

## **ADMISSIBILITY OF EVIDENCE OF ELECTRONIC RECORD IN INDIA<sup>1</sup>**

By a recent Judgement dated 14.07.2020, the Supreme Court of India while deciding Arjun PanditRao Khotkar<sup>2</sup> settled the law relating to admissibility of evidence of electronic records in legal proceedings. Above said judgement was delivered by a three-judge bench comprising of Hon'ble Justices Mr R.F. Nariman, Mr S. Ravindra Bhatt and Mr V. Ramasubramanian JJ dealing with the interpretation of Section 65B of the Evidence Act<sup>3</sup>. The said bench was formed to decide the correctness of the judgement of the Supreme Court of India in Shafhi Mohammad Case<sup>4</sup> in the light of a judgement given by a three-judge bench of the Supreme Court in Anvar P V Case<sup>5</sup>. The above said sec 65B of the Evidence Act was introduced 20 years ago by an Act 21 of 2000 is neither in line with the development of technology nor in line with the major jurisdictions of the world, was the comment of Justice V. Ramasubramanian who wrote a supplementary judgement, even though he concurred with the majority view.

As a matter of practice, genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. Hence, one of the principle issues that arise in a court proceeding is the nature and manner of electronic records in a court proceeding. This becomes important in view of section 22 A of the Evidence Act that reads that oral admissions to the contents

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<sup>2</sup> Arjun Panditrao Khotkar Vs Kailash Kushan Rao Gorantyal and others, (2020) SCCOnline SC 571

<sup>3</sup> Indian Evidence Act, 1872

<sup>4</sup> Shafhi Mohammad Vs State of Himachal Pradesh, (2018) 2 SCC 801

<sup>5</sup> Anvar PV Vs PK Bhaseer , (2014) 10 SCC 473

of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. Moreover, section 59 under part II of Evidence Act dealing with proof reads that all facts, except the contents of the documents or electronic records, may be proved by oral evidence. More importantly section 65A of the Evidence Act reads that the contents of electronic records may be proved in accordance with the provisions of section 65B.

Section 65B of the Evidence Act states that any information contained in the electronic record shall be deemed to be a document without further proof or production of the original as an admissible evidence. In 65B(2) it explains certain conditions that are required to be fulfilled, to make the electronic record as an admissible evidence which include that the record is produced from the computer which was used to store and process the information by the person having lawful control over the computer in the course of regular business activities, during the said period the said device was operating properly, the information contained in the electronic record is derived from such information fed into the computer etc., In addition to that the person occupying a responsible official position in relation to the operation of the relevant device should certify certain aspects under Section 65B(4) of the Evidence Act. For the convenience the said section is reproduced below-

*“(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate stating 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 a 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 manner stated in the certificate; and for the purposes 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 of stating it. ”*

The main issue covered in the article is whether the above said certificate under section 65B (4) is mandatory or not for the purpose of admissibility of an Electronic record as an evidence. In the case of Anvar P V (Supra) the Court held that 65B(4) certificate by the competent person is mandatory requirement for admissibility of an electronic record as an evidence. It further held that the person who certifies only needs to state that the certificate that the same is to the best of his knowledge and belief. Most importantly the said certificate should accompany the electronic record like Computer Printout, Compact Disc(CD), Video Compact Disc(VCD), Pen drive etc., pertaining to which a statement sought to be given in evidence, when the same is produced in evidence. It further stated that only if the electronic evidence is duly produced in terms of Section 65B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A, opinion of Examiner of Electronic Evidence. It further held that the Evidence Act does not contemplate or permit the proof of an Electronic record by an oral evidence if requirements under Section 65B of the Evidence Act are not complied with as the law now stands in India.

Later various judgments including Shafhi Mohamad(Supra) held 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 certificates being in control of the said device and not of the opposite party. It was further held that in a case where electronic evidence is produced by a party who is not in possession of a device, such party cannot be required to produce certificate under section 65B(4) of the Evidence Act. It was further held that the applicability of requirement of the said certificate being procedural it can be relaxed by the Court whenever interest of justice so justifies.

But in the above said Arjun Panditrao (Supra), the Supreme Court of India settled the law by overruling Shafhi Mohammad (Supra) and declaring Tomaso judgement<sup>6</sup> of the Supreme Court of India and upheld Anvar PV (Supra) with one alteration in paragraph 24 by deleting the words “under section 62 of the Evidence Act”. Hence, the law as on today with regard to admissibility of electronic record as evidence can be summarized as follows:

- a) The required certificate under section 65B(4) is unnecessary if 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.
- b) In cases where the computer happens to be part of a computer system or computer network and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with section 65B(1), together with the requisite certificate under section 65B(4).

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<sup>6</sup> Tomaso Bruno Vs State of UP, (2015) 7 SCC 178

c) Hence, the certificate under section 65B(4) of the Evidence Act is mandatory and not procedural.

Indian Arbitration Act<sup>7</sup> expressly excludes the applicability of Evidence Act to the arbitration proceedings and hence the above said requirement of filing a certificate under section 65B(4) does not arise with regard to electronic records produced as evidence in an arbitration proceeding.

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<sup>7</sup> Arbitration and Conciliation Act, 1996