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A CRITIQUE ON ADMISSIBILITY AND MODE OF PROOF OF THIRD-PARTY ELECTRONIC RECORDS

Ms. Pooja C. Kavlekar*

Introduction

Evidence is a mystical word that intrigues the greatest legal minds. It constitutes the edifice of the adjudicatory process. The various stages of its discernment, seizure, preservation, production, authentication and appreciation, forms the entire gamut of the process of adjudication. The Indian Evidence Act 1872 provides that a fact may be proved by oral or documentary evidence. As far as expert evidence is concerned, the Act always contained Section 45 that permitted courts to resort to aid of experts when forming an opinion on matters relating to foreign law, art, science, finger impressions or identity of handwriting. However, with the rampant inroads that technology has made in the lives of people, proof of a fact no longer needs to be confined to the human and documentary mode. The potent ability of electronic mode in proving a fact forced the lawmakers to amend the Indian Evidence Act in line with the Information and Technology Act of 2000. The Indian Evidence Act earlier recognised two types of evidence namely “oral” and “documentary”. As per amended Section 3(2) of Indian Evidence Act ``electronic record” is categorized as “documentary evidence” in terms of section 3(2) of the said Act[1].

*LLM (Gold Medalist), District (Ad Hoc) and Additional Sessions Judge, North Goa Panaji Research Scholar Department of Law, Goa University.

[1] The Indian Evidence Act, Sec 3, No. 1 Act of Parliament 1872 (India) -"All documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence”.

Definition of Electronic Record

The Indian Evidence Act does not define the word "electronic record". This definition is found in section 2(t) of the Information Technology Act 2000, which defines electronic record as any data, record or data generated, image or sound which is stored, received or sent in an electronic form or microfilm or computer-generated microfiche. In simple words an electronic record is data that is generated or transmitted or stored, electronically. As this data originally exists in a form that is not discernible to the human eyes, the legislature has devised a form of making it readable and consequently admissible. Electronic evidence is led in courts by production of electronic records. Any form of evidence, when produced in court, passes through three quintessential phases of relevancy, admissibility and mode of proof. While the general rules of relevancy of a fact which is proposed to be proved through evidence are prescribed under section 5 to 55 of the Indian Evidence Act, the aspect of admissibility and mode of proof depends upon the nature of evidence that is proposed to be tendered in proof of that relevant fact.

Primary and Secondary Evidence.

The Indian Law classifies evidence as primary and secondary. Primary evidence is the original document produced for inspection of the court (Section 62 of the Indian Evidence Act), while secondary evidence (Section 63 of the Indian Evidence Act) is evidence in the nature of copies that are made permissible only under certain circumstances. As an original electronic record is in essence in digital form, the Act makes its computer output which is printed on a paper or stored or recorded on an optical or magnetic media, admissible on the condition that the such an output is accompanied by a certificate under section 65B of the Indian Evidence Act. Here it needs to be clarified that if the original electronic record is

produced for the inspection of the court the same becomes admissible without any certification. However if a party proposes to produce a secondary evidence referred to as computer output in section 65B then in that case a certificate needs to be appended with that secondary evidence.

What is a third party electronic record?

At the outset there has to be clarity about what constitutes third party electronic records. In its broadest form a third party electronic record would be a record which has no connection with the litigating parties, i.e. it can neither be attributed to the complainant or the accused or to the plaintiff and the defendant. It belongs to a third party, but its appreciation is necessary to prove or introduce a fact in issue. It can also be interpreted to mean an electronic record attributable to a person other than the person producing its secondary evidence. In other words the electronic record was generated or that the lawful control of the device generating the electronic record was with some other person.

Illustratively stated computer generated bank statements or certificates, CCTV footage available with a private party, information uploaded on a social networking site by a third party who has no connection with the case pending in the court of law. The challenge in admissibility and proof of third party electronic record is that when a litigating party produces a computer output of the original electronic record, the person who has the lawful possession of the original record may not be available before the court to tender the certificate under section 65B of the Indian Evidence Act. Thus making the computer output inadmissible. This article attempts to examine this issue with the help of judicial pronouncements and challenges that courts continue to face despite these binding precedents.

Evolution of law relating to Admissibility electronic records

Section 65B is the bedrock of law relating to admissibility electronic evidence. It is the first hurdle that every electronic record that is tendered in evidence has to cross. As stated above, if the original electronic record is produced before the court there is no need to resort to section 65B of the Indian Evidence Act. However if a party proposes to produce secondary evidence then a certificate under section 65B has to be annexed to the record. The record referred to herein can be printed on a paper, stored or recorded or copied on an optical or a magnetic media. The question whether certificate under section 65B is mandatory, first arose for consideration before the Supreme Court in the landmark case of ***State (NCT of Delhi) v Navjot Sandhu***[2]***.*** In that case the Hon'ble Apex court had an opportunity to consider the import of section 65B of the Indian Evidence Act and its correlation with the existing provisions pertaining to Secondary evidence under the Indian Evidence Act. The court was called upon to harmoniously construe the existing provision relating to secondary evidence with the newly introduced section 65B. In this case an appeal was filed against conviction following the attack on Parliament on 13th December 2001. Electronic records produced therein were call records. The question that arose before the court was as regards the proof and admissibility of these mobile telephone call records details (CDR).

In this case the learned counsel for the accused contended that the prosecution had not produced a certificate under section 65B of the Indian Evidence Act with particulars enumerated in clauses (a) to (e), and therefore the information contained in the electronic record could not be adduced in evidence. It was further argued that in the absence of examination of a competent witness who was acquainted with the

[2] AIR 2005 SC 3820

functioning of the computers at the relevant time and who has personal knowledge about the manner in which the printouts were taken, section 63 of the Indian Evidence Act, also could not be invoked. In that case the prosecution relied upon the testimony of two witnesses to prove the computerized record that was furnished by the cellular service providers namely AIRTEL (Bharti Cellular Limited) and ESSAR Cellphone. Call details and the forwarding letter was produced as documentary evidence. The person who signed the covering letters was examined as a witness, who testified that the call details of the particular telephone numbers were contained in the relevant exhibits produced by him. The Hon'ble Court took note of the fact that there was no suggestion put to these witnesses on the aspect of authenticity of the call records or the possible tampering of the entries, even though these arguments proceeded on the lines that there could have been fabrication.

The court considered that Section 63 of the Indian Evidence Act which states that secondary evidence also includes, "*copies made from the original by mechanical processes which ensure the accuracy of the copy*" and that this section permits production of secondary evidence if the original is of such a nature that it is cannot be easily moved to the court. Here the information admittedly was stored in huge servers which could not be easily moved and produced in the Court. Hence, printouts taken from the computer servers by following a mechanical process and certified by a responsible official, of the service providing Company, could be led in evidence, through a witness who could identify the signatures of the certifying officer or depose facts based on his personal knowledge. It was held that compliance of Section 65B of the Indian Evidence Act, 1872 was not mandatory and that it was no bar for adducing secondary evidence under the other provisions of the Indian Evidence Act, namely, Sections

63 & Section 65.

It was contended on behalf of the accused that the witnesses examined were not technical persons acquainted with the functioning of the computers, nor did they have any personal knowledge of the technical details contained in the servers of the computers. This argument however was rejected. The Hon'ble Court noted that the witnesses were responsible officials of the concerned Companies who deposed that they were the printouts obtained from the computer records. In fact the evidence of the witness showed that he was familiar with the computer system and its output. If there was some questioning regarding specific details or if a specific suggestion of fabrication of printouts was put to the witness, it would have been obligatory on the prosecution to call a technical expert. The Hon'ble court relied upon the judgment in the case of R Vs. Shepard [3] and held that Electronic evidence could be admitted and proved even under section 63 and 65 of the Indian Evidence Act and that resort to section 65B is not mandatory.

The judgment was found to practically nullify the effect of section 65B of the Indian Evidence Act. The Indian Evidence Act prescribed a special

[3] The following observations of the House of Lords in the case of R Vs. Shepard [1993 AC 380] "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."Such a view was expressed even in the face of a more stringent provision in Section 69 of the Police and Criminal Act, 1984 in U.K. casting a positive obligation on the part of the prosecution to lead evidence in respect of proof of the computer record. The court agreed with the submission of Mr. Gopal Subramanium that the burden of prosecution under the Indian Law cannot be said to be higher than what was laid down in R Vs. Shepard (supra). Although necessary suggestions were not put forward to the witnesses so as to discredit the correctness/genuineness of the call records produced, we would prefer to examine the points made out by the learned counsel for the accused independently.

procedure for production of electronic records because printed copies of such information are vulnerable to manipulation which cannot easily be discernible by human eyes. It was argued by Cyber Law experts that by bypassing section 65B, the Hon'ble Supreme court had permitted hearsay evidence. The case of ***Ratan Tata v. Union of India***[4] The view taken in ***Navjyot Sandhu***[5] was followed. This was a case where a CD containing intercepted telephone calls, was admitted in evidence without producing a certificate under section 65B of the Indian Evidence Act. In 2007, the United States District Court for Maryland decided in ***Lorraine v. Markel American Insurance Company***[6]**,** held that the process of proving electronically stored information is prescribed in the Federal Rules of Evidence and the same needs to be strictly complied. In that case the question of admissibility and proof of emails as evidence of a contract was raised. These emails were produced without following Federal Rules of Evidence. The American federal courts took a contrast view to the lenient view taken by its predecessors[7].

The trend therefore was to recognize electronic evidence as a special breed of evidence requiring separate rules for its admissibility and authentication. It discouraged the process of its admissibility and authentication in the same manner as traditional documentary evidence.

Taking a cue from the progression of law in the United States in ***Anvar P.***

[4] Writ Petition (Civil) 398 of 2010 before Supreme Court of India

[5] State (NCT OF DELHI) VS Navjot Sandhu [2005 11 SCC 600

[6] 241 FRD 534 (D. Md. 2007)

[7] Judge Grimm discussed five evidence standards ESI evidence must satisfy: (1) is the ESI relevant (under Rule 401); (2) is it authentic (under Rule 901(a)); (3) is it hearsay (under Rule 801) and, if so, does it constitute an exception under Rules 803, 804 and 807, (4) does it comply as an original or or duplicate under the original writing rule or, if not, can it be admitted pursuant to the admissible secondary evidence rules 1001- 1008 to prove the content of ESI and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or another factor identified by Rule 403 of the Federal Rules of Evidence

V. vs. P.K Basheer &Ors[8], the Hon'ble Supreme Court overruled the decision in the case of ***Navjot Sandhu,(supra)*** and redefined the concept of admissibility of electronic records to correctly reflect the letter and spirit of the amended provision and harmoniously interpreting sections 63, 65 and 65B of the Indian Evidence Act. The court applied the maxim *generalia specialibus non derogant* ("the general does not detract from the specific"), In this case, Mr P.V. Anwar had filed an appeal contending that his opponent P. K. Basheer, MLA had defamed him. The defamatory content was recorded CDs that contained electronic propaganda, interviews and recordings of public meetings that were done on a mobile phone and video cameras. This electronic record was copied on CDs which were produced as evidence without a certificate under section 65B of the Indian Evidence Act. This evidence was challenged on the ground that it is secondary evidence as the original cell phone or camera on which it was recorded has not been produced. Here in fact the person who recorded some of the speeches was also examined as a witness.

However the Supreme Court did not agree with the view that the courts could admit electronic records as evidence without certificate under section 65B, by resorting to other modes. It was held that section 65A and 65B are a complete code in itself exclusive of the other provisions of the Indian Evidence Act and therefore an electronic record cannot be admitted by resorting to other provisions relating to secondary evidence. Justice Kurian Joseph authoring the judgment held that since section 65B begins with a non obstante clause. It is independent of the procedure prescribed under other provisions of the Indian Evidence Act relating to the production of secondary evidence. The court further noted that only when

[8] AIR 2015 SC 180

the conditions prescribed under section 65B of the Indian Evidence Act are satisfied the electronic record denoted as a "computer output" can be admitted in evidence without further proof or production of the original. Despite this view taken by the Hon'ble Supreme Court declaring section 65A and section 65 B as a self-contained code, the practical challenges faced in admissibility of electronic record, made subsequent judgements water down the effect of the judgment in the case of Anwar P V (supra).

In the case of ***Tomaso Bruno and another v. State of Uttar Pradesh***[9]**,** the Hon'ble Supreme Court held that Secondary evidence of contents of an electronic record can also be led under Section 65 of the Indian Evidence Act. In that case it was held that the omission to produce CCTV footage, which is the best evidence, raises serious doubt about the prosecution case. The Court drew an adverse inference against the prosecution under Section 114 (g) of the Indian Evidence Act, and conviction was, therefore, set aside. Further in of ***Sonu @ Amar v. State of Haryana***[10]**,** a question arose whether CDRs which were produced without a certificate under section 65B of the Indian Evidence Act could be read in evidence. The Hon'ble Supreme court relied on the basic principle of admissibility and mode of proof as would be applicable for conventional documents and that the objection as regards admissibility had to be raised at the stage when the copy of the electronic record was produced at the first instance by the prosecution before the trial court. Admittedly, there was no objection taken at the time when the CDRs were adduced in evidence before the Trial Court. The court therefore held that the CDRs could be admissible in evidence without the certificate[11]. A two-Judge Bench of the Apex Court

[9] (2015) 7 SCC 178
[10] 2017 SCC Online 765
[11] The Supreme Court reasoned that the crucial test in such a case is whether the defect could have been cured at the stage of marking the document. Upon an objection relating to

in ***Shahfi Mohammed v. The State of Himachal Pradesh***[12], were required to consider a situation where the certificate under section 65B could not be produced on account of the original record being in possession of a third party[13]. In this case the court was considering the utility of videography in investigation and the potential roadblock of section 65B in respect of electronic records which are not in possession of the party producing its secondary evidence. After considering the rival submissions it was held that if the original record is in possession of a third party, the party intending to produce its copy is exempted from producing a certificate under section 65B. This however does not mean that the copy of the

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the mode or method of proof, the Courts holds that in 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 holds that the mode or method of proof is with connected appeals procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. It holds that 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. An example was taken as to the statements under section 161 of the Code of Criminal Procedure, which fall under the category of inherently inadmissible evidence and CDRs do not fall in the said category of documents.

[12] SPECIAL LEAVE PETITION (CRL.)No.2302 of 2017

[13] After hearing submissions of the parties and clarifying 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) the Apex Court (in reference to aforesaid judicial decisions) made the following observations: i. Electronic evidence is admissible under the Act. Section 65A and 65B are clarificatory and procedural in nature and cannot be held to be a complete code on the subject. ii. If the electronic evidence so produced is authentic and relevant, then it can certainly be admitted subject to the court being satisfied of its authenticity. The procedure for its admissibility may depend on the facts such as whether the person producing the said evidence is in a position to furnish a certificate under Section 65B (h). iii. The applicability of the procedural requirement under Section 65B(4) of the Act of furnishing a certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such a certificate being in control of the said device and not of the opposite party. iv. 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 Act cannot be held to be excluded. In such cases, procedure under the said provisions cannot be held to be excluded. v. A person who is in possession of authentic evidence but on account of manner of proving, such a document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which the party producing cannot possibly secure, will lead to denial of justice. vi. A party who is not in possession of a device from which the document is produced cannot be required to produce a certificate under Section 65B (4) of the Act. Thus, the requirement of a certificate under Section 65B is not always mandatory.

electronic record can be directly read in evidence. It was held that the evidence so produced has to be tested on the touchstone of sections 61 to 65 of the Indian Evidence Act. The court held Section 65A and 65B of the Indian Evidence Act to be only clarificatory and procedural in nature, as opposed to being a complete code. The court emphasized on authenticity rather than admissibility and held that the procedure for admissibility may depend on the facts such as, whether the person producing the said evidence is in a position to furnish a certificate under Section 65B or not. In a case where a party is not in possession of a device, containing the original electronic record, the party can resort to Sections 63 and 65 of the Indian Evidence Act. Thus denial of admission of a copy or computer output of a third party electronic record, only on the ground of non-availability of certificate under section 65B, would be unjust. Thus, it was held that the requirement of a certificate under Section 65B is not always mandatory. The Hon'ble Apex Court in the case of ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal***[14] attempted to clear the deadlock to a very large extent. Since the passing of judgment in the case of ***Mohd Shafi(supra)***, two more judgments came from two different High Courts. The Madras High Court in ***K. Ramajyam Appu v. Inspector of Police***[15] which held that oral evidence can be given through a person who was in-charge of a computer device in the place of the certificate. In ***Tomaso Bruno v. State of U.P.***[16]**,**it was held that that Sections 65A and 65B of the Indian Evidence Act cannot be held to be a complete Code on the subject. This finding was directly contrary to the ratio laid down by ***Anvar P.V. (supra)***. It was further elucidated that the requirement

[14] 2020 SCC OnLine SC 571
[15] 2016 CrLJ 1542 (Mad)
[16] (2015) 7 SCC 178

of a certificate under Section 64B (4), is only procedural and could be relaxed by the Court wherever the interest of justice so requires, and one circumstance in which the interest of justice validates relaxation would be in a case 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 obtain the requisite certificate.

In **A*rjun Panditrao Khotkar (supra)*** the facts in issue were video recordings which were produced by the Election Commission, without a certificate under section 65B of the Indian Evidence Act from the person in charge of the device that had generated the computer output. In this case filing of nomination papers were challenged on the ground that they were filed beyond the time limit by the Election Commission. The petitioner sought to rely upon the video recordings available at the office of the Returning Officer. However despite several correspondences made the Returning Officer who was in incharge of the records refused to give a certificate under section 65B of the Indian Evidence Act. Although the VCD were already on record there was no certificate under section 65B produced to support them. The Hon'ble High Court then observed 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. The question however was whether the VCDs could be admitted as secondary evidence in the absence of a certificate? Finding that no written certificate as per Section 65-B (4) of the Indian Evidence Act, was furnished by any of the election officials, and more essentially, the Returning Officer, the High Court then held that the substantive evidence, in form of cross examination of Smt. Mutha, which testifies all the requirements of section 65B of the Evidence Act, is sufficient to admit the electronic record.

The Hon'ble court held that the witness Smt Mutha was incharge of the management of the relevant activities and her evidence can be used and needs to be used as substantial compliance of the provision of section 65-B of the Indian Evidence Act and hence based on this evidence the election of the Returning Candidate was therefore was declared void in the impugned judgment. This order of the Hon'ble High Court was challenged before the Hon'ble Supreme Court. The argument was that, as there was no certificate under section 65B of the Indian Evidence Act the electronic record in the form of CD could not be admitted in evidence. Reliance was placed on the judgment in the case of ***Anvar P.V. (supra)***, and it was argued that the theory of substantial compliance that was accepted by the Hon'ble High Court is contrary to this judgment. Hence it was urged that the order of the trial court should be set aside. Per contra it was argued that the testimony of the witness Mutha was taken down in writing. The witness statement is signed by the Returning Officer. This would itself amount to the requisite certificate being issued under Section 65B (4) of the Indian Evidence Act.On behalf of the intervener it was argued that the case of ***Anvar P.V. (supra)*** requires to be clarified to the extent that Sections 65A and 65B being a complete code as to admissibility of electronic records, what is to be done when it is not possible to produce a certificate under section 65B of the Indian Evidence Act.

The Hon'ble Supreme court considered the origins of section 65B of the Indian Evidence Act and particularly the non obstante clause and held since section 65A and 65B were introduced in view of the enactment of the Information Technology Act, it is a complete code in itself and cannot be supplanted or modified by any other provisions of law.[17]. It was

[17] 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

observed that the opening lines of section 65B 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. The court therefore reiterated that the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. Addressing the question as to what is to be done in the circumstances where it is not possible to produce the certificate under section 65B, the court urged parties to explore Section 165 of the Indian Evidence Act, Order XVI of the Civil Procedure Code, 1908 and Section 91 of the Code of Criminal Procedure, 1973. The court noted that the facts of the present case show

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 this 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 offenses, 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 metadata to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic records, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016.

that despite efforts of the Respondents to get a certificate under Section 65B (4) of the Evidence Act from the authorities, the authorities willfully refused to give such a certificate. In such circumstances the court held that the proper recourse would have been to apply to the court for its production either under the provisions of the Civil Procedure Code or the Indian Evidence Act. The court noted that certificate can be given by a person who occupies a 'responsible official position' in relation to the operation of the relevant device, or a person who may otherwise be in the 'management of relevant activities' as is the requirement of Sub-section (4) of Section 65B of the Indian Evidence Act .

Other Challenges Pertaining To Third Party Electronic Records

At para 49 of the judgment the Hon'ble Supreme Court has observed that *"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".*

In that case the court considered that the facts of the case show that *all* efforts were made by the Respondents, through the High Court or otherwise, to get the certificate under Section 65B (4) of the Indian Evidence Act from the authorities, despite that the authorities concerned willfully refused, to give the certificate. The Hon'ble Court applied maxims "*lex non cogit ad impossibilia , and impotentia excusat legem* and held that when there is a serious disability that makes it impossible to obey the law, the disobedience of the law can be excused[18]. However what

[18] The Hon'ble court held 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

remains unanswered is that if section 65B is a complete code in itself and that there is no other mode of proving a copy of an electronic record, even if the court gives a finding that the applicant, for reasons beyond his control is unable to produce a certificate under section 65B, the court will not be able to admit copy of the electronic record in evidence on that count. The said case the Hon'ble Supreme court did not have an occasion to examine the effect of this paradox to the facts at hand as the litigation has become infructuous due to passage of time.

This deadlock has to be cleared by the enterprise of the legislature and hence it cannot be said that Arjun Kotkar (supra) is a missed opportunity to lay down the law on the confusion pertaining to third party electronic records. On the contrary it has made an honest attempt to show a path towards which such cases should move in case there is a difficulty in producing certificates from a third party. In addition to the pointed issue raised in this case there are intriguing aspects relating to third party electronic records. A certificate under section 65B can only be produced by a person having lawful control over the electronic device that has generated the computer output. The status and standing of this person in

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 obey the law, the alleged disobedience of the law is excused."

trial, his identity, his availability and most importantly his refusal to issue a certificate have to be considered. It may be noted that section 65B of the Indian Evidence Act uses the phrase "computer output" and not "copy". The word computer output has not been defined in either the Information Technology Act or the Indian Evidence Act. From the reading of section 65B the term "computer output" can be understood as that information from the original electronic record which is printed on a paper or is stored, recorded or copied on an optical or magnetic media. In common parlance such a document is referred to as a copy, but one cannot be oblivious of the fact that the legislature has declined to use the word "copy" although this word was used in enacting other provisions relating to secondary evidence. The following issues may arise in matters relating to admissibility of a third party electronic record.

1. **No information of the third party that holds the electronic record**

There may be cases where a party intending to produce an electronic record does not even know the persons who generated the computer output. The document is received by the person wanting to produce the same as a copy. This form of electronic record may be received by a party in the form of printouts in ordinary chores of life. For example invoices from a grocery store, flyers, statement of accounts, boarding passes in web check ins, bank statements or insurance related papers. If these documents pertain to a foreign country (as may happen in matrimonial disputes or child custody cases) there may be no information available with the holder of the documents about the third party which has generated the same and/or the third party may not be amenable to the jurisdiction of the court that directs the production of a certificate. It may be argued that the document itself may give a clue of the identity of the lawful owner of the

original. This cue may be useful if a substantial period has not passed between the time of generating the copy till the time the copy is tendered in evidence. If years have been passed it may not be possible to trace the original and correlate it with the copy issued by the person who at the relevant time was in charge of activities.

2. **Right of the accused to remain silent.**

The second impediment in such cases is, matters where there is no obligation on the lawful holder of the original electronic record to produce a certificate. Article 20 of the Constitution of India enjoins the principle of right of the accused against self-incrimination. The article upholds the right of the accused to remain silent and is based on the maxim *'Nemo tenetur seipsum accusare'* which means 'No one is obligated to blame himself. Consequently therefore the provisions of the Criminal Procedure Code which pertain to the power of the court to direct a person to produce documents are inapplicable. In the landmark case of ***Shyamlal Mohanlal vs State Of Gujarat***[19] in the context of section 94 of the Criminal Procedure Code, it was categorically held that "the generality of the word "person" used in the section is of no significance. If the legislature intended to make the section applicable to an accused person, it would have said so in specific words. If the section is construed so as to include an accused person it is likely to lead to grave hardship for the accused and make investigations unfair to him, for, if he refused to produce the document before the police officer, he would be faced with a prosecution under the Indian Penal Code. The words "attend and produce" used in the

[19] AIR 1965 SC 1251

section are inept to cover the case of an accused, especially when the order is issued by a police officer. In matters where the original electronic record is with the accused even if the Police manage to secure a copy or a printout, the printout would be inadmissible until and unless the police seize the original electronic record. The question arises as to what would happen in an eventuality where the device that was used to generate the original record is destroyed by the accused. This may happen in TADA cases where some fliers or printouts may be found without knowing the details of the device from which these fliers were printed.

3. **Refusal by a third party against whom no adverse inference can be drawn.**

It may be noted that if a third party does not produce a certificate even upon directions of the court no adverse inference can be drawn against that party. Simply, because the party has no connection with the litigation. The litigant who relies on such a document stands to suffer. This observation is made notwithstanding the fact that there are provisions in law that provide for penal consequences in case of disobedience.

4. **Whether direction to produce a certificate under section 65B of the Indian Evidence Act tantamount to production of a document in a strict sense.**

The doctrine of impossibility has been applied in the case of Arjun Panditrao(supra) in its proper perspective. However if the Hon'ble Supreme court has endorsed the doctrine of impossibility, its refusal to accept the principle of substantial compliance is intriguing. The Hon'ble Supreme Court has suggested that the court can have recourse to provisions empowering the court to issue directions to the third party to

produce certificate under section 65B of the Indian Evidence Act in civil and criminal cases, however it is my respectful view that these provisions would only apply to existing documents. Whereas 65B, envisages a situation where the authenticity of the copy vis a vis the original has to be certified by the maker of the certificate. In order words directions will have to be given for certification of a record and not production of a certificate.In civil cases if the relevant documents are in possession of a third party, recourse is often made to relevant provisions of the Civil Procedure Code or the Indian Evidence Act. Section 30 of the Civil Procedure Code confers powers upon the court to order discovery or compel the production of a document. Order 11 of Civil Procedure Code pertains to discovery and inspection, Order 12 deals with admission of documents and facts and Order 13 production, compounding and return of documents. Order 16 of Civil Procedure Code provides for summoning and attendance of witnesses to give evidence or to produce documents.

Similarly in criminal cases the power to compel production of documents or other things is governed by section 91 to 94 of CrPC. In addition to this, Section 311 of Criminal Procedure Code also empowers the court to summon any material witness at any stage for the purpose of giving evidence. It may be noted that none of these provisions empower the court to compel a person to give a certificate certifying that a particular state of things existed. All these provisions would apply to existing documents only, whereas section 65B of the Indian Evidence Act requires the person who creates a copy of electronic record to be produced in the court to certify that a certain state of things existed in connection with the computer that generated that record.

The power of the court to compel the production of these documents is therefore open to challenge and the provisions would be open either to liberal interpretation or strict application.

5. **Due to passage of time the person carrying out the copying process may no longer be available for such certification.**

In matters where printouts of electronic records are taken without anticipation of its use in a litigation, it may so happen that due to passage of time the person carrying out the copying process may no longer be available for such certification especially if the printout was taken in official capacity. There are judgements of the Hon'ble Supreme court that a certificate under section 65B has to be contemporaneous. However a situation like above cannot assure the same. All these aspects therefore have to be properly addressed by the legislature, as was observed in Arjun Panditrao Khotkar(supra) itself.