

# INFORMATION TECHNOLOGY ACT 2000

As amended by Act No. 10 of 2009 w.e 27-10-2009

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*MCR HRD –*

Special Foundation Course (FC)

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# ELECTRONIC / DIGITAL EVIDENCE

# Electronic Evidence

- Electronic frontier as the unique nature of e-evidence,
- Electronic Evidence have involved into a fundamental pillar of communication, processing and documentation.
- various forms of electronic evidence are increasingly being used in both Civil & Criminal Litigations.
- admissibility of electronic evidence and it substantially impacts the outcome of civil law suit or conviction/acquittal of the accused.

# Electronic Evidence - categories

- categories of electronic evidence such as website data, social network communication, e-mail, SMS/MMS and computer generated documents
- Explanation to Sec 79A - “Electronic Form Evidence” means any information of probative value that is either stored or transmitted in electronic form and includes evidence, digital data, digital video, cell phones, digital fax machine etc.

# Objective of the IT Act, 2000

- Gives Legal recognition to electronic documents
- Gives legal recognition of Digital Signatures
- To facilitate electronic filing of documents with Government departments
- To facilitate electronic storage of data, legality of electronic fund transfer
- To amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Book Evidence Act, 1891, and the Reserve Bank of India Act, 1934. Amended by virtue of Sec 92 of the IT Act.

# Amendment

The definition of 'evidence' has been amended to include electronic records.

The definition of 'documentary evidence' has been amended to include all documents, including electronic records produced for inspection by the court.

# First Principles of evidence

Construction by plaintiff, destruction by defendant.

Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence.

Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility.

There is a revolution in the way the evidence is produced before the court.

Properly guided, it makes the systems function faster and more effective. Amendments have shown judicial pro activism



# What is evidence - Imp Amendments to EA

- Section 3 of the Evidence Act, 1872 defines evidence as under: "Evidence" - Evidence means and includes:-
  - 1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
  - 2) all documents including **electronic records** produced for the inspection of the court. Such documents are called documentary evidence.

# What is admission - Imp Amendments to EA

Sec 17. Admission defined.—An admission is a statement, 1[oral or documentary **or contained in electronic form**], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned. Comment s Admissibility is substantive evidence of the fact Admissibility is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness; Bishwanath Prasad v. Dwarka Prasad, AIR 1974 SC 117.

# What is admission - Imp Amendments to EA

•22A. When oral admissions as to contents of electronic records are relevant.—Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.

•to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question.

# Imp Amendments to Evidence Act

## Sec 45 A:

45A Opinion of Examiner of Electronic Evidence. —When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 (21 of 2000) is a relevant fact. Explanation .— For the purposes of this section, an Examiner of Electronic Evidence shall be an expert;

Examiner under Sec 79 A.

# Imp Amendments to Evidence Act

Sec 34 – The words “entries in the books of Accounts” - substituted with “ Entries in the Books of Accounts including those maintained in electronic form”

Sec 35 – The word “Record” (occurring in two places) “ record or electronic record” was substituted.

# Imp Amendments to Evidence Act

Sec 39 Where there is,— (i) a longer statement, or (ii) a conversation, or (iii) an isolated document, or (iv) a document contained in a book, or (v) a series of letters or papers, the court has discretion to use the relevant portion of the conversation, document, books or series of letters or papers and requires the production of that portion or pages. In other words, the evidence shall be given of only explanatory or qualifying part of the statement, document, book etc. Same is applicable to electronic record under the section. The statements made in books cannot be relied on unless supported by contemporaneous records.

What evidence is to be given and to be taken is total discretion of the judge. His discretion is always guided by principles of justice, conscience and convenience.

# Imp Amendments to Evidence Act

## Digital Signatures

Evidence relating to Digital signatures is dealt in three sections

Sec 49 A Opinion as to Digital signature when relevant - expert opinion of Certifying Authority

Sec 67A- Proof as to digital signature – that the DS affixed to a document belongs to the owner is to be proved

Sec 73A- Proof as to verification of DS –prescribes procedures for verification of digital signatures.

# Case Law

## **BODALA MURALI KRISHNA VS. SMT. BODALA PRATHIMA (2007 (2) ALD 72)**

the court held that, “...the amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were added. These provisions are referred only to demonstrate that the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence.”



# Evidence other than in paper form – prior to digitization :

- Tape recordings
- Recording done on recording devices in any format.
- Phone conversation recordings

R.M. Malkani Vs. State of Maharashtra's, 1973 Cri.L.J. 228 – tape was primary and direct evidence of what was said and recorded. Defined document under Sec 3 of the evidence act.

Chandrakant R. Mehta vs. The State 1993 (3) Bom. C.R.99. It was observed that if it is to be acceptable after a lapse of time, it must be sealed at the earliest point of time and not to be opened except under order of the court.

# What is Electronic evidence:

Also called digital evidence

According to Oxford Digital is defined as :

1. operating with signals or information
2. represented by discrete numeric values
3. commonly represented by digits 1 and 0
4. Signal opposed to analogue

# Sec 2(t) of the Information Technology Act.

## Section 2(t) of Information Technology Act 2000 provides:

‘electronic record’ means, “data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;”

# What is Electronic document:

‘Electronic document

- a. should consist of computer data
- b. does not include programme or system file
- c. should be intended to be used in soft form
- d. should not be printed

“Electronic records is defined in the IT Act, 2000

- a. as any data, record or data generated,
- b. any image or sound stored, received or sent
- c. in an electronic form or microfilm or computer generated micro fiche

# Evidence Act & Electronic or Digital Evidence – 65A and 65B

Sec 61 to 65 of the evidence act retained with the word document and its content – hence 61 to 65 are not applicable to electronic documents

Specific section was brought in the for of Sec 65 A and 65B to exclusively deal with electronic documents.

It is the cardinal principle of interpretation that if the legislature has omitted to use any word, the presumption is that the omission is intentional Scheme of Section 61 to 65 signifies the clear and explicit legislative intention, i.e. not to extend the applicability of Section 61 to 65 to the electronic record in view of overriding provision of Section 65B

# Evidence Act – Sec 65B

Sec 65B exclusively deals with the admissibility of electronic evidence

Sec 65 B starts with a non obstante clause -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

**Union of India and Anr., v. G.M. Kokil and Ors.** observed “It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.”

# Evidence Act – Sec 65B

any information contained in an electronic form, is deemed to be a document and is admissible in evidence without further proof of the original's production, provided that the conditions set out in Section 65-B are satisfied

- which is printed on a paper, stored, recorded or
- copied in optical or magnetic media
- produced by a computer

The evidence under Sec 65B is the secondary copy in the form of computer output comprising of printout or the data copied on electronic/magnetic media.

# Evidence Act – Sec 65B (2) – conditions

1. Firstly, the computer output containing the information should have been produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer.
2. The second requirement is that it must be shown that during the said period the information of the kind contained in electronic record or of the kind from which the information contained is derived was 'regularly fed into the computer in the ordinary course of the said activity'.



## **Evidence Act – Sec 65B (2) – conditions**

**3. A third requirement is that during the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time that break did not affect either the record or the accuracy of its contents.**

**4. The fourth requirement is that the information contained in the record should be a reproduction or derived from the information fed into the computer in the ordinary course of the said activity.**

## **Evidence Act – Sec 65B (3) – computers constituting single computer**

- i] By combination of computers operating over that period, or
- ii] By different computers operating in succession over that period, or
- iii] By different combinations of computers operating in succession over that period, or
- iv] In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.

# Evidence Act – Sec 65B (4) – Certificate to be provided

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

# Evidence Act – Sec 65B (4) – conditions to give statement

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device

## Important:

such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence.

# Evidence Act – Sec 65B (5) – conditions to give statement

Information supplied to the computer was supplied with or without human intervention

Information supplied by means of appropriate equipment

Information supplied in the due course of those activities

Computer output is taken to have been produced by such a system.

# Evidence Act – Can Evidence be video recorded - YES – But subject to conditions

**TWENTIETH CENTURY FOX FILM CORPORATION Vs. NRI FILM PRODUCTION ASSOCIATES (P) LTD. (AIR 2003 KANT 148)**

1. Before a witness is examined in terms of the Audio-Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen. A copy is to be made available to the other side. (Identification Affidavit).
2. The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.
3. The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.

# Evidence Act – Can Evidence be video recorded

## - YES – But subject to conditions

**TWENTIETH CENTURY FOX FILM CORPORATION Vs. NRI FILM PRODUCTION ASSOCIATES (P) LTD. (AIR 2003 KANT 148)**

4. The witness should not plead any inconvenience on account of time different between India and USA.
5. Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.
6. Learned Judge is to record such remarks as is material regarding the demur of the witness while on the screen.
7. Learned Judge must note the objections raised during recording of witness and to decide the same at the time of arguments.

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8. After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.

9. The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.

10. The learned Judge may also impose such other conditions as are necessary in a given set of facts.

11. The expenses and the arrangements are to be borne by the applicant who wants this facility.



# Evidence Act – Sec 65B – Model certificate

**Ark Shipping Co. Ltd. Vs. GRT Shipmanagement Pvt. Ltd.**  
**2007(5) ALLMR 516.**

Bombay High Court discussed the necessity of certificate as well as also gave a format of the constituents of the certificate.

**Harpal Singh @ Chhota Vs. State Of Punjab, SC**  
**Criminal Appeal No. 2539 of 2014**

reiterated that any electronic record in the form of secondary evidence cannot be admitted in evidence unless a certificate under Section 65B (4) of the Evidence Act is produced.

# Evidence Act – Sec 65B – Case Law

## **Anvar P.V. Vs. P.K.Basheer and ors. SC**

Decided Sep-18-2014

**The Court has interpreted the Section 22A, 45A, 59, 65A & 65B of the Evidence Act and held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate U/s 65 B(4) of Evidence Act.**

**It has been elucidated that 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.**

held that “an electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in term...

# Evidence Act – Sec 65B – Case Law

## Abdul Rahaman Kunji Vs. The State of West Bengal... MANU/WB/0828/2014

while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of Section 65B r/w Section 88A of Evidence Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication.

# Evidence Act – Sec 65B – Case Law

## Jagdeo Singh Vs. The State and Ors....

MANU/DE/0376/2015

Hon'ble High Court of Delhi, while dealing with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate u/s 65B Evidence Act, the court observed that the secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever.

# Examiner of Electronic Evidence – 79A

## **Scheme formulated**

Central Government or a State Government agencies to act as Examiner of Electronic evidence

Purpose – expert opinion before any court.

based on international standards like ISO/IEC 17025 (A Standard on General requirements for the competence of testing and calibration laboratories) and ISO/IEC 27037 (A Standard on Information technology - Security techniques - Guidelines for identification, collection, acquisition and preservation of digital evidence).

# Conclusion

admissibility of the secondary electronic evidence has to be adjudged within the parameters of Section 65B

secondary electronic evidence is without a certificate u/s 65B of Evidence Act, it is not admissible

proposition of the law settled by Apex Court and other HC's.

# Pitfall

secondary electronic evidence seized from the accused wherein, the certificate u/s 65B of Evidence Act cannot be taken and the accused cannot be made witness against himself as it would be violative of the Article 19 of the Constitution of India. privilege against self-incrimination

‘No man, not even the accused himself can be compelled to answer any question, which may tend to prove him guilty of a crime, he has been accused of.’ S.161 (2) of the Code of Criminal Procedure

# THANK Q

# Questions Please

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