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"THE LATEST LAW ON ELECTRONIC EVIDENCE IN INDIA AND ITS IMPLICATIONS"

Man Pal Ramawat*
Ph.D. Research Scholar, Department of Law,
M.D. University, Rohtak, Haryana, India.
manramawat1978@gmail.com

Abstract This research paper aims to discuss the latest Indian law on electronic evidence and the implications thereof. Technology is increasing rapidly. Electronic devices have become part of life of every individual. With increase of the usage of the technology, the cases of cyber crimes are also increasing in which the criminals are using various electronic devices and the techniques and such criminals are committing various frauds and crimes with the help of the latest technology and the devices. So there is an immediate need to update the existing Indian law on electronic evidence. It has become necessary to examine the latest law on electronic Evidence in India and its implications. This paper aims to examine the latest Indian law on electronic evidence and to discuss the emerging issues and problems in the latest law on electronic evidence in India.

Keywords: Admissibility, The BSA, The I.T. Act, Electronic Evidence, Electronic Record, Evidence, Digital record, The Indian Evidence Act and the presumptions.

INTRODUCTION

In the present century there is a lot of technological advancements. Technology has become integral part of life of every poor or rich individual, every small or big business as well as justice dispensation system. Electronic means of communication are also increasing every day and most of the business activities are being done with the help of the electronic devices. The technological advancements have also necessitated amendments in the Indian Law. Already various amendments have been done in the Indian Law on electronic evidence. It is to be seen as to what are the implications of the Indian Law on electronic evidence and whether the Indian Law on electronic evidence is keeping pace with the latest technology or not.

UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996.

In the year 1996, the United Nations Commission on International Trade Law (UNCITRAL) had drafted model law on electronic commerce, which is known by the name of UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996. This model law was adopted by the United Nations by Resolution dated 30th January, 1997. The clause (2) of this Resolution recommended to give favorable considerations to this model law when the States will enact or revise their law. Under the above said Model Law legal recognition is provided to the electronic record. It has made provision that the document can be retained in electronic form. The signatures can also be put through electronic form. It specifically provided that the evidence in electronic form cannot be denied legal validity simply on the ground that it is in electronic form. The purpose of Article 9 is to establish the admissibility of the electronic record as evidence in legal proceedings and their evidential value. Even, the rule of "the best evidence" will not deny legal recognition to the document in electronic form. So, the main emphasis of the Model Law is to give legal

recognition to the evidence in electronic form and to ensure its admissibility in evidence in the Courts of law. In other words the States were advised to make such laws or to amend the existing laws so as to enable the admissibility of electronic evidence in the court proceedings. India is also a signatory to the above said resolution of the United Nations Commission.

THE INFORMATION TECHNOLOGY ACT, 2000 (I.T. Act)

The I.T. Act (Act No.21 of 2000) was enacted to give effect to the resolution dated 30th January, 1997 passed by the United Nations to promote efficient delivery of the Government Services by means of electronic records. This Act came into force w.e.f. 17th October, 2000. This Act extends to the whole of India. This Act applies also to any offence or contravention thereof committed outside India by any person. This Act has brought various changes regarding the electronic evidence and its recognition. Section 4 gives legal recognition to the electronic record. Since this section contains a non obstante clause, so this section will prevail on all other Indian laws. Now as per Section 4, it cannot be insisted that the document should be only in printed form. Section 5 provides legal recognition of electronic signatures. Section 6 says that “if there is any requirement of any law regarding filing of any document in any form, such requirement shall be deemed to have been satisfied if the same is effected by means of electronic form”. Now the contracts can be executed in any electronic form. The electronic record is to be treated at par like the documentary record.

THE INDIAN EVIDENCE ACT, 1872

When the Information Technology Act,2000, was enacted, there was an urgent need to make some amendments in the Indian Evidence Act, 1872, regarding the electronic records. So, in the year 2000 and in 2009, various new Sections were added in the Indian Evidence Ac and some of the existing Sections were amended. Section 3 of the Indian Evidence Act, 1872, has defined ‘document’ and after amendment document also includes electronic records. The meaning of word ‘document’ has been expanded to include the electronic records within the definition of the document. So now anything that is converted into electronic form can be considered as electronic evidence. For example a C.D, a pen drive, a CCTV footage, a micro clip, memory card, a computer, a mobile phone, a hard disk, a laptop, any other electronic device are part of the electronic evidence.

New Sections 65A and 65B were also added in the year 2000. Section 65A provides that "the contents of electronic records may be proved in accordance with the provisions of Section 65B". Section 65-B provides the procedure to prove the contents of the electronic records. If the electronic evidence in original form is produced in the court, the same is made admissible as primary evidence like any other ordinary evidence in the Indian Evidence Act. But when the primary electronic evidence is not produced and only its copy is produced, it has to be proved in accordance with the procedure provided under Section 65B of the Indian Evidence Act. As per the requirement of the procedure of Section 65B of the Indian Evidence Act, one certificate has to be produced regarding the electronic evidence. That certificate has to be given by the person who is owner, incharge or in control of the original electronic device and not by any other person. The certificate itself does not prove the authenticity of the electronic evidence but even then it is

indispensable. If the electronic evidence is not accompanied by said certificate, the electronic evidence shall not be admissible in evidence. Various presumptions have been made regarding the electronic evidence in sections 81-A, 85-A, 85-B, 85-C and 90-A of the Indian Evidence Act which are rebuttable presumptions. Even these presumptions under the Indian Evidence Act regarding such electronic evidence shall not be drawn if the said certificate is not furnished with the electronic evidence and such electronic evidence is not proved in accordance with section 65-B.

BHARATIYA SAKSHYA ADHINIYAM, 2023.(BSA)

Recently the Bharatiya Sakshya Adhiniyam, 2023 (BSA) was passed by the Parliament of India. It was published in the Gazettes of India on December 25, 2023. It came into force w.e.f. July 1, 2024. By way of Section 170 of the BSA, the Indian Evidence Act, 1872 was repealed. As per Section 1, this Adhiniyam applies to all the judicial proceedings in any Court or before Court martial. However, this does not apply to affidavits presented before any Court or officer as well as to any proceedings before an Arbitrator.

Section 2(1) of the BSA contains definitions clause. Section 2(1)(d) of the BSA has defined the term document. It says that " document means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records". Further, Illustration(vi) has also been added in sub section (d) of Section 2(1). This Illustration provides that "an electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents". Section 2(1)(e) defines "evidence". This Section says that "evidence means and includes all statements including statements given electronically which the Court permit or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence". This section further provides that " all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence". By way of the above definitions, the scope of the definition of the term "document" and "evidence" has been expanded in the BSA and now document includes electronic and digital records and the evidence includes the statements given electronically as well.

Digital records was missing from the definition of document provided under the Indian Evidence Act, 1872. The Illustration (vi) has given various examples of various electronic records. As per the above said definitions, anything in the form of electronic or digital records is to be considered as documentary evidence before the Court and thereby the electronic and digital records have been kept at par with the other documentary evidence. It appears that the scope of the documentary evidence has been expanded so as to include within it the electronic and digital records and this is in consonance with Section 4 of the I.T. Act which provides legal recognition of the electronic records. A new sub section (2) has been added in Section 2 of the BSA which provides that the words and expressions not defined in the BSA but defined in the Information Technology Act, 2000, the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and the Bharatiya Nyaya Sanhita, 2023 (BNS) shall have the same meanings assigned to them in the said Act and Sanhitas. In view of this sub section, various terms defined under the Information Technology Act, 2000, the BNSS

and BNS shall be deemed to have been defined under the BSA. Under the I.T. Act various terms relating to the electronic technology have been defined. Interestingly, the term "electronic record" has been defined under Section 2(t) of the I.T. Act which provides that " electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche". However, the term "digital record" has not been defined either in BSA or in BNSS or BNS or the I.T. Act. So, we have to go by the dictionary meaning of this term. Digital records can be said to be those records which are digitized versions of physical document or documents originally created in digital format. The addition of the words " or otherwise recorded" and "or any other means" in the definition of document has further expanded the scope of the document recorded in any form by any means. This has made the definition of document more exhaustive keeping in view the advancement of the technology even in coming decades or century.

Section 39 of the BSA corresponds with Section 45 and 45A of the Indian Evidence Act, 1872. Some amendments have also been made in the Section. Firstly, Section 45 and 45A of the Indian Evidence Act have been combined in Section 39 of the BSA. This section is in two parts. Section 39 is containing sub section (1) and sub section (2). Sub section (1) provides about the opinions of the experts and simultaneously has also defined the persons who are to be called as experts. As per sub section (1) the persons specially skilled in foreign law, science or art or any other field are included as experts. So, now any person who is specially skilled in any other field may be an expert to give opinion. Such specially skilled person can also give his opinion as an expert regarding the electronic or digital records and he or she can also give the certificate required from an expert as per Section 63 of The BSA. Sub Section (2) of Section 39 provides "When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of Information Technology Act, 2000 (21 of 2000), is a relevant fact". Explanation attached to this sub section provides that for the purpose of this sub section, an examiner of electronic evidence shall be an expert. Sub Section (2) corresponds with Section 45A of the Indian Evidence Act, 1872. Section 79A of the Information Technology Act provides that the Central Government may notify the examiner of electronic evidence for providing expert opinion on any electronic evidence before any Court by way of notification. Very surprisingly, the Central Government has not notified any of the Government lab of Haryana under Section 79A of the I.T. Act so far. However, some central labs at Gujarat, Calcutta, New Delhi, Thiruvananthapuram, Dharamshala, Bangalore, Hyderabad, Gandhi Nagar (Gujarat) have been notified by the Central Government under Section 79A of the I.T. Act. Opinion of the expert of Central labs can be taken when there is a dispute or a question regarding the genuineness or the authenticity of the electronic or digital records. In rest of the cases, opinions of any person who is specially skilled in any other field may be taken.

Section 57 of the BSA is corresponding with Section 62 of the Indian Evidence Act, 1872 which has defined and explained primary evidence. There were only two Explanations attached to Section 62 of the Indian Evidence Act. New Explanations 4 to 7 have been added in Section 57 of the BSA regarding electronic and digital records. As per the Explanation 4 "where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence". Explanation 5 says that "where an electronic or digital record

is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed". As per this Explanation, when any electronic or digital record was required to be kept or retained by some particular person in the natural course of the business or in natural circumstances and such person produces the said electronic or digital record, the same shall be considered as primary evidence. However, if the authenticity or genuineness of such electronic or digital record is disputed by the opposite side, in that case such presumption regarding primary nature of the evidence cannot be legally drawn. This Explanation is meant for the cases such as when the CDRs from the telecom service providers are produced in the Court, the CCTV footage is produced from the police surveillance camera and the CCTV footage produced from the possession of the occupier of the premises. Explanation 6 provides that "where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence". This Explanation is made to bring the live events on the social media within the ambit of the primary evidence. Such as Youtub live, Instagram live, live telecast of any event on OTT palate form or live streaming of the cricket match. As per this Explanation when live event is recorded on any personal computer or laptop, such recording shall be considered as primary evidence. Explanation 7 provides that "where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence". This Explanation will include temporary files, automatic backup files, Google backups as well as cloud storage etc.

The above said explanations are regarding the electronic or digital records only and the same have expanded the scope of the primary evidence in electronic or digital form. So, in view of the Explanations 4 to 7, the electronic or digital record mentioned in these Explanations shall be considered as primary evidence although the same was not in the category of the primary evidence as per the definition given in Section 62 of the Indian Evidence Act, 1872. The electronic or digital records mentioned in these Explanations are deemed to be primary evidence although they are not actually the primary evidence. However, these Explanations are not itself establishing the authenticity or genuineness of any electronic or digital records. These explanations are only treating certain electronic or digital records in certain circumstances as primary evidence only.

Section 59 of the BSA is corresponding to Section 64 of the Indian Evidence Act. This section provides that "the documents shall be proved by primary evidence except in the cases mentioned in the subsequent sections". Section 61 of the BSA says that "nothing in this Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to section 63, have the same legal effect, validity and enforceable as other document". This is a new section added in BSA. This section has been added on the basis of Article 9 of the Uncitral Model Law on Electronic Commerce with Guide to Enactment 1996 as adopted by the General Assembly of United Nations in the year 1996 which also contains similar clauses. On the basis of this section, any document in electronic or digital form shall not be denied its admissibility in the evidence in the Courts simply on the ground that it is in electronic or digital form but this provision is subject to section 63 of the BSA.

Section 62 of the BSA provides special provisions relating to evidence in electronic record. This section says that "the contents of electronic record may be proved in accordance with Section 63".

This section corresponds to 65A of the Indian Evidence Act and no amendment has been made in this section. Section 63 of BSA corresponds to Section 65B of the Indian Evidence Act, 1872. Some amendments have been made in Section 63. There is no major difference in the language of section 63 of BSA in comparison with Section 65-B of the Indian Evidence Act. One main difference is that in section 65-B no format of the certificate was mentioned and it was also not mentioned as to when the said certificate is to be filed. However in sub-section (4) of Section 63 of the BSA it is specifically mentioned that the certificate required under this section shall be submitted alongwith the electronic record at each stage where the electronic evidence is being submitted in the Court. Further under the BSA, format of the certificate has been prescribed in the Schedule itself. Under the BSA now two Certificates are required to be given. One Certificate is to be given by the person who was owning or maintaining or managing or operating the electronic device at the relevant time and such person shall also mention the HASH value of the electronic record, which was not required under section 65-B of the Indian Evidence Act. Further one more certificate is required from the expert on the format given in the Schedule of the BSA and such expert shall also mention the details of the device used for electronic evidence and the HASH value of the electronic record. So main differences between these two provisions are that (i) In section 65-B the format of the Certificate was not given, but in Section 63 of the BSA format of the Certificate has been given; (ii) in section 65-B only one Certificate was required to be filled, but in Section 63 of the BSA two certificates are to be filed along with the electronic record i.e. one by the owner or the incharge of the electronic device and one by the expert; (iii) in section 65-B only the owner or the incharge of the electronic device concerned could have given the certificate, but in Section 63 of the BSA the person who was owning or maintaining or managing or operating the electronic device at the relevant time, can gave the certificate; (iv) in Section 65-B there was no provision for mentioning the HASH vaule of the electronic evidence in the certificate, but in section 63 of the BSA now the HASH value is to be stated in the certificates and that too by the owner or the incharge of the electronic device as well as by the expert and (v) in section 65-B it was not mentioned as to when the certificate is to be filed, but in section 63 of the BSA it is mentioned specifically that the certificate is to be filed along with the electronic evidence.

It is pertinent to note here that section 65-B of the Indian Evidence Act was borrowed and copied from Section 5 of the Civil Evidence Act, 1968 with some minor modifications. In the case of **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors.**[1] it was held by the Supreme Court of India that section 5 of the Civil Evidence Act was copied while inserting section 65-B of the Indian Evidence Act. Whereas section 63 of the BSA was copied from section 65-B of the Indian Evidence Act with some minor modifications.

SUPREME COURT OF INDIA ON ELECTRONIC EVIDENCE

In the case of **Yusafalli Esmail Nagree vs State of Maharashtra**[2] and in the case of **R.K. Malkani vs State of Maharashtra**[3] it was observed by the Supreme Court of India that the tape recorded conversations are admissible in evidence subject to some safeguards to ensure the authenticity thereof and that there is no tempering in the same. But there are different views of The Supreme Court of India regarding the admissibility of electronic evidence under Section 65B of the Indian Evidence Act. In the case of **State of Delhi vs. Navjot Sandhu**[4] , it was observed by the Supreme Court of India that the electronic evidence which was the print out of various E-mails

and C.D.Rs was admissible in evidence even though the procedure under section 65-B of the Indian Evidence Act is not followed and even in absence of certificate as required under Section 65B (4) of the Evidence Act. Thereafter the case of ***Anvar P.V. Vs. P.K. Basheer & Ors*[5]*.,*** was decided by a three Judge Bench of the Supreme Court. In this case the law laid down in the case of **State of Delhi vs. Navjot Sandhu[4]** was set aside by the three Judges Bench of the Supreme Court of India. It was declared therein that the secondary electronic evidence under the Evidence Act, 1872 can and should be proved only as per the procedure prescribed under Section 65B of the Indian Evidence Act. It was further observed that an electronic record by way of secondary evidence shall not be admissible in evidence unless the requirements given under Section 65B are satisfied. Thereafter in the case of **Tomaso Bruno and another vs. State of U.P[6]**, a three judges bench of Supreme Court was deciding a criminal appeal against conviction of accused regarding a murder case under Section 302 IPC. In this case the CCTV footage was not produced, but the person who had seen the CCTV footage was examined as a witness in evidence. In that regard it was observed that the secondary evidence can be given under Section 65 of the Indian Evidence Act. Section 65-B of the Indian Evidence Act was not properly considered in this case. So the law laid down in this case was contrary to the law laid down by three judges bench in **Anvar's[5]** case. Thereafter again in the case of **Vikram Singh vs. State of Punjab[7],** it was observed that if original primary evidence is produced in electronic form, in that case a certificate required under Section 65B of Evidence Act is not necessary. It was further observed that the original tape recording conversations was legally admissible in evidence without making compliance of Section 65B as it was a primary evidence. Thereafter in the case of **Sonu @ Amar vs. State of Haryana[8]** the Supreme Court of India was hearing a criminal appeal in a case of murder and kidnapping. In this case several calls were made by the accused to the family of deceased for ransom. CDRs were collected and the same were produced and exhibited during trial before the trial Court, but no objection was taken before the trial Court against exhibiting those CDRs. It was observed by the Supreme Court in the appeal that no objection was allowed against the admissibility of above said CDRs on the ground that Section 65B of Evidence Act was not complied with. This Judgment is also running contrary to the law laid down in the case of ***Anvar P.V. Vs. P.K. Basheer & Ors*[5]**. Thereafter in the case of **Shafhi Mohammad Vs. State of Himachal Pradesh[9]**, it was observed by a two Judges Bench of the Supreme Court of India that some electronic records are admissible in evidence without certificate under Section 65B of Evidence Act, if a party is not in a position to produce the said certificate and the electronic device in question is in possession of the opposite party. This is contrary to the law laid down by the three Judges Bench in the case of ***Anvar P.V. Vs. P.K. Basheer & Ors*[5]**. Thereafter in the case of ***Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal*[1],** the above said decisions of the Supreme Court of India, except the decision in the case of **Sonu @ Amar vs. State of Haryana[8] ,** were examined by the three Judges Bench of the Supreme Court of India. In this case the law laid down in the case of ***Tomaso Bruno and another vs. State of U.P*[6]** as well as in the case of **Shafhi Mohammad Vs. State of Himachal Pradesh[9],** was overruled. Whereas the law laid down in **Anvar's case[5]** was reaffirmed. It was further observed that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record. It was further observed that the requirement of certificate under section 65-B can be dispensed with only if the opposite party does not produce the required certificate despite the specific directions given by the Court under the provisions of various laws. It was further observed that compliance of section 65-B is not required when primary evidence in electronic form is produced. It was further recommended that section 65B of the Evidence Act,1872 is outdated, it was poorly copied from Section 5 of The U.K. Civil Evidence Act, 1968,

even when that section 5 was already deleted from the U.K. Law and that it is the need of the hour to have a relook at section 65B of the Indian Evidence Act, 1872.

EMERGING ISSUES IN THE INDIAN LAW ON ELECTRONIC EVIDENCE.

Although Indian law on electronic evidence is a very exhaustive and comprehensive, but even then there are some emerging issues and those issues and problems are within section 63 of the BSA. This section says that notwithstanding anything contained in the Indian Evidence Act, the electronic evidence shall not be admissible in evidence unless the same is proved in accordance with the procedure contained under Section 63 of he BSA. Section 63 of the BSA is almost similar to Section 65-B of the Indian Evidence Act which was making the electronic evidence inadmissible instead of making the same admissible because of the complicated and technical procedure contained therein. Even if the procedure contained under Section 63 of the BSA or Section 65-B of the Indian Evidence Act is followed, this provision does not prove the authenticity of the electronic record in secondary form. However if the electronic record in secondary form is found to be genuine, but the procedure contained in section 63 is not strictly followed and the certificate is not filed by the owner or the expert, in that case such electronic evidence shall not be admissible in evidence. Mentioning of HASH value of the electronic record in two certificates will not automatically prove the authenticity of the electronic evidence in secondary form. Since section 63 is almost a copy of section 65-B of the Indian Evidence Act, it will have the same problems and issues as were being faced in section 65-B of the Indian Evidence Act. Even the views of the Supreme Court of India on Section 65-B of the Indian Evidence Act have not been consistent throughout and the view taken in one case is being overruled in the next case. Further in the case of **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal**[1], it was recommended that section 65B of the Evidence Act,1872, is outdated and it was poorly copied from Section 5 of The U.K. Civil Evidence Act, 1968, even when that section 5 was already deleted. But even then the Indian Law Makers have copied section 65-B while enacting section 63 of the BSA. A mistake once committed in the year 2000 while inserting section 65-B in the Indian Evidence Act has been again repeated while enacting section 63 of the BSA.

SUGGESTIONS

In the year 1968 in U.K. almost similar provision was made by way of section 5 of the U.K. Civil Evidence Act for the civil cases. Regarding the criminal cases almost similar provision was there in the U.K. in the shape of section 69 of the Police and Criminal Evidence Act, 1984 (PACE). The U.K. Law Commission has already considered the above said sections 5 and 69 outdated and afterthought and that the same are not serving any purpose. On the basis of U.K. Law Commission Repors section 5 of the U.K. Civil Evidence Act as well as section 69 of the Police and Criminal Evidence Act, 1984 (PACE) have already been deleted in the U.K. in the year 1995 and 1997 respectively. But even then the Indian Law makers have copied section 5 of the Civil Evidence Act in the year 2000 in the shape of section 65-B of the Indian Evidence Act and then by way of section 63 of the BSA. We have a very bitter experience with section 65-B from the year 2000 to 2024 till the Indian Evidence Act was repealed. So on the basis of past experience from the year 2000 to 2024 in India as well as from the year 1968 to 1997 in U.K. we can see that similar provision has not served any purpose in the past. If it has not served any purpose in past and has created so much problems and difficulties in admissibility of the electronic evidence, then we cannot expect that section 63 of the BSA is going to serve any purpose in future when there is so many technologial revolutions and advancements in the present era. So the suggestion is that section 63 of the BSA should be deleted as the similar provisions in the U.K. has already been deleted. If any separate or specific provision is required to be made, that should be a very simple law in a simple language on the same pattern as is existing in USA or in U.K.

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