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## Electronic Evidence: Its Relevance and Admissibility under the Indian Evidence Act, 1972

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*Electronic evidence has been the most significant form of evidence in the 21<sup>st</sup> century. This is because of the rapidly developing technological environment, whereby technological gadgets like cellphones, tablets, laptops, etc have become necessities and this has resulted in the way communications and transactions are made and stored. In addition to being used for the purpose of communication, cell phones and other gadgets are used by people to archive their lives which again relates back to the concept of evidence as this archived information, which includes photos, videos, messages, emails, audio recordings, etc can be used as evidence in the court. Legal recognition was provided for electronic data/documents by virtue of Section 65A and 65B of the Indian Evidence Act, 1872<sup>1</sup> which was added to the Indian Evidence Act post the amendment of the Information Technology Act, 2000. The Indian government amended the Information Technology Act, of 2000 with the official goal of providing legal recognition for transactions carried out through electronic data interchange and other forms of electronic communication, commonly referred to as electronic commerce, which involve the use of alternatives to paper-based methods of communication and information storage and to facilitate electronic filing of documents with the government. The author through this research paper seeks to carry out a thorough analysis of the concept of electronic evidence, to try and understand the meaning, relevance, and admissibility of electronic evidence under the Indian Evidence Act and in order to do so, various judgments passed by the Supreme Court have been taken into cognizance.*

**Keywords:** *electronic evidence, admissibility, evidence act, section 65a & b.*

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<sup>1</sup> Indian Evidence Act, 1872, ss 65A and 65B

## **INTRODUCTION: ELECTRONIC EVIDENCE - MEANING**

Electronic evidence is data that is monitored, extracted, or distributed through a communications process by any man-made machine, program, or network system, including the performance of analogue devices or data in digital format, that can potentially make either party's truthful record more plausible or less likely than it would be without the evidence. The first component of the previously described definition is that it is supposed to include all sorts of evidence that is created, managed, or stored in any device or piece of technology that may be considered a computer. The second component is to include many sorts of devices that may be used to transfer information, such as basic gadgets that can provide a legitimate output. The third component limits the information to material that is relevant to the point on which the adjudicator is deciding the contested dispute, regardless of the nature or severity of the disagreement. The last component, however, limits the scope of electronic evidence to what the parties are willing to provide in the course of the fact-finding process. Because some evidence will be admissible but excluded by the adjudicator within their remit of authority, or inadmissible for reasons that have nothing to do with the nature of the evidence, the third part of the definition of e-evidence that deals with the aspect of admissibility but does not use admissibility in itself as a defining criterion. The huge development in e-administration in recent times has spread to both the private and public sectors and electronic evidence has grown to be considered a fundamental form of evidence as it is linked to almost all important functions like communication, administration, etc. Government organizations have been coming up with various laws, rules, and regulations to keep an eye on the transaction that has been taking place electronically. The different types of Electronic Evidence are also being utilized in the legal procedures and the judges are regularly made to decide on the suitability of electronic proof and consider the impact of the same with regard to the conviction or exoneration rates. The Court keeps on wrestling with this considerably new form of evidence because of its one-of-a-kind nature which is prone to be distorted easily and the same creates issues with regard to the admissibility of the other forms of pieces of evidence.

## **ELECTRONIC EVIDENCE AND ITS ADMISSIBILITY**

The definition of evidence under Section 3 of the Indian Evidence Act, 1872, distinguishes between two forms of evidence: a) oral evidence and b) documentary evidence, which includes electronic records prepared for the court's scrutiny<sup>2</sup>. The definitions for electronic evidence are found in Sections 65A and 65B of the Act, which was added to the Evidence Act with the introduction of the Information and Technology Act. The primary premise governing the evidence act is that direct oral evidence is elevated to the status of a valid type of evidence capable of proving or vouching for all facts, with the exclusion of records. According to the hearsay rule, any non-direct oral evidence cannot be considered unless and until it meets one of the exceptions mentioned in Sections 59 and 60<sup>3</sup> of the Evidence Act, as read with the hearsay rule. Hearsay evidence refers to a statement by an individual who is not present at the trial to another person and this is offered by another third party during the trial as evidence. The law bars the admissibility of such forms of evidence as it is troublesome and difficult to decide its credibility and accuracy which again requires a long interrogation process. It is not possible nor is it practical to conduct a cross-examination of the person who made the statement under question and to whom the statement was made, the evidence provided by the third party, in this case, is not taken into consideration. It is well recognized that the document itself serves as the main piece of proof<sup>4</sup>. However, there are several situations in which such proof might not be available. As a result, Section 63 of the Evidence Act made secondary evidence such as certificates and mechanically processed copies of the primary evidence acceptable<sup>5</sup>. As a result, the hearsay rule's requirements are weakened by the rules for allowing secondary evidence. As the digital age came into being, it also included the digitization of documents, which led to a number of new challenges to the hearsay rule because the law had previously only addressed the admissibility of secondary forms of evidence in addition to the primary form of evidence. However, as documents became more digital, the admissibility of secondary documents was now more broadly defined. The phrases

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<sup>2</sup> Indian Evidence Act, 1872, s 3

<sup>3</sup> Indian Evidence Act, 1872, ss 59 and 60

<sup>4</sup> Indian Evidence Act, 1872, s 62

<sup>5</sup> Indian Evidence Act, 1872, s 63

document or content of documents are used instead of electronic documents or content of electronic documents in Sections 61 to 65 of the act to stress the expanded application of the aforementioned provisions with regard to electronic records<sup>6</sup>. The IT Act modified Section 59<sup>7</sup> of the Evidence Act by inserting Sections 65A and 65B<sup>8</sup>, two new evidentiary requirements for electronic records. These two sections of the act deal with the consideration of electronic evidence as a piece of primary evidence, doing away with the concept of electronic evidence being considered as a form of hearsay evidence, but it is only considered if the said evidence fulfills the conditions laid out under section 65A of the Evidence Act, which establishes special law for electronic evidence. The contents of electronic records may be proved in accordance with section 65B's provisions. Section 65B and Section 65C<sup>9</sup> of the Evidence Act emphasizes the instances whereby the computers can be considered as one despite the time frame in which the information was added or processed by the computer and the interlinked computers. Section 65B talks about the furnishing of a certificate that would identify the electronic records that would vouch for the manner in which the said piece of evidence was manufactured or produced by a computer and the same must be attested by a person who occupies a respectable position in the place where the operation of the device is done or must be a part of the management of the activities that is in line with the operation of the concerned device.

## CASE LAWS

*Som Prakash v State of Delhi*<sup>10</sup>- In this case Supreme Court observed that it is imperative that there are some changes made at regular intervals in the statutory systems in order to build a capable mechanism that could effectively deal with the system of justice and significantly reduce the burden that is put on the investigators of the cases and the judges of the court.

*Shafi Mohammad v State of Himachal Pradesh*<sup>11</sup>- The Apex court in this case held that in case a person isn't in a position to produce the certificate that is attested by a person occupying

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<sup>6</sup> Indian Evidence Act, 1872, ss 61-65

<sup>7</sup> Indian Evidence Act, 1872, s 59

<sup>8</sup> Indian Evidence Act, 1872, ss 65A and 65B

<sup>9</sup> Indian Evidence Act, 1872, ss 65B and 65C

<sup>10</sup> *Som Prakash v State of Delhi* (1974), AIR 989

<sup>11</sup> *Shafhi Mohammad v The State of Himachal Pradesh* (2017) SLP (Criminal) No. 2302/2017

some sort of a responsible position in the place where the device is being operated or managed then in such instances application of Section 65B (4)<sup>12</sup> must not be done as the same would result in denial of justice as the furnishing of the certificate is absolutely mandatory

*Anvar v Basheer*<sup>13</sup>- The Supreme Court determined that Section 65A of the Evidence Act, when read alongside Sections 59 and 65B, is sufficient to find that the special rules on evidence pertaining to electronic records must follow the process outlined in Section 65B of the Evidence Act, that alone is a whole code.

*Sanjay Singh Ramrao v Dattaray Gulabrao Phalke*<sup>14</sup>- When assessing whether the transcription of a recorded discussion in a situation where the tape has been translated might be accepted, the court in this opinion relied on the decision in the Anvar case.

*Tomaso Bruno and Anr. v State of Uttar Pradesh*<sup>15</sup>- In this matter, the court noted that electronic evidence was crucial for proving the facts and that scientific rigour and advancements in information technology had to permeate the inquiry process.

*Dharambir v CBI*<sup>16</sup> - The Delhi High Court ruled that Section 65B of the Indian Evidence Act must be followed and that the accused is entitled to all information that is actively accessible and stored in subcutaneous memory, including a mirror image of the original electronic media on which the data was originally stored.

*Basavraj R. Patil v State of Karnataka*<sup>17</sup> - In this case, the question that was put before the court of laws was whether while recording the statement under Section 313 of the Criminal Procedure Code<sup>18</sup> the physical presence of the accused was mandatory. The court decided that because evolution has made a substantial beneficial contribution to the advancement of the legal system in the nation, the aforementioned part of the Criminal Code must be taken into

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<sup>12</sup> Indian Evidence Act, 1872, s 65B(4)

<sup>13</sup> *Anvar P.V v P.K.Basheer & Ors.*, (2014) Civil Appeal No. 4226/2012

<sup>14</sup> *Sanjay Singh Ramrao v Dattaray Gulabrao Phalke* (2015) Criminal Appeal No. 97/2015

<sup>15</sup> *Tomaso Bruno and Anr., v State of Uttar Pradesh* (2015) Criminal Appeal No. 142/2015

<sup>16</sup> *Dharambir v CBI* 148 (2008) DLT 289

<sup>17</sup> *Basavraj R. Patil v State of Karnataka* (2000) 8 SCC 740

<sup>18</sup> Criminal Procedure Code, 1973, s 313

consideration in a manner that accommodates the changes that they have brought about. The accused is not required to appear in person before the court in order to respond to the court's inquiries. This implies that evidence can be presented electronically, even through video conferencing, even in criminal situations.

*Abdul Rahaman Kunji v State of West Bengal*<sup>19</sup>- In this matter, the court ruled that secondary electronic evidence cannot be admitted into evidence without being provided with a certificate as required by Section 65B of the Evidence Act, and the court is not permitted to address this question in any way.

*SIL Import, USA v Exim Aides Exporters*<sup>20</sup>- In this case, the Supreme Court ruled that technical development had already begun before Parliament had a chance to examine the bill for the Amendment Act. Therefore, we cannot ignore the fact that Parliament was aware of these advancements that were already in use when it regarded the notice in writing.

## CONCLUSIONS AND RECOMMENDATIONS

Strict adherence to the conditions enlisted under Section 65B of the Evidence Act is absolutely mandatory for people who plan to depend upon the furnishing of any form of an electronic record to prove their case in a court of law. This opinion of the Apex Court was primarily made to make sure that the electronic evidence is of a reliable nature, that is free from any sort of tampering or misuse or changes that were wrongfully done to convict another person who is innocent. The Indian Evidence Act also needs to undergo a lot of changes and amendments in order to be accommodative to the changing times and be able to face the issues that come with the electronic pieces of evidence. These types of evidence are generally very easily susceptible to tampering and misuse by any person who has the access to the information. The next issue is with regards to the authenticity of the electronic record, the authenticity can be verified by including a condition that the document was made in the standard manner by an individual who has got nothing to do with the case and also by providing a valid and acceptable guarantee that the document in question was prepared by a group of people who

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<sup>19</sup> *Abdul Rahaman Kunji v The State of West Bengal* (2014) Criminal Appeal No. 454/2009

<sup>20</sup> *M/S. Sil Import, USA v M/S. Exim Aides Silk Exporters* (1999)

were antagonistic to the defender of the document and that the said document was being utilized against the party, this reduces the risk the records being manipulated to a certain extent. This is to be done when a party that has no sort of interest or benefit in the proceedings of the case will find the need to ensure the genuineness of the document that could have been altered or tampered with by another party. The law in our country must also seek to provide a solution to the problem with regards to the importance that is being put on the furnishing of a document declaring the originality and credibility of the person who generated the document ensuring that the document generated is free from any sort of external meddling and tampering. The courts also must be aware of the fact that manufacturing, altering, and changing the information is an easy job as the same isn't addressed by Section 65B of the Evidence Act. There have been a lot of issues lately in the technological world because of constant malpractices and frauds that are being committed like falsely altering data, impersonating another falsely, etc. It leads to some serious questions being raised with regards to the authenticity of the information that was created and transmitted via the electronic space as such information is prone to tampering by a lot of external parties. It is hence understood that India still can't seem to devise a system that would confidently guarantee the complete veracity of the substance of electronic records, which are prone to be an easy target of tampering by any person or group of persons who have access to the server or the computer where such information has been stored. There are a lot of advantages that come with the admissibility of electronic evidence but there are some disadvantages and complexities that also come along and it is the duty of the courts to analyse the validity and admissibility of the evidence in the cases by analyzing whether the evidence that is being offered is in compliance to the essential pre-conditions spelled out under the provisions of the Act.