JOURNEY AND CRITICAL ANALYSIS OF INDIAN EVIDENCE ACT, 1872 VIS-A-VIS ELECTRONIC EVIDENCE.

By

Dr Sushil Kumar Gupta
MBBS, LLB, PGDMLS

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WHAT THE MIND DOES NOT KNOW

THE EYES CANNOT SEE

-ANONYMOUS

"WHAT THE EYE DOESN'T SEE AND THE MIND

DOESN'T KNOW, DOESN'T EXIST."

— D.H. LAWRENCE,

Lady Chatterley's Lover

"Circumstantial evidence is a very tricky thing. It may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different".

— Arthur Conan Doyle,
The Adventures of Sherlock Holmes

"People almost invariably arrive at their beliefs not on the basis of proof but on the basis of what they find attractive."

—Blaise Pascal,
De l'art de persuader

I believe in evidence. I believe in observation, measurement, and reasoning, confirmed by independent observers. I'll believe anything, no matter how wild and ridiculous, if there is evidence for it. The wilder and more ridiculous something is, however, the firmer and more solid the evidence will have to be."

— Isaac Asimov,
The Roving Mind

Preface

The idea of writing this book is accidental and is by way of an extension of the idea of writing an article on the subject. The same cropped up due to basic fundamentals regarding electronic evidence, developed over a period of time, based on the various judgments passed by Higher courts, being questioned and shaken during one of the Online classes on Law of Evidence being held by Shri Ankit Dhotrekar, Assistant Professor, Bennett University, India, which I happen to listen when the same was being attended by my daughter, a second year law student of Bennett University.

On doing research on the aspect, to my utter surprise, I found that what he said in the two-minute clip, on Electronic Evidence was totally contrary to the law laid down by the Apex Court but the same sounded reasonable. All this inspired me to do research on the subject and the result of the research is what has transformed into this book.

While writing the book the main focus which drove me was the way, Higher Courts have dealt with the electronic records by classifying them into Primary Electronic Record and Secondary Electronic Records which has led to incorrect interpretation of the provisions of Section 65-A and 65-B as the same is contrary to the settled position of law with regard to interpretation of Statutes.

While writing the book I have divided the same into various Chapters dealing with the basics of Law of Evidence, the Historical aspect of Electronic Evidence, how the same is being applied or dealt with by various other

countries like UK, USA, Canada, South Africa, Singapore, South West Australia and Sri Lanka so as to understand the basic concepts of the law of electronic evidence and its applicability. The last two Chapters before Conclusion and Suggestions analyse the various judgments passed by the Supreme Court and the High Courts on Electronic Evidence so as to understand the various facets, difficulties, interpretation and the manner in which the Electronic Evidence has been dealt with. Further while analysing the judgments passed by the High Courts the same have been divided into three phases:

a) Before the Coming into effect the law as laid in Navjot Sandhu Case.
b) The period between Navjot Sandhu Case and its overruling by the P V Anvar Case.
c) The period after the law was laid in the P V Anvar Case.

I must express my gratitude firstly to Shri Ankit Dhotrekar, Assistant Professor, whose two-minute clip on electronic evidence acted as an inspiration and setting into motion the Act which ultimately culminated in writing of this book. I also express my gratitude to Shri C S Sharma, retired Legal luminary as a law Officer from CBI, who I consider as my Law Guru, who has guided me and encouraged me in accomplishment of this work. I also express my gratitude to Senior Advocate Shri N. Hariharan, who has acted as a road master to give valuable suggestions and further Hon'ble Justice Shri ---------- for writing an appreciative foreword to this book. Apart from the above I also express my gratitude to all my associates working with me, my wife and my daughter for rendering valuable

assistance in completion of this book. I also express my gratitude to my friend and colleagues Specially Manan Verma and Kamal Mohan Gupta Advocates on Record, and my Senior Associate Dr Sumant Bharadwaj for providing me encouragement and valuable suggestions.

In the end I will quote the famous lines from Umasankar which is based on the quotes of William Makepeace Thackeray that "*The world is like a looking glass; if you smile, it smiles, if you frown, it frowns back. If you look at it through a red glass all seems red and rosy; if through a blue; if through a smoked one, all dull and dirty. Always try to look at the bright side of things; almost everything in the world has a bright side*."

June, 2020. -Dr. Sushil Kumar Gupta
New Delhi.

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CHAPTER I

INTRODUCTION

"The Law of Evidence is the system of rules and standards by which the admission of proof at the trial of lawsuit is regulated."

–McCormick On Evidence[1], 1984 3rd Edn. Page 1.

1.1 SOME BASIC CONCEPTS OF EVIDENCE ACT.

As per *Steve Uglow's Law of Evidence*[2]:

"Law of Evidence is not about determining the consequences of facts but about establishing those facts."

For understanding the above phrase, it is important to know the meaning of the two terms

a) Consequences of facts
b) Establishing of facts.

Consequence of facts is the decision reached by the Court after appreciation of the Evidence. Establishing of facts is the proof of the facts i.e. it deals with the aspect of existence or non-existence of the facts.

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[111] *McCormick On Evidence[1], 1984 3rd Edn. Page 1.*

[2] Steve Uglow's Law of Evidence: TEXT and MATERIALS, 1997, page 1

Law of Evidence is an Adjective law or in other words the Procedural Law. Whereas the Substantive law deals with "**What"** of Law the Procedural Law deals with the aspect "**How"** of Law. The Law of Evidence was drafted with an object to permit the materials before the Court which were logical and having probative value. The word Logical took the shape of relevancy which is dealt with by Section 5 to 55 of the Evidence Act, 1872 and the word probative meant what is useful to proof. One great Object of the Evidence Act was to prevent laxity in the admissibility of evidence, and to introduce uniformity.

The main principles which underlie the law of Evidence are[3]:

a) Evidence must be confined to the matters in issue
b) Hearsay evidence must not be admitted
c) The best Evidence must be given in all cases.

Sir James Stephen, the propounder of the Indian Evidence Act, 1872 has used three words with respect to Law of Evidence:

a) Relevancy
b) Admissibility
c) Appreciation.

Relevancy pertains to Quality/character of the facts, admissibility pertains to how the evidence is to be put forth and appreciation is application of Judicial mind for reaching conclusion. The Evidence Act deals with only the first of two. Whereas Relevancy deals with "*What*" in respect of the facts i.e. what facts are to be considered, the Rule

[3] Ratanlal & Dhirajlal 22nd Edn. 2006 page 3.

of Admissibility deals with "*How"* the Evidence is to be gone about. Further Admissibility presupposes relevancy of facts i.e. whatever is admissible has to be relevant whereas the reverse is not true. It is also important to understand that Relevancy has always to be looked into in relation to facts whereas admissibility has to be looked into with respect to Evidence. Fact which are considered as relevant for the purpose of the Act are not only the facts in issue but also the facts found relevant as per provisions of Section 5 to 55 of the Act. Further relevancy and admissibility always precede appreciation of Evidence. The above aspects are stated in P V Anvar Case[4]:

"*Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence."*

The Evidence Act does not deal with the genuineness, veracity or reliability of the evidence which is included in the appreciation of the Evidence. Evidence in any case be it Civil or Criminal is always needed in case when the facts are disputed and relevant as per Sections 5 to 55 of the Evidence Act.

Proof is the Consequence of Evidence i.e., '*Evidence*' precedes '*Proof'*. Evidence Act deals with the proof of facts and not truth of the facts as the truth cannot be bound by any legal framework as truth is based on Complete which is impossible whereas proof is based on possibility

[4] *P.V.Anvar (2014)10 SCC 473*

or in other words proof is an illusive end to an ever-lasting pursuit. Further '*Proof*" is a piece of "*legal fiction*" that provides a terminus to the otherwise "*unending trial*", before the Court. The word proof which is a consequence of Evidence, leads to conclusion and it means any three of the following:

a) Proved meaning, the fact exists
b) Disproved meaning fact does not exist
c) Not proved the court concludes that it does not know whether the facts Exists or they do not exist.

So the sequence of Events which emerged is that once a disputed fact is there it has to be checked on the aspect of relevancy (as per Section 5 to 55 of the Evidence Act) and then evidence has to be led as per the Rules of Evidence be it in the form of Rule of Best Evidence, Presumptions, Burden of Proof, Privileged Communication etc. After the Evidence is led it has to be weighed i.e. Appreciated and finally on the basis of the said Appreciation Conclusion is drawn whether the Disputed fact stands proved, disproved or not proved.

1.2 EVIDENCE

Section 3 of the Evidence Act defines Evidence as under:

"Evidence" "*Evidence*" means and includes —

(1) All statements, which the court permits or requires to be made before it by witness, in relation to matters of fact under inquiry; Such statements are called oral evidence;

(2) [All documents including Electronic record produced for the inspection of the court]; Such documents are called documentary evidence."

Thus, the Indian Evidence Act recognizes only two types of Evidence i.e. Oral Evidence and Documentary Evidence. All the other types of Evidences are to be looked into and appreciated from these two types of Evidences Only. Whereas Section 59 and 60 deals with Oral Evidence Section 61 to Section 90-A deals with Documentary Evidence. Of these the Relevant Section for the purpose of this book are Section 61 to 65 and Section 65-A and Section 65-B. It is important to point out that apart from the above there is a third category of evidence called Material Evidence or Real Evidence but the same has been dealt with in proviso to Section 60 of the Evidence Act which reads as under:

"Provided also that, if oral Evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

This provision clearly shows that the material evidence or real evidence has to be proved by way of Oral Evidence.

There are two types of Oral Evidence

a) Direct means reference to facts which were perceived by senses.
b) Indirect or Hearsay.

The Indian Evidence Act Allows Direct Oral Evidence but does not allow Hearsay Evidence in general until and unless the Oral Evidence falls in the category of exceptions:

a) Admission, Statements made in the presence of a party; confessions

b) Statements made by person since deceased;

c) Statements contained in public documents;

d) Statements which are part of Res gestae, expressions of mental or bodily feeling, ancient documents probative of ancient possession and admission by conduct.

There are three categories of Documentary Evidence

a) Primary Evidence

b) Secondary Evidence

c) Documentary Evidence which is neither Primary nor Secondary.

Section 61 to 65 deals with Primary and Secondary Documentary Evidence. Section 62 defines Primary Evidence and Section 63 defines Secondary Evidence and Section 65 deals with the conditions under which Secondary Evidence may be given.

1.3 LAW OF BEST EVIDENCE

The Law of Evidence requires that "*best evidence*" must be given in proof of the facts in issue or relevant facts. By the words "*best evidence*" is meant "*Best Possible evidence*" in the given

circumstance. Primary evidence is considered to be the "*best evidence*" since it is the best available corroboration of the existence of a fact[5]. The rule has its origin in the common law and can be traced back to the 18th century. In *Omychund* v. *Barker*[6] Lord Hardwicke held that no evidence was admissible unless it was "*the best that the nature of the case will allow*". Thus, best Evidence Rule was in respect of:

a) Nature of the fact admitted
b) Circumstances would allow
c) Party Could adduce

It demands that the contents of a document must, in the absence of a legal excuse, be proved by Primary and not by secondary or substitute evidence. This rule however, which is merely a survival of the ancient doctrine of profert, requiring the physical production of the instrument pleaded, existed, long before the best-evidence principle was formulated; though it has, in fact, gone through a reaction not very dissimilar to that experienced by the best evidence idea. Thus, originally at Common Law no secondary evidence was allowed.; if the deed was lost, or in possession of the adversary, the plaintiff failed. Afterwards, in case of loss, equity relieved, then exceptions were allowed by the Common law also, marshalled at first strictly by degree i.e., a counterpart, then a copy, then an abstract or

[5] Article on admissibility of electronic evidence by Justice Kurian Joseph.
[6] *Omychund* v. *Barker (1745) 1 Atk21: 26 ER 15*

recital, then parol evidence, the next best being let in only if the class above were not available.

The rule came into being at a time when copying was done manually by a clerk and the rationale for the rule was that unless the original was produced, there would be a significant chance of error or fraud in relying upon a copy. This rule also found favour with the draftsmen of the Indian Evidence Act, 1872 and Sections 60, 64 and 91 of the Indian Evidence Act are based on this rule. Section 60 provides that oral evidence must be direct, meaning thereby that it must be adduced by the person who has seen, heard, or perceived the fact by any other sense, and in case of the opinion of an expert it must be adduced by the expert who holds that opinion. Section 64 of the Act provides that documents must be proved by primary evidence except in certain cases mentioned in Section 65 of the Act. Section 91 of the Indian Evidence Act forbids proving the contents of a written document other than by the document itself. Sections 64 and 65 of the IEA are based on the cardinal rule of law of evidence that the best evidence in the circumstances must be given to prove a fact in issue. All these provisions have been incorporated in the Evidence Act to establish the rule of Best Evidence. Since Electronic Records because of its very nature is fragile, and is susceptible to manipulation, edition, deletion, addition etc. hence the same are put to the rule of reliability before they are held to be admissible. It was because of this reason that the legislature by virtue of Section 65-B had placed certain conditions to be fulfilled before the said electronic records is

considered as admissible. Even prior to the enactment of these provisions by the Legislature the Courts have framed certain guidelines relating to the reliability of the electronic records before the same was considered as admissible. Since Electronic Evidence is to a certain extent an exception to the rule of Best Evidence hence it was important to establish its reliability first before making the same admissible.

CHAPTER 2

2.1 HISTORICAL ASPECT OF ELECTRONIC EVIDENCE

The History of Computing Project defines 1947 as the beginning of the Industrial Era of Computing. So much happened in computing since 1947 that it is helpful to break it down into manageable chunks. In particular, digital forensics – or forensic computing as some like to call it – has a shorter history. Electronic communications started in US in 1958. It was the research on the US ARPA project, which increased technological progress on networks, protocols and software and led to the ARPAnet (1969)[7]. From its origin in 1960s, the internet or ARPAnet as it was known then, was a means of sharing expensive computer equipment, initially for research in universities and colleges and later also for US Government Défense projects.

By 2000, the Internet, which was been described as a "*global decentralized network of computer networks*", exploded into a global marketplace for business and commerce as well as an information superhighway for individuals, governments and educational institutions alike. Further the development of the "*World Wide Web*" (the Web") which is an integral part of the internet based on the

[7] International Contracts I: Jurisdictional Issues and Global Commercial and Investment Governance [Eds. Bimal Patel, Mamta Biswal, Joshua Aston] Chapter 8: Cross Border Transactions and Role of UNCITRAL: Electronic Commerce as an Emerging Trend by Nishtha Chughi a law student

Hyper Text Transfer Protocol ("http") and the development of user friendly browser software which allows a user, with little knowledge of technology and software, to connect to any website address in the world in seconds in a seeming simple process of typing in the website address. (i.e. its "URL" (*Uniform Resource Locator*) or domain name) in the text box on the user's computer screen and pressing "*enter*". This technological transparency, allowing ease of use, has played a major part in the Web's phenomenal growth. This explosive growth of Internet use has resulted in an equally significant explosion in electronic commerce.

Prior to that the American Court in the case of *'Brlndley v. State', 193 Ala .43 (O)[8]; Annotated Cases 1916 E 177 (D)* interalia held,

"*it is open to the State to produce the dictograph (electro-telephonic communication) in evidence and to have the operator thereof explain the instrument and demonstrate the principles on which it operates*." The Supreme Court of Michigan held that there was no error in the admission of this testimony particularly as it was established that the instrument was a substantially accurate and trustworthy reproducer of sounds actually made. In the course of his order Blair J. observed as follows:

"*Communications conducted through the medium of the telephone*

[8] *'Brlndley v. State', 193 Ala .43 (O)[8]; Annotated Cases 1916 E 177 (D)*

are held to be admissible, at least in cases where there is testimony that the voice was recognized ..... The ground for receiving the testimony of the phonograph would seem to be stronger, since in its case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves". *(Boyne City, G. and A. R. Co. and v. Anderson', 117 Am SR 642 (B).[9])*

Justice Swift in the English case of *'Buxton v. Cumming, (1927) 71 Sol. Jo. 232 (E)[10]* raised the question whether a dicta-phone record has ever been accepted in evidence by the Courts and upon the counsel replying that he did not think so, said that he saw no reason why such a record as the one which the witness states he had made should not be put in evidence.

The first time the Indian Courts considered the Electronic Evidence was in the form of a Tape-recorded evidence. The same was treated like a photograph of an incident as a record capable of representing the situation admissible under S. 7 and also a relevant fact under S.8 as the recording of the contemporaneous dialogue is part of *res gestae.* It is also held to be admissible to corroborate under S. 157, to contradict under S. 155(3) and also to test the veracity of the witness under S. 146(1) and for impeaching his impartiality under S. 153 Exception 2 of the Evidence Act It has been held that the above

[9] *Boyne City, G. and A. R. Co. and v. Anderson', 117 Am SR 642 (B).*
[10] *'Buxton v. Cumming, (1927) 71 Sol. Jo. 232 (E)*

evidence is not hit by Art. 21, nor barred by Art. 20(3) of the Constitution of India, if there was no compulsion. The same is also not hit by S. 162 of the Criminal Procedure Code if it is not made to a police officer in the course of investigation.

In *Rup Chand's case AIR 1956 Punjab 173*[11], in proceedings over a suit on promissory note, on the question of admissibility of the tape record, Chief Justice Bhandari of the then Punjab High Court observed that the petition raised a question, which is as novel as it is new. The above was the first decision by a superior Court on the point. The Court held that the record of a conversation although by no stretch of imagination can be treated as a statement "*in writing or reduced into writing*" under S. 3(65) of the General Clauses Act as it is unlike in the case of printing, lithography, photography and other modes of representing or reproducing words in a visible form there is no rule of evidence which prevents a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements from deposing that while he was engaged in conversation with the witness a tape recorder was in operation, or from-producing the said tape record in support of the assertion that a certain statement was made in his presence. The Court relied on the decisions of the American and English Courts with respect to admissibility of evidence furnished by devices for electro telephonic communications, for

[11] *Rup Chand's case AIR 1956 Punjab 173*

dispelling the cloud of misgivings about the admissibility of tape-recorded evidence.

The above decision was followed by *Manindra Nath* v. *Biswanath, (1963) 67 Cal. W.N. 191*[12], wherein the Calcutta High Court permitted the previous statement of the defendant recorded on the tape to be used to contradict the plaintiffs evidence in the Court on condition that it is proved that the instrument accurately recorded the statement even if the same was done behind the back of the witness.

The Supreme Court in a precedent setting judgment in S. *Pratap Singh* v. *State of Punjab, (1964) 4 SCR 733*[13], for the first time adjudged the admissibility of the tape-recorded telephonic conversations between the then Chief Minister Sri. Pratap Singh Kairon, who allegedly bore ill-will towards a Civil Surgeon and initiated disciplinary proceedings against him cancelling his leave on the eve of superannuation. Both the majority judgment by Justice N. Rajagopala Ayyangar as well as the minority judgment by Justice Raghubar Dayal pronounced approving the admissibility of the tape record of the telephonic conversation of the Civil Surgeon with the Chief Minister and his wife overruling the order of the High Court disallowing the same on the ground that tape recordings are capable of being tampered with. The majority observed that there are few documents and possibly no piece of evidence which could not be

[12] *Manindra Nath* v. *Biswanath, (1963) 67 Cal. W.N. 191*
[13] S. *Pratap Singh* v. *State of Punjab, (1964) 4 SCR 733*

tampered with but that would certainly not be a ground on which the Court could reject evidence as inadmissible or refuse to consider it. The above factor would have a bearing only on the weight to be attached to the evidence and not on its inadmissibility. The Court permitted the State on behalf of the Chief Minister to re-tape record the tape recordings produced for assessing the genuineness of the identity of the voice. In the above case, no dispute was raised as to the identity of the voice as such. The Court extensively relied on the tape recordings of the telephonic conversation and upheld the case set up by the Civil Surgeon that the proceedings against him has been initiated to wreck vengeance on him for incurring the wrath of the Chief Minister for the discredit that he brought to him by the allegations that the petitioner had made in a feature that appeared in the Blitz weekly.

In *Yusufalli* v. *State of Maharashtra*, *AIR 1968 SC 147*[14], a case involving attempt to bribe a civil servant, Bachawat, J. rejected the contention that the alleged recording of the conversation that took place at an arranged trap is hit by Art. 20(3) of the Constitution of India pointing out that there was no compulsion; and also held that the tape recording is done without the knowledge of the appellant is not an objection to its admissibility and that it is a relevant fact and is admissible under Ss. 7 and 8 of the Evidence Act. But it should be received with caution as one of the features of magnetic tape recording is the ability to erase and reuse the recording medium.

[14] *Yusufalli* v. *State of Maharashtra*, *AIR 1968 SC 147*

In *Rama Reddy* v. *V.V. Giri, (1970) 2 SCC 340 : AIR 1971 SC 1162*[15], the constitution Bench of the Supreme Court, on an Election Petition examined the entire ramifications and repercussions of the evidence in the form of tape record and also chronicled decisions on the point in India as well as in the other high-profile Common Law countries, i.e. England and the United States. The Court noted that although in *Hopes* v. *H.M. Advocate*[16]*,* (1960) Scots Law Times 264 and *R.* v. *Mills*[17]*,* (1962) 3 All. E.R. 298, the issue came up and the tape records were played before the Jury, the matter was prominently dealt with in *R.* v. *Masqud Ali*[18]*,* (1965) 2 All. E.R. 464, wherein the Court of Appeal noted that there is no difference in principle between a tape recording and a photograph. It was noted that, *"the evidence as to things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted for quite long"*. The Court affirmed that the tape records are admissible, provided the accuracy of the recordings can be proved and the voices recorded properly identified and provided also that the evidence is relevant and otherwise admissible. The Court observed in *Hopes's case*[19] (op. cit.) that the witness evidence of the conversation was as much primary evidence as the evidence from replaying of the tape recorded. Each received it at the same time, the one recording it in the human

[15] *Rama Reddy* v. *V.V. Giri, (1970) 2 SCC 340 : AIR 1971 SC 1162*
[16] *Hopes* v. *H.M. Advocate*[16]*,* (1960) Scots Law Times 264
[17] *R.* v. *Mills*[17]*,* (1962) 3 All. E.R. 298
[18] *R.* v. *Masqud Ali*[18]*,* (1965) 2 All. E.R. 464
[19] *Hopes* v. *H.M. Advocate*[19]*,* (1960) Scots Law Times 264

memory, the other upon a piece of tape. The Court in *Rama Reddy's case*[20] (op. cit.) held that the previous statement recorded on tape can be used not only to corroborate the evidence given by the witness, but also to contradict the evidence given before the Court as well as to test the veracity of the evidence and also to impeach his impartiality, i.e. under Ss. 157, 155(3), 146(1) and 153 Exception 2 of the Evidence Act. The Court observed that the tape itself is primary and direct evidence admissible as to what has been said and picked up by the recorder.

In *R.M. Malkani* v. *State of Maharashtra*[21]*, (1973) 1 SCC 471 : AIR 1973 SC 157*, involving demand for bribe amounting to extortion by Coroner of Bombay, a civil servant, the Court allowed admission of tape recorded conversations obtained at the trap set up holding that it was not tainted by coercion or unfairness quoting *Maqsud Ali's*[22] *case* (op. cit) that it is something like the method of informer and of the eaves dropper which is commonly used in the detection of crime and that the only difference here was that a mechanical device was the eaves dropper. But, as the detection is by deception, as a police procedure, the same should be used sparingly and accepted with circumspection, care and caution, the Court of appeal had added. It is not hit by Art. 21 of the Constitution of India or by S. 162 Cr.P.C. as the statement was not made to a police officer, the Supreme Court

[20] *Rama Reddy* v. *V.V. Giri, (1970) 2 SCC 340 : AIR 1971 SC 1162*
[21] *R.M. Malkani* v. *State of Maharashtra*[21]*, (1973) 1 SCC 471 : AIR 1973 SC 157*
[22] *R.* v. *Masqud Ali*[22]*,* (1965) 2 All. E.R. 464

further held.

It was in *Z.B. Bukhari* v. *B.R. Mehra*[23]*, (1976) 2 SCC 17: AIR 1975 SC 1788*, an election case, the Supreme Court held that the tape records are really '*Documents*' under S. 3 of the Evidence Act. The Court therein reiterated that the same are admissible on satisfying the following conditions:

"*(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who knew it.*

(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act"

It was in *Ram Singh's* case[24] *AIR 1986 SC 3: (1985) Supp1 SCC 611*, another election case that the Supreme Court elaborately considered the various facets of the admissibility of the tape record and laid down definite guidelines. The Court has also observed that such evidence should also be received, with some caution and assessed in the light of all the circumstances of each case, as it is possible to be altered by transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination

[23] *Z.B. Bukhari* v. *B.R. Mehra*[23]*, (1976) 2 SCC 17: AIR 1975 SC 1788*

[24] *Ram Singh's* case[24] *AIR 1986 SC 3: (1985) Supp1 SCC 611*

by technical experts. Continuity, clarity and coherence are all matters that have to be looked into for a fair and reliable assessment. The important feature of such evidence is that if accepted the same would change the fate and face of the *lis* and clinch the issue, and the controversy between the parties. On the other hand, if detected to be fake, it will not just back-fire but boomerang and non-suit the party that produced the evidence. In the above case, the tape records were not relied on as found to be not inspiring confidence. On the analogy of a mutilated document the Court observed that the same was not coherent, distinct or clear.

The Court in *Sumitra Debi v. Calcutta Dyeing & Bleaching Works*[25]*, AIR 1976 Cal. 99*, in a suit on accounts warned that anything which is born of trickery or trapping or cunningness should be very cautiously and carefully considered by the Court; and that ventriloquism is not very uncommon and hence the Court should fully guard against all these possible tampering and manufacturing and should look for independent corroboration and intrinsic evidence before he relies on the tape.

In *Quamarul Islam* v. *S.K. Kanta*[26]*,* 1994 Supp (3) SCC 5: AIR 1994 SC 1733, also an election case regarding corrupt practices, the Court did not rely on the tape recordings as there was no proper evidence as to its custody to rule out the possibility of tampering. Evidence in

[25] *Sumitra Debi v. Calcutta Dyeing & Bleaching Works*[25]*, AIR 1976 Cal. 99*
[26] *Quamarul Islam* v. *S.K. Kanta*[26]*,* 1994 Supp (3) SCC 5: AIR 1994 SC 1733

the form of tape record although singularly advantageous to gauge the truth, on the flip side is the fact that there is a lot of space for manoeuvring and hence strict proof as to every aspect of its authenticity and perfection is to be insisted. This aspect was particularly stressed by Justice AR. Lakshmanan (as he then was) in *K.S. Mohan* v. *Sandhya Mohan*[27], AIR 1993 Mad 59, in which case the Court substantially relied on the tape-recorded evidence produced to establish the infidelity of the wife.

In *Joginder Kaur v. Surjit Singh*[28], *AIR 1985 P&H 128*, the Court allowed the appeal of the wife against the decision allowing a decree of divorce under S.13(l)(iii) of the Hindu Marriage Act, 1955 on the ground that she is suffering from schizophrenia partly relying on her stealthily tape recorded version that she is having the ailment. The recorded voice was not proved or compared with the voice of the wife who was sitting as respondent in lower Court and hence it cannot be held beyond reasonable doubt that the voice recorded is that of the appellant and not that of an imposter, the Court noted.

In *C.R.Mehta v. State of Maharashtra*[29], *1993 Crl.L.J. 2863*, a case of offering bribe to the Home Minister of the State to get COFEPOSA detention orders revoked, negotiations tape recorded at trap laid by the police, the Court declined to place reliance as the tapes ought to have been sealed at the earliest point of time and not opened except

[27] *K.S. Mohan* v. *Sandhya Mohan*[27], AIR 1993 Mad 59
[28] *Joginder Kaur v. Surjit Singh*[28], *AIR 1985 P&H 128*,
[29] *C.R.Mehta v. State of Maharashtra*[29], *1993 Crl.L.J. 2863*

under orders of Court. In the above matter, it was found that on each occasion after recording was done, the tape was sealed and later the same tapes were opened and the balance part of it was used on the next occasion. The tapes were not sufficiently audible also. Evidently, the matter involved was a criminal investigation.

A bare perusal of the above shows that the precedential law laid down a great stress on the authenticity and genuineness of the records prior to the same being considered as admissible. It was only after the satisfaction of certain conditions or test which can be called as "*Rule of Reliability"* that the said piece of electronic evidence was considered to be admissible for the court to look into it. The court held that the tests laid by it regarding identification or voice, accuracy, audibility, no possibility of tampering etc. are to be applied first and only after satisfaction of the same the said records were held to be admissible. This was contrary to the general principle where authenticity or genuineness is to be tested at the stage of appreciation of Evidence looking into the nature of the records which is easily susceptible to tampering, manipulation, alteration, excision, deletion etc.

CHAPTER 3

A BRIEF PERSPECTIVE OF THE LAW OF ELECTRONIC EVIDENCE OF OTHER COUNTRIES

3.1 LAW OF ELECTRONIC EVIDENCE IN UK

Amendments in respect of Electronic Evidence in the Indian Evidence Act, 1872 was highly influenced by the U K Model both in language and in structure. Hence it is important to understand the same. Section 5 of the Civil Evidence Act, 1968[30] identical to Section 65 B of the Indian Evidence Act declares, for instance, that a certificate fulfilling four specified conditions, and signed by a person '*occupying a responsible position'* may be evidence of the matters stated therein. Section 65B appears to have been copied almost word to word from Section 5 of the Civil Evidence Act, 1968. It is interesting (and appalling) to note that this happened in 2000, about 5 years after the UK repealed the 1968 Act and replaced it with the UK Civil Evidence Act, 1995[31]. The said section[32] of the 1968 Act reads as under:

"(1) In any civil proceedings a statement contained in a Admissibility

[30] Civil Evidence Act, 1968 of UK
[31] UK Civil Evidence Act, 1995
[32] Section 5 of Civil Evidence Act, 1968 of UK

document produced by a computer shall, subject to rules of statements by court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents ; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing

information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) (a) above was regularly performed by computers, whether—

a) by a combination of computers operating over that period; or

b) by different computers operating in succession over that period; or

c) by different combinations of computers operating in succession over that period; or

d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) *identifying the document containing the statement and describing the manner in which it was produced;*

(b) *giving such particulars of any device involved in* ***the*** *Part I production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;*

(c) *dealing with any of the matters to which the conditions mentioned in subsection (2) above relate,*

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act—

(a) *information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;*

(b) *where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;*

(c) *a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.*

(6) Subject to subsection (3) above, in this Part of this Act "computer" means any device for storing and processing information,

and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process."

It is pertinent to mention here that in the UK law this provision was mentioned under Part I of the Civil Evidence Act, 1968 titled *Hearsay Evidence*. Further a certificate under the hand of a person having prescribed qualifications in computer system analysis and operation or a person responsible for the management or operation of the computer system as to all or any of the matters referred to in subsection (2) or (3) of this section shall, subject to subsection (6) of this section, be accepted in any legal proceedings, in the absence of contrary evidence, as proof of the matters certified. An apparently genuine document purporting to be a record kept in accordance with subsection (2) of this section, or purporting to be a certificate under subsection (4) of this section shall, in any legal proceedings, be accepted as such in the absence of contrary evidence. The court may, if it thinks fit, require that oral evidence be given of any matters comprised in a certificate under this section, or that a person by whom such a certificate has been given attend for examination or cross-examination upon any of the matters comprised in the certificate).

For relying on the Electronic Evidence, it was taken care that the law relating to admissibility and proof of electronic record have a positive mandate to be satisfied by the one who relies upon electronic record. The positive mandate being to establish positively that there was no

malfunctioning of the equipment processing the operations at the relevant time, to which the record relates. In England this positive mandate was statutorily enacted and the prosecution had to show by positive and affirmative evidence that it was safe to rely upon the document produced by a computer from out of its memory. The Police & Criminal Evidence Act[33], 1984 was enacted. But, while interpreting Section 69 of the said Act, the courts took a practical approach and gave an interpretation where computer generated record could be proved by a statement, made by an employee unfamiliar with the precise details of the operation of the computer, that the print out was retrieved from the computer memory and the computer was not malfunctioning.

In R.V. Shepherd[34], 1993 A. C. 380. Lord Griffiths, dealing with the defence argument held:

"*The principal argument for the defendant starts with the proposition that the store detective was not a person occupying a responsible position in relation to the operation of the computer within the meaning of paragraph 8(d) of Schedule 3 to the Act and, therefore, was not qualified to sign a certificate for the purpose of providing proof of the matters contained in Section 69(a). This I accept. Although the store detective understood the operation of the computer and could speak of its reliability, she had no responsibility for its operation. I cannot however, accept the next step in the*

[33] The Police & Criminal Evidence Act[33], 1984 Section 69.
[34] R.V. Shepherd[34], 1993 A. C. 380

defendant's argument which is that oral evidence is only acceptable if given by a person who is qualified to sign the certificate. The defendant does not go so far as to submit that evidence must be given by a computer expert but insists that it must be someone who has responsibility for the operation of the computer; either the operator or someone with managerial responsibility for the operation of the computer. Documents produced by computers are an increasingly common feature of all business and more and more people are becoming familiar with their uses and operation. Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly."

Statement by the witness that when the computer was working, they had no trouble with operation of Central Computer was held sufficient in discharge of the affirmative burden. *In R v. Ana Marcolino*[35]*, (CA "Crim. Div"),* following the dictum of Lord Griffiths in *R.V. Shepherd*[36]

[35] R v. Ana Marcolino, CA (Crim Div) (Henry LJ, Alliott J, Judge Grigson) 28/04/1999
[36] R.V. Shepherd[36], 1993 A. C. 380

the evidence of the witness proving electronic record was analysed step wise which analyses is illuminative as to how the issue was dealt with. Lord Justice Henry posed the question:

"Does the evidence given by Mr. Slade satisfy the test in *Shepherd, 1993 AC 380*?"

The answer came as follows:

"*1) he had been employed by Vodaphone for over four years as the risk supervisor and his duties included identifying fraudulently used accounts and liaising with the police. This account had been used fraudulently.*

2) He had retrieved from the computer the records relating to this mobile telephone and produced from those records the itemized account for the relevant period. To do so, he had accessed the billing records for that period.

3) He was not familiar with the precise details of the operations of the computer because he had not designed it. However, he had general knowledge of the system. He had no reason to believe that the computer records were inaccurate because of improper use.

4) Vodaphone is continuously audited by the DTI. No complaint has been made as to the accuracy of their records. Vodaphone has their own quality assurance Department which instantly monitored the system.

5) He asserted that the computer was working properly at the relevant time. In support of that assertion he relied upon the following

facts:

a) *There was no record of any malfunction. Had there been it would have been drawn to his attention by the billing department. In any event, the computer had ancillary equipment which would have taken over, had there been any failure or malfunction of the primary systems.*

b) *If there had been any malfunction, the billing records would be classed as 'in suspension'; those records were not.*

c) *The billing record itself is made without human intervention, although it is triggered by the use of a mobile phone. The system runs a series of internal checks as to accuracy and function before the call is made and the subsequent detail recorded. If there is any malfunction the records are put into suspension. The records of these calls had not been suspended.*

d) *The records in relation to malfunction were kept by persons who could not reasonably be expected to have any personal recollection of them. These persons had a duty to report any malfunction. None had been reported.*

Miss Calder submitted that the evidence of external audit is irrelevant. In our judgment, the jury was entitled to take into account that these records were produced by a large company providing a substantial public service the subject of licensing and external audit by the DTI. Such evidence goes directly as to whether there has been improper use. It is the view of this Court that the totality of the evidence as set out above satisfies the test propounded by Lord Griffiths. Mr. Slade

was sufficiently familiar with the workings of the computer. The records are designed to reveal malfunction. None was revealed. The conviction was found to be safe and the appeal was dismissed."

In DPP v. Me. Kewon[37], (1997) 1 Criminal Appeal 155, Lord Hoffman, applying Section 69 of the Police and Criminal Evidence Act, 1984 in relation to the inaccuracy in the time display in the computer printout, held:

"*I shall for the moment assume that the inaccuracy in the time display meant that "the computer not operating properly". The question is therefore whether that was "such as to affect the production of the document or the accuracy of its contents". If the words are read literally, it did. The document said that the first test had occurred at 23.00 GMT when it was in fact 00.13 BST. As to one hour, the discrepancy is merely as to the way in which the time was expressed. 23.00 GMT is the same time as 00.00 BST. But the remaining 13 minutes cannot, I think, be dismissed as de minimis. The inaccuracy of the time reading therefore affected the accuracy of a part of the contents of the document. In my view, however, the paragraph was not intended to be read in such a literal fashion. "The production of the document or the accuracy of its contents" are very wide words. What if there was a software fault which caused the document to be printed in lower case when it was meant to be in upper case? The fault has certainly affected the production of the document. But a rule which excluded an otherwise accurate document on this ground would*

[37] *DPP v. Me. Kewon[37], (1997) 1 Criminal Appeal 155*

be quite irrational.

To discover the legislative intent, it is necessary to consider the purpose of the rule. The first thing to notice is that Section 69 is concerned solely with the proper operation and functioning of a computer. A computer is a device for storing, processing and retrieving information. It receives information from, for example, signals down a telephone line, strokes on a keyboard or (in this case) a device for Chemical analysis of gas, and it stores and processes that information. If the information received by the computer was inaccurate (for example, if the operator keyed in the wrong name) then the information retrieved from the computer in the form of a statement will likewise be inaccurate. Computer experts have colourful phrases in which to express this axiom. But Section 69 is not in the least concerned with the accuracy of the information supplied to the computer. If the gas analyser of the Intoximeter is not functioning properly and gives an inaccurate signal which the computer faithfully reproduces, Section 69 does not affect the admissibility of the statement. The same is true if the operator keys in the wrong name. Neither of these errors is concerned with the proper operation or functioning of the computer. The purpose of Section 69, therefore, is a relatively modest one. It does not require the prosecution to show that the statement is likely to be true. Whether it is likely to be true or not is a question of weight for the justices or jury. All that Section 69 requires as a condition of the admissibility of a computer-generated statement is positive evidence that the computer has properly processed, stored and reproduced

whatever information it received. It is concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered as evidence of a fact which it states. The language of Section 69(1) recognises that a computer may be malfunctioning in a way which is not relevant to the purpose of the exclusionary rule. It cannot therefore be argued that any malfunction is sufficient to cast doubt upon the capacity of the computer to process information correctly. The legislature clearly refused to accept so extreme a proposition. What, then, was contemplated as the distinction between a relevant and an irrelevant malfunction? It seems to me that there is only one possible answer to that question. A malfunction is relevant if it affects the way in which the computer processes, stores or retrieves the information used to generate the statement tendered in evidence. Other malfunctions do not matter. It follows that the words "not such as to affect the production of the document or the accuracy of its contents" must be read subject to the overall qualification that the paragraph is referring to those aspects of the document or its contents which are material to the accuracy of the statement tendered in evidence."

The Law Commission in England[38] reviewed the law relating to computer generated evidence. It summed up the major problem posed for the rules of evidence by computer output in the words of Steyn, J.:

"Often the only record of the transaction, which nobody can be

[38] Law Commission in England

expected to remember, will be in the memory of a computer. ... if computer output cannot relatively readily be used as evidence in criminal case, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have "bugs". --Realistically, therefore, computers must be regarded as imperfect devices."

It noted that given the extensive use of computers, computer evidence could not be unnecessarily impleaded, while giving due weight to the fallibility of computers. The Law Commission noted that Section 69 had enacted a law which was unsatisfactory for the following reasons:

First, Section 69 fails to address the major causes of inaccuracy in computer evidence. As Professor Tapper has pointed out, "*most computer error is either immediately detectable or results from error in the data entered into the machine*".

Secondly, advances in computer technology make it increasingly difficult to comply with Section 69: it is becoming *"increasingly impractical to examine (and therefore certify) all the intricacies of computer operation*". These problems existed even before networking became common.

A **third** problem lies in the difficulties confronting the recipient of a computer-produced document who wishes to tender it in evidence: the recipient may be in no position to satisfy the court about the operation of the computer. It may well be that the recipient's

opponent is better placed to do this.

Fourthly, it is illogical that Section 69 applies where the document is tendered in evidence, but not where it is used by an expert in arriving at his or her conclusions, nor where a witness uses it to refresh his or her memory. If it is safe to admit evidence which relies on and incorporates the output from the computer, it is hard to see why that output should not itself be admissible; and conversely, if it is not safe to admit the output, it can hardly be safe for a witness to rely on it.

The Commission recommended deletion of Section 69, the opinion was: "*Where a party sought to rely on the presumption, it would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been - in which case the party would have to prove that it was (beyond reasonable doubt in the case of the prosecution, and on the balance of probabilities in the case of the defence), The principal has been applied of such devices as speedometers and traffic lights, and in the consultation paper we saw no reason why it should not apply to computers."*

Section 69 of the Police and Criminal Evidence Act, 1984 has since been repealed and the common law presumption: *"in the absence of evidence to the contrary the courts will presume that mechanical instruments were in order at the material time*", operates with full force.

Experience has shown to us that development in computer networking, access, control, monitoring and systems security are increasingly making it difficult for computer errors to go undetected. Most computer errors are immediately detected or resultant error in the date is immediately recorded. In a court of law, it would be impractical to examine the intricacies of computer functioning and operations. To put it in the words of the Law Commission report in England: "*Determined defence lawyers can and do cross-examine the prosecution's computer expert at great length. The complexity of modern systems makes it relatively easy to establish a reasonable doubt in a juror's mind as to whether the computer was operating properly. Bearing in mind the very technical nature of computers, the chances of this happening with greater frequency in future are fairly high. We are concerned about smoke-screens being raised by cross-examination which focuses in general terms on the fallibility of computers rather than the reliability of the particular evidence. The absence of a presumption that the computer is working means that it is relatively easy to raise a smokescreen.*"

This Act was replaced by the UK Civil Evidence Act, 1995[39] which has made the rule of admissibility of computer-generated documents technology-neutral.

[39] UK Civil Evidence Act, 1995

3.2 LAW OF ELECTRONIC EVIDENCE IN AUSTRALIA.

SOUTH AUSTRALIAN EVIDENCE ACT, 1929.

Part 6A[40] was inserted into the Act in 1972 as a result of a recommendation made by the Law Reform Committee of South Australia[41] in 1969 as to the admissibility of computer evidence in civil proceedings The Law Reform Committee described its proposal for Part 6A as having the same effect as Sec 5 of the Civil Evidence Act 1968 (UK), with certain additional safeguards. Section 59B of Part 6A was amended in 1979 to extend to criminal proceedings. The said reads as under:

"**Part 6A—Computer evidence**

Interpretation

59A. In this Part, unless the contrary intention appears—

"computer" *means a device that is by electronic, electro-mechanical, mechanical or other means capable of recording and processing data according to mathematical and logical rules and of reproducing that data or mathematical or logical consequences thereof*;

"**computer output**" or "**output**" *means a statement or representation (whether in written, pictorial, graphical or other form) purporting to be a statement or representation of fact— (a) produced by a computer; or (b) accurately translated from a statement or representation so produced*;

[40] Part 6A of SOUTH AUSTRALIAN EVIDENCE ACT, 1929

[41] Law Reform Committee of South Australia 1968

"data" *means a statement or representation of fact that has been transcribed by methods, the accuracy of which is verifiable, into the form appropriate to the computer into which it is, or is to be, introduced*.

Admissibility of computer output 59B.

(1) Subject to this section, computer output shall be admissible as evidence in any civil or criminal proceedings.

(2) The court must be satisfied—

(a) that the computer is correctly programmed and regularly used to produce output of the same kind as that tendered in evidence pursuant to this section; and

(b) that the data from which the output is produced by the computer is systematically prepared upon the basis of information that would normally be acceptable in a court of law as evidence of the statements or representations contained in or constituted by the output; and

(c) that, in the case of the output tendered in evidence, there is, upon the evidence before the court, no reasonable cause to suspect any departure from the system, or any error in the preparation of the data; and

(d) that the computer has not, during a period extending from the time of the introduction of the data to that of the production of the output, been subject to a malfunction that might reasonably be expected to affect the accuracy of the output; and

(e) that during that period there have been no alterations to the mechanism or processes of the computer that might reasonably be

expected adversely to affect the accuracy of the output; and

(f) that records have been kept by a responsible person in charge of the computer of alterations to the mechanism and processes of the computer during that period; and

(g) that there is no reasonable cause to believe that the accuracy or validity of the output has been adversely affected by the use of any improper process or procedure or by inadequate safeguards in the use of the computer.

(3) Where two or more computers have been involved, in combination or succession, in the recording of data and the production of output derived therefrom and tendered in evidence under this section, the court must be satisfied that the requirements of subsection (2) of this section have been satisfied in relation to each computer so far as those requirements are relevant in relation to that computer to the accuracy or validity of the output, and that the use of more than one computer has not introduced any factor that might reasonably be expected adversely to affect the accuracy or validity of the output.

(4) A certificate under the hand of a person having prescribed qualifications in computer system analysis and operation or a person responsible for the management or operation of the computer system as to all or any of the matters referred to in subsection (2) or (3) of this section shall, subject to subsection (6) of this section, be accepted in any legal proceedings, in the absence of contrary evidence, as proof of the matters certified.

(5) An apparently genuine document purporting to be a record kept in accordance with subsection (2) of this section, or purporting to be

a certificate under subsection (4) of this section shall, in any legal proceedings, be accepted as such in the absence of contrary evidence. (6) The court may, if it thinks fit, require that oral evidence be given of any matters comprised in a certificate under this section, or that a person by whom such a certificate has been given attend for examination or cross-examination upon any of the matters comprised in the certificate.

In 1985 the Australian Law Reform Commission while referring to the several judgments observed, "*it is ironic that specific computer legislation designed to facilitate proof has been found to be more stringent than the common law*."

A need was felt that Part 6A of the Evidence Act 1929 (SA) should be deleted and replaced with new and amended provisions in Part IV of the Act (Public Acts and documents) and with consequential amendments to Part V of the Act (Banking records), to ensure that these provisions cover evidentiary material produced, recorded, stored or copied using modern technologies. There should not be a separate set of electronically or digitally referenced principles for facilitating the proof of evidence produced electronically and for governing how that evidence may be used in court. The provisions replacing Part 6A of the Evidence Act 1929 (SA) should aim for consistency with relevant provisions in the Uniform Evidence Acts to the greatest extent possible within the structure of the Act and should (1) facilitate the proof of evidence generated, recorded or stored not

only by traditional computers but also by the internet, modern electronic devices or digital processes;

(2) contemplate the convergence between computer-stored evidence, computer generated evidence and electronic and digital communications;

(3) recognise that authentication in every case is too heavy a burden for the parties and that it needlessly increases the cost and length of litigation;

(4) provide, instead, for documents or things that are produced, recorded, copied or stored electronically or digitally, a rebuttable evidential presumption that the technological process or device so used did in fact produce the asserted output and did so reliably, so that a party adducing evidence of such documents or things would no longer have to prove the authenticity and reliability of the process or device unless evidence sufficient to raise doubt about it had been adduced;

(5) permit the tendering of a document or business record that has been retrieved, produced or collated by the use of a device when there is no other way that the information that has been stored this way can be used by a court (for example, when there is no hard copy precursor for the electronically-generated material sought to be admitted into evidence);

(6) redefine '*document*' and '*business record*', to include digital objects.

With these objectives in mind the said provision Part 6 A in the Act was deleted. Thus, South-West Australia has also followed the same

path as was done in U.K and thus have now made the law in force as technology-neutral.

3.3 LAW IN UNITED STATES

In the United States, admissibility of evidence is governed by the Federal Rules of Evidence (FRE) and a careful perusal of the same shall reveal that the rules on admissibility of electronic evidence in the United States are almost similar to those in India with inclusion of Section 22-A and 45-A in the Indian Evidence Act, 1872. Rule 901 and 902[42] of the Federal Rules of Evidence, 2015 lay down out a non-exhaustive list of accepted authentication methods. These range from oral evidence to expert testimony to proof by public reports. In 2007, in *Lorraine* v. *Market American Insurance* Co[43]., the Chief Magistrate Judge of the District of Maryland extended the applicability of these provisions to electronic evidence. This landmark decision is widely regarded as an essential and as explaining the position of law in the US on, the admissibility of electronic evidence. This has led to the creation of a flexible, inclusive framework whereby electronic evidence can be made admissible by way of multiple means; parties and courts are not constrained by any one method of authentication. This ensures that "*room for growth and development in this area"* is guaranteed. The court held that when an electronic record is produced as evidence, it should be tested on following counts before it is

[42] Rule 901 and 902[42] of the Federal Rules of Evidence, 2015
[43] *Lorraine* v. *Market American Insurance* Co[43]., the Chief Magistrate Judge of the District of Maryland, 2007

admissible

(i) is the content of the document relevant;

(ii) is it genuine;

(iii) is it only a hearsay;

(iv) whether the document is original or duplicate and in the case of latter, is there any admissible secondary evidence to corroborate it; and

(v) whether the probative value of the evidence stands the scrutiny of principles of fair treatment?

Such a model, mirroring the non-exhaustive, broad set of authentication methods prescribed by Rules 901 and 902 of the American Federal Rules of Evidence, 2015 would allow for authentication methods such as metadata, authentication through public records, oral testimony, specimen comparison etc. There are several benefits to increasing the number of authentication methods for electronic evidence in this manner. A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the

information on the hard drive was placed there by the defendant. A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

3.4 LAW OF ELECTRONIC EVIDENCE IN CANADA

The Uniform Electronic Evidence Act 1998[44] deals with the law of electronic Evidence in Canada. It consists of 9 sections. The **First** section is a definition or interpretation clause and defines "data", "electronic record" and "electronic records system". The **Second** section deals with the Application of the Act according to which the application of Common Law and statutory rule relating to admissibility remained intact except for rules relating to authenticity and best evidence. The **Third** section deals with Authentication where the burden of proving the authenticity is on the person claiming it. The **Fourth** Section deals with the best evidence rule which as per the Act is satisfied on proof of the integrity of the electronic records system in or by which the data was recorded or preserved. Section five and six deals with presumptions, where Section **five** is a presumption clause relating to presumption of Integrity of Electronic Records on the establishment of the fact that at all material times the computer system or other similar device was operating properly or, if it was not,

[44] The Uniform Electronic Evidence Act 1998.

the fact of its not operating properly did not affect the integrity of the electronic record; and there are no other reasonable grounds to doubt the integrity of the electronic records system. Section **Six** deals with presumptions regarding integrity on the absence of evidence to the contrary that the electronic record was recorded or preserved by a party to the proceedings other than the party seeking to introduce it; or the electronic record was recorded or preserved in the usual and ordinary course of business by a person who is not a party to the proceedings. Section **seven** deals with the applicability of Affidavit in respect of Compliance of Section 5 and 6. Section **eight** of the Act titled as Standards with regards to admissibility of electronic records stated that the evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or preserved, having regard to the type of business or endeavour that used, recorded or preserved the electronic record and the nature and purpose of the electronic record. Section **nine** which dealt with the retention of original after microfilming has been repealed.

A perusal of the various provisions of the act shows that the definition of, "*electronic record*" as per the Act does not cover any thing that is not recorded or preserved by or in a computer system or similar device. This was kept intentionally as the according to the Act An electronic record is not part of the system that produced it.

Further no change was made to the law of hearsay in order to ensure the proper admission of electronic records. The admission of any record may depend on hearsay rules such as the business records rule or the bank records rule, in some jurisdictions hence the Act does not change those rules likewise it was felt that recorded evidence may be subject to many other rules, about privilege, about competence, about notice, about documents found in the possession of an accused person, that are not affected by this Act however the same was intended to affect existing law on authentication and best evidence.

Section 3 codifies the common law rule on authentication which applies equally to paper records. The proponent needs only to bring evidence that the record is what the proponent claims it. This evidence is usually given orally and is subject to attack, like any other. The Act does not open an electronic record to attacks on its integrity or reliability at this stage. That question is reserved for the new "*best evidence*" rule. The best evidence rule generally requires that the proponent of a record should produce the original record or the closest thing available to an original. The notion of "*original*" is not easily applicable to many electronic records. The Act therefore dispenses with the need for an original, by substituting another way of serving the purpose of the rule i.e. evidence of the reliability of the system that produced the record. Since it is usually impossible to provide direct evidence of the integrity of the individual record to be admitted hence System reliability is a substitute for record reliability. The Act does not say expressly that the proponent of an electronic record does

not have to produce an original, but the displacement of the usual best evidence rule will have that effect. Even if there is an original of an electronic record, as in the case of an electronic image of a paper document, the Act does not require the production of the paper. Nor does it require that the original have been destroyed before the electronic image becomes admissible. The Act sets up a rule for admitting electronic records. Records retention policies, for paper or electronic records, are beyond its scope, and should not be determined by the law of evidence in any event. Someone who destroys paper originals in the ordinary course of business, ideally in accordance with a rational schedule, should not be prejudiced in using reliable electronic versions of those records.

The presumptions needed to show reliability is based on evidence that includes both the computer system that produced the record and the record-keeping system in which it operates. The principle underlying the presumptions is the integrity of most electronic records is not disputed; they are admitted in evidence routinely. This Act does not intend to make the process more difficult, or to provide grounds for frivolous but possibly expensive attacks on otherwise acceptable records. It does intend to point out the basic criteria on which integrity of an electronic record can be judged. This presumptive evidence of reliability may be brought by anyone and about anyone's records. It is not limited to the proponent of a particular record. So for example if one wanted to introduce a third party's record, but that record was not produced in the ordinary course of business and thus could not

benefit from the presumption in section 6, one could lead evidence of the system where that record was recorded or preserved, to create the presumption in section 5.

Section 6 deals with an electronic record obtained from another party in the proceedings, or from someone who is not a party. The record is presumed reliable. If it is not reliable, then the other person has the opportunity to show the unreliability and rebut the presumption, since that person knows his or her or its own record-keeping system better than anyone else. This section creates a presumption of reliability of business records of non-parties to the proceeding. The purpose of the rule is to ensure the admissibility of electronic records from non-parties whose record-keeping systems are not susceptible to ready proof as part of the proceeding.

Section 7 allows the evidence to support the presumptions in sections 5 and 6 to be put in by affidavit instead of by oral evidence. The person making the affidavit may not know personally every aspect of the record-keeping system, but if the person informs himself or herself of the relevant information, then the affidavit will be acceptable. Cross-examination on the affidavit may expose relevant gaps in the information, of course. If doubt is cast on the reliability of the affidavit, then the person presenting the electronic record may have to provide more detailed support of the record-keeping system.

Section 8 makes relevant the adherence of that system to recognized standards for the kind of record and the kind of business

in question. This Act does not make compliance with such standards obligatory to get electronic records admitted, but it makes them relevant to the question of admissibility. Records managers seeking to create systems that will produce records that can be admitted in evidence may take some comfort in that rule. The language of the section does not require that the standards be external to the person whose records are in issue. One could show compliance (or not) with one's own standards. Whether this would be as effective as complying with more broadly based standards is a practical question left to the records managers of the proponent of the evidence.

3.5 LAW OF ELECTRONIC EVIDENCE IN SINGAPORE

The primary source of the law of evidence in Singapore is the Evidence Act[45] (Cap 97) ('the Act). The Evidence Act, which provides the framework of rules for the types of evidence that can be admitted as evidence during court proceedings, defines *"electronic records"* as a record generated, communicated, received or stored by electronic, magnetic, optical or other means in an information system or transmitted from one information system to another. Many business and financial records are now electronic or are being converted from hardcopies to digital records.

The Evidence (Amendment) Bill was introduced in Parliament on 5 December 1995, passed on 18 January 1996 and the *Evidence*

[45] The Evidence (Amendment) Act of Singapore 1997.

(Amendment) Act ('Amendments') came into force on 8 March 1996. Order 63A of the Rules of Court was introduced on 8 March 1997 to provide for *'Electronic Filing and Service*'. However, the Provision of Section 35 and 36 introduced by way of this Act were repealed by the Evidence (Amendment) Act 2012.

The Act defines

'*computer*' to mean: … *an electronic, magnetic, optical, electrochemical, or other data-processing device, or a group of such interconnected or related devices, performing logical, arithmetic or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices* ... . [s 3(1)]

'Computer output' or 'output' has been defined to mean*: "a statement or representation (whether in audio, visual, graphical, multimedia, printed, pictorial, written or any other form) - (a) produced by a computer; or (b) accurately translated from a statement or representation so produced' (s 3(1))."*

Admissibility of computer output

The amended Sections 35 and 36 of the Act provide for three different ways to admit computer output as evidence in court:

"(a) by way of express agreement between the parties to the proceedings (or between the Public Prosecutor and defence counsel);

(b) by showing that the computer output was from an 'approved process' (where the network is independently audited); and

(c) by showing that, in a particular case, the computer output was from a source that was working properly at all material times. The amendments have emphasised relevance which had always been the key to the issue of admissibility of any evidence."

The **first** method of admitting electronic/computer evidence is by way of express agreement which can be made at any time even in the course of proceedings in court (s 35(1)(a)). However, in criminal proceedings where a lawyer does not represent the accused, such evidence cannot be admitted by agreement (s 35(2)(a)). This is to forestall any allegation that the prosecution tricked the accused into agreeing to admit such evidence. Such agreement can also be vitiated by proof of duress, fraud, misrepresentation or mistake (s 35(2)(b)). The express agreement is that neither the authenticity nor the accuracy of the contents of the computer output in question is disputed.

The **second** method is by way of computer output produced in an 'approved process' (s 35(1)(b)). A presumption arises that the output is accurate unless proven otherwise. Such process is approved when it is checked ('audited') and certified by an agency (called the

'certifying authority') that is appointed by the Minister in accordance with the regulations.

The **third** method is where the party tendering the computer output is required to show - through an affidavit and certificate from the Systems Operator or Information System Manager - that there is no reason to doubt the truth or reliability of the output and that, at all material times, the system was operating properly or, if not, that the accuracy of the output was not adversely affected (section 35(1)(c)). Where there is no Systems Operator or Information System Manager available, the section allows an expert with access to the system to provide the necessary certification. Where a certificate is produced, Section 35(9) provides that it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. Any person who in a certificate tendered under subsection (3), (4), (6), (7) or (8) in a court makes a statement which he knows to be false or does not reasonably believe to be true shall be guilty of an offence and shall be liable on conviction to a fine or to imprisonment for a term not exceeding 2 years or to both. (section 35(11)). Any computer output tendered in evidence and duly authenticated shall not be inadmissible as evidence of proof of the contents of the original document merely on the ground that (s 35(10)):

- certain parts or features of the original document, such as boxes, lines and colours, do not appear in the output if such parts and features do not affect the accuracy of the relevant contents; or

- it is secondary evidence.

The court may, if it is not satisfied with the accuracy of the output, call for further evidence by affidavits or oral examination of the relevant operators or persons (section 36(1) and (2)). Evidence by affidavit may also be given by an independent expert appointed or accepted by the court (section 36(2)(e)). The court may, if it thinks fit, call for the oral evidence of the Deponent of an affidavit or the issuer of the certificate concerning the accuracy of the computer output (s 36(3)).

In 2011 the Electronic Transaction Act was passed which gives legal recognition to the electronic records and electronic signatures by way of evidentiary presumptions to ensure these have the same legal effect, validity or enforceability as paper records.

Certain legal presumptions pertaining to electronic records as provided in Electronic Transaction Act in brief are as under:

1. There is no legal difference between electronic records and paper records.
2. There is no legal difference between electronic records and paper documents when satisfying the legal requirements of being in writing.
3. There is no legal difference between an electronic signature and a hand-written signature when satisfying the legal requirement of a signature.
4. There is no legal difference between electronic records and paper

records when admitting these as evidence in legal proceedings.

5. There is no legal difference between a contract entered into electronically and a paper contract.

With the enactment of the Electronic Transaction Act[46] in 2011 certain amendments were made in the Evidence Law in Singapore and the Provision of Section 35 and 36 introduced by way of Evidence (Amendment) Act 1997 were repealed by the Evidence (Amendment) Act[47] 2012.

3.6 LAW OF ELECTRONIC EVIDENCE IN SOUTH AFRICA

On 2 August 2002 the President assented Electronic Communications and Transactions Act[48], 2002 with the following objects:

a) to provide for the facilitation and regulation of electronic communications and transactions;

b) to provide for the development of a national e-strategy for the Republic;

c) to promote universal access to electronic communications and transactions and the use of electronic transactions by SMMEs;

d) to provide for human resource development in electronic transactions;

e) to prevent abuse of information systems;

[46] Electronic Transaction Act[46] of 2011 of Singapore.
[47] The Evidence (Amendment) Act 2012 of Singapore.

[48] Electronic Communications and Transactions Act[48], 2002

f) to encourage the use of e-government services; and to provide for matters connected therewith.

The Electronic Communications and Transactions Act 25 of 2002 ("ECT Act") enables and facilitates electronic communications and transactions in the public interest in South Africa. The key definitions in the ECT Act are those of "data" and "data message", as this informs the type of information that is given protection under the ECT Act. In terms of section 1 of the ECT Act, "*data*" means electronic representations of information in any form. In addition, "*data message*" means data generated, sent, received or stored by electronic means and includes voice, where the voice is used in an automated transaction and a stored record.

The authenticity or originality of electronically produced documents, such as a certificate downloaded from the e-services portal of a public body, are often questioned. It may be tricky in the normal course to convince other members of the public to accept the electronically generated certificates as an authentic or original document.

Section 14: It deals with Originals. It reads as under:

"(1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if-

(a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and

(b) that information is capable of being displayed or produced to the person to whom it is to be presented.

(2) For the purposes of sub-section I(a), the integrity must be assessed-

(a) by considering whether the information has remained complete and unaltered. except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display:

(b) in the !ight of the purpose for which the information was generated; and

(c) having regard to all other relevant circumstances."

Section 15 of the Act which deals with the *Admissibility and Evidential Weight of data messages* reads as under:

"(1) In any legal proceedings. the rules of evidence must not be applied so as to deny the admissibility of a data message. in evidence-

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to-

(a) the reliability of the manner in which the data message was generated, stored

(b) the reliability of the manner in which the integrity of the data message was

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law. admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

South Africa have both enacted a Special Statute in the form of the Electronic Communications and Transactions Act, 2002 to deal with Electronic Evidence and method for dealing with the authenticity in respect of Electronic Evidence has been left open to be decided by the

court as per their discretion providing only a general guideline in respect of the same.

3.7 LAW OF ELECTRONIC EVIDENCE IN SRILANKA

ELECTRONIC TRANSACTIONS ACT, No. 19 of 2006

The Electronic Transactions Act[49], No 19 of 2006 was enacted to recognize & facilitate the formation of contracts, the creation & exchange of data message, electronic recording and other communications in electronic form in Sri Lanka and to provide for the appointment of certification Authority and accreditations of certificate service providers and to produce and to provide formalities connected therewith or incidental thereto.

The object of the act:

- *"facilitate international and domestic electronic commerce by eliminating legal barriers to establishing legal certainty*
- *to encourage the use of reliable forms of electronic commerce*
- *to facilitate electronic filing of documents with government and to promote efficient delivery of government services by means of reliable forms of electronic communication*
- *to promote public confidence in the authenticity, integrity in*

[49] The Electronic Transactions Act[49], No 19 of 2006

electronic commerce and reliability of data message, electronic documents, electronic records or other communications…"

Heralding a clear and distinct message that Sri Lanka is desirous of being at the forefront of innovation and accordingly the country should embrace and introduce modern legislation in the field of commerce and industry, the lawmakers under Chapter V of the Act deals with Rules governing Evidence. Section 21 of the Act, reads as under:

"21. (1) Notwithstanding anything to the contrary in the Evidence Ordinance or any other written law, the following provisions of this section shall be applicable for the purposes of this Act.
(2) Any information contained in a data message, or any electronic document, electronic record or other communication—
(a) touching any fact in issue or relevant fact; and
(b) compiled, received or obtained during the course of any business, trade or profession or other regularly conducted activity, shall be admissible in any proceedings:
Provided that, direct oral evidence of such fact in issue or relevant fact if available, shall be admissible; and there is no reason to believe that the information contained in a data message, or any electronic document, electronic record or other communication is unreliable or inaccurate:
Provided further that, for the purposes of paragraphs (a) and (b), if any information is contained in a data message, electronic document,

electronic record or other communication made by a person—

(i) who is dead or who by reason of his bodily or mental condition is unfit to attend as a witness; or

(ii) who is outside Sri Lanka and where reasonable steps have been taken to find such person and he cannot be found; or

(iii) who does not wish to give oral evidence through fear; or

(iv) who is prevented from so giving evidence, evidence relating to such information shall, if available, be admissible.

(3) The Courts shall, unless the contrary is proved, presume the truth of information contained in a data message, or in any electronic document or electronic record or other communication and in the case of any data message, electronic document, electronic record or other communication made by a person, that the data message, electronic document or electronic record or other communication was made by the person who is purported to have made it and similarly, shall presume the genuineness of any electronic signature or distinctive identification mark therein."

Provisions of the Evidence (Special Provisions) Act[50], No. 14 of 1995 not to apply

"22. Nothing contained in the Evidence (Special Provisions) Act, No. 14 of 1995 shall apply to and in relation to any data message, electronic document, electronic record or other document to which the provisions of this Act applies."

[50] Evidence (Special Provisions) Act[50], No. 14 of 1995

Electronic Transaction Act, 2006 was introduced to identify and expedite the establishment of contracts, the initiation and exchange of data messages, electronic documents, electronic records, and other electronically formed communications. It is to be applied not in conflict with the Evidence Ordinance or any other written law. Certain presumptions are enacted by ETA 2006 by its Section 21(3). As regard the first presumption, it is of the candidness of the data message, electronic document or electronic record. This is a dramatic reversal of well-known hearsay rule. Emerging of any data message, electronic document or record from the person who claims to have made it would be the second presumption. Thirdly, the genuineness of any electronic signature will be presumed by the court. It is an obvious fact that these presumptions could be rebutted by proving the contrary. ESPA 1995 in contrary, confines its presumptions only to include the truthfulness of any contemporaneous recording or statement furnished by a device or a computer of common use. Nevertheless, it is proposed that such generalized devices may lead to unauthorized tampering which may cause uncertainty. The Courts shall, unless proved in contrary, postulate the truth of information contained in a data message, electronic document, electronic record or other communication and in respect of a person who made any data message, electronic document, electronic record or other communication, that it was made by the person who is claimed to have made it and shall surmise the genuineness of any electronic signature or distinctive identification mark. A delicate approach has been taken by the legislature to accept electronic evidence and the

burden of proof of the genuineness of such document has been effectively moved from proposing party to the opposing party ETA 2006 was introduced to identify and expedite the establishment of contracts, the initiation and exchange of data messages, electronic documents, electronic records, and other electronically formed communications.

CHAPTER 4

ENACTMENT OF INFORMATION TECHNOLOGY ACT, 2000

4.1 BACKGROUND

The last few years of the 20th Century saw rapid strides in the field of information and technology. New challenges were thrown by the expanding horizon of science and technology with respect to dealing with proof of facts in disputes where advanced techniques in technology was used and brought in aid. Storage, processing and transmission of date on magnetic and silicon medium became cost effective and easy to handle. Conventional means of records and data processing became out dated. Law had to respond and gallop with the technical advancement. "*He who sleeps when the sun rises, misses the beauty of the dawn. Law did not sleep when the dawn of Information and Technology broke on the horizon*." World over, statutes were enacted. Rules relating to admissibility of electronic evidence and it's proof were incorporated[51].

New technological developments always raise important issues: among them, economic, moral and social impact of the technology, and the legal framework to establish the rights and liabilities of the

[51] RMLNLUJ (2014) Appreciation of Electronic Evidence: A Critique of Judicial Approach by Kumar Askand Pandey (Associate Professor RML National Law University, Lucknow) quoting from the division Bench of Delhi High Court *State* v. *Mohd. Afzal,* 107 (2003) Delhi Law Times 385 (DB).

various actors involved in the use of that technology. The extent to which a state should intervene in the affairs of those affected by the technology is dependent on a number of factors: the level of the perceived risk, both in the short and in the long term, to a given society by the various actors, groups, interests and individuals within that society; the flexibility of the existing legal framework to cope with legal issues that arise in the context of the new technology and its use; the abilities of those within a given society to regulate their affairs in a manner that ensures that legal rights of individuals (or, for that matter, the moral fabric of that society) are not undermined; and the nature of the actors involved in the use of technology.

The rule that permeates global laws of evidence is to not shut out relevant evidence for fear of ease with which its authenticity or integrity may be tampered with. Regulating such human transactions and inter course, which require to be guided and controlled by the law. To cope with this situation, in 1996, the United Nations Commission on International Trade Law, adopted a Model Law on Electronic Commerce and the U.N. General Assembly by its resolution A/RES/ 51/162, 1997 dated 30th January, 1997 recommended that all States give favourable consideration to the Model Law in enacting and revising their Laws. The UNCITRAL Model Law on Electronic Signatures, which the Indian draftsman drew heavily from whilst formulating the laws for proving electronic records, placed substantial weightage to provide for acceptability of electronic documents. In response thereto, the Information Technology Act 21 of 2000 has

been enacted by Indian Parliament. It came into force on the 17th October, 2000 vide G.S.R. 788(E), dated 17th October, 2000[52].

Section 65A and 65B of the Evidence Act, 1872 were introduced in 2000 with the aim to lay down admissibility standards for electronic evidence in courts.

4.2 SCOPE OF THE INFORMATION TECHNOLOGY ACT

Justice P.N Bhagwati in the case of *National Textile Workers' Union v P.R. Ramakrishnan[53] (1983) 1 SCC 228*, held that "*law cannot stand still and it must change with the changing social concepts and values. If the law fails to respond to the needs of changing society, then it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth*."

New communication systems and digital technology have made dramatic changes in the way we live. A revolution is occurring in the way people transact business. Although people are aware of these advantages, they are reluctant to conduct business or conclude any transaction in the electronic form due to lack of appropriate legal framework. The two principal hurdles which stand in the way of

[52] The Information Technology Act 21 of 2000
[53] *National Textile Workers' Union v P.R. Ramakrishnan[53] (1983) 1 SCC 228*

facilitating electronic commerce and electronic governance are the requirements as to writing and signature for legal recognition. Many legal provisions assume the existence of paper-based records and documents and records which should bear signatures. The Law of Evidence is traditionally based upon paper-based records and oral testimony. Since electronic commerce eliminates the need for paper-based transactions, hence to facilitate e-commerce, the need for legal changes have become an urgent necessity. International trade through the medium of e-commerce is growing rapidly in the past few years and many countries have switched over from traditional paper-based commerce to e-commerce.

The advent of Information and Communication Technology (ICT) has had enormous impact on the way people communicate and transact business today. The scientific and technological innovations in the realm of ICT have been a great facilitator of seamless business transactions across the border. Be it sale and purchase, auctions or business negotiations, businesses are thriving on the ICT as today cyber space is the place to be in. Nations are embracing the new challenges being posed by the ICT by enacting new legislations and fine-tuning the existing ones. India, in discharge of its obligation under the United Nations Commission on International Trade Law (UNCITRAL), enacted the Information Technology Act, 2000 (ITA) to primarily encourage and legitimize e-business and through the same Act, also amended its Indian Evidence Act, 1872 (IEA) especially on the issue of recognition, admissibility and appreciation of electronic

evidence. The ITA was further amended by the Information Technology (Amendment) Act, 2008 (ITAA). The increased use of ICT in planning, facilitating and executing crimes has given rise to many new issues in the law of evidence.

It is easier to store, retrieve and speedier to communicate. People are aware of these advantages but they are reluctant to conduct business or conclude transactions in the electronic form due to lack of legal framework. At present many legal provisions recognise paper-based records and documents which should bear signatures. Since electronic commerce eliminates the need for paper-based transactions, therefore, to facilitate e-commerce, there is a need for legal changes. The United Nations Commission on International Trade Law adopted the Model Law on Electronic Commerce in 1996. India being signatory to it has to revise its laws as per the said Model Law. Keeping in view the urgent need to bring suitable amendments in the existing laws to facilitate e-commerce and with a view to facilitate Electronic Governance, the Information and Technology Bill was introduced in the Parliament.

4.3 STATEMENT OF OBJECTS AND REASONS

An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce",

which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto;

The Act is envisaged

* to provide legal recognition to transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information,
* to facilitate electronic filing of documents with Government agencies, and
* to make suitable amendments to the Penal Code, 1860, the Indian Evidence Act, the Bankers' Books Evidence Act and the Reserve Bank of India Act.

4.4 SALIENT FEATURES OF THE ACT IN RESPECT OF ELECTRONIC EVIDENCE

The Act assigns meaning certain terms and these have been accepted as such in the Indian Evidence Act, 1872.

g) "Certifying Authority" means a person who has been granted a licence to issue a [1][electronic signature] Certificate under section 24;

(p) "digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3;

(q) "Digital Signature Certificate" means a Digital Signature Certificate issued under sub-section (4) of section 35;

(r) "electronic form", with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

(t) "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;

(v) "information" includes [data, message, text], images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche;

(ze) "secure system" means computer hardware, software, and procedure that—

(a) are reasonably secure from unauthorised access and misuse;

(b) provide a reasonable level of reliability and correct operation;

(c) are reasonably suited to performing the intended functions; and

(d) adhere to generally accepted security procedures;

(zf) "security procedure" means the security procedure prescribed under section 16 by the Central Government;

(zg) "subscriber" means a person in whose name the [Electronic

Signature] Certificate is issued;

Further the Second Schedule read with Section 91 of the Act amends the Indian Evidence Act, 1872. Amendments are made to take care of admissibility of electronic records along with paper-based document. Other consequential amendments are also made to take note of the provisions of this Act. The salient features of the amendments made in the Indian Evidence Act are:

* In Section 3 the definition of "evidence" is amended to include the contents of electronic records.

The expressions in the definition section, Certifying Authority, digital signature, Digital Signature Certificate, electronic form, electronic record, information and subscriber extracted above and the expressions, "secure electronic record" and "secure digital signature" specified in Sections 14 & 15 will have the same meaning assigned to them in this Act and are inserted in the definition Section

* A new Section 22-A is added to provide for relevance of oral admissions as to the contents of electronic records when the genuineness of the electronic record is in question.

* In Sections 34 & 35 electronic record is added to books of accounts and records. Likewise in Section 59, contents of documents is amended to include those of electronic records as well.

* Section 39 is substituted to provide admissibility of statement contained in part of electronic record, forming part of a longer statement.

* A new Section 47-A is inserted to provide that the opinion of the

Certifying Authority which has issued the Digital Signature Certificate is a relevant fact when the Court has to form an opinion as to the Digital Signature of any person.

* New Sections 65-A and 65-B are introduced as special provisions relating to electronic records and admissibility of computer outputs and elaborate provisions are made in this behalf on the lines of Sections 36-A of the Central Excise Act, 1944 and Section 108-C of the Customs Act, 1962.

* Section 67-A is newly added to provide for proof of the digital signature of any subscriber except in the case of a secure digital signature.

* A new Section 73-A is added to empower the Court to direct a subscriber, Certifying Authority or the Controller to produce the Digital Signature Certificate or any other person to apply for the public key for verification of the digital signature.

* New Section 81-A provides that the Court shall presume the genuineness of every electronic record purporting to be the Official Gazette or other electronic record directed by any law to be kept, if such a record is kept substantially in the form required by law and is produced from proper custody.

* New Sections 85-A, 85-B and 85-C provide that the Court shall presume the genuineness of secure electronic agreements, and the authenticity and integrity of secure electronic records and secure digital signatures, and Digital Signature Certificates unless the contrary is proved.

* Under new Section 88-A, the Court may presume the

genuineness of an electronic message, but such presumption will not apply to the identity of the person by whom such message was sent.

* New Section 90-A provides that any electronic record purporting or proved to be five years old and produced from proper custody may be presumed to bear the Digital Signature of the person concerned as affixed by him or by a person authorized by him.

* Section 131 is substituted to provide that no one shall be compelled to produce documents or electronic records which any other person would be entitled to refuse to produce.

CHAPTER 5

ELECTRONIC RECORD - AS DOCUMENTARY EVIDENCE

5.1 DOCUMENTARY AND REAL EVIDENCE

"Document"[54]: "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used or which may be used for the purpose of recording that matter.

"Evidence": "Evidence" means and includes —

(1) All statements, which the court permits or requires to be made before it by witness, in relation to matters of fact under inquiry;

Such statements are called oral evidence;

(2) All documents including Electronic record produced for the inspection of the court;

Such documents are called documentary evidence.

(t) "**Electronic Record":** "Electronic Record" means data, record or

[54] Section 3 Evidence Act 1872.

data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche;

(o**) "Data":** "Data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

Material Evidence: Phipson in his Law of Evidence gives the definition of "Real Evidence" as "*Material objects other than documents, produced for inspection of the court, are commonly called real evidence."*

5.2 A JOURNEY FROM BRITISH TO INDIAN LAWS.

Document when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony nor inference is relied upon. *Unless its genuineness is in dispute* [*Belt* v. *Lawes*[55]*, The Times, 17 November 1883.], the thing speaks for itself.

[55] *Belt* v. *Lawes*[55]*, The Times, 17 November 1883*

In *Lyell* v. *Kennedy*[56] *(No. 3),* (1884) 50 L.T. 730), it was held that photographs of tombstones and houses were "*documents*" for the purpose of discovery**.**

In *King* v. *Daye*[57]*,* (1908) 2 K.B. 333), Darling J adding to the majority opinion held

"...*But I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, or clay, and it might be, and often was, on metal. So, I should desire to guard myself against being supposed to assent to the argument that a thing is not a document unless it be a paper writing. I should say it is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence*." In this case a sealed packet was held to be a "*document*" and hence, liable for production on summons.

In *Hayes* v. *Brown*[58] (1920 (1 K.B. 250), the Divisional Court acknowledged the fact that a plan of the scene of an accident prepared for the purpose of trial is a "*document*" within the concerned County Court Rules relying on the illustration of Taylor on Evidence

[56] *Lyell* v. *Kennedy*[56] *(No. 3),* (1884) 50 L.T. 730
[57] *King* v. *Daye*[57]*,* (1908) 2 K.B. 333
[58] *Hayes* v. *Brown*[58] (1920 (1 K.B. 250

dealing with admissibility of ancient documents, wherein, it was indicated that the term document includes maps and plans.

In *Emperor* v. *Krishtappa Khandappa*[59] (AIR 1925 Bom. 327), it was held that, the letters, imprinted on the trees would be a document within the meaning of section 29 of the Penal Code, 1860 on the basis that the dispute involved related to the imprint on a tree and not the tree as such. Hence, merely because the seal was imprinted on a tree, the question of the medium on which it was imprinted, loses its significance.

In *Re Alderton and Barry's Application*[60] *(1941) 59 R.P.C. 56*, Morton J. expressly doubted whether blank workmen's time sheets could be classified as documents within section 11(1)(b) of the Patent and Design Acts 1907-1939 expressly because in their original state they conveyed no information of any kind to anybody.

In *Sapporo Maru (Owners) Vs. Statue of Liberty*[61] *HL 1968 1 WLR 739* it was held that '*If tape recordings are admissible, it seems that a photograph of radar reception is equally admissible – or indeed, any other type of photograph. It would be an absurd distinction that a photograph should be admissible if the camera were operated manually by a photographer but not if it were operated by a trip or clock mechanism. Similarly, if evidence of weather conditions were*

[59] *Emperor* v. *Krishtappa Khandappa*[59] (AIR 1925 Bom. 327)
[60] *Re Alderton and Barry's Application*[60] *(1941) 59 R.P.C. 56*
[61] *Sapporo Maru (Owners) Vs. Statue of Liberty*[61] *HL 1968 1 WLR 739*

relevant, the law would affront common sense if it were to say that those could be proved by a person who looked at a barometer from time to time, but not by producing a barograph record. So too with other types of dial recordings. Again, cards from clocking-in-and-out machines are frequently admitted in accident cases.' But in these case it was admissible as material evidence.

In Chancery Court in *Grant* v. *Southwester and County Properties Ltd.*[62]*,* (1975) Ch. 185 : (1974) 2 All.E.R. 465), the Court when called upon to consider the question whether tape recording on a tape amounted to a document held:

"*There are a number of cases in which the meaning of the word "document*" has been discussed in varying circumstances. Before briefly referring to such cases, it will, I think, be convenient to bear in mind that the derivation of the word is from the Latin "*documentum*". It is something which instructs or provides information. Indeed, according to Bullokar's English Expositor (1621), it meant a lesson. The Shorter Oxford English Dictionary has as the fourth meaning for the word the following: "*Something written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, coin, etc.*,".

The Court confined itself to the provisional question as to whether the kind of material alleged to be a document was confined to material,

[62] *Grant* v. *Southwester and County Properties Ltd.*[62]*,* (1975) Ch. 185 : (1974) 2 All.E.R. 465

which makes an appeal to the eye, as distinct from material which makes an appeal to the ear, an appeal to the nose or indeed, any other sense. It concluded by holding that, to constitute the document, the form which it takes seems to be immaterial; it may be anything on which information is written or inscribed-paper, parchment, stone or metal. The Court concluded that, the tape recording provided the information and hence is a document.

In *Senior* v. *Holdsworth, Ex parte Independant Television New Ltd.*[63] (1976) Q.B. 23), the question came up was whether the film which was sought to be summoned fell within the ambit of a document. Relying on the above decisions, the Queens Bench held that the cinematograph, which was sought to be summoned in that case, was indeed a document.

In *Ziyauddin Burhanuddin Bukhari* v. *Brij Mohan Ramdas Mehra*[64] ((1976) 2 SCC 17) in an election trial, admissibility of tape recording of election speeches came up for consideration. Supreme Court held that, "*tape records of speeches are "documents" under section 3 of the Evidence Act*" and stand on no different footing than photographs.

In *R.* v. *Wood*[65], (1982) 76 Cr App R 23 CA the Court of Appeal considered computer printouts in circumstances in which they were not admissible under the Criminal Justice Act 1965. It was necessary for the prosecution to present evidence of a comparison of the

[63] *Senior* v. *Holdsworth, Ex parte Independant Television New Ltd.*[63] (1976) Q.B. 23
[64] *Ziyauddin Burhanuddin Bukhari* v. *Brij Mohan Ramdas Mehra*[64] ((1976) 2 SCC 17
[65] *R.* v. *Wood*, (1982) 76 Cr App R 23 CA

analysis of certain processed metals stolen with that of metals found in the defendant's possession. The Court held that since the computer had been used as a calculator, the print-outs were a piece of real evidence on the basis that, a print-out from a device, of what is displayed or recorded on a mechanical measuring device is real evidence admissible at common law. In the absence of evidence to the contrary, the courts will presume that [mechanical instruments] were in order at the material time.

In Castle v Cross[66] ([1984] 1 WLR 1372, [1985] 1 All ER 87) the prosecution sought to rely on a print-out of an automatic breath-testing device, which was a computer. The Divisional Court held that the print-out was admissible and that the operator of the device should have been permitted to give evidence of what he observed and to interpret the print-out.

In Taylor v. *Chief Constable Cheshire*[67] (1987 (1) All.ER 225) it was held that, there was no difference in principle between a video film and a photograph or tape recording.

The Bombay High Court in *North West Airlines* v. *Union of India*[68] (2007 (214) ELT 178 (Bom.) considered the question whether the floppies, CDs, Hard disc, Pen drives, etc. in which information which are useful for the investigation is stored, are electronic documents or not. Relying on section 65B(1) of the Evidence Act, it was held that,

[66] Castle v Cross[66] ([1984] 1 WLR 1372, [1985] 1 All ER 87)
[67] *Taylor* v. *Chief Constable Cheshire*[67] (1987 (1) All.ER 225)
[68] *North West Airlines* v. *Union of India*[68] (2007 (214) ELT 178 (Bom.)

it amounted electronic documents and print out of such information can be taken on papers, hence the material on which is stored in such as hard disc, etc. can be termed as electronic files and electronic documents. Any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall also be deemed to be also a document, if the conditions mentioned in that section are satisfied, in relation to the information and computer in question, and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. *In Tukaram S. Dighole* v. *Manik Rao Shivaji Kokate*[69]*,* (2010) 4 SCC 329), which was an election dispute, the video/audio cassette were held to be document relying on *Ziyauddin's case*[70] (supra).

In *Santhosh Madhavan* v. *State of Kerala*[71] (Crl.R.P. No. 781 of 2009), the dispute related to supply of certain objects including video cassettes, pen drive, etc. to the accused. The Court held that video cassettes and pen drives are electronic records and therefore, documents within the meaning of section 65B of the Evidence Act. It was directed that the copies of the documents shall be issued to the accused. This decision proceeded almost in the same line as that of the decision of the Bombay High Court in *North West Airlines's case*[72]

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[69] *Tukaram S. Dighole* v. *Manik Rao Shivaji Kokate*[69]*,* (2010) 4 SCC 329),
[70] *Ziyauddin Burhanuddin Bukhari* v. *Brij Mohan Ramdas Mehra*[70] ((1976) 2 SCC 17
[71] *Santhosh Madhavan* v. *State of Kerala*[71] (Crl.R.P. No. 781 of 2009)
[72] *North West Airlines* v. *Union of India*[72] (2007 (214) ELT 178 (Bom.)

(supra). Evidently, in both these cases, question whether they fell within the definition of document or not was not discussed in detail. The Court only held that, they were electronic documents and hence held to be a document. Court while referring to the definition of evidence as provided under the Evidence Act as well as the term document which includes photographs as per illustration to the Section and in essence document records information of some sort. The Court proceeded to hold that, though the definition of document in Indian Evidence Act and General Clause Act were in parametria, the definition in IPC differed slightly. Referring to the definition of documentary evidence in *Halsbury's Laws of India,* 2007[73] Reissue, Vol.15 at page 343, the Court concluded that documentary evidence means and includes all documents including electronic records produced for the inspection of the Court.

In *Sherin V. John* v. *State of Kerala*[74] (2018 (3) KHC 725), the question posed by the Court was whether the accused was entitled to get copies of a "*tablet*", two hard discs of computer, a pen drive and a compact disc, all of which allegedly contained visuals produced in Court by the prosecution. The Court, after referring to the definition of evidence in the Indian Evidence Act, observed that the definition conveys an impression that it recognized only two categories of evidence, oral evidence and documentary evidence. The Court posed the question as to how could material objects like weapons or

[73] *Halsbury's Laws of India,* 2007[73] Reissue, Vol.15 at page 343
[74] *Sherin V. John* v. *State of Kerala*[74] (2018 (3) KHC 725),

properties produced in court, made part of the evidence. The Court proceeded to hold that, law recognized a third category of evidence other than oral evidence and documentary evidence, known as real or physical evidence which consists of material objects other than documents produced for the inspection of the court.

All the decisions referred to above have consistently held that photographs, audio and video cassettes were documents. They proceeded on the basis that a document meant something which was intended to convey some information, notwithstanding the matter on which, it was inscribed. Conceptually, this gives a clear indication as to the crux of the whole question involved. Any item, may fall within the definition of document, irrespective of the medium on which it is printed, exhibited, written or inscribed, if it conveys an information. On the other hand, if the medium itself is the subject matter, it will be a material object. The 11 Judge's Bench of the Supreme Court in *State of Bombay* v. *Kathi Kalu Oghad*[75] (AIR 1961 SC 1808). That was a case, wherein, the Constitution Bench considered the question of real and physical evidence. The Court held that the evidence has been classified into three categories;(1) oral testimony, (2) evidence furnished by documents and (3) material evidence. Referring to the materials like fingerprint, specimen signature and handwriting, the Supreme Court held that they are neither oral, nor documentary evidence, but belong to the third category of material evidence. The Court denoted it by name material evidence, instead of real evidence.

[75] *State of Bombay* v. *Kathi Kalu Oghad*[75] (AIR 1961 SC 1808)

It was held that, no evidence was required to prove their genuineness, since they are taken before the Court or pursuant to the orders passed by it.

The Kerala High Court in the case of *P. Gopalakrishnan Vs. State of Kerala*[76] *2108 SCC Online Kerala 3244* proceeded to hold that, the tablets, memory cards etc. are material evidence hence not covered by Section 207 Cr.P.C, as there is no law providing for issuance of copy of material objects to the accused. In Appeal the Apex Court in 2019 SCC Online SC 1532 after analysing most of the cases observed that real evidence was often used interchangeably with physical evidence, to describe objects that are used to prove or disprove the issue involved. It seems that, documentary evidence also involves physical objects like written documents, cassette or CD recordings, videotapes or DVD recordings. However, when evidence is documentary, physical objects are only the carriers of the information and they are not the evidence by itself. Actual evidence is the information recorded on the paper, tape or disc. This leads to the crucial distinction between the documentary evidence and other material objects. If the evidence conveys an information, engrossed, inscribed, engraved, printed or recorded on the physical object on which it carries, that evidence is documentary in nature. On the other hand, material objects are those objects which are the evidence by itself and it is not an information that is drawn from that object that is sought to be established in legal proceeding. The above distinction

[76] *P. Gopalakrishnan Vs. State of Kerala*[76] *2108 SCC Online Kerala 3244*

was clearly spelt out in *Grant's case*[77] (supra) where it was held that to constitute a document, the form which it takes seems to be immaterial; it may be anything on which the information is written or inscribed. A reference to the definition of "*document*" in section 3 of the Evidence Act shows that it contemplates two components; "any matter expressed or described" and the "*substance"* upon which it is expressed or described. Hence, any evidence intended to establish the information expressed on any substance dehors the substance, evidence is documentary. Conversely, if it relates to the "*substance*" it is a material object. Accordingly, in a case relating to stealing of a CD from a shop, which is proposed to be established through the CCTV footage recorded on a CD. Former CD is the material object and the latter is documentary evidence. Hence, documentary evidence also involves physical objects, like written documents, photograph, cassette, DVD or memory card. However, when evidence is documentary, the physical objects are only the carriers of evidence. They are not the evidence by itself. This seems to be the single litmus test to distinguish between a documentary evidence and material object or physical evidence. Applying the above the Apex Court concluded**,** that the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned

[77] *Grant* v. *Southwester and County Properties Ltd.[77],* **(**1975) Ch. 185 : (1974) 2 All.E.R. 465

copy thereof to enable him/her to present an effective defence during the trial.

The 42nd Law Commission Report[78], dealing with definition of documents under Section 29 opined as under:

"2.56. The main idea in all the three Acts is the same and the emphasis is on the "matter" which is recorded, and not on the substance on which the matter is recorded. We feel, on the whole, that the Penal Code should contain a definition of "document" for its own purpose, and that section 29 should be retained."

In the 156th Report[79], the Commission opined:

"*11.08 Therefore, the term 'document' as defined in Section 29, IPC may be enlarged so as to specifically include therein any disc, tape, sound track or other device on or in which any matter is recorded or stored by mechanical, electronic or other means. The aforesaid proposed amendment in section 29 would also necessitate consequential amendment of the term "document" under section 3 of the Indian Evidence Act, 1872 on the lines indicated above."*

Another question is with regard to the position of "*electronic record*" and "*data*" and whether the electronic record as predicated in Section 2(1)(t) of the Information and Technology Act, 2000 (for short, 'the 2000 Act') would, thereby qualify as a "*document*" within the meaning of Section 3 of the Indian Evidence Act, 1872 (for short, 'the 1872

[78] 42nd Law Commission Report
[79] 156th Law Commission Report

Act') and Section 29 of the Indian Penal Code, 1860 (for short, 'the 1860 Code')?

Delhi High Court in the case of *Dharambir Khattar Vs. CBI*[80] while analysing the above mentioned issue held electronic record as mentioned in Section 2(1) (t) of the 2000 Act refers to data or data generated, image or sound stored, received or sent in an electronic form and conjoint reading with definition of data as defined in Section 2(1)(o) makes it amply clear that an electronic record is not confined to "data" alone, but it also means the record or data generated, received or sent in electronic form. The expression "data" includes a representation of information, knowledge and facts, which is either intended to be processed, is being processed or has been processed in a computer system or computer network or stored internally in the memory of the computer. However, the word 'data' therefore includes not only the active memory of the computer, like the hard disc, but even the subcutaneous memory. There are six levels of memory in the hard discs and therefore an information which was written and then rewritten upon more than 5 times could still be retrieved from the subcutaneous memory of the hard disc. Even if there is a doubt whether that entire information can be reconstructed, certainly the information to the effect that the memory in the hard disc has been written and rewritten upon for over six times would be available. It is possible to analyze a hard disc with the help of a software programme, to find out on what date the information was first written

[80] *Dharambir Khattar Vs. CBI 2008 Delhi High Court* 148 DLT 289

with the exact time of such change and to retrieve such information in respect of each of the occasions when such information is removed and reinserted or changed on the hard disc. While there can be no doubt that a hard disc is an electronic device used for storing information, once a blank hard disc is written upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programmes it is possible to find out the precise time when such changes occurred in the hard disc. To that extent even a blank hard disc which has once been used in any manner, for any purpose will contain some information and will therefore be an electronic record. This is of course peculiar to electronic devices like hard discs.

Therefore, when Section 65B of Evidence Act 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 was stored or was earlier stored or continues to be stored. There are two levels of an electronic record. One is the hard disc which once used itself becomes an electronic record in relation to the information regarding the changes the hard disc has been subject to and which information is retrievable from the hard disc by using a software programme. The other level of electronic record is the active accessible information recorded in the hard disc in the form of a text file, or sound file or a

video file etc. Such information that is accessible can be converted or copied as such to another magnetic or electronic device like a CD, pen drive etc. Even a blank hard disc which contains no information but was once used for recording information can also be copied by producing a cloned or a mirror image.

While drawing the conclusions the Court held:

"*(a) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer;*

(b) Once the hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose;

(c) therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if does not at present contain any accessible information

(d) In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.

(e) Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 the EA, read with Sections 2(o) and (t) IT Act, there can be no doubt that an electronic record is a document.

(f) The further conclusion is that the hard disc in the instant cases are themselves documents because admittedly they have been subject to changes with their having been used for recording telephonic conversations and then again subject to a change by certain of those files being copied on to CDs. They are electronic records for both their latent and patent characteristics."

(g) *In the instant cases, for the purposes of Section 173(5)(a) read with Section 207(v) CrPC, not only would the CDs containing the relevant intercepted telephone conversations as copied from the HDs be considered to be electronic record and therefore documents but the HDs themselves would be electronic records and therefore documents.*

Thus, from the above it can be concluded that in respect of documents **v**arying definitions have been adopted in legislation**.** A document may be relied on as real evidence (where its existence, identity or appearance, rather than its content, is in issue), or as documentary evidence where reliance on a document as proof of its terms or contents.

CHAPTER 6

AUTHENTICATION OF ELECTRONIC RECORDS

6.1 GENERAL CONCEPT.

The legal rules of evidence present strong challenges to the use of digital information as legally acceptable records. A technique is needed whereby digital recordings (including images) can be offered and accepted as legal evidence. The most difficult rule of evidence for digital recording to meet is authentication.

Authentication[81] is the means to prove, first, the conditions under which the record was made, and, second, that the recording is offered in its original unaltered form. The conditions under which the record was made include date, time, location, people present, and other relevant conditions. The *best evidence rule* requires that the original document (recording) be admitted into evidence if it is available. Digital recordings are very susceptible to alteration. When the originality of a recording is questioned, often expert witnesses provide testimony as to whether or not the recording appears altered.

Authenticity of a document; its integrity, that it has not been

[81] (2012) PL January S-23[t] Cyber Forensics and Admissibility of Digital Evidence Cyber Forensics and Admissibility of Digital Evidence by Swati Mehta. Gold Medalist, Assistant Professor, Faculty of Law, National Law University, Jodhpur. This article was published in the SCC Journal Section at (2011) 5 SCC J-54.

tampered with or modified or altered in any manner and its non-repudiation primarily ensure its admissibility, as evidence. The rule that permeates global laws of evidence is to not shut out relevant evidence for fear of ease with which its authenticity or integrity may be tampered with. The normal rule of leading documentary evidence is the production and proof of the original document itself. Secondary Evidence of the contents of a document can also be led under Section 65 of the Evidence Act.

When a photograph is introduced as evidence, the context in which the photograph was taken and the degree to which the photograph matches the original recording are both questioned. Traditionally, the person taking the photograph offers testimony as to the date, time, location, etc. of the photograph[82]. In addition, it may be necessary to obtain testimony of people involved with the chain of custody of the photograph. It may be necessary to offer testimony from expert witnesses to attest to the fact that the photograph is unaltered. The ease with which digital photographs can be altered has deterred the use of digital photography in situations where a photograph is likely to be used as evidence.

Second, the declaration by the Supreme Court that reliability or genuineness "*go to the weight of evidence and not to admissibility*"[83]

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83 Article Authenticating Electronic Evidence: §65b, Indian Evidence Act, 1872 Ashwini Vaidialingam published in Articles section of www.manupatra.com

is not accurate. If one examines the Evidence Act, it is clear that it does not split the process of adducing evidence into the stages of relevance, admissibility and weight. In fact, it is completely silent on how evidence is to be weighed. The only reference to the stages of relevance and admissibility is under Section 136, which states that if the judge thinks a fact is relevant, he '*shall*' admit it. Therefore, far from recognizing them as different evidentiary stages, the Evidence Act conflates relevancy with admissibility. However, despite this lack of statutory support, there is significant Supreme Court jurisprudence that has explained what is to be considered at the stage of admissibility. Starting with *R.M. Malkani* v. *State of Maharashtra*[84] a line of Supreme Court cases concerning the evidentiary value of tape-recorded conversations, have held that reliability of the evidence must be established before it is admitted. That is, even if the information is relevant, it will not be admitted if it is not reliable. The reason for this has consistently been that new technology, like tape-records, can easily be tampered with or manipulated. Given these identical concerns, there is no reason why this ratio cannot be extended to electronic evidence as well; in fact, the same logic applies seamlessly.

6.2 AUTHENTICATION OF ELECTRONIC RECORDS PRIOR TO 2000

[84] *R.M. Malkani* v. *State of Maharashtra (1973)1SCC 471*

The Constitution Bench in the case of *N. Sri Rama Reddy* v. *V.V. Giri*[85] (1970) 2 SCC 340 Hon'ble Apex Court in para 22 in page 1169 has observed like this:

"*Having due regard to the decisions referred to above, it is clear that a previous statement made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the, veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last-mentioned matters, under Section 146(1), Exception 2 to Section 146(1). Exception 2 to Section 153 and Section 155(3) of the Evidence Act*."

However, in para 27 on page 1170 the Hon'ble Apex Court has observed like this:

"*We once again emphasize that this order relates only to the admissibility in evidence of the conversation recorded on tape and has not dealt with the weight to be attached to that evidence."*

In *Yusufalli Esmail Nagree* v. *The State of Maharashtra*[86] AIR 1968 SC 147 it was observed:

"*If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices*

[85] *N. Sri Rama Reddy* v. *V.V. Giri*[85] (1970) 2 SCC 340

[86] *Yusufalli Esmail Nagree* v. *The State of Maharashtra*[86] AIR 1968 SC 147

must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with."

Ziyauddin Burhanuddin Bukhari v. *Brijmohan Ramdass Mehra*[87] *(1976) 2 SCC 17* held as under:

"*We think that the High Court was quite right in holding that the tape records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:*

(a) *"The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.*

(b) *Accuracy of what was actually recorded has to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.*

(c) *The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."*

These requirements were deduced from *R.* v. *Maqsud Ali*[88]*,* (1965) 2 All ER 464. In the case of *R.M. Malkani* v. *State of Maharashtra*[89]

[87] *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra*[87] (1976) 2 SCC 17
[88] *R.* v. *Maqsud Ali*[88]*,* (1965) 2 All ER 464
[89] *R.M. Malkani* v. *State of Maharashtra*[89] 1973) 1 SCC 471

1973) 1 SCC 471 particularly para 23 on page 163, and para 27 on page 163 which reads as under:

"*23. Tape recorded conversation is admissible provided **first** the conversation is relevant to the matters in issue; **secondly,** there is identification of the voice; and **thirdly,** the accuracy of the tape-recorded conversation is provided by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res-gestae. It is also comparable to a photograph of a relevant incident. The tape-recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr. Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape-recorded conversation. The tape-recorded conversation is admissible in evidence*."

"*27. When a Court permits a tape recording to be played over it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. The fact that tape recorded conversation can be altered is also borne in mind by the Court while admitting it in evidence*."

In Ram *Singh and others v. Col. Ram Singh*[90]*,* admissibility as to the tape-recorded statement was considered and the conditions of admissibility of such a statement are enumerated as under:

"(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker.

Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

Under the *'primary evidence rule*' at common law, it was once thought

[90] (Ram *Singh and others v. Col. Ram Singh)*[90]*,(1985) Suppl. SCC 611*

necessary that the contents of any private document is to be proved by production of the original document. A copy of an original document, or oral evidence as to the contents of that document, was considered admissible only in specified circumstances, namely:
"(1) where another party to the proceedings failed to comply with a notice to produce the original which was in his possession (or where the need to produce it was so clear that no such notice was required);
(2) where production of the original was shown to be impossible.
(3) where the original appeared to have been lost or destroyed;
(4) where a third party in possession of the original lawfully declined to produce it"....

In *"Cross On Evidence"*[91] 4th edn., 1974, p. 12, the learned author has included tape-recordings in the various categories of judicial evidence and has observed:
"*When a court permits a tape-recording to be played over, it is acting on real evidence if it treats the intonation of the words as relevant. if the court's attention is directed solely to the terms of the recording, it may be considering whether to act on a hearsay statement, as when a recorded conversation is received as evidence of an admission by one of the parties, or the court may receive the recording as original evidence, as when a recording of slanderous words is admitted in order to show that the words were in fact spoken. At a trial by jury the party relying on the tape-recording must satisfy the judge that there is a prima facie case that it is the original, and it must be*

[91] *"Cross On Evidence"*[91] 4th edn., 1974, p. 12

sufficiently intelligible to be placed before the jury. The evidence must define and describe the provenance and history of the recording up to the moment of its production in court. If a transcript of the recording is put in evidence the court will of course have to be satisfied of its accuracy. It has accordingly been held in Scotland that a typist who prepares a transcript after familiarising herself with the contents of a recording by playing it over many times, may be treated as an expert for the particular occasion, her evidence verifying the transcript as truly representing the contents of the recording being evidence of expert opinion."

The learned author has ended the discussion with a quotation from Sir Jocelyn Simon, where he has observed:
*'...the law is bound these days to take cognisance of the fact that mechanical means must replace human effort. O*f course, *comments and criticisms can be made, and no doubt will be made, on the audibility or the intelligibility, or perhaps the interpretation, of the results of the use of a scientific method; but that is another matter, and that is a matter of value, not of competency*."

The Supreme Court in *Rama Reddy* v. *V.V. Giri*[92] *(1970) 2 SCC 340* approved all these observations and said "*that it is apparent that the tape itself is primary and direct evidence admissible as to what has been said picked up by the recorder*." It is, therefore, settled law that a tape-record of a conversation can be admitted, provided it is

[92] *Rama Reddy* v. *V.V. Giri*[92] *(1970) 2 SCC 340*

established that it is authentic, which means that it was really a conversation between the persons whom the producers of the tape-record in Court want the Court to believe as the persons, whose conversation was recorded....

Supreme Court made three observations in connection with the tape-record evidence:

(1) *If the prosecution wants to rely on the tape-recorded evidence, it is the duty of the investigating officer to take into possession, as early as he can, the tape-record of conversation, which is relevant to the investigation. The tape- record can be taken in the presence of the* panchas*; and as soon as possible thereafter a transcript also of the same may be made in the presence of the* panchas, *who are able to hear what is recorded. It is desirable that the police officers should take assistance of electronic experts or persons, who are in a position to know what is recorded, at least when the tape-record is played slowly to enable the Court to appreciate the fairness of the investigation and the efforts made for making an accurate transcript of the tape-record.*

(2) *Now that the tape-records and the electronics have come into our civilisation for more than two decades, it; is high time for the Parliament to make a proper enactment with regard to the tape-recorded evidence, their production, relevance and the mode by which the evidence should be collected, produced and proved in Court particularly having regard to the recent havoc made by the tape-*

record in the United States of America against its President Nixon. It is high time that some legislation like s. 5 of the Civil Evidence Act in 1968 in England or something with regard to tape-records must be made so as to evolve a uniform practice of admitting and dealing with the tape-recorded evidence.

(3) *Until such a legislation is made or the High Court issues a circular in this behalf, the trial Courts may ordinarily follow, as far as possible and as a matter of uniform practice, the following suggestions:*

(a) *Tape-recorded side in the cassette should be given a separate identifiable Exhibit and always kept under Seal to be operated only with the permission of the Court and within the hearing and sight of the presiding Judge or some officer appointed by him for this purpose. Record should be maintained as to how, when and why the seal was broken and how it was once again sealed.*

(b) *Proper rules may be made for supply of tape-recorded conversation to the parties, or to anyone applying for it having a* bona fide *interest therein.*

(c) *Before production of the tape-record, a transcript record of the conversation must be filed and proved by the person who made it or in whose presence it was made; and this transcript record must be given a separate Exhibit.*

(d) *If the parties or any of them desire that the Court should at any stage have tape-record heard and the accuracy of the transcript checked up, the Court may play it, on the party applying and supplying necessary and proper player for it, as often as necessary*

and make notes of the hearing of the tape-record and such notes shall be separately exhibited.

(e) *In Sessions cases the transcript must be accompanied by an Official English translation of the transcript when the tape recorded conversation is not wholly in English and the translation also shall be given a separate Exhibit.*

(f) *With a view to check up the accuracy of the tape-record, notes and transcript the Court may at any time require the original tape-record to be played in the presence of all parties at the cost of the party relying on the tape-record in such manner as it deems proper and necessary.*

Supreme Court in Rama Reddy[93] Concluded by observing, "*We think such rules will have to be evolved in the administration of criminal and civil justice with regard to the proper and uniform use of tape-records, so that they will guide the parties, who produce the tape recorded evidence in Court and the officers of the Court in dealing with such evidence and maintain and preserve them in proper condition. Without a source, there is no authenticity for the translation and it was held that 'source' and 'authenticity' are the two key factors for electronic evidence."*

6.3 ENACTMENT OF SECTION 65A OF EVIDENCE ACT & ITS RELEVANCE

[93] *Rama Reddy* v. *V.V. Giri*[93] *(1970) 2 SCC 340*

The amendment in the Evidence Act 1872 was brought by virtue of Section 92, Schedule II of Information Technology Act, 2000. The provision reads as under:

"Sec 65-A The contents of electronic records may be proved in accordance with the provisions of Section 65-B".

A bare perusal of the same shows that just like Section 59 says that all facts, except the (contents of documents or electronic records) may be proved by oral evidence or section 61 says that the contents of the documents may be proved either by Primary or Secondary Evidence meaning thereby that the facts can be proved only by oral evidence and that too direct evidence and the contents of the documents are to be proved by primary or secondary in a similar way the contents of Electronic Record are to be proved in accordance with the provision of Section 65B only. Thereby reflecting that the only way the contents of electronic record can be proved is in accordance with the provision of Section 65 B only.

It is further pertinent to mention here that the Section does not make any distinction or does not divide the electronic records into primary and secondary electronic records and it refers to only electronic records. Further a bare perusal of Section 65-B (1) shows that the electronic records are divided into two categories the "*Electronic Record"* itself and the *"Computer Output".* As far as the Electronic record is concerned, it has the same meaning as defined

under section "*2t*" of the Information Technology Act, 2000. The same reads as under:

"*Electronic Record" means data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated micro fiche;"*

Thus the definition shows that generation, storing, receiving and sending of data are electronic records.

"*Computer Output*" is defined in Section 65-B (1) itself which means, "*an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a Computer."*

An important question that arises is what was the need of enacting Section 65A. A deep thought when given to this issue is that until and unless we read the section that the Electronic Records can be proved by virtue of Section 65-B only, this section carries no meaning and it becomes nugatory or otiose. Just like Section 59 says that all facts except the contents of a document may be proved by Oral evidence and section 61 says that the contents of the Document may be proved either by Primary or Secondary evidence, similarly Section 65A says that the electronic records are to be proved in accordance with the provisions of section 65B. Since, all these sections whether it is section 59, 61 or section 65A have the word "May" yet for the purpose of the law of Evidence, they treated as shall, meaning thereby that facts (except contents of documents and electronic records) are to be proved only by Oral Evidence, Contents of the documents are to be proved only by Primary and Secondary Evidence similarly Electronic

Records are to be proved only in accordance with Section 65-B. This is the reason why Section 65-A and 65-B are considered a Special provision and a Complete code in itself.

The next question arises is why was there a need for making 65-A and 65-B as a Special Provision in respect of Electronic Evidence. Prior to the enactment of Information Technology Act, 2000 in respect of Electronic Evidence reliability was tested before the same were held to be admissible. Since Electronic Records because of its very nature is fragile, and is susceptible to manipulation, edition, deletion, addition etc. hence the same are put to the rule of reliability before they are held to be admissible. It was because of this reason that the legislature by virtue of Section 65-B had placed certain conditions to be fulfilled before the said electronic records is considered as admissible.

Section 65-B (1) Classifies Electronic Evidence into "*Electronic Records"* and "*Computer Output"*. As far as the Electronic Record is concerned it has the same meaning as is defined u/s 2(t) of the Information Technology Act, 2000 as mentioned supra. "*Computer Output*" is defined in section 65-B(1) itself as

"Any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a Computer (hereinafter referred to as the computer output)".

Further with regards to "*Computer Output*" a legal fiction has been created that the same may be considered as a document provided it satisfies the conditions as mention in section 65B(2) and if those conditions are satisfied then neither the oral evidence nor the production of the original is required, meaning thereby that once the conditions of section 65-B(2) are satisfied then the "*Computer Output*" will attain the same status as "*Electronic Records*".

The same means that on the satisfaction of the condition as enumerated in Section 65-B (2) even the "*Computer Output*" will attain the same status of "Electronic Records". The section further shows that it not only relates to Contents of the Documents but it also relates to facts which are proved by direct Oral Evidence. This aspect further shows that the intention of the Legislature was never to classify the Electronic Records as Primary and Secondary but it is a separate class of its own which is called as "*Electronic Records*". It is pertinent to mention here that contents of the document are to be proved by documentary evidence as mentioned from Section 61 to 65 of the Evidence Act, but the facts which are other than the contents of the document are proved by Oral Evidence which should be direct and not indirect. It is worthwhile to mention here that as per the Second Proviso in Section 60 the material things other than the document are to be proved by Oral Evidence. Thus, the Electronic Record in the form of Computer Output is admissible as evidence not only in respect of contents of the Electronic Record but also in respect of the facts stated pertaining to its creation, copying etc. which

actually falls within the purview of Oral Evidence. Thus, an Electronic Record in the form of "*Computer Output*", is to be treated as Electronic Record and is not to be considered as Primary Electronic Record and Secondary Electronic Record and the only distinction that is has to be drawn into whether the same is "*Electronic Record*" or the "*Computer Output".*

Section 65A and 65B have been added to the Indian Evidence Act, 1872 by the Information Technology Act, 2000. The Government of India enacted Information Technology Act 2000 with the objectives stating officially as:

"to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto."

The main aim of the said legislation was to provide legal recognition to electronic documents, electronic signatures, other offences and contraventions and dispensation of justice for cyber-crimes.

Then again, in Section 61 to 65 Indian Evidence Act, the words "*Contents of Documents*" have not been supplanted by "*Contents of*

Documents or electronic records" as has been done in Section 59. This oversight of, "*Electronic Records*" in the plan of Section 61 to 65 means the Legislature had a reasonable and express administrative goal, i.e. not to expand the pertinence of Section 61 to 65 to the Electronic record and instead in perspective enacted Section 65-A and 65-B in the Indian Evidence Act as Special Provisions as to admissibility of evidence relating to "*Electronic Record".* Further, instead of abrogating arrangement of Section 65-B of the Indian Evidence Act either in 2000 or as per amendment in Information Technology Act, 2008 which was solely managing the acceptability of the "Electronic Record" despite having the knowledge of the fact that the language of Section 65-B was in consonance with Section 5 of the Civil Evidence Act, 1968 of United Kingdom and the same was repealed by the UK Civil Evidence Act 1995 vide which electronic evidence was made technology neutral. Despite the above, Section 65B was still not only introduced in the Evidence Act in 2000 but was not abrogated or modified even in the Information Technology Amendment Act, 2008 thereby showing the legislative intent that the admissibility of the electronic records in India after the amendment of the Evidence Act in 2000 can only be determined under Section 65-A and 65-B of the Indian Evidence Act, 1872.

The moment we divide the electronic evidence into primary and secondary electronic evidence, and try to prove the contents of the primary electronic records as per the provision of Section 62 as has been done in various judgments passed by High Court and Supreme

Court in the cases pertaining to electronic evidence, overlooking the provision of Section 65-A (and its joint reading with Section 65-B(1) in particular), is an attempt to make the provisions of Section 65-B otiose or redundant, which by no means can be said to be the intent and spirit of the legislature.

By not supplanting, "*Contents of documents*" with "*Contents of Documents and Electronic records*" in Section 61 to 65A, the goal of the law-making body is expressly clear i.e. not to expand the relevance of segment 61 to 65 to the "*Electronic Record*". It is the cardinal rule of understanding that if the law-making body has discarded to utilise any word, the assumption is that the oversight is deliberate. It is very much settled that the Legislature does not utilise any word pointlessly.

Section *65A and 65B of the Evidence Act, 1872 were introduced in 2000 with the aim to lay down admissibility standards for electronic evidence in courts.* This creates a conflict between the relevancy and admissibility of electronic evidence, something that has been recognized by jurisdictions across the world. That is, parties are not obligated to produce the original record, which may be present on a desktop computer or a remote server, and which is difficult (if not impossible) to bring to court. This enabling provision creates an exception to the common law evidentiary principle that where an original document is available, no secondary document may be produced. The fact that such extensive comparison to the original

provisions in Chapter V of the Evidence Act possibly raises two questions.

First, whether there is a requirement of Sections 65A and 65B.

Second, whether the purview of Sections 61 to 65 is broad enough and equally capable of dealing with Electronic Evidence.

The answer to the former appears to be in the affirmative. With respect to the second question, while it is true that Sections 61 to 65 of the Evidence Act are broad enough to cover Electronic Evidence themselves, and such an approach would have led to Electronic Evidence being treated the same way as physical evidence. This would not have taken into account their particular unreliability. Not only does electronic evidence carry with it the usual problems of deliberate or accidental human error that traditional evidence does not have, it poses additional problems such as hardware failure, software glitches, and the comparative ease of tampering and manipulation.[94] These problems are beyond the comprehension of traditional evidence law. It is in recognition of this that several countries have introduced Special laws to deal with Electronic Evidence. In the words of one preamble, the purpose of these special laws is to "*facilitate and regulate .. . electronic communications and transactions*" while simultaneously "*preventing abuse of information systems*".

[94] *Supra* note 1; J. Hofman, *Electronic Evidence in Criminal Cases*, 19(3) SACJ 257, 258 (2006).

The Apex Court in *Utkal Contractors and Joinery Pvt. Ltd. v. Territory of Orissa*[95] 1987(3)SCC 279, held that

"*No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation, nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily."*

In this manner, the fundamental goal to present the particular arrangement of Section 65-A and 65-B has its starting point to the specialised idea of the proof especially as the confirmation in the electronic shape can't be created in the official courtroom inferable from the measure of PC/server, living in the machine dialect and in this manner, requiring the mediator to peruse the same. The provision given in Evidence Act under Sec 65 A and B are referred only to demonstrate that the emphasis at present is to recognise the

[95] *Utkal Contractors and Joinery Pvt. Ltd. v. Territory of Orissa*[95] 1987(3)SCC 279

"Electronic Records" and digital signature as admissible piece of evidence. Section 65B of the Evidence Act influences the auxiliary duplicate as PC to yield including printout or the information replicated on electronic/ attractive media which has been termed as "*Computer Output*".

6.4 AUTHENTICATION OF ELETRONIC RECORDS (AFTER 2000) & SCHEME OF SECTION 65-B.

In India, the introduction of Sections 65A and 65B, with their elaborate conditions and safeguards were meant to provide the answers and were in agreement with the Supreme Court where it has asked as to whether I can say that if any incident is seen by an eye-witness through binocular or telescope and if it is brought to the notice of the Court by such person can it be said that he is not an eye-witness? More so, if we watch something through the same can it be said that we have not watched it[96]? The answer to this question lies in the kind of evidence that is permitted under the Evidence Act.

As per Section 3, broadly two kinds of evidence are permitted, documentary evidence and oral evidence. Either of these two kinds of evidence may, theoretically, be sources of information regarding the accuracy and reliability of an electronic record. This '*genuineness*' is precisely what the four conditions under Section 65B (2), as discussed

[96] Pootholi Damodaran Nair *Versus* Babu 2005 SCC Online Ker 189.

above, seeks to ensure. To illustrate, as per Section 65B (2) (c), a person seeking to introduce as evidence computer output generated at a particular time, must ensure "*that throughout the material part of the said period, the computer was operating properly"*. If the computer alleged to have produced the record was not operating properly at the relevant time, it is highly probable that the document was not generated accurately. Similarly, if the information contained in the computer output was not of the kind "*regularly fed into the computer in the ordinary course of the said activities*", it would obviously raise red flags. Such information will have to be scrutinized to see if it was manufactured specifically for the purpose of the trial or not. Thus, genuineness is clearly a concern that Section 65B (2) addresses. The purpose behind Section 65-B, which specifically relates to admissibility, is to guarantee '*source and authenticity*' of documents. The stand taken by the Supreme Court while dealing with electronic evidence that reliability or genuineness "*go to the weight of evidence and not to admissibility*" is not accurate. If one examines the Evidence Act, it is clear that it does not split the process of adducing evidence into the stages of relevance, admissibility and weight. In fact, it is completely silent on how evidence is to be weighed. The only reference to the stages of relevance and admissibility is under Section 136, which states that if the judge thinks a fact is relevant, he '*shall*' admit it. Therefore, far from recognizing them as different evidentiary stages, the Evidence Act conflates relevancy with admissibility. However, despite this lack of statutory support, there is significant Supreme Court jurisprudence

that has explained what is to be considered at the stage of admissibility in respect of Electronic Evidence. Starting with *R.M. Malkani* v. *State of Maharashtra*[97] a line of Supreme Court cases concerning the evidentiary value of tape-recorded conversations, have held that reliability of the evidence must be established before it is admitted. That is, even if the information is relevant, it will not be admitted if it is not reliable. The reason for this has consistently been that new technology, like tape-records, can easily be tampered with or manipulated. Given these identical concerns, there is no reason why this ratio cannot be extended to electronic evidence as well; in fact, the same logic applies seamlessly. Supreme Court in Anvar[98] emphasized the importance of authenticity of electronic evidence for these very reasons. Therefore, contrary to the reasoning provided by the Supreme Court, genuineness is indeed a concern under Section 65B, and is a crucial part of the evidentiary stage of admissibility.

Section 65-B of the Evidence Act, consists of five sub-sections. Subsection (1) begins with *non-obstante* clause and gives primacy and overriding effect to the said provision over the other provisions of the Act. A dissection of that sub-section would reveal that it consists of distinct parts. The first part stipulates that any information contained in the "Electronic Record", in the form of paper print output or optical or magnetic media output, i.e. the electronic record copied,

[97] R.M.Malkani Vs. State of Maharashtra (1973)1 SCC 471.
[98] *P.V.Anvar (2014)10 SCC 473*

stored or recorded on an optical or magnetic media from another source, i.e., the "*Computer Output*" shall be deemed to be a document. The first part, therefore, deals with the paper printout or optical or magnetic media on which the Electronic Record has been copied, stored or recorded as distinct from the original media on which the data or information is created, or recorded, stored, received, sent or copied. Media and paper print outs are tangible articles. Paper print outs can be seen and read. Media can also be seen and read, when viewed with appropriate equipment or when its paper printouts are taken. Noticeably and pertinently, the paper printout output or the optical or magnetic media output, on satisfaction of the conditions stipulated in Section 65B is treated as a document by itself. The conditions would relate to the information and the computer from which the printout on paper or optical or magnetic media has been produced by copying, recording or storing the files. The following part, states that when the conditions mentioned in the section in relation to (a) information and (b) computers are satisfied, the document i.e. the printed paper or the optical or magnetic media on which the files have been copied, stored and recorded, shall be admissible in evidence, without further proof or production of the original. In such circumstances, production of the original computer or equipment from which the paper printout or media was produced by copying, recording or storing the files is not required to be produced. Once the requirements are satisfied, the printed document or the optical or magnetic media would be evidence of the contents as to what was stored in the computer from which the

print out, or media was created by way of copying, recording or storing files. The last part therefore deals with the effect, when the requirements stated in Section 65B are satisfied. The computer output - when provisions of section 65-B are satisfied is treated as evidence of the contents of the original or facts therein of which direct evidence is admissible. The Computer Output of the "*Electronic Record*" is treated as a document and are admissible and bear the same status as "*Electronic Records*" on the question of admissibility. The provision, therefore, negates and does not require production of the original computer/equipment/media, on which the data was stored and from which computer output be it in the form of printed paper or optical or magnetic media data has been obtained. Apart from the above on the satisfaction of the conditions as mentioned in Section 65-B(2) not only the contents of the Electronic records but also the fact stated therein of which direct evidence is admissible, also becomes admissible.

Sub-section 2 to Section 65-B explains and elucidates the term *'Computer Output'* and in a manner expounds and expands what is meant by the original device or computer from which output is obtained. As per sub-clause (a) to sub-section 2 Computer Output can consist of information produced by the computer during the period the computer was regularly used to store or process the information for the purpose of any activity regularly carried on over "*that period*" by a person, having lawful control over the use of the computer. Clause (b) states that information contained in the

"Electronic Record" or derived from should be regularly fed into the Computer in ordinary course of the said activities. Clause (c) postulates that the Computer during the relevant period should have operated properly and if it had not operated properly or was out of operation for a part of the period, such failure should not affect the electronic record or the accuracy of its contents. Lastly, sub-clause (d) recognizes that "*Electronic Record*" could consist of data or information collected or fed into the computer. The word "*derived*" used in Sub-section 2 of Section 65-B finds its meaning and exposition in the explanation[99]. The said expression for the purpose of section 65B would mean, derived as a result of calculation, operation or any other process. The word derives, therefore, has been given a specific and affirmative meaning for Section 65B.

Sub-section (3) to Section 65B elucidates and explains sub-section (2) and provides that the output produced could be of data stored or information processed by combination of computers operating simultaneously during that period or different computers in succession over the period in question or even multiple computers operating in succession over the period. Sub-section acknowledges and accepts that the computer, i.e., device from which "*computer output*" is obtained, may be one in the combination of computers used or even one operating in succession. The provisions recognise that information or data is easily and frequently, for convenience, business or technical reasons, transferred, copied, recorded or stored in

[99] Kundan Singh v. State 2015 SCC OnLine Del 13647

different machines/equipment simultaneously or in succession. The importance and relevancy of information could arise subsequently and long after it is created. Backup or archives are maintained to store specific and important information. In such cases, all computers used for the purpose during the period in question from the beginning till the period where the output is obtained, are treated and regarded as the single computer for the purpose of the Section.

Before adverting to sub-section (4), it is advisable to first expound Sub-Section (5) for the said Section is relevant for interpreting Sub-Sections (1), (2) and as per sub-clause (a) to sub-section (5), information is taken to have been supplied to a computer when it is supplied in any appropriate form and whether it is done directly, i.e. as in the case of call record data which gets recorded in the computer/server without any interference, or with human intervention, as where a data entry operator gives commands or uses a key board to feed the data or when the sales man punches in details of the sales made. Importantly, the information or data could be supplied to the computer from which the computer output is taken, by means of appropriate equipment. This transfer can be with or without human intervention. For example, data or information stored in one computer can be transferred to another computer as a result of pre-fixed or standard commands after particular period of time or as a result of specific commands given as a result of human interference. Sub-clause (a) to sub-section (5) recognises that data or information can be created and then transferred, copied and stored

to the computer from which output is obtained by different modes and ways. Transfer of information or data in form of files after they are first created are frequent and a common occurrence. The impact of sub-clause (a) to sub-section (5) is to be noticed and given effect to when we interpret and apply subsections (2) and (3) of Section 65B to a factual matrix of a given case. Sub-clause (c) to sub-section (5) is clarificatory in nature and states that computer output can be produced directly as it can happen when data or information stored in the computer is printed as a result of pre-existing commands. It can happen also when a command to take print out or to copy, store or record is given with human intervention. The "*Computer Output*", may be a result of appropriate equipment attached to the computer. Sub-clause (b) to sub-section (5) is rather ambiguously uses the expression "*any official*" without explaining what is meant by the said term. However, when we read sub-section (4) to Section 65B, the meaning to be given to the expression "*any official*" emerges. Sub-clause (b) applies when information is supplied to "*any official*" in the course of activities carried on by him, i.e., in the course of "*official*" activities with a view that the said information shall be stored and processed for the purpose of the activities carried on by that officer or official. It is also elucidated that the information could be beyond or otherwise in the course of the said activities. Even in such cases the information is treated as supplied in the course of the activities of the official. We clarify that the word "*official*", as used in clause (b) of sub-section (5) of Section 65B, is not intended to mean or be restricted to a person holding an office or employed in public capacity.

It connotes, as exemplified by the use of the same expression (albeit in its adjective form) in Sub-Section (4), a person primarily responsible for the management or the use, upkeep or operations of such device. It would, thus, cover a computer device containing electronic records in the hands or control of a private individual or entity.

Subsection (4) states that,

"(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

(a) Identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

And purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be

stated to the best of the knowledge and belief of the person stating it."

A bare perusal of the above shows that whenever it is desired to give the Evidence in respect of "*Electronic Records*" or in respect of "*Computer Output*", as per provision of Section 65-B, a certificate in the form as mentioned in 65-B (4), (a) to (c) has to be given. The word desire has been used intentionally by the legislature as any print-out can be used either in the form of a "*documentary evidence*" or in the form of an "Evidence of *Electronic Record/Computer Output*". When used in the form of Documentary evidence one has to adopt the provisions as given in Section 61 to 65 but when used in the form of "*Evidence in respect of Electronic Records*" then the provisions of Section 65-B are to be followed and a certificate is required. This explains the use of the words, "*desire*" in this Section. The word Statement used in this section means "*contents of electronic record*".

Further as per Sub-section 4(a) the certificate should contain the identification of the "*Electronic Record*" containing the statement but also the manner in which the electronic record was produced. A bare perusal of the same shows that this provision in applicable in respect of "*Electronic Records*" and not in respect of "*Computer Output*". Further this also shows that the certificate not only concerns with the contents of Electronic Records but it also concerns with the factum of How the Electronic Record has been produced. The Second part i.e. the mode of production of electronic records could have been Proved only by direct oral evidence but by way of the present certificate that

part has been taken care of and after this certificate the Oral evidence in respect of the same is not required. This aspect also finds corroboration from the provision of Subsection (1) where while dealing with "*Computer Output*" it is mentioned as "*without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible"* and this aspect i.e. the mode of production in respect of *"Computer Output"* is taken care of by *provision of Subsection (2)(a) of 65-B.*

Sub-Section (4)(b) seeks details of the device involved in production of that "*Electronic Record*" to show that the same was produced by Computer. This is also applicable in respect of "Electronic Records" and not in respect of "*Computer Output"*. In respect of "*Computer Output*", the said condition is already mentioned in Sub-section 2(d).

Sub-Section (4)(c) deals with the conditions mentioned in Sub-section (2) and since this pertains to the "*Computer Output"* hence this is applicable in respect of the same and does not relate to the "*Electronic Record".*

The Legislature will never seek a duplicity of the things. If all the Conditions mentioned in the certificate are made mandatory in respect of "*Computer Output*" there will be duplicity and that could never have been the intent of the Legislature. Further the word "any" used has to be read literally and should not be read as "*all*" otherwise

the same will lead to absurdity.

All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to "*Electronic Record"* sought to be used as Evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice hence the above safeguards as mentioned in Section 65-B (4) (a) and (b) in respect of "*Electronic Records*" or the Provisions 65-B (1), (2), (3), (5) and (4)(c) in respect of "*Computer Output*".

6.5 "FACTUM OF TRUTH" AND "FACTUM OF STATEMENT".

Evidence may be offered for different purposes. The same evidence can be treated as hearsay and non-hearsay depending upon its relevance, i.e., whether it is relevant for a substantive truth or for some other purpose. For example, when person A meets person B and speaks to him about an occurrence, testimony of person B to the said effect would not be hearsay, but may become hearsay if a party seeks to rely upon facts stated by person A implicating a third person. Thus, we must notice and record the difference between a "*factum of statement*" and *"truth of a statement"*. The said distinction has been recognised and accepted in several pronouncements in *J.D. Jain* v.

State Bank of India[100], AIR 1982 SC 673, *Manilal Navavati* v. *Sushila Mahendra Nanavati*[101], AIR 1965 SC 364 and *S.R. Ramaraj* v. *Special Court, Bombay*[102], (2003) 7 SCC 175. Thus, electronic record produced as a statement as a tangible in form of a CD, print out on paper, etc. as a fact in itself, must be distinguished from electronic record, which is produced to prove truth of the matter it asserts or correctness of contents for the latter postulates adjudication of veracity and credibility of the information by the person who has made a statement offering or producing the document for its truth.

In view of the aforesaid discussion, information memorised as business record or records maintained in common course of events are not treated as hearsay even if the maker lacks personal knowledge of the facts or events. The document should be prepared in normal course of business must have been at or near the time of events it records and should have been made in normal course of business activities or events. Sub-section (4) to Section 65B postulates that the certificate should be given by a person occupying a responsible official position in relation to operation of the relevant device or management of the relevant activities. If the said conditions are satisfied, it promotes and establishes the trustworthiness. In such cases, presumption of fact regarding genuineness and authenticity of the content can be invoked at the discretion of the court under Section 114 of the Evidence Act.

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[100] *J.D. Jain* v. *State Bank of India*[100], AIR 1982 SC 673

[101] *Manilal Navavati* v. *Sushila Mahendra Nanavati*[101], AIR 1965 SC 364

[102] *S.R. Ramaraj* v. *Special Court, Bombay*[102], (2003) 7 SCC 175

In terms of sub-section (1) to Section 65B, original evidence need not be produced when conditions of Section 65B are satisfied. However, Section 65B nowhere states that the contents of the computer output shall be treated as the truth of the statement. Section 65B deals with admissibility of "*electronic records*" and does not deal not with the truthfulness or veracity of the contents. However, when a certificate under Section 65B is produced the Court may presume or form a prima facie opinion, which is rebuttable and may not be accepted.

Electronically generated record is entirely a product of functioning of a computer system or computer process, like call record details or a report generated on a fax, which shows the number from and to which the fax were sent, time, etc. is generated electronically. It does not contain any assertion. Therefore, as noticed above it is not hearsay. These are not writings made by a person (*United States* v. *Khorozian*[103], 333 F. 3 498, 506). Normally non-assertive conduct is more reliable, provided there has been no fraud and interpolation in the preparation of the record. Computer generated telephone records are not similar to a statement by a human declarant and, therefore, cannot be treated as hearsay and the credibility and evidentiary value is determined on the reliability and accuracy of the process involved. Ergo, in these cases when conditions of Section 65B are satisfied, the probative value or weight can be substantial of course, subject to verification as to the credibility and integrity of the contents.

[103] *United States* v. *Khorozian*[103], 333 F. 3 498, 506

The distinction between "*factum of a statement*" and "*truth of a statement*"[104] and the "*concept of presumption*" of memorandum or records maintained in normal course of business and the credibility or trustworthiness of electronic records has been dealt with above. However, it must be understood that mere admission or admissibility of the electronic record would not mean that the contents of the electronic record have been proved beyond doubt and debate and are automatically proved when the document is marked exhibit. Mere marking of a document as exhibit does not dispense with the proof of its contents (*Sait Tarajee Khimchand* v. *Yelamarti Satyam*[105]*,* AIR 1971 SC 1865, *Narbada Devi Gupta* v. *Birendra Kumar Jaiswal*[106]*,* (2003) 8 SCC 745 and *Mohd. Yusuf* v. *D*[107]*.,* AIR 1968 BOMBAY 112).

Provisions of Section 65 of Evidence Act are apposite on the said legal principle and reference can also be made to Sections 91 and 92 of the Evidence Act. The latter sections deal with exclusion of oral evidence by documentary evidence in certain cases and in which cases oral evidence can be led even when there are documents recording terms of contract, grant or any other disposition of property or when a matter is required by law to be reduced to a form of a document. The effect of the aforesaid provisions is that when a certificate under Section 65B authenticates the computer output, it will only show and establish that the computer output is the paper

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[105] *Sait Tarajee Khimchand* v. *Yelamarti Satyam*[105]*,* AIR 1971 SC 1865,

[106] *Narbada Devi Gupta* v. *Birendra Kumar Jaiswal*[106]*,* (2003) 8 SCC 745

[107] *Mohd. Yusuf* v. *D*[107]*.,* AIR 1968 BOMBAY 112)

print out or media copy, etc. of the computer from which the output is obtained. The court has still to rule out when challenged or otherwise, the possibility of tampering, interpolation or changes from the date the record was first stored or created in the computer till the computer output is obtained. The focus over here is not so much on the creation of the out-put as stipulated under sub-section (2) to Section 65B, but rather on the preservation and sanctity of the record after it was originally created. It extends beyond identification of the particular computer equipment and the process or equipment used for computer output, etc. It would relate to the policies, procedures for use of the equipment that stored the said information since creation and data base and integrity of the same. Questions which would arise and have to be answered is whether data base was protected and had no or limited access, which permits modification/alteration; whether the data base could be wrongly lodged or created or could be transferred or changed when the data base was transferred and stored in the backup systems. These are questions which are pertinent and have to be examined to ascertain whether or not there was possibility of change, alteration or manipulation in the initial or original data after it was created. The courts must rule out that the records have not been tampered and read the data or information as it originally existed. These are aspects which are not codified as such, for probative value is examined on the case to case basis keeping in mind the relevant facts.

CHAPTER 7

SUPREME COURT ON SECTION 65-A AND 65-B OF THE EVIDENCE ACT, 1872 AND ITS CRITICAL ANALYSIS.

7.1 State (NCT of Delhi) Vs. Navjot Sandhu[108]

(2005) 11 SCC 600:

(Parliament Attack Case).

In this case the proof and admissibility of mobile telephone call records was in question on the ground that there was no certificate attached along with the call detail records as per the provision of Section 65-B(4) of the Indian Evidence Act, 1872 nor was any expert examined in this respect. The Apex Court considered the Call detail Records as Secondary Evidence for the reason that they were "*copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies"* and invoked Section 65 on the basis that, "*evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable as the information contained in the call records is stored in huge servers which cannot be easily*

[108] State (NCT of Delhi) Vs. Navjot Sandhu[108] (2005) 11 SCC 600: (Parliament Attack Case).

moved and produced in the Court." The Court held that printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service providing Company can be led into evidence through a witness who can identify the signatures of the certifying officer or otherwise speak to the facts based on his personal knowledge. Irrespective of the compliance of the requirements of Section 65B which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 & 65. It may be that the certificate containing the details in sub-Section (4) of Section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 & 65. The following observations of House of Lords in the case of *R Vs. Shepard*[109] *[1993 AC 380]* are quite apposite:

"*The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of*

[109] *R Vs. Shepard*[109] *[1993 AC 380]*

knowing what the computer is required to do and who can say that it is doing it properly."

That on the basis of the above aspect the court held the Call detail records admissible in evidence.

Analysis:

To analyse the above case some queries are required to be answered:

a) Whether the Court was dealing with Secondary Documentary Evidence or with Electronic records in the form of Computer outputs?

b) Whether the Electronic Evidence in the Form of Computer Outputs can be considered and made equivalent to the Secondary Documentary Evidence?

c) Does Section 65-B(1) creates a legal fiction in respect of Electronic records to be considered as documents only on the fulfilments of certain conditions as per provision of Section 65-B ?

d) Does the Enactment of Section 65-A and 65-B make Sections 61 to 65 inapplicable in respect of Electronic Evidence?

e) Does the way in which Court has interpreted the admissibility of Electronic Record makes Section 65-A nugatory or Otiose?

f) Whether the Provisions of Section 65-A and 65-B have been enacted as Special Provisions under the Indian Evidence Act, 1872?

g) Whether the Provisions of Section 65-A and 65-B are a complete Code in itself?

The question while analysing the present case is not whether the Call detail records are admissible or not in the absence of the Certificate but whether they could have been made admissible as Secondary Evidence as per Section 63 and 65 of the Evidence Act without even reverting to Section 65-A or 65-B. The queries raised above if analysed in the light of discussion had previously in Chapter 6.3 to 6.5 will provide the answers and thereby show that the method adopted by the Court to deal with the issue of interpreting admissibility of electronic records was not proper and was done in a manner that contravenes principles of Statutory interpretation. Secondly the Supreme Court has improperly used the methods of authentication of Secondary Evidence to the Electronic Records. The said interpretation by the Supreme Court is also an attempt to offset the question of accuracy and reliability as enacted by the amendment made in the Evidence Act in 2000.

7.2 P V Anvar Vs. P K Basheer[110]

(2014)10 SCC 473.

(Election Petition)

The question of law under Section 65B in Anvar arose in connection with an election petition under Section 100(1)(b) of the Representation of People's Act, 1951. P.V. Basheer, the respondent, had been elected to the Kerala Legislative Assembly in 2011. The petitioner, P.K. Anvar, challenged the election on the grounds that the election propaganda used in the form of songs, speeches, and announcements had been defamatory. He argued that this amounted to a '*corrupt practice'*, and prayed for the setting aside of the election. In response, the Respondent challenged the admissibility of CDs containing said propaganda on the grounds that the requirements under Section 65B were not satisfied. Specifically, the certificate discussed by Section 65B(4) was missing. The Kerala High Court, concurring with the Respondent that the requirements under Section 65B had not been met, dismissed the election petition. In appeal against this decision, the petitioner approached the Supreme Court.

The Supreme Court commenced its analysis by taking note of Section 59, which prohibits the use of oral evidence to prove the contents of documents and electronic records, and Section 65A, which states that

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110 P V Anvar Vs. P K Basheer[110] *(2014)10 SCC 473 (Election Petition)*

the only way to adduce evidence of electronic records is through Section 65-B. On this basis, it excludes the applicability of all provisions of the Evidence Act, except Section65B.

This pure statutory interpretation is followed by an examination of its own previous decision in Afsan Guru. The Supreme Court disagrees with Afsan Guru's[111] dictum that Sections 61-65 of the Evidence Act can be applied where the conditions stipulated in Section 65-B were not satisfied. It holds that while Sections 61-65 deal with general documentary evidence, Section 65-B only refers to one special subset - electronic records. Therefore, applying the principle of *generalia specialibus non derogant*, the Supreme Court holds that electronic evidence can be adduced solely under Section 65-B. This conclusion is buttressed by the observation that Section 65-B begins with a *non-obstante* clause. The Supreme Court's interpretation of Section 65-B consequently becomes critical.

In its analysis of the provision, the Supreme Court's focus is almost exclusively on sub-sections (2) and (4) of Section 65-B. It comes to these significant conclusions:

(1) The purpose of the provisions of Sections 65-A and 65-B of the Evidence Act, is to sanctify secondary evidence in electronic form, generated by a Computer. (Para 14).

(2) The very admissibility of Electronic record which is called

[111] State (NCT of Delhi) Vs. Navjot Sandhu[111] (2005) 11 SCC 600: (Parliament Attack Case).

computer output, depends on the satisfaction of the four conditions under section 65-B (2) of the Evidence Act. Thereby making following of this condition mandatory. (Para 14).

(3) Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, the question would arise as to genuineness thereof and in that situation, resort can be made to Section 45-A Opinion of Examiner of Electronic Evidence. (Para 17).

(4) The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence, if requirements under Section 65-B are not complied with. (Para 18)

(5) The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient 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 in itself. (Para 20)

(6) The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To

that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct 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 65B are satisfied. (Para 22).

(7) In the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B of the said Act, obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record is inadmissible. (Para 22).

(8) If an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act. (Para 24).

Analysis of the judgment:

The Supreme Court's comes to three significant conclusions:

First, all the conditions under sub-section (2) are mandatory.

Second conclusion of the Supreme Court relates to its interpretation of Section 65-B (4). In addition to the four conditions under Section 65-B(2), the Court paraphrases Section 65-B(4) to arrive at five

conditions that it states must be satisfied before a statement under Section65B can be made. These conditions (Para 14) are as under:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B (2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

The first of these relates to the method of authentication wherein the Court mandates the certificate thereby holding that in the absence of a certificate, the electronic record will be inadmissible under Section 65-B. The next three conditions laid down by the court concerns the contents of the certificate and the last one deals with the aspect of signing of the certificate. While these conditions are derived from the language of Section 65-B (4), the interpretation adopted by the court

is very curious.[112]

(1) The Supreme Court ignores words "*any of the following things*," before listing out its clauses (a), (b), and (c) Supreme Court, in interpreting this, reads it as clauses (a), (b), and (c) Section 65-B(4) are *compulsory* aspects of the certificate. Similarly, Section 65-B(4)(c) permits the certificate to deal with any of the matters to which the conditions mentioned in sub-section (2) relate". The Supreme Court reads it to mean that *all* of the conditions mentioned in sub-section (2) *must* be specified in the certificate. The replacement of 'any' with 'all' is not comprehensible.

(2) Supreme Court while dealing with Section 65-B(4)(c) reads it as "certificate must deal with the applicable conditions" whereas the said provision does not contain these words. No such language of 'applicable condition' exists in the section. Alarmingly, the addition of such a word creates a dichotomy between sub-section (2) and sub-section (4). Sub-section (2) makes 'all' the conditions mandatory as a condition for making the electronic evidence to be treated as a "*document*", without regard to their "applicability." It is unclear how an element of "applicability" can be introduced into the sub-section by judicial interpretation.

[112]Article Authenticating Electronic Evidence: §65b, Indian Evidence Act, 1872 Ashwini Vaidialingam published in Articles section of www.manupatra.com

(3) Finally, the Supreme Court by reading in between the lines, engages in selective paraphrasing Clause (a) and (b) of Section 65-B(4) and mentions the same as the manner in which the electronic record was produced and the particulars of the device involved in the production of that record whereas as per clause 65-B (4) (b) the purpose of giving the particulars is to show that the electronic record was produced by a Computer which is in contravention to the general principle of interpretation that the statute has to be read as a whole. Further in respect to the person authorised to sign the the Supreme Court refers merely to 'operation' and leaves out "management" thereby indicating a substantial degree of negligence on the part of the Supreme Court.

Therefore, it is clear that that the interpretation of Section 65-B (4) in Anvar does not conform to the language of the provision, which both unambiguously and repeatedly adopts a policy of flexibility. Such an approach is in complete contravention of the basic principles of statutory interpretation i.e. a statute has to be read as a whole and further the literal interpretation of the Statute for which no explanation has been given.

Third conclusion the Supreme Court arrives at, in its interpretation of Section 65-B, is that the electronic record shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document. This dicta is to be read alongside a reference made to Afsan Guru. The Supreme Court in Anvar specifically notes that in

Afsan Guru[113], a '*responsible officer*' had certified the electronic records in question "*at the time of production itself*". That contemporaneous authentication is met with implicit approval in Anvar and it was because of this contemporaneity requirement that the electronic evidence in Anvar was finally held to be inadmissible even though the requirement of contemporaneity is unquestionably extra-statutory. Section 65-B makes no mention of any time period within which the certificate must be produced, let alone that the certificate must be taken at the same time as the document The Supreme Court held that since a certificate was not produced at the same time the computer output was generated, it could not be admitted at all. What this means is that if a party omits to get a certificate at the time of, say, generating CD or printout, the evidence becomes inadmissible.

Another aspect that has to be looked into is whether the Certificate alone is the method of authentication of the electronic records as has been held in this judgment. This takes us to a very substantive aspect as to whether the Court though has mentioned the provision of Section 22-A but while analysing 65-A and 65-B it has completely overlooked the same even though it provides that oral evidence can be adduced if it is in relation to the genuineness of the records. The genuineness of electronic record is precisely what is provided under Section 65-B (2) and thus Oral Evidence as a means of authentication

[113] State (NCT of Delhi) Vs. Navjot Sandhu[113] (2005) 11 SCC 600: (Parliament Attack Case)

of the records is permissible as per the Evidence Act itself.

Has taken a contradictory stand where on one hand it is saying that the conditions of Section 65-B (2) are mandatory in nature (these conditions are for authentication of the genuineness of the electronic record) and on the other hand is saying, "*only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof.. .*" (Para 17). It is clear from the above statement that the Supreme Court believes that the question of genuineness can never be answered at the stage of admissibility and is always a post-admission question. Such an understanding of evidence law is incorrect for two reasons.

First, this argument is in contradistinction to the object and reason of enacting Section 65-A and 65-B on the one hand and the language of Section 65-B on the other hand. As the Supreme Court itself acknowledges, that all these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. This is unquestionably a question relating to the genuineness of the document. Therefore, there is clear contradiction in the court's reasoning behind dismissing oral evidence.

Second, Supreme Court in respect of electronic evidence adduced prior to the amendment made in 2000 concerning the evidentiary

value of tape-recorded conversations, have held that reliability of the evidence must be established before it is admitted. That is, even if the information is relevant, it will not be admitted if it is not reliable. The reason for this has consistently been that new technology, like tape-records, can easily be tampered with or manipulated. Given these identical concerns, there is no reason why this ratio cannot be extended to electronic evidence as well; in fact, the same logic applies seamlessly. Ironically, the Supreme Court in Anvar itself emphasized the importance of authenticity of electronic evidence for these very reasons.

Therefore, contrary to the reasoning provided by the Supreme Court, genuineness is indeed a concern under Section 65-B, and is a crucial part of the evidentiary stage of admissibility. Consequently, it should permissible under the Evidence Act for a party to adduce oral evidence to satisfy the conditions of Section 65-B(2) and the certificate should not be the only possible authentication method envisaged.

Another important contradiction which appears in the judgment is the classification of the Electronic Records under the category or Primary and Secondary Electronic Evidence. In the earlier part the Supreme Court says that Section 65-A and 65-B are a Complete code in itself and the provisions of Section 61-65 does not apply in respect of Electronic Records. To substantiate this aspect it relies on the maxim *Generalia specialibus non derogant, i.e.* Special Law will always prevail over the General Law but in the later part of the judgment it

holds that in case of Primary Electronic Evidence the provision of Section 62 will apply. This shows lack of clarity making the judgment self-contradictory in itself. Further Once Section 65-A says that the Electronic Records are to be proved as per provisions of Section 65-B there is no other provision which should be used for making electronic records admissible.

The Supreme Court's decision in Anvar on the one hand blatantly disregards principles of statutory interpretation, ignoring and wilfully reading in statutory requirements as it sees fit and is in contradistinction to not only the statute, principles of interpretation of statute but even within itself. Yet, when viewed from a policy per-spective, it has yielded benefits granting dual advantage of uniformity and certainty in evidentiary practices.

7.3 R.K. Anand v. *Delhi High Court*[114]

(2009) 8 SCC 106

(BMW Hit & Run Case)

In *R.K. Anand* v. *Delhi High Court,* the Supreme Court was considering the admissibility of recordings on some microchips and CDs. The court found that first of all the Case concerned with Contempt Proceedings where the principle of CrPC and Evidence Act does not apply strictly and what is to be

[114] *R.K. Anand* v. *Delhi High Court*[114] *(2009) 8 SCC 106 (BMW Hit & Run Case)*

followed is the principle of Natural Justice. It further held that the authenticity and integrity of the Sting Operation had never been doubted or disputed during the trial and the Appellant by way of his conduct had admitted the same. It was a case where the microchip was preserved by a popular TV channel studio and the court believed that it could not have been tampered with.

7.4 Ramlila Maidan Incident case[115]

*(*2012) 5 SCC 1

Baba Ramdev Hunger Strike Case

The manner of how the CD could be admitted in evidence has been considered in *Ramlila Maidan Incident case* wherein the CD containing the recording along with an affidavit in the manner required under Section 65B of the IEA was directed to be filed in court and the court had taken on record an affirmation by the Trust on affidavit that the CD had not been tampered with. In many cases the courts have denied probative value to the electronic records if the same is not in compliance with Section 65B of the Indian Evidence Act.

7.5 Sanjay Singh RamraoChavan Vs. Dattatray Gulabrao Phalke[116]

(2015) 3 SCC 123

In this case the offence of demanding bribe was sought to be proved

[115] Ramlila Maidan Incident case[115](2012) 5 SCC 1 Baba Ramdev Hunger Strike Case
[116] Sanjay Singh RamraoChavan Vs. Dattatray Gulabrao Phalke[116] *(2015) 3 SCC 123*

by producing a tape-recorded conversation which the Supreme Court found to be inadmissible. In fact, the Directorate of Forensic Science Laboratories, State of Maharashtra had stated in its report that the conversation is not in audible condition and, hence, the same was not considered for spectrographic analysis. The learned counsel for the respondents submitted that the conversation had been translated and the same had been verified by the *panch* witnesses. Admittedly, the *panch* witnesses had not heard the conversation, since they were not present in the room. The Supreme Court held that as the voice recorder was itself not subjected to analysis, there was no point in placing reliance on the translated version, having no source for authenticity of the translation. Approving the decision in *Anvar case,* the Supreme Court reiterated that source and authenticity are the two key factors for electronic evidence. The relevant part of the judgment is as under:

"16. **As** *the voice recorder is itself not subjected to analysis, there is no point in placing reliance on the translated version. Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for an electronic evidence, as held by this Court in* Anvar P.V. *v.* P.K. Basheer[117], *(2014) 10 SCC 473.*

Though as per the judgment it appears that the same was in consonance of the law laid down in Anvar Case where it talks of the fact that Source and Authenticity are the two key factors for an

[117] *Anvar P.V.* **v.** *P.K. Basheer[117],* (2014) 10 SCC 473

electronic evidence but a close analysis shows that in Anvar Case the Supreme Court in Para 17 "*only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof.. .*" (*Para 17*). It is clear from the above statement that the Supreme Court believes that the question of genuineness can never be answered at the stage of admissibility and is always a post-admission question but in this case it is acting contrary to the said view and is considering Genuineness of the electronic record at the stage of admissibility itself which is the correct way to look into the Electronic Evidence thereby further establishing that the view taken by the Apex Court with regard to the genuineness of electronic record in Para 17 of the Anvar Judgment was incorrect.

7.6 Sonu @ Amar Vs. State of Haryana[118]

(2017) 8 SCC 570

In this case the Supreme Court was dealing with the Admissibility of Call Detail Records which were admitted as Evidence before the Trial Court without any Certificate under Section 65-B and without an objection regarding mode/method of proof of call detail records (CDRs) at the time they were admitted before the Trial Court. The

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[118] Sonu @ Amar Vs. State of Haryana[118] *(2017) 8 SCC 570*

said issue was raised for the first time before the Supreme Court. The contention of the Appellant-accused was that the CDRs could not be proved under S. 65-B, as admittedly they were not certified in accordance with sub-section 65-(B) (4). The Apex Court thereof held that the same cannot be permitted to be raised at the appellate stage as the objection relates to mode or method of proof. The Court further held *that* it is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence and the Objection is that they were marked before the trial court without a certificate as required by S. 65-B(4). The Objection relating to mode or method of proof has to be raised at the time of marking of document as an exhibit i.e. at trial stage, and not later. The crucial test is, whether defect could have been cured at the stage of marking the document. Applying such test herein, if an objection was taken to CDRs being marked without a certificate, the court could have given prosecution an opportunity to rectify the deficiency. The Objections regarding admissibility of documents which are per se inadmissible can be taken even at appellate stage *as the same* is a fundamental issue. However, mode or method of proof is procedural and objections, if not taken at trial, cannot be permitted at Appellate stage. If objections to mode of proof are permitted to be taken at Appellate stage by a party, the other side does not have an opportunity of rectifying deficiencies. Objection that CDRs are unreliable due to violation of procedure prescribed in S. 65-B (4), Evidence Act cannot be permitted to be raised at present stage, as the objection relates to mode or method of proof.

The Apex Court further held that an electronic record is not admissible unless it is accompanied by a certificate as contemplated under Section 65-B (4) of the *Evidence Act is no more res integra*. The Court while dealing with the effect of *overrule of* Navjot Sandhu[119] case by Anvar Case[120] discussed the aspect *of the operation of the judicial tool of* "*prospective overruling*" particularly in respect of the cases where trials were held during the period between 4-8-2005 and 18-9-2014 when the interpretation of Section 65-B(4) by this Court by a judgment dated 4-8-2005 in *Navjot Sandhu* held the field till it was overruled on 18-9-2014 in *Anvar case during which b*ecause of the interpretation of Section 65-B in *Navjot Sandhu*, there was no necessity of a certificate for proving electronic records and in those cases Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in *Anvar case* has to be retrospective in operation unless the judicial tool of "*prospective overruling*" is applied. However, retrospective application of the judgment is not in the interest of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage. Attempts will be made to reopen cases which have become final.

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[119] State (NCT of Delhi) Vs. Navjot Sandhu[119] (2005) 11 SCC 600: (Parliament Attack Case)

[120] *Anvar P.V.* **v.** *P.K. Basheer[120],* (2014) 10 SCC 473

ANALYSIS:

The practical problem faced in the present case by the Court while deciding the issues appears to be because of the errors committed in interpretation of the Electronic Evidence in the Navjot Sandhu Case and Anvar Case. Had the same been interpreted properly this situation would not have arisen. The various errors committed which gave has led to the problem situation which was being appreciated has dealt with the issue in the present case appears to be:

a) Applicability of Section 65-A has not considered in the case of Navjot Sandhu and has been diluted in Anvar Case by dividing the Electronic Record in Primary and Secondary Electronic Evidence.

b) The Aspect of Bringing in the provisions of Section 63 and 65 in Navjot Sandhu and of Section 62 in Anvar Case.

c) Making Certificate under Section 65-B (4) as the only means of authentication of electronic record.

d) Overlooking Section 22-A as one of the means of Authentication of the Document.

e) Overemphasising on placing the Certificate u/s 65-B (4) for the purpose of Authentication of Electronic Evidence.

f) Instead of making reliability/genuineness of Electronic Evidence as the basis of admissibility the Court held that the question of genuineness can never be answered at the stage of admissibility and is always a post-admission question. It was because of this incorrect interpretation that certificate u/s 65-B (4) became a method or mode of proof.

It is pertinent to mention here that in the case of Electronic Evidence Compliance of Section 65-B (2) is a mandatory condition for considering the electronic records in the form of Computer Output as documents. Since this aspect has been overlooked in the present case hence the Authentication of Electronic Records was taken as a mode or manner of proof instead of Considering the same as inadmissible because they did not satisfy the condition of Authentication as per Section 65-B prior to be rendered as admissible. It is also important to mention here that the burden in respect of authentication is on the party who relies on the electronic record. Hence the whole case should have been looked into from this aspect. If any evidence oral or documentary had been led in respect of authentication of the electronic record the same becomes admissible irrespective of the fact whether certificate under Section 65-B (4) is there or not.

7.7 Tomasu Bruno Vs. State of Uttar Pradesh[121]

(2015) 7 SCC 178.

In this case CCTV footage, the missing best evidence, was considered as a crucial piece of evidence to determine whether the accused were responsible for the commission of the crime. Court held that it was

[121] Tomasu Bruno Vs. State of Uttar Pradesh[121] *(2015) 7 SCC 178.*

for the prosecution to produce this and its omission, raises serious doubts about the prosecution case. The Court, drew an adverse inference against the prosecution under Section 114, illustration (g) of the Evidence Act, holding that the prosecution withheld the same as it would be unfavourable to them had it been produced the conviction was set aside. The relevant part of the judgment is as under:

"*With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents strictu sensu are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer-generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of*

the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

25. Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra[122], (2012) 9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru[123], (2005) 11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

26. The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and SIM details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non- production of CCTV footage, non-collection of call records (details) and SIM details of mobile phones seized from the accused

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[122] *Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra[122], (2012) 9 SCC 1*
[123] *State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru[123], (2005) 11 SCC 600*

cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made.

27. As per Section 114 (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption under Section 114 (g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption under Section 139 of Negotiable Instruments Act, where the court has no option but to draw statutory presumption under Section 114 of the Evidence Act. Under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party."

Analysis:

However, in spite of the *Anvar case* ruling, it seems that the ghost of *Parliament attack case* was still haunting the courts as is evident from

the three-judge Bench decision of the Supreme Court in the present case wherein the Appellants, two Italian nationals, were convicted for murder of their friend, another Italian national and the evidences against them were largely circumstantial. As the prosecution failed to adduce the "*best evidence*" in the form of CCTV footage of the hotel where the alleged murder was committed, the Supreme Court acquitted the appellants drawing an adverse inference under Section 114 (g) of the Indian Evidence Act. Though not directly related with admissibility of Electronic Evidence under Section 65B of the Indian Evidence Act, the Supreme Court in this case erroneously quoted with approval the *Parliament attack case* proposition on the issue of admissibility of electronic record. Quoting the *Parliament attack case* after the same has been expressly overruled in the *Anvar case* will only add to the confusion on the issue of admissibility of electronic records.

The judgment in this case was passed just after 4 months of the judgment in the Anvar Case, wherein the Section 63 and 65 of the Evidence Act were excluded in respect of Electronic Evidence and it was held that the same can be proved only by virtue of Section 65-A and 65-B of Indian Evidence Act and the same is a complete code in itself and applying the maxim *Generalia specialibus non derogant, i.e.* special law will always prevail over the general law the Court had overruled the judgment passed in Navjot Sandhu Case in respect of Electronic Evidence.

Interestingly, in the present case it was held that in cases involving Electronic Evidence, Secondary Evidence may be adduced under Section 65 and this was in consonance with the overruled judgment of the Navjot Sandhu Case. Astonishingly, the judge who delivered the opinion in Anvar Case was also a part of the bench deciding this case, although he did not deliver the opinion of the Supreme Court which was delivered by Hon'ble R. Banumathi, J. The present judgment did not even make a reference to the Anvar Case and relied on the overruled Navjot Sandhu Case which is against the spirit of consistency, the basis for precedential law and this further creates confusion.

Further the law passed in this case does not lay proper law as:

a) The Court was dealing with Electronic records in the form of Computer outputs and not Secondary Documentary Evidence.

b) The Electronic Evidence in the Form of Computer Outputs cannot be considered and made equivalent to the Secondary Documentary Evidence.

c) The Court has ignored that Section 65-B (1) creates a legal fiction in respect of Electronic records to be considered as documents only on the fulfilments of certain conditions as per provision of Section 65-B (2).

d) The Enactment of Section 65-A and 65-B make Sections 61 to 65 inapplicable in respect of Electronic Evidence.

e) The way in which Court has interpreted the admissibility of Electronic Record makes Section 65-A nugatory or Otiose.

f) The court has committed an error in not considering the fact that authenticity of electronic record is an essential condition linked with the admissibility of electronic evidence and the same is not just a manner or mode of proof rather it goes into the root of admissibility and non-compliance of the same renders the electronic evidence inadmissible.

g) Further the Court holding the aspect that "*Electronic documents strictu sensu are admitted as material evidence" is incorrect because the electronic record is to be considered as documentary evidence and not material or real evidence. Further as per Section 65(B)(1) the Electronic records are deemed to be documents only on the conditions as mentioned in Section 65 (B)(2).*

7.8 Vikram Singh Alias Vicky Walia Vs. State of Punjab[124]*.*

(2017) 8 SCC 518

The Present was a murder and kidnapping case, where the conversation was recorded on the landline phone of the Complainant and a fresh Review Petition was filed by the convict for reopening the earlier dismissed Review Petition in 2011 of which one of the grounds was that the tape-recorded conversation without a certificate u/s 65-

[124] Vikram Singh Alias Vicky Walia Vs. State of Punjab[124] *(2017) 8 SCC 518*

B (4) cannot be deemed to be a valid evidence and has to be ignored from consideration. However the Court relying on the Anvar case reiterated that Primary Electronic Record was to be proved as per provision of Section 62 of the Evidence Act and the certificate under Section 65-B(4) of the Evidence Act is therefore not required, when the original electronic evidence is produced.

The same cassette containing conversation by which ransom call was made on the landline phone was handed over by the Complainant in original to the police. This Court in its judgment dated 25-1-2010 has referred to the aforesaid fact and has noted the said fact to the following effect: *(*Vikram Singh case[125], *(2010) 3 SCC 56 at page 61, para 5)*.

"5. *The cassette on which the conversations had been recorded on the landline was handed over by Ravi Verma to SI Jiwan Kumar and on a replay of the tape, the conversation was clearly audible and was heard by the police."*

20. The tape-recorded conversation was not secondary evidence which required certificate under Section 65-B, since it was the original cassette by which ransom call was tape-recorded, there cannot be any dispute that for admission of secondary evidence of electronic record a certificate as contemplated by Section 65-B is a mandatory

[125] *(*Vikram Singh **Alias Vicky Walia Vs. State of Punjab** [125], *(2010) 3 SCC 56*

condition. In *Anvar P.V.* this Court had laid down the above proposition in para 22. However, in the same judgment this Court has observed that the situation would have been different, had the primary evidence been produced. The conversation recorded by the Complainant containing ransom calls was relevant under Section 7 and was primary evidence which was relied on by the Complainant. In para 24 of the judgment of this Court in *Anvar P.V*[126] it is categorically held that if an electronic record is used as primary evidence *the same is admissible in evidence*, without compliance with the conditions in Section 65-B.

ANALYSIS:

The present was a case where the judgment was based on the proposition of law as settled in Anvar Case. Since in Anvar the Supreme Court divides the Electronic records i.e. the Computer output into Primary and Secondary Electronic Records and further in Para 24 goes on to state that the same can be proved by virtue of Section 62 of the Evidence Act the same was the proposition of law followed in the present case. In Anvar case the court classifies the Electronic Records under the category or Primary and Secondary Electronic Evidence. In the earlier part of the same judgment the Supreme Court says that Section 65-A and 65-B are a Complete code in itself and the provisions of general sections of documentary

[126] *Anvar P.V.* **v.** *P.K. Basheer*[126]*,* (2014) 10 SCC 473

evidence does not apply in respect of Electronic Records. To substantiate this it relies on the maxim *Generalia specialibus non derogant, i.e.* Special Law will always prevail over the General Law but in the later part of the judgment it holds that in case of Primary Electronic Evidence the provision of Section 62 will apply. This shows lack of clarity making the judgment self-contradictory in itself. Further Once Section 65-A says that the Electronic Records are to be proved as per provisions of Section 65-B there is no other provision which should be used for making electronic records admissible and the same cannot be divided into primary and secondary.

7.9 *Mukesh Vs. State for NCT of Delhi*[127]

(2017) 6 SCC 1

(Nirbhaya Case)

The present was a case, "*where the attitude, perception, the beastial proclivity, inconceivable self-obsession and individual centralism of the six made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide.*" This is in crux the description of the incident of the Nirbhaya Case. As far as the electronic evidence in the

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[127] *Mukesh Vs. State for NCT of Delhi*[127] *(2017) 6 SCC 1 (Nirbhaya Case)*

present case is concerned the same was collected and proved as under:

"the investigating agency went around to collect the electronic evidence. A CCTV footage produced by PW-25, Rajender Singh Bisht, in a CD, Ex.PW-25/C-1 and PW-25/C-2, and the photographs, Ex.PW-25/B-1 to Ex.PW-25/B-7, were collected from the Mall, Select City Walk, Saket to ascertain the presence of PW-1 and the prosecutrix at the Mall. The certificate under Section 65-B of the Indian Evidence Act, 1872 (for short, "Evidence Act") with respect to the said footage is proved by PW-26, Shri Sandeep Singh, vide Ex.PW-26/A. Another important evidence is the CCTV footage of Hotel Delhi 37 situated near the dumping spot. The said footage showed a bus matching the description given by the informant at 9:34 p.m. and again at 9:53 p.m. The said bus had the word "Yadav" written on one side. Its exterior was of white colour having yellow and green stripes and its front tyre on the left side did not have a wheel cap. The description of the bus was affirmed by PW-1's statement. The CCTV footage stored in the pen drive, Ex.P-67/1, and the CD, Ex.P-67/2, were seized by the I.O. vide seizure memo Ex.PW-67/A from PW-67, Pramod Kumar Jha, the owner of Hotel Delhi 37. The same were identified by PW-67, Pramod Jha, PW-74, SI Subhash, and PW-76, Gautam Roy, from CFSL during their examination in Court. PW-78, SHO, Inspector Anil Sharma, had testified that the said CCTV footage seized vide seizure memo Ex.PW-67/A was sent to the CFSL through

S.I. Sushil Sawaria and PW-77, the MHC(M). Thereafter, on 01.01.2013, the report of the CFSL was received."

The above showed that all precautions were taken at the time of adducing evidence to show the compliance of the provisions of Section 65-B by adducing evidence in the form of certificate, expert examination, statements of the responsible persons who operated the Computers which were the source of Computer output etc. Further there appears to be no dispute raised with regard to the genuineness of the electronic record.

Supreme Court while analysing the Electronic records stated as under:

"425. The computer-generated electronic record in evidence, admissible at a trial is proved in the manner specified in Section 65-B of the Evidence Act. Sub-section (1) of Section 65 of the Evidence Act makes electronic records admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65-B of the Evidence Act. When those conditions are satisfied, the electronic record becomes admissible in any proceeding without further proof or production of the original, as evidence of any of the contents of the original or any fact stated therein of which direct evidence is admissible."

The present was a simple application of the provisions of Section 65-B in its literal sense.

7.10 Union of India Vs. Cdr. Ravindra V Desai[128]

(2018) 16 SCC 273

The present was a case where the Call Detail Records were tendered as evidence during the Court Martial Proceedings. However, before the AFT, the Respondent raised technical objection with regard to the Evidentiary value of the Certificate u/s 65-B. To rectify the same a fresh Certificate marked Exhibit T-3 was filed and a witness i.e. the responsible person had appeared before the Court and has explained the entire process od issuance of CDR, Certificate etc. The Tribunal being satisfied with the above held the same to be admissible.

Supreme Court upheld the same analysed the same in the light of the judgment in "*Sonu alias Amar v. State of Haryana[129], (2017) 8 SCC 570,"* which can be traced to the following discussion in the said judgment:

"32. *It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as*

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128 Union of India Vs. Cdr. Ravindra V Desai[128] *(2018) 16 SCC 273*

[129] *Sonu alias Amar v. State of Haryana[129], (2017) 8 SCC 570*

required by Section 65-B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

In the present case the Supreme Court has just followed the law laid down in its earlier judgment i.e. Sonu @ Amar Vs. State of Haryana reiterating that the certificate u/s 65-B can be produced later also at the time of tendering of Evidence. However, Sonu @ Amar Vs. State of Haryana has already been analysed above and the same is not repeated here.

7.11 Shafi Mohd. Vs. State of H.P.[130]

(2018) 2 SCC 807

The question which arose in the present case (*while looking into the aspect dealing with videography of the Crime scene or recovery scene during investigation for inspiring confidence in the evidence collected during investigation*) was that the evidence of which original is not available on the computer or a device in the control or possession of the applicant, can secondary evidence of it be led unhindered by the requirement of a certificate envisaged under Section 65-B(4) of the Evidence Act. Supreme Court in this case holding the rigor of the rule that secondary evidence of electronic record can only be led subject to satisfaction of the requirements of Section 65-B(4) as held in Anvar case[131], in view of Decision in *Tomaso Bruno* v. *State of Uttar Pradesh[132],* (2015) 7 SCC 178, held that in a case where electronic evidence is produced by a party, who is not in possession of the

[130] Shafi Mohd. Vs. State of H.P.[130] *(2018) 2 SCC 807*
[131] *Anvar P.V.* **v.** *P.K. Basheer[131],* (2014) 10 SCC 473
[132] *Tomaso Bruno* v. *State of Uttar Pradesh[132],* (2015) 7 SCC 178,

device, applicability of Sections 63 and 65 of the Evidence Act, cannot be held excluded. It is held there by their Lordships that the requirement of producing a certificate under Section 65-B(4), as a condition precedent to the leading of secondary evidence of electronic record, is attracted when such evidence is produced by a person, who is in control of the relative device, and, not when the device is with the opposite party.

26. The said position of law is best expressed in the words of their Lordships in *Shafhi Mohammad* (supra), where elucidating the issue, it has been held:

"An apprehension was expressed on the question of applicability of conditions under Section 65B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further

proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

6. We have been taken through certain decisions which may be referred to. In Ram Singh and Others v. Col. Ram Singh[133], 1985 (Supp) SCC 611, a Three-Judge Bench considered the said issue. English Judgments in R. v. Maqsud Ali[134], (1965) 2 All ER 464, and R. v. Robson[135], (1972) 2 ALL ER 699, and American Law as noted in American Jurisprudence[136] 2d (Vol.29) page 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such 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 the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

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[133] *Ram Singh and Others v. Col. Ram Singh[133], 1985 (Supp) SCC 611*
[134] *R. v. Maqsud Ali[134], (1965) 2 All ER 464,*
[135] *R. v. Robson[135], (1972) 2 ALL ER 699*
[136] *American Jurisprudence[136] 2d (Vol.29) page 494*

7. In Tukaram S. Dighole v. Manikrao Shivaji Kokate[137], 2010(1) R.C.R.(Civil) 959 : 2010(1) Recent Apex Judgments (R.A.J.) 611 : (2010) 4 SCC 329, the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

8. In Tomaso Bruno and Anr. v. State of Uttar Pradesh[138], 2015(1) R.C.R.(Criminal) 678: 2015(1) Recent Apex Judgments (R.A.J.) 340: (2015) 7 SCC 178, a Three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra[139], 2012(4) R.C.R.(Criminal) 417 : 2012(4) Recent Apex Judgments (R.A.J.) 544 : (2012) 9 SCC 1 and State (NCT of Delhi) v. Navjot Sandhu[140], (2005) 11 SCC 600.

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[137] *Tukaram S. Dighole v. Manikrao Shivaji Kokate[137], 2010(1) R.C.R.(Civil) 959:(2010) 4 SCC 329*
[138] *Tomaso Bruno and Anr. v. State of Uttar Pradesh[138], (2015) 7 SCC 178*
[139] *Mohd. Ajmal Amir Kasab v. State of Maharashtra (2012) 9 SCC 1*
[140] *State (NCT of Delhi) v. Navjot Sandhu[140], (2005) 11 SCC 600*

9. We may, however, also refer to judgment of this Court in Anvar P.V. v. P.K. Basheer and Others[141], 2014(4) R.C.R.(Civil) 504: 2014(5) Recent Apex Judgments (R.A.J.) 459: (2014) 10 SCC 473, delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandhu (supra) that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.

10. Though in view of Three-Judge Bench judgments in Tomaso Bruno[142] and Ram Singh[143] (supra), it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person

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[141] *Anvar P.V. v. P.K. Basheer and Others[141], (2014) 10 SCC 473*
[142] *Tomaso Bruno and Anr. v. State of Uttar Pradesh[142], (2015) 7 SCC 178*
[143] Ram Singh & Ors. Vs. Col. Ram Singh (1985) Suppl. SCC 611

producing such evidence is in a position to furnish certificate under Section 65B(4).

11. Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V[144]. (supra), this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

12. The term "electronic record" is defined in Section 2(t) of the Information Technology Act, 2000 as follows:
"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."

13. Expression "data" is defined in Section 2(o) of the Information Technology Act as follows.
"Data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been

[144] *Anvar P.V. v. P.K. Basheer and Others[144], (2014) 10 SCC 473*

prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

14. The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession 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 denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such 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. Thus, requirement of certificate under Section 65B(4) is not always mandatory.

15. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section

65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies."

ANALYSIS

One way of looking at the present case is that the aforesaid decision of a two-Judge Bench accepts the view taken in *Anvar P.V.'s case* delivered by a three-Judge Bench, but creates one more exception by clarification that in a case where electronic evidence is produced by a party who is not in possession of a device, the applicability of Sections 63 and 65 of the Evidence Act cannot be excluded. It holds in such situation, there cannot be insistence upon the production of certificate under Section 65-B(4) of the Evidence Act. It further holds that the applicability of requirement of certificate being procedural can be relaxed by the Court wherever interest of justice so requires.

Another way of looking at it is that the ignorance of Section 65-A, classification of electronic evidence into primary and secondary as has been done by the Apex Court starting from Navjot Sandhu[145], continued in P V Anvar[146] and further in *Shafhi Mohammad case[147] had led to the* difficulties in complying with the complex provisions under Section 65-B (2) of the Evidence Act. Further the incorrect

[145] *State (NCT of Delhi) v. Navjot Sandhu[145], (2005) 11 SCC 600*
[146] *Anvar P.V. v. P.K. Basheer and Others[146], (2014) 10 SCC 473*
[147] Shafi Mohd. Vs. State of H.P.[147] *(2018) 2 SCC 807*

interpretation of Section 65-B(4) in *Anvar P.V.* v. *P.K. Basheer*, which has been continued in all subsequent decisions of the Supreme Court including in *Shafhi Mohammad case* has led to inconsistency and difficulties in the compliance of the provisions by the Investigating agencies and further application of the provisions in a correct manner. The aspect of ignorance of Section 65-A and classification of Electronic Evidence into Primary and Secondary has already been dealt with earlier. However the issue of discussion with respect to Certificate under Section 65-B(4) is relevant for understanding and analysing the present case.

A perusal of Section 65-B (4) of the Evidence Act in its entirety, shows that the necessity for the all-encompassing certificate as interpreted by Anvar Case led to sufferings in a number of cases relying on Navjot Sandhu Case for want of the certificate. The primary fallacy in *Anvar P.V.* v. *P.K. Basheer*[148] lies in its interpretation of Section 65-B(4) to mean that ***all three*** criteria laid down therein ought to be complied with, whereas the legislative intent was that ***only any*** of the three options set out there in ought to be Complied. Secondly the making of the certificate mandatory and the only method of authentication of electronic records as held by Anvar case was also brought in by Anvar Case whereas the legislative intent was otherwise. The ignoring of the provision of Section 22-A of the Evidence Act as another mode of authentication of electronic record was another error committed by

[148] ibid

Anvar Case. For proper understanding it is relevant to go through Section 65-B (4) of the Evidence Act which reads as under:

Section 65-B (4) reads thus:

"65-B (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing **any *of the following things***, that is to say—

(a) *identifying the electronic record* containing the statement *and describing* the *manner* in which it was *produced*;

(b) giving such *particulars of any device* involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) *dealing with any of the matters to which the conditions mentioned in sub-section (2) relate*,

and purporting to be *signed by a person occupying a responsible official position* in relation to the *operation of the relevant device or the management of the relevant activities* (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

Anvar P.V. v. *P.K. Basheer*[149] proceeds on the fallacious assumption that the certificate mandated under Section 65-B (4) has to be

[149] ibid

submitted elaborating ***ALL*** of the three parameters set out therein. The parliamentary mandate however was ***ONLY for ANY of*** the following to be set out in the certificate and not for all:

(i) identifying the electronic record;
(ii) providing particulars of the device involved in production of the electronic document;
(iii) compliance with the provisions of Section 65-B (2) of the Evidence Act;

Apart from the above it is nowhere mentioned in the Provision that the same is mandatory and the only means adopted for the purpose of Authentication. Hence the Court in Anvar case has gone wrong on both of these aspects.

After Anvar the Supreme Court had multiple occasions to revisit *Anvar*, one of the earliest being in the case of Tomaso Bruno Vs. *State of Uttar Pradesh*[150] where it erroneously quoted with approval the *Parliament attack case* proposition on the issue of admissibility of electronic record by Quoting the *Parliament attack case*[151] after the same has been expressly overruled in the *Anvar case*[152]*.* Interestingly, in this case it was held that Secondary Evidence may be adduced under Section 65 and this was in consonance with the

[150] *Tomaso Bruno and Anr. v. State of Uttar Pradesh*[150]*, (2015) 7 SCC 178*

[151] ibid
[152] ibid

overruled judgment of the Navjot Sandhu Case. Then again, the Court had an Occasion to Visit Anvar in the case of Sonu @ Amar Vs. State of Haryana where the Apex Court was dealing with the need for prospective overruling, especially when the interests of justice would otherwise be affected. But the court still toed the same line of Anvar Case to a large extent.

The exercise that a two-Judge Bench took up in *Shafhi Mohammad* v. *State of H.P* gave hope for a comprehensive review of Section 65-B and its implementation. The judgment did help substantially in easing proving of electronic documents but it did not rectify the interpretational error in *Anvar.* However, it merely distinguished *Anvar* to reintroduce Section 63 and Section 65 of the Evidence Act which was the basis of the overruled Navjot Sandhu Case. In *Shafhi Mohammad*[153], the Supreme Court took note of the instances, such as those which are primary evidence can be proved by Section 62 as was held in the Anvar Case in Para 24 to come to the Conclusion that Sections 65-A and 65-B "*cannot be held to be a complete code on the subject*". It further carved out a circumstance that where the documents may be in the custody of the opponent, when a litigant may not be able to submit a certificate under Section 65-B(4), as envisaged under *Anvar* the certificate was not required and was necessary "*only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control*

[153] ibid

of the said device and not of the opposite party". The Supreme Court further held that in such cases i.e. where the person was not in a position to produce the certificate from a person in control, Sections 63 and 65 cannot be deemed to be excluded. The Supreme Court further clarified that the trial court would have the discretion to relax the requirement of the certificate under Section 65-B(4) based on the facts of the case.

In effect therefore, a smaller Bench of the Supreme Court than that which decided *Anvar P.V.* v. *P.K. Basheer*[154] brought back the *Navjot Sandhu case* rationale in part by upholding the processes for proving secondary evidence. A review of sub-clauses *(a)* and (*b*) of Section 65-B(4) would have provided the answer to proving of third-party documents i.e. that the certificate may merely identify the document and how it was produced or simply provide details of the device used to produce the electronic record only to show that it is a computer record.

The whole problem has arisen because the judicial discretion has substituted where the legislature has clearly not mandated it, which is not only contrary to the provision itself but has also resulted in total chaos in the implementation of the provision.

7.12 Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal[155] 2019 SCC Online SC 1553

[154] ibid

[155] Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal[155] 2019 SCC Online SC 1553 *Ref. of Shafi Mohd. Vs. State of H.P to a larger bench.*

Ref. of Shafi Mohd. Vs. State of H.P to a larger bench.

Any documentary evidence by way of an "electronic record" under the Indian Evidence Act can be proved only in accordance with the procedure prescribed under Section 65-B of the Indian Evidence Act, 1872. This is what is provided under Sections 59 and 65A of the Indian Evidence Act. Section 59 provides that all facts except the contents of document or "electronic evidence", may be proved by Oral Evidence. Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B of the Act. Section 65B deals with the admissibility of "*electronic records*". Section 65A and Section 65B were introduced into the Evidence Act in 2000 providing special processes for proving copies of extracts of electronic records. It provided a method of certifying the authenticity of the copy and the integrity of the content of such copy. In other words, any electronic record, which is printed, stored, recorded or copies made on to an optical or magnetic media and produced by a computer will be deemed to be a document only if the conditions set out in Section 65B (1) of the Evidence Act are satisfied and it was held so in *Anvar P.V.* v. *P.K. Basheer*[156]. However, in *Shafhi Mohammed* v. *State of H.P*[157]*.* the Apex Court revisited the principles laid down in *Anvar P.V.* (supra) and it was held that the applicability of procedural requirement under Section 65B(4) of the Evidence Act

[156] ibid
[157] ibid

for furnishing certificate is not always mandatory.

The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession 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 denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

We are of the considered opinion that in view of *Anvar P.V.*[158], the pronouncement of this Court in *Shafhi Mohammad*[159] needs reconsideration. With the passage of time, reliance on electronic records during investigation is bound to increase. The law therefore needs to be laid down in this regard with certainty. We, therefore, consider it appropriate to refer this matter to a larger Bench. Needless

[158] ibid
[159] ibid

to say that there is an element of urgency in the matter.

It was in this case that the matter was referred to a larger bench for reconsideration of the Shafhi Mohd. Case. The Larger Bench of three judges has heard the matter and the same has been reserved for orders.

7.13 State of Karnataka Vs. M.R.Hiramath[160]

(2019) 7 SCC 515

The present was a case where the High Court had quashed the proceedings because of lack of Compliance on behalf of the prosecution to file the Certificate U/s 65-B (4) of the Evidence Act. The Supreme Court the following para from Anvar[161] for interpreting Section

"*Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer.*"

"*Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc*

[160] State of Karnataka Vs. M.R.Hiramath[160] *(2019) 7 SCC 515*
[161] ibid

(VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice."

The Court relying on *Union of India and Others v CDR Ravindra V Desai*[162]*[(2018) 16 SCC 272]* which was itself based on the following proposition of law as held in *Sonu alias Amar v State of Haryana*[163] *[(2017) 8 SCC 570]:*

"The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency."

On the basis of the above it concluded that the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production

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[162] *Union of India and Others v CDR Ravindra V Desai*[162]*[(2018) 16 SCC 272]*
[163] *Sonu alias Amar v State of Haryana*[163] *[(2017) 8 SCC 570]*

of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

ANALYSIS:

In this case the court has simply relied only on the aspect as to when the Certificate under Section 65-B can be tendered in evidence relying on the proposition of law laid down in the case of *Sonu alias Amar v State of Haryana*[164]*.* It has not visited the law laid down in any of the cases relied by it and just simply relied on them.

7.14 Rajender @ Rajesh @ Raju Vs. State[165]

(2019) 10 SCC 623

The present was a case of murder of Delhi MCD Councillor Atma Ram Gupta and the court while analysing the admissibility of electronic records which were Call Detail record in the present case where objection was raised for non-production of certificate under S. 65-B(4). The Court relying on the case of Somu @ Amar Vs. State of Haryana held said objection cannot be raised at appellate stage as the same relates to mode and method of proof. In this case, objection as to reliability of call records of appellant-accused A-l on account of non-compliance with procedure under S. 65-B(4) was raised for the

[164] ibid

[165] **Rajender @ Rajesh @ Raju Vs. State**[165] *(2019) 10 SCC 623*

first time before High Court and since no such objection was raised at the time of marking of such records before trial court, It was held that such records can be considered.

In this the Court simply relying on the case of *Sonu @ Amar Vs. State of Haryana*[166] *(2017) 8 SCC 570* held the CDRs to be admissible considering that no objection with regard to its admissibility was taken at the time of marking the same as Exhibit and further that the production of Certificate u/s 65-B(4) relates to method or mode of proof. It did not visit the judgment relied by it and simply relied on it.

7.15 P. Gopalakrishnan Vs. State of Kerala.[167]

(2019) SCC Online SC 1532

The main issues in the presence case was

a) Whether the contents of a memory card/pen- drive being electronic record as predicated in Section 2(1)(t) of the Information and Technology Act, 2000 (for short, 'the 2000 Act') would, thereby qualify as a "document" within the meaning of Section 3 of the Indian Evidence Act, 1872 (for short, 'the 1872 Act') and Section 29 of the Indian Penal Code, 1860 (for short, 'the 1860 Code')?

b) If so, whether it is obligatory to furnish a cloned copy of the contents of such memory card/pen-drive to the accused facing

[166] ibid

[167] P. Gopalakrishnan Vs. State of Kerala.[167]*(2019) SCC Online SC 1532*

prosecution for an alleged offence of rape and related offences since the same is appended to the police report submitted to the Magistrate and the prosecution proposes to rely upon it against the accused, in terms of Section 207 of the Code of Criminal Procedure, 1973 (for short, 'the 1973 Code')?

The High Court adverted to certain judgments before concluding that the memory card would be a material object**.** The Apex Court analysed this issue in detail and it came to the conclusion that the contents of the memory card would be a "matter" and the memory card itself would be a "substance" and hence, the contents of the memory card would be a "document" and which prosecution proposes to use against the accused must be furnished to the accused as per the mandate of Section 207 of the 1973 Code.

The issue of Electronic Record to be considered as Document has already been discussed in detail in the relevant Chapter. However it is pertinent to mention here that even 65-B (1) mentions that the electronic records are deemed to be also a document if the conditions mentioned in section 65-B are satisfied in relation to the information and the Computer in question.

7.16 Tukaram S. Dighole vs. Manikrao Shivaji Kokate[168]

(2010) 4 SCC 329

The present was an Election Petition and the short question for consideration involved was whether the Tribunal was justified in discarding the cassette placed on record by the Appellant to prove the allegation of appeal by the Respondent to the voters to vote on communal ground, amounting to a corrupt practice within the meaning of Section 123(3) of the Act?

The Supreme Court held:

"*Tested on the touchstone of the tests and safeguards, enumerated above, we are of the opinion that in the instant case the appellant has miserably failed to prove the authenticity of the cassette as well as the accuracy of the speeches purportedly made by the respondent. Admittedly, the appellant did not lead any evidence to prove that the cassette produced on record was a true reproduction of the original speeches by the respondent or his agent. On a careful consideration of the evidence and circumstances of the case, we are convinced that the appellant has failed to prove his case that the respondent was guilty of indulging in corrupt practices."*

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168 Tukaram S. Dighole vs. Manikrao Shivaji Kokate[168] *(2010) 4 SCC 329*

ANALYSIS:

This was a case where the Supreme Court had discarded the Cassette i.e. the electronic evidence as the same was not considered as authentic. The Apex Court relied on the various test of authenticity as were held in respect of the tape recorded evidence and finding that the Appellant had not complied with the same had discarded the said piece of electronic evidence. It did not look into the case from the angle of Section 65-A and 65-B of the Evidence Act.

CHAPTER 8

HIGH COURTS ON SECTION 65-A AND 65-B OF THE INDIAN EVIDENCE ACT, 1872 & ITS CRITICAL ANALYSIS.

The way the High Courts have dealt with the Electronic Evidence after the enactment of Section 65-A and 65-B of the Evidence Act, 1872 can be divided into various phases for a proper analysis of the judgments passed by them:

a) The Judgments of the High Court passed before the Verdict in the Parliament Attack Case.

b) The Judgments of the High Court passed after the verdict in the Parliament Attack Case but before it was overruled by Anvar Case.

c) The Judgments of the High Court passed after the Anvar Case.

8.1 JUDGMENTS OF THE HIGH COURT PASSED PRIOR TO THE VERDICT IN THE PARLIAMENT CASE.

8.1.1 Kalyan Roy @ Mantu Vs. State of West Bengal[169]

2002 Online Cal 573

This was one of the first cases in which the issue of Electronic Evidence came into discussion before the Calcutta High Court, after the enactment of Section 65-A and 65-B of the Evidence Act in 2000. Though in this case the provisions of Section 65-A and 65-B were not visited but mention was made about their existence. One of the issue was with regard to the admissibility of the Evidence of Dr. Rohit Kumar Basu & his team of Khas Khabar i.e. touching on the question of the electronic media & the Evidence thereof.

The Court held that the Information and Technology Act, 2000 has been enacted by the Parliament to gear up with the challenges of contemporary times as the traditional concept of the law of Evidence faces the challenge with the introduction of the electronic method and Computer technology. Accordingly, the provisions have also been made in the said Act in the said regard viz. Sections 65-A and 65-B.

Holding that one has to view the conceptual aspect in the light of the Information Technology Act, 2000 with the amendment in the said

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[169] Kalyan Roy @ Mantu Vs. State of West Bengal[169] *2002 Online Cal 573*

Act the court upheld the order of the trial court of allowing the examination of the witness touching the question of Electronic media and the Evidence thereof.

8.1.2 Amitabh Bagchi Vs. Ena Bagchi[170]

2004 SCC Online Cal. 93

The question in this case was not at all related to the provisions of Section 65-A and 65-B but was with regard to the permissibility of video conferencing for recroding the evidence of a witness. The Calcutta High Court relying on the judgment of Supreme Court in the case of *State of Maharashtra v. Dr. Praful B. Desai[171], AIR 2003 SC 2053* and of the Karnataka High Court in the case of *Twentieth Century Fox Film Corporation v. N.R.I. Film Production Associates (P) Ltd[172]., AIR 2003 Kant 148* allowed the video Conferencing.

8.1.3 Pootholi Damodaran Nair Vs. Babu[173]

2005 SCC Online Ker 189

The present was a case where the question of placing the tape-recorded evidence before the court was in question. The Court on the basis of earlier decisions summed up that various decisions of the

[170] Amitabh Bagchi Vs. Ena Bagchi[170]*2004 SCC Online Cal. 93*
[171] *State of Maharashtra v. Dr. Praful B. Desai[171], AIR 2003 SC 2053*
[172] *Twentieth Century Fox Film Corporation v. N.R.I. Film Production Associates (P) Ltd[172]., AIR 2003 Kant 148*
[173] Pootholi Damodaran Nair Vs. Babu[173]*2005 SCC Online Ker 189*

High Courts and that of the highest Court of the land have laid down that, "*the tape record like photograph of an incident is a record capable of re-presenting the situation admissible under S.7 and also a relevant fact under S.8 as the recording of the contemporaneous dialogue is part of res gestae. It is admissible to corroborate under S.157, to contradict under S.155(3) and also to test the veracity of the witness under S. 146(1) and for impeaching his impartiality under S. 153 Exception 2 of the Evidence Act. It has been held that the above evidence is not hit by Art.21, nor barred by Art.20(3) of the Constitution of India, if there was no compulsion. The same is also not hit by S.162* " of the Criminal Procedure Code if it is not made to a police officer in the course of investigation.

Then quoting the Rup Chand's case[174] (op.cit), on the question of admissibility of the tape record, particularly the observations of Chief Justice Bhandari of the then Punjab High Court observed that the petitioner raised a question, which is as novel as it is new and the record of a conversation although by no stretch of imagination can be treated as a statement "*in writing or reduced into writing*" under S.3(65) of the General Clauses Act, as it is unlike in the case of printing, lithography, photography and other modes of representing or reproducing words in a visible form there is no rule of evidence which prevents a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements from deposing that while he was engaged in conversation with the witness a tape

[174] Rup Chand Vs. State of Punjab AIR 1956 Punjab 173

recorder was in operation, or from producing the said tape record in support of the assertion that a certain statement was made in his presence. The Court relied on the decisions of the American and English Courts with respect to admissibility of evidence furnished by devices for electro telephonic communications, for dispelling the cloud of misgivings about the admissibility of tape-recorded evidence. Evidence in the form of tape record although singularly advantageous to gauge the truth, on the flip side is the fact that there is a lot of space for manoeuvring and hence strict proof as to every aspect of its authenticity and perfection is to be insisted. This aspect was particularly stressed by Justice A.R. Lakshmanan (as he then was) in *K.S.Mohan v. Sandhya Mohan*[175]*, AIR 1993 Mad.59*, in which case the Court substantially relied on the tape recorded evidence produced to establish the infidelity of the wife. The Court allowing the petition directed the Court below to take whatever steps required including playing the tape to ascertain its authenticity keeping in mind the broad guidelines laid down by the Supreme Court and the precedents in the matter.

In the present case it is pertinent to mention that even though the judgment was passed after more than 4 years of the Enactment of the provisions of 65-A and 65-B in the Indian Evidence Act but the High Court instead of reverting to these provisions still continued to apply the law as was there prior to the enactment. It did not consider the amendments brought about in the Evidence Act in the year 2000

[175] *K.S.Mohan v. Sandhya Mohan*[175]*, AIR 1993 Mad.59*

by way of the introduction of the Special Provisions in the Act in the form of Section 65-A and 65-B.

8.1.4 State vs. Mohd. Afzal and Ors.[176]

107 (2003) DLT 385

The judgment passed by the Delhi High Court after hearing in Appeals as well as Reference made to it with regard to the Death Sentence awarded to the accused during the trial of the Parliament Attack case. The issue of Call detail records was discussed in this case before the matter went to the Supreme Court where the law with regard to dealing with electronic Evidence u/s 65-A and 65-B was formulated which held the ground for almost a decade before the same was overruled by the Anvar Case. Since the issue had been dealt with by the High Court of Delhi in detail it will be important to discuss the same.

The Delhi High Court while circumspecting the issue on the aspect of admissibility of the Call detail records for the first time went visited the provisions of Section 65-A and 65-B in detail.

The issue raised by the defence was that the contents of the of electronic record could be proved only in the manner prescribed by Sub-section (4) of Section 65B i.e. by issuance of a certificate signed

[176] State vs. Mohd. Afzal and Ors.[176]*107 (2003) DLT 385*

by a person occupying a responsible position in relation to the operation of the computer or by a person responsible for the management of the calls recorded by the computer and as the records were not proved in such a manner hence could not be relied upon. On the other hand reply of the prosecution was that as per Sub-section (1) of Section 65B computer generated print outs were admissible in evidence provided they satisfied the conditions mentioned in Sub-section (2) and Sub-section (4) merely provided on alternative mode of proof by way of certification.

The High Court after narrating after quoting the various provisions of the Information Technology Act, 2000 and Section 3, 65-A and 65-B of the Evidence Act held that Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in Sub-section (2) of Section 65B.

The Delhi High Court then discussed the normal way of proving a document and after quoting 65 (d) held that, "*the Computerised Operating Systems and Support systems in industry cannot be moved to the court. The information is stored in these computers on magnetic tapes (hard disc). Electronic record produced there from has to be taken in the form of a print out. Sub-section (1) of Section 65B makes admissible without further proof, in evidence, print out of a electronic record contained on a magnetic media subject to the satisfaction of*

the conditions mentioned in the section. The conditions are mentioned in Sub-section (2). Thus, compliance with Sub-section (1) and (2) of Section 65B is enough to make admissible and prove electronic records. This conclusion flows out, even from the language of Sub-section (4). Sub-section (4) allows the proof of the conditions set out in Sub-section (2) by means of a certificate issued by the person described in Sub-section 4 and certifying contents in the manner set out in the sub-section. The sub-section makes admissible an electronic record when certified that the contents of a computer printout are generated by a computer satisfying the conditions of Sub-section 1, the certificate being signed by the person described therein. Thus, Sub-section (4) provides for an alternative method to prove electronic record and not the only method to prove electronic record."

Analysing the issue further to support the above contention the court held that, "*Whether Section 65B casts a positive mandate on the person relying upon electronic record, to adduce affirmative evidence that at all material time the computer was working properly when information was being fed in it, and whether on facts, the computer generated call details have to be ignored due to alleged malfunctioning?"* It further raised a query *"Did the law relating to admissibility and proof of electronic record have a positive mandate to be satisfied by the one who relies upon electronic record? The positive mandate being to establish positively that there was no malfunctioning of the equipment processing the operations at the relevant time, to which the record relates."*

To find an answer to the above queries the Delhi Court dwelled upon the English law i.e Section 5 of the *Civil Evidence Act 1968 of UK* and Section 69 of the *Police & Criminal Evidence Act, 1984* to understand the working and relied upon the judgment delivered in *R. V.Shepherd*[177] *1993 A.C. 380* wherein *the Statement by the witness that when the computer was working they had no trouble with operation of central computer was held sufficient in discharge of the affirmative burden*, *R v. Ana Marcolino*[178] wherein Lord Griffiths held that the the jury was entitled to take into account that these records were produced by a large company providing a substantial public service the subject of licensing and external audit by the DTI. Such evidence goes directly as to whether there has been improper use. It is the view of this Court that the totality of the evidence as set out above satisfies the test propounded by Lord Griffiths. Mr. Slade was sufficiently familiar with the workings of the computer. The records are designed to reveal malfunction. None was revealed*, DPP v. Me. Kewon*[179] *(1997) 1 C A 155* where Lord Hoffman held "*The production of the document or the accuracy of its contents" are very wide words. What if there was a software fault which caused the document to be printed in lower case when it was meant to be in upper case? The fault has certainly affected the production of the document. But a rule which excluded an otherwise accurate document on this ground would*

[177] ibid
[178] ibid
[179][179] *DPP v. Me. Kewon*[179] *(1997) 1 C A 155*

be quite irrational. To discover the legislative intent, it is necessary to consider the purpose of the rule."

Thereafter it discussed the developments in England which ultimately led to the repealing of Section 5 in the Civil Evidence Act 1968[180] and Section 69 of the Police and Criminal Evidence Act, 1984[181] and the and the common law presumption :- "in the absence of evidence to the contrary the courts will presume that mechanical instruments were in order at the material time", operates with full force. Based on the above the Court concluded that, *"the only practical way to deal with computer generated evidence unless the response is by way of a challenge to the accuracy of computer evidence on the ground of misuse of system or operating failure or interpolation. Such challenge has to be established by the challenger. Generic and theoretical doubts by way of smoke screen have to be ignored."*

After above the court while weighing the evidence considered the testimony of PW.35 and PW.36 sufficient to establish that the call details Ex.PW.35/2 to Ex.PW.35/8 and Ex.PW.36/1 to Ex.PW. 36/5 were computer generated and pertained to the respective periods indicated in the print outs and that they related to the services provided by the respective companies in respect of the different mobile phone numbers. It is true that neither witness made a positive

[180] Section 5 in the Civil Evidence Act 1968[180]
[181] Section 69 of the Police and Criminal Evidence Act, 1984[181]

statement that during the relevant period, the computers worked properly but reading the statement as a whole, the same is implicit. No suggestion was given to the witness that their computers were malfunctioning. We are satisfied that on the evidence on record, the prosecution has duly proved the electronic record Ex.PW.35/2 to Ex.PW.35/8 and Ex.PW.36/1 to 36/5.

Analysis of the above judgment shows that the approach of the High Court in dealing with the electronic Evidence was correct except for the fact that it was considering certain general provisions of the Documentary evidence particularly Section 65(d) of Secondary evidence which became the basis of the law settled by the Supreme Court in Navjot Sandhu Case[182]. As far as the alternative methods of proving the authenticity is concerned the approach of the High Court was correct.

8.2 Judgments of the High Court passed after the verdict in the Parliament Attack case but before it was overruled by Anvar Case.

8.2.1 Societe Des Products Nestle SA v. Essar Industries[183] (2006) 33 PTC 469 (Del).

This case was to place on record the affidavit of Venita Gabriel in

[182] ibid
[183] *Societe Des Products Nestle SA v. Essar Industries[183] (2006) 33 PTC 469 (Del).*

view of the enactment of Section 65-A and 65-B in the Indian Evidence Act, which deals with the mode and manner in which the electronic data can be proved in a court of law. The affidavit sought to comply with the requirements of Section 65-B of the Evidence Act, 1872 in respect of electronic records maintained and relied upon by the plaintiffs in support of their case as on 1999. In this case the court discussed the Navjot Sandhu Case[184] and quoted the relevant para of the same as per which the Electronic records could also be proved by virtue of Section 63 and 65 of the Evidence Act as Secondary Evidence. The Court allowed the placement of the affidavit on record. Thus, this judgment relied on the Navjot Sandhu Case.

8.2.2 State of Gujarat Vs. Shailender Kamal Kishore Ponda & Ors.[185]

2007 SCC Online Guj 255.

The present was a case where in a matter of kidnapping for ransom the defence wanted the trial Court to watch the C.D. and hear entire conversation which took place between the victim and local T.V. Channel where certain questions were put to the victim immediately after he was rescued by police. The prosecution opposed the same on the following grounds:

[184] ibid

[185] State of Gujarat Vs. Shailender Kamal Kishore Ponda & Ors.[185] *2007 SCC Online Guj 255.*

1) The stage was of prosecution evidence and not of defence and the same can be brought in defence.

2) The Court has to be satisfied with regard to the genuineness and accuracy of the electronic record.

3) The Subject matter has to be shown to be relevant according to the rules of relevancy.

4) The accuracy has to be proved by the maker of the record.

5) Evidence has to be there direct or circumstantial to rule out the possibility of tampering of the record.

The Court while considering the issue held that CD being an electronic record, provisions of Sections. 65-A and 65-B of the Evidence Act will be applicable. Further the Court observed that CD being primary and direct evidence admissible as to what has been said and picked-up by the recorder. A previous statement made by a witness and recorded on tape, can be used not only to corroborate the evidence given by the witness in the Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality. Thus, apart from being used for corroboration, the evidence is admissible in respect to other three matters i.e. under Sec. 146(1) of the Evidence Act which provides questions lawful in cross-examination. The said section provides that when a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend to test his veracity. Sec. 153 provides exclusion of evidence to contradict answers to questions testing veracity. In that behalf Sec.

153 is relevant and Exception 2 of said section is also relevant which provides that if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

The Court further observed that weight to be given to such evidence is however distinct and separate from the question of its admissibility. Assuming for the moment that the trial Court admits some evidence contrary to the rules of evidence or the provisions of the Evidence Act by merely exhibiting the same or by merely admitting the same no final conclusion is drawn or decision is taken on such evidence. The defence is ultimately obliged to establish by cogent evidence as regards the genuineness of the CD, as to how the CD was prepared, by examining the person who prepared the CD and who authenticates the same as regards the true nature of the same. It is only after the defence discharges this obligation that the trial Court would be in a position to consider it as a piece of evidence. Therefore, at this stage when the question is as regards to admissibility of a document in the form of a CD by the defence, there should not be any serious objection because the trial Court will consider the relevancy of the same and the authenticity of the same at the final stage while appreciating the entire evidence on record. The Victim has deposed before Court that he does not remember anything about giving such interview.

This is a case where though the provisions of Section 65-A and

65-B were mentioned but the case was decided on the basis of the old law as it existed prior to enactment of Section 65-A and 65-B i.e. the law of tape-recorded evidence. The Court did not apply the provision of Section 65-B in the present case despite discussing it. However ultimately the court rejected the Petition on some other grounds.

8.2.3 Dharambir Khattar Vs. CBI[186]

(2008) 148 DLT 289.

This was a case where the Questions of law as concerning supply of copies of documents, gathered by the prosecution during investigation, to an accused person at the pre-charge stage. and the same involved the interpretation of Sections 173(5) and 207 of the Code of Criminal Procedure 1973 (CrPC), Sections 3 and 65B of the Indian Evidence Act 1872 ('EA') and Sections 2(o) read with Section 2(t) of the Information Technology Act, 2000 (IT Act). After analysing the law on this aspect the Court came with the following conclusions:

(a) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer;

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[186] Dharambir Khattar Vs. CBI[186]*(2008) 148 DLT 289.*

(b) Once the hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose;

(c) therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if does not at present contain any accessible information

(d) In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.

(e) Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 the EA, read with Sections 2(o) and (t) IT Act, there can be no doubt that an electronic record is a document.

(f) The further conclusion is that the hard disc in the instant cases are themselves documents because admittedly they have been subject to changes with their having been used for recording telephonic conversations and then again subject to a change by certain of those files being copied on to CDs. They are electronic records for both their latent and patent characteristics.

(g) In the instant cases, for the purposes of Section 173(5)(a) read with Section 207(v) CrPC, not only would the CDs containing the relevant intercepted telephone conversations as copied from the HDs be considered to be electronic record and therefore documents but the HDs themselves would be electronic records and therefore documents.

8.2.4 Rakesh Kumar Vs. State[187]

2009 SCC Online Del 2609

In this case the issue which was to be dealt with was with regard to the Electronic Evidence in the form of call detail records. The Court applied the proposition of law as settled in the Navjot Sandhu case and held that irrespective of compliance of the requirements of Section 65B, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 & 65. This case in principle totally followed the proposition of law as was laid down in the Navjot Sandhu Case and did not treat the Section 65-A and 65-B as a Complete Code in itself or as a Special Provision applicable in case of Electronic Records.

[187] Rakesh Kumar Vs. State[187] *2009 SCC Online Del 2609*

8.2.5 Gajraj v. State,[188]

ILR (2009) Supp (2) Del 477.

In this case also the issue was whether the call detail records have been proved as per the provision of Section 65-B of the Evidence Act and the Delhi High Court applied the proposition of law as laid in the Navjot Sandhu case and held the Call detail records to be proved.

8.2.6 A.M.Perumal Ltd. Vs. Star Tours & Travels (India) Ltd.[189]

2010 Cri. LJ 3732.

In this case the Electronic record was produced at the request of Revision Petitioner, and hence the contention was that the same is admissible in evidence without further proof. The High Court of Kerala held that, electronic record would be admissible in evidence only if the record produced satisfies the conditions laid down under Sec. 65-B(2) and contains a certificate as contemplated by Sec. 65B(4). If the document doesn't satisfy the conditions under Sec. 65B(2) or if it is not certified as contemplated under Sec. 65B(4), it is inadmissible. Merely because the production of the accounts was sought by the

[188] *Gajraj v. State,[188]ILR (2009) Supp (2) Del 477.*

[189] A.M.Perumal Ltd. Vs. Star Tours & Travels (India) Ltd.[189] *2010 Cri. LJ 3732.*

revision petitioner, the record so produced cannot be accepted in evidence so long as it didn't satisfy the conditions stipulated under Sec. 65B(2) or doesn't contain the certificate as contemplated under Sec. 65B(4).

8.2.7 Brij Kishore v. State,[190]

2010 SCC OnLine Del 1892

Commenting on the way the trial court allowed proving of a document stored in electronic form the court held that it has to be proved either by means of a certificate issued by the person/authority in whose custody the device in which the document was stored in electronic form that the printout generated has been through the device & reflects the information stored in electronic form in the ordinary course or through the testimony of the person who generates the printout from the device in which the same is stored. It cannot be exhibited when a police officer tenders it saying that he procured it. It again in this case basically followed the principles of the Navjot Sandhu Case.

8.2.8 Shubha v. State of Karnataka, (Unreported)[191]

Crl. App. Nos. 722, 757 & 856 of 2010 (Kar)

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[190] *Brij Kishore v. State,[190]2010 SCC OnLine Del 1892*

[191] *Shubha v. State of Karnataka, (Unreported)[191]Crl. App. Nos. 722, 757 & 856 of 2010 (Kar)*

In this case also the court relied on the judgment of Navjot Sandhu Case. It held that the Call detail records produced by the prosecution as Electronic Record stand duly proved in the light of the proposition laid down in the Navjot Sandhu Case.

8.2.9 Mohd. Tahir Mohmed Arif Bakaswala v. State of Gujarat[192]

2010 SCC Online Guj 4829.

In this case with regard to the admissibility of the electronic record the court held that, *"a document which is accepted in evidence with the consent of the parties to the proceedings can be termed as acceptance of the document in evidence in support of the case of either side and once the same is accepted by the trial court as evidence, it would not lie in the mouth of such consenting party to contend that the document was not proved or that the mandatory procedure for proving the document was not followed and therefore, cannot be accepted in evidence."*

8.2.10 Devesh Kumar v. State,[193]

ILR (2010) 2 Del 798.

In this case the court also the Delhi High Court commented on the

[192] Mohd. Tahir Mohmed Arif Bakaswala v. State of Gujarat[192]*2010 SCC Online Guj 4829.*

[193] *Devesh Kumar v. State*,[193] ILR (2010) 2 Del 798.

Investigating officers and trial courts for lack of knowledge of proving electronic records reiterated the stand taken by it in Brij Kishore case and concluded that since the provision 65(B) has not been complied with hence the electronic records cannot be taken into consideration.

8.2.11 Hemlata Vs. State of Raj.[194]

2011 SCC Online Raj. 2540.

In this case again the issue was proving the call detail records as electronic records and the contention of defence was that the prosecution has neither produced the certificate under Section 65-B(4) nor produced any competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the print outs of the call records were taken. The Court quoted the proposition of law as laid in the Navjot Sandhu Case[195] held that,

"in the case under adjudication, neither the certificates as required are produced nor the testimony of person acquaint with computer system giving output is examined. No material is also available to establish continuity and regularity of the system giving output (the call details). The call details produced are electronically generated documents and Sushri Ragini Vyas, Executive, Customer Care Unit, is not in-charge of the computer system, and no material is available on record to establish her acquaintance with the system. Even otherwise, she has not supplied any certificate as required. In the case of State

[194] Hemlata Vs. State of Raj.[194] *2011 SCC Online Raj. 2540.*
[195] ibid

(NCT of Delhi) v. Navjot Sandhu @ Afsan Guru (supra) Hon'ble Supreme Court, while noticing the provisions of Section 65-B of the Indian Evidence Act, held that that the print outs taken from the computers/servers by mechanical process and certified by the responsible officer of the service provider company can be led to the evidence through a witness who can identify the signatures of the certifying officer or otherwise based on his/her personal knowledge. In the present case this eventuality too is not available as neither the certificate of relevant and competent person is produced nor any person acquainted to him/her was brought before the court as witness. It is further pertinent to note that the identification of the cellphone numbers was given by the Executive, Customer Care in handwriting and, therefore, i.e. not an electronically generated document. Nothing is available on record to establish as to how such identification was made. In view of the discussions made above, connectivity of the accused appellants with the cell numbers given is quite doubtful and the call details produced too are not at all sufficient to satisfy their acceptance."

8.2.12 Mohd. Wasim v. State,[196]

2012 SCC OnLine Del 5378

In this case also by applying of the principles laid down in the case of Navjot Sandhu[197] the Call detail records in the form of electronic

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196 *Mohd. Wasim v. State,[196]2012 SCC OnLine Del 5378*

[197] ibid

records were held to be admissible.

8.2.13 Devender Kumar Yadav v. State (NCT of Delhi),[198] 2012 SCC OnLine Del 3771

In this case the trial court after noting the requirements for proving Computer generated electronic evidence, prescribed u/s 65-B of the Indian Evidence Act, 1872 held that none of the call details were proved. The High Court affirmed the same as to be not proved as required u/s 65-B of the Indian Evidence Act as neither any certificate as required under Sub-section (4) was produced nor did the witness testify that the conditions specified under Sub-section (2) were met with.

8.2.14 Essaki Ammal @ Chitra Vs. Veerbhadra[199] 2012 (4) CTC 743.

In this case the Respondent wanted to play the tape-recorded conversation before the Court for which he sought permission which was granted by the trial court. The High Court relying on both the criteria of placing tape recorded evidence i.e. the old precedential law laid by Apex Court as well as the provision of Section 65-A and 65-B upheld the order of the Trial court subject to the fact that the trial

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198 *Devender Kumar Yadav v. State (NCT of Delhi),[198]2012 SCC OnLine Del 3771*

199 *Essaki Ammal @ Chitra Vs. Veerbhadra[199]2012 (4) CTC 743.*

court will take steps for assessing the authenticity of the same.

8.2.15 Manoj Kumar Vs. State[200]

(2013) 196 DLT 243.

In this case relying on the testimony of the nodal officers of the Various Service Providers the Court held electronic evidence as admissible. The relevant part of the judgment is as under:

"The prosecution examined the concerned Nodal Officers to prove the call details provided by them during investigation. The Nodal Officers from various service providers brought original record in the court to prove the computer-generated documents made available to the police during investigation. They were cross-examined at length."

8.2.16 Sun Pharmaceutical Industries Vs. Mukesh Kumar[201]

2013 SCC Online Del 2713.

In this case the contention of the Respondent was that the electronic printouts of the sale invoices was not duly proved as per Section 65-B (4). The court held that 65-B(4) provides an alternate method of proving an electronic record by producing the certificate of a person in whose custody the Computer device in which the document was stored in electronic form remained. Relying on the case of *Rakesh Kumar Vs. State[202] 2009 SCC Online Del 2609* the court held that no

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[200] Manoj Kumar Vs. State[200]*(2013) 196 DLT 243.*

[201] Sun Pharmaceutical Industries Vs. Mukesh Kumar[201] *2013 SCC Online Del 2713.*

[202] *Rakesh Kumar Vs. State[202] 2009 SCC Online Del 2609*

oral testimony of the person issuing certificate may be necessary unless there is challenge to the accuracy of the Computer evidence on account of misuse of the system or operation failure or interpolation. It is pertinent to mention here that the judgment Rakesh Kumar was itself based on the law laid down in Navjot Sandhu Case[203].

8.2.17 Babu Ram Aggarwal v. Krishan Kumar Bhatnagar,[204] 2013 SCC OnLine Del 324.

In this case in respect of proving the e-mails the court held that the same has to be proved/ established that the computer, during the relevant period was in lawful control of the person proving the email; that information was regularly fed into the Computerin the ordinary course of the activities, the computer was operating properly and the contents printed on paper are derived from the information fed into the computer in the ordinary course of activities and a certificate identifying the electronic record has to be proved. Since these conditions were not satisfied hence the emails cannot be said to be proved.

8.2.18 Pankaj Kumar Vs. State of H.P[205].

[203] ibid
[204] *Babu Ram Aggarwal v. Krishan Kumar Bhatnagar,[204]2013 SCC OnLine Del 324.*
[205] Pankaj Kumar Vs. State of H.P[205] *(2014) SCC Online HP 2710.*

(2014) SCC Online HP 2710.

In this case the High Court of Himachal Pradesh has just quoted the paras of the *Mohd. Afzal Case*[206] *107 (2003) DLT 385* of Delhi High Court and held that *"Thus in our opinion, is the only practical way to deal with computer generated evidence unless the response is by way of a challenge to the accuracy of computer evidence on the ground of misuse of system or operating failure or interpolation. Such challenge has to be established by the challenger. Generic and theoretical doubts by way of smoke screen have to be ignored."* The Court acquitted the accused.

8.2.19 Vijay @ Monti Vs. State NCT Of Delhi[207]

2014 SCC Online Del 4585.

In this case the evidence of PW-16 R.K.Singh was challenged on the ground that he did not proved the call records in accordance with Section 65B of the Indian Evidence Act. The High Court by placing reliance on *163 (2009) DLT 658 (DB) Rakesh Kumar & Ors. Vs. State*[208] held that

"No doubt, this witness has not produced the certificate under Section 65B Indian Evidence Act, however while deposing in the Court he has certified the computer generated documents to be from the record maintained in the due course of business and a true copy of the record

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[206] *Mohd. Afzal Case*[206] *107 (2003) DLT 385*
[207] Vijay @ Monti Vs. State NCT Of Delhi[207] *2014 SCC Online Del 4585.*
[208] *Rakesh Kumar & Ors. Vs State*[208]*163 (2009) DLT 658 (DB)*

maintained. The only objection raised during the examination of R.K. Singh was that the originals Ex.PW-16/E and Ex.PW-16/F have not been produced. This objection is wholly fallacious as the two documents itself note that they are system generated reports and each copy generated is a original copy. In Rakesh Kumar & Ors. this Court held that in the absence of a certificate under Section 65B(4) of the Evidence Act the testimonies of the concerned officers may also fulfil the conditions prescribed under Section 65B(2) of the Evidence Act which has been complied as noted above."

It is pertinent to mention here that Rakesh Kumar was based on the basis of law as has been laid in the case of Navjot Sandhu[209].

8.2.20 Achchey Lal Yadav v. State[210], 2014 SCC OnLine Del 4539;

In this case the High Court discarded the Electronic Evidence as it was not proved as per the provisions of Section 65-B and the judgment of conviction and sentence was set aside and the matter was remanded back to the trial court to take proper evidence with respect to the electronic records. The Court relied on the law as had been laid in the case of Rakesh Kumar[211] and Mohd. Afzal Case[212].

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[209] ibid
[210] *Achchey Lal Yadav v. State[210], 2014 SCC OnLine Del 4539*
[211] ibid
[212] ibid

8.2.21 Parminder Kaur v. State,[213]

2014 SCC OnLine Del 3918;

In this case the data downloaded from the mobile phone was found not to be satisfactorily proved by the High Court for the following reasons:

1) The phones recovered were not sealed
2) Prosecution has not proved any certificate u/s 65-B of the Evidence Act.

Relying on *Navjot Sandhu[214] case* wherein it was laid that printouts of the information stored in the mobile phone would be admissible as secondary evidence u/s 63 and 65 of the Evidence Act even if the conditions u/s 65-B are not fulfilled. However, in the instant case no evidence has been produced that the mobile phones were in perfect condition and no expert witness has been examined to testify that he retrieved the data & the same was true and correct. Thus, the printout placed on record cannot be taken into consideration even as secondary evidence.

8.2.22 Pradeep Kumar v. State of Bihar,[215]

2014 SCC Online Pat 483

In this case the High Court of Patna held the Call details brought into evidence, as legally inadmissible because the requisite certificate

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213 *Parminder Kaur v. State,[213]2014 SCC OnLine Del 3918;*
[214] ibid
[215] *Pradeep Kumar v. State of Bihar,[215] 2014 SCC Online Pat 483*

in terms of the provisions of sub-section (4) of Section 65-B of the Evidence Act, was not furnished. Further after quoting the said section the Court observed that in the light of the above, it is clear that no authorised person has certified the correctness of the call detail records in terms of the requirements set out by Sub-Section (4) of Section 65-B & thus the report as regards the call details was inadmissible in evidence. This Judgment the High Court has held the same contrary to the law as laid in the case of Navjot Sandhu Case .

8.2.23 Aniruddha Bahal v. CBI[216], (2014) 210 DLT 292.

In the case the court observed as under:

"*However, the said documents are not supported by any certificate under Section 65B of the Evidence Act, 1862, to show that the document is a correct representation of an electronic document as alleged by the CBI. There is no evidence that the minutes of meeting dated 29.9.1999 were displayed on the website."*

"Section 65 B of the Evidence Act lays down the procedure for admissibility of electronic records. Though more than 13 years have passed, the prosecution has not filed any certificate under Section 65B. It is stated that Sh. Prakash Shokhanda, Under Secretary

[216] *Aniruddha Bahal v. CBI[216],(2014) 210 DLT 292.*

(Vigilance), MHA, stated that the information was downloaded by the then MHA website incharge but statement of website incharge was not got recorded nor any certificate obtained."

8.2.24 Biru @ Birpal & Anr. Vs. State of H.P[217]. 2014 SCC Online HP 2982.

In this case the High Court of Himachal Pradesh held that there is a detailed procedure u/s 65-B of the Indian Evience Act, 1872, the manner in which Electronic records is required to be proved. Thereafter the paras of the *Mohd. Afzal Case[218] 107 (2003) DLT 385* of Delhi High Court were quoted and held that *"Thus in our opinion, is the only practical way to deal with computer generated evidence unless the response is by way of a challenge to the accuracy of computer evidence on the ground of misuse of system or operating failure or interpolation. Such challenge has to be established by the challenger. Generic and theoretical doubts by way of smoke screen have to be ignored."* The Court held the same to be inadmissible.

Analysis of the above judgments of High Court:

Despite the good intentions behind the enactment of the provisions of Section 65-A and 65-B it has been dealt with in a very complex way thereby creating more of confusion and controversy rather than assisting the courts to deal with electronic records. The Courts in most

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[217] *Biru @ Birpal & Anr. Vs. State of H.P*[217]2014 SCC Online HP 2982.

[218] *Mohd. Afzal Case*[218] *107 (2003) DLT 385*

of the cases could not get out of the mindset of the precedential law as was applicable prior to these amendments. Secondly the courts neither observed the provision as a special provision nor the fact that clause 65-B was a non-obstante clause and the electronic evidence could not have been treated as primary and secondary nor the general principles of documentary evidence were applicable to the Electronic evidence.

Further the High Courts in their treatment of electronic evidence under section 65B have been inconsistent and arbitrary. Due to different courts demanding different methods for the fulfilment of the conditions laid down in Section 65B(2), there has been tremendous lack of uniformity and consistency. This variation in practice not only inconveniencies litigants, it also creates possibilities for the derailment of justice.

The judgment passed in the Navjot Sandhu case led to a general relaxation of standards for electronic evidence. High Courts around the country approved other authentication methods as replacements for certificates, most notably, oral evidence. This has been done through the testimony of persons who created the computer output, persons qualified to testify as to the signature of the certifying officer, or the particularly low threshold of persons capable of "*speaking of the facts based on [their] personal knowledge*."

At the same time, many courts have also ignored both Mohd. Afzal and Afsan Guru, instead choosing to continue to demand a

certificate for authentication. In other cases, where neither certificates nor oral evidence were deemed adequate authenticators for uniquely complex technology, courts have called for technical data such as 'bit image copy' and hash codes. In one exceptional case, the court simply did away with the authentication requirement on the basis that the other party had consented to placing certain computer files on record.

On an overall analysis of the cases dealing with Section 65B, it is clear that admission of evidence depends entirely on judicial discretion. Courts choose to follow whatever local requirements they believe is most appropriate for a case. An opportunity was presented to the Supreme Court nine years after Afsan Guru, in Anvar, to revisit the test for admissibility under Section 65B, and conclusively lay down a standard, solving this problem of inconsistency and uniformity.

8.3 Judgments of the High Court passed after the Anvar Case.

8.3.1 Abdul Rahaman Kunji Vs. State of West Bengal[219]

2014 SCC Online Cal 18816.

[219] Abdul Rahaman Kunji Vs. State of West Bengal[219] *2014 SCC Online Cal 18816.*

In this case the court was dealing with the Electronic Mails and it quoted Section 88-A of the Evidence Act according to which the Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed in the computer for transmission. However, the Court cannot draw any presumption about the person who sent the message. However, this is a rebuttable presumption.

In the present case there was no certification of the e-mails by the certifying authority as mandated by Section 65B of the Evidence Act but the Court relied on the judgment of the Delhi High Court in the case of *Rakesh Kumar and Ors. v. State*[220] *reported in 183 (2009) Delhi Law Times 658* which was based on the law laid in the Navjot Sandhu Case[221]. The Delhi High Court dealt with call records and the question as to whether they were genuine. The documents which are produced in this case are downloaded and printed from an e-mail account of an individual on a computer which was not used by that individual in his normal course of activities. Those documents can be proved by leading evidence to show that the e-mails were downloaded on a computer which was regularly in use by the police and were then printed. A witness would have to testify that such a procedure was carried out. This has been done by the prosecution in this case. In this case the *Anvar case*[222] failed to make any impact upon question

[220] *Rakesh Kumar and Ors. v. State*[220] *reported in 183 (2009) Delhi Law Times 658*
[221] ibid
[222] ibid

of admissibility of electronic records strictly in accordance with Section 65B of the IEA. Thus while deciding the admissibility of e-mail, the Calcutta High Court has held that an e-mail downloaded and printed from the e-mail account of the person can be proved by virtue of Section 65B read with Section 88A of the Indian Evidence Act, 1872. The testimony of the witness who had downloaded and printed the said mails is sufficient to prove the electronic communication even in absence of a certificate in terms of Section 65 B of the IEA. It is submitted that this decision delivered in ignorance of *Anvar case* is *per incurium.*

8.3.2. Ram Kishan Fauji Vs. State of Haryana[223]

2015 SCC Online P & H 5058.

In this case conceding that CD was electronic record as defined under the ITA, the Punjab and Haryana High Court held that as there was no link possible between digital evidence storage media, namely, CD and memory chip that was said to have been source for replication of data in CD as mentioned in the Laboratory report, if the CD could not stand test of authenticity by its comparison with its hash value with source, then transcript of what had been obtained through its audio footage or what it purports to capture could not be taken as of any value.

[223] Ram Kishan Fauji Vs. State of Haryana[223]*2015 SCC Online P & H 5058.*

8.3.3. State of Haryana Vs. Samsher[224]

2014, SCC Online P & H 21316.

In this case the call detail records were not attested by anyone, name of users had been inscribed by hand, tower locations were also not indicated. No data had also been collected from the mobile Company to show as to whom the SIM cards used in the mobile belonged to. The Court relied on Anvar[225] case to conclude that until the certificate was issued in terms of Section 65-B of the Indian Evidence Act, the Call details produced cannot be admitted as Evidence.

8.3.4 Ankur Chawla Vs. CBI[226]

2014 SCC Online Del 6461

The proceedings in the case was challenged on the ground that the recorded conversations could not be held to be admissible in the absence of a certificate u/s 65-B of the Evidence Act. The Court held that for electronic record becomes admissible in evidence only when it is in accordance with the procedure prescribed u/s 65-B of the Indian Evidence Act, 1872. the Delhi High Court quashed the corruption charges framed against the petitioner on the ground that the charges were based on inadmissible audio and video CDs.

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[224] State of Haryana Vs. Samsher[224] *2014, SCC Online P & H 21316.*

[225] ibid

[226] Ankur Chawla Vs. CBI[226] *2014 SCC Online Del 6461*

Agreeing with the submissions of the petitioner that once audio and video CDs are excluded from consideration for want of mandatory certificate under Section 65B of the IEA then there is no incriminating material on record and so impugned order calling upon the petitioners to face trial deserves to be quashed.

It is pertinent to mention that the contemporaneity requirement as laid in the Anvar[227] Case was unquestionably extra-statutory. Section 65-B makes no mention of any time period within which the certificate must be produced, let alone that the certificate must be taken at the same time as the document. The effects of this holding were felt when Delhi High Court in this case applied the contemporaneity requirement to declare evidence inadmissible, stating that since time had elapsed, there was "*no point in now permitting the prosecution to place the certificate on record.*"

8.3.5 Jagdeo Singh Vs. State & Ors.[228]

2015 SCC Online Del 7229

One of the question which arose in this case for consideration was that the evidence in relation to intercepted calls, which is essentially electronic evidence, satisfies the requirements under Section 65-B of the Indian Evidence act, 1872. The court applied the law as laid in the case of P.V. Anvar in the present case and finding that no certificate

[227] ibid
[228] Jagdeo Singh Vs. State & Ors.[228] *2015 SCC Online Del 7229*

has been issued in terms of Section 65-B(4) hence the electronic evidence in the form of intercepted conversation and the Call detail records cannot be looked by the court for any purpose whatsoever.

8.3.6. Paras Jain Vs. State of Rajasthan[229]

2015 SCC Online Raj 8331.

A Single Judge of the High Court of Rajasthan did not agree with the judgment of the Delhi High Court in *Ankur Chawla*[230] case observing that "when legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable"

The Rajasthan HC had the opportunity to consider a situation where the prosecution had not produced the certificate at the time of filing the charge-sheet; they had produced it during the course of the trial. The court dismissed a challenge against this delayed filing by the

[229] Paras Jain Vs. State of Rajasthan[229] *2015 SCC Online Raj 8331.*
[230] Ankur Chawla Vs. CBI[230] *2014 SCC Online Del 6461*

accused on the grounds that in Anvar[231], "*the question of stage at which such electronic record is to be produced was not before the Hon'ble Court*". Such creative reading of Anvar enabled the prosecution to bring on record crucial electronic evidence. Although, it has been observed by Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced along with the charge-sheet and if it is not produced along with the charge-sheet, doors of the Court are completely shut and it cannot be produced subsequently in any circumstance.

It is pertinent to mention that the contemporaneity requirement as laid in the Anvar Case was unquestionably extra-statutory and thus the same was rectified.

8.3.7 Kundan Singh Vs. State[232]

SCC Online Del 13647

In *Kundan Singh* v. *State*[233], the Section 65-B certificate pertaining to the call detail records of the accused was not submitted along with the charge- sheet and was produced by the nodal officer of the

[231] ibid

[232] Kundan Singh Vs. State[232] *SCC Online Del 13647*

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telecom agency concerned during the course of his re-examination. The Division Bench of the Delhi High Court was called upon to decide as to whether under Section 65-B, the certificate was to be submitted along with the charge-sheet or if it could be produced during the course of examination. The Court while placing reliance on *Anvar P.V. case*[234] held that Section 65-B does not require simultaneous certification of electronic record. To quote:

"*The expression used in the said paragraph is when the electronic record is "produced in evidence". Earlier portion of the same sentence emphasises the importance of certificate under Section 65-B and the ratio mandates that the said certificate must accompany the electronic record when the same is "produced in evidence". To us, the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper printout or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to Section 65-B. This is not so stated in Section 65-B or sub-section (4) thereof. Of course, it is necessary that the person giving the certificate under sub-section (4) to Section 65-B should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in sub-section (2), identify the electronic record, describe the manner in which "computer output" was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer."*

[234] ibid

Further in this case the Division Bench dealt with the meaning of the word "official" and observed as under:

"Sub-clause (b) to sub-section (5) is rather ambiguously uses the expression "any Official" without explaining what is meant by the said term. However, when we read sub-section (4) to Section 65-B, the meaning to be given to the expression "any Official" emerges. Sub-clause (b) applies when information is supplied to "any Official" with a view that the said information shall be stored & processed for the purpose of the activities carried on by that officer or official. It is also elucidated that the information could be beyond or otherwise in the course of the said activities. Even in such cases the information is treated as supplied in the course of the activities of the Section 65-B is not intended to mean or be restricted to a person holding an office or employed in public capacity. It connotes as exemplified by the use of the same expression (albeit in its adjective form) in sub-section (4) a person primarily responsible for the management or the use, upkeep or operations of such device. It would thus, cover a computer device containing electronic records in the hand or control of a private individual or entity."

Thus, the Division Bench of the Delhi High Court held that the trial court committed no infirmity by taking it on record. In doing so, the Division Bench overruled a decision of a Single Judge of the Delhi High Court which had taken a contrary view and held that:

"... In these circumstances, we do not accept the legal ratio in Ankur Chawla *v.* CB1 *wherein it has been held that the certificate under*

Section 65-B must be issued when the computer output was formally filed in the court and certificate under Section 65-B cannot be produced when the evidence in form of electronic record is tendered in the court as evidence to be marked as an exhibit. The said certificate can be produced when the electronic record is to be admitted and taken on record i.e. when prosecution, defence or a party to the civil litigation wants the electronic record to be marked as an exhibit and read in evidence."

So what was done by the single bench in Ankur Chawla case[235] was undone by the Division bench in this case.

8.3.8 Vikas Verma Vs. State of Raj[236]

2015 SCC Online Raj 396.

In this case the Court while quoting Relevant portions from Anvar case clarifying about the certificate held that the same must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition,

[235] Ankur Chawla Vs. CBI[235] *2014 SCC Online Del 6461*
[236] Vikas Verma Vs. State of Raj[236]*2015 SCC Online Raj 396.*

excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Since in this case the certificate in terms of Section 65-B was not produced hence it was held that the electronic evidence relied by the prosecution was not admissible.

8.3.9 S.K.Saini Vs. CBI[237]

2015 SCC Online Del 11472

Admittedly, no certificate under Section 65 B of the Indian Evidence Act, 1872 was ever produced by the prosecution for the alleged tape recordings and Audio Cassettes. Hence following the law laid in Anvar case[238] and in Ankur Chawla case[239] the court held the audio and video CDs as clearly inadmissible.

8.3.10 Balasaheb Gurling Todkari Vs. State of Maharashtra[240]

2015 SCC Online Bom 3360

Relying on the case of P V Anvar[241] the Bombay High Court held that, "*In the present case the requisite certificate on CDRs as per law was not filed. In view of the ration laid down in the above authority*

[237] S.K.Saini Vs. CBI[237] *2015 SCC Online Del 11472*

[238] ibid

[239] ibid

[240] Balasaheb Gurling Todkari Vs. State of Maharashtra[240] *2015 SCC Online Bom 3360*

[241] ibid

absence of such certificate would render the Call Record Data inadmissible in law. Being inadmissible they can't be considered."

8.3.11 Indian Micro Electronics (P) Ltd. Vs. Chandra Industries & Ors[242].

2015 SCC Online Del 10076.

In this case in respect of the print out of the copy of the e-mail (Mark DW2/B) dated 07.06.2008 allegedly sent by the accused, being an electronic record which printed out on paper, it is required to have a certificate under Section 65 B of the Evidence Act, which the e-mail (Mark DW2/B) does not have. Quoting Section 65 B the court held that for an electronic evidence to be admissible as evidence, it is required to have a certificate in accordance to the abovementioned section. The certificate under Section 65B assures its authenticity. Since, the copy of the e-mail (Mark DW2/B) dated 07.06.2008 is not certified in terms of Section 65 B, it is not admissible evidence and cannot be relied upon by the accused.

8.3.12 Bonanzo Portfolio Ltd. Vs. State of Assam[243]

(2015) 1 GLT 339

In this case the Court relying on the P V Anvar[244] case held that a computer output can be said to have been proved only when the

[242] Indian Micro Electronics (P) Ltd. Vs. Chandra Industries & Ors[242]*2015 SCC Online Del 10076.*

[243] Bonanzo Portfolio Ltd. Vs. State of Assam[243] *(2015) 1 GLT 339*

[244] ibid

procedures, prescribed in Section 65B of the Evidence Act are rigidly followed and not otherwise. The computer-generated copy of the statement of account was not proved by the complainant during the trial as required under the law. Since the computer outputs containing alleged transactions between the parties were not proved in accordance with the prescription of law, it cannot be said that the accused owed the complainant Rs. 4,56,689.12 as on 18.3.2008.

8.3.13 S.M.Katwal Vs. Virbhadra Singh[245]

2015 SCC Online HP 1155

This case the admissibility of a CD containing the alleged conversation alleged to have been prepared from an audio cassette was in question. the It is urged that no doubt an electronic record is a documentary evidence under Section 3 of the Indian Evidence Act, however, whether it is genuine or not is a question to be taken into consideration in accordance with the legal provisions and also in the given facts and circumstances of the case. The Court held that the law on the question of admissibility of an electronic document in evidence is no more res-integra as the Apex Court in *Anvar P.V. v. P.K. Bashee*[246]*r* supra while taking note of the provisions contained under Sections 22A, 45A, 59, 65A and 65B of the Indian Evidence Act has held that the electronic evidence has to be proved as per

[245] S.M.Katwal Vs. Virbhadra Singh[245] *2015 SCC Online HP 1155*
[246] ibid

provisions of Section 65-B. Further in this case since nothing had come on record to show as to how, at what time and who has prepared the same. Therefore, the audio-cassette/CD does not stand for the test of legal scrutiny and thus was not relied upon. Here the Court applied both the earlier laws pertaining to the tape-recorded evidence as well as the law laid in the case of Anvar before reaching the conclusion.

8.3.14 Hosmanero Prakash Vs. State of Karnataka[247]

(2015) 2 AIR Kant 710.

In this case no certificate was produced nor any of the officers of the service provide Company was examined. In the absence of such material on record the Call Details cannot be looked into in as much as they are hit by the provision of Section 65-B of the Indian Evidence Act,1872. The Court relied on the Anvar's Case[248] while holding the inadmissibility of the Call details.

[247] Hosmanero Prakash Vs. State of Karnataka[247] *(2015) 2 AIR Kant 710.*
[248] Ibid

8.3.15 Naveen Vs. State[249]

(2015) 5 Kant. LJ 574 (DB).

The Court held, "*The Apex Court in the Anvar's Case[250] has clarified & Concluded that the admissibility of Secondary Evidence of Electronic Record depends upon the satisfaction of conditions as prescribed u/s 65-B of the Indian Evidence Act. It is also clarified that mere production of copy of statement pertaining to Electronic Record in Evidence not being the original Electron ic Record would not suffice the requirement of Section 65-B. The Mandatory requirement is that such statement has to be accompanied by a certificate as specified in Section 65-B of the Indian Evidence Act. Such certificate must accompany the Electronic Record like CD, VCD, pen drive or print out of the computer-generated record which contains the statement which is sought to be given as secondary evidence, when the same is produced in evidence. In absence of such certificate, the secondary evidence of Electronic Record be admitted in evidence as in the present case.*"

8.3.16 R.S.Raj Kannappam Vs. K R Periakaruppam[251]

2015 SCC Online Mad 12741.

In this case which was an Election Petition and the Petitioner has

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[249] Naveen Vs. State[249] *(2015) 5 Kant. LJ 574 (DB).*

[250] ibid

[251] 16 R.S.Raj Kannappam Vs. K R Periakaruppam[251] *2015 SCC Online Mad 12741.*

strongly relied on the CDs which were in the form of secondary evidence to prove the allegation of "*Corrupt Practices*" and thus, as rightly contended by the senior counsel appearing for the first respondent, they are inadmissible in evidence as they failed to comply with the mandatory provision of S. 65B of the Evidence Act. No certificate, as contemplated under S. 65B of the Evidence Act, was marked before this Court and consequently, this Court holds that the same are inadmissible in evidence.

8.3.17 Vishal Kaushik Vs. Family Court & Anr.[252]

AIR 2015 Raj. 146.

In this case it was held: "Aspect about admissibility of evidence with reference to provisions of Indian Evidence Act, 1872 has indeed been diluted by Section 14 of the Family Courts Act. The question, which still arises in the present case, is whether conversation tape recorded by the husband without wife's consent or without her knowledge, can be received in evidence and be made use of against her? That question has to be answered in an affirmative 'no', as recording of such conversation had breached her "right to privacy", one of the facets of her 'right to liberty' enshrined under Article 21 of the Constitution of India. The exception to privileged communication between husband and wife carved out in Section 122 of the Indian Evidence Act, which enables one spouse to compel another to disclose

[252] Vishal Kaushik Vs. Family Court & Anr.[252] *AIR 2015 Raj. 146.*

any communication made to him/her during marriage by him/her, may be available to such spouse in variety of other situations, but if such communication is a tape recorded conversation, without the knowledge of the other spouse, it cannot be, admissible in evidence or otherwise received in evidence. The argument that this would defeat right of fair trial of the petitioner-husband, proceed on the fallacious assumption of sanctimony of the method used in such recording and in that process, ignores the right of fair trial of the respondent-wife. In a case like present one, husband cannot be, in the name of producing evidence, allowed to wash dirty linen openly in the Court proceedings so as to malign the wife by producing clandestine recording of their conversation."

8.3.18 Nyati Builders Pvt. Ltd. Vs. Rajat Dinesh[253] *2015 SCC Online Bom 7578.*

In this case the Bombay High Court relying on the Judgment in *P V Anvar Case*[254] held that electronic record by way of secondary evidence shall not be admissible in evidence unless the requirements under section 65B are satisfied. However, the main issue was that when the plaintiff filed electronic record, they did not file certificate in terms of section 65B and the learned trial Judge did not admit

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[253] Nyati Builders Pvt. Ltd. Vs. Rajat Dinesh[253] *2015 SCC Online Bom 7578.*

[254] ibid

those documents and kept the issue open. The plaintiffs, thereafter filed application seeking permission to produce the fresh certificate under section 65B (4) and the learned trial Judge permitted the plaintiffs to file fresh certificate in compliance of requirements of Section 65B (4). The said order of the judge allowing the application was challenged and it was contended that keeping the issue of admissibility of electronic records open was not justified and the trial judge ought to have considered this aspect only at the time of final hearing of the suit. The High Court while holding that the learned trial Judge has not committed any error in admitting e-mails in evidence as no provision was pointed out prohibiting the plaintiffs from applying for admitting the documents subject to compliance of requirements of section 65B(4).

8.3.19 Avadut Waman Kushe Vs. State of Mah[255]

2016 SCC Online Bom 3236.

In the present case while dealing with the question whether the certificate under Section 65-B(4) of the Indian Evidence Act required to be filed for admission in evidence of the electronic record must necessarily be filed simultaneous with the electronic record or whether it can be filed at any subsequent stage of the proceedings, the Bombay High Court clarified that there was no necessity for the

[255] Avadut Waman Kushe Vs. State of Mah[255] *2016 SCC Online Bom 3236.*

certificate to be issued at the stage of submission of the documents during investigation or even when charge-sheet was filed in criminal proceedings. The Court held that, "*there is nothing in the provision that specifies the stage of production of the certificate. Firstly, the provision of Section 65-B is about admissibility of electronic record and not production of it. Next the opening words of Section 65-B(4) are "In any proceedings where it is desired to give statement in evidence". This can only be the stage at which the record is tendered in evidence for being considered it's admissibility. This definitely cannot be the stage of filing of the chargesheet which is absolutely the preliminary stage of the proceedings. Therefore, I find no substance in the submissions advanced on behalf of the petitioner. The certificate need not be filed at the time of production of the electronic record. It can be filed at the time, the record is tendered in evidence. The subsequent filing of the certificate cannot reduce it's effectiveness as a safeguard against tampering etc*".

8.3.20 K. Ramajayan Vs. Inspector of Police[256] *2016 SCC Online Mad 451.*

In this case the High Court during the hearing of the Appeal noticed that the trial Court had not played the DVR (MO-2) and seen the CCTV

[256] K. Ramajayan Vs. Inspector of Police[256] *2016 SCC Online Mad 451.*

footages in the presence of the accused. Thus the court observed as follows:

"In this regard we propose to dispel misgivings, if any, in the mind of trial Judges about their power to view such evidences. There will be instances where, by the time the case comes up for trial in one court, the electronic record would have had a natural death for want of proper storage facilities in the Court property room. To obviate these difficulties, we direct that, on a petition filed by the prosecution, the Judicial Magistrate, who receives the electronic record, may himself view it and take a backup, without disturbing the integrity of the source, in a CD or Pen drive or any other gadget, by drawing proceedings. The backup can be kept in safe custody by wrapping it in antistatic cover and should be sent to the Sessions Court at the time of committal. The present generations of Magistrates are computer savvy and they only require legal sanction for taking a backup. They can avail the service of an expert to assist them in their endeavour. Therefore, we hold that a Court has the power to view CCTV footage and video recordings, be it primary or legally admissible secondary evidence, in the presence of the accused for satisfying itself as to whether the individual seen in the footage is the accused in the dock."

8.3.21 Kishan Tripathi Vs. State[257]

2016 SCC Online Del 1136.

In this case the court while considering the CCTV footage held that, *"the CCTV footage, which was directly and immediately stored in the hard drive of the computer is the original media, that was self-generated and created without any human intervention. This CCTV footage is not secondary evidence and does not require certification under Section 65B of the Evidence Act. This issue is no longer res integra and is settled in the decision of the Supreme Court in Anvar P.V. (S) versus P.K. Basheer[258], (2014) 10 SCC 473, which hold:*

"24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made there from which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not

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[257] Kishan Tripathi Vs. State[257] *2016 SCC Online Del 1136.*

[258] ibid

satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."

The aforesaid paragraph elucidates difference between primary and secondary evidence. When primary or direct evidence in form of original data be it a CD, hard drive or any other electronic record is produced, the same is admissible and taken on record. This takes care of the contention of the appellant that the CCTV footage should be discarded and not read in evidence in the absence of a certificate under Section 65B of the Evidence Act.

The CCTV footage is captured by the cameras and can be stored in the computer where files are created with serial numbers, date, time and identification marks. These identification marks/ details are self-generated and recorded, as a result of pre-existing software commands. The capture of visual images on the hard disc is automatic in the sense that the video images get stored and recorded suo-moto when the CCTV camera is on and is properly connected with the hard disc installed in the computer. It is apparent in the present case from the evidence led that no one was watching the CCTV footage when it was being stored and recorded. The recording was as a result of

commands or instructions, which had already been given and programmed. The original hard disc, therefore, could be the primary and the direct evidence. Such primary or direct evidence would enjoy a unique position for anyone who watches the said evidence would be directly viewing the primary evidence. Section 60 of the Evidence Act states that oral evidence must be direct, i.e., with reference to the fact which can be seen, it must be the evidence of the witness, who had seen it, with reference to the fact, which could be heard, it must be evidence of the witness, who had heard it and if it relates to the fact, which could be perceived by any other sense or any other manner, then it must be the evidence of the witness, who says who had perceived it by that sense or by that manner. Read in this light, when we see the CCTV footage, we are in the same position as that of a witness, who had seen the occurrence, though crime had not occurred at that time when the recording was played, but earlier.

HG wells in his book "The Time Machine" had said "Now I want you clearly to understand that this lever, being pressed over, sends the machine gliding into the future, and these other reverses the motion. This saddle represents the seat of a time traveller. Presently I am going to press the lever, and off the machine will go. It will vanish, pass into future Time, and disappear. Have a good look at the thing. Look at the table too, and satisfy yourselves there is no trickery." Time machine is friction, albeit seeing the CCTV footage with your own eyes as a judge gives you an insight into the real world in the past. In the present case, the court has itself seen the CCTV footage,

and has travelled back in time to the time when the occurrence took place and thereby has seen the occurrence in the same position as that of a witness, who would have seen the occurrence, if he was present. There cannot be a more direct evidence. This video recording which captures the occurrence, would be per se and mostly discerningly reliable and compellingly conclusive evidence, unless its authenticity and genuineness is in question.

Per force, we must rule out any possibility of manipulation, fabrication or tampering. The hard-disk CCTV footage must pass the integrity test. It is a two-fold test, system integrity and record integrity. It is with this over cautious and pensive approach, that we have proceeded and have bestowed our consideration. We would accept the genuineness and authenticity of the CCTV footage played before us, for good and sound reasons. This "internal evidence" establishes its genuineness. Hard disk in the present case is not only a physical object, but a document within the meaning of section 3 of the Evidence Act [See Shamsher Singh Verma Vs. State of Haryana[259], 2015 (12) Scale 597]. The Supreme Court in Mobarik Ali Ahmed Vs. State of Bombay[260], AIR 1957 SC 857, has held that execution of a document can also be proved by the "internal evidence" contained in the contents of the document. The circumstantial evidence enforces our belief that the original document, i.e. hard drive, is original and authentic."

[259] Shamsher Singh Verma Vs. State of Haryana[259], 2015 (12) Scale 597
[260] Mobarik Ali Ahmed Vs. State of Bombay[260], AIR 1957 SC 857

8.3.22 Saidai Sa Duraiswamy Vs. M.K.Stalin[261]

2016-5- LW-448.

Dealing with the aspect of ingredients of S. 65-B of the Evidence Act, 1872 under the caption "Admissibility of Electronic Record", this Court significantly points out that S. 65-B of the Act is a new provision which prescribes the mode for proof of contents of electronic records and the primary purpose is to sanctify proof by secondary evidence. Indeed, this facility of proof by secondary evidence would apply to any computer output, such output being deemed as a document. In this connection, it is not out of place for this Court to relevantly point out that a computer output is a deemed document for the purposes of proof. In reality, S. 65-B(1) of the Evidence Act enjoins that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer and to be referred to as computer output, shall also be deemed to be a document. If the conditions specified under S. 65-B of the Act are satisfied, the electronic record shall become admissible in any proceedings without further proof or production of the original as evidence of any contents of the original or of any fact stated in it.

That apart, an Electronic Evidence without a certificate under S. 65-

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[261] Saidai Sa Duraiswamy Vs. M.K.Stalin[261] *2016-5- LW-448.*

B of the Evidence Act, 1872 cannot be proved by means of an oral evidence and also the opinion of an Expert under S. 45-A of the Evidence Act cannot be resorted, to make such electronic evidence admissible. Further, once the electronic evidence is properly adduced along with the certificate of sub-s. (4) of S. 65-B of the Act, the other party may challenge the genuineness and if original electronic record is challenged, although S. 22-A of the Evidence Act disqualifies oral evidence as to the contents of the "Electronic Records", an oral evidence as to the genuineness of record certainly can be offered, as opined by this Court. That apart, an Electronic Evidence without a certificate under S. 65-B of the Evidence Act, 1872 cannot be proved by means of an oral evidence and also the opinion of an Expert under S. 45-A of the Evidence Act cannot be resorted, to make such electronic evidence admissible. Further, once the electronic evidence is properly adduced along with the certificate of sub-s. (4) of S. 65-B of the Act, the other party may challenge the genuineness and if original electronic record is challenged, although S. 22-A of the Evidence Act disqualifies oral evidence as to the contents of the "*Electronic Records*", an oral evidence as to the genuineness of record certainly can be offered, as opined by this Court.

It is to be remembered that S. 45-A of the Evidence Act, 1872 which provides for the Opinion of Examiner of Electronic Evidence (who is appointed under S. 79-A of the Information Technology Act, 2000) can only be availed once the provisions of S. 65-B of the Evidence Act are very much fulfilled. As such, the compliance of ingredients of S.

65-B of the Evidence Act are now mandatory for persons who intend to rely upon emails, websites or any electronic record in a civil case or criminal case to which the provisions of the Evidence Act are squarely applicable.

8.3.23 Eli Lily & Com & Anr. Vs. Maiden Pharma Ltd.[262]

2016 Online Del 5921

The counsel for the plaintiffs states that the objection of the counsel for the defendant was confined only to the affidavit aforesaid under Sections 65-A and 65-B and not to any other document filed for the first time along with the affidavit by way of examination-in-chief. The counsel for the plaintiffs has contended that at the time when documents including electronic record are filed, that do not constitute evidence and become evidence only when they are tendered into evidence and thus as per the aforesaid paragraphs also, the affidavit under Section 65-B has to be filed at the time of tendering the electronic record into evidence. Though the ratio of Anvar P.V.[263] supra, to me, appears to require the certificate/affidavit under Section 65-B of the Evidence Act to accompany the electronic record when produced in the Court, and a learned Single Judge of this Court also in Ankur Chawla v. Central Bureau of Investigation[264] 2014 SCC OnLine Delhi 6461 opining so acquitted the petitioner/accused therein (though the SLP is pending in the Supreme Court) but a Single Judge

[262] Eli Lily & Com & Anr. Vs. Maiden Pharma Ltd.[262] *2016 Online Del 5921*
[263] ibid
[264] Ankur Chawla v. Central Bureau of Investigation[264] 2014 SCC OnLine Delhi 6461

of the High Court of Rajasthan in Paras Jain v. State of Rajasthan[265] 2015 SCC OnLine Raj. 8331 did not agree with the judgment of this Court in Ankur Chawla supra observing that "*when legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable*".

A Division Bench of this Court in *Kundan Singh v. State[266] 2015 SCC OnLine Delhi 1364* also, on a reading of Anvar P.V. supra, disagreed with the view taken in Ankur Chawla supra and held that "*the words "produced in evidence" did not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under Section 65-B(4). It was held that all that is necessary is that the person giving the certificate under Section 65-B(4) should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in Section 65-B(2), identify the electronic record, describe the manner in which computer output was produced and also give particulars of the device*

[265] Paras Jain v. State of Rajasthan[265] 2015 SCC OnLine Raj. 8331
[266] *Kundan Singh v. State[266] 2015 SCC OnLine Delhi 1364*

involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer. It was further held that emails are downloaded and computer output, in the form of paper prints, are taken every day; these emails may become relevant and important electronic evidence subsequently; it is difficult to conceive and accept that the emails would be inadmissible, if the official who downloaded them and had taken printouts had failed to, on that occasion or simultaneously record a certificate under Section 65-B."

It thus but has to be held that the plaintiffs are entitled to file the certificate under Section 65-B of the Evidence Act, even subsequent to the filing of the electronic record in the Court. Order 11, Rule 6 of CPC as applicable to commercial suits is also not found to provide to the contrary. The affidavit aforesaid under Sections 65-A and 65-B of the Evidence Act filed along with the affidavit by way of examination-in-chief is thus permitted to be taken on record. However, it will be open to the counsel for the defendant to cross-examine the deponent of the said affidavit and the proof of the said affidavit under Sections 65-A and 65-B of the Evidence Act shall be subject to such cross-examination and if it is found that the deponent of the affidavit was not a competent person to issue the certificate/affidavit, needless to state, the electronic record tendered in evidence shall also not be read.

8.3.24 M/s. Bajaj Auto Ltd. Bom Vs. TVS Motor[267] *2016-4-LE-865.*

The primordial question that arises for consideration, is whether the question of admissibility, proof and relevancy raised by the applicant/defendant, particularly in respect of electronic record could be decided at the initial stage or at the time of final arguments?

The Court held that in the light of the judgment reported in *Reliance Infocomm Ltd. Vs. Bharat Sanchar Nigam Ltd. & Ors[268]. (2008) 10 SCC 535,* wherein, Web Satellites viz. Internet Sources and Internet Sites, have been relied upon, and therefore, the objection as to the marking of the said exhibits, can be decided at the time of final arguments.

Audio-Video recording:

An objection was raised with regard to the audio-video recording in the form of Compact Disc (CD) containing compilation of video bytes/clippings from several television channels' programmes/news telecasts. According to the learned Senior Counsel appearing for the applicant/ defendant, the said CD has been stated to be downloaded from an unverifiable source on Internet and edited by the respondent/plaintiff to suit their convenience and no certificate of authenticity has been provided by any of the news channels to prove

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[267] M/s. Bajaj Auto Ltd. Bom Vs. TVS Motor[267] *2016-4-LE-865.*

[268] *Reliance Infocomm Ltd. Vs. Bharat Sanchar Nigam Ltd. & Ors[268]. (2008) 10 SCC 535*

that the interviews were conducted or aired by them. Per contra, the learned Senior Counsel appearing for the respondent/ plaintiff, would submit that pursuant to the orders passed copies of documents have been furnished to the applicant/defendant and immediately, on receipt of the same, no objection was raised by them; but, however, at the time of marking the exhibits, objections were raised and the concerned exhibits have been marked subject to objections and the tenability of the same can be gone into at the time of final arguments.

The Court held that after considering the rival submissions and the various judgments it is of the view that the above said objection mainly pertains to the mode of proof and the same can be gone into at the time of arguments. In the light of the factual aspect coupled with the legal position, except the objections raised by the applicant/ defendant with regard to the marking of photocopies of certain documents and clippings of newspapers and press reports, the rest of the objections with regard to the marking of other documents, can be decided at the time of final arguments to be advanced by the respective parties.

8.3.25 Punam Thakur Vs. State of Haryana[269]

2016 SCC Online P & H 5243.

Learned Senior Advocate appearing on behalf of the petitioner has raised an argument that the pen-drive that forms part of the charge sheet cannot be relied upon by the trial court as there has been non-compliance of Section 65-B of the Evidence Act in so far as there has been no certification as mandated by law.

Relying on the judgment rendered in *Paras Jain v. State of Rajasthan*[270], *Sonu alias Amar v. State of Haryana*[271] *(2017) 8 Supreme Court Cases 570*, *Kundan Singh v. State*[272] *the court held:*
" *any electronic media, which is relied upon, has to be proved in terms of the provisions of Section 65-B of the Indian Evidence Act. A careful reading of the said judgment rendered in Anvar's case supra, as relied upon by the learned Senior advocate for the petitioner, in the opinion of this Court, does not specify the stage at which the said certificate has to be adduced. Even in the judgment rendered in Sonu's case Supra the Supreme Court recognized that the mode or method of proof is at the time of marking of the document as an exhibit and not necessarily earlier*."

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[269] Punam Thakur Vs. State of Haryana[269] *2016 SCC Online P & H 5243.*

[270] ibid
[271] ibid
[272] ibid

Therefore, in view of the ratio of the judgment, referred to above, it is held that even though there has to be strict compliance of Section 65-B of the Evidence Act pertaining to any electronic data, noncompliance of the same would not render the said document inadmissible at the time of framing of the charge. Needless to say that it is for the trial court to refer to the validity of the document at the time of final judgment.

8.3.26 Kurppasamy Vs. State of T.N.[273]

2017 SCC Online Mad 1678.

In this case the court relying on the Anvar's case[274] held that, *"Admissibility of the Secondary Evidence of Electronic Record depends upon the satisfaction of the conditions as enumerated under Section 65-B of the Indian Evidence Act. On the other hand the primary evidence of Electronic Record adduced i.e. the original record itself is produced in court under Section 62, the same is admissible in evidence without Compliance with the conditions in section in 65-B. Mere production of the CD/Electronic Evidence without any details contained in it and also the mandatory certificate required under Section 65-B (4) of the Indian Evidence Act Cannot be received or admitted in Evidence."*

273 Kurppasamy Vs. State of T.N.[273] *2017 SCC Online Mad 1678.*
[274] ibid

8.3.27 Mohd. Rashid Vs. State[275]

2017 SCC Online Del 8629.

In this case the Delhi High Court differentiating the Electronic Evidence into Primary and Secondary relying on the Anvar's case and the law held in the case of Krishan Tripathi case held the mandate of certificate u/e 65-B is limited to Secondary Evidence by way of Electronic Record and not primary evidence. The court further held that CCTV footage stored directly in the hard drive of a Computer being self-generated without human intervention and hence is not Secondary Evidence requiring certificate u/s 65-B. The court held that certificate u/s 65-B was only required for proving the pen drive and the CD which are secondary evidence as having been copied from the hard drive. As far as Hard Drive is concerned the same being Primary evidence was admissible per se under Section 62 of the Evidence Act.

8.3.28 Jaimin Jewellery Exports (P) Ltd. Vs. State of Mah.[276]

2017 SCC Online Bom 1771.

In this case the Court with regard to the electronic evidence held, "*it has to be borne in mind that section 65-B only relates to the admissibility of electronic records. It authenticates the genuineness*

[275] Mohd. Rashid Vs. State[275] *2017 SCC Online Del 8629.*

[276] Jaimin Jewellery Exports (P) Ltd. Vs. State of Mah.[276] *2017 SCC Online Bom 1771.*

of the copy/computer printout and thus absolves the parties from producing the original. This section only makes the computer output admissible on complying with the requirement of the section. It does not prove the actual correctness of the entries and does not dispense with the proof or genuineness of entries made in such electronic record Furthermore, there is no presumption regarding the genuineness of the entries in electronic records. Hence, it was necessary for the Complainant Company prove the correctness of the entries. In the instant case, the witnesses examined by the complainant did not have any personal knowledge regarding the entries made in the said statement at Exh.'FF' and were therefore not competent to depose about the correctness of the entries."

8.3.29 Om Prakash Vs. CBI[277]

2017 SCC Online Del 10249.

In the present case the issue before the court was whether an objection as to the admissibility of the evidence or mode of proof thereof can be taken when it is tendered and not subsequently. Section 65B of the Indian Evidence Act which is para materia Section 2A of the Act came up consideration before the Supreme Court in the decision Anvar P.V.[278] (supra) wherein it was held that a computer generated document would be admissible only when accompanied by a certificate under Section 65B Indian Evidence Act and in the absence

[277] Om Prakash Vs. CBI[277] *2017 SCC Online Del 10249.*
[278] ibid

thereof it would be inadmissible. This Court in the decision reported as *2015 SCC Online Del 13647 Kundan Singh Vs. State*[279] held that the decision in Anvar P.V. (supra) did not hold that the said certificate cannot be produced in exercise of powers of the Trial Court under Section 311 Cr.P.C. or at the appellate stage under Section 391 Cr.P.C. It was held that Evidence Act is a procedural law and in view of the pronouncement in Anvar P.V. (supra) partly overruling Navjot Sandhu (supra), the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Legal position on the point is thus well settled that is if the document is otherwise inadmissible for want of a certificate or any other requirement of law, it being exhibited in the course of trial does not make the document admissible in law and though an objection as to the mode of proof can be waived off and should be taken at the first instance, however the objection as to the admissibility of a document which goes to the root of the matter can be taken at any stage.

From the conjoint reading of the provisions of Evidence Act and as held in the various decisions of the Supreme Court noted above, it is evident that mode of proof of a document is distinct from standard of proof. The mode of proof of a document which is governed by Section 63 to 65 and 65B Indian Evidence Act in case of electronic evidence remains the same whether it is a civil or a criminal proceeding and can be waived off unless the document is per-se inadmissible in evidence as then the objection before the Appellate Court would be

[279] *Kundan Singh Vs. State*[279]*2015 SCC Online Del 13647*

to the admissibility of the document and not to the mode of proof of the document. Having not objected to the mode of proof of an admissible document during the trial, the party is, whether in civil or criminal proceeding, is estopped from challenging the mode of proof thereon. The concept of mode of proof of a document cannot be confused with standard of a proof which is proof beyond reasonable doubt in a criminal proceeding whereas by way of preponderance of probability in civil proceeding. However, if the statements of accounts have been exhibited without the necessary certificate as contemplated under Section 2A of the Act, the same being inadmissible in evidence, even in the absence of an objection taken as to the mode of proof during trial, this Court cannot read the same in evidence even though marked as an exhibit.

8.3.30 G Arun @ Arun Kumar Vs. State rep.[280]

2017 SCC Online Mad 30131.

In this case the core issue was whether the copy of the Compact Disc is a document or a material object and whether the accused is entitled to the copy of the same under Section 207 of CrPC. The Court after reiterating the provisions of Section 65-B of the Evidence Act. Apart from the case of Tarun Tyagi[281] the court relied on the unreported judgment of this Court passed in the case of *Shammenul Islam* v. *the Inspector of Police, Special Investigation Team, CBCID, B-6, Kattur Police*

[280] G Arun @ Arun Kumar Vs. State rep.[280] *2017 SCC Online Mad 30131.*
[281] Tarun Tyagi 2009(3) Crimes 339

Station, Coimbatore[282] in Criminal Appeal No. 231 of 2004 dated 08.03.2011 and concluded that in view of 65-B of the Section of Indian Evidence Act read along with the above said two judgments, I am of the view of that the copies of the Compact Disc sought for by the petitioner cannot be deemed to be a material object and that the petitioner is entitled for a copy of the Compact Disc under Section 207 of Cr.P.C.

8.3.31 Prabeen Kr. Vs. State of Bihar[283]

2017 SCC Online Pat 1030.

The question in this case with regard to the admissibility of the electronic records in the form of call detail record, CD and VCD and the court after considering the provisions of Section 65-B and the law laid down in the case of P V Anvar[284] and Navjot Sandhu[285] concluded that in the absence of the certificate u/s 65-B (4) the Secondary electronic evidence is not admissible.

8.3.32 Harpal Singh Bundela Vs. State of MP[286]

2017 SCC Online MP 1141.

The principal of law, laid down by the Apex Court, is that if electronic

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[282] *Shammenul Islam* v. *the Inspector of Police, Special Investigation Team, CBCID, B-6, Kattur Police Station, Coimbatore*[282] in Criminal Appeal No. 231 of 2004 dated 08.03.2011

[283] Prabeen Kr. Vs. State of Bihar[283] *2017 SCC Online Pat 1030.*

[284] ibid

[285] ibid

[286] Harpal Singh Bundela Vs. State of MP[286] *2017 SCC Online MP 1141.*

record is duly produced in terms of Section 65(b) of Evidence Act then it is admissible in evidence and for that a certificate is necessary of a person as required in specifications as mentioned in para 15 of the judgment of the Apex Court in the case of P V Anvar. In the present case, no such certificate was produced. Neither the voice recorder was produced before the Court nor it is was examined by the Court. Hence, the court concluded that in its opinion, the trial Court has committed an error of law in relying the transcript and electronic evidence. This evidence is inadmissible in law. *As* the voice recorder is itself not subjected to analysis, there is no point in placing reliance on the translated version. Without source, there is no authenticity for the translation. Source and authenticity are the two key factors for an electronic evidence, as held by this Court in *Anvar P.V. vs. P.K. Basheer*[287]*,* (2014) 10 SCC 473.

8.3.33 Barnali Baishya Vs. State of UP[288]

2018 SCC Online ALL 5603.

The question which arose for consideration in this case was : *who would be 'a person occupying a responsible position' within the meaning of Section 65B(4) Indian Evidence Act, 1872, for the purpose*

[287] ibid

[288] Barnali Baishya Vs. State of UP[288] *2018 SCC Online ALL 5603.*

of issuing a 'certificate of authenticity' as envisaged under Section 65B(4) last mentioned in relation to 'electronic record', or information 'sent in electronic form' as defined under Section 2(1)(t) and 2(1)(r), Information Technology Act, 2000, where such electronic record, or information in electronic form, is generated and sent from a personal computer or mobile phone?

Answering this question the Court after analysing the issue held: "*Assuming, that the applicant is entitled to lead secondary evidence of the electronic record, that she relies on, it is the applicant, who alone can establish that the conditions envisaged under Section 65-B(2) of the Evidence Act, are all fulfilled so as to render secondary evidence of the electronic record admissible. This is so as he is the master and owner of the computer or the other electronic device, like the mobile phone, where the electronic data or records, of which secondary evidence is sought to be given, has been produced, received, fed, or stored. For the same reason, it is the applicant alone, who can furnish a certificate, to the extent it relates to the computers in her possession and control, in order to lead secondary evidence of it, as envisaged under Section 65-B(4). It can certainly not be a Cyber Expert from the Cyber Cell of the Police, who can qualify as a person occupying a responsible official position in relation to the operation of the relevant device, or the management of the relevant activities, within the meaning of Section 65-B (4) of the Evidence Act.*

8.3.34 HDFC Bank Ltd. Vs. Suhrit Services (P) Ltd.[289]

2018 SCC Online Del 8220

In this case the High Court observed:

"There is however some serious re-thinking required on the manner in which electronic documents are to be proved. In each case where electronic documents are involved, it would be impractical to expect the parties to produce the primary evidence which would be the medium on which the document is stored, considering that electronic documents could be stored on hard drives, hard disks, CPUs, micro-processors, cameras, telephones, etc. Certificates under Section 65B accompanying the printouts have simply become standard formats. Cross examination on these certificates can involve debates on model of computer, printer, questions as to who took printouts etc. Courts, therefore, need to take a pragmatic attitude in these cases. Unless there is a serious challenge to the electronic documents i.e., tampering, forgery, hacking, misuse of an email address, change in contents etc., usually printouts of electronic documents ought to be allowed to be read in evidence. The complex procedure laid down for proving of electronic documents can prove to be extremely cumbersome and can have enormous impact especially in commercial transactions, as it has had in the present case."

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[289] HDFC Bank Ltd. Vs. Suhrit Services (P) Ltd.[289] *2018 SCC Online Del 8220*

Relying on *Shafhi Mohammad v. State of Himachal Pradesh*[290]*, [SLP(Crl.) No.2302/2017 dated 30th January, 2018],* wherein it was held that the requirement of Section 65B of the Evidence Act is not always mandatory and that requirement of the said certificate, which is a procedural requirement, can be relaxed by Courts in the interest of justice the court applied the same proposition of law in the present case.

8.3.35 Bhupesh Vs. State of Mah.[291]

2018 Online Bom 1163.

In this case the Court summarize the law laid down by the Apex Court in respect of admissibility of electronic evidence:

1. "The purpose of the provisions of Sections 59, 65-A and 65-B of the Evidence Act, is to sanctify secondary evidence. (Para 14 of Anvar's case[292]*).*

2. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, the question would arise as to genuineness thereof and in that situation, resort can be made to Section 45-A - Opinion of Examiner of Electronic Evidence. (Para 17 of Anvar's case).

3. *The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence, if requirements under Section 65-B are not complied with. (Para 18 of* Anvar's case).

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[290] Shafhi Mohd. Vs. State of HP (2018) 8 SCC 801.

[291] Bhupesh Vs. State of Mah.[291] *2018 Online Bom 1163.*

[292] ibid

4. *An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B of the Evidence Act are satisfied. In the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B of the said Act, obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record is inadmissible. (Para 22 of* Anvar's).

5. The view taken by the Apex Court in Navjot Sandhu's case *that even if the certificate containing the details in sub-section (4) of Section 65-B of the Evidence Act is not filed, that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65 of the said Act, stands overruled and is declared to be no longer a good law. (Para 22 of* Anvar's case*).*

6. If an electronic record as such used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance of the conditions in Section 65-B of the said Act. (Para 24 of Anvar's case).

7. The objection that the electronic record tendered in evidence is inadmissible in the absence of a certificate, as required by Section 65-B(4) of the Evidence Act pertains to the mode or method of proof which is procedural, and objections, if not taken at the trial, cannot be permitted to be taken at the appellate stage. (Paras 29 and 32 of

Sonu's case[293]*).*

8. Withholding of the best evidence in the form of electronic record clinching the issue, raises a serious doubt about the case of the prosecution and an adverse inference against the prosecution under Section 114, illustration (g) of the Evidence Act can be drawn that the prosecution withheld the same, as it would be unfavourable to them had it been produced. (Paras 21 and 28 of Tomaso Bruno's case[294]).

9. *The applicability of procedural requirement under Section 65-B of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. The requirement is not always mandatory. (Para 14 of* Shafhi Mohammad's case[295]).

10. The applicability of requirement of certificate being procedural can be relaxed by Court whenever interest of justice so justifies. (Para 15 of Shafhi Mohammad's case*)."*

The Court held that: "*What we understand from the law summarized as above is that Section 65-B of the Evidence Act deals with the secondary evidence and not with the primary evidence in the form of*

[293] Sonu @ Amar Vs. State of Haryana (2017) 8 SCC 570
[294] Tomasu Bruno Vs. State of U.P. (2015) 7 SCC 178
[295] Shafhi Mohd. Vs. State of HP (2018) 8 SCC 801.

electronic record. If the reliance is placed on the primary evidence, then it is not necessary to produce the certificate under Section 65-B of the Evidence Act in compliance with the conditions stipulated by the Apex Court in para 14 of its decision in Anvar's case. *In case where the electronic evidence is produced by a party, who is not in possession of the device, the applicability of Sections 63 and 65 of the Evidence Act is not excluded, and in such a case, the procedural requirement under Section 65-B of the Evidence Act is not at all attracted. In cases where the provision of Section 65-B is not attracted, oral evidence of electronic record becomes admissible and recourse could be to the provisions of Sections 59, 63 and 65 of the Evidence Act. Though the provision of sub-section (4) of Section 65-B of the Evidence Act is mandatory and non-compliance of it, makes the secondary evidence of electronic record inadmissible, nonetheless, it is procedural dealing with the mode and manner of proof. Any objection as to its admissibility has, therefore, to be raised at the time when such evidence is sought to be tendered. However, if such secondary evidence is permitted to be tendered without any objection, the demand for compliance of the conditions in sub-section (4) of Section 65-B is deemed to have been waived, as has been considered in the case of* Tomaso Bruno, *cited supra. Such objection cannot subsequently be entertained by the Court to deprive the party tendering such evidence, an opportunity to rectify the defects or the deficiencies. Therefore, the question as to whether the provision of sub-section (4) of Section 65-B of the Evidence Act is attracted or not, will have to be decided in the facts and circumstances of each*

case and the Court can relax such requirement whenever interest of justice so requires or justifies."

8.3.36 ICICI Bank Ltd. Vs. Dilkash Star Vision[296]

2018 SCC Online Del 9542.

In this case relying on the judgment passed in *Shafhi Mohammad* v. *State of Himachal Pradesh*[297]*, (2018) 2 SCC 801* the High Court held has held,

"t*he applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession 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 denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate is not always mandatory."*

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[296] ICICI Bank Ltd. Vs. Dilkash Star Vision[296] *2018 SCC Online Del 9542.*

[297] Shafhi Mohd. Vs. State of HP (2018) 8 SCC 801.

8.3.37 P. Gopalakrishnan Vs. State of Kerala[298]

2018 SCC Online Ker 3244.

The crucial question before the court was whether the memory card produced by the prosecution falls within the ambit of a document as contemplated under section 207 Cr.P.C. Evidently, if it is a document, the consequence is inescapable in the light of rigour under section 207 Cr.P.C. and the copy of it is liable to be furnished to the accused and if not, otherwise. Dealing with a number of case laws like In *Emperor* v. *Krishtappa Khandappa[299] (AIR 1925 Bom. 327)*, *In* King *v.* Daye[300], *(1908) 2 K.B. 333), In* Grand *v.* Southwestern and County Properties Ltd.,[301] *(1975) Ch. 185 : (1974) 2 All.E.R. 465),* Rex *v.* Daye[302] *((1908) 2 K.B. 333, 340), In* Senior *v.* Holdsworth, Ex parte Independant Television New Ltd[303]. *(1976) Q.B. 23),* North West Airlines *v.* Union of India[304] *(2007 (214) ELT 178 (Bom.)*, Santhosh Madhavan *v.* State of Kerala[305] *(Crl.R.P. No. 781 of 2009)*, Taylor *v.* Chief Constable Cheshire[306] *(1987 (1) All.ER 225)*, *Ziyauddin Burhanuddin Bukhari* v. *Brij Mohan Ramdas Mehra[307] ((1976) 2 SCC*

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[298] P. Gopalakrishnan Vs. State of Kerala[298]*2018 SCC Online Ker 3244.*

[299] *Emperor* v. *Krishtappa Khandappa[299] (AIR 1925 Bom. 327)*

[300] King *v.* Daye[300], *(1908) 2 K.B. 333)*

[301] Grand *v.* Southwestern and County Properties Ltd.,[301] *(1975) Ch. 185 : (1974) 2 All.E.R. 465),*

[302] Rex *v.* Daye[302] *((1908) 2 K.B. 333, 340),*

[303] Senior *v.* Holdsworth, Ex parte Independant Television New Ltd[303]. *(1976) Q.B. 23)*

[304] North West Airlines *v.* Union of India[304] *(2007 (214) ELT 178 (Bom.*

[305] Santhosh Madhavan *v.* State of Kerala[305] *(Crl.R.P. No. 781 of 2009)*

[306]Taylor *v.* Chief Constable Cheshire[306] *(1987 (1) All.ER 225)*

[307] *Ziyauddin Burhanuddin Bukhari* v. *Brij Mohan Ramdas Mehra[307] ((1976) 2 SCC 17),*

17), *Tukaram S. Dighole* v. *Manik Rao Shivaji Kokate*[308]*, (2010) 4 SCC 329), Sherin V. John* v. *State of Kerala*[309] *(2018 (3) KHC 725),* came to the conclusion that the larger conceptual distinction between the document and material object emerges is that if the evidence conveys an information, engrossed, inscribed, engraved, printed or recorded on the physical object on which it carries, that evidence is documentary in nature. On the other hand, material objects are those objects which are the evidence by itself and it is not an information that is drawn from that object that is sought to be established in legal proceeding. In all the above decisions referred above, the CD, cassettes, tablet, multimedia a and such other things were produced to introduce in evidence the information recorded on such physical things. Hence, they were held to be documentary evidence.

This leads to the crucial question that is to be answered in this case. Evidently, the crux of the prosecution allegation is that, offence was committed for the purpose of recording it on a medium. Memory card is the medium on which it was recorded. Hence, memory card seized by the police itself is the product of the crime. It is not the contents of the memory card that is proposed to be established by the production of the memory card. The acts of sexual abuse is to be established by the oral testimony of the victim and witnesses. It is also not the information derived from the memory card that is sought to be established by the prosecution. Prosecution is trying to establish

[308] *Tukaram S. Dighole* v. *Manik Rao Shivaji Kokate*
[309] *Sherin V. John* v. *State of Kerala*[309] *(2018 (3) KHC 725*

that the alleged sexual abuse was committed and it was recorded. Though, in the course of evidence, contents of it may be sought to be established to prove that, it was the memory card created by the accused, contemporaneously recorded on the mobile, along with the commission of offence, that does not by itself displace the status of the memory card as a document. Memory card itself is the end product of the crime. It is hence a material object and not a documentary evidence. Hence, it stands out of the ambit of section 207 Cr.P.C. However the above Decision was reversed by the Supreme Court in Appeal.

8.3.38 Biplav Biswas Vs. State[310]

2018 SCC Online Del 8939.

In this case relying on the judgment passed by the Supreme Court in the case of Shafhi Mohammad **v.** *The State of Himachal Pradesh[311] (2018) 2 SCC 801* wherein the Apex Court has held that Sections 65-A and 65-B of the Indian Evidence Act are by way of a clarification and are procedural provisions and i*f the electronic evidence* is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under

[310] Biplav Biswas Vs. State[310] *2018 SCC Online Del 8939.*
[311] Shafhi Mohd. Vs. State of HP (2018) 8 SCC 801.

Section 65B (4).

The High Court concluded by holding as under:
"From the above extracted portion from the judgment of the Hon'ble Supreme Court, it was critically established that the requirement of producing the certificate u/s 65-B of the Indian Evidence Act, 1872 is a procedural aspect and the requirements of the production can be relaxed whenever required and justified, in the interest of justice. Therefore, the argument raised by Learned Counsel for the Appellant that the aforesaid CD is not admissible as the same is not supported by a certificate under Section 65-B of the Indian Evidence Act, 1872, holds no ground."

8.3.39 Jisal Rasik Vs. State of Kerala[312]

2019 SCC Online Ker 3164

The question in this case was whether the Electronic evidence in the form of digital footage of a CCTV Camera was a material thing or a document and the court was analysing the issue in context of Section 207 Cr PC. The Court observed as under:
"*However, after the advent of technology, the line between categorizing a thing as a 'material thing' or a document has become*

[312] Jisal Rasik Vs. State of Kerala[312] *2019 SCC Online Ker 3164*

more or less obliterated. If a hard disk or a magnetic disk containing data is stolen and the same is seized and produced in court, it may sometimes be difficult to categorize it as 'a thing' produced for inspection of the court or a 'document'. One way of distinguishing it is by asking a question as to whether the item is relevant in itself or whether the item is relevant because of the information that can be retrieved from it. In other words, if a material thing is produced in court to rely on the data that it contains, it is probably a document and it has to be regarded as such. On the other hand, if the material thing is brought to court in order to rely on it as it is, it is a thing and may be exhibited as a material object."

Relying on *Tarun Tyagi* [313]case wherein it was alleged that the accused had stolen source codes of a software, a search was conducted in his house and hard disks were seized. At the stage of Section 207 of the Code of Criminal Procedure, all other records except for the cloned copies of the Hard Disk were supplied to the accused. The accused approached the Apex Court and contended that the copies of the hard disks are to be supplied to demonstrate during trial that no case is made out against him. He also contended that the cloned copies are required for enabling him to prepare his cross examination and a proper defence strategy. The CBI opposed the prayer and it was urged that the accused would misuse the same. The Apex Court repelled the contention and the cloned copies of the

[313] Tarun Tyagi 2009(3) Crimes 339

hard disk were ordered to be supplied to the accused.

In this case the Court concluded by observing that the CCTV footage in the instant case is "*data"* as defined u/s 2(o) of the Information Technology Act, 2000 and it is an "*Electronic Record"* as defined u/s 2 (t) of the Information Technology Act, 2000. The same has to regarded as Documentary Evidence and directed the prosecution to supply cloned Digital Copies of the footage to the accused.

8.4 Analysis of the judgments of the High Court[314]

After the ruling in the Anvar's case[315] the High Courts have duly relied on the *Anvar case* in deciding admissibility of electronic record as evidence and those decisions which were not in accordance with *Anvar case* were held to have questionable authority. In *Jagdeo Singh* v. *State*[316]*,* quoting *Anvar case,* the Delhi High Court has said that, "*the law on admissibility of electronic evidence is now abundantly clear. If there is no certificate accompanying electronic evidence in terms of Section 65B of the IEA, such evidence is inadmissible. Consequently, as far as the present case is concerned, as the Court was satisfied that the intercepted telephone calls presented in the form of CDs before the trial court which were then examined by the forensic expert did not satisfy the requirements of Section 65B of the IEA, the net result was that the electronic evidence in this case in the*

[314] Article Authenticating Electronic Evidence: §65b, Indian Evidence Act, 1872 Ashwini Vaidialingam published in Articles section of www.manupatra.com

[315] ibid

[316] *Jagdeo Singh* v. *State 2015 SCC Online Del 7229.*

form of the intercepted conversations and the CDRs cannot be looked into by the Court for any purpose whatsoever."

In *Ankur Chawla* v. *CBI*[317], the Delhi High Court quashed the corruption charges framed against the petitioner on the ground that the charges were based on inadmissible audio and video CDs. Agreeing with the submissions of the petitioner that once audio and video CDs are excluded from consideration for want of mandatory certificate under Section 65B of the IEA then there is no incriminating material on record and so impugned order calling upon the petitioners to face trial deserves to be quashed. Apart from the above there are a number of cases in which the High Court has had followed Anwar like *Manoj Kumar Vs. State of Karnataka*[318] *(Unreported) Crl. Appeal 1419 of 2012 decided on 30/06/2015, S.K.Saini Vs. CBI*[319] *2015 SCC Online Del 11472, Balasaheb Gurling Todkari Vs. State of Maharashtra*[320] *(2015) 3 Bom CR (Cri) 51, Indian Micro Electronics (P) Ltd. Vs. Chandra Industries & Ors.*[321] *2015 SCC Online Del 10076, Bonanza Portfolio Ltd. Vs. State of Assam*[322] *(2015) 1GLT 339, S.M.Katwal Vs. Virbhadra Singh*[323] *2015 SCC Online H.P. 1155, Hosamanera Prakash Vs. State of Karnataka*[324] *(2015) 2 AIR Kant.*

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[317] Ankur Chawla Vs. CBI 2014 SCC Online Del 6461

[318] *Manoj Kumar Vs. State of Karnataka*[318] *(Unreported) Crl. Appeal 1419 of 2012 decided on 30/06/2015*

[319] *S.K.Saini Vs. CBI*[319] *2015 SCC Online Del 11472,*

[320] *Balasaheb Gurling Todkari Vs. State of Maharashtra (2015) 3 Bom CR (Cri) 51, 1.*

[321] *Indian Micro Electronics (P) Ltd. Vs. Chandra Industries & Ors. 2015 SCC Online Del 10076,*

[322] *Bonanza Portfolio Ltd. Vs. State of Assam (2015) 1GLT 339,*

[323] *S.M.Katwal Vs. Virbhadra Singh 2015 SCC Online H.P. 1155,*

[324] *Hosamanera Prakash Vs. State of Karnataka (2015) 2 AIR Kant. 710,*

710, Naveen Vs. State[325] *(2015) 5 Kant. LJ 574 (DB), Vikas Verma Vs. State of Raj.*[326] *(2015) 2 WLN 494 (Raj), R.S.Raj Kannappam Vs. K R Periakaruppam*[327] *2015 SCC Online Mad 12741, Saidai Sa Duraiswamy Vs. M.K.Stalin*[328] *2016-5- LW-448, Kurppasamy Vs. State of T.N*[329]*. 2017 SCC Online Mad 1678, Prabeen Kr. Vs. State of Bihar*[330] *2016 SCC Online Pat 1030, Harpal Singh Bundela Vs. State of MP*[331] *2017 Online MP 1141. etc.*

But there are also instances where the *Anvar case* failed to make any impact upon question of admissibility of electronic records strictly in accordance with Section 65B of the IEA. In *Abdul Rahaman Kunji*[332] v. *State of* W.B., a Division Bench of Calcutta High Court, while deciding the admissibility of e-mail, held that an e-mail downloaded and printed from the e-mail account of the person can be proved by virtue of Section 65B read with Section 88A of the IEA. The testimony of the witness who had downloaded and printed the said mails is sufficient to prove the electronic communication even in absence of a certificate in terms of Section 65 B of the IEA. This case followed the proposition of law settled in Rakesh Kumar Case of Delhi High Court based on the overruled Navjot Sandhu Case and the decision in this case was delivered in ignorance of *Anvar case* and the same is *per*

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[325] *Naveen Vs. State (2015) 5 Kant. LJ 574 (DB*
[326] *Vikas Verma Vs. State of Raj. (2015) 2 WLN 494 (Raj),*
[327] *R.S.Raj Kannappam Vs. K R Periakaruppam 2015 SCC Online Mad 12741,*
[328] *Saidai Sa Duraiswamy Vs. M.K.Stalin 2016-5- LW-448*
[329] *Kurppasamy Vs. State of T.N. 2017 SCC Online Mad 1678,*
[330] *Prabeen Kr. Vs. State of Bihar 2016 SCC Online Pat 1030,*
[331] *Harpal Singh Bundela Vs. State of MP 2017 Online MP 114*
[332] *Abdul Rahaman Kunji*[332] v. *State of* W.B.,2014 SCC Online Cal 18816

incurium.

In *Ram Kishan Fauji* v. *State of Haryana*[333]*,* conceding that CD was electronic record as defined under the Information Technology Act, the Punjab and Haryana High Court held that as there was no link possible between digital evidence storage media, namely, CD and memory chip that was said to have been source for replication of data in CD as mentioned in the Laboratory report, if the CD could not stand test of authenticity by its comparison with its hash value with source, then transcript of what had been obtained through its audio footage or what it purports to capture could not be taken as of any value. Thus it has gone too technical to comment on the authenticity of the electronic record and the same were seen prior to Compliance of the provisions of Section 65-B as held in the Anvar case.

The fallacy in the judgment of the Supreme Court in Anvar P.V. Vs. P.K.Basheer[334] with respect to the interpretation of Section 65-B (4), of the Indian Evidence Act led to the evolution of interpretation of Section 65-B in the post-Anvar phase and the last of such being the Shafhi Mohd. Vs. State of H.P.[335] which also did not correct the erroneous interpretation of 65-B(4) and thereby missed the bus while revisiting Anvar. The judgment in Anvar did not clarify as to the stage of submitting certificate but has stated that the same be produced along with the Electronic Record. This contemporaneity requirement

[333] *Ram Kishan Fauji* v. *State of Haryana*[333]*2015 SCC Online P&H 5058*
[334] ibid
[335] ibid

as mentioned in the Anvar's case was unquestionably extra-statutory. The effects of this holding in Anvar Case was seen by the Delhi High Court in *Ankur Chawla* v. CBI[336] where the said principle was applied to declare evidence inadmissible, stating that since time had elapsed, there was "*no point in now permitting the prosecution to place the.. .certificate on record*."

The Delhi High Court settled this Primary question of Contemporaneity regarding the certificate under Section 65-B in *Kundan Singh* v. *State*[337] where it also overruled the judgment delivered in the Ankur Chawla case on this issue. The Delhi High Court clarified that the provision itself was clear and that it is necessary to provide this certificate only at the stage of giving evidence and not at the stage of collection of evidence. The Bombay High Court clarified the same issue in *Avadut Waman Kushe* v. *State of Maharashtra*[338], confirming that there was no necessity for the certificate to be issued at the stage of submission of the documents during investigation or even when charge-sheet was filed in criminal proceedings. The Madras High Court in *K. Ramajayam* v. *Inspector of Police*[339], reiterated what the Delhi High Court clarified i.e. that the certificate may be issued at the time of trial but also went on to hold that the person issuing the certificate was not required always to be examined. The Delhi High Court in the case of *Eli Lily & Com & Anr. Vs. Maiden*

[336] Ankur Chawla Vs. CBI 2014 SCC Online Del 6461
[337] Kundan Singh 2015 SCC Online Del 13647
[338] *Avadut Waman Kushe* v. *State of Maharashtra 2016 SCC Online Bom 3236*
[339] *K. Ramajayam* v. *Inspector of Police*[339],2016 SCC Online Mad 451.

Pharma Ltd.[340] *2016 Online Del 5921 also followed the same principle as laid in Kundan's case*[341].

The Rajasthan HC had the opportunity to consider a situation where the prosecution had not produced the certificate at the time of filing the charge-sheet; they had produced it during the course of the trial. The court dismissed a challenge against this delayed filing by the accused on the grounds that in Anvar "*the question of stage at which such electronic record is to be produced was not before the Hon'ble Court*". Such creative reading of Anvar enabled the prosecution to bring on record crucial electronic evidence. *In this case the court held interalia held that w*hen legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the Court with the charge-sheet. The Court held it to be merely an irregularity not going to the root of the matter and is curable.

The Delhi High Court in *Kundan Singh* v. *State*[342] clarified that use of the word "*officially"* "is not intended to mean or be restricted to a person holding an office or employed in public capacity but only

[340] *Eli Lily & Com & Anr. Vs. Maiden Pharma Ltd.*[340] *2016 Online Del 5921*
[341] Kundan Singh Vs. State 2015 SCC Online Delhi 13641.
[342] ibid

refers to "*a person primarily responsible for the management or the use, upkeep or operations of such device*". Further the High court of Allahabad also explained the meaning of the word "*Responsible Person*" in the case of *Barnali Baishya Vs. State of Uttar Pradesh*[343]*.* The Madras High Court in *K. Ramajayam* v. *Inspector of Police*[344] further clarified that a forensic expert may collect the evidence in large servers, feed it into his computers and then issue the certificate describing the source. This further eased the way, especially in submission of Section 65-B(4) certificates in criminal cases, where the accused was certainly not going to give such certificates for electronic evidence collected from his custody nor can prosecution always procure the persons in charge of large storage mediums such as "*Google*" to submit such certificates. Where certificates are mandated from both such persons, the Madras High Court further held that it is not necessary for the person giving such certificate to be examined as a witness in all instances "*unless the Court suspects the integrity of the electronic record that is produced as evidence"* doubts the reliability of a piece of evidence, as long as the certificate is produced, it will be forced to place it on record. It was only when the authenticity of the certificate was questioned that cross-examination was required. The Madras High Court also clarified the feasibility of the forensics experts providing such certificate. It finally cautioned against the *"... anachronistic mind-set of suspecting and*

[343] *Barnali Baishya Vs. State of Uttar Pradesh 2018 SCC Online All 5603*
[344] *K. Ramajayam* v. *Inspector of Police*[344],2016 SCC Online Mad 451.

doubting every act of the police, lest the justice delivery system should become a mockery".

In Bhupesh Vs. State of Maharashtra[345] The Bombay High Court summarized the law of the electronic Evidence as held by the Apex Court in *Anvar's Case[346], Tomaso Bruno Case[347], Sonu's Case[348] and Shafhi's Case[349]* and then while giving its own opinion on the aspect summarized the law as,

"*Section 65-B of the Evidence Act deals with the Secondary Evidence and not with the Primary Evidence in the form of electronic record. If the reliance is placed on the Primary Evidence, then it is not necessary to produce the certificate under Section 65-B of the Evidence Act in compliance with the conditions stipulated by the Apex Court in para 14 of its decision in* Anvar's case. *In case where the electronic evidence is produced by a party, who is not in possession of the device, the applicability of Sections 63 and 65 of the Evidence Act is not excluded, and in such a case, the procedural requirement under Section 65-B of the Evidence Act is not at all attracted. In cases where the provision of Section 65-B is not attracted, oral evidence of electronic record becomes admissible and recourse could be to the provisions of Sections 59, 63 and 65 of the Evidence Act. Though the provision of sub-section (4) of Section 65-B of the Evidence Act is*

[345] Bhupesh Vs. State of Maharashtra 2018 SCC Online Bom 1163
[346] ibid
[347] ibid
[348] ibid
[349] ibid

mandatory and non-compliance of it, makes the secondary evidence of electronic record inadmissible, nonetheless, it is procedural dealing with the mode and manner of proof. Any objection as to its admissibility has, therefore, to be raised at the time when such evidence is sought to be tendered. However, if such secondary evidence is permitted to be tendered without any objection, the demand for compliance of the conditions in sub-section (4) of Section 65-B is deemed to have been waived, as has been considered in the case of Tomaso Bruno, *cited supra. Such objection cannot subsequently be entertained by the Court to deprive the party tendering such evidence, an opportunity to rectify the defects or the deficiencies. Therefore, the question as to whether the provision of sub-section (4) of Section 65-B of the Evidence Act is attracted or not, will have to be decided in the facts and circumstances of each case and the Court can relax such requirement whenever interest of justice so requires or justifies."*

In Punam Thakur[350] relying on the judgment rendered in *Paras Jain v. State of Rajasthan*[351], *Sonu alias Amar v. State of Haryana*[352] *(2017) 8 Supreme Court Cases 570* and *Kundan Singh v. State*[353] *the court held:*

"any electronic media, which is relied upon, has to be proved in terms of the provisions of Section 65-B of the Indian Evidence Act. A careful

[350] Punam Thakur 2017 SCC Online P&H 5243
[351] Paras Jain 2015 SCC Online Raj. 8331
[352] *Sonu alias Amar v. State of Haryana*[352] *(2017) 8 Supreme Court Cases 570*
[353] Kundan Singh Vs. State 2015 SCC Online Delhi 13641

reading of the said judgment rendered in Anvar's case supra, as relied upon by the learned Senior advocate for the petitioner, in the opinion of this Court, does not specify the stage at which the said certificate has to be adduced. Even in the judgment rendered in Sonu's case Supra the Supreme Court recognized that the mode or method of proof is at the time of marking of the document as an exhibit and not necessarily earlier."

In case of *Kishan Tripathi Vs. State*[354] the Delhi High Court relying on Para 24 of the Anvar's case held the CCTV footages as primary evidence and that no certificate under Section 65-B (4) is required in their respect and they can be proved as per provision of Section 62 of the Evidence Act. The court further held that CCTV footage stored directly in the hard drive of a Computer being self-generated without human intervention and hence is not Secondary Evidence requiring certificate u/s 65-B. The court held that certificate u/s 65-B was only required for proving the pen drive and the CD which is a secondary evidence as having been copied from the hard drive. As far as Hard Drive is concerned the same being Primary evidence was admissible per se under Section 62 of the Evidence Act. In the case of *Mohd. Rashid*[355], *Kuruppasamy Vs. State of Tamil Nadu*[356], *HDFC Bank Vs. Surhit Services (P) Limited*[357], *Jaimin Jewellery Exports (P) Ltd. Vs.*

[354] *Kishan Tripathi Vs. State 2016 SCC Online Del 1136*
[355] *Mohd. Rashid*[355]*,2017 SCC Online Del. 8629*
[356] *Kuruppasamy Vs. State of Tamil Nadu, 2017 SCC Online Mad 1678*
[357] *HDFC Bank Vs. Surhit Services (P) Limited, 2018 SCC Online Del 8220*

State of Maharashtra[358]*, Om Prakash Vs. CBI* [359]etc. the court reiterated the law as held in Para 24 of the Anvar's case and relied in Kishan Tripathi's case[360] in respect of Primary Evidence and held that there is no need of certificate under section 65-B(4) and the same are to be proved as per the provision of Section 62 of the Evidence Act. In these cases the High Court's differentiating the Electronic Evidence into Primary and Secondary relying on the Anvar's case held the mandate of certificate u/e 65-B is limited to Secondary Evidence by way of Electronic Record and not Primary Evidence.

Another issue which came up before some of the High Courts was whether the Memory Card, Hard Disc, CD etc. was material evidence or a document for the purpose of Section 207 of Cr.PC. The issue cropped up in the case of G.Arun @ Arun Kumar Vs. State[361], P.Gopalakrishnan Vs. State of Kerala[362] and Jisal Rasik[363]. In the case of P.Gopalakrishnan the matter came up before the Supreme Court on this issue wherein the said electronic records were held to be documents and the matter has been settled once and for all.

Relying on the judgment passed by the Supreme Court in the case of *Shafhi Mohammad* **v.** *The State of Himachal Pradesh*[364] *(2018) 2 SCC 801* wherein the Apex Court has held that Sections 65-A and

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[358] *Jaimin Jewellery Exports (P) Ltd. Vs. State of Maharashtra, 2017 SCC Online Bom 1771*
[359] *Om Prakash Vs. CBI 2017 SCC Online Del 10249*
[360] *Kishan Tripathi Vs. State 2016 SCC Online Del 1136*
[361] G.Arun @ Arun Kumar Vs. State[361] 2017 SCC Online Mad 30131
[362] P.Gopalakrishnan Vs. State of Kerala 2018 SCC Online Ker 3244
[363] Jisal Rasik. 2019 SCC Online Ker 3164
[364] ibid

65-B of the Indian Evidence Act are clarificatory and procedural provisions and i*f the electronic evidence* is authentic and relevant, the same can certainly be admitted subject to the Court being satisfied about its authenticity. Further the procedure for its admissibility may depend on the facts and situation of the case such as whether the person producing such evidence is in a position to furnish certificate under Section 65B (4)or not. The High courts have decided the issue in the case of *ICICI Bank Vs. Dilkash Star Vision*[365] and *Biplav Biswas Vs. State*[366] relying on this principle.

The above in crux were the basis and the issues on which the various High Courts have adjudicated after the Judgment passed in the Anvar Case.

[365] *ICICI Bank Vs. Dilkash Star Vision*[365] 2018 SCC Online Del 9542
[366] *Biplav Biswas Vs. State*[366]*2019 SCC Online Del 8939*

CHAPTER 9

CONCLUSION & SUGGESTIONS

The journey of Electronic Evidence which started with the Rup Chand Case[367] and got further clarified, consistent and reliable with the passage of time and improvement in Technology passed the testing times in the case of Manindra Nath Vs. Biswanath[368] where the law of Rup Chand case was reiterated and achieved the precedential setting in S. Pratap Singh Vs. State of Punjab[369]. It achieved new dimensions in the case of Yusufali Esmail Nagree Vs. State of Maharashtra[370] where the Electronic Evidence was categorized as "*Document"* much prior it had obtained statutory sanction in the year 2000. Further it achieved new heights and clarifications in the case of *Rama Reddy Vs. V.V. Giri*[371] and *R.M. Malkani*[372]*.* The case of Z.B.Bukhari Vs. B.R.Mehra[373] and further Ram Singh[374] crystallized the tests of reliability which were to be applied before the Electronic Evidence was held to be admissible. These became the main aspects to look into the admissibility of the

[367] Rup Chand Case AIR 1956 Punjab 173
[368] Manindra Nath Vs. Biswanath (1963) 67 Cal W.N.191
[369] S. Pratap Singh Vs. State of Punjab (1964) 4 SCR 733
[370] Yusufali Esmail Nagree Vs. State of Maharashtra AIR 1968 SC 147
[371] *Rama Reddy Vs. V.V. Giri (1970) 2 SCC 340*
[372] *R.M. Malkani (1973) 1 SCC 471*
[373] Z.B.Bukhari Vs. B.R.Mehra (1976) 2 SCC 17
[374] Ram Singh & Ors. Vs. Col. Ram Singh (1985) Suppl. SCC 611

Electronic Evidence prior to the Enactment of Information Technology Act, 2000.

Since the Electronic records was being susceptible to tampering, alteration, transposition, excision, etc. hence various safeguards, were provided before holding this piece of Evidence admissible. This was contrary to the Documentary Evidence where the admissibility is decided first and the genuineness and authenticity of the document is seen at the stage of appreciation of the Evidence. Based on the same Concept the Provision of Section 65-A and 65-B of the Evidence Act were introduced as Special Provision because of the Special Character of Electronic Evidence being susceptible to tampering, alteration, transposition, excision, editing, manipulation etc.

However, it is pertinent to mention here that the provision of Section 65-B was based on Section 5 of the *Civil Evidence Act 1968 of UK* and Section 69 of the *Police & Criminal Evidence Act, 1984.* The said provisions were analysed *In R. Vs. Shepherd*[375] *1993 A.C. 380, R v. Ana Marcolino*[376] and *DPP v. Me. Kewon*[377] *(1997) 1 C A 155. In the last judgment* Lord Hoffman observed "*The production of the document or the accuracy of its contents" are very wide words. What if there was a software fault which caused the document to be printed in lower case when it was meant to be in upper case? The fault has certainly affected the production of the document. But a rule which*

[375] ibid
[376] ibid
[377] ibid

excluded an otherwise accurate document on this ground would be quite irrational. To discover the legislative intent, it is necessary to consider the purpose of the rule." It was in this background that in 1995 the provision of Section 5 of the *Civil Evidence Act 1968 of UK* and Section 69 of the *Police & Criminal Evidence Act, 1984 were repealed and* was replaced by the UK Civil Evidence Act, 1995 which made the rule of admissibility of computer-generated documents technology-neutral.

The provisions 65-A and 65-B, were for the first time tested by the Delhi High Court in the Parliamentary Attack Case. The High Court after analysing the issue discussed the entire law and saw the same in the light of the developments which had taken in U.K. Applying the same the Delhi High court[378] concluded by citing the common law presumption:

"*in the absence of evidence to the contrary the courts will presume that mechanical instruments were in order at the material time*", operates with full force. Based on the above the Court held that, *"this is the only practical way to deal with computer generated evidence unless the response is by way of a challenge to the accuracy of computer evidence on the ground of misuse of system or operating failure or interpolation. Such challenge has to be established by the challenger. Generic and theoretical doubts by way of smoke screen have to be ignored."*

[378] State v. Mohd. Afzal, (2003) 107 DLT 385

The Apex Court while deciding the Appeal in the Parliament Attack Case[379], considered the Call detail Records as Secondary Evidence for the reason that they were "*copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies"* and invoked Section 65 on the basis that, "*evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable as the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the Court.".*

The said position of law remained in existence for almost a decade when the same was overruled by the Anvar case[380], which more or less holds the position of law in this respect till now except for a few hiccups in the form of proposition laid in the case of Tomaso Bruno[381], Sonu @ Amar[382] and Mohd. Shafhi[383] where the rigidity imposed by Anvar case was diluted to some extent. In *Anvar case* the Supreme Court has settled the controversies surrounding the issue of admissibility of electronic evidence emanating from the conflicting decisions and practices of various High Courts and trial courts prior to it.

The amendments to the Evidence Act including Section 65-A and Section 65-B were clearly intended to facilitate proving of electronic

[379] State (NCT of Delhi) Vs. Navjot Sandhu (2005) 11 SCC 600.
[380] Anvar P.V Vs. P.K. Basheer (2014) 10 SCC 473
[381] Tomasu Bruno Vs. State of UP (2015) 7 SCC 178
[382] Sonu @ Amar Vs. State of Haryana (2017) 8 SCC 570
[383]Shafhi Mohd. Vs. State of HP (2018) 2 SCC 801

records. No law is enacted to hamper justice dispensation, especially procedural ones, which are oft quoted to be handmaids of justice. The interpretation of the above provisions was probably driven by situations prevailing on the said date. The provisions however continue, as they are and it is therefore imperative for the true and correct interpretation to be now implemented to ensure that justice delivery is not impeded.

The whole Complexities in the provisions have started by classifying the electronic Evidence as Primary and Secondary which is against the statutory mandate. The only way the same can be categorized is by classifying them as "*Electronic Records"* and "*Computer Output*". Any act of categorization of Electronic Records into primary and secondary Electronic Records renders the provision of Section 65-A nugatory. Further the provisions 65-A and 65-B are to be considered a Complete Code in itself but the other amendments made while enacting these provisions like 22-A, 45-A, 88-A etc. should also be considered particularly when the question pertains to proving genuineness of electronic record for satisfying the conditions as provided in 65-B (2) but these does not affect the admissibility of the Electronic Evidence.

The legal rules of evidence present strong challenges to the use of digital information as legally acceptable records. A technique is needed whereby digital recordings (including images) can be offered and accepted as legal evidence. The most difficult rule of evidence for

digital recording to meet is authentication. Authentication is the means to prove, first, the conditions under which the record was made, and, second, that the recording is offered in its original unaltered form. The conditions under which the record was made include date, time, location, people present, and other relevant conditions. The *best evidence rule* requires that the original document (recording) i.e. "*Electronic Records"* be admitted into evidence if it is available. Digital recordings are very susceptible to alteration. When the originality of a recording is questioned, often expert witnesses provide testimony as to whether or not the recording appears altered.

There are three ways in which common law jurisdictions deal with the aspect of admissibility of electronic evidence.

1. A special provision is made in respect of electronic evidence or the electronic evidence is dealt on par with traditional kinds of evidence. India, Canada and South Africa have both enacted special statutes to deal with electronic evidence. On the other hand, the US and the present UK both address it under their main evidence statutes.

2. Specific methods have been prescribed for dealing with authenticity like in the case of India, Canada and Australia whereas the same is left open to be decided by the court as per its discretion which is prevalent in countries like US and South Africa.

3. The aspect of authenticity is considered only at the stage of appreciation of Evidence. This approach is followed in UK.

In India there is a need for increasing the number of authentications method for Electronic Evidence i.e. apart from the certificate, Oral Evidence as prescribe in Section 22-A of the Evidence Act should also be allowed. Apart from the above provision under Section 45-A in the form of Expert Evidence should also be permitted and they should not be excluded. Certificate as provided under Section 65-B (4) should not be considered as the only means of Authentication. These means will not only remove the rigidity created by the Anvar case but will also act to give more credence and reliability to the Electronic Evidence. *Finally*, by allowing multiple methods of authentication that corroborate the Section 65-B certificate, the electronic evidence sought to be admitted will be forced to meet a higher reliability threshold and this will go a long way in improving the truth-seeking function of courts.

It may also be time now for legislators to review the complicated structure of Section 65-B, which draws heavily from the now repealed Section 69 of the UK's Police and Criminal Evidence Act, 1984. Illustrations of simple provisions for relying on electronic evidence should be added as has been done in respect of other provisions of the Evidence Act. It may therefore be expedient for India to also review existing provisions and provide simple and easy language to interpret provisions for relying on electronic records to ensure fair dispensation of justice.

Appendix A

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 20825-20826 OF 2017

ARJUN PANDITRAO KHOTKAR ...Appellant

Versus

KAILASH KUSHANRAO GORANTYAL AND ORS. .Respondents

WITH

CIVIL APPEAL NO.2407 OF 2018

CIVIL APPEAL NO.3696 OF 2018

J U D G M E N T

R.F.Nariman

1. I.A.No. 134044 of 2019 for intervention in C.A. Nos. 20825-20826 of 2017 is allowed.

2. These civil Appeals have been referred to the bench of three honourable Judges of this Court by a Division Bench reference

order dated 26.07.2019, dealing with the interpretation of Section 65B of the Indian Evidence Act, 1872, ("Evidence Act") by two judgments of this court. In the reference order, after quoting from Anvar P.V. v. P.K. Basheer & Ors. (2014) 10 the Indian Evidence Act, 1872 SCC 473 (a three Judge Bench decision of this Court), it was found that a Division Bench judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad v. State of Himachal (2018) 2 SCC 801 may need reconsideration by a Bench of a larger strength.

3. The brief facts necessary to appreciate the controversy in the present case, as elucidated in Civil Appeals 20825-20826 of 2017, are as follows:

i Two election petitions were filed by the present Respondents before the Bombay High Court under Sections 80 and 81 of the Representation of the People Act, 1951, challenging the election of the present Appellant, namely, Shri Arjun Panditrao Khotkar (who is the Returned Candidate [hereinafter referred to as the " RC"] belonging to the Shiv Sena party from

101-Jalna Legislative Assembly Constituency) to the Maharashtra State Legislative Assembly for the term commencing November, 2014. Election Petition No.6 of 2014 was filed by the defeated Congress (I) candidate Shri Kailash Kishanrao Gorantyal, whereas Election Petition No.9 of 2014 was filed by one Shri Vijay Chaudhary, an elector in the said constituency. The margin of victory for the RC was extremely narrow, namely 296 votes - the RC having secured 45,078 votes, whereas Shri Kailash Kishanrao Gorantyal secured 44,782 votes.

ii The entirety of the case before the High Court had revolved around four sets of nomination papers that had been filed by the RC. It was the case of the present Respondents that each set of nomination papers suffered from defects of a substantial nature and that, therefore, all four sets of nomination papers, having been improperly accepted by the Returning Officer of the Election Commission, one Smt. Mutha, (hereinafter referred to as the "RO"), the election of the RC be declared void. In particular, it was the contention of the present Respondents that the late

presentation of Nomination Form Nos. 43 and 44 by the RC - inasmuch as they were filed by the RC *after* the stipulated time of 3.00 p.m. on 27.09.2014 - rendered such nomination forms not being filed in accordance with the law, and ought to have been rejected.

iii. In order to buttress this submission, the Respondents sought to rely upon video-camera arrangements that were made both inside and outside the office of the RO. According to the Respondents, the nomination papers were only offered at 3.53 p.m. (i.e. beyond 3.00 p.m.), as a result of which it was clear that they had been filed out of time. A specific complaint making this objection was submitted by Shri Kailash Kishanrao Gorantyal before the RO on 28.09.2014 at 11.00 am., in which it was requested that the RO reject the nomination forms that had been improperly accepted. This request was rejected by the RO on the same day, stating that the nomination forms had, in fact, been filed within time.

4. Given the fact that allegations and counter allegations were

made as to the time at which the nomination forms were given to the RO, and that videography was available, the High Court, by its order dated 16.03.2016, ordered the Election Commission and the concerned officers to produce the entire record of the election of this Constituency, including the original video recordings. A specific order was made that this electronic record needs to be produced along with the 'necessary certificates'.

5. In compliance with this order, such video recordings were produced by the Election Commission, together with a certificate issued with regard to the CDs/VCDs, which read as follows:

"Certificate

This is to certify that the CDs in respect of video recording done on two days of filing nomination forms of date 26.9.2014 and 27.9.2014 which were present in the record are produced.

Sd/-

Asst. Returning Officer
101 Jalna Legislative Assembly
Constituency/Tahsildar Jalna

Sd/-

Returning Officer
101 Jalna Legislative Assembly
Constituency/Tahsildar Jalna"

Transcripts of the contents of these CDs/VCDs were prepared by the High Court itself. Issue nos.6 and 7 as framed by the High Court (and its answers to these issues) are important, and are set out in the impugned judgment dated 24.11.2017, and extracted hereinbelow:

Issues

6. Whether the petitioner proves that the nomination papers at Sr. Nos. 43 and 44 were not presented by respondent/ Returned candidate before 3.00 p.m. on 27/09/2014?

Findings

Affirmative. (nomination papers at Sr. Nos. 43 and 44 were not presented by RC before 3 p.m. of 27.9.2014.

7. Whether the petitioner proves Affirmative. (A, B forms that the respondent /Returned were presented after candidate submitted original 3.00 p.m. of 27.9.2014)" forms A and B along with nomination paper only on 27/09/2014 after 3.00 p.m. and along with nomination paper at Sr. No. 44?

7. In answering issues 6 and 7, the High Court recorded:

"60. Many applications were given by the petitioner of Election

Petition No. 6/2014 to get the copies of electronic record in respect of aforesaid incidents with certificate as provided in section 65-B of the Evidence Act. The correspondence made with them show that even after leaving of the office by Smt. Mutha, the Government machinery, incharge of the record, intentionally avoided to give certificate as mentioned in section 65-B of the Evidence Act. After production of the record in the Court in this regard, this Court had allowed to Election Commission by order to give copies of such record to applicants, but after that also the authority avoided to give copies by giving lame excuses. It needs to be kept in mind that the RC is from political party which has alliance with ruling party, BJP, not only in the State, but also at the center. It is unfortunate that the machinery which is expected to be fair did not act fairly in the present matter. The circumstances of the present matter show that the aforesaid two officers tried to cover up their mischief. However the material gives only one inference that nomination forms Nos. 43 and 44 with A, B forms were presented before the RO by RC after 3.00 p.m. of 27.9.2014 and they were not handed over prior to 3.00

p.m. In view of objection of the learned counsels of the RC to using the information contained in aforesaid VCDs, marked as Article A1 to A6, this Court had made order on 11.7.2017 that the objections will be considered in the judgment itself. This VCDs are already exhibited by this Court as Exhs. 70 to 75. Thus, if the contents of the aforesaid VCDs can be used in the evidence, then the petitioners are bound to succeed in the present matters."

8. TheHigh Court then set out Sections 65-A and 65-B of the Evidence Act, and referred to this Court's judgment in Anvar P.V. (supra). The Court held in paragraph 65 of the impugned judgment that the CDs that were produced by the Election Commission could not be treated as an original record and would, therefore, have to be proved by means of secondary evidence. Finding that no written certificate as is required by Section 65-B(4) of the Evidence Act was furnished by any of the election officials, and more particularly, the RO, the High Court then held:

"69. In substantive evidence, in the cross examination of Smt. Mutha, it is brought on the record that there was no complaint

with regard to working of video cameras used by the office. She has admitted that the video cameras were regularly used in the office for recording the aforesaid incidents and daily VCDs were collected of the recording by her office. This record was created as the record of the activities of the Election Commission. It is brought on the record that on the first floor of the building, arrangement was made by keeping electronic gazettes like VCR players etc. and arrangement was made for viewing the recording. It is already observed that under her instructions, the VCDs were marked of this recording.

Thus, on the basis of her substantive evidence, it can be said that the conditions mentioned in section 65-B of the Evidence Act are fulfilled and she is certifying the electronic record as required by section 65-B (4) of the Evidence Act. It can be said that Election Commission, the machinery avoided to give certificate in writing as required by section 65-B (4) of the Evidence Act. But, substantive evidence is brought on record of competent officer in that regard. When the certificate expected is required to be issued on the basis of best of knowledge and belief, there is

evidence on oath about it of Smt. Mutha. Thus, there is something more than the contents of certificate mentioned in section 65-B (4) of the Evidence Act in the present matters. Such evidence is not barred by the provisions of section 65-B of the Evidence Act as that evidence is only on certification made by the responsible official position like RO. She was incharge of the management of the relevant activities and so her evidence can be used and needs to be used as the compliance of the provision of section 65-B of the Evidence Act. This Court holds that there is compliance of the provision of section 65-B of the Evidence Act in the present matter in respect of aforesaid electronic record and so, the information contained in the record can be used in the evidence." Based, therefore, on "substantial compliance" of the requirement of giving a certificate under Section 65B of the Evidence Act, it was held that the CDs/VCDs were admissible in evidence, and based upon this evidence it was found that, as a matter of fact, the nomination forms by the RC had been improperly accepted. The election of the RC was therefore was declared void in the impugned judgment.

9. Shri Ravindra Adsure, learned advocate appearing on behalf of the Appellant, submitted that the judgment in Anvar P.V. (supra) covered the case before us. He argued that without the necessary certificate in writing and signed under Section 65B(4) of the Evidence Act, the CDs/VCDs upon which the entirety of the judgment rested could not have been admitted in evidence. He referred to Tomaso Bruno and Anr. v. State of Uttar Pradesh (2015) 7 SCC 178, and argued that the said judgment did not notice either Section 65B or Anvar P.V. (supra), and was therefore *per incuriam.* He also argued that Shafhi Mohammad (supra), being a two-Judge Bench of this Court, could not have arrived at a finding contrary to Anvar P.V. (supra), which was the judgment of three Hon'ble Judges of this Court. In particular, he argued that it could not have been held in Shafhi Mohammad (supra) that whenever the interest of justice required, the requirement of a certificate could be done away with under Section 65B(4). Equally, this Court's judgment dated 03.04.2018, reported as (2018) 5 SCC 311, which merely

followed the law laid down in Shafhi Mohammad (supra), being contrary to the larger bench judgment in Anvar P.V. (supra), should also be held as not having laid down good law. He further argued that the Madras High Court judgment in K. Ramajyam v. Inspector of Police (2016) Crl. LJ 1542, being contrary to Anvar P.V. (supra), also does not lay down the law correctly, in that it holds that evidence *aliunde,* that is outside Section 65B, can be taken in order to make electronic records admissible. In the facts of the present case, he contended that since it was clear that the requisite certificate had not been issued, no theory of "substantial compliance" with the provisions of Section 65B(4), as was held by the impugned judgment, could possibly be sustained in law.

10. Ms. Meenakshi Arora, learned Senior Advocate appearing on behalf of the Respondents, has taken us in copious detail through the facts of this case, and has argued that the High Court has directed the Election Commission to produce before the Court the original CDs/VCDs of the video-recording done at the office of the RO, along with the necessary certificate. An application dated 16.08.2016 was also made to the District Election Commission

and RO as well as the Assistant RO for the requisite certificate under Section 65B. A reply was given on 14.09.2016, that this certificate could not be furnished since the matter was sub-judice. Despite this, later on, on 26.07.2017 her client wrote to the authorities again requesting for issuance of certificate under Section 65B, but by replies dated 31.07.2017 and 02.08.2017, no such certificate was forthcoming. Finally, after having run from pillar to post, her client applied on 26.08.2017 to the Chief Election Commissioner, New Delhi, stating that the authorities were refusing to give her client the necessary certificate under Section 65B and that the Chief Election Commissioner should therefore ensure that it be given to them. To this communication, no reply was forthcoming from the Chief Election Commissioner, New Delhi. Given this, the High Court at several places had observed in the course of the impugned judgment that the authorities deliberately refused, despite being directed, to supply the requisite certificate under Section 65B, as a result of which the impugned judgment correctly relied upon the oral testimony of the RO herself. According to Ms. Arora, such oral testimony

taken down in the form of writing, which witness statement is signed by the RO, would itself amount to the requisite certificate being issued under Section 65B(4) in the facts of this case, as was correctly held by the High Court. Quite apart from this, Ms. Arora also stated that - independent of the finding given by the High Court by relying upon CDs/VCDs - the High Court also relied upon other documentary and oral evidence to arrive at the finding that the RC had not handed over nomination forms directly to the RO at 2.20 p.m (i.e. before 3pm). In fact, it was found on the basis of this evidence that the nomination forms were handed over and accepted by the RO only *after* 3.00 p.m. and were therefore improperly accepted, as a result of which, the election of the Appellant was correctly set aside.

11. On law, Ms. Arora argued that it must not be forgotten that

Section 65B is a procedural provision, and it cannot be the law that even where a certificate is impossible to get, the absence of such certificate should result in the denial of crucial evidence which would point at the truth or falsehood of a given set of facts.

She, therefore, supported the decision in Shafhi Mohammad (supra), stating that Anvar P.V. (supra) could be considered to be good law only in situations where it was possible for the party to produce the requisite certificate. In cases where this becomes difficult or impossible, the interest of justice would require that a procedural provision be not exalted to such a level that vital evidence would be shut out, resulting in manifest injustice.

12. Shri Vikas Upadhyay, appearing on behalf of the Intervenor, took us through the various provisions of the Information Technology Act, 2000 along with Section 65B of the Evidence Act, and argued that Section 65B does not refer to the stage at which the certificate under Section 65B(4) ought to be furnished. He relied upon a judgment of the High Court of Rajasthan as well as the High Court of Bombay, in addition to Kundan Singh v. State 2015 SCC OnLine Del 13647 of the Delhi High Court, to argue that the requisite certificate need not necessarily be given at the time of tendering of evidence but could be at a subsequent stage of the proceedings, as in cases where the requisite certificate is not forthcoming due to no fault

of the party who tried to produce it, but who had to apply to a Judge for its production. He also argued that Anvar P.V. (supra) required to be clarified to the extent that Sections 65A and 65B being a complete code as to admissibility of electronic records, the "baggage" of Primary and Secondary Evidence contained in Sections 62 and 65 of the Evidence Act should not at all be adverted to, and that the drill of Section 65A and 65B alone be followed when it comes to admissibility of information contained in electronic records.

13. It is now necessary to set out the relevant provisions of the Evidence Act and the Information Technology Act, 2000. Section 3 of the Evidence Act defines "document" as follows:

"Document.-- "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

"Evidence" in Section 3 is defined as follows:

"Evidence."-- "Evidence" means and includes—

(1) all statements which the Court permits or requires to be made

before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence."

The Evidence Act also declares that the expressions "Certifying Authority", "electronic signature", "Electronic Signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act. Section 22-A of the Evidence Act, which deals with the relevance of oral admissions as to contents of electronic records, reads as follows:

"22A. When oral admission as to contents of electronic records are relevant. -- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question."

14. Section 45A of the Evidence Act, on the opinion of the Examiner of Electronic Evidence, then states:

"45A. Opinion of Examiner of Electronic Evidence.--

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 the Information Technology Act, 2000 (21 of 2000), is a relevant fact.

Explanation.-- For the purposes of this section, an Examiner of Electronic Evidence shall be an expert."

15. Sections 65-A and 65-B of the Evidence Act read as follows:

"65A. Special provisions as to evidence relating to electronic record.--The contents of electronic records may be proved in accordance with the provisions of section 65B."

"65B. Admissibility of electronic records.- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section

are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in

which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

3. Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether-

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation

over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed

by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the Person stating it.

(5) For the purposes of

(a) information shall be taken to be supplied to a Computer if it is supplied thereto whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment; --

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or

without human intervention) by means of any appropriate equipment.

Explanation. -- For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

4. The following definitions as contained in Section 2 of the Information Technology Act, 2000 are also relevant:

"(i) "computer" means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;"

"(j) "computer network" means the inter-connection of one or more computers or computer systems or communication device through- (i) the use of satellite, microwave, terrestrial line, wire,

wireless or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers or communication device whether or not the inter-connection is continuously maintained;"

"(l) "computer system" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions;"

"(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the

memory of the computer;"

"(r) "electronic form", with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;"

"(t) "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;"

5. Sections 65A and 65B occur in Chapter V of the Evidence Act which is entitled "Of Documentary Evidence". Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary

evidence except in the circumstances hereinafter mentioned. Section 65 of the Evidence Act is important, and states that secondary evidence may be given of *"the existence, condition or contents of a document in the following cases..."*.

6. Section 65 differentiates between existence, condition and contents of a document. Whereas "existence" goes to "admissibility" of a document, "contents" of a document are to be proved *after* a document becomes admissible in evidence. Section 65A speaks of "contents" of electronic records being proved in accordance with the provisions of Section 65B. Section 65B speaks of "admissibility" of electronic records which deals with "existence" and "contents" of electronic records being proved once admissible into evidence. With these prefatory observations let us have a closer look at Sections 65A and 65B.

7. It will first be noticed that the subject matter of Sections 65A and 65B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65A indicates that "special provisions" as to evidence relating to electronic

records are laid down in this provision. The marginal note to Section 65B then refers to "admissibility of electronic records".

8. Section 65B(1) opens with a *non-obstante* clause, and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that "document" as defined by Section 3 of the Evidence Act does not include electronic records.

9. Section 65B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65B(2(a)) to 65(2(d)) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in the period in question. The conditions mentioned in sub-sections 2(a) to 2(d)

must be satisfied cumulatively.

10. Under Sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" - whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, "doing any of the following things..." must be read as doing all of the following things, it being well settled that the expression "any" can mean "all" given the context (see, for example, this Court's judgments in Bansilal Agarwalla v. State of Bihar (1962) 1 SCR 33[1] and 1 "3. The first contention is based on an assumption that the word "any one" in Section 76 means only "one of the directors, and only one of the shareholders". This question as

regards the interpretation of the word "any one" in Section 76 was raised in Criminal Appeals Nos. 98 to 106 of 1959 (Chief Inspector of Mines, etc.) and it has been decided there that the word "any one" should be interpreted there as "every one". Thus under Section 76 every one of the shareholders of a private company owning the mine, and every one of the directors of a public Om Parkash v. Union of India (2010) 4 SCC 17[2]). This being the case, the conditions mentioned in sub-section (4) must also be interpreted as being cumulative.

24. It is now appropriate to examine the manner in which Section 65B was interpreted by this Court. In Anvar P.V. (supra), a three Judge Bench of this Court, after setting out Sections 65A and 65B of the Evidence Act, held:

"14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer.

It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65- B (2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) 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, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the

electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B (2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards,

the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

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20. Proof of electronic record is a special Provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special

law, the general law under Sections 63 and 65 has to yield.

21. In *State (NCT of Delhi)* v. *Navjot Sandhu* a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows: (SCC p. 714)

"*150.* According to Section 63, "secondary evidence" means and includes, among other things, 'copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies'. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of

the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence,

under Sections 63 and 65, of an electronic record."

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant,* special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application 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, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in *Navjot Sandhu case,* does not lay down the correct 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. Thus, in the case of CD, VCD, 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, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-.

24. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

25. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which

were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65- B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act." Shri Upadhyay took exception to the language of paragraph 24 in this judgment. According to the learned counsel, primary and secondary evidence as to documents, referred to in Sections 61 to Section 65 of the Evidence Act, should be kept out of admissibility of electronic records, given the fact that Sections 65A and 65B are a complete code on the subject.

26. At this juncture, it is important to note that Section 65B has its genesis in Section 5 of the Civil Evidence Act 1968 (UK), which

reads as follows:

"Admissibility of statements produced by computers.

(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the

information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) above was regularly performed by computers, whether-

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a

computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being

stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(6) Subject to subsection (3) above, in this Part of this Act "computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process."

27. It may be noticed that sub-sections (2) to (5) of Section 65B of the Evidence Act are a reproduction of sub-sections (2) to (5) of Section 5 of the Civil Evidence Act, 1968, with minor changes[3]. The definition of 3 Section 69 of the UK Police and Criminal Evidence Act, 1984 dealt with evidence from

computer records in criminal proceedings. Section 69 read thus:

"**69.-**(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown-

(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of that computer;

(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and

(c) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning

the statement as may be required by the rules shall be provided in such form and at such time as may be so required. ”

By Section 70, Sections 68 and 69 of this Act had to be read with Schedule 3 thereof, the provisions of which had the same force in effect as Sections 68 and 69. Part I of Schedule 3 supplemented Section 68. Notwithstanding the importance of Part I of Schedule 3, we propose to refer to only two provisions of it, namely:

“computer” under Section 5(6) of the Civil Evidence Act, 1968 was not, however, adopted by Section 2(i) of the Information Technology Act, 2000, which as noted above, is a ‘means and includes’ definition of a much more complex and intricate nature. It is also important to note Section 6(1) and (5) of the Civil Evidence Act, 1968, which state as follows:

“(1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of section 2, 4 or 5 of this Act it may, subject to any rules of court, be proved by the production of that document or (whether or not

that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

"1. Section 68(1) above applies whether the information contained in the document *was* supplied directly or indirectly but, if it *was* supplied indirectly, only if each person through whom it *was* supplied *was* acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied. ″

"6. Any reference in Section 68 above or this Part of this Schedule to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him. ″

Part II supplemented Section 69 in important respects. Two provisions of it are relevant, namely-

"8. In any proceedings where it is desired to give a statement in evidence in accordance with section 69 above, a certificate -

(a) identifying the document containing the statement and describing the manner in which it *was* produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document *was* produced by a computer;

(c) dealing with any of the matters mentioned in Section 69(1) above; and

(d) purporting to be signed by a person occupying a reasonable position in relation to the operation of the computer, shall be evidence of anything stated in it; and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

9. Notwithstanding paragraph 8 above, a court may require oral evidence to be given of anything of which evidence could be given by a certificate under that paragraph."

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(5) If any person in a certificate tendered in evidence in civil proceedings by virtue of section 5(4) of this Act wilfully makes a

statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both."

28. Section 6(1), in essence, maintains the dichotomy between proof by 'primary' and 'secondary' evidence - proof by production of the 'document' itself being primary evidence, and proof by production of a copy of that document, as authenticated, being secondary evidence. Section 6(5), which gives teeth to the person granting the certificate mentioned in Section 5(4) of the Act, by punishing false statements wilfully made in the certificate, has not been included in the Indian Evidence Act. These sections have since been repealed by the Civil Evidence Act of 1995 (UK), pursuant to a UK Law Commission Report published in September, 1993 (Law Com. No. 216), by which the strict rule as to hearsay evidence was relaxed, and hearsay evidence was made admissible in the circumstances mentioned by the Civil Evidence Act of 1995. Sections 8, 9 and 13 of this Act are important, and are set out hereinbelow:"8. Proof of statements

contained in documents.

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved—

(a) by the production of that document, or

(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it, authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

9. **Proof of records of business or public authority.**

(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong. For this purpose—

(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and

(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.

(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong. In this section—

"records" means records in whatever form;

"business" includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

"public authority" includes any public or statutory undertaking, any government department and any person holding office under

Her Majesty.

(4) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or description of documents or records."

Section 13 of this Act defines "document" as follows:

"document" means anything in which information of any description is recorded, and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;"

29. Section 15(2) of this Act repeals enactments mentioned in Schedule II therein; and Schedule II repeals Part I of the Civil Evidence Act,1968 - of which Sections 5 and 6 were a part. The definition of "records" and "document" in this Act would show that electronic records are considered to be part of "document" as defined, needing no separate treatment as to admissibility or proof. It is thus clear that in UK law, as at present, no distinction

is made between computer generated evidence and other evidence either qua the admissibility of, or the attachment of weight to, such evidence.

30. Coming back to Section 65B of the Indian Evidence Act, sub-section (1) needs to be analysed. The sub-section begins with a *non-obstante* clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "*...without further proof or production of the original*..." make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed document" now becomes admissible in evidence without further proof or production of the original as evidence of any contents of the original, or of any fact stated therein of which

direct evidence would be admissible.

31. The *non-obstante* clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose. However, Section 65B(1) clearly differentiates between the "original" document - which would be the original "electronic record" contained in the "computer" in which the original information is first stored - and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65B differentiates between the original information contained in the "computer" itself and copies made therefrom - the former being primary evidence, and the latter being secondary evidence.

32. Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or

even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "...if *an electronic record as such is used as primary evidence under Section 62 of the Evidence Act*...". This may more appropriately be read without the words *"under Section 62 of the Evidence Act,...".* With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

33. In fact, in Vikram Singh and Anr. v. State of Punjab and Anr. (2017) 8 SCC 518, a three-Judge Bench of this Court followed the law in Anvar P.V. (supra), clearly stating that where primary evidence in electronic form has been produced, no certificate under Section 65B would be necessary. This was so stated as follows:

"25. The learned counsel contended that the tape- recorded conversation has been relied on without there being any certificate under Section 65-B of the Evidence Act, 1872. It was contended that audio tapes are recorded on magnetic media, the same could be established through a certificate under Section 65-B and in the absence of the certificate, the document which constitutes electronic record, cannot be deemed to be a valid evidence and has to be ignored from consideration. Reliance has been placed by the learned counsel on the judgment of this Court in *Anvar P.V.* v. *P.K. Basheer.* The conversation on the landline phone of the complainant situate in a shop was recorded by the complainant. The same cassette containing conversation by which ransom call was made on the landline phone was handed

over by the complainant in original to the police. This Court in its judgment dated 25-1-2010 has referred to the aforesaid fact and has noted the said fact to the following effect:

"*5.* The cassette on which the conversations had been recorded on the landline was handed over by Ravi Verma to SI Jiwan Kumar and on a replay of the tape, the conversation was clearly audible and was heard by the police."

26. The tape-recorded conversation was not secondary evidence which required certificate under Section 65-B, since it was the original cassette by which ransom call was tape-recorded, there cannot be any dispute that for admission of secondary evidence of electronic record a certificate as contemplated by Section 65-B is a mandatory condition."[4]

34. Despite the law so declared in Anvar P.V. (supra), wherein this Court made it clear that the special provisions of Sections 65A and 65B of the Evidence Act are a complete Code in themselves when it comes to 4 The definition of "data", "electronic form" and "electronic record" under the Information Technology Act, 2000 (as set out hereinabove) makes it clear

that “data” and “electronic form” includes “magnetic or optical storage media”, which would include the audio tape/cassette discussed in Vikram Singh (supra). admissibility of evidence of information contained in electronic records, and also that a written certificate under Section 65B(4) is a *sine qua non* for admissibility of such evidence, a discordant note was soon struck in Tomaso Bruno (supra). In this judgment, another three Judge Bench dealt with the admissibility of evidence in a criminal case in which CCTV footage was sought to be relied upon in evidence. The Court held:

“24. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents stricto sensu are admitted as material evidence. With the amendment to the Evidence Act in 2000, Sections 65-A and 65-B were introduced into Chapter V relating to documentary

evidence. Section 65-A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65-B is complied with. The computer-generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65-B of the Evidence Act. Sub-section (1) of Section 65-B makes admissible as a document, paper printout of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in subsection (2) of Section 65-B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW 13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

25. The production of scientific and electronic evidence in court as contemplated under Section 65-B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra*

[(2012) 9 SCC 1] , wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in *State (NCT of Delhi)* v. *Navjot Sandhu,* the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers."

35. What is clear from this judgment is that the judgmentof Anvar P.V. (supra) was not referred to at all. In fact, the judgment in State v. Navjot Sandhu (2005) 11 SCC 600 was adverted to, which was a judgment specifically overruled by Anvar P.V. (supra). It may also be stated that Section 65B(4) was also not at all adverted to by this judgment. Hence, the declaration of law in Tomaso Bruno (supra) following Navjot Sandhu (supra) that secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act to make CCTV footage admissible would be in the teeth of Anvar P.V., (supra) and cannot be said to be a correct statement of the law. The said view is accordingly overruled.

36. We now come to the decision in Shafhi Mohammad (supra). In this case, by an order dated 30.01.2018 made by two learned Judges of this Court, it was stated:

"21. We have been taken through certain decisions which may be referred to. In *Ram Singh* v. *Ram Singh [Ram Singh* v. *Ram Singh,* 1985 Supp SCC 611] , a three-Judge Bench considered the said issue. English judgments in *R.* v. *Maqsud Ali [R.* v. *Maqsud Ali,* (1966) 1 QB 688] and *R.* v. *Robson* [R. v. *Robson,* (1972) 1 WLR 651] and American Law as noted in *American Jurisprudence* 2d (Vol. 29) p. 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such 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 the case of tape- recording, it was observed that voice of the speaker must be duly identified, accuracy of the statement

was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

22. In *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate* [(2010) 4 SCC 329], the same principle was reiterated. This Court observed that new techniques and devices are the order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

23. In *Tomaso Bruno* v. *State of U.P.* [(2015) 7 SCC 178], a three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an

investigating agency. Reference was made to the decisions of this Court

i. Kasab Vs. State of Maharashtra

ii. And State Delhi) Vs. Navjot Sandhu

24. We may, however, also refer to the judgment of this Court in *Anvar P.V.* v. *P.K. Basheer,* delivered by a three- Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65-B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65-B of the Evidence Act was required to be followed and a contrary view taken in *Navjot Sandhu* that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65-B of the Evidence Act.

25. Though in view of the three-Judge Bench judgments in *Tomaso Bruno* and *Ram Singh* [1985 Supp SCC 611] , it can be

safely held that electronic evidence is admissible and provisions under Sections 65-A and 65-B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65-B(4).

26. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In *Anvar P.V.,* this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

27. The term "electronic record" is defined in Section 2(1) (t) of the Information Technology Act, 2000 as follows:

"2.(1)(t) "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;"

28. The expression "data" is defined in Section 2(1)(o) of the Information Technology Act as follows:

"2.(1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;" The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position

to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession 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 denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

29. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."

37. It may be noted that the judgments referred to in paragraph 21 of Shafhi Mohammed (supra) are all judgments before the year 2000, when Amendment Act 21 of 2000 first introduced Sections 65A and 65B into the Evidence Act and can, therefore, be of no assistance on interpreting the law as to admissibility into evidence of information contained in electronic records. Likewise, the judgment cited in paragraph 22, namely Tukaram S. Dighole v. Manikrao Shivaji Kokate (2010) 4 SCC 329 is also a judgment which does not deal with Section 65B. In fact, paragraph 20 of the said judgment states the issues before the Court as follows:

"20. However, in the present case, the dispute is not whether a cassette is a public document but the issues are whether:

(i) the finding by the Tribunal that in the absence of any evidence to show that the VHS cassette was obtained by the appellant from the Election Commission, the cassette placed on record by the appellant could not be treated as a public document is perverse; and

(ii) a mere production of an audio cassette, assuming that the

same is a certified copy issued by the Election Commission, is per se conclusive of the fact that what is contained in the cassette is the true and correct recording of the speech allegedly delivered by the respondent or his agent?"

The second issue was answered referring to judgments which did not deal with Section 65B at all.

38. Much succour was taken from the three Judge Bench decision in Tomaso Bruno (supra) in paragraph 23, which, as has been stated hereinabove, does not state the law on Section 65B correctly. Anvar P.V. (supra) was referred to in paragraph 24, but surprisingly, in paragraph 26, the Court held that Sections 65A and 65B cannot be held to be a complete Code on the subject, directly contrary to what was stated by a three Judge Bench in Anvar P.V. (supra). It was then "clarified" that the requirement of a certificate under Section 64B(4), being procedural, can be relaxed by the Court wherever the interest of justice so justifies, and one circumstance in which the interest of justice so justifies would be where the electronic device is produced by a party who is not in possession of such device, as a result of which such party

would not be in a position to secure the requisite certificate.

39. Quite apart from the fact that the judgment in Shafhi Mohammad (supra) states the law incorrectly and is in the teeth of the judgment in Anvar P.V. (supra), following the judgment in Tomaso Bruno (supra) - which has been held to be *per incuriam* hereinabove - the underlying reasoning of the difficulty of producing a certificate by a party who is not in possession of an electronic device is also wholly incorrect.

40. As a matter of fact, Section 165 of the Evidence Act empowers a Judge to order production of any document or thing in order to discover or obtain proof of relevant facts. Section 165 of the Evidence Act states as follows:

"Section 165. Judge's power to put questions or order production.- The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order,

nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

41. Likewise, under Order XVI of the Civil Procedure Code, 1908 ("CPC") which deals with 'Summoning and Attendance of Witnesses', the Court can issue the following orders for the production of documents:

"6. Summons to produce document.—Any person may be

summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

7. Power to require persons present in Court to give evidence or produce document.—Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

xxx xxx xxx

10. Procedure where witness fails to comply with summons.—(1) Where a person has been issued summons either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court— (a) shall, if the certificate of the serving officer has not been verified by the affidavit, or if service of the summons has affected by a party or his agent, or (b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected

service, or cause him to be so examined by any Court, touching the service or nonservice of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property."

42. Similarly, in the Code of Criminal Procedure, 1973 ("

CrPC"), the Judge conducting a criminal trial is empowered to issue the following orders for production of documents:

"91. Summons to produce document or other thing. —

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed— (a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or (b) to apply to a letter, postcard, telegram or other document

or any parcel or thing in the custody of the postal or telegraph authority."

"349. Imprisonment or committal of person refusing to answer or produce document.—If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not, after a reasonable opportunity has been given to him so to do, offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the Presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal, he may be dealt with according to the provisions of section 345 or section 346."

43. Thus, it is clear that the major premise of Shafhi Mohammad (supra) that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of

such a certificate from the requisite person under Section 65B(4) in cases in which such person refuses to give it.

44. Resultantly, the judgment dated 03.04.2018 of a Division Bench of this Court reported as (2018) 5 SCC 311, in following the law incorrectly laid down in Shafhi Mohammed (supra), must also be, and is hereby, overruled.

45. However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the Respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the Court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the Court, and the Court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate,

the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is *lex non cogit ad 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 othe law, the alleged disobedience of the law is excused. This was well put by this Court in Re: Presidential Poll (1974) 2 SCC 33 as follows:

"14. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

15. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its

mandatory character. The maxim of law impotentia excusat legam is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legam is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See Broom's Legal Maxims 10th Edn. at pp. 162-163 and Craies on Statute Law 6th Edn. at p. 268)." It is important to note that the provision in question in Re Presidential Poll (supra) was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case. These maxims have been applied by this Court in different situations in other election cases - see Chandra

Kishore Jha v. Mahavir Prasad and Ors. (1999) 8 SCC 266 (at paragraphs 17 and 21); Special Reference 1 of 2002 (2002) 8 SCC 237 (at paragraphs 130 and 151) and Raj Kumar Yadav v. Samir Kumar Mahaseth and Ors. (2005) 3 SCC 601 (at paragraphs 13 and 14).

46. These Latin maxims have also been applied in several other contexts by this Court. In Cochin State Power and Light Corporation v. State of Kerala (1965) 3 SCR 187, a question arose as to the exercise of an option of purchasing an undertaking by the State Electricity Board under Section 6(4) of the Indian Electricity Act, 1910. The provision required a notice of at least 18 months before the expiry of the relevant period to be given by such State Electricity Board to the State Government. Since this mandatory provision was impossible of compliance, it was held that the State Electricity Board was excused from giving such notice, as follows:

"Sub-section (1) of Section 6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the license. But the State Government claims that under sub-section (2) of Section 6 it is now vested with the option. Now, under sub-section (2) of Section 6, the

State Government would be vested with the option only "where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking". It is common case that the State Electricity Board was duly constituted. But the State Government claims that the State Electricity Board did not elect to purchase the undertaking. For this purpose, the State Government relies upon the deeming provisions of sub-section (4) of Section 6, and contends that as the Board did not send to the State Government any intimation in writing of its intention to exercise the option as required by the sub-section, the Board must be deemed to have elected not to purchase the undertaking. Now, the effect of sub-section (4) read with sub-section (2) of Section 6 is that on failure of the Board to give the notice prescribed by sub-section (4), the option vested in the Board under sub-section (1) of Section 6 was liable to be divested. Sub-section (4) of Section 6 imposed upon the Board the duty of giving after the coming into force of Section 6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. Section 6 came into force on September 5, 1959, and the relevant period expired on December 3, 1960. In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase

on the expiry of December 2, 1960, was impossible from the very commencement of Section 6. The performance of this impossible duty must be excused in accordance with the maxim, lex non cogitia ad impossibilia (the law does not compel the doing of impossibilities), and sub-section (4) of Section 6 must be construed as not being applicable to a case where compliance with it is impossible. We must therefore, hold that the State Electricity Board was not required to give the notice under sub-section (4) of Section 6 in respect of its option of purchase on the expiry of 25 years. It must follow that the Board cannot be deemed to have elected not to purchase the undertaking under subsection (4) of Section 6. By the notice served upon the appellant, the Board duly elected to purchase the undertaking on the expiry of 25 years. Consequently, the State Government never became vested with the option of purchasing the undertaking under sub-section (2) of Section 6. The State Government must, therefore, be restrained from taking further action under its notice, Ex. G, dated November 20, 1959."[384]

384 (1965) 3 SCR 187, at 193.

47. In Raj Kumar Dubey v. Tarapada Dey and Ors. (1987) 4 SCC 398, the maxim *non cogit ad impossibilia* was applied in the context of the applicability of a mandatory provision of the Registration Act, 1908, as follows:

"6. We have to bear in mind two maxims of equity which are well settled, namely, actus curiae neminem gravabit —An act of the Court shall prejudice no man. In Broom's Legal Maxims, 10th Edn., 1939 at page 73 this maxim is explained that this maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is lex non cogit ad impossibilia (Broom's Legal Maxims — page 162) — The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.

7. In this case indisputably during the period from 26-71978 to December 1982 there was subsisting injunction preventing the arbitrators from taking any steps. Furthermore, as noted before the award was in the custody of the court, that is to say, 28-1-1978 till the return of the award to the arbitrators on 24-11-1983, arbitrators or the parties could not have presented the award for its registration during that time. The award as we have noted before was made on 28-11-1977 and before the expiry of the four months from 28-11-1977, the award was filed in the court pursuant to the order of the court. It was argued that the order made by the court directing the arbitrators to keep the award in the custody of the court was wrong and without jurisdiction, but no arbitrator could be compelled to disobey the order of the court and if in compliance or obedience with court of doubtful jurisdiction, he could not take back the award from the custody of the court to take any further steps for its registration then it cannot be said that he has failed to get the award registered as the law required. The aforesaid two legal maxims — the law does not compel a man to do that which he cannot possibly perform and an act of the court shall prejudice no man would, apply with full vigour in the facts of this case and if that is the position then

the award as we have noted before was presented before the Sub-Registrar, Arambagh on 25-11-1983 the very next one day of getting possession of the award from the court. The Sub-Registrar pursuant to the order of the High Court on 24-6-1985 found that the award was presented within time as the period during which the judicial proceedings were pending that is to say, from 28-1-1978 to 24-11-1983 should be excluded in view of the principle laid down in Section 15 of the Limitation Act, 1963. The High Court, therefore, in our opinion, was wrong in holding that the only period which should be excluded was from 26-7-1978 till 20-12-1982. We are unable to accept this position. 26-7-1978 was the date of the order of the learned Munsif directing maintenance of status quo and 20-12-1982 was the date when the interim injunction was vacated, but still the award was in the custody of the court and there is ample evidence as it would appear from the narration of events hereinbefore made that the arbitrators had tried to obtain the custody of the award which the court declined to give to them."

48. These maxims have also been applied to tenancy legislation- see M/s B.P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmick and Anr. (1987) 2 SCC 401 (at paragraph 12), and have also been applied to relieve authorities of fulfilling their obligation to allot plots when such plots have been found to be un-allottable, owing to the contravention of Central statutes - see Hira Tikoo v. U.T., Chandigarh and Ors. (2004) 6 SCC 765 (at paragraphs 23 and 24).

49. On an application of the aforesaid maxims to the present case, it is clear that though Section 65B(4) is mandatory, yet, on the facts of this case, the Respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third-party over whom the Respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

50.We may hasten to add that Section 65B does not speak of the *stage* at which such certificate must be furnished to the Court. In Anvar P.V. (supra), this Court did observe that such certificate must accompany the electronic record when the same is

produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, 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 do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

51 In a recent judgment, a Division Bench of this Court in State of Karnataka v. M.R. Hiremath (2019) 7 SCC 515, after referring to Anvar

P.V. (supra) held:

"16. The same view has been reiterated by a two- Judge Bench of this Court in *Union of India* v. *Ravindra* V *Desai* [(2018) 16 SCC 273]. The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in *Sonu* v. *State of Haryana* [(2017) 8 SCC 570], in which it was held:

"32. *... The crucial test, as affirmed by this Court, is* whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency."

17. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage

when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."

52. It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/ final report have to be given to the accused. Section 207 of the CrPC, which reads as follows, is mandatory[6]. Therefore, the electronic evidence, i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of

such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement.

6 *"**Section 207. Supply to the accused of copy of police report and other documents.-***

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of costs, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded

to the Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

53. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial. As recognised by this Court in Central Bureau of Investigation v. R.S. Pai (2002) 5 SCC 82,

the only exception to this general rule is if the prosecution had 'mistakenly' not filed a document, the said document can be allowed to be placed on record. The Court held as follows:

"7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court."

54. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in

respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 of the CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the Court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the Court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case - discretion to be exercised by the Court in accordance with law.

55. The High Court of Rajasthan in Paras Jain v. State of Rajasthan 2015 SCC OnLine Raj 8331, decided a preliminary objection that was raised on the applicability of Section 65B to the facts of the case.

The preliminary objection raised was framed as follows:

"3. (i) Whether transcriptions of conversations and for that matter CDs of the same filed alongwith the charge-sheet are not admissible in evidence even at this stage of the proceedings as

certificate as required u/Sec. 65-B of the Evidence Act was not obtained at the time of procurement of said CDs from the concerned service provider and it was not produced alongwith charge-sheet in the prescribed form and such certificate cannot be filed subsequently."

After referring to Anvar P.V. (supra), the High Court held:

"15. Although, it has been observed by Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced along with the charge-sheet and if it is not produced along with the charge-sheet, doors of the Court are completely shut and it cannot be produced subsequently in any circumstance. Section 65-B of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the Court. One of the principal

issues arising for consideration in the above case before Hon'ble Court was the nature and manner of admission of electronic records.

16. From the facts of the above case it is revealed that the election of the respondent to the legislative assembly of the State of Kerala was challenged by the appellant-Shri Anwar P.V. by way of an election petition before the High Court of Kerala and it was dismissed vide order dated 16.11.2011 by the High Court and that order was challenged by the appellant before Hon'ble Supreme Court. It appears that the election was challenged on the ground of corrupt practices committed by the respondent and in support thereof some CDs were produced alongwith the election petition, but even during the course of trial certificate as required under Section 65-B of the Evidence Act was not produced and the question of admissibility of the CDs as secondary evidence in the form of electronic record in absence of requisite certificate was considered and it was held that such electronic record is not admissible in evidence in absence of the certificate. It is clear from the facts of the case that the question

of stage at which such electronic record is to be produced was not before the Hon'ble Court.

17. It is to be noted that it has been clarified by Hon'ble Court that observations made by it are in respect of secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act and if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance with the conditions in Section 65-B of the Evidence Act.

18. To consider the issue raised on behalf of the petitioners in a proper manner, I pose a question to me whether an evidence and more particularly evidence in the form of a document not produced alongwith the charge- sheet cannot be produced subsequently in any circumstances. My answer to the question is in negative and in my opinion such evidence can be produced subsequently also as it is well settled legal position that the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record.

19. Relevant portion of sub-sec. (1) of Sec. 91 Cr.P.C. provides that whenever any Court considers that the production of any document is necessary or desirable for the purposes of any trial under the Code by or before such Court, such Court may issue a summons to the person in whose possession or power such document is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons. Thus, a wide discretion has been conferred on the Court enabling it during the course of trial to issue summons to a person in whose possession or power a document is believed to be requiring him to produce before it, if the Court considers that the production of such document is necessary or desirable for the purposes of such trial. Such power can be exercised by the Court at any stage of the proceedings before judgment is delivered and the Court must exercise the power if the production of such document is necessary or desirable for the proper decision in the case. It cannot be disputed that such summons can also be issued to the complainant/informer/victim of the case on whose instance the FIR was registered. In my considered view when

under this provision Court has been empowered to issue summons for the producment of document, there can be no bar for the Court to permit a document to be taken on record if it is already before it and the Court finds that it is necessary for the proper disposal of the case irrespective of the fact that it was not filed along with the charge-sheet.

I am of the further view that it is the duty of the Court to take all steps necessary for the production of such a document before it.

20. As per Sec. 311 Cr.P.C., any Court may, at any stage of any trial under the Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Under this provision also wide discretion has been conferred upon the Court to exercise its power and paramount consideration is just decision of the case. In my opinion under this provision it is permissible for the Court even to order production of a document before it if

it is essential for the just decision of the case.

21. As per Section 173(8) Cr.P.C. carrying out a further investigation and collection of additional evidence even after filing of charge-sheet is a statutory right of the police and for that prior permission of the Magistrate is not required. If during the course of such further investigation additional evidence, either oral or documentary, is collected by the Police, the same can be produced before the Court in the form of supplementary charge-sheet. The prime consideration for further investigation and collection of additional evidence is to arrive at the truth and to do real and substantial justice. The material collected during further investigation cannot be rejected only because it has been filed at the stage of the trial.

22. As per Section 231 Cr.P.C., the prosecution is entitled to produce any person as a witness even though such person is not named in the charge-sheet.

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the

opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured alongwith the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced alongwith the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form."

56. In Kundan Singh (supra), a Division Bench of the Delhi High Court held: "50. *Anwar P.V.* (supra) partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in *Navjot Sandhu* (supra), holding that Section 65B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65B(4) is mandatory. *Anwar P.V.* (supra) does not state or hold that the said certificate cannot be produced in

exercise of powers of the trial court under Section 311 Cr.P.C or, at the appellate stage under Section 391 Cr.P.C. Evidence Act is a procedural law and in view of the pronouncement in *Anwar P.V.* (supra) partly overruling *Navjot Sandhu* (supra), the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65B."

57. Subject to the caveat laid down in paragraphs 50 and 54 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.

58. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a 'responsible official position' in relation to the operation of the

relevant device, as also the person who may otherwise be in the 'management of relevant activities' spoken of in Sub-section (4) of Section 65B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief" (Obviously, the word "and" between knowledge and belief in Section 65B(4) must be read as "or", as a person cannot testify to the best of his knowledge *and* belief at the same time).

59. We may reiterate, therefore, that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly "clarified" in Shafhi Mohammed (supra). Oral evidence in the place of such certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D 426, which has been followed in a number of the

judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.

60. In view of the above, the decision of the Madras High Court in K. Ramajyam (supra), which states that evidence *aliunde* can be given through a person who was in-charge of a computer device in the place of the requisite certificate under Section 65B(4) of the Evidence Act is also an incorrect statement of the law and is, accordingly, overruled.

61. While on the subject, it is relevant to note that the Department of Telecommunication's license conditions [i.e. under the 'License for Provision of Unified Access Services' framed in 2007, as also the subsequent 'License Agreement for Unified License' and the 'License Agreement for provision of internet service'] generally oblige internet service providers and providers of mobile telephony to preserve and maintain electronic call records and records of logs of internet users for a

limited duration of one year[7]. Therefore, if the police or other individuals (interested, or party to any form of litigation) fail to secure those records - or secure the records but fail to secure the certificate - within that period, the production of a post-dated certificate (i.e. one issued after commencement of the trial) would in all probability render the data unverifiable. This places the accused in a perilous position, as, in the event the accused wishes to challenge the genuineness of this certificate by seeking the opinion of the Examiner of Electronic Evidence under Section 45A of the Evidence Act, the electronic record (i.e. the data as to call logs in the computer of the service provider) may be missing.

62. To obviate this, general directions are issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the concerned period (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period. Concerned parties can then summon such records at the stage of defence evidence, or in the event such data is required to cross-examine a particular witness.

This direction shall be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licenses, or under Section 67C of the Information Technology Act, which reads as follows:

"67C. Preservation and retention of information by intermediaries.-

(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine."

63. It is also useful, in this context, to recollect that on 23 April 2016, the conference of the Chief Justices of the High Courts, chaired by the Chief Justice of India, resolved to create a uniform platform and guidelines governing the reception of electronic evidence. The Chief Justices of Punjab and Haryana and Delhi

were required to constitute a committee to "frame Draft Rules to serve as model for adoption by High Courts". A five-Judge Committee was accordingly constituted on 28 July, 2018[8]. After extensive deliberations, and meetings with several police, investigative and other agencies, the Committee finalised its report in November 2018. The report suggested comprehensive guidelines, and recommended their adoption for use in courts, across several categories of proceedings. The report also contained Draft Rules for the Reception, Retrieval, Authentication and Preservation of Electronic Records. In the opinion of the Court, these Draft Rules should be examined by the concerned authorities, with the object of giving them statutory force, to guide courts in regard to preservation and retrieval of electronic evidence.

64. We turn now to the facts of the case before us. In the present case, by the impugned judgment dated 24.11.2017, Election Petition 6/2014 and Election Petition 9/2014 have been allowed and partly allowed respectively, the election of the RC being

declared to be void under Section 100 of the Representation of the People Act, 1951, *inter alia,* on the ground that as nomination papers at serial numbers 43 and 44 were not presented by the RC before 3.00 p.m. on 27.09.2014, such nomination papers were improperly accepted.

65. However, by an order dated 08.12.2017, this Court admitted the Election Appeal of the Appellant, and stayed the impugned judgment and order.

66. We have heard this matter after the five year Legislative Assembly term is over in November 2019. This being the case, ordinarily, it would be unnecessary to decide on the merits of the case before us, as the term of the Legislative Assembly is over. However, having read the impugned judgment, it is clear that the learned Single Judge was anguished by the fact that the Election Commission authorities behaved in a partisan manner by openly favouring the Appellant. Despite the fact that the reason given of "substantial compliance" with Section 65B(4) in the absence of

the requisite certificate being incorrect in law, yet, considering that the Respondent had done everything in his power to obtain the requisite certificate from the appropriate authorities, including directions from the Court to produce the requisite certificate, no such certificate was forthcoming. The horse was directed to be taken to the water to drink - but it refused to drink, leading to the consequence pointed out in paragraph 49 of this judgment (supra).

67. Even otherwise, apart from evidence contained in electronic form, the High court arrived at the following conclusion:

"48. The evidence in cross examination of Smt. Mutha shows that when Labade was sent to the passage for collecting nomination forms, she continued to accept the nomination forms directly from intending candidates and their proposers in her office. Her evidence shows that on 27.9.2014 the last nomination form which was directly presented to her was form No. 38 of Anand Mhaske. The time of receipt of this form was mentioned in the register of nomination forms as 2.55 p.m. In respect of subsequent

nomination forms from Sr. Nos. 39 to 64, the time of acceptance is mentioned as 3.00 p.m. Smt. Mutha admits that the candidates of nomination form Nos. 39 to 64 (form No. 64 was the last form filed) were not present before her physically at 3.00 p.m. At the cost of repetition, it needs to be mentioned here that form numbers of RC are 43 and 44. The oral evidence and the record like register of nomination forms does not show that form Nos. 43 and 44 were presented to RO at 2.20 p.m. of 27.9.2014. As per the evidence of Smt. Mutha and the record, one Arvind Chavan, a candidate having form Nos. 33, 34 and 35 was present before her between 2.15 p.m. and 2.30 p.m. In nomination form register, there is no entry showing that any nomination form was received at 2.20 p.m. Form Nos. 36 and 37 of Sunil Khare were entered in the register at 2.40 p.m. Thus, according to Smt. Mutha, form No. 38, which was accepted by her directly from the candidate was tendered to her at 2.55 p.m. of 27.9.2014 and after that she had done preliminary examination of form No. 38 and check list was given by her to that candidate. Thus, it is not possible that form Nos. 43 and 44 were directly handed over to

Smt. Mutha by RC at 2.20 p.m. or even at 3.00 p.m. of 27.9.2014.

50. Smt. Mutha (PW 2) did not show the time as 2.20 p.m. of handing over the check list to RC and she showed the time as 3.00 p.m., but this time was shown in respect of all forms starting from Sr. Nos. 39 to 64. Thus, substantive evidence of Smt. Mutha and the aforesaid record falsifies the contention of the RC made in the pleading that he had handed over the nomination forms (form Nos. 43 and 44) directly to RO prior to 3.00 p.m., at 2.20 p.m."

68. Thus, it is clear that apart from the evidence in the form of electronic record, other evidence was also relied upon to arrive at the same conclusion. The High Court's judgment therefore cannot be faulted.

69. Shri Adsure, however, attacked the impugned judgment when it held that the improper acceptance of the nomination form of the RC himself being involved in the matter, no further pleadings and particulars on whether the election is "materially

affected" were required, as it can be assumed that if such plea is accepted, the election would be materially affected, as the election would then be set aside. He cited a Division Bench judgment of this Court in Rajendra Kumar Meshram v. Vanshmani Prasad Verma (2016) 10 SCC 715, wherein an election petition was filed against the appellant, *inter alia*, on the ground that as the appellant – the returned candidate - was a Government servant, his nomination had been improperly accepted. The Court held that the requirement of Section 100(1)(d) of the Representation of People Act, 1951, being that the election can be set aside only if such improper acceptance of the nomination has "materially affected" the result of the election, and there being no pleading or evidence to this effect, the election petition must fail. This Court stated:

"9. As Issues 1 and 2 extracted above, have been answered in favour of the returned candidate and there is no cross-appeal, it is only the remaining issues that survive for consideration. All the said issues centre round the question of improper acceptance of

the nomination form of the returned candidate. In this regard, Issue 6 which raises the question of material effect of the improper acceptance of nomination of the returned candidate on the result of the election may be specifically noticed.

10. Under Section 100(1)(d), an election is liable to be declared void on the ground of improper acceptance of a nomination if such improper acceptance of the nomination has materially affected the result of the election. This is in distinction to what is contained in Section 100(1)(c) i.e. improper rejection of a nomination which itself is a sufficient ground for invalidating the election without any further requirement of proof of material effect of such rejection on the result of the election. The above distinction must be kept in mind. Proceeding on the said basis, we find that the High Court did not endeavour to go into the further question that would be required to be determined even if it is assumed that the appellant returned candidate had not filed the electoral roll or a certified copy thereof and, therefore, had not complied with the mandatory provisions of Section 33(5) of the 1951 Act.

11. In other words, before setting aside the election on the above

ground, the High Court ought to have carried out a further exercise, namely, to find out whether the improper acceptance of the nomination had materially affected the result of the election. This has not been done notwithstanding Issue 6 framed which is specifically to the above effect. The High Court having failed to determine the said issue i.e. Issue 6, naturally, it was not empowered to declare the election of the appellant returned candidate as void even if we are to assume that the acceptance of the nomination of the returned candidate was improper."

70. On the other hand, Ms. Meenakshi Arora cited a Division Bench judgment in Mairembam Prithviraj v. Pukhrem Sharatchandra Singh (2017) 2 SCC 487. In this judgment, several earlier judgments of this Court were cited on the legal effect of not pleading or proving that the election had been "materially affected" by the improper acceptance of a nomination under Section 100(1)(d)(i) of the Representation of People Act, 1951. After referring to Durai Muthuswami v. N. Nachiappan and Ors. 1973(2) SCC 45 and Jagjit Singh v. Dharam Pal Singh 1995 Supp (1) SCC 422, this Court then referred to a three-Judge

Bench judgment in Vashist Narain Sharma v. Dev Chandra 1955 (1) SCR 509 as under:

"25. It was held by this Court in *Vashist Narain Sharma* v. *Dev Chandra* [(1955) 1 SCR 509] as under:

"9. The learned counsel for the respondents concedes that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the petitioner but he argues that the question can arise in one of three ways:

(1) where the candidate whose nomination was improperly accepted had secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes,

(2) where the person referred to above secured more votes, and

(3) where the person whose nomination has been improperly accepted is the returned candidate himself.

It is agreed that in the first case the result of the election is not

materially affected because if all the wasted votes are added to the votes of the candidate securing the highest votes, it will make no difference to the result and the returned candidate will retain the seat. In the other two cases itis contended that the result is materially *affected.* So far as the third case is concerned it may be readily conceded that such would be the conclusion*..."*

This Court then concluded:

"26. Mere finding that there has been an improper acceptance of the nomination is not sufficient for a declaration that the election is void under Section 100(1).

(d). There has to be further pleading and proof that the result of the election of the returned candidate was materially affected. But, there would be no necessity of any proof in the event of the nomination of a returned candidate being declared as having been improperly accepted, especially in a case where there are only two candidates in the fray. If the returned candidate's nomination is declared to have been improperly accepted it would mean that he could not have contested the election and that the result of the election of the returned candidate was materially

affected need not be proved further...”

71. None of the earlier judgments of this Court referred to in Mairembam Prithviraj (supra) have been adverted to in Rajendra Kumar Meshram (supra) cited by Shri Adsure. In particular, the judgment of three learned Judges of this Court in Vashist Narain Sharma (supra) has specifically held that where the person whose nomination has been improperly accepted is the returned candidate himself, it may be readily conceded that the conclusion has to be that the result of the election would be “materially affected”, without there being any necessity to plead and prove the same. The judgment in Rajendra Kumar Meshram (supra), not having referred to these earlier judgments of a larger strength binding upon it, cannot be said to have declared the law correctly. As a result thereof, the impugned judgment of the High Court is right in its conclusion on this point also.

72. The reference is thus answered by stating that:

(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act.

The judgment in Tomaso Bruno (supra), being *per incuriam,* does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the judgment dated 03.04.2018 reported as (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.

(b) The clarification referred to above is that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which

reads as "...if *an electronic record as such is used as primary evidence under Section 62 of the Evidence Act..."* is thus clarified; it is to be read without the words *"under Section 62 of the Evidence Act,..."* With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.

(c) The general directions issued in paragraph 62 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

(d) Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for

the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016.

73. These appeals are dismissed with costs of INR One Lakh each to be paid by Shri Arjun Panditrao Khotkar (i.e. the Appellant in C.A. Nos. 20825-20826 of 2017) to both Shri Kailash Kushanrao Gorantyal and Shri Vijay Chaudhary.

(R. F. Nariman)

(S. Ravindra Bhat)

(V. Ramasubramanian)

New Delhi.

14th July, 2020.

V. Ramasubramanian.J

REPORTABLE

1. While I am entirely in agreement with the opinion penned by R. F. Nariman, J. I also wish to add a few lines about (i) the reasons for the acrimony behind Section 65B of the Indian Evidence Act, 1872 (hereinafter "Evidence Act") (ii) how even with the existing rules of procedure, the courts fared well, without any legislative interference, while dealing with evidence in analogue form, and (iii) how after machines in analogue form gave way to machines in electronic form, certain jurisdictions of the world changed their legal landscape, over a period of time, by suitably amending the law, to avoid confusions and conflicts.

1. Reasons for the acrimony behind Section 65B

2. Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as (i) admissibility (ii) relevancy and (iii) proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the

sequence in which evidence has to go through these three check posts, changes. Generally and theoretically, admissibility depends on relevancy. Under Section 136 of the Evidence Act, relevancy must be established before admissibility can be dealt with. Therefore if we go by Section 136, a party should first show relevancy, making it the first check post and admissibility the second one. But some documents, such as those indicated in Section 68 of the Evidence Act, which pass the first check post of relevancy and the second check post of admissibility may be of no value unless the attesting witness is examined. Proof of execution of such documents, in a manner established by law, thus constitutes the third check post. Here again, proof of execution stands on a different footing than proof of contents.

3. It must also be noted that whatever is relevant may not always be admissible, if the law imposes certain conditions. For instance, a document, whose contents are relevant, may not be admissible, if it is a document

requiring stamping and registration, but had not been duly stamped and registered. In other words, if admissibility is the cart, relevancy is the horse, under Section 136. But certain provisions of law place the cart before the horse and Section 65B appears to be one of them.

4. Section 136 which confers a discretion upon the Judge to decide as to the admissibility of evidence reads as follows:

136. Judge to decide as to admissibility of evidence. —When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant:, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first- mentioned, unless the party

undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

5. There are three parts to Section 136. The first part deals with the discretion of the Judge to admit the evidence, if he thinks that the fact sought to be proved is relevant. The second part of Section 136 states that if the fact proposed to be proved is one, of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned. But this rule is subject to a small concession, namely, that **if the party undertakes to produce proof of the last mentioned fact later and the Court is satisfied**

about such undertaking, the Court may proceed to admit evidence of the first mentioned fact. The third part of Section 136 deals with the relevancy of one alleged fact, which depends upon another alleged fact being first proved. The third part of Section 136 has no relevance for our present purpose.

6. Illustration (b) under Section 136 provides an easy example of the second part of Section 136. Illustration (b) reads as follows:

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

7. What is laid down in Section 65B as a precondition for the admission of an electronic record, resembles what is provided in the second part of Section 136. For example, if a fact is sought to be proved through the contents of an

electronic record (or information contained in an electronic record), the Judge is first required to see if it is relevant, if the first part of Section 136 is taken to be applicable.

8. But Section 65B makes the admissibility of the information contained in the electronic record subject to certain conditions, including certification. The certification is for the purpose of proving that the information which constitutes the computer output was produced by a computer which was used regularly to store or process information and that the information so derived was regularly fed into the computer in the ordinary course of the said activities.

9. In other words, if we go by the requirements of Section 136, the computer output becomes admissible if the fact sought to be proved is relevant. But such a fact is admissible only upon proof of some other fact namely, that it was extracted from a computer used regularly etc. In simple terms, **what is contained in the computer**

output can be equated to the first mentioned fact and the requirement of a certification can be equated to the last mentioned fact, referred to in the second part of Section 136 read with Illustration (b) thereunder.

10. But Section 65B(1) starts with a non-obstante clause excluding the application of the other provisions and it makes the certification, a precondition for admissibility. While doing so, it does not talk about relevancy. In a way, Sections 65A and 65B, if read together, mix-up both proof and admissibility, but not talk about relevancy. Section 65A refers to the procedure prescribed in Section 65B, **for the purpose of proving the contents of electronic records,** but Section 65B speaks entirely about **the preconditions for admissibility**. As a result, Section 65B places admissibility as the first or the outermost check post, capable of turning away even at the border, any electronic evidence, without any enquiry, if the conditions stipulated therein are not fulfilled.

11. The placement by Section 65B, of admissibility as the first or the border check post, coupled with the fact that a number of 'computer systems' (as defined in Section 2(l) of the Information Technology Act, 2000) owned by different individuals, may get involved in the production of an electronic record, with the 'originator' (as defined in Section 2(za) of the Information Technology Act, 2000) being different from the recipients or the sharers, has created lot of acrimony behind Section 65B, which is evident from the judicial opinion swinging like a pendulum.

11. How the courts dealt with evidence in analogue form without legislative interference and the shift

12. It is a matter of fact and record that courts all over the world were quick to adapt themselves to evidence in analogue form, within the framework of archaic, centuries old rules of evidence. It was not as if evidence in analogue form was incapable of being manipulated. But the courts managed the show well by applying time tested rules for

sifting the actual from the manipulated.

13. It is no doubt true that the felicity with which courts adapted themselves to appreciating evidence in analogue form was primarily due to the fact that in analogue technology, one is able to see and/ or perceive something that is happening. In analogue technology, a wave is recorded or used in its original form. When someone speaks or sings, a signal is taken directly by the microphone and laid onto a tape, if we take the example of an analogue tape recorder. Both, the wave from the microphone and the wave on the tape, are analogue and the wave on the tape can be read, amplified and sent to a speaker to produce the sound. In digital technology, the analogue wave is sampled at some interval and then turned into numbers that are stored in a digital device. Therefore, what are stored, are in terms of numbers and they are, in turn, converted into voltage waves to produce what was stored.

14. The difference between something in analogue form and

the same thing in digital form and the reason why digital format throws more challenges, was presented pithily in an article titled **'Electronic evidence and the meaning of "original"',**[385] by Stephen Mason (Barrister and recognised authority on electronic signatures and electronic evidence). Taking the example of a photograph in both types of form, the learned author says the following:

For instance, a photograph taken with an analogue camera (that is, a camera with a film) can only remain a single object. It cannot be merged into other photographs, and split off again. It remains a physical object. A photograph taken with a digital camera differs markedly. The digital object, made up of a series of zeros and the number one, can be, and frequently is, manipulated and altered (especially in fashion magazines and for advertisements). Things can be taken out and put

385 ***Stephen Mason,*** **Electronic evidence and the meaning of "original",** ***79 Amicus Curiae*** 26 (2009)

in to the image, in the same way the water droplets can merge and form a single, larger droplet. The new, manipulated digital image can also be divided back into its constituent parts.

Herein lies the interesting point: when three droplets of water fuse and then separate into three droplets, it is to be questioned whether the three droplets that merge from the bigger droplet were the identical droplets that existed before they merged. In the same way, consider a digital object that has been manipulated and added to, and the process is then reversed. The original object that was used remains (unless it was never saved independently, and the changes made to the image were saved in the original file), but another object, with the identical image (or near identical, depending on the system software and application software) now exists. Conceptually, it is possible to argue that the two digital images are different: one is the original, the other a copy of the original that was manipulated and returned to its original state (whatever "original" means). But both images are

identical, apart from some additional meta data that might, or might not be conclusive. However, it is apparent that the images, f viewed together, are identical - will be identical, and the viewer will not be able to determine which is the original, and which image was manipulated. In this respect, the digital images are no different from the droplets of rain that fall, merge, then divide: there is no telling whether the droplets that split are identical to the droplets that came together to form the larger droplet.

15. That courts did not have a problem with the evidence in analogue form is established by several judicial precedents, in U.K., which were also followed by our courts. A device used to clandestinely record a conversation between two individuals was allowed in **Harry Parker vs. Mason**[386] in proving fraud on the part of the plaintiff. While **Harry Parker** was a civil proceeding, the principle laid down therein found acceptance in a criminal trial in **R. vs. Burr and**

386 [1940] 2 KB 590

Sullivan.[387] The High Court of Judiciary in Scotland admitted in evidence, the tape record of a conversation between the complainant and a black mailer, in **Hopes and Lavery vs. H. M. Advocate.**[388] A conversation recorded in police cell overheard without any deception, beyond setting up a tape recorder without warning, was admitted in evidence in **R. vs. Mills**.[389]

16. ***Then came*** *R. vs. Maqsud Ali*[390] ***where Marshall J. drew an analogy between tape-recordings and photographs and held that*** *just as evidence of things seen through telescopes or binoculars have been admitted, despite the fact that those things could not be picked up by the naked eye, the devices used for recording conversations could also be admitted, provided the accuracy of the recording can be proved and the voices recorded properly identified.*

387 [1956] Crim LR 442

388 [1960] Crim LR 566

389 [1962] 3 All ER 298

390 [1965] 2 All ER 464

17. ***Following the above precedents, this Court also held in*** *S. Pratap Singh vs. State of Punjab,*[391] *Yusaffalli Esmail Nagree vs. State of Maharashtra,*[392] *N. Sri Rama Reddy vs. V. V. Giri,*[393] *R.M. Malkani vs. State of* ***Maharashtra,***[394] *Ziyauddin Burhanuddin Bukhari vs. Brjmohan Ramdass Mehra,*[395] *Ram Singh vs. Col. Ram* ***Singh,***[396] *Tukaram S. Dighole vs. Manikrao Shivaji Kokate,*[397] ***that tape records of conversations and speeches are admissible in evidence under the Indian Evidence Act, subject to certain conditions. In*** *Ziyauddin Burhanuddin Bukhari* ***and*** *Tukaram S. Dighole,* ***this Court further held that tape records constitute "document" within the meaning of the expression under Section 3 of the Evidence Act. Thus, without looking up to the law makers to come up with necessary amendments***

391 (1964) 4 SCR 753

392 (1967) 3 SCR 720

393 AIR 1972 SC 1162

394 AIR 1973 SC 157

395 (1976) 2 SCC 17

396 AIR 1986 SC 3

397 (2010) 4 SCC 329

from time to time, the courts themselves developed certain rules, over a period of time, to test the authenticity of these documents in analogue form and these rules have in fact, worked well.

18. *There was also an important question that bothered the courts while dealing with evidence in analogue form. It was as to whether such evidence was direct or hearsay. In* ***The Statute of Liberty, Sapporo Maru M/S (Owners) vs. Steam Tanker Statute of Liberty (Owners)****,*[398] *the film recording of a radar set of echoes of ships within its range was held to be real evidence. The court opined that there was no distinction between a photographer operating a camera manually and the observations of a barometer operator or its equivalent operation by a recording mechanism. The Judge rejected the contention that the evidence was hearsay.*

19. *But when it comes to a computer output, one of the earliest of cases where the Court of Appeal had to deal with evidence in the form of a printout from a computer was in* ***R. vs. Pettigrew.***[399] *In that*

398 [1968] 2 All ER 195

399 [1980] 71 Cr. App. R. 39

case, the printout from a computer operated by an employee of the Bank of England was held to be hearsay. But the academic opinion about the correctness of the decision was sharply divided. While Professor Smith[400] considered the evidence in this case as direct and not hearsay, Professor Tapper[401] took the view that the printout was partly hearsay and partly not. Professor Seng[402] thought that both views were plausible.

20. *But the underlying theory on the basis of which academicians critiqued the above judgment is that wherever the production of the output was made possible without human intervention, the evidence should be taken as direct. This is how the position was explained in* ***Castle vs. Cross,***[403] *in which the printout from the Intoximeter was held to be direct and not hearsay, on the ground that the breath alcohol value in the printout comprised information*

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400 Professor Smith was a well-known authority on criminal law and law of evidence; J.

C. Smith, The admissibility of statements by computer, Crim LR 387, 388 (1981).

401 Professor Tapper is a well-known authority on law of evidence; Colin Tapper, *Reform*

of the law of evidence in relation to the output from computers, 3 IntlJ L & Info Tech 87 (1995).

402 Professor Seng is an Associate Professor at the National University of Singapore;

Daniel K B Seng, *Computer output as evidence*, Sing JLS 139 (1997).

403 [1984] 1 WLR 1372

produced by the Intoximeter without the data being processed through a human brain.

21. ***In*** *R vs. Robson Mitchell and Richards,*[404] ***a printout of telephone calls made on a mobile telephone was taken as evidence of the calls made and received in association with the number. The Court held*** "*where a machine observes a fact and records it, that record states a fact. It is evidence of what the machine recorded and this was printed out. The record was not the fact but the evidence of the fact".*

22. *But the facility of operating in anonymity in the cyber space, has made electronic records more prone to manipulation and consequently to a greater degree of suspicion. Therefore, law makers interfered, sometimes making things easy for courts and sometimes creating a lot of confusion. But over a period of time, certain jurisdictions have come up with reasonably good solutions. Let us now take a look at them.*

404 [1991] Crim LR 360

III. **Legislative developments in U.S.A., U.K. and Canada on the admissibility of electronic records**

POSITION IN USA

23. The Federal Rules of Evidence (FRE) of the United States of America as amended with effect from 01.12.2017 recognise the availability of more than one option to a person seeking to produce an electronic record. Under the amended rules, a person can follow either the traditional route under Rule 901 or the route of self-authentication under Rule 902 whereunder a certificate of authenticity will elevate its status. Rules 901 and 902 of FRE read as follows:

24. *Rule 901. Authenticating or Identifying Evidence.*

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only —not a complete list—of evidence that satisfies the

requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Non expert Opinion About Handwriting. A non expert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including sef-identfication, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(1) Evidence About a Process or System Evidence describing a process or system and showing that it produces an accurate result.

(7) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court

Rule 902. *Evidence That Is Self-Authenticating.*

The following items of evidence are self- authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal

Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and a signature purporting to be an execution or attestation.

(B) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if: it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent:—that the signer has the official capacity and that the signature is genuine.

(C) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness

relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(D) If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(1) order that it be treated as presumptively authentic without final certification; or

(2) allow it to be evidenced by an attested summary with or without final certification.

as correct

(E) Certified Copies of Public Records. A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified by:

(1) the custodian or another person authorized to

make the certification;

(2) or a certificate that complies with Rule 902(1), or a federal statute, or a rule prescribed by the Supreme Court.

(F) Official Publications.

(1) A book:, pamphlet, or other publication purporting to be issued by a public authority.

(2) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(3) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(G) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(H) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related

documents, to the extent allowed by general commercial law.

(I) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(J) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court;. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record.—and must make the record and certification available for inspection —so that the party has a fair opportunity to challenge them.

(K) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than

complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed.. The proponent must also meet the notice requirements of Rule 902(11).

(L) Certified Record.s Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(M) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

25. An important decision in the American jurisprudence on this issue was delivered by Chief Magistrate Judge of District of Maryland in **Lorraine vs. Markel American Insurance Co.**[405] In this case, Paul Grimm, J. while dealing with a challenge to an arbitrator's decision in an insurance dispute, dealt with the issue whether emails discussing the insurance policy in question, were admissible as evidence. The Court, while extending the applicability of Rules 901 and 902 of FRE to electronic evidence, laid down a broad test for admissibility of electronically stored information.[406] This decision was rendered in 2007 and the FRE were amended in 2017.

26. Sub-rules (13) and (14) were incorporated in Rule 902 under the amendment of the year 2017. Until then, a

405 241 FRD 534 (2007)

406 ***Paragraph 2: "Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered(1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901 (a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001-1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance."***

person seeking to produce electronic records had to fall back mostly upon Rule 901 (except in few cases covered by sub-rules (11) and (12) of Rule 902). It means that the benefit of self-authentication was not available until then [until the advent of sub-rules (13) and (14), except in cases covered by sub-rules (11) and (12)]. Nevertheless, the introduction of sub-rules (13) and (14) in Rule 902 did not completely exclude the application of the general provisions of Rule 901.

27. Rule 901 applies to all evidence across the board. It is a general provision. But Rule 902 is a special provision dealing with evidence that is self-authenticating. Records generated by an electronic process or system and data copied from an electronic device, storage medium or file, are included in sub-rules (13) and (14) of Rule 902 of the Federal Rules of Evidence.

28. But FRE 902 does not exclude the application of FRE 901. It is only when a party seeks to invoke the benefit of self-authentication that Rule 902 applies. If a party chooses

not to claim the benefit of self-authentication, he is free to come under Rule 901, even if the evidence sought to be adduced is of an electronically stored information (ESI).

29. In an article titled 'E-Discovery: Authenticating Common Types of ESI Chart', authored by Paul W. Grimm (the Judge who delivered the verdict in **Lorraine)** and co-authored by Gregory P. Joseph and published by Thomson Reuters (2017), the learned authors have given a snapshot of the different methods of authentication of various types of ESI (electronically stored information). In a subsequent article (2018) titled 'Admissibility of Electronic Evidence' published under the caption 'Grimm-Brady Chart' (referring to Paul W. Grimm and Kevin F. Brady) on the website "complexdiscovery.com", a condensed chart is providedwhich throws light on the different methods of authentication of ESI. The chart is reproduced in the form of a table, with particular reference to the relevant sub-rules of Rules 901 and 902

of the Federal Rules of Evidence as follows**:**

S. No.	Type of ESI	Potential Authentication Methods
1	**Email, Text Messages, and Instant Messages**	**■ Witness with personal knowledge (901(b)(1))** **■ Expert testimony or comparison with authenticated examples (901(b)(3))** **■ Distinctive characteristics including circumstantial evidence (901(b)(4))** **■ System or process capable of proving reliable and dependable result (901(b)(9))** **■ Trade inscriptions (902(7))** **■ Certified copies of business record (902(11))** **■ Certified records generated by an electronic process or system (902(13))** **■ Certified data copied from an electronic device, storage medium, or file (902(14))**
2	**Chat Room Postings, Blogs, Wikis, and Other Social Media Conversations**	**■ Witness with personal knowledge (901(b)(1))** **■ Expert testimony or comparison with authenticated examples Distinctive characteristics including circumstantial evidence (901(b)(4))** **■ System or process capable of proving reliable and dependable result (901(b)(9))** **■ Official publications (902(5))**

		■ **Newspapers and periodicals (902(6))** ■ **Certified records generated by an electronic process or system (902(13))** ■ **Certified data copied from an electronic device, storage medium, or file (902(14))**
3	**Social Media Sites (Face-book, Linked-In, Twitter, Instagram, and Snapchat)**	■ **Witness with personal knowledge (901(b)(1))** ■ **Expert testimony or comparison with authenticated examples (901(b)(3))** ■ **Distinctive characteristics including circumstantial evidence (901(b)(4))** ■ **Public records (901(b)(7))** ■ **System or process capable of proving reliable and dependable result (901(b)(9))** ■ **Official publications (902(5))** ■ **Certified records generated by an electronic process or system (902(13))** ■ **Certified data copied from an electronic device, storage medium, or file (902(14))**
4	**Digitally Stored Data and Internet of Things**	■ **Witness with personal knowledge (901(b)(1))** ■ **Expert testimony or comparison with authenticated**

		examples (901(b)(3)) ■ **Distinctive characteristics including circumstantial evidence (901(b)(4))** ■ **System or process capable of proving reliable and dependable result (901(b)(9))** ■ **Certified records generated by an electronic process or system (902(13))** ■ **Certified data copied from an electronic device, storage medium, or file (902(14))**
5	**Computer Processes, Animations, Virtual Reality, and Simulations**	■ **Witness with personal knowledge (901(b)(1))** ■ **Expert testimony or comparison with authenticated examples (901(b)(3))** ■ **System or process capable of proving reliable and dependable result (901(b)(9))** ■ **Certified records generated by an electronic process or system (902(13))**
6	**Digital** **Photographs**	■ **Witness with personal knowledge (901(b)(1))** ■ **System or process capable of providing reliable and dependable result (901(b)(9))** ■ **Official publications (902(5))** ■ **Certified records generated by an electronic process or system**

		(902(13)) **■ Certified data copied from an electronic device, storage medium, or file (902(14))**

30. It is interesting to note that while the Indian Evidence Act is of the year 1872, the Federal Rules of Evidence were adopted by the order of the Supreme Court of the United States exactly 100 years later, in 1972 and they were enacted with amendments made by the Congress to take effect on 01.07.1975. Yet, the Rules were found inadequate to deal with emerging situations and hence, several amendments were made, including the one made in 2017 that incorporated specific provisions relating to electronic records under sub-rules (13) and (14) of FRE 902. After this amendment, a lot of options have been made available to litigants seeking to rely upon electronically stored information, one among them being the route provided by sub-rules (13) and (14) of FRE 902. This development of law in the US demonstrates that, unlike in India, law has kept pace with technology to a

great extent.

POSITION IN UK

31. As pointed out in the main opinion, Section 65B, in its present form, is a poor reproduction of Section 5 of the UK Civil Evidence Act, 1968. The language employed in sub-sections (2), (3), (4) and (5) of Section 65B is almost in **pari materia** (with minor differences) with sub-sections (2) to (5) of Section 5 of the UK Civil Evidence Act, 1968. However, sub-section (1) of Section 65B is substantially different from sub-section (1) of Section 5 of the UK Civil Evidence Act, 1968. But it also contains certain additional words in sub-section namely **"without further proof or production of the original".** For easy comparison and appreciation, sub-section (1) of Section 65B of the Indian Evidence Act and sub-section (1) of Section 5 of UK Civil Evidence Act, 1968 are presented in a tabular form as follows:

Section 65B(1), Indian Evidence Act, 1872	**Section 5(1), Civil Evidence Act, 1968 [UK]**
Notwithstanding anything contained in this Act, any information contained in any Civil proceedings a statement contained in a document produced by an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and Computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible . if it is shown that the conditions the mentioned in sub-section (2) below (2) below are satisfied in relation to the statement and Computer in question.	Notwithstanding anything contained in this Act, any information contained in an In any civil proceedings a statement contained in a document produced by a electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

32. But the abovementioned Section 5 of the U.K. Act of 1968 was repealed by the Civil Evidence Act, 1995. Section 15(2) of the Civil Evidence Act, 1995 repealed the enactments specified in Schedule II therein. Under

Schedule II of the 1995 Act, Part I of the 1968 Act containing Sections 1-10 were repealed. The effect is that when Section 65B was incorporated in the Indian Evidence Act, by Act 21 of 2000, by copying subsections (2) to (5) of Section 5 of the UK Civil Evidence Act, 1968, Section 5 itself was not there in the U.K. statute book, as a result of its repeal under the 1995 Act.

33. The repeal of Section 5 under the 1995 Act was a sequel to the recommendations made by the Law Commission in September 1993. Part III of the Law Commission's report titled 'The Hearsay Rule in Civil Proceedings' noted the problems with the 1968 Act, one of which concerned computer records. Paragraphs 3.14 to 3.21 in Part III of the Law Commission's report read as follows:

Computer records

3.14 A fundamental mistrust and fear of the Potential for error or mechanical failure can be detected in the elaborate precautions governing computer records in section 5 of the 1968 Act. The Law Reform Committee

had not recommended special provisions for such records, and section 5 would appear to have been something of an afterthought with its many safeguards inserted in order to gain acceptance of what was then a novel form of evidence. Twenty-five years later, technology has developed to an extent where computers and computer-generated documents are relied on in every area of business and have long been accepted in banking and other important record-keeping fields. The conditions have been widely criticised, and it has been said that they are aimed at operations based on the type of mainframe operations common in the mid 1960s, which were primarily intended to process in batches thousands of similar transactions on a daily basis.

3.15 So far as the statutory conditions are concerned, there is a heavy reliance on the need to prove that the document has been produced in the normal course of business and in an uninterrupted course of activity. **It is at least questionable whether these requirements provide any real safeguards in relation to the**

reliability of the hardware or software concerned. In addition, they are capable of operating to exclude wide categories of documents, particularly those which are produced as the result of an original or a "one off' piece of work. Furthermore, they provide no protection against the inaccurate inputting of data.

3.16 We have already referred to the overlap between sections 4 and 5. If compliance with section 5 is a prerequisite, then computer-generated documents which pass the conditions set out in section 5(2) "shall" be admissible, notwithstanding the fact that they originated from a chain of human sources and that it has not been established that the persons in the chain acted under a duty. In other words, the record provisions of section 4, which exist to ensure the reliability of the core information, are capable of being disapplied. In the context of our proposed reforms, we do not consider that this apparent discrepancy is of any significance, save that it illustrates the fact that section 5 was something of an afterthought.

3.17 Computer-generated evidence falls into two categories. First, there is the situation envisaged by the 1968 Act, where the computer is used to file and store information provided to it by human beings. Second, there is the case where the record has itself been produced by the computer, sometimes entirely by itself but possibly with the involvement of some other machine. Examples of this situation are computers which are fed information by monitoring devices. A particular example is automatic stock control systems, which are now in common use and which allow for purchase orders to be automatically produced. Under such systems evidence of contract formation will lie solely in the electronic messages automatically generated by the seller's and buyer's computers. **It is easy to see how uncertainty as to how the courts may deal with the proof and enforceability of such contracts is likely to stifle the full development and effective use of such technology.** Furthermore, uncertainty may deter

parties from agreeing that contracts made in this way are to be governed by English law and litigated in the English courts.

3.18 It is interesting to compare the technical manner in which the admissibility of computer-generated records has developed, compared with cases concerning other forms of sophisticated technologically produced evidence, for example radar records (See Sapporo Maru (Owners) v. Statue of Liberty (Owners) [1968] 1 W.L.R. 739). In the Statue of Liberty case radar records, produced without human involvement and reproduced in photographic form, were held to be admissible to establish how a collision of two ships had occurred.. It was held that this was "real" evidence, no different in kind from a monitored tape recording of a conversation. Furthermore, in these cases, no extra tests of reliability need be met and the common law rebuttable presumption is applied, that the machine was in order at the material time. The same presumption has been

applied to intoximeter printouts (Castle v. Cross [1984] 1 W.L.R.1372).

3.19 There are a number of cases which establish the way in which courts have sought to distinguish between types of computer-generated evidence, by finding in appropriate cases that the special procedures are inapplicable because the evidence is original or direct evidence. As might be expected, case law on computer-generated evidence is more likely to be generated by criminal cases of theft or fraud, where the incidence of such evidence is high and the issue of admissibility is more likely to be crucial to the outcome and hence less liable to be agreed. For example, even in the first category of cases, where human involvement exists, a computer-generated document may not be considered to be hearsay if the computer has been used as a mere tool, to produce calculations from data fed to it by humans, no matter how complex the calculations, or how difficult it may be for humans to reproduce its work, provided the

computer was not "contributing its own knowledge" (R v. Wood (1983) 76 Cr. App. R. 23).

3.20 There was no disagreement with the view that the provisions relating to computer records were outdated and that there was no good reason for distinguishing between different forms of record keeping or maintaining a different regime for the admission of computer-generated documents. This is the position in Scotland under the 1988 Act. Furthermore, we were informed of fears that uncertainty over the treatment of such records in civil litigation in the United Kingdom was a significant hindrance to commerce and needed reform.

3.21 Consultees considered that the real issue for concern was authenticity that this was a matter which was best dealt with by a vigilant attitude that concentrated upon the weight to be attached to the evidence, in the circumstances of the individual case, rather than by reformulating complex and inflexible conditions as to admissibility. (emphasis supplied)

33. In Part IV of the 1993 Report, titled 'Recommendations for Reform', Paragraph 4.43 dealt with the recommendations of the Law Commission in relation to computer records. Paragraph 4.43 of the Law Commission's report along with Recommendation Nos. 13, 14 and 15 are reproduced for easy reference:

Computerised records

4.43 *In the light of the criticisms of the present provisions and the response on consultation, we have decided to recommend that no special provisions be made in respect of computerised records. This is the position in Scotland under the 1988 Act and reflects the overwhelming view of commentators, practitioners and others. That is not to say that we do not recognise that, as familiarity with and confidence in the inherent reliability of computers has grown, so has concern over the potential for misuse, through the capacity to hack, corrupt, or alter information, in manner which is undetectable. We do not underestimate these dangers. However, the current provisions of section 5 do not*

afford any protection and it is not possible to legislate protectively. Nothing in our proposals will either encourage abuse, or prevent a proper challenge to the admissibility of computerised records, where abuse is suspected. Security and authentication are problems that experts in the field are constantly addressing and it is a fast-evolving area. The responses from experts in this field. such as the C.B.I., stressed that, whilst computer-generated information should be treated similarly to other records, such evidence should be weighed according to its reliability, with parties being encouraged to provide information as to the security of their systems. We have proposed a wide definition for the word "document". This will cover documents in any form and in particular will be wide enough to cover computer-generated information.

We therefore recommend that:

13. Documents, including those stored by computer, which form part of the records of a business or public authority

should be admissible as hearsay evidence under clause 1 of our draft Bill and the ordinary notice and weighing provisions should apply.

14. The current provisions governing the manner of proof of business records should be replaced by a simpler regime which allows, unless the court otherwise directs, for a document to be taken to form part of the records of a business or public authority, if it is certified as such, and received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerized records.

15. The absence of an entry should be capable of being formally proved by affidavit of an officer of the business or authority to which the records belong. (emphasis in original).

34. The above recommendations of the Law Commission (U.K.) made in 1993, led to the repeal of Section 5 of the 1968 Act, under the 1995 Act. The rules of evidence in civil cases, in so far as electronic records are concerned, thus got liberated in U.K. in 1995 with

the repeal of Secton 5 of the U.K. Civil Evidence Act,1968.

35. But there is a separate enactment in the UK containing the rules of evidence in criminal proceedings and that is the Police and Criminal Evidence Act, 1984. Section 69 of the said Act laid down rules for determining when a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein. Section 69 of the said Act laid down three conditions (there are too many negatives in the language employed in Section 69). In simple terms, they require that it must be shown (i) that there are no reasonable grounds for believing that the statement is not inaccurate because of improper use of the computer; (ii) that at all material times the computer was operating properly and (iii) that the additional conditions specified in the rules made by the court are also satisfied.

36. The abovementioned Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) was repealed by Section 60 of the Youth Justice and Criminal Evidence

Act, 1999. This repeal was also a sequel to the recommendations made by the Law Commission in June 1997 under its report titled "Evidence in Criminal Proceedings: Hearsay and Related Topics". Part 13 of the Law Commission's Report dealt with computer evidence in **extenso**. The problems with Section 69 of the 1984 Act, the response during the Consultative Process and the eventual recommendations of the U.K. Law Commission are contained in paragraphs 13.1 to 13.23. They are usefully extracted as follows:

13.1 *In Minors ([1989] 1 WLR 441, 443D-E.) Steyn J summed up the major problem posed for the rules of evidence by computer output:*

Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer... If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution on the other hand, computers are not infallible. They do occasionally

malfunction. Software systems often have "bugs". ...Realistically, therefore, computers must be regarded as imperfect devices

13.2 The legislature sought to deal with this dilemma by section 69 of PACE, which imposes important additional requirements that must be satisfied before computer evidence is adduced - whether it is hearsay or not (Shephard [1993] AC 380).

13.3 In practice, a great deal of hearsay evidence is held on computer, and so section 69 warrants careful attention. It must be examined against the requirement that the use of computer evidence should not be unnecessarily impeded, while giving due weight to the fallibility of computers.

PACE, SECTION 69

13.4 In the consultation paper we dealt in detail with the requirements of section 69: in essence it provides that a document produced by a computer may not be adduced as evidence of any fact stated in the document unless it is shown that the computer was

properly operating and was not being improperly used. If there is any dispute as to whether the conditions in section 69 have been satisfied, the court must hold a trial within the trial to decide whether the party seeking to rely on the document has established the foundation requirements of section 69.

13.5 In essence, the party relying on computer evidence must first prove that the computer is reliable - or, if the evidence was generated by more than one computer, that each of them is reliable (Cochrane [1993] Crim LR 48). ***This can be proved by tendering a written certificate, or by calling oral evidence****. It is not possible for the party adducing the computer evidence to rely on a presumption that the computer is working correctly (Shephard [1993] AC 380, 384E). It is also necessary for the computer records themselves to be produced to the court (Burr v DPP [1996] Crim LR 324).*

The problems with the present law

13.6 In the consultation paper we came to the

conclusion that the present law was unsatisfactory, for five reasons.

13.7 First:, section 69 fails to address the major causes of inaccuracy in computer evidence. As Professor Tapper has pointed out:, "most computer error is either immediately detectable or results from error in the data entered into the machine"

13.8 Secondly, advances in computer technology make it increasingly difficult to comply with section 69: it is becoming "increasingly impractical to examine (and therefore certify) all the intricacies of computer operation". These problems existed even before networking became common.

13.9 A third problem lies in the difficulties confronting the recipient of a computer- produced document who wishes to tender it in evidence: the recipient may be in no position to satisfy the court about the operation of the computer. It may well be that the recipient's opponent is better placed to do this.

13.10 Fourthly, it is illogical that section 69 applies where

the document is tendered in evidence (Shephard [1993] AC 380), but not where it is used by an expert in arriving at his or her conclusions (Golizadeh [1995] Crim LR 232), nor where a witness uses it to refresh his or her memory (Sophocleous v Ringer [1988] RTR 52). If it is safe to admit evidence which relies on and incorporates the output from the computer, it is hard to see why that output should not itself be admissible; and conversely, if it is not safe to admit the output, it can hardly be safe for a witness to rely on it.

13.11 At the time of the publication of the consultation paper there was also a problem arising from the interpretation of section 69. It was held by the Divisional Court in McKeown v DPP ([1995] Crim LR 69) that computer evidence is inadmissible if it cannot be proved that the computer was functioning properly - even though the malfunctioning of the computer had no effect on the accuracy of the material produced. Thus, in that case, computer evidence could not be relied on because there was a malfunction in the clock part of an

Intoximeter machine, although it had no effect on the accuracy of the material part of the printout (the alcohol reading). On appeal, this interpretation has now been rejected by the House of Lords: only malfunctions that affect the way in which a computer processes, stores or retrieves the information used to generate the statement are relevant to section 69 (DPP v McKeown DPP v Jones [1997] 1 WLR 295).

13.12 In coming to our conclusion that the present law did not work satisfactorily, ***we noted that in Scotland, some Australian states, New Zealand, the United States and Canada, there is no separate scheme for computer evidence, and yet no problems appear to arise.*** *Our provisional view was that section 69 fails to serve any useful purpose, and that other systems operate effectively and efficiently without it.*

13.13 We provisionally proposed that section 69 of PACE be repealed without replacement. Without section 69, a common law presumption comes into play (Phipson

para 23-14, approved by the Divisional Court in Castle v Cross [1984] 1 WLR 1372, 1377B).

In the absence of evidence to the contrary, the courts will presume that mechanical instruments were in order at the material time

13.14 Where a party sought to rely on the presumption, it would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been - in which case the party would have to prove that it was (beyond reasonable doubt in the case of the prosecution, and on the balance of probabilities in the case of the defence). The principle has been applied to such devices as speedometers (Nicholas v Penny [1950] 2 KB 466) and traffic lights (Tingle Jacobs & Co v Kennedy [1964] 1 WLR 638), and in the consultation paper we saw no reason why it should not apply to computers.

The response on consultation

13.15 On consultation, the vast majority of those who dealt with this point agreed with us. A number of those in favour said that section 69 had caused much trouble with little benefit.

13.16 The most cogent contrary argument against our proposal came from David Ormerod. In his helpful response, he contended that the common law presumption of regularity may not extend to cases in which computer evidence is central. He cites the assertion of the Privy Council in Dillon v R ([1982] AC 484) that "it is well established that the courts will not presume the existence of facts which are central to an offence". If this were literally true it would be of great importance in cases where computer evidence is central, such as Intoximeter cases (R v Medway Magistrates' Court:, ex p Goddard [1995] RTR 206). But such evidence has often been permitted to satisfy a central element of the prosecution case. Some of these cases were decided before section 69 was introduced (Castle v Cross [1984] 1 WLR 1372); others have been decided

since *i*ts introduction, but on the assumption (now held to be mistaken) (Shephard [1993] AC 380) that it did not apply because the statement produced by the computer was not hearsay (Spiby (1990) 91 Cr App R 186; Nev*i*lle [1991] Crim LR 288). The presumption must have been applicable; yet the argument successfully relied upon in Dillon does not appear to have been raised.

13.17 It should also be noted that Dillon was concerned not with the presumption regarding machines but with the presumption of the regular*i*ty of official action. This latter presumption was the analogy on which the presumption for machines was originally based; but it is not a particularly close analogy, and the two presumptions are now clearly distinct.

13.18 Even where the presumption applies, it ceases to have any effect once evidence of malfunction has been adduced. The question is, what sort of evidence must the defence adduce, and how realistic is it to suppose that the defence will be able to adduce it without any knowledge of the working of the machine? On the

one hand the concept of the evidential burden is a flexible one: a party cannot be required to produce more by way of evidence than one in his or her position could be expected to produce. It could therefore take very little for the presumption to be rebutted, if the party against whom the evidence was adduced could not be expected to produce more. For example, in Cracknell v Willis ([1988] AC 450) the House of Lords held that a defendant is entitled to challenge an Intoximeter reading, in the absence of any signs of malfunctioning in the machine itself, by testifying (or calling others to testify) about the amount of alcohol that he or she had drunk.

13.19 *On the other hand it may be unrealistic to suppose that in such circumstances the presumption would not prevail. In Cracknell v Willis Lord Griffiths ([1988] AC 450 at p 468C- D) said:*

If Parliament wishes to provide that either there is to be an irrebuttable presumption that the breath testing machine is reliable or that the presumption can only be

challenged by a particular type of evidence then Parliament must take the responsibility of so deciding and spell out its intention in clear language.

Until then I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible.

But his Lordship went on:

I am myself hopeful that the good sense of the magistrates and the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that few defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a critical eye on evidence such as was produced by Hughes v McConnell ([1985] RTR 244) before being persuaded that it is not safe to rely upon the reading that it produces ([1988] AC 450, 468D-E).

13.20 Lord Goff did not share Lord Griffiths' optimism that motorists would not seek to challenge the analysis by spurious evidence of their consumption of alcohol, but did share his confidence in

the good sense of magistrates who, with their attention drawn to the safeguards for defendants built into the Act ..., will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a printout, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure ([1988] AC 450 at p 472B- C).

13.21 These dicta may perhaps be read as implying that evidence which merely contradicts the reading, without directly casting doubt on the reliability of the device, may be technically admissible but should rarely be permitted to succeed. However, it is significant that Lord Goff referred in the passage quoted to the safeguards for defendants which are built into the legislation creating the drink-driving offences. In the case of other kinds of computer evidence, where (apart

from section 69) no such statutory safeguards exist, we think that the courts can be relied upon to apply the presumption in such a way as to recognise the difficulty faced by a defendant who seeks to challenge the prosecution's evidence but is not in a position to do so directly. The presumption continues to apply to machines other than computers (and until recently was applied to non-hearsay statements by computers) without the safeguard of section 69; and we are not aware of any cases where it has caused injustice because the evidential burden cast on the defence was unduly onerous. Bearing in mind that it is a creature of the common law, and a comparatively modern one, we think it is unlikely that it would be permitted to work injustice.

13.22 Finally it should not be forgotten that section 69 applies equally to computer evidence adduced by the defence. A rule that prevents a defendant from adducing relevant and cogent evidence, merely because there is no positive evidence that it is reliable, is in our view unfair.

Our recommendation

13.23 We are satisfied that section 69 serves no useful purpose. We are not aware of any difficulties encountered in those jurisdictions that have no **equivalent.** We are satisfied that the presumption of proper functioning would apply to computers, thus throwing an evidential burden on to the opposing party, but that that burden would be interpreted in such a way as to ensure that the presumption did not result in a conviction merely because the defence had failed to adduce evidence of malfunction which it was in no position to adduce. We believe, as did the vast majority of our respondents, that such a regime would work fairly. **We** recommend the repeal of section 69 of PACE. (Recommendation 50) (emphasis supplied).

37. Based on the above recommendations of the U.K. Law Commission, Section 69 of the PACE, 1984, was declared by Section 60 of the Youth Justice and Criminal

Evidence Act, 1999, to have ceased to have effect. Section 60 of the 1999 Act reads as follows:

"*Section 69 of the Police and Criminal Evidence Act, 1984 (evidence from computer records inadmissible unless conditions relating to proper use and operation of computer shown to be satisfied) shall cease to have effect*."

38. It will be clear from the above discussion that when our lawmakers passed the Information Technology Bill in the year 2000, adopting the language of Section 5 of the UK Civil Evidence Act, 1968 to a great extent, the said provision had already been repealed by the UK Civil Evidence Act, 1995 and even the Police and Criminal Evidence Act, 1984 was revamped by the 1999 Act to permit hearsay evidence, by repealing Section 69 of PACE, 1984.

POSITION IN CANADA

39. Pursuant to a proposal mooted by the Canadian Bar Association hundred years ago, requesting all Provincial

Governments to provide for the appointment of Commissioners to attend conferences organised for the purpose of promoting uniformity of legislation among the provinces, a meeting of the Commissioners took place in Montreal in 1918. In the said meeting, a Conference of Commissioners on Uniformity of Laws throughout Canada was organised. In 1974, its name was changed to Uniform Law Conference of Canada. The objective of the Conference is primarily to achieve uniformity in subjects covered by existing legislations. The said Conference recommended a model law on Uniform Electronic Evidence in September 1998.

40. The above recommendations of the Uniform Law Conference later took shape in the form of amendments to the Canada Evidence Act, 1985. Section 31.1 of the said Act deals with authentication of electronic documents and it reads as follows:

Authentication of electronic documents

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its

authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

41. Section 31.2 deals with the application of 'best evidence rule' in relation to electronic documents and it reads as follows:

Application of best evidence rule — electronic documents

31.2(1) *The best evidence rule in respect of an electronic document is satisfied*

(a) *on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or*

(b) *if an evidentiary presumption established under section 31.4 applies.*

Printouts

(1) *Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the*

best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

42. Section 31.3 indicates the method of proving the integrity of an electronic documents system, by or in which an electronic document is recorded or stored. Section 31.3 reads as follows:

Presumption of integrity

31.3 *For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven*

(a) *by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable*

grounds to doubt the integrity of the electronic documents system;

(b) *if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or*

(c) *if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.*

43. ***Section 31.5 is an interesting provision which*** *permits evidence to be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored.* ***This is for the purpose of*** *determining under any rule of law whether an electronic document is admissible. Section 31.5 reads as follows:*

Standards may be considered

31.5 *For the purpose of determining under any*

rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

44. Under Section 31.6(1), matters covered by Section 31.2(2), namely the printout of an electronic document, the matters covered by Section 31.3, namely the integrity of an electronic documents system, and matters covered by Section 31.5, namely evidence in respect of any standard, procedure, usage or practice, may be established by affidavit. Section 31.6 reads as follows:

Proof by affidavit

31.6(1) *The matters referred to in subsection 31.2(2) and sections 31.3 and 31.5 and in regulations made under section 31.4 may be established by affidavit.*

Cross-examination

(2) A party may cross-examine a deponent of an affidavit referred to in subsection (1) that has been introduced in evidence

(a) as of right, if the deponent is an adverse party or is under the control of an adverse party; and

(b) with leave of the court, in the case of any other deponent.

45. Though a combined reading of Sections 31.3 and 31.6(1) of the Canada Evidence Act, 1985, gives an impression as though a requirement similar to the one under Section 65B of Indian Evidence Act, 1872 also finds a place in the Canadian law, there is a very important distinction found in the Canadian law. **Section 31.3(b) takes care of a contingency where the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to produce it. Similarly, Section 31.3(c) gives leverage for the party relying upon an**

electronic document to establish that the same was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

IV. Conclusion

46. It will be clear from the above discussion that the major jurisdictions of the world have come to terms with the change of times and the development of technology and fine-tuned their legislations. Therefore, it is the need of the hour that there is a relook at Section 65B of the Indian Evidence Act, introduced 20 years ago, by Act 21 of 2000, and which has created a huge judicial turmoil, with the law swinging from one extreme to the other in the past 15 years from **Navjot** Sandhu[407] **to** Anvar P.V.[408] **to** Tomaso Bruno[409] **to**

407 State (NCT of Delhi) vs. Navjot Sandhu, (2005) 11 SCC 600

408 Anvar P.V. vs. P.K. Basheer, (2014) 10 SCC 473

409 Tomaso Bruno vs. State of UP, (2015) 7 SCC 178

Sonu[410] **to** Shcfhi Mohammad.[411]

47. With the above note, I respectfully agree with conclusions reached by R. F. Nariman, J. that the appeals are to be dismissed with costs as proposed.

.....J.
(V. RAMASUBRAMANIAN)

JULY 14, 2020
NEW DELHI

410 Sonu vs. State of Haryana, (2017) 8 SCC 570

411 Shafhi Mohammad vs. The State of Himachal Pradesh, (2018) 2 SCC 801

ANALYSIS OF THE ABOVE JUDGMENT

The present was a case where the Supreme Court by way of a reference was asked to examine about the need to revisit P.V. Anwar case, particularly in the light of certain judgments passed by the other benches of the Supreme Court and the High Courts after overruling the law laid in the Parliament Attack case on this issue, in the Anwar Case. The issues which were before the court which needed consideration were

1. Segregation of Electronic Evidence into Primary Electronic Evidence and Secondary Electronic Evidence.
2. Whether "*any*" or "*all*" the Conditions as mentioned in 65-B (4) has to be mentioned in the certificate.
3. Whether the issuance of certificate U/s 65-B (4) was mandatory and the only means of authentication.
4. What happens when the certificates cannot be produced by the parties.
5. Whether Section 65-B is a mode of proof or it goes into the root in respect of the admissibility of the electronic records.
6. Whether the provisions of Section 65-A and 65-B are a complete code in itself.
7. Stage at which the certificate is to be produced.

Segregation of Electronic evidence into Primary Electronic Evidence and Secondary Electronic Evidence and Whether "any" or "all" the Conditions as mentioned in 65-B (4) has to be followed in the Certificate.

Both the issues have been dealt in the judgment from Paras 12 to 35. The court while dealing with the issue of Primary and Secondary Evidence has analysed the various provisions of the Indian Evidence Act like Section 3 particularly the definition of the word "*document*", provisions of Section 61 to 65, Section 65-A and 65-B, various provisions of the Civil Evidence Act, 1968 and Civil Evidence Act, 1995 of U.K, Provisions of Section 68 to 70 of the *UK Police and Criminal Evidence Act, 1984. As per the analysis it came to the conclusion that Section 65-B(1) talks of original and copies and thus it* categorized the same into Primary and Secondary Evidence without referring to the technical aspects of the electronic data or the definition of "*Evidence*" as given in Section 3 of the Evidence Act.

The Electronic Evidence as per Section 65-A and 65-B can be categorized into "*Electronic Records*" and "*Computer output*". A dissection of that sub-section would reveal that it consists of distinct parts. The first part stipulates that any information contained in the Electronic Record in the form of paper print output or optical or magnetic media output, i.e. the Electronic Record copied, stored or recorded on an optical or magnetic media from another source, i.e., the "*Computer Output*" shall

be deemed to be a document. The first part, therefore, deals with the paper printout or optical or magnetic media on which the Electronic Record has been copied, stored or recorded as distinct from the original media on which the data or information is created, or recorded, stored, received, sent or copied. Media and paper print outs are tangible articles. Paper print outs can be seen and read. Media can also be seen and read, when viewed with appropriate equipment or when its paper printouts are taken. Noticeably and pertinently, the paper printout output or the optical or magnetic media output, on satisfaction of the conditions stipulated in Section 65-B is treated as a document by itself. The digital evidence cannot be divided into Primary and Secondary as the same is never readable and is in binary format. It is only after it undergoes the process of processing and conversion it becomes readable. What is seen on the screen or monitor is always after the data undergoes the process of processing and conversion. Thus, the original of the data can never be seen unless there is a process of conversion from binary file to text file or otherwise.

Before adverting further, it is important to consider the Provision of Section 3 of the Indian Evidence Act, 1872 where "*Document*" as well as "*Evidence*" is defined. They read as under:

"Document" *"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be*

used or which may be used for the purpose of recording that matter."

"Evidence" *"Evidence" means and includes —*
(1) All statements, which the court permits or requires to be made before it by witness, in relation to matters of fact under inquiry;
Such statements are called oral evidence;
(2) ***6****[All documents including Electronic record produced for the inspection of the court];*
Such documents are called documentary evidence."

A bare perusal of the above shows that even though as per the definition of the document electronic record is not included under it but while defining "*Evidence*" the same has been considered as a part of "*Documentary Evidence*" but there is no mention of the term "*Computer Output*". This is an important aspect which the court has failed to notice as in Para 21 the court notices and has observed,
"*the deeming fiction is for the reason that "document" as defined by Section 3 of the Evidence Act does not include electronic records."*

This observation is not correct as the court has simultaneously not looked into the definition of Evidence given in the same Section where for the purpose of documentary evidence Electronic Records has been held to be inclusive in the document. Further this reflects that even though the Electronic

records are considered as Documentary Evidence yet they have been segregated from the term Document. Meaning thereby the Electronic Record though inclusive in Documentary evidence yet it maintains a "*separate class*" in itself.

The Hon'ble court without analysing the contents of Section 65-B (4) has simply applied the proposition of law that *doing any of the following things..."* must be read as doing *all of the following things*, by applying the principle that the expression "*any*" can mean "*all*" given the context. There is no doubt that the word "any" can mean all in the given context but the question is whether in the context of Section 65-B(4) does "*any*" mean "*all*". The Hon'ble Supreme Court has not analysed the issue in the context of Section 65-B (4). Further it is to be seen that by giving a literal meaning to "*any*" is there any ambiguity, or is there a mischief so that "*any"* has to be read as "*all" or* does interpreting "*any*" as "*all*" lead to any "*absurdity".*

Subsection (4) reads:
"(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

(a) Identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

And purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

A bare perusal of the above shows that whenever it is desired to give the Evidence in respect of "*Electronic Records*" or in respect of "*Computer Output*", as per provision of Section 65-B, a certificate in the form as mentioned in 65-B (4), (a) to (c) has to be given. It is important to mention here that the word statement in evidence refers to the contents of documents as the language of Section 65-A and 65-B have been taken from Section 5 of the Civil Evidence Act, 1968 of U.K. where instead of contents of documents the word "*statement in evidence*" is being used. Thus, in respect of Electronic records "*statement in evidence*" will refer to the "*contents of the Electronic Records*".

The word "desire" has been used intentionally by the legislature as any print-out can be used either in the form of a "*document*" or in the form of an "Evidence of *Electronic Record/ Computer Output*". When used in the form of Document evidence one has to adopt the provisions as given in Section 61 to 65 but when it is used in the form of "*Evidence in respect of Electronic Records*", then the provisions of Section 65-B are to be followed and a certificate is required. This explains the use of the words, "*desire*" in this Section. The word Statement used in this section means "*contents of electronic record*". These aspects have not been considered by the Supreme Court while holding that "*any*" means "*all*".

The following example shows the absurdity in this interpretation. A case where while working on the Computer some Malware gets installed or a part of the data (irrelevant) becomes corrupt which is rectified without much damage to the relevant data. In such a case the person having control over the Computer cannot be compelled to issue a certificate "*that such data was regularly fed into computer in the regular and ordinary course of busines*" since such an incident will actually be compelling him by reading the word "*any*" as "*all*", to lie on oath even though the said instance was a solitary incident.

Further as per Sub-section 4(a) the certificate should contain the identification of the "*Electronic Record*" containing the

statement but also the manner in which the "*Electronic Record*" was produced. A bare perusal of the same shows that this provision in applicable in respect of "*Electronic Records*" and not in respect of "*Computer Output*". Further this also shows that the certificate not only concerns with the "*Contents of Electronic Records*" but it also concerns with the factum of "*How"* the "*Electronic Record*" has been produced. The Second part i.e. the mode of production of "*Electronic Records*" could have been Proved only by direct oral evidence but by way of the present certificate that part has been taken care of and after this certificate, the Oral evidence in respect of the production of "*Electronic Records*" is not required. This aspect also finds corroboration from the provision of Subsection (1) where while dealing with "*Computer Output*" it is mentioned as "*without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible"* and this aspect i.e. the mode of production in respect of "*Computer Output"* is taken care of by *provision of Subsection (2)(a) of 65-B.*

Sub-Section (4)(b) seeks details of the device involved in production of that "*Electronic Record*" to show that the same was produced by Computer. This is also applicable in respect of "*Electronic Records*" and not in respect of "*Computer Output"*. In respect of "*Computer Output*", the said condition is already mentioned in Sub-section 2(d).

Sub-Section (4)(c) deals with the conditions mentioned in Sub-section (2) and since this pertains to the "*Computer Output"* hence this is applicable in respect of the same and does not relate to the "*Electronic Record".*

The Legislature will never seek a duplicity of the things. If all the Conditions mentioned in the certificate are made mandatory in respect of "*Computer Output*" there will be duplicity of Section 65-B (4) (a) and (b) and Section 65-B (2) (a) and (d) and that could never have been the intention of the Legislature. Thus, the provision should be given its literal interpretation and the word "any" used has to be read literally and should not be read as "*all*" otherwise the same will lead to duplicity in the certificate, amounting to absurdity. Further, it will also render that Section 65-B applicable only to "*Computer Output*" and not to "*Electronic Records*" and this will make provision of Section 65-A otiose or redundant which could not have been the intention of the Legislature.

It is important to mention here that since Computer information or record can be edited or manipulated or tempered with without being detected particularly when the data is in binary form or unreadable hence various safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to "*Electronic Record"* sought to be used as Evidence. "*Electronic Records*" being more susceptible to tampering, alteration, transposition, excision, etc. without

such safeguards, the whole trial based on proof of "*Electronic Records*" can lead to travesty of justice hence the above safeguards as mentioned in Section 65-B (4) (a) and (b) in respect of "*Electronic Records*" or the Provisions 65-B (1), (2), (3), (5) and (4)(c) in respect of "*Computer Output*" are required. Same was the provision of law even prior to 2000 when authenticity and reliability were the conditions precedent for the "*Electronic Records*" to be considered as admissible. It was not to be construed that in case of original tapes, the condition of reliability was not required. Even in respect of original tapes the test of reliability was to be fulfilled before the same were held to be admissible. Hence the judgment has faulted on two aspect first categorization of the Electronic Evidence into Primary and Secondary and then reading the word "*any*" in Sub-Section (4) as "*all*".

Whether the issuance of certificate U/s 65-B (4) was mandatory and the only means of authentication.

Section 65-B (4) starts "*In any proceedings where it is desired to give a statement in evidence by virtue of this section….."* The words "*where it is desired"* used in this Section shows that there is an option available to prove the Statements in Evidence either by virtue of Section 65-A and 65-B or by use of other Sections. Since certain print outs obtained by use of Computer are in the form of documents hence the statement in evidence in respect of them can be proved as per the provision of Section 61 to 65 of the Evidence Act. It is only

when the record is being proved as Electronic Evidence by virtue of Section 65-A and 65-B that the certificate becomes mandatory and as per the Evidence Act the only means of authentication. It is because of this, that Section 5 of the Civil Evidence Act, 1968 was repealed. The US law in the form of Rule 902 provides various modes of Authentication but as per the Indian Evidence Act, certificate u/s 65-B (4) is the only mode of authentication before considering the admissibility of the "*Electronic Records*" or "*Computer Output*". It is for this reason that Hon'ble Justice V. Ramasubramanian concludes by observing as under:

"It will be clear from the above discussion that the major jurisdictions of the world have come to terms with the change of times and the development of technology and fine-tuned their legislations. Therefore, it is the need of the hour that there is a relook at Section 65B of the Indian Evidence Act, introduced 20 years ago, by Act 21 of 2000, and which has created a huge judicial turmoil, with the law swinging from one extreme to the other in the past 15 years from ***Navjot*** *Sandhu*[412] ***to*** *Anvar P.V.* ***to*** *Tomaso Bruno*[413] ***to*** *Sonu*[414] ***to*** *Shafhi Mohammad*[415]".

The same can be used as modes. The contents of electronic

[412] *State (NCT of Delhi) v. Navjot Sandhu Ors. (2005) 11 SCC 600*
[413] *Tomaso Bruno & Anr vs State Of U.P, (2015) 7 SCC 178*
[414] *Sonu@ Amar v. State of Haryana, Criminal Appeal No. 1779/2013*
[415] *Shafhi Mohammad vs The State Of Himachal Pradesh, (2018) 2 SCC 801*

record as any print-out can be used either in the form of a "*document*" or in the form of an "Evidence of *Electronic Record/ Computer Output*". When used in the form of Document evidence one has to adopt the provisions as given in Section 61 to 65 but when it is used in the form of "*Evidence in respect of Electronic Records*", then the provisions of Section 65-B are to be followed and a certificate is required. This explains the use of the words, "*desire*" in this Section. The word Statement used in this section means "*contents of electronic record*". These aspects have not been considered by the Supreme Court while holding that "*any*" means "*all*".

What happens when the certificates cannot be produced by the parties.

In the case of *Shafhi Mohammad* the Division Bench granted exemption to third parties i.e. persons who produce the "*Electronic Record"* but are not in-charge of the Computer System for proving the Electronic Records for practical reasons as it was not possible to obtain certificate under Section 65-B from an organisation or authority or stranger. In the present judgment the court dealt with this issue from Para 36 to 49 and held that Shafhi Mohammad laid an incorrect law and overruled it. Further the Court provided an alternative that in such a situation the court should play an active role and by virtue of its power either under Section 165 of the Evidence Act or Order XVI of Civil Procedure Code, 1908 or Under Section 91, 311 & 349 of Criminal Procedure Code,

1973 Summons the Stranger or Authority or Institution to produce such a certificate thereby placing a positive obligation on the trial court judge, to summon the certificate in a case where electronic evidence is relied by a party without a certificate. The said procedure as laid by Supreme Court has its own hazards as the type of Certificate produced under such Compulsion may itself be violative of right against self-incrimination as guaranteed under article 20(3) of the Constitution particularly in the case where the Computer was in possession and control of the accused and the question before the court will be whether he can be compelled to give a certificate as per 65-B (4) which will incriminate him. Further the quality of such certificate will always be doubtful. The narration of the Supreme Court regarding condonation of such requirement of Compliance of Section 65-B after making futile efforts will also open a new Pandora Box. Further such type of interpretation is also against the statute where the word "*desired*" is mentioned. Thus, instead of clarifying the issue the judgment in the present case has made the Compliance of the same more complicated and impractical.

Whether Section 65-B is a mode of proof or it deals with admissibility of the Electronic Records.

The judgment reaffirmed the law as laid in Anvar Case by making the certificate under Section 65-B (4) mandatory and as a condition precedent to the admissibility of the Electronic

Evidence. Hence the court has ruled that 65-B deals with the admissibility of the Electronic Evidence and it is not merely the mode of proof. By this judgment the court has in fact indirectly has also over-ruled the law laid in the case of Sonu Vs. State of Haryana wherein it was inter-alia held that the ground of non-production of certificate under section 65-B, could not be entertained before an Appellate Court, if the objection has not been taken during trial as it pertains to being only a mode of proof and does not render the electronic evidence inherently inadmissible. Since as per the judgment in Arjun Panditrao's [416]case the Court has held that the certificate is mandatory and goes to the core of the admissibility of the document thus it is not a mode of proof but absence of the certificate renders Electronic Evidence inadmissible.

Whether the provisions of Section 65-A and 65-B are a complete code in itself.

The court in the present case reiterated the stand of Sec 65-A and 65-B as a Complete Code in itself as was laid in the case of P V Anvar. In P V Anvar case in Para 24 there was a self-contradiction in the judgment on this aspect wherein Para 24 the court has observed as under:

"if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section

[416] *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, Civil Appeal Nos. 20825-20826 of 2017, 2407 and 3696 of 2018*

65-B of the Evidence Act"

In the present case the said view of 65-A and 65-B being a complete code has been fortified by correcting the said lacuna in Para 24 of the judgment of P V Anvar by the present judgment in Para 32 wherein it is stated as under:

"This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of Anvar P.V. (supra) which reads as "…if an Electronic Record as such is used as primary evidence under Section 62 of the Evidence Act…". This may more appropriately be read without the words "under Section 62 of the Evidence Act,…". With this minor clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited."

Since the Electronic Evidence can be undetectably edited or copied without being detected hence the courts always applied the rule of reliability on such evidence before considering the same as admissible. It was in keeping with this spirit that the Legislature framed the provisions of Section 65-A and 65-B as a Special provision in respect of Electronic Records. Thus, it is considered as a complete Code in itself.

Stage at which the certificate is to be produced.

The present case shows that after the present judgment has dealt with this issue elaborately, which was somehow missed in the Anvar case. In Para 52 the court observes as under:

"*It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. Section 207 of the CrPC, -------, is mandatory. Therefore, the electronic evidence, i.e. the computer output, has to be furnished at the latest before the trial begins.*"

In Para 53 the Court relied on *para 7 of* the judgment, *Central Bureau of Investigation v. R.S. Pai*[417] *(2002) 5 SCC 82,*

"7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court."

Further the Court thereafter deals with the balancing act and approved the law laid in the case of Paras Jain[418] by the

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[417] *Central Bureau of Investigation v. R.S. Pai (2002) 5 SCC 82*

[418] *Paras Jain v. State of Rajasthan, 2016 (2) RLW 945 (Raj.)*

Rajasthan High Court and Kundan Singh[419] by the Delhi High Court. However, despite elaborately dealing with the issue there is yet no clarity as to when should the court conclude that the said electronic evidence is inadmissible for want of a certificate u/s 65-B or when should it feel that it should exercise its power under various section 165 of Evidence Act or Section 91 or 349 or 311 of CrPC or Order XVI of Civil Procedure Code, 1908.

Conclusion

The present case has created more confusion, Complications and uncertainties on the law of Electronic Evidence by wrongly segregating the same into Primary and Secondary Evidence, reading "*any*" as "*all*" in Section 65-B (4), laying positive obligations on the court for getting Complied the Provision of Section 65-B (4), and several other issues. It seems that a golden opportunity has been missed by the Supreme Court by declining to revisit Anvar case.

[419] Kundan Singh v. The State, I (2016) CCR 1 (Del.)