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ELECTRONIC EVIDENCE – A NEED TO AMEND SEC. 65B OF THE INDIAN EVIDENCE ACT, 1872

Dr. O. N. Ravi*

1. Background

The surging tide of technological changes arising on account of innovations that overwhelm commerce and trade has also brought about a corresponding need to reshape the laws relating to them in order to reflect those changes. One such law which grapples to keep pace with the change in technology is the Law of Evidence. Law of Evidence is a critical legislation that plays a very important role in the administration of justice. The legal rights set out in the vast array of substantive laws that are in currency in the legal system can be enforced only when the rules of admissible evidence are clearly articulated in the Law of Evidence. The Indian Law of Evidence as it stands today, adopted more than a century back from the Victorian era, attempts to keep pace with the avalanche of technological developments in commercial transactions that are undertaken by various entities in the market economy. The concepts of e-commerce or e-trade or internet of things or smart contracts pose real challenges to the policy or law makers to come out with a correct framework of law to ensure their smooth enforcement.

Way back in 2000, with the introduction of Information Technology Act, 2000, a host of laws such as Indian Penal Code, 1861, Banker's Book Evidence Act, 1891, Indian Evidence Act, 1872, were all amended to give

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effect to the recognition of the concept of "electronic data and document". The Information Technology Act itself was modelled on UNCITRAL Model Law on Electronic Commerce. With the above changes, currently the definition of 'evidence' under the Indian Evidence Act, 1872 covers: a) the evidence of witness i.e. oral evidence, and b) documentary evidence which includes electronic record produced for the inspection of the court.[1] Sec. 3 of the Act was amended and the phrase "All documents produced for the inspection of the Court" was substituted by "All documents including electronic records produced for the inspection of the Court".[2]Documentary Evidence plays a very vital role in the legal proceedings. It is defined as documents produced for the inspection of the Court[3]. The main purpose of production of the documents is to verify and rely upon the truth of the contents set out in the document. While the authenticity of the document and the truthfulness of the contents can only be found through oral evidence through examination of the witness[4], the contents of the document can be ascertained or proved either by Primary or Secondary Evidence[5]. Before the introduction of the Information Technology Law in 2000, the Primary and Secondary Evidence of all documents including electronic documents were governed by Sec. 61, Sec. 62 and Sec. 63 of the Indian Evidence Act, 1872. Accordingly, if the document itself is produced for inspection, it serves as Primary Evidence. The certified copies or copies made from the original by mechanical processes by themselves ensured the accuracy of the copy or copies made from or compared with the original or counterparts of documents as

[1] Indian Evidence Act, No.1 s 3, Act of Parliament, 1872(India)
[2] Information Technology Act, No.21 s 92 ,2000 (India)
[3] Indian Evidence Act No.1 s 3, Act of Parliament, 1872 (India)
[4] Indian Evidence Act No.1 s 59, Act of Parliament, 1872 (India)
[5] Indian Evidence Act, No.1 s 61, Act of Parliament, 1872 (India)

against the parties who did not execute them or oral accounts of the contents of a document given by some person who has seen the document, served as Secondary Evidence. This applied to electronic documents as well.

However, the introduction of 65A and 65B under the Second Schedule to the Information Technology Act, 2000[6] brought about metamorphic changes in the way the "electronic documents" were treated as evidence before the courts both in civil and criminal cases. If the original electronic record itself is produced as proof, then the same would be admitted as Primary Evidence[7] without having to satisfy conditions mentioned in Sec.65B[8] However, more often than not, the question of production of original electronic records may be impractical and hence the law prescribes a detailed procedure for admission of secondary evidence of electronic records. If the conditions satisfied in Sec.65B are strictly adhered to, then the secondary evidence of electronic records would be considered as "document" and admitted as evidence. However, the Evidence Act will not permit the proof of an electronic record by oral evidence if the requirements of Sec.65B are not complied with. It is essential here to note that Sec. 65 of the Act speaks of three criteria for evidence namely, existence or admissibility, condition and contents of a document in the instances mentioned in that Section. But since a separate dispensation has been carved out in respect of electronic evidence, all these three criteria are combined within two sections - Sec.65A and Sec. 65B. Sec. 65A stipulates that contents of electronic devices are to be

[6] Information Technology Act No.21, s 92, Act of Parliament, 2000(India)
[7] Indian Evidence Act, No.1 s 62, Act of Parliament, 1872 (India)
[8] Anvar P.V. v P.K. Basheer [2014] 10 SCC, 473

proved as per Sec.65B and Sec.65B deals with the admission, conditions and contents of such records.

Sec. 65B is worded as a non-obstante clause to give it the overriding force over the other provisions of the Act. The operating part of the Section stipulates that:

"Any information contained in an electronic record 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-

a) if the conditions mentioned in this section are satisfied in relation to the information and computer in question and
b) 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."

The said conditions to be fulfilled are set out in detail in sub-section 2 of Section 65B vide (a) to (d). Sub-Section 4 of Section 65B deals with the certification to be given of such record sought to be adduced as evidence by a responsible person connected with the operation of the said device.

2. Approach Of The Judiciary On Electronic Evidence

Courts in India have been proactive in dispensation of justice when it comes to the question of the admissibility of electronic evidence. Video conferencing was permitted as a natural adjunct to electronic method of recording evidence[9]. The Court insisted in such cases to ensure precaution

[9] Amitabh Bagchi v Ena Bagchi [2005] AIR, cal 11

as to identification of witness and the accuracy of witnesses[10]. In Matrimonial proceedings also, audio CDs were permitted to be adduced as evidence subject to the right of cross-examination by the party who objected its production[11]. The procedure set out in Sec.65B was insisted upon in the absence of which the secondary evidence of electronic record was held to be not admissible. This was a very significant judgement given in 2014 in the matter of Anvar P.V. v P.K.Basheer & Ors[12]. In this case, the Hon'ble Supreme Court had settled the controversies arising from the various conflicting judgments on the admissibility of the electronic evidence. The Court has interpreted Sec. 22A, 45A, 59, 65A and 65B of the Evidence Act and held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate u/s 65B(4) of Evidence Act. It has been stated that the electronic evidence without certificate u/s 65B cannot be proved by oral evidence and also the opinion of the expert u /s 45A Evidence Act cannot be resorted to make such electronic evidence admissible. This changed the contours of the interpretation in so far as it relates to the requirement of certification under 65B. It was also held that such certification extended only to the secondary electronic evidence and not to the original electronic evidence. This case overruled an earlier case, famously known as Parliament Attack case[13], where it was held that cellular phone records, in the nature of secondary evidence, were permitted to be adduced as evidence without any certification required under Sec. 65B stating that the same can be treated otherwise as secondary evidence under Sec. 63 and Sec. 65 in order to serve the large interests of justice.

[10] Bodala Murali Krishna v Bodala Prathima [2007] AIR, AP43
[11] G. Shyamala Ranjini v M.S.Tamizhnathan, [2008] NOC, 476(Mad)
[12] Supra 8
[13] State (NCT of Delhi) v. Navjot Sandhu, [2005] 11 SCC, 600

However, in Shafi Mohammad v. State of Himachal Pradesh[14] the Apex Court held that Courts can rely on electronic records without the certificate (as required u/s 65B). This was a radical change that overruled the position laid down in the Anvar case[15]. In another case in 2018, the Supreme Court has held that the certification of electronic record is not mandatory wherever the interests of justices so justify. The bench observed that section 65B of Evidence Act is a procedural provision and if the electronic evidence is "authentic and relevant" the same can certainly be admitted, subject to the satisfaction of the court and it may depend on situation such as "whether the person producing such evidence is in a position to furnish the certificate under Sec. 65B (4)"[16].

Subsequently, the Hon'ble Supreme Court allowed a partial appeal in the matter of P. Gopalkrishnan v. State of Kerala and Anr.[17] and held that -

"**The contents of the memory card/pen drive electronic record are to be taken as a document.**"

3. Analysis Of Sec.65-B Post Supreme Court Judgement

From the decisions of the courts in India, it is very clear that 'electronic record' in various forms have come to occupy a central stage in the law of evidence and are attaining a very high degree of admissibility. However, earlier the courts have been adopting different approaches on the need to adhere to the procedural requirements set out in Sec.65B for the purpose of assessing the admission of electronic records as "evidence" under the law. As mentioned supra, wherever the procedural requirements under

[14] Shafi Mohammad v. State of Himachal Pradesh [2018] 2 SCC, 801
[15] Supra 8
[16] PTI, 'Courts can rely on electronic records without certificate: Supreme Court' (Economic Times, 04 February, 2018) <https://economictimes.indiatimes.com/news/politics-and-nation/courts-can-rely-on-electronic-records-without-certificate-supreme-court/articleshow/62777759.cms> accessed 29 February 2020
[17] MANU/KE/2817/2018

Sec.65B were not very strictly adhered to by the courts they were more for the reasons of serving the larger interests of justice where such adherence became impossible. However, the curtains have been brought down on various interpretations on this issue by the judgement of the Supreme Court in the case of Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and others[18]. It was held that the certification stipulated under Sec.65B (4) is a mandatory requirement and a condition precedent to the admissibility of an electronic evidence as a "secondary evidence". It also differentiated between the original contents stored in the computer and copies made therefrom. If the original device itself is produced, it will be primary evidence and in the event of impossibility of the same, secondary evidence can be given of the same records after only strict adherence to the conditions set out in Sec.65B including the certification prescribed under that section.

But, at the same time, where a party is unable to submit the certificate under the Sec.65B due to reasons beyond his control where he has applied for a certificate to the authority or the concerned person in control of the computer or device and the same has not been given, the aggrieved person can apply to the Court under the extant provisions of Civil Procedure Code or Criminal Procedure Code or the Evidence Act upon which summons can be issued by the court for the production of certificate. Then in that case the party is presumed to have done all that he can to obtain the certificate. In such scenarios, the two latin maxims namely, lex non cogit ad impossibilia (what is impossible will not be demanded by the law) and impotentia excusat legem (where one is incapacited due to an impossible event, his disobedience to law will be excused) will be invoked by the Courts to give relief to the party who has applied for the certificate.

[18] (2020) 7 SCC

Furthermore, the Court has also held that the certificate can be obtained at any time during the trial and not necessarily only at the initial stage. The Courts can exercise their discretion in such cases, of course, ensuring without any miscarriage of justice.

In terms of the above judgement, the law relating to admission of electronic evidence set out under Sec.65B has been made abundantly clear. That Sec.65A and Sec.65B are complete code by themselves and secondary evidence of electronic record will be valid evidence only when the requirements of Sec.65A and 65B are strictly adhered to and not otherwise.

As the secondary evidence of electronic records has been made watertight by the above judgement necessitating strict adherence to Sec.65A and 65B of the Evidence Act, it may be interesting to analyse whether the said Sec.65-B is comprehensive enough to include all types of electronic records. The opening part of Sec.65-B stipulates that any information in an electronic record that is "printed, stored, recorded or copied in optical or magnetic media in a computer (hereinafter referred to as the "computer output"), shall be deemed to be a "document". This defines what is a "document" for the purpose of this Section as the general definition of "document" in the Evidence Act does not include an "electronic record" within its purview. In order to qualify as a "document", it is necessary to see whether an electronic record falls within the expression "stored, recorded or copied in optical or magnetic media in a computer as only such output from a computer is taken as "computer output" for the purposes of this Section and referred to throughout in subsequent parts of the Section. Going by the language used in the Section, any device which is based on the "optical or magnetic media" appears to have been covered under this

Section leaving out other types of media such as semiconductor etc., where storage is made possible due to the latest technological changes

It is interesting to note that while the expression "electronic data" used in the section appears to be a wide expression, it is the expression **computer output** used subsequently which has a limited scope. This is especially so in view of the advancement of technology whose frontiers are expanding at a rapid pace bringing in its wake newer innovations and devices of technology. The current provision of Sec. 65B was drafted in the year 2000 without much change in its structure and with a gap of over two decades a lot of technological innovations have taken place bringing about newer and sophisticated electronic devices based on various media such as semiconductor. Currently, the term 'electronic record' is defined in Sec.2(t) of Information Technology Act, 2000 as "data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated microfiche". Again the expression 'Data' is defined in the same Act as "a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized 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 network and may be in any form, computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer". Reading together both the definitions give a very wide amplitude to the expression 'electronic record' and seeks to bring within its purview all types of electronic records. Accordingly, one may infer the expression electronic record used in Sec.65A and 65B is wide enough to cover all types of electronic record. It is only the words "stored, recorded or copied in optical or magnetic media produced by a computer" that have

limited the scope of the "computer output". Again, the expression "computer" defined in Sec.2(1)(i) of the Information Technology Act, 2000 is a wide term. For the purpose of this Section, only those output produced by a computer that are stored or recorded in optical or magnetic media will be covered and those resting or stored on other media such as semiconductors are not covered. Technically, that may pose the problem of the same in being used as secondary evidence under the Evidence law.

It is worth mentioning here that Sec.65B is a non-obstante clause and held to be a code by itself. Evidence law being procedural in nature needs to be strictly adhered to. Sec.65-B is based on a similar provision contained in the now repealed Section 5 of the UK Civil Evidence Act, 1968, quoted with approval by the Supreme Court in the above judgement. The expression used in the UK law was "computer" which was wider than the expression used in Sec.65B as explained above. It merits mention here that UK Law Commission (vide Part III of the Law Commission's Report titled: "The Hearsay Rule in Civil Proceedings, quoted with approval by Supreme Court in the above judgement) recommended the repeal of Section 5 based on the feedback arising out of wider consultations amongst various stakeholders, that the technology has developed rapidly since 1968 and the computer-records are relied in every facet of business activities and the conditions set out in the 1968 Act are no more relevant in the current times. Accordingly, the said section was repealed subsequently. It is also worth noting that other jurisdictions such as Scotland, USA, Canada and some states of Australia and New Zealand do not have separate provisions for computer related evidence and are functioning without any glitches. [19]

[19] Ibid

The Supreme Court observed in the Anvar case[20] that "Proof of electronic record is a special provision under the Evidence Act. The very caption of Sec. 65A of the Evidence Act, read with Sec. 59 and Sec. 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Sec. 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sec. 63 and Sec. 65 has to yield". Though the expression 'electronic record' mentioned in Sec. 65A is very wide and appears to include all types of electronic record, the said Sec. 65A is controlled by Sec. 65B which prescribes a separate procedure for proving the secondary evidence of an electronic record. Hence, what is stated as electronic record in Sec.65B will be more relevant for proving an electronic record as a secondary evidence While traditional devices such as floppy disk, CDs, VCDs, CD-ROMs etc., may operate on optical or magnetic media, it is doubtful whether devices such as memory card or pen drive etc. that operate on different technology can be brought within the definition of 'document' mentioned in Sec.65B. In order to appreciate the technical differences between various devices that are used, it is important to analyse the type of technology that serves as the backbone of each of the media used in a computer.

Optical drives use a laser to read or write information to a separate storage media, such as a DVD, CD or Blu-ray disks. These drives are available in internal and external models, but unlike the flash drives, they are bulkier to be moved from one computer to another. 'Magnetic drives' refer to devices that spin magnetically-coated storage media for reading and writing information. The most common example is a computer hard drive, which has numerous platters coated with magnetic material for data

[20] Supra 8

storage. USB drives which are known as Flash drives contain mini circuit boards with memory chips to save and retain the data and information with an integrated USB interface. For this, no moving parts are required. Also, no separate media is required to read or record the data. Flash drives derive the power from the computer once they are plugged in, requiring no extra power supply. These types of storage media are also called solid state memory or flash memory, and distinctly are different from the optical and magnetic drives. Memory cards, such as compact flash and SD cards are also like flash drives, but without built-in USB connector to directly plug into the computer.

The USB flash drive is a storage device that consists of NAND-type flash memory and integrated with USB interface. It is typically small, lightweight, portable and rewritable.[21] Fujio Masuoka (Toshiba) created flash memory, a memory system that retained all data without requiring a power source.

The MOSFET (Metal Oxide Semiconductor Field Effect Transistor) transistor is a semiconductor device which is widely used for switching and amplifying electronic signals in the electronic devices[22]. A transistor is essentially a semiconductor device with physical properties that make it ideal for amplifying or switching electric current and other signal[23]. EEPROM (Electrically Erasable Programmable Read-Only Memory) is

[21] Mr. A. N. Magdum and Dr. Y. M. Patil, "A Secure Data Transfer Algorithm for USB Mass Storage Devices to Protect Documents", <http://www.ijeert.org/pdf/v2-i4/10.pdf, accessed on 29 February, 2020

[22] 'What is MOSFET with Working? MOSFET as a Switch' <https://www.elprocus.com/mosfet-as-a- switch-circuit-diagram-free-circuits> accessed 29 February, 2020

[23] Ali Habeb Aseeri and Fouzeyah Rajab Ali, "Bipolar Junction Transistor as a Switch <http://www.iosrjournals.org/iosr-jeee/Papers/Vol13%20Issue%201/Version-1/H1301015257.pdf> Accessed on 29 February, 2020

widely used in various instruments and devices for storing experimental or ordinal data, assembly code and boot loader.[24] It is a type of non-volatile memory used in computers, integrated in microcontrollers for smart cards and remote keyless systems, and other electronic devices to store relatively small amounts of data but allowing individual bytes to be erased and reprogrammed. Commonly used USB are just one type of EEPROM. Flash is used for common day to day usage for data exchange but EEPROMs are seldom rewritten, hence, used within embedded systems. NAND flash memory is a type of non-volatile storage facility that can compete with magnetic storage devices, such as hard disks[25].

In a white paper published by Sandisk(a western digital brand), Flash 101 and Flash Management[26] NAND flash is defined as a non-volatile solid state memory with the capability to retain stored data when unpowered. NAND and NOR are the two fundamental flash architectures used in electronic systems today. Both NOR and NAND Flash memory were invented by Dr. Fujio Masuoka in 1984. NAND flash offers faster erase and write times and up to ten times the write endurance compared to NOR flash. It requires a smaller chip area per cell (compared to NOR), thus allowing greater storage densities. NAND flash achieves these advantages by sharing some of the common areas of the storage transistor through strings of serially connected transistors. NOR devices require additional

[24] Nathan David, "The Design and Implementation of a Universal EPROM Programmer"< https://www.ijert.org/research/the-design-and-implementation-of-a-universal-eprom-programmer-IJERTV2IS90700.pdf> accessed on 29 February, 2020

[25] Erin Sullivan, 'What are the NAND flash memory types and where do they work best?' (27 February, 2020) < https://searchstorage.techtarget.com/feature/What-are-the-NAND-flash-memory-types-and-where-do-they-work-best > accessed 29 February,2020

[26] 'A detailed overview of flash and flash management techniques' (October 2016) <https://documents.westerndigital.com/content/dam/doc-library/en_us/assets/public/western-digital/collateral/white-paper/white-paper-sandisk-flash101-management.pdf> accessed 29 February 2019

control circuits to independently access each storage transistor for random, independent addressability. NAND flash access is similar to other block-oriented storage devices such as hard disks and optical media, and therefore is frequently used in mass-storage devices such as memory cards, e.MMC devices and USB flash drives.

In view of the above technical specifications that apply for each media, SD cards and USB drives cannot be considered as part of optical/magnetic media. They use flash storage. Sec.65B was introduced in the Indian Evidence Act at a time when the recent innovations were unknown. Way back in 2000, Policy makers could not have comprehended or envisaged all newer technological devices as mentioned above that are currently in very high usage. While mobiles, pen drives can technically be used as Primary Evidence under Sec.62, the same may have difficulty when being used as Secondary evidence in view of the restricted rigours of the language and mandatory requirements set out in Sec.65 as upheld by the Supreme Court. While the judgements of the Supreme Courts cited above centred around the issue of certification and conditionalities mentioned in the sub-sections 2 to 4 of Section 65B the subject matter of dispute or judgment was not on the point of limitation of technical expression used in Sub-section 1 of the Section. Yet, the ruling will have an equal force on the limitation of the expression, thereby only covering electronic devices which are stored or copied or recorded in optical or magnetic media. In view of this, there is a compelling need to amend the provisions of Sec.65B to make it broader than the current restrictive language which does not yield to include newer devices that are not based on optical or magnetic media. It is worth noting that the Supreme Court itself has observed that there is a need to revisit the Section 65B as it was introduced 20 years back.

4. Principle Of Casus Omissus and its Applicability

It may always be argued that the Courts may still permit devices based on the latest technology and stored in media other than optical or magnetic, such as USB devices (pen drive or memory cards) as secondary evidence under Sec. 65B, to serve the larger interests of justice. However, on a deeper analysis, it is doubtful whether such an approach would be appropriate in view of the above judgement of the Honourable Supreme Court. The Courts may also be guided by the rule of Casus Omissus. It is an application of the same principle that a matter which should have been, but has not been provided for in a statute cannot be supplied by courts, as to do so will be legislation and not construction[27]. It has also been recognized by the Supreme Court[28] that if a matter, for which a provision may have been desirable, but has not been really provided for by the legislature, the omission cannot be called a defect of the nature which can be cured or supplied by recourse to the mode of construction advocated by DENNING, L.J., in the Seaford case[29]. In that case, Lord Denning observed that "when a defect appears in legislation, a judge must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature ". However, this mode of construction was disapproved by the House of Lords in the case of Magor & St. Mellos R.D.C v. Newport Corporation[30]. In other words, the difference is as to

[27] Hansraj Gupta v Dehra Dun Mussoorie Electric Tramway Co. Ltd., [1933] AIR PC 63 [65]
[28] Petron Engineering Construction Pvt Ltd. v CBDT, [1989] AIR SC 501, [508-509] P.K.Unni v. Nirmala Industries[1990] AIR SC 933 [937-1990]
[29] Seaford Court Estate Ltd. v Asher [1994] 2 All ER 155, [164] (CA)
[30] [1951] 2 ALL ER 839(HL)

how much one can infer by necessary implication to fill in a prima facie gap[31].

5. Conclusion

To conclude, 'electronic document' as mentioned in Sec.65B is only restricted to those devices or tools which are based on optical or magnetic media. The Section as it is worded has a restricted meaning. The innovative devices that are invented day in and day out in the fast-growing technological world, may not fall within the ambit of the Sec.65B which was drafted in 2000.

While such devices can be adduced as primary evidence, the same may have challenges in being admitted as secondary evidence under Sec.65B. Though the Courts have been extending the existing provision to accept USB-pen drives or memory cards as "electronic document", the immediacy of amendment by broad basing the Section to provide for all types of new devices, both current and future, cannot be overemphasised.

[31] O.S. Singh v Union of India, [1996] SCC 37.