



Electronic Record as Evidence in the Courts: An Analysis

Anjum Parvez, Seema Yadav and Sandhya Verma

Law College Dehradun, Uttaranchal University, Dehradun.

HOD, Deptt. of Law, SVD, Aligarh.

Law College Dehradun, Uttaranchal University, Dehradun.

Corresponding author: hotlinealigarh@gmail.com

ABSTRACT:

In our day to day life, electronic devices and gadgets are playing the vital and indispensable role as now almost all systems, viz, Banking, Commerce, Trade, and Education etc. have been much depending upon internet and computers. Digital cameras, video and audio recorders, Compact Discs, SD Cards of mobile have made a pertinent place in our daily activities. However, the same technology also generates a new kind of problem before the legal system that how to prove the electronic record before the courts of law so that the same can be used as evidence. This article explores the Laws and relevant case laws in India in order to trace out the present state of affair of electronic records in the form of evidence and its admissibility in India.

Keywords: Evidence, Electronic Record, Law, Courts

INTRODUCTION:

Electronic record has become the vital part of our life as we become more accustomed to the electronic devices like CD, DVD, hard disk/ memory card data, website data, social network communication, e-mail, instant chat messages, SMS/MMS and computer generated documents.. However, a potential problem also emerged with rampant and general use of such electronic devices and gadgets which give birth to the new kind of challenge to the courts, that is what, how and when to rely on evidence relating to electronic records. Section 3 of the Indian Evidence Act, 1872 (hereinafter referred as Evidence Act) after the amendment in 2000, now provides that “All documents including electronic records produced for the inspection of the Court” is to be called Documentary Evidence. But problem has yet to be sort out as, although electronic record may be used as documentary evidence, but the rules of proving the same in the courts are entirely different.

Electronic Records

According to Section 2(t) of Information Technology Act, 2000, Electronic Records means any data, record or data generated, image or sound stored, received or sent in the electronic form or micro film or computer generated

microfiche¹. Thus, all internet activities, electronic chats, mobile or telephones communications, image created or video recorded, CCTV record will fall in the category of Electronic Record. As per Section 65-B of Indian Evidence Act² Electronic records are ‘secondary evidence’. On the basis of rules of secondary evidence, when the original documents cannot be produced in the court then copies of such documents can be produced as secondary evidence and it will be admissible in the court according to its merit. In the matters of electronic documents, however, there exists no thin line between original or secondary. Whenever the evidence related to electronic document present in the court, the genuineness of the document must have to be established for the authenticity of electronic records except the conditions provided under Section 65B. In that case, the electronic record becomes automatically admissible as evidence of its contents in the same manner as a certified copy of a public document. Such certified copy is also secondary evidence but is received as if it is primary evidence, because of sections 77 and 79³.

1 Information Technology Act, 2000; Section 2(t).

2 Indian Evidence Act, 1872 (Act 1 of 1872); Section 65-B

3 Law Commission of India, 185th Report on Indian Evidence Act, available at: <https://lawcommissionofindia.nic.in/reports/185thReport-PartII.pdf>

The Proof of electronic record is a special provision introduced by the Information Technology Act, 2000 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 65B 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 following the maxim *generalia specialibus non derogant*⁴.

Important Judicial Pronouncements Relating to Electronic Records

In *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*, 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 computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows:

“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..... However, it was held that irrespective of the compliance with the requirements of Section 65B, 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.”⁵ From this judgment the court has clarified its authenticity and elaborated the legislations accordingly. As held in *Shafhi Mohammad v. The State of Himachal Pradesh*, the requirement under Section 65-B is reliable⁶. The Supreme Court held that the legal position on the subject matter of the admissibility of electronic device specially to the party who has no possession of the document produced. Such party cannot be required to produce certificate under section 65B (4) of the Evidence Act. Hence the admissibility of the requirement of certificate being procedural is relaxed by the court in the interest of justice.

In the case of *M/S Xact Studio International v. M/S Liwona Sp. Z. O. O*⁷, it was held that the emails, which have been placed on the record with the certificate are held as sufficient to prove the genuineness of the mails.

4 *State (NCT of Delhi) v Navjot Sandhu @ Afzal Guru*, (2005) 11 SCC 600
 5 *Anwar PV v. PK Basher* 2014 10 SCC 473
 6 (2018) 2 SCC 801
 7 *RFA 849/2016 High Court of Delhi at New Delhi*

Hence it covers the electronic record provided under Indian Evidence Act, 1872 which have been placed on record along with the certificate as filed, are held to be sufficient to prove the genuinity of the emails. As it covers the electronic record provided under the Indian Evidence Act, 1872. The Indian Legislation has provided the strict rules to establish the admissibility of electronic record in the court.

In the entertainment area of TV soaps in India, there is one simple standard of criminal investigation have been established and that is the use of cell phones. From these different electronic evidences, the police in TV soaps act to catch the criminals but in real case the admissibility of these evidences are questioned in the court. To answer these questions there are the precedent set by the courts that a cell phone is a computer which is programmed to do among others the function of receiving digital audio signals, convert it into analogue audio signal and also send analogue audio signals in a digital form externally by wireless technology⁸.

In the different court rulings, the courts of India have relied upon the electronic evidence in different ways according to the value and reliability of records produced. These electronic records become much more admissible with the insertion of section 65-B of Indian Evidence Act. It is pertinent that sec 65-B deals with the admission of electronic evidences in the court. With the advancement of technology court also take a step toward such advancements where the court allowed the admissibility of E-mail in print out along with the certificate under section 65B of the act. Also, a certificate is to be issued in that regard by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities. 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 and were then printed⁹.

Section 45 of Indian Evidence Act starts with the non-obstante clause which lays down the evidence collected through the electronic or oral means are admissible as evidence in the court proceedings. This section contains two provisos where it provides that, the contents of any wire, electronic or oral communication are only admissible with the copy of order provided by the competent authority with application which is approved with not less than ten days

8 *Syed Asifuddin and Ors. v. The State of Andhra Pradesh* 2006 (1) ALD Cri 96
 9 *Abdul Rahaman Kunji v. The State of West Bengal* 2014 SCC OnLine Cal 188

before the trial or hearing of proceeding. 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 and 65-B¹⁰

In the Landmark case of *R. M. Malkani v. State of Maharashtra*, it was held that Tape recorded conversation is admissible¹¹. The recorded conversation is considered as the relevant fact by the court under section 8 of Indian Evidence Act. Also, the court has admitted the tape under section 7 as evidence. Even in some cases according to the High Court, “the crux of the matter is the conversation between the complainant and the accused” That conversation is inaudible and the same is not to be taken in evidence¹². Hence the admissibility of tape recorder differ from case to case.

Electronic evidence may be obtained from electronic records which have very wide range to include such as the emails, photographs, tape recorder, sting operations via electronic means, videography, mobile or telephone communication etc. The tape recorder itself is regarded as “primary and direct evidence admissible of what has been said and picked up by the receiver”¹³. The apex court has established the conditions for the admissibility of tape recorder as follows;

- a) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice.
- b) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence i.e. direct or circumstantial.
- c) 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.
- d) The statement must be relevant according to the rules of Evidence Act.
- e) The recorded cassette must be carefully sealed and kept in safe or official custody.
- f) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances¹⁴.

The number of tape recorded evidences and their admissibility in the court proceedings are questioned by the court and still their criteria and admissibility are well established. The guidelines have specific phenomena to be administered in the court. The court has opined in the case of admissibility of photographs as electronic evidence that, when photographs are taken digitally and the person taking the photographs himself has deposed in the Court, his statement that he got the photographs developed himself is sufficient and satisfy the requirements of Section 65B of the Evidence Act. Section 65-B of the Evidence Act is not to be applied mechanically. A digital photograph which is proved constitutes electronic evidence, which is admissible.”¹⁵ Certain technologies are admissible by court as electronic evidences.

It is submitted that there huge difference in the principle between a tape recorder and a photograph, keeping in view their nature, however, both of them provide clear and straight information about the incident, if un-tempered. The recordings are admissible in any circumstances but it totally wrong on the side of court to deny these electronic evidences due to its accuracy of recordings which can be proved and the voices can be identified, also that the evidences are relevant and admissible. Hence, the tape recordings are admissible in the court as the evidence¹⁶. The electronic evidences are wide enough to cover all the aspects of electronic devices. These devices are admissible in the court proceedings as well with the law provided in the Indian Evidence Act, 1872.

The definition of ‘Evidence’ in Section 3 of the Evidence Act, which is amended hence read with the definition of ‘electronic record’ in the Section 2(t) of the information Technology Act, 2000, it includes the compact disc which contain the electronic record of a conversation. The court is of opinion that the electronic evidences are received as the evidence and court may, also listen to the recording before granting or rejecting the application¹⁷.

The Honourable Supreme Court has opined in the case of *Tomaso Bruno and Anr. v. State of Uttar Pradesh* that 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 evidence¹⁸.

10 Supra note 3

11 *R. M. Malkani v. State of Maharashtra* AIR 1973 SC 157

12 *Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke & Anr* 2015 (3) SCC 123

13 *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra & Ors* AIR 1975 SC 1778

14 *Ram Singh & Ors v. Col. Ram Singh* 3 1985 SCR Supl. (2) 399

15 *Puneet Prakash v. Suresh Kumar Singhal & Anr* 2018 SCC OnLine Del 9857.

16 *R. V. Maqsd Ali* (1975) 2 All E.R. 464

17 *K.K. Velusamy v. N. Palaanisamy* AIR 2011 (11) SCC 275

18 (2015) 7 SCC 178

Many courts have opined and admitted the fact that with the advancement of science and technology, it is now possible to conduct the investigation in relation to electronic records with new scientific techniques or with new criteria. Like video conferencing equipment is now possible to set up in the court where in that case evidence would be recorded by the magistrate in open court. With the help of this the requirements of the Sections 274 and 275 of CrPC would be fully met¹⁹. The telephonic conversation, hard disk and compact disk are considered as the electronic evidence under section 65-B of Indian Evidence Act²⁰. All of this becomes possible with the strict rulings pronounced by the courts regarding the same.

In the famous case of *Jagjit Singh v. State of Haryana*²¹, the court has observed that electronic evidences present in a form of interview transcript from different news channels like Aaj Tak, Zee News etc. are admissible under Indian Evidence Act.

The apex court has struck down certain provision regarding electronic evidences which violated the right to privacy guaranteed under Indian Constitution²² as a fundamental right. In the case of *Shreya Singhal v. Union of India*²³, it was held that Section 66-A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2). Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

CONCLUSIONS:

In the end, after analyzing all the above-mentioned relevant judgments and specific laws relating to the electronic records, one may conclude that no clear cut standard has been established so far either by the legislature or the Courts regarding the admissibility of electronic record as evidence. In India, Courts including Supreme Court taking the electronic record in the form of evidence on the basis of case to case facts and circumstances. It is submitted it appears very difficult to any agency or institution to lay clear and categorical method of admissibility of electronic record, because establishing the scientific principles in the field of science is not that difficult as to proving of the

same scientific principles before the court of law. Section 65-B of Evidence Act, although gives a comprehensive detailed process for establishing the genuineness of the electronic record, yet the same process in practical matters is not that easy.

It is recommended that Indian Legislatures i.e. Parliament of India and State Legislatures must made an effort to formulate fool proof legislation especially on the admissibility of electronic record before the court so that it may be used as unimpeachable evidence.

ACKNOWLEDGEMENTS

We are thankful to our principal for encouragements and critical suggestions received.

REFERENCES

- Information Technology Act, 2000; Section 2(t).
 Indian Evidence Act, 1872 (Act 1 of 1872); Section 65-B
 Law Commission of India, 185th Report on Indian Evidence Act, available at: <https://lawcommissionofindia.nic.in/reports/185thReport-PartII.pdf>
State (NCT of Delhi) v Navjot Sandhu @ Afzal Guru, (2005) 11 SCC 600
Anwar PV v. PK Basher 2014 10 SCC 473
 (2018) 2 SCC 801
RFA 849/2016 High Court of Delhi at New Delhi
Syed Asifuddin and Ors. v. The State of Andhra Pradesh 2006 (1) ALD Cri 96
Abdul Rahaman Kunji v. The State of West Bengal 2014 SCC OnLine Cal 188
R. M. Malkani v. State of Maharashtra AIR 1973 SC 157
Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke & Anr 2015 (3) SCC 123
Ziyauddin Burhanuddin Bukhariv.Brijmohan Ramdass Mehra & Ors AIR 1975 SC 1778
Ram Singh &Ors v. Col. Ram Slngh 3 1985 SCR Supl. (2) 399
Puneet Prakash v. Suresh Kumar Singhal&Anr 2018 SCC OnLine Del 9857.
R. V. Maqsd Ali (1975) 2 All E.R. 464
K.K. Velusamy v. N. Palaanisamy AIR 2011 (11) SCC 275 (2015) 7 SCC 178
The State of Maharashtra v. Dr.Praful B. Desai AIR 2003 SC 2053
Dharambir v. Central Bureau of Investigation 148 (2008) DLT 289
 2006(2) SCC 1
Pandey J.N, Constitution of India ,2021. (2013) 12 S.C.C. 73

19 *The State of Maharashtra v. Dr.Praful B. Desai* AIR 2003 SC 2053

20 *Dharambir v. Central Bureau of Investigation* 148 (2008) DLT 289

21 In the famous case of *Jagjit Singh v. State*

22 *Constitution of India*, 1950

23 (2013) 12 S.C.C. 73