

Admissibility of electronic evidence under Indian law

Opinion

Advancement in technology has led to evolved means of committing crimes. Offences like cyber stalking, hacking, e-commerce frauds had not been heard of before the take-off of Internet; however, these crimes are on the rise. Traditional crimes like that of cheating, criminal breach of trust, money laundering, have also taken a complex turn with the aid of electronic development. The Indian Evidence Act, 1872 is the law governing relevancy and admissibility of evidence in the courts of law in India. Though it is a pre-independence legislation drafted by Sir James Fitzjames Stephen on the lines of the English Law on evidence, however, the Act introduces certain modifications as well. Electronic evidence implies the paperless record of any act or omission produced for the inspection of the court with an intention of using the same as proof of some fact-in-issue or relevant fact or disproving it as such. The present article discusses the admissibility of electronic evidence upon the amendment of the Indian Evidence Act, 1872.¹

The Indian Evidence Act, 1872² defines evidence in an inclusive manner, as constituting oral and documentary evidence.³ Oral evidence includes all statements of witnesses in relation to facts under inquiry that are either permitted by the court or required to be made before it. Documentary evidence on the other hand, means, all documents produced for the inspection of courts. Thus, a sale deed produced to show for sale of immovable property is documentary evidence; an agreement of service of a newly appointed employee is documentary evidence when produced in court as a proof of employment, etc. The 2000 Amendment to the IEA⁴ amended the definition of documentary evidence bringing electronic records under its purview. Thus, contents of electronic records, like that of traditional documents, could now be proved either through primary evidence or through secondary evidence.⁵ However, the Amendment also introduces a special procedure in regard to electronic records by inserting Sections 65A and 65B to the IEA. It introduces safeguards in the form of mandatory conditions⁶ and certificate⁷ to ensure the authenticity of the source and the contents of the record itself. If the genuineness of the electronic record is still questioned, the Act allows for an expert's opinion to verify the electronic record produced in terms of Section 65B.

The IEA relies on the definition of 'electronic record' as provided for under Section 2(1)(t) of the Information Technology Act, 2000,⁸ which is "data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche." Thus, a movie stored in MPEG format on a DVD, an email sent through a laptop, footage recorded via a CCTV

¹See James Fitzjames Stephen, "The Indian Evidence Act with an Introduction on the Principles of Judicial Evidence" *Macmillan & Co.*, 1872, p.2.

²Here in after referred to as the 'IEA'.

³Section 3, IEA.

⁴Vide Second Schedule, the Information Technology Act, 2000.

⁵See Section 61, IEA.

⁶Per Section 65B (2), IEA.

⁷Per Section 65B (4), IEA.

⁸Here in after referred to as the 'IT Act'.

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are all examples of electronic records under the IT Act. The Act faced technological challenges prior to the 2000 Amendment as well. Tape recorded telephonic conversations were discussed by the Supreme Court of India in Yusufalli Esmail Nagreev. State of Maharashtra.⁹ The court discussed the admissibility in evidence of a tape purporting to have a recorded conversation. It was held that if the statement made in the recording was relevant per the provisions of the IEA and the accuracy, time and place of the tape bearing such recorded statement is proved by a competent witness and the voices therein are properly identified, the tape recording shall be relevant and admissible in evidence.¹⁰

The provisions of the Code of Criminal Procedure, 1973 were interpreted by the Supreme Court in a manner so as to include recording of evidence of a witness residing in a foreign country through video conferencing in State of Maharashtra v. Praful B. Desai.¹¹ Quoting Justice Bhagwati's words that 'law must change with changing social values',¹² the Supreme Court held that in favour of updating construction of on-going statutes like the Code of Criminal Procedure Code in the light of changing technology,¹³ especially when the IEA recognizes electronic records as evidence. Finally, in Anvar P.V. V.P.K. Basheer,¹⁴ the Supreme Court clarified the law relating to admissibility of electronic evidence per the newly introduced provisions to the IEA. Sandhu's case was partly overruled. The ratio of the judgement can be aptly extracted as follows:

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

⁹(1967) 3 SCR 720.

¹⁰Concurring with the reasoning of this judgement, the Supreme Court in Ram Singh v. Col. Ram Singh 1985 SCR Suppl. (2) 399, laid down conditions for admissibility in evidence of tape recorded statements.

¹¹Appeal (Crl.) 476 of 2003:(2003)4 SCC 601.

¹²Id., p.5, Justice Bhagwati in National Textile Workers' Union v. P.R. Ramakrishnan, (1983) 1 SCC 228, at p.256

¹³See *id.*, p.5-6.

¹⁴Civil Appeal No. 4226 of 2012: AIR 2015 SC 180.

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 65B(2).¹⁵ Section 65B was initially interpreted in traditional manner by the Supreme Court in 2003.¹⁶ In Sandhu's case, the Supreme Court held secondary evidence to prove electronic record¹⁷ admissible in absence of certificate under sub-section (4) of Section 65B of the IEA. This was

¹⁵Civil Appeal No. 4226 of 2012 at paragraph 13.

¹⁶See *State (N.C.T. of Delhi) v. Navjot Sandhu @ Afsan Guru* (2005)11 SCC 600; also called the Parliament Attack Case.

¹⁷The electronic records sought to be admitted in this case were cell phone call records.

however overruled in Basheer. Since an electronic record is part of documentary evidence under the IEA, each of these can be considered a document the contents of which can be proved in accordance with the special procedure laid down under Sections 65A and 65B. Further, if the genuineness of any electronic record is challenged before the court, oral evidence to prove the same can be permitted per Section 22A of the IEA. In conclusion, the present law can be summarised as: the computer output shall be treated as a document if the conditions under Section 65B are fulfilled and the certificate there under shall be enough for the proof of its contents, i.e., the information stored in electronic form.

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None.

Conflicts of interest

None.