's decision in the K. Ramajyam^{xx} case.

7. No certificate under Section 65 B is required where electronic evidence has been produced as primary evidence i.e. the original document itself is produced. *"This can be done by the owner of a laptop computer, 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."* The Supreme Court clarified the aforesaid position by placing reliance on the Anvar P.V case and further stated that this position need not be revisited.

8. The court issued certain directives to cellular companies and internet service providers for the maintenance of Call Detail Records and other relevant records. These directives ought to be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These would be applicable to all proceedings until rules and directions under Section 67C of the Information Technology Act and data retention conditions would be formulated. The court also recommended the concerned authorities to examine the 'Draft Rules for the Reception, Retrieval, Authentication and Preservation of Electronic Records' with the objective of statutory enforcement.

CONCLUSION

There is no distinction in the admissibility of electronic evidence under the Indian laws in criminal and civil proceedings. It should also be remembered that admission of documents do not amount to the admission of the validity of its content. The validity of the content is still required to be proven and the burden of proof varies in both criminal and civil proceedings: civil proceedings have the test of preponderance of probabilities while in criminal proceedings the facts need to be proved beyond a reasonable doubt.^{xxi} However this distinction only becomes clear after the admissibility of the evidence is proved and has been admitted in the Court under Section 65B of the Evidence Act.

As far as it has been seen until now, Section 65B of the Evidence Act has been pre-dominantly in use in criminal proceedings rather than civil proceedings. The evidence that is being admitted under Section 65B is generally the deciding factor between a conviction and an acquittal. Sometimes electronic evidence may be the only evidence available and if it is inadmissible then the defendant would be acquitted. In light of this observation it becomes crucial to question the admissibility of electronic evidences.

With regards to the threshold held by the Courts with respect to the admissibility of electronic evidence, the prosecution would prefer a lower threshold to convict more defendants while the defendants would prefer a higher threshold to acquit more defendants. Allowing a lower threshold could however increase the abuse of electronic evidence. It is here that Blackstone's formulation should be remembered: "It is better that ten guilty persons escape than that one innocent suffer". This is one of the basic principles of our criminal jurisprudence. It is due to this principle that the Evidence Act has laid down a strict procedure in order for an electronic evidence to become admissible.

The Supreme Court in the Anvar P.V. case had explicitly overruled the cases where the Courts had been admitting electronic evidence which did not comply with the procedure laid down under Section 65B of the Evidence Act. The reinforcement of this principle by the Supreme Court in the Arjun Panditrao case has gone a long way in correcting the judicial interpretation regarding the admissibility of electronic evidence and the previous abuse and injustices cause due to the admitted uncertified electronic evidence. Enforcing a stricter compatibility with the existing procedure certainly alleviates the risk of tampering with electronic evidence and is a commendable approach. However, the Court affording relief to the concerned party from the procedures under 65B could prove to create an escape route, that the judiciary aims to avoid in the first place. The application of the specified maxims ought to be permitted only in exceptional cases. Unreservedly meting out relief on the basis of this proposition would be in contrast with the spirit of this judgement.

Justice V. Ramasubramanian's concurring judgement partakes in an examination of the legal developments on the admissibility of electronic records in U.S.A., U.K. and Canada. He reflects upon the fine-tuned legislation of these jurisdictions and stresses on the necessity to re-examine Section 65B of the Indian Evidence Act. The Indian Parliament has to look at the rules pertaining to electronic evidence and decide upon what to do. However, till that is done the *Arjun Panditrao Khotkar* judgement is the applicable Indian law with regard to the

admissibility of electronic evidence. The widespread use of electronic evidence has brought forth an entire new question regarding the admissibility and reliability of electronic evidence and the future cases in this regard can change the very face of the way how the judiciary handles cases.

ENDNOTES

ⁱ State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.

ⁱⁱ Rakesh Kumar and Others v. State, 2009 SCC Online Del 2609.

ⁱⁱⁱ Anvar P.V. v. P.K. Basheer, AIR 2015 SC 180.

^{iv} Preeti Jain v. Kunal Jain and Another, 2016 SCC Online Raj 2838.

^v Paras Jain v. State of Rajasthan, 2015 SCC Online Raj 8331.

^{vi} Kundan Singh v. State, 2015 SCC Online Del 13647.

^{vii} Pravata Kumar Tripathy v. Union of India, 2014 SCC Online Ori 407.

^{viii} Balasaheb Gurling Todkari and Ors. v. State of Maharashtra, 2015 SCC Online Bom 3360.

^{ix} Ankur Chawla v CBI, 2014 SCC Online Del 6461.

^x Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke, (2015) 7 SCC 178.

^{xi} Tomaso Bruno v. State of U.P., (2015) 7 SCC 178.

^{xii} Abdul Rahaman Kunji v. State of West Bengal, 2014 SCC Online Cal 18816.

^{xiii} Sonu v State of Haryana, 2017 SCC OnLine SC 765

^{xiv} M/s. ICICI Bank Limited v. Kamini Sharma & Anr, 2018 SCC OnLine Del 6933; Prabeen Kumar v. The State of Bihar through Central Bureau of Investigation, 2017 SCC OnLine Pat 1030; Vikram Singh and Another v State of Punjab and Another, 2017 SCC OnLine SC 1169; The State of Maharashtra, through Police Station Officer, Lakadganj Police Station, Nagpur v Rajesh S/o Dhannalal Daware and Another, 2016 SCC OnLine Bom 2596; Girwar Singh v. CBI, 2016 SCC OnLine Del 2329; Harpal Singh alias Chhota v State of Punjab, 2016 SCC OnLine SC 1293; R.S. Raja Kannappan v. K.R. Periakaruppa, 2015 SCC Online Mad 12741; S.K. Saini v. C.B.I., 2015 SCC Online Del 11472; Jagdeo Singh v. State, 2015 SCC Online Del 7229; S.M. Katwal v. Virbhadra Singh, 2015 SCC Online HP 1155.

^{xv} Shafhi Mohammed v. State of Himachal Pradesh, 2018 SCC OnLine SC 56

^{xvi} Barnali Baishya v. State of U.P. and Another, 2018 SCC OnLine All 5603; The State of Maharashtra v. Chandrabhan Sudam Sanap, 2018 SCC OnLine Bom 6576; Puneet Prakash v. Suresh Kumar Singhal & Anr., 2018 SCC OnLine Del 9857

^{xvii} Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Others, 2019 SCC OnLine SC 1553

^{xviii} Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Others, 2020 SCC OnLine SC 571

^{xix} Kundan Singh v. State, 2015 SCC OnLine Del 13647

^{xx} K. Ramajyam v. The Inspector of Police, 2016 SCC OnLine Mad 451

^{xxi} Razik Ram v. Jaswant Singh Chouhan, (1975) 4 SCC 769