A JUDICIAL CONUNDRUM OF SECTION 65B OF THE INDIAN EVIDENCE ACT 1872: SHOULD LEGISLATURE REVISIT THE LAW?

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ABSTRACT

S.65B of the Indian Evidence Act 1872 is a "complete code" on the admissibility of electronic evidence in India. As opposed to other time-tested principles of evidence law, S.65B has failed to provide an unadorned procedure for making electronic evidence admissible. The complex language employed by S.65B is probably the reason for numerous conflicting decisions given by the Indian judiciary so far. This paper thus aims to analyze the landmark decisions of the Supreme Court concerning electronic evidence along with the recent Arjun Khotkar's decision. The researcher shall put forth arguments that the law on electronic evidence is not settled yet and that the Supreme Court needs to constitute a larger bench to readdress the issue. In addition to this, the researcher suggests that an immediate intervention needs to be made by the legislature by redrafting S.65B in a clear and lucid manner, bringing it in line with global practices.

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INTRODUCTION

The law on electronic evidence has been nothing short of a wrangle in India. While the principles of Evidence Law have withstood the test of time in India, they fell short when a new form of evidence i.e. electronic evidence began to almost replace the traditional form of evidence. It was not so that electronic evidence was incapable of being governed under the then existing Evidence law, but the inclusion of Section 65B was a result of the peculiar nature of the electronic evidence. Electronic evidence unlike traditional evidence is easily susceptible to tampering, modification and alterations. Therefore, only the authenticity and integrity of electronic evidence would ensure its admissibility in a court of law.[139]

The law on the admissibility of electronic evidence in India can be substantially found in Section 65A and Section 65B of The Indian Evidence Act, 1872.[140] Section 65A is an enabling provision that merely states that the contents of electronic records may be proved in accordance with the provisions of Section 65B.[141] Section 65B however stipulates a series of complicated procedures and lays down conditions for proving electronic records in a court of law including the production of a mandatory certificate under Section 65B(4).[142] These provisions that were added via an amendment have become a source of controversy due to the conflicting interpretations given by various High Courts and the Supreme Court of India. Recently, the Supreme Court attempted to set to rest the controversies that arose from the interpretation of Section 65B that led the "law swinging from extreme end to the other".[143] Instead of settling the legal position once and for all, the Supreme Court has once again complicated the issue leading to a judicial re-writing of Section 65B.

This paper consists of three main parts – 1) The first part shall briefly state the legislative background of Section 65B 2) The second part shall consist of some progressive judgments of the Indian judiciary that readily accepted and appreciated electronic evidence even before the IT Act 2000 was born and 3) The third part shall include some landmark conflicting judicial decisions on electronic evidence that shall be analyzed to argue that the precedent on this issue is neither coherent nor consistent. Based on the legislative background and judicial interpretation of Section 65B, this paper argues that the Supreme Court has failed to state the correct position of law on electronic evidence. Thus, it is proposed that the legislature needs to

[139] N. S. Nappinai, "Electronic Evidence - The Great Indian Quagmire" 3 SCC J-41 (2019).
[140] The Indian Evidence Act, 1872, ss. 65A, 65B.
[141] The Indian Evidence Act, 1872, s. 65A.
[142] The Indian Evidence Act, 1872, s. 65B.
[143] Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal 2020 3 SCC 216.

revisit this 20 years old law and bring it in line with the global contemporary developments in this subject area.

LEGISLATIVE BACKGROUND OF SECTION 65B OF THE INDIAN EVIDENCE ACT 1872

Section 65A and Section 65B were inserted in the Indian Evidence Act 1872 via an amendment brought by the Information Technology Act 2000.[144] Section 65B which deals with the admissibility of electronic evidence is heavily drawn from Section 5 of the UK Civil Evidence Act, 1968. However, Section 5 of the UK Civil Evidence Act of 1968 was repealed by the Civil Evidence Act, 1995 following recommendations of the Law Commission made in 1993.[145] The Law Commission in its report emphasized the need for a new law on the procedures for admitting electronic evidence in the courts. It recognized the inadequacy of the then-existing law it created due to developments in technology and raised doubts on whether the existing procedures provided any "*real safeguards*" on the reliance on electronic evidence.[146] It is also important to note that, the Law Commission had opined that rather than instilling inflexible, stringent legal provisions for making electronic evidence admissible; it should be best dealt with a vigilant attitude from case to case basis depending on how much weight should be given to that evidence.[147]

The UK also had a separate law that contained rules of evidence in criminal proceedings i.e. the Police and Criminal Evidence Act, 1984. S.69 of this Act laid down rules on the admissibility of computer-produced documents. This was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999, also on the recommendations made by the Law Commission in 1997.[148] The report pointed out the increasing difficulty in complying with the provision that caused more problems than any benefits. It also recognized that S. 69 served "*No Useful Purpose"* and jurisdictions having no such similar provisions are facing no difficulties.[149] Thus, when India decided to adopt a complicated procedure in the form of S.65B, from the UK, it was already repealed from UK law books due to its practical inadequacy and inefficiency.

[144] The Information Technology Act, 2000 (Act 21 of 2000).
[145] Supra 5.
[146] See Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Others 2020 3 SCC 216.
[147] Ibid.
[148] Supra 8.
[149] Supra 1.

In India, the birth of the Information Technology Act 2000 brought amendments to various legislations including the Indian Evidence Act 1872. Initially, the original Information Technology Act 2000, despite being new legislation was unable to withstand the new developments in technology. The original Information Technology Act 2000 was primarily focused on giving legal recognition to electronic records, digital signatures and; facilitating electronic commerce and electronic governance.[150] Due to its restricted approach, major amendments were sought in the Information Technology Act 2000 in the year 2008. Interestingly, even the 2008 amendments seem to have been brought without any parliamentary debates or discussions. It is unfortunate that Section 65A and Section 65B which were added in the year 2000 did not undergo a review when amendments were sought in Information Technology Act 2000. Thus for almost 21 years, we are following a complicated and stringent provision in law to make electronic evidence admissible in courts during trials while the rest of the world has already done away with such a restrictive approach in proving electronic evidence.

JUDICIAL APPROACH ON ELECTRONIC EVIDENCE BEFORE IT ACT 2000

Technological developments existed way before the IT Act 2000 came into the picture. Even in those days, Indian Courts were grappled with similar issues. History shows us that judicial decisions have almost always preceded legislative developments. Just like that, our courts were quick in adapting themselves to the new form of evidence while fitting them into the already existing legal framework. The courts appreciated electronic evidence by applying the centuries-old principles of evidence law i.e. Sections 61 to 65.

In some of the earliest judgments, the Supreme Court decided on the issues raised by the production of electronic evidence by relying on the judgments of England. The two most important judgments which can be found referred to in almost all of the judgments on the electronic evidence in India were R. v. Maqsud Ali[151] and R. v. Robson[152]. The court in these judgments discussed what was to be proved when an electronic record that contains the voice of an individual is produced. 1) The voice of the person must be duly identified by the maker of the record or by others who know it 2) Accuracy of what was recorded has to be proved 3) The probabilities of tampering have to be ruled out.

[150] Statement of Objects and Reasons, The Information Technology Act, 2000 (Act 21 of 2000).
[151] 1965 2 All ER 464.
[152] 1972 2 All ER 699.

This view was reiterated by the Supreme Court of India in many cases including Ram Singh & Ors vs Col. Ram Singh's case.[153] Commenting on acceptance of new-age electronic pieces of evidence in Som Prakash v. State Of Delhi[154], the Supreme Court has rightly observed that

"in our technological age, nothing more primitive can be conceived of than denying discoveries and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific aids to prove guilt."

Also, emphasizing on the need for statutory changes to develop a problem-solving approach to criminal trials, the Supreme Court in SIL Import, USA v. Exim Aides Silk Exporters, Bangalore[155], held that,

"Technological advancement like facsimile, internet, e-mail, etc. were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue."

There is no exhaustive list of what can be provided as evidence in the courts of law. Some of the common electronic records which are produced in the courts in civil and criminal cases are CCTV footage, call recordings, e-mails, video recordings, messages, etc. However, it is to be remembered that whenever evidence is made admissible in the court only the contents of the document are proved and it does not mean that the truth of the content is proved.[156] The truth of the content is to be proved separately. A while back, this ratio was reiterated in Jaimin Jewelry's case.[157]

The observation of the Supreme Court on the admissibility of tape-recorded evidence is also relevant to note here –

"If a statement is relevant, accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voice must be properly identified."[158]

In the same case, the Supreme Court also acknowledged that since the recordings stored in magnetic tapes have the ability to get erased or reused, such type of evidence must be received by the court with caution and only when it is satisfied with its authenticity. It has also been held that tape-recorded conversation could be admitted as evidence, provided the conversation

[153] AIR 1986 SC 3.
[154] AIR 1974 SC 989.
[155] 1999 4 SCC 567.
[156] Om Prakash Berlia v. Unit Trust of India AIR 1983 Bom 1.
[157] Jaimin Jewelery Exports Pvt. Ltd. v. State of Maharashtra 2017 3 Mah LJ 691 (Bom).
[158] Yusufalli Esmail Nagree v. State of Maharashtra 1967 3 SCR 720.

is relevant to the matters in issue, the voice can be properly identified and the possibility of erasing parts of the tape is eliminated.[159]

The evidentiary value of tape-recorded conversation was also considered in another case where the recorded conversation was not audible throughout and was broken at a very crucial place. The accused alleged that the same had been tampered with. The accuracy of the recording was not proved and the voices were also not properly identified. In such circumstances, the court held that it wouldn't be safe to rely on a tape-recorded conversation as corroborating the evidence of the prosecution witness.[160]

Even the Bombay High Court while reiterating on the "authenticity" component of tape recordings has observed that,

"The law is quite clear that tape-recorded evidence if it is to be acceptable, must be sealed at the earliest point of time, and not opened except under orders of the Court".[161]

Just like other pieces of documents such as photographs or printed papers, tape recordings were also held to be a 'document', as defined by S. 3 of the Evidence Act.[162] Also in one case, it was held that the Evidence Act was ongoing and the word "handwriting" in Section 45 of the Act would include "typewriting".[163] Similarly, courts have over a period of time, extended the scope of various terms such as "telegraph" to include "telephone" and "documents" to include "computer databases". The interface of law and technology is a classic example of how the judiciary has stepped in time and again to indulge in the practice of harmonious interpretation of legal provisions while the law remains intact with contemporary challenges.

JUDICIAL INTERPRETATION OF SECTION 65B

The complexities involved in proving electronic evidence first began with the Supreme Court's judgment in Navjot Sandhu's case[164], popularly known as the "Parliament Attack Case". The court while interpreting S.65B held that the compliance of provisions under S. 65B(4) was discretionary and not mandatory. Also, reliance could be placed on S. 63 and S. 65 while proving electronic evidence. As a result of this interpretation, the mandate of producing a certificate became mere words on a piece of paper. This position of law remained till 2014 till

[159] R. M. Malkani v. State of Maharashtra AIR 1973 SC 157.
[160] R. Venkatesan v. State 1980 Cr. L.J. 41.
[161] C. R. Mehta v. State of Maharashtra 1993 Cri. L.J. 2863.
[162] Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra and Others 1976 2 SCC 17, Tukaram S. Dighole v. Manikrao Shivaji Kokate 2010 4 SCC 329.
[163] State v. S. J. Choudhary 1996 2 SCC 428.
[164] State (N.C.T. of Delhi) v. Navjot Sandhu 2005 11 SCC 600.

Anvar's case[165] overruled Navjot Sandhu's case. Before Anvar's case, some High Courts had already stated the correct position of law. They opined that the admissibility of computer-generated documents was subject to the conditions specified in S. 65B (2) and the requirement of a certificate under S. 65B (4) was mandatory and not discretionary.

Then came Anvar's judgment which sought to clarify the law on this point. It simplified the scope and parameters of S. 65B (2). It correctly stated that a special legal provision will always overrule a general legal provision thus holding that S.65B is a complete code on electronic evidence. This meant that electronic evidence couldn't be made admissible under any other provisions of the Indian Evidence Act. However, the judgment committed a huge error while interpreting S. 65B (4). It made compliance of not just S. 65B (2) but also 65B (4) mandatory in its entirety. That counted to the fulfilment of six parameters in all. The court failed to take the legislative intent into consideration which clearly states "any" of the three options set out in S.65B (4) are to be complied with. This mandate in practicality resulted in absurd conclusions. Such rigid interpretation of this provision would be even more problematic when the possession of the device would be with a third party from whom a certificate would be difficult to be obtained. This interpretation in Anvar's case needed to be rectified to reinstate the legislative intent, as many relevant and reliable electronic shreds of evidence would become inadmissible for want of compliance with the provisions.

Until Anvar's judgment, several courts in the country had followed the precedent laid down in Navjot Sandhu's case while proving electronic evidence. Due to the absence of a prospective overruling clause in Anvar's judgment, several cases faced catastrophic consequences. Thus, in the State of Haryana v. Shamsher[166], the accused in a murder case were acquitted as the electronic evidence relating to call records was not accompanied by a certificate under Section 65B(4) of the Indian Evidence Act. Similarly, the following cases met the same fate – Sukhvinder Singh v. State[167], Vikas Verma v. State of Rajasthan[168] and this is only the tip of an iceberg. This issue was pointed out by a two-judge bench of the Supreme Court in Sonu v. State of Haryana[169], however for reason unknown, it did not refer this issue to a larger bench for reviewing Anvar's judgment. Interestingly though, it did discuss the adverse impact Anvar's ruling would have on the dispensation of criminal justice.

[165] Anvar P.V. v. P.K. Basheer 2014 10 SCC 473.
[166] 2014 SCC OnLine P&H 21316.
[167] Sukhvinder Singh v. State 2015 SCC OnLine Del 7229.
[168] Vikas Verma v. State of Rajasthan 2015 SCC OnLine Raj 396.
[169] Sonu v. State of Haryana 2017 8 SCC 570, 2017 3 SCC (Cri) 663.

There is no doubt that Anvar's judgment has had a huge impact and consequentially it did end up opening the pandora's box. As a result of this judgment, the trial courts and High Courts suddenly became grappled with several consequential questions relating to the admissibility of electronic evidence in the courts. These gaps were plugged by several High Courts of the country. Thus on the question of what should the certificate contain, the Bombay High Court has laid some light on the format of the certificate in ARK Shipping Co. Ltd. v. CRT Ship management Pvt. Ltd.[170] Similarly, many High Courts have commented on the stage at which a certificate under Section 65B(4) needs to be produced. Thus the Delhi High Court in Kundan Singh v. State[171] while specifically overruling Ankur Chawla's case[172] held that the certificate to be produced under these provisions is to be given at the stage when evidence is produced and not at the stage of collection of evidence. The same was clarified by the Bombay High Court which confirmed that there was no necessity for the certificate to be issued during the investigation or even when the chargesheet was filed in criminal proceedings.[173] Further, in a very elaborate judgment given by the Madras High Court in Ramajayam's case[174], very important aspects relating to the admissibility of electronic evidence were discussed. It went a step further and stated that a certificate may be given at any stage of the trial and the person issuing the certificate was not always needed to be cross-examined. Only when the authenticity of the document produced was in question, the court would allow cross-examination. It also discussed in detail who should give the certificate, how is it to be given, etc.

After Anvar's case, with many chances that the Supreme Court had in reviewing the interpretational fallacy committed in Anvar's case, it was hoped that the same would be corrected in Shafhi Mohammad's case.[175] However, the two-judge bench merely opened a backdoor and reintroduced S. 63 and S. 65 of the Evidence Act in making electronic evidence admissible which has clearly not done much good. While interpreting S. 65B(4)(c) in Shafhi Mohd's case, the Supreme Court carved out an exception to Anvar's case and not overruled it. It merely stated that a certificate under S. 65B cannot be produced in a court when the person is not the lawful authority or the electronic record that is being produced by the party who is not the lawful custodian of it. It is submitted that Shafhi's case was decided by a smaller bench

[170] 2007 SCC OnLine Bom 663
[171] 2015 SCC OnLine Del 13647.
[172] Ankur Chawla v. CBI 2014 SCC OnLine Del 6461.
[173] Avadut Waman Kushe v. State of Maharashtra 2016 SCC OnLine Bom 3236.
[174] K. Ramajayam v. Inspector of Police 2016 SCC OnLine Mad 451.
[175] Shafhi Mohammad. v. State of Himachal Pradesh 2018 SCC OnLine SC 56.

than that of Anvar and could not have overruled it. It has merely relaxed the rigidity that Anvar's case had introduced.

Recently, in Arjun Khotkar's case, a three-judge bench of the Supreme Court overruled Shafhi's case, Tomaso Bruno's case[176] and Ramjayam's case.[177] It upheld in its entirety the erroneous interpretation in Anvar's case. I have already established above that, Shafhi's case was not contradictory to Anvar's case but a mere extension of it. I argue that the present judgment should have clarified the interpretation in Shafhi's case and not overruled it. Secondly, the Supreme Court in the present case held Tomaso Bruno's case as per incuriam. However, on technical grounds, it cannot do so because the bench strength is the same in both cases. It would require a larger bench to hold it per incuriam. If that is so, then technically, the interpretation in Tomaso Bruno, that S.65 could be resorted to, still stands. This makes Arjun Khotkar's judgment contradictory to Tomaso Bruno's judgment and would require a larger bench to resolve this issue. However, if the technicality issue is kept aside, Tomaso Bruno's case did commit a huge error. The judgment doesn't refer to Anvar's case at all but refers to Navjot Sandhu's case which was specifically overruled. I further argue that Ramjayam's case had heavily relied on Shafhi's case which was not entirely bad in law and need not have been overruled. The present case i.e. Arjun Khotkar's case has differentiated between primary and secondary electronic evidence. The nature of electronic evidence dictates that no such distinction can be drawn when a piece of electronic evidence is in question. It should be viewed as a separate third category.[178] Even the bare reading of S. 65B seems to suggest it, and had this not been the legislative intent, it wouldn't have inserted S.65B in the first place as primary and secondary evidence could be dealt with under S.61 – S.65 of the Indian Evidence Act, 1872.[179]

Despite a flawed judgment in Arjun Khotkar's case, even if it is considered as a precedent, it still leaves many issues unanswered. At what stage of the trial should the certificate be produced, if a certificate u/s 65B is produced does it mean that the electronic evidence is completely flawless? How to determine whether the chain of custody of the evidence was unbroken? In that case who should produce a certificate? Who can issue a certificate in a case where the electronic evidence was obtained illegally? And numerous other questions. It is just

[176] Tomaso Bruno v. State of U.P. 2015 7 SCC 178.
[177] K. Ramajayam v. Inspector of Police 2016 SCC OnLine Mad 451.
[178] Naavi. Org, available at: https://www.naavi.org/wp/understanding-section-65b-of-indian-evidence-act/ (last visited on August 15, 2021).
[179] Livelaw.in, available at: https://www.livelaw.in/columns/recent-judgement-of-the-supreme-court-in-arjun-khotkar-a-missed-opportunity-to-revisit-65b-160201 (last visited on August 15, 2021).

a matter of time that the need to constitute a larger bench than the one in Arjun Khotkar's case shall be required to ease and clarify the law on this point.

THE WAY AHEAD

As we dig deeper into the application of Section 65B and the varied interpretations given by various High Courts and Supreme Court, one factor that has remained constant throughout this journey is the "inconsistency" in its application. However, it is worth acknowledging that courts in India were quick in adapting themselves to the new form of evidence i.e. electronic evidence. Even before the Information Technology Act 2000 was passed that brought various amendments in different laws including the Indian Evidence Act 1872; the time-tested evidence law principles were invoked to admit electronic evidence in the courts. However, the dynamic nature of technology demands the dynamism of legal principles.

Section 65B has remained static while technology has undergone a tremendous change. It is probably the reason why the Supreme Court has been time and again attempting to fill the gaps that have arisen due to an acrimonious relationship between technology and law. Consciously or not, this has resulted in the judicial rewriting of the law, which has complicated the law on electronic evidence. It is emphasized that no law should be interpreted so stringently that shall shut away a reliable piece of evidence in toto on mere technical grounds. Such stringent interpretations shall result in the travesty of justice. In an era where most of the pieces of evidence are in the form of electronic evidence, it is important that procedures are put in place to ensure its authenticity and integrity. At the same time, they should be relaxed enough for making the best evidence admissible in the courts. This leaves us with two questions to ponder upon - Does the production of a certificate under Section 65B really ensures the authenticity and integrity of electronic evidence? Should India adopt a new legislative model for making the procedures relating to the admissibility of electronic evidence easy?

There is no direct answer to the first question. For example, consider the Arjun Khotkar's case where it was held that a certificate under S.65B shall be a condition precedent to make electronic evidence admissible in a court. However, the court in this case has not taken a clear stand on at which stage of the trial should the certificate be produced. What is interesting about this case is that it allowed the electronic evidence to be made admissible without a certificate under S.65B citing reasons that the party in question had exhausted all possible means to obtain it. This in my opinion has again left the court open to exercise its discretion which was

originally suggested in Shafhi Mohammad's case.[180] Ironically, Arjun Khotkar's case has overruled Shafhi Mohammad's case but it has eventually taken the same route that was suggested in Shafhi Mohammad's case. One more factor that cannot be ruled out is the fact that it may be comparatively easier for someone to obtain a certificate under S.65B. Can it be assumed that every electronic evidence accompanied by a certificate shall be free from any defect whatsoever? Another situation can be where obtaining a certificate may be impossible for someone like a whistleblower. In that case, would it be fair in the interest of justice to make a perfectly good piece of evidence non-admissible?

Going back to the original two questions, the obvious answer to the second question is "Yes"[181] considering the incoherent and inconsistent interpretations of S.65B. It is suggested that the legislature revisits the law taking into consideration the recent legislative developments that have taken place on the subject of electronic evidence globally.[182]

[180] Supra 37.

[181] See Justice. V. Ramasubramanian's separate opinion in Arjun Khotkar's case - Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Others (2020) 3 SCC 216, also see opinion by N. S. Nappinai - N. S. Nappinai, *Electronic Evidence - The Great Indian Quagmire 2019 3 SCC J-41*, SCC Online, available at http://www.scconline.com/DocumentLink/Gr38kI2E (last visited on August 18, 2021).

[182] Countries like UK, USA, Australia, Sri Lanka have eased the provisions on electronic evidence. See also N. S. Nappinai, *Technology Laws Decoded*, 608-609 (1st ed., 2017).