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Electronic Evidence – Revisiting the Basics

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February 2023

Introduction

In order to prove a fact vide a document, one may rely on the original document, a carbon copy, print-out, or a public record, etc., thereby either placing reliance over primary or secondary evidence. For documentary evidence, in contrast to oral evidence, before placing reliance on the same, the court looks at the said evidence in the sequence of relevancy, admissibility, and proof. Generally, admissibility depends on relevancy.¹ However, in the case of electronic records², which is also a “document” admissible as evidence after amendments to the Indian Evidence Act, 1872 (“Evidence Act”) read with sections 2(o) and 2(t) of the Information & Technology Act, 2000 (“IT Act”); admissibility precedes relevancy. This and other aspects in relation to electronic evidence is dealt with under the provisions of sections 65A and 65B of the Evidence Act, which has been held to be a complete code in itself by the Supreme Court in *Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors*³.

This write-up touches upon certain basic principles that may kept in mind when a party seeks to rely on electronic evidence.

Relevancy of Electronic Records

Section 5 of the Evidence Act provides that evidence can only be given regarding facts in issue or when relevant. Further, whoever desires any court to give judgment as to a legal right on the existence of a fact which she/he asserts, has to prove the existence of that fact. Accordingly, as per section 136 of the Evidence Act, relevancy must be established before admissibility can be dealt with.⁴ However, as per sections 65A and 65B of the Evidence Act, when read together, the said sections only deal with proof and admissibility of electronic evidence, and not the aspect of relevancy of such evidence. Thus, it is noticed that the relevancy of electronic evidence is determined only after determining the issue of admissibility of such evidence (i.e., after submission of a certificate under section 65B of the Evidence Act).

¹ Section 136 of the Evidence Act.

² Section 2(o) of the Information Technology Act, 2000.

³ [\(2020\) 7 SCC 1](#) | Civil Appeal Nos. 20825 – 20826 of 2017.

⁴ Ref to Fn 3 (*see* Para 2 of judgment written by Justice V Ramasubramanian).

Admissibility of Electronic Records

Section 65B clearly differentiates between the original information contained in the computer itself and copies made therefrom. However, despite the same, copies of the electronic record are treated at par as primary evidence for admissibility once the compliance envisaged under section 65B of the Evidence Act is undertaken.

Therefore, section 65B of the Evidence Act makes it clear that when it comes to information as specified in Section 65B(1) of the Evidence Act, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf, thereby making Sections 62 to 65 of the Evidence Act redundant for this purpose.⁵

It can thus be concluded that section 65B of the Evidence Act place admissibility as the first or the outermost check-post, whereunder the certificate required under 65B (4) of the Evidence Act is a condition precedent to the admissibility of electronic evidence.

However, it is worth mentioning that if primary evidence is placed before the court, which may be a laptop, mobile phone, tape recorder, etc. (containing the electronic evidence), the same is admissible in evidence, without compliance with the conditions in section 65B of the Evidence Act.⁶

Proving contents of Electronic Records

Section 65A of the Evidence Act states that for the purposes of proving the electronic record the procedure envisaged under Section 65B of the Evidence Act must be followed. However, on a reading of section 65B of the Evidence Act, it appears that the section only limits itself to the admissibility of the electronic evidence itself (and not its contents) without having to prove the same by relying upon the primary/ original record/ evidence.

The aforesaid ambiguity is removed on a reading of section 22A of the Evidence Act which provides that “oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question”. Therefore, on a conjoint of reading of sections 22A and 65B of the Evidence Act, it becomes clear that unless the genuineness of the electronic evidence is challenged, it passes the test of admissibility of both ‘form’ and of ‘content’ by following the procedure mandated under the section 65B of the Evidence Act.

Section 65B of the Evidence Act is thus an exception to the Best Evidence Rule⁷, where the only requirement is that the contents of the output must be authentic and there should be reason to believe that they are authentic. Where, however, the genuineness is questioned, oral evidence has to be led, and in some cases, expert evidence may also be led in terms of section 45A of the Evidence Act for proof of the said document.

⁵ Anvar P.V. vs. P.K. Basheer & Ors | (2014) 10 SCC 473.

⁶ Ibid Fn 5

⁷ The Best Evidence Rule is a rule in law according to which when evidence such as a document or recording is presented, only the original will be accepted unless there is a legitimate reason that the original cannot be used.

Who can give a certificate under Section 65B (4) of the Evidence Act

The person who gives a certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the relevant device (from where the electronic evidence is obtained), as also the person who may otherwise be in the 'management of relevant activities'.

Considering that such a certificate may also be given long after the electronic evidence has actually been produced by the computer, it is stated that the person giving the requisite certificate can do so based on his belief and not necessarily his knowledge. This is since, the Courts have held that the word "and" used in the expression "best of his knowledge and belief" in Section 65B(4) of the Evidence Act must be read as "or".⁸

Further, where the person having a 'responsible official position' is not producing the certificate in terms of Section 65B of the Evidence Act, one can also apply to the court under its powers to call for production of the same. Once such application is made to the Court, the Court then orders or directs that the requisite certificate be produced by such person. In case, the party who has relied on electronic evidence and ought to have provided a certificate, has done all that she/he can possibly do to obtain the requisite certificate but is unable to do so, then the requirement for certificate will be relaxed in view of the principles of *lex non cogit an 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.⁹

At what stage can you fulfil the conditions specified under Section 65B of the Evidence Act

Section 65B of the Evidence Act does not speak of the stage at which such certificate must be furnished to the Court. In *Anvar P.V. vs. P.K. Basheer & Ors.*¹⁰, the Supreme Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. However, the law laid down in *Paras Jain vs. State of Rajasthan*¹¹ and *Kundan Singh vs. State*¹² was upheld in the case of *Arjun Panditrao's case* (supra) where it was observed that as long as the hearing in a trial¹³ is not over, the requisite certificate can be directed to be produced by the judge at any stage, so that information contained in the electronic form can then be admitted and relied upon as evidence. Further, in *Arjun Panditrao's case* (supra), it was clarified that in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in section 65B(4) of the Evidence Act and require that such certificate be given by such person/persons; this the trial judge ought to seek at the stage when the electronic record is produced in evidence before him without the requisite certificate.

⁸ Ref to Fn 3 in Para 58.

⁹ Ref to Fn 3 in Para 49.

¹⁰ (2014) 10 SCC 473.

¹¹ 2015 SCC OnLine Raj 8331.

¹² 2015 SCC OnLine Del 13647.

¹³ The stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet (*see Fn 3*).

Additionally, it has to be borne in mind, that if a certificate is being submitted post the filing of the electronic record, the party submitting the certificate ought to satisfy to the court the reasons for such delayed submission. It is to be noted that such a party is not immune to the risk of her/his certificate not being taken on record thereby resulting in a situation that the electronic record, though filed at the appropriate time, is not read in evidence.¹⁴ Depending on the facts of each case, the discretion of the Court is exercised keeping in mind the importance of a fair trial, bona fides of the party, and the prejudice that may be caused to the concerned party.

K&Co. Observations

While the main emphasis of this article is on the basic principles to be noted when a party seeks to rely on electronic evidence, before parting, it would be worthwhile to reflect on one practical aspect concerning leading of electronic evidence. This is regarding the absolute reliance on a certificate under section 65B of the Evidence Act, particularly in cases of video and audio evidence. Even though, at first brush, it appears that the law on proving electronic evidence is settled, however, in reality when it comes to proving electronic evidence, it is seen that the courts often insist on the production of primary evidence, i.e., the electronic device itself, rather than relying on a certificate under section 65B of the Evidence Act and the provisions of section 22A and 45A of the said Act in support thereof. This however appears to be not owing to a rigid mindset but due to the practical difficulty faced by the courts to determine the genuineness of the electronic record when questioned. Accordingly, even though a party relying on the contents of an electronic record ought to be able to prove their case by simply providing a certificate under section 65B (4) of the Evidence Act and leading oral or expert evidence in support thereof, however, that may not always be the case.

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¹⁴ Eli Lilly And Company & Anr vs. Maiden Pharmaceuticals Limited (CS(COMM) 1472/2016).