

## Electronic evidence at Trial: Appreciating digital issues and Adjudication process

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### Abstract:

How to admit electronic evidence to decide cases has become a major conundrum in Indian judicial practice. As a new branch of evidence with high technology, digital evidence has been playing an increasingly important role in solving legal disputes. In the meantime, it has also brought variety of issues and challenges into the legal system regarding evidence, such as how to search, seize and preserve digital evidence, how to analyse, review and digital evidence, and more importantly, how to effectively decide cases based on electronic evidence.

Digital or electronic evidence is any probative information stored or transmitted in digital form that a person to a court case may use at trial. Before accepting digital evidence a court will determine if the evidence is relevant, if it is authentic, if it is hearsay and if a copy is acceptable or the original is required.

### INTRODUCTION

How to admit electronic evidence to decide cases has become a major conundrum in Indian judicial practice. As a new branch of evidence with high technology, digital evidence has been playing an increasingly important role in solving legal disputes. In the meantime, it has also brought variety of issues and challenges into the legal system regarding evidence, such as how to search, seize and preserve digital evidence, how to analyse, review and digital evidence, and more importantly, how to effectively decide cases based on electronic evidence.

Digital or electronic evidence is any probative information stored or transmitted in digital form that a person to a court case may use at trial. Before accepting digital evidence a court will determine if the evidence is relevant, if it is authentic, if it is hearsay and if a copy is acceptable or the original is required.

E-Evidence is found in any digital forms like e-mails, digital photographs, ATM transaction logs, word processing documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser history and databases etc.

The courts were sceptical in admitting the digital evidence in the very beginning. But slowly they started admitting the same and gave them the status of corroboratory evidence. The opinion of Indian Judiciary at that point of time is that digital evidence is very much fragile and is prone to manipulation. Indian courts in number of cases opined that Digital Evidence be likely to be more voluminous, easy to destroy, easily modified and duplicated, potentially more expressive and more readily available.

### **Significance of Cyber Forensics:**

Recently a new branch of forensics has developed and helped in bringing authenticity to the electronic or digital evidence found in computers and any digital storage mediums. The goal of computer forensics is to explain the current state of a digital artifact which can include a computer system, storage medium (hard disk or pen drive), an electronic document (e.g., a spam email message or ads on browser) or even a sequence of packets moving in a computer network.

Computer forensics is a branch of forensic science pertaining to legal evidence found in any computers and any digital storage mediums. Computer forensics is also known as digital forensics. The goal of computer forensics is to explain the current state of a digital artifact.

The term digital artifact can include, a computer system, storage medium (hard disk or pen drive), an electronic document (e.g. an email message or any URL link) or even a sequence of packets moving in a computer network.

### **Development of Law relating to Electronic Evidence:**

The information and Technology Act,2000 authenticated or recognized all kinds of electronic evidences. The definition of 'documentary evidence' has been modified to include all other documents, including electronic records produced for inspection by the court. Section number 3 of the Evidence Act, was amended to the effect that all electronic documents, records were given a legal status of evidence.

The Information Technology Act is based on the UNCITRAL (United Nations Commission on International Trade Law) model Law on Electronic Commerce.

Amendments to the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker's Book Evidence Act 1891 provides the legislative framework for transactions in electronic world.

The definition of 'evidence' has been amended/modified to include electronic records.

The definition of 'documentary evidence' has been amended to include all the documents, including electronic records produced for inspection by the court.

Section 3 of the Evidence Act, 1872 says evidence as under:

"Evidence" - Evidence means and includes: -

1)-----

2) any documents including electronic records produced for the inspection of the court.

The term 'electronic records' has the same meaning as that assigned to it under the IT Act. IT Act give for "data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated microfiche". The definition of 'admission' (Section 17 of the Evidence Act) has been changed to include a statement in oral, documentary, or electronic form which suggests an inference to any fact at issue or of relevance. New Section 22A has been placed

into Evidence Act to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides those oral admissions regarding the contents of electronic records are not suits unless the genuineness of the electronic records produced is in question.

### **Issue of Primary and Secondary Evidence vis-à-vis Electronic Evidence:**

According to Section 61 of IEA, contents of documents may be given either by Primary or by Secondary evidence. As per section 62 Primary Evidence says the document itself produced for the inspection of the Court.

When the question regarding submission of primary or secondary evidence in relation to electronic documents arises, Section 65A provides that contents of electronic records may be proved in accordance with the provisions of Section 65B. as per the general rule laid down in the Indian Evidence Act all the document shall be proved with the help of primary evidence <sup>1</sup>. Therefore, acceptance of Secondary Evidence is only an exceptional provision which is subjected to the conditions mentioned in Section 65.<sup>2</sup>

Any electronic document whether it is primary or secondary is not humanly readable. Court cannot take a view of its own because the document is written in binary language and readable only in a binary reading device ie.. a computer. Hence according to one view Hence Electronic Documents are to be always produced only with another human being providing a written testimony to what the document contains and the discussion regarding the “primary” and “Secondary” nature of documents in electronic form is practically of not any use.

Section 65B of Indian Evidence Act indicates the manner in which a certificate has to be produced in sequence to make an electronic document admissible in a Court. It is not necessary to discuss whether it is admissible as a “Primary” document or a “Secondary” document.

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<sup>1</sup> Sec 64

- <sup>2</sup> Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:
  - (a) When the original is provided or appears to be in the possession or power of the person against whom the document is sought to be shown, 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 notice.
  - (c) When the original has been tear down 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 consist of numerous accounts or other documents which cannot conveniently be examined in the Court, and the fact to be proved is the normal result of the whole collections.

When the hard disk that is taken out of a computer and said to contain an electronic document, it is only a "Container" of an "Electronic Document" is not the electronic document itself. It applies even to a CD which contains only one document which is under reference of the Court. The subject document can only be read by a human being when the "container" is connected to a compatible electro mechanical device namely the "Computer System" and read through an operating system such as Windows with an application such as "Microsoft word". Even if the Judge fixes a computer in the Court room and himself reads the document, his reading is dependent on the device called the "Computer", the operating system and the application which should be functioning normally. Hence an electronic document has to be always certified to the effect that this is what the document means when read in a computer with appropriate application running in an appropriate operating system". The person who provides the certification assists the Court like an "Expert". This has been recognized and implemented in the Section 65A calling itself as "Special Provision" and indicating the certification process under "Section 65B"

**The Core Law relating to admission of electronic evidence:**

Section 65B provides that notwithstanding anything contained in the Evidence Act and any information contained in an electronic record, is deemed to be a document and is admissible in the evidence without further proof of the original's production, provided that the conditions are set out in Section 65B are satisfied.

Section 65B(1) states that if any information is in an electronic record produced from a computer (known as computer output) has been copied on to a optical or magnetic media, then such electronic record has been copied 'shall be deemed to be also a document' subject to conditions set out in Section 65B(2) being satisfied.

Both in relation to the information as well as the computer in question such document 'shall be admissible in any of proceedings when further proof or production of the original same as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.'

The conditions specified in Section 65(B)(2) are:

1. Starting, the computer output containing the information should have been given by the computer during the period of which computer was used regularly to store or process information for the purpose of any activities regularly carried on over that particular period by the person having lawful control over the use of the computer.
2. The second requirement says that it must be shown that during the said period the information of the type contained in electronic record or of the kind from which the information contained is derived was 'regularly fed into the computer in the ordinary course of the said activity'.
3. A third requirement points that 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 that break is not affect either the record or the accuracy of its contents.

4. The fourth requirement points that the information present in the record should be a reproduction or derived from the information fed into the computer in the ordinary course of the said activity.

Under Section 65B(4) the certificate which identifies the electronic record having the statement and describes the manner in which it was produced giving the items of the device involved in the production of that record and deals with the conditions mentioned in Section 65(B)(2) and is signed by a person occupying a responsible official position in relation to the operation of the relevant device 'shall be evidence of any matter stated in the certificate'.

#### **Judicial Recognition of Electronic Evidences:**

Slowly courts have started accepting evidences recorded digitally. For instance in *Amitabh Bagchi Vs. Ena Bagchi*<sup>3</sup> the court held that the physical presence of person in Court is optional for purpose of adducing evidence and the same can be done through medium like video conferencing.

*State of Maharashtra v Dr Praful B Desai*<sup>4</sup> involved the question whether a witness can be examined by the way of a video conference. The Supreme Court observed that video conferencing is an improvement of science and technology which permits seeing, hearing and talking with someone who is not physically present at the court with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The court allowed to examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.

In *Tomaso Bruno and Anr. v. State*<sup>5</sup> of Uttar Pradesh, a three-Judge Bench observed that "improvement of information technology and scientific temper must pervade the way of investigation. Electronic evidence was relevant to build the facts. Scientific and electronic evidence can be a very help to an investigating agency".

#### **Judicial Interpretation of Sec 65 A and 65B:**

In *Bodala, Mr. Murali Krishna Vs. Smt. Bodala Prathima*<sup>6</sup> the court held that, "the amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were added into law. This provisions are referred only to demonstrate the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence."

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<sup>4</sup> AIR 2003 SC 2053.

<sup>5</sup> MANU/SC/0057/2015 : (2015) 7 SCC 178.

<sup>6</sup> (2007 (2) ALD 72)

In Dharambir, CBI(Central Bureau of Investigation)<sup>7</sup>, the court arrived at the conclusion that when Section 65B talks of an electronic record produced by a computer referred to as the computer output) it would also include a hard disc in which information were stored or was earlier stored or continues to be stored.

It distinguished as there being two levels of an electronic record. One is the hard disc which is used itself becomes an electronic record in the relation to the information regarding the changes. Hard disc has been subject to and which information is retrievable from the hard disc by using a software program.

Another level of electronic record is the active accessible information recorded in the hard disc in the form of a sound file, text file or a video file etc. Such information's are accessible and can be converted or copied as such to another magnetic or electronic device like a CD, pen drive etc.

Even a empty hard disc which has no information but was once used for recording information can also be copied by producing a copied had or a mirror image.

In State (NCT of Delhi) v Navjot Sandhu<sup>8</sup>, there was an appeal against conviction of the attack on Parliament held on December 13, 2001. In this case dealt with the proof and admissibility of telephone call records.

While taking the appeal against the accused for attacking the Parliament, a submission was made on be-half of the accused that no reliance could be put on the mobile telephone call records, due to the prosecution had failed to produce the relevant certificate under Section 65B(4) of the Evidence Act.

The Supreme Court finalized that a cross-examination of the competent witness acquainted with the functioning of computer during the relevant time and the manner in which the printed copies of the call records were taken was sufficient to prove the call records.

In *Mr. Jagjit Singh vs State of Haryana*<sup>9</sup> the speaker of the Legislative Assembly of the State of Haryana rejected a member for defection. While hearing the matter, the Supreme Court took the appreciation of digital evidence in the form of interview transcripts from the ZeeNews television channel. The Aaj Tak television channel and the Haryana News of Punjab television channel. The court found that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview while reaching the conclusion that the voices recorded on the CD were those of the persons taking action. The Supreme Court found no infirmity in the speaker's reliance on the digital evidence and the conclusions reached by him. The comments written in this case indicate a trend emerging in Indian courts. i.e., judges are recognize and appreciate the importance of digital evidence in legal proceedings.

In Twentieth Century, The Fox Film Corporation vs NRI Film Production Associates (P) Ltd.<sup>10</sup>certain conditions have been break down for video-recording of evidence:

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<sup>7</sup> (148 (2008) DLT 289)

<sup>8</sup> **(AIR 2005 SC 3820).**

<sup>9</sup> (2006) 11 SCC 1

<sup>10</sup> (AIR 2003 Kant 148)

- “1. Before a witness is examined in terms of the Audio and Video Link, witness is to place an affidavit or an undertaking duly verified before a notary or a Judge that person, who is shown as the witness is the same as who is going to depose on the screen. A copy is to be provided to the other side. (Identification affidavit).
2. The person who examines with the witness on the screen is also to file an affidavit/undertaking before taking the examining the witness with a copy to the other side with regard to identification.
3. The witness must be examined during working hours of Indian Courts. Oath is to be administered through the media.
4. The witness should not plead any inconvenience on account of time difference between India and USA or any other country.
5. Before taking examination of the witness, a set of plaint, written statement and other documents must be read and sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.
6. Learned Judge has to record such kind of remarks as is material regarding the demur of the witness while on the screen.
7. Learned Judge must note the objections raised during recording of witness and to take the same at the time of arguments.
8. Once recording the evidence, the same has to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.
9. The visual has to be recorded and the record would be at the both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.
10. The learned Judge may also impose such other conditions as they are necessary in each set of facts.
11. The expenses and the arrangements are to be made by the applicant who wants this facility.”

**Relevancy and admissibility of the Electronic Evidence:**

In Kundan Singh Vs. The State, the genuineness of mobile records was called in question. The CDR copy was retrieved from archives of the company but was not stamped<sup>11</sup>. The computer output submitted shall satisfy the conditions laid down in Sub clause 4 of Sec 65<sup>12</sup>.

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<sup>11</sup> [MANU/DE/3674/2015]

<sup>12</sup> “The certificate under sub-section (4) to Section 65B must state the following:

- (a) Identify the electronic record by identifying the statement, that is "computer output" in form of printed copies, recorded, or stored optical or magnetic media.

Another controversy was also clarified regarding the issue of whether the certificate issued under Sec 65 shall be issued along with the submission of evidence or during the trial when the person is called for Evidence. In *Mr. Anwar P.V. (S) vs P.K. Basheer*<sup>13</sup> and Others, the Supreme Court has held that the certificate shall accompany the electronic record such as print out “,

The supreme court referred to *Anwar P.V. Basheer* wherein it is noticed the differences between the relevancy and admissibility, which is examined at the initial stage and genuineness, veracity and reliability of the evidence, which is seen by the court subsequently or in the second stage.

In *Mr. Ram Singh and Ors. vs. Col. Ram Singh*<sup>14</sup>, a Three-Judge Bench considered the said issue. The court felt that “it will be wrong to reject the law of evidence advantages to be gained by new techniques and new digital devices, given the accuracy of the recording can be proved. This kind of evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same.”

In *Mr. Shafhi Mohammad vs. The State of Himachal Pradesh*<sup>15</sup> one of the questions which during the trial whether videography of the ‘scene of recovery’ during investigation should be necessary to inspire confidence in the form of evidence collected. The court re-created its decision rendered in *Navjotsingh Sandu* and held that “The applicability of procedural requirement Under Section 65B(4) of Evidence Act to furnishing certificate is to be applied only when such electronic evidence is given by the person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In this case, electronic evidence is produced by a party who is not in position 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 reject of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such kind of 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. Therefore, requirement of certificate Under Section 65B(h) is not always mandatory”.

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(b) Particulars of the device present in the production of that electronic record to show that the electronic record was produced by the computer; and

(c) State that the computer output has many information, which was stored or input into the computer over the stated period when computer was regularly used to store or process information. The computer output consists of information or data or is derived from information regularly fed into the computer in ordinary course of such activities.

(d) The certificate should state as required by sub-clause (c) to sub-section (2) that the computer is during the relevant periods was working properly and if it was not operating properly during the time or a part of the said time, it had not affected the electronic record or accuracy thereof.”

<sup>13</sup> [MANU/SC/0834/2014].

<sup>14</sup> MANU/SC/0176/1985 : 1985 (Supp) SCC 611.

<sup>15</sup> MANU/SC/0058/2018



In Mr. Arjun Panditrao Khotkar vs. Mr. Kailash Kushanrao Gorantyal and Ors<sup>16</sup>. The video recording evidence is the election commission office was submitted which was duly certified by the concerned officer. The court held that “ the certificate required Under Section 65B(4) is a possible precedent to the admissibility of evidence by the way of electronic record, as correctly held in Anvar P.V. , and incorrectly "clarified" in Shafhi Mohammed. Oral evidence in the this place of such certificate cannot possibly suffice as Section 65B(4) is a compulsory requirement of the law.” Section 65B(4) of the Evidence Act clearly states that the secondary evidence is admissible only if lead in the manner stated or not. To hold otherwise would render Section 65B(4) otiose”.

Most of the judgment given by J. Rama Subramaniam and J. Rohinton cleared the position of law regarding the admissibility of primary and secondary electronic evidence. Most view is “The evidence relating to electronic record, as noted before, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of an Evidence Act shall yield to the same. ‘*Generalia specialibus non derogant*’, special law will always be prevail over the general law. It looks, the court skipped to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no record in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, statement of law on admissibility of secondary evidence pertaining to electronic record, as mentioned by this Court in Navjot Sandhu case, does not lay down the proper legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65-B are satisfied. Hence, in the case of CD, DVD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which secondary evidence pertaining to that electronic record, is inadmissible”.

So the Supreme court has finally laid the controversy to rest by saying that Original evidence is admissible U/s 62, Certificate U/s 65B is mandatory for secondary evidence, 65B(2) to be complied, Certificate U/s 65B can't be substituted by the statement of the witness. It also clarified that in a criminal trial, Certificate U/s 65B is to be filed before the start of trial but in appropriate cases, the certificate U/s 65B could be produced at a later stage. Judge is given a discretion to produce fresh 65B in place of defective certificate. Court U/s 91 or 311 Cr. P.C. or 165 Evidence Act, can direct the party possessing the original evidence to produce the certificate U/s 65B.

- In case of CDR, the opposite party cannot challenge the veracity of the evidence if the same is destroyed, so direction be issued to the companies to preserve the evidence for production during trial.
- Laddi v State of Haryana (2013), SC in Pratap Singh v State of Punjab
- The relationship between the law and technology is not easy. One and law has indeed yielded in favor of technology.

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<sup>16</sup> MANU/SC/0521/2020

- tape recording of a relevant conversation is admissible under sec 7 of the IEA
- Rakesh Kumar v State (2009), 65B makes admissible as a document, printed paper of electronic records stored in optical or magnetic media generated by a computer subject to the fulfillment of subsection (2 ) of 65 B.
- Delhi High Court, Mr. Abdul Rahman Kunji vs. State of west Bengal, 65 B is a complete code.
- In Mr. Kundan Singh vs. State, the Bench of Delhi High court has held that “secondary evidence in the form of a printed paper or media output produced by copying, recording or storing data files is treated as document and are admissible and bear the same status as ‘direct evidence” on the question of admissibility. The provision negates and does not require production of the original computer, equipment/media which the data was stored and from which computer output be it in the form of paper print or optical medium data has been obtained.
- Raksha Jindal v CBI (2015) The Delhi High Court eschewed the electronic evidence on record as the certificate requirement under sec 65B was not complied with.
- State of Harayana v Shamsheer ( 2014) the Punjab and Harayana High Court called the electronic evidence as “rickety evidence” and as it was not at all supported by a certificate under section 65B acquitted some of the accused in a murder case.
- State v Om Prakash Srivastav (2013), a case of extortion where the entire evidence rested on call and SMS records Delhi District Court acquitted the accused for want of sufficient evidence as the certificate under Sec 65 B was not produced.
- Khalistan Zindabad Force (2015) for alleged smuggling of drugs and where the raid resulted in heavy arms and ammunitions the Delhi High Court rejected the digital evidence in the form of intercepted conversations and the CDRs for want of certificates. The trial court had relied on the same and convicted the accused.
- Vicky v State of Rajasthan (2015), Rajasthan High Court rejected call records on the ground of lack of 65B certificate but convicted on the ground that defective investigation cant be a ground for acquittal.
- ARK Shipping Co Ltd (2008) the Bombay High Court held – an affidavit of evidence in lines with the requirements under sec 65B were sufficient compliance with the requirement of the said provision for proving electronic records.
- Puneet Malhotra (2014) a case was registered for circulation of obscene messages, a lady receiving vulgar messages complained and the accused acquitted for noncompliance with 65B certification. It held that deposition in examination in chief. In a manner akin to section 65B of IEA was of no consequence. (District Court)

#### Oral Evidence on Electronic Evidence

- This difference provides clarification on when a “Oral Admission” may be relevant is same as the application of Section 45A the role of a Digital Evidence Examiner referred to under Section 79A of ITA 2000/8
- The Judgment looked to Section 22A of IEA which stated, *“Oral admissions as to the contents of electronic records are not relevant, until the genuineness of the electronic record produced is in question.”*
- Judgment also referred to Section 45A as per which the opinion of Digital Evidence Examiner (under Section 79A-When appointed) is relevant only if the genuineness of an already admitted electronic evidence is in question.
- Under Section 65B (4) of an Evidence Act, if it is desired to provide a statement in any proceedings pertaining to an digital record, it is permissible provided the following conditions are satisfied:
  - (a) There must be a certificate which says the electronic record containing the statement;
  - (b) The certificate must describe the way the digital record was produced.
  - (c) The certificate must furnish the type of the device involved in the production of that record.
  - (d) The certificate must engage with the applicable conditions mentioned Under Section 65B(2) of the Evidence Act; and
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- (e) The certificate must be signed off by the person occupying a responsible official position in relation to the operation of the relevant device.

Stage of submission of the certificate:

- Trial
- Anvar stopped with saying the certification is mandatory
- Silent about the stage of submission?
- Who will certify?
- Created confusion – resulted in many acquittals for want of certificate
- Salman Salim Khan v The state of Maharashtra (2015)
  - death of one platform dweller.
  - rejected the evidentiary value of receipts for want of 65 B certificate which proves that he took drinks in a Bar

Sudir Engineering Company vs. Nitco Roadways Ltd. (23.03.1995 - DELHC) : MANU/DE/0414/1995

- Any document submitted by either party passes through 3 stages before it is held proved or disproved. These are:
- First stage: when the documents are submitted by either party in the Court; these documents are on file, do not become part of the judicial record.
- Second stage: when the documents are produced as evidence by the party and the Court admits the documents in evidence. A document admitted in evidence becomes a part of the judicial record of the case and constitutes evidence.
- Third stage: the documents which are held “proved or not proved or disproved” when the Court is called upon to apply its judicial mind by reference to Section 3 of the Evidence Act. Normally, this stage arrives 31 the final date of the suit or proceeding.
- Hence the certificate is required at the stage of evidence

According to the amendment to Section 17 of Indian Evidence Act (IEA) newly introduced by ITA 2000, evidence are consists of 3 types namely

a) Oral

b) Documentary

c) Electronic Document

- This amendment has introduced new “Third Category of Evidentiary Statement” called “Electronic Documents” to the two other type of documents.
- It’s treated as a documentary evidence
- *“Electronic record are produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872.”* (IEA),
- **Presumption in Law:** In any proceedings involving a secure digital record, the court shall presume, unless contrary is proved, that the secure electronic record has not been altered until the specific point of time, to which the secure status relates. The law also says that in any proceedings, involving secure digital signature, the court shall allow, unless the contrary is proved, that the secure digital signature is affixed with the intention of signing or approving the electronic record
- *Mrs. Societe Des products Nestle SA case 2006 (33) PTC 469 & State v Mohd Afzal, 2003 (7) AD (Delhi)*<sup>1</sup>
- By virue provision of Section 65A, the contents of digital records may be proved in evidence by parties in accordance with provision of 65B.
- Held- Sub section (1) of section 65b does admissible as a document, printed paper of electronic records stored in optical or magnetic media produced by a computer subject to fulfillment of conditions specified in subsection two of Section 65B.

- The computer from record is generated was regularly used to store or process information or data in respect of activity regularly carried on by the person having lawful control over the period and relates to the period over which the computer was regularly used.
- Information was inserted into the computer in the ordinary course of the activities of the person having lawful control over the computer.
- The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy.
- Information or the data reproduced is such as is fed into computer in the ordinary course of activity.

What is primary and what is secondary?  
65A is independent of other sections:

- According to Section 61
  - Contents of documents may be given either by Primary or by Secondary evidence
- According to Section 62
  - Primary Evidence is the document itself produced for the inspection of the Court

65A is independent of other sections

- According to Section 63
  - Secondary Evidence is and includes
    - Certified copies provided under the provisions hereinafter contained.
    - Copies made from the original evidence by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies.
    - Copies prepared from or compared with the original.
    - Counter parts of the documents as against the parties who did not execute them.
    - Oral accounts of the contents of documents are given by some person who has himself seen it.
- According to Section 64
  - Documents are proved by primary evidence except in the cases hereinafter mentioned.
- Acceptance of Secondary Evidence is therefore only an exceptional provision
- It is subject to conditions mentioned in Section 65

Exceptions for invoking Section 65:

- The secondary evidence may be given of the existence, condition or contents of a document in the following cases:
  - (a) When the original evidence is shown or appears to be in the possession or power of the person against whom the document is sought to be proved or any person out 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 or a condition or a content of the original evidence have been proved to be admitted in writing by a person against whom it is proved or by his representative in interest.
  - (c) When the original evidence has been break down or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default produce it in reasonable time.
  - (d) When the original evidence is of such a nature as not to be easily movable.
  - (e) When the original evidence is a public document within the meaning of Section 74.
  - (f) When the original evidence 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 original evidence consist 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 collections.

Every Electronic Document has to be “Certified”:

- Hence an electronic document has to be always certified to the effect
  - “This is what the document means when read in a computer with appropriate application running in an appropriate operating system”
    - » The person who provides the certification assists the Court like an “Expert”
  - This has been recognized and implemented in the Section 65A calling itself as “Special Provision” and indicating the certification process under “Section 65B”

[Anvar P.V. Vs P.K.Basheer](#) and others (Supreme Court of India Appeal No 4228 of 2012) Mr. Lodha R.M, Mr. Kurian Joseph and Miss. Rohinton Fali Nariman:

- First Principle enunciated by Basheer Judgment

*“Evidence is built by the Plaintiff and challenged by the defendant. Construction is through pleadings and submitted the evidence by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the Court after the stage of relevancy and admissibility”.*

- This distinction provides clarity on when a “Oral Admission” may be relevant as well as the application of Section 45A role of a Digital Evidence Examiner (DEE) referred under Section 79A of ITA 2000/8
- The Judgment pointed to Section 22A of IEA which stated as the *“Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.”*
- Judgment again pointed to Section 45A according to which the opinion of Digital Evidence Examiner (under Section 79A-When appointed) is applicable only when the genuineness of an already admitted electronic evidence is in question.
- According to ITA 2000,
- *A document is being generated or having been prepared or have been prepared in a formalized way and intended to be processed or being processed or has been processed in a computer system and in any kind will be considered as an “Electronic Record/Document”.*
- In view to the above, the “Computer Printout” which for all ordinary person looks like a “Document” (category 2 of section 17 of IEA), is to the discerning eyes, actually a “Document in Electronic Form” (category 3 of Section 17 of IEA).
- This fine distinction refers to an important aspect of Section 65B and same to which of the computer print-outs require section 65B certification and which don’t.
- When a person signing the printed document is the person who is the owner of the content of the print out, he might simply affix his signature to the document without a Section 65B certificate similar to a case where we use a Computer as a Type writer.
- Therefore, if any Bank Manager is signing a statement of account of a customer. He will simply sign without Section 65B certificate since he is already authorized by the Bank to take responsibility for the transactions represented by the statement.
- If, a document is viewed by a person other than the person who owns the content, and he wants to provide a print out of the document. Then he needs to provide a Section 65B certification.
- Hence, A kiosk operator of e-Governance system who can view the land records in the computer can give a certified copy as a printout though he is not the Tahasildar or the Village accountant provided he appends certificates as required under Section 65B.
- *Proof of digital record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The vary caption of Section 65A of the Evidence Act. Read with Sections 59 and 65B is enough to hold 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.”*

- It categorically mentioned that “Being a special law, the general law under Sections 63 and 65 has to yield.”
- *“An digital record by means of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied.”*
- It continued to state,
- *“in the case of CD, DVD or chip and etc., the same shall be accompanied by the certificate in means of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible”*
- It also stated,
- *“The situation would have been different the appellant adduced primary evidence, by making available in evidence data, the CDs used for records and songs. Had those CDs used for objectionable songs or records been duly got seized through the police or Election Commission and had same been used as the primary evidence, the High Court could have played major of the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements or records were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification.*
- *It is clear that notwithstanding what we have stated in the preceding paragraphs on the secondary evidence on digital record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same can be admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.”*

Who can give the 65B certificate ?.

- Section 65B also makes a straight statement that a computer output produced with Section 65B certificate is to be considered as “also a document” and does not state it is a primary or secondary document. It only mention that this computer output is also deemed to be a document acceptable without the production of the “original” and does not specifically state that it is a “acceptable secondary document”
- Section 79A is an enabling provision which mentions as under.
- Section 79A Central Government to notify Examiner of Electronic Evidence
- The Central Government may or may not, for the purposes of providing expert opinion on digital form evidence before any court or other authority specify, by notification in the official Gazette, any department, body or patries of the Central Government or a State Government as an Examiner of Electronic Evidence.



- Explanation: - the purpose of this section, “Electronic Form Evidence” (EFE) says any information or data of probative value that is either stored or sent in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines”.
- This section has introduced in the Information Technology Amendment Act 2008 and became an effective from 27th October 2009. Under this provision the Indian Government was empowered to appoint any “agency of the Central or State Government” as an “Examiner of Electronic Evidence”. This is not meant for individual parties but only for an organization.
- It is expected that any organization would follow few standard practices which make their process reliable enough for the Court to consider the evidence certified by it as authentic enough to proceed with the trial.
- Section 45A of the Indian Evidence Act (IEA) stipulates the opinion of the examiner of the electronic evidence appointed pursuant to sec 79A of the IT Act would be a relevant fact.
- Expert of cyber forensics comes under section 5 but 45A excludes all of them
- Evidence Act for both civil and criminal cases.
- It will be a main process in all such forensic investigations that lab will on receipt of a material create cloned copies so that any request for production of the evidence in the form in which it was presented to them is fulfilled.
- But just because of evidence is certified by a “Digital Evidence Examiner”, Court cannot refuse to allow the defendant to question the evidence. This would volume to trampling of the rights of the defendant.
- Therefore, we should accept the use of Digital Evidence Examiner should be considered as “discretionary” and not “mandatory”. Whenever there is a “reasonable” doubt as to the authenticity of an electronic document presented as evidence, then court may adopt a mandatory requirement of examination by an “accredited digital evidence examiner” while the Police will continue to have the discretion to adopt it as a “Best Practice”.
- The Supreme Court bought out an in-depth analysis of the law governing digital records in India and UK wherefrom Section 65B bears its genesis and held inter alia as follows:
  - The certificate required under Section 65B(4) is a condition precedent to the admissibility of digital evidence by means of electronic record and overruled the judgment passed in Mr. *Shafhi*. Further, the judgment in *Tomaso Bruno v. State of U.P.* [(2015)7SCC178] was ordered per incuriam and the judgment in *K. Ramajyam v. Inspector of Police* [(2016)Crl.LJ1542] passed by Madras High Court was overruled.
- Section 65B (1) couched in a non-obstante class clarifies that admissibility and proof of information or data contained in an digital record must follow Section 65B, being a special provision and Sections 62 to 65 are irrelevant with respect to such electronic records.
- Digital records have be the original data of information contained in the “computer” itself and copies made therefrom, such “original” being primary evidence while the copies being

secondary evidence. Therefore, the certificate in Section 65B (4) is unnecessary if the original evidence itself is produced. Such production of the original may be by way of the owner of a laptop, tablet or a mobile phone into the witness box and giving that the concerned device, on which the original information is first stored, is owned and/or operated by him. This kind of proof however cannot be adduced if the device cannot be physically brought to Court [in such case the only means of proving the data will be in accordance with Section 65B(1) read with Section 65B(4)]. Accordingly, the Court clarified that the last sentence in paragraph 24 of *Anvar* which reads as “...if an electronic record as such is used as primary evidence *under Section 62 of the Evidence Act...*”, may more appropriately be read without the words “under Section 62 of the Evidence Act”.

- The risk in obtaining a document can be avoided by many statutory provisions:

(i) Section 165 of the Act empowers a Judge to order production of any document or thing in order to discover or obtain proof of relevant facts; (ii) Order XVI of the Civil Procedure Code. In 1908 deals with ‘Summoning and Attendance of Witnesses’ and the Court can issue orders for the production of documents;

(iii) Sections 91 and 349 of the Code of Criminal Procedure, 1973.

- In other situation where the certificate has been applied for the person or authority does not comply in such request, any parties can apply to the Court to direct the person to produce the certificate. Even if pursuant to the directions of the Court certificate cannot be get, the alleged disobedience of the law of excused.

- Sec 65B is silent as with and when the certificate is to be produced. Though generally the certificate can accompany the digital record when the same is produced as evidence, though there is some level of discretion that may be exercised depending on the facts of each case. Insofar as criminal trials are concerned though generally documents are to be filed before commencement of the trial. The Court may exercise discretion and allow production later if no prejudice is caused.

- General directions are also issued to cellular companies and internet service providers to maintain CDRs and other relevant records as per the law and it has been directed to appropriate rules and directions should be formed in exercise of the Information Technology Act (ITA) 2000.