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Intricacies to the Authenticity of Electronic Evidence

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ABSTRACT

Whenever we deal with any case, it becomes a natural corollary to the fact that certain evidence has to be adduced in the court of law in order to prove the claim subsisting in that case. This shows the considerable value of 'evidence' in the criminal justice system. Now, since we have moved into a new era of digitalization, wherein, we all encounter the products of the digital world every now and then. Sometimes, the use of electronic devices, which can be called as 'electronic records', make the working of the courts easier. But at the same time, it is not a free stream for the courts that to admit any such electronic record without paying much heed onto its credibility. It is of paramount consideration for the courts to look into the nature and substance of an evidence and thus, no differential treatment can be meted out for an "electronic evidence". Before I begin with the Research Paper, there are few methodological points which are required to be broached up. Firstly, my data is a collection of Supreme Court case law. Going by the golden words of Dr. B.R. Ambedkar, who once said that Article 32 is the heart and soul of the Constitution and in case of infringement of any fundamental right, it can be invoked at the very first instance before the Supreme Court. Thus, Apex Court being the final arbiter of the rights, I restrict the approach of my submission by keeping in mind the subject-matter to those relevant cases that have been decided by the Supreme Court. Secondly, since there is a plethora of cases available on the subject of electronic evidence, so I have narrowly tailored my approach towards the subject by only taking those cases into consideration which are dealing with the "admissibility of electronic evidence" and also, certain other analogous cases with such subject-matter forming a pivotal part of the concept of admissibility of an electronic evidence as a whole. In order to identify my chalked-out parameters, I have relied upon SCC Online which is a private reporter and an authentic source as affirmed by the Apex Court. Since I have done a qualitative analysis, I will be carving out the final affirmations on the subject of electronic evidence. Bearing this template in mind, I would like to begin with the next part of my submission.

Keywords: Evidence, Electronic Evidence, Supreme Court, Law, Digitalization

INTRODUCTION

It becomes an imperative that when we are dealing with the issue of admissibility of electronic evidence, it is required to first look into the fact that whether the status of evidence has been accorded to an 'electronic material'. In the case of **State of Maharashtra v. Praful Desai**[1], the Supreme Court explicitly mentioned that 'electronic evidence' is included within the ambit of the term 'evidence' and thus, video conferencing can be an alternative to the traditional manner of recording evidence. Also, the above discussion brings another question into focus that though being an evidence, can an 'electronic record', as mentioned under section 65B (1) of the Indian Evidence Act, 1872 (hereinafter referred to as IEA), be considered as a 'document'. Pertaining to the question, in the case of **P. Gopalkrishnan v. State of Kerala & Another**[2], it was stated that section 2(1)(t) of the Information and Technology Act, 2000[3] (IT Act) and section 2(1)(o)[4] of the same Act provides and recognizes electronic evidence by laying down its constituents and sub-constituents, i.e. electronic record and data respectively. If we conjoin both the definitions with the definition of 'document' provided under section 3 of the IEA, an inference can be drawn that a document and an electronic record are sharing a common purpose of collecting, storing or recording information and therefore, an electronic evidence or electronic record can be considered to be a 'document'.

The objective of the aforesaid discussion was to formulate that an electronic record is a document for the purpose of proving its contents either by primary or secondary evidence under section 61 of the IEA.

TRAVERSING THROUGH THE 'CONTRADICTING' VIEWS ON ELECTRONIC EVIDENCE

If we trace the development of electronic evidence in India, it is manifestly clear that the views on the subject are not sharing a common track, rather few opinions have even led to further ambiguities in the law. In this part, I will be discussing the judgments beginning from 2004 which

[1] (2003) 4 SCC 601
[2] (2019) SCC 1532
[3] (t) "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;
[4] (o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised 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 printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

was the pioneer year in the foundation of electronic evidence in India. Although, I have, in my full capacity, endeavored to touch upon all the judgments wherein the courts have struggled to give a conclusive view on the issue of admissibility as to electronic evidence, but the below mentioned analysis is not exhaustive and may be open to further inclusions.

STATE (NCT OF DELHI) V. NAVJOT SANDHU ALIAS AFSAN GURU[5]:

In the present case, the question of admissibility was revolving around the printouts given in support of the call records and the correctness of statement recorded of a non-expert regarding the working condition of the computer. Since it was a high- profile case of terrorism, the call records being the considerable evidence need to be scrutinized carefully. The counsel for the accused contended that the requirements under section 65B (4)[6] of the IEA have not been fulfilled

[5] (2005) 11 SCC 600

[6] S. 65B- Admissibility of electronic records—
(1) Notwithstanding anything contained in this 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 (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—
(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—
(a) by a combination of computers operating over that period; or
(b) by different computers operating in succession over that period; or
(c) by different combinations of computers operating in succession over that period; or
(d) 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, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.
(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—
(a) identifying the electronic record containing the statement and describing the manner in which it was produced;
(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the

and also, the witnesses who affirmed to the working condition of the computer cannot be relied upon for not being experts in that regard.

The view of the court could be considered as a lenient approach for abstaining itself from complying with the strict requirements of law. The court said that section 65B cannot take away the effect of section 65[7] of the IEA which allows the production of a secondary evidence, i.e. printouts of the call records in the present case, where it is impossible to produce the original document and since all the calls used to get recorded in the server, the same cannot be brought before the court.

Also, the court was satisfied by the testimony given by both the witnesses who were the officials of service-providing companies and were well-versed with the working of the computer system wherefrom the call records were extracted in the form of printouts. Upon such satisfaction, the

management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.
(5) For the purposes of this section—
(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

[7] S.65- Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—
(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
(d) when the original is of such a nature as not to be easily movable;
(e) when the original is a public document within the meaning of section 74;
(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence; [India] to be given in evidence;"
(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

court did not go further to call an expert in order to look into the working condition of the computer and the same was allowed to be done by such above-mentioned reasonably prudent persons having knowledge of such system.

Finding: *In the court's opinion, a secondary electronic evidence under section 65 is an alternative to the one produced with the adhered requirements of section 65B and similarly, any person having reasonable knowledge about an impugned system can supersede an expert of the relevant field.*

ANVAR P.V. V. P.K. BASHEER & ORS.[8]:

This case went a step ahead in addressing the issue of admissibility of electronic evidence and the previous rule laid down in the Navjot Sandhu case was overruled. Here, the appellant challenged the election of the respondent on the ground of using such speeches, songs and announcements, thereby indulging in corrupt practices. The evidence against him was recorded, stored in a computer and was then transferred to CD's, producing the same in the court without the certificate required under section 65B (4) of the IEA.

The court denied admitting the evidence by making few observations in this behalf which can be incapsulated in the following points: (1) By virtue of the principle of *Generalia Specialibus Non Derogant* (special law will prevail over general law) and also, the *Non-obstante* nature of section 65B (Notwithstanding anything contained in the Evidence Act,…), section 65A[9] and 65B shall gain significance over section 63[10] and 65 of the IEA. (2) Such certificate shall be necessarily carried along with the secondary evidence like CD, DVD, Pen Drive, Printout, etc. through which its contents will be proved. (3) Once the evidence is recorded after complying with the aforesaid requirements, then an expert or examiner under section 45-A[11] of the IEA can be called upon to

[8] (2014) 10 SCC 473

[9] S.65A- Special provisions as to evidence relating to electronic record—The contents of electronic records may be proved in accordance with the provisions of section 65B

[10] S.63- Secondary evidence—Secondary evidence means and includes—
(1) Certified copies given under the provisions hereinafter contained
(2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
(3) Copies made from or compared with the original;
(4) Counterparts of documents as against the parties who did not execute them;
(5) Oral accounts of the contents of a document given by some person who has himself seen it.

[11] S.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

look into the genuineness of such secondary electronic evidence. (4) In case the original or primary evidence has been produced, there is no need to look into the other sections and thus, section 62[12] has an overriding effect.

Finding: *The court has conferred an indispensable value to the production of certificate under section 65B (4) of the IEA, which will precede the secondary evidence and the expert's opinion, if any, but the same will not hold water if the primary evidence has been adduced.*

TOMASO BRUNO & ANR. V. STATE OF UTTAR PRADESH[13]:

The present case dealt with the death of a foreigner who came along with other foreigners, being charged for his murder but were acquitted as the CCTV footages being the best evidence were not shown which could have easily proven the guilt of the accused persons, instead of beating around the bush on the prosecution side.

In this case, the question was actually related to the non-production of electronic evidence, despite its value as a material evidence and only a passing reference was given by the court as to the admissibility of an electronic evidence, if in case it is produced in any other case. The court made an important remark as to the value of 'Best Evidence' which was the electronic evidence in this case and the same ought to have been produced.

Though such reference brought an ambiguity in the position of law which was supposed to be clear in the case of Anvar P.V. The court said that a secondary evidence can be produced under section 65 of the IEA and the availability of the certificate required under section 65B of the same Act will only bring more convenience for the prosecution as well as for the investigation agency.

Finding: *The judgment delivered in Tomaso Bruno case degraded the position of law with respect to the admissibility of secondary electronic evidence and this brings a direct conflict between this case and the Anvar P.V. case.*

[12] S.62- Primary evidence—Primary evidence means the document itself produced for the inspection of the Court. Explanation 1—Where a document is executed in several parts, each part is primary evidence of the document; Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Explanation 2—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

[13] (2015) 7 SCC 178

HARPAL SINGH V. STATE OF PUNJAB[14]:

The case was related to the extraction of money for the release of a kidnapped person and the call records of the same were secured in the hard disk of the server which were produced in the court through printouts. However, such printouts were not accompanied by a certificate as required under section 65B (4) of the IEA.

Since there was no certificate as mentioned above, the court did not admit the printouts of the call records by stating that the secondary electronic evidence will only be taken into consideration if the requirements under section 65B (4) have been complied with.

Finding: *By upholding the judgment of Anvar P.V. case, the court in this case reiterated the principle of Generalia Specialibus Non Derogant and therefore, section 65B will have an upper hand in any case of admissibility of secondary electronic evidence.*

VIKRAM SINGH & ANOTHER V. STATE OF PUNJAB & ANOTHER[15]:

This case was also related to the ransom calls made in respect of the kidnapped person and the same was tape-recorded in an 'original cassette'. While it was being produced in the court, the question raised was again with respect to the requirement of a certificate under section 65B (4) of the IEA but this time, the court omitted to consider the certificate as a pre-requisite for the admissibility of the cassette.

The rationale behind such non-consideration of the certificate was based on the paramount value granted to the primary evidence over the secondary evidence and since, the cassette was an original document which implies that it requires no supporting certificate or an expert's remark as to its authenticity and will be considered on the face of it. Thus, any evidence falling within the domain of section 62 of the IEA does not require any other considerations in order to suffice its reliability.

Finding: *As the name suggests, 'Primary' evidence will hold the highest value and does not need to look for the requirements under section 65B because they are meant for holding good a secondary electronic evidence.*

SONU ALIAS AMAR V. STATE OF HARYANA[16]:

Being another case of kidnapping and murder, the call detail records (CDR's) were again one of the main concerns in the case. The primary objection raised was regarding the requirement of

[14] (2017) 1 SCC 734
[15] (2017) 8 SCC 518
[16] (2017) 8 SCC 570

certificate under section 65B (4) of the IEA and the reliance was placed upon the case of Anvar P.V. However, the only difference between this case and the previous cases is that in the present case, *the issue was with respect to the stage at which objection regarding the admissibility of an electronic evidence can be raised*. Since in this case, the requirement of certificate was not raised by the accused at the court of first instance when the evidence was being recorded, but did the same at the appellate stage.

The ambiguity arises as to which is the most appropriate stage in a case for raising an objection regarding the admissibility of an electronic evidence. With respect to this, the court delimitated a line between *mode of proof* and *admissibility of evidence*, which will decide that when an objection as to an evidence can be raised. Relying upon the case of **R.V.E Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple**[17], the court stated that if the objection is with respect to the admissibility of electronic evidence, then it can even be raised at the appellate stage as otherwise it would be inherently lacking the capacity to be considered as an evidence. On the other hand, if the issue lies with respect to the mode of proof of the evidence, the same shall be raised at the earliest possible opportunity at the trial court itself and not thereafter, as, if the court will ask the other part to bring the certificate required under section 65 B (4) of the IEA, it will inflict undue pressure on such party and may not even be able to procure the certificate at the appellate stage.

Finding: *Looking at the bifurcation created between the admissibility and mode of proof; pertaining to the issue of electronic evidence, if the objection so raised is one requiring the production of certificate, then it will be considered as a loophole in the mode of proof and the same has to be rectified at the trial stage when the evidence was first time recorded and not thereafter.*

SHAFHI MOHAMMAD V. STATE OF HIMACHAL PRADESH[18]:

This case takes back to the question that how much importance shall be attached to the certificate required under section 65 B (4) of the IEA. The court in this case did not consider the certificate to be a mandatory requirement for the admissibility of a secondary electronic evidence but only a mere procedural provision which adds more authenticity to the evidence. Whereas, if an evidence is in itself sufficient and reliable, then the same does not require to be attached with a certificate. But at the same time, it is also necessary to see that such evidence is not susceptible to tampering, otherwise, its essence will be lost.

[17] (2003) 8 SCC 752
[18] (2018) 2 SCC 801

Also, the requirement of certificate cannot be imposed mandatorily in especially those cases, where the party is not in possession of the device wherefrom the evidence was procured and thus, he may not be in a position to extract a certificate.

Finding: *This case may prove as amicus curiae to the party producing the electronic evidence but at the same time, it opens doors for various ambiguities in the law. Firstly, when a special law has been enacted, then it is presumed that the legislature has framed such law keeping in mind the general law already prevailing and thus, the special law must be given due importance over the general law. In the present case, section 65B (4) being the special law has been allowed to be dispensed and more reliance is placed upon section 63 of the IEA. Secondly, if such approach is allowed, it will certainly lead to a plethora of cases wherein the courts have to deal with rampant tampering of evidence.*

UNION OF INDIA & ORS. V. CDR. RAVINDRA V. DESAI[19]:

In this case, a naval officer made obscene calls to three different women and came to Mumbai. His contact number was traced and an official of the Vodafone company was asked to produce the call detail records along with the certificate as required under section 65B (4) of the IEA in the court, since the sim was of Vodafone. The official did produce the certificate but there was fault in it as it was regarding the customer agreement and the same was challenged by the accused.
The court simply stated that it is a 'curable defect' and the official was again asked to produce the correct certificate which was thereby later produced and the same was taken into consideration.

Finding: *Tracing the case of R.V.E. Venkatachala, it was clearly mentioned that if the objection is with respect to mode of proof of evidence, then the same must be raised as early as possible and the same has been very much complied in the case in hand.*

STATE OF KARNATAKA V. M.R. HIREMATH[20]:

In this case, a sting operation was conducted by a civilian against the Deputy Commissioner in Land Acquisition with due help of the police. The police asked the complainant to put a spy camera on his body followed by various other directions. The operation was successfully conducted and thereafter, a case was filed against him for demanding a bribe of Rupees Five Lakhs from the complainant. However, the respondent challenged the secondary electronic evidence, i.e. the spy

[19] (2018) 16 SCC 273
[20] (2019) 7 SCC 515

camera, for not producing it with the certificate under section 65B (4) of the IEA and that too at the time of "filing of charge-sheet".

The court refuted such contention of the respondent by stating that the evidence is supposed to be proven during the trial and notwithstanding that whether a certificate was produced at time of filing the charge-sheet.

Finding: *In the complete series of cases mentioned up till now, it has nowhere been mentioned that the evidence is required to be produced before the court at a particular stage in the case, but it is a general phenomenon in the procedural domain of law that an evidence is required to be recorded during the trial and it is scrutinized at the same stage.*

RAJENDER V. STATE (NCT OF DELHI)[21]:

The case was based on the offence of murder and the call detail records were having a significant role to play. After the CDR's were produced before the court, an objection was raised for the first time before the High Court that the same has not been adduced with a certificate under section 65B (4) of the IEA and thus, does not hold value.

However, rejecting such contention, the court, relying on the judgment of Sonu v. State of Haryana, said that where an objection is with regard to the mode of proof of the evidence, then the same has to be raised before the trial court when such evidence is being recorded and not directly at such a later stage. Since, the requirement of certificate is a procedural aspect or an infirmity in the mode of proof, the same should have been raised earlier and not directly before the High Court.

Finding: *It is not concrete up till now that when exactly such procedural requirements have to be fulfilled like one can produce before the court the evidence at the time of filing of charge sheet or during the trial, which is a practice followed in India but one thing is straight forward that any objection as to any evidence has to be raised immediately at the time when such evidence has been produced for recording before the court and not to be raised at a later stage.*

Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.[22]:

In the present case, the dispute was with respect to the election of Arjun Panditrao, who filed his nomination at 3:53 P.M. whereas the stipulated time for filing of nominations was till 3 P.M. only and on this ground, his election was challenged by the respondent. The respondent relied on the

[21] (2019) 10 SCC 623
[22] (2020) SCC 571

video-cameras that were installed at the office and in order to comply with the requirements enunciated under section 65B (4) of the IEA, the court ordered the election commission to produce the electronic record along with the requisite certificate.

When the same was not complied by the commission, as the certificate was never produced, the court summoned the Returning Officer and thereafter, she was examined in accordance with the requirements of section 65B (4) and this finally led the court to undertake the electronic record. However, the same was challenged by the appellant for the want of certificate under section 65B (4) and later, the court finally made various affirmations with respect to the admissibility of electronic evidence which have been listed below:

- The first rule was with regard to section 62 of the IEA where if the electronic record has been produced by the owner of such device by directly approaching the court, then there is no need to consider the requirements of section 65B (4) of the said Act.
- Secondly, if the computer system is a part of such configuration that it cannot be produced before the court or it is not in the possession of the concerned party, then the same can be produced through an electronic record accompanied by a certificate as mentioned under section 65B (4) of the Act.
- From the above two rulings, it is clear that judgments delivered in the case law *Tomaso Bruno and Shafhi Mohammad* have been overruled and also, because the judgments so delivered in both these cases were *Per Incuriam* to that of Anvar P.V. case.
- Section 65B has been considered to be a complete code in itself as it is a special provision with respect to electronic record and thus, the general law under section 63 and 65 have to yield to it.
- With regard to the question of the stage at which an objection can be raised against an electronic evidence like the objection regarding the certificate, the law delivered in the case of Sonu v. State of Haryana will prevail as it was nowhere overruled in the judgment of Arjun Panditrao.

CONCLUDING REMARKS

From the above analysis, I have come up with few uncertainties that are existing regarding the admissibility of electronic evidence. Although, the judgment delivered in the case of Arjun Panditrao has touched upon almost all the facets of the subject-matter of this submission but there are still some grey areas and the same have been discussed below-

- Firstly, if we go through the detailed analysis of every judgment or even the annexure, one can easily conclude that the courts have placed more reliance upon sub-section 4 of section 65B of the IEA. This shows that the requirement of certificate has more value than that of looking into the 'working condition of the computer' wherefrom the electronic record has been extracted. Even in the case of Harpal Singh v. State of Punjab, the court has said that it is pertinent to adduce the certificate in the court in case of a secondary electronic evidence, though the requirements under sub-section 2 can be looked into later.

In the case of **Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke**[23], it was contemplated that "source and authenticity" are the key factors for an electronic evidence and the same will be better understood if we will emphasize more on sub-section 2 of section 65B of the IEA which deals with rules regarding the working condition of the computer and the same is the 'source' of the impugned electronic record.

- Secondly, in the case of Sonu v. State of Haryana, a distinction has been made between admissibility and mode of proof of an evidence but is there actually any line of distinction between them. The marginal note of section 65B is '*Admissibility* of electronic records' and beneath the section has been laid down the requirement of certificate which is the mode of proof, this implies that mode of proof in this case is a 'constituent' of admissibility of evidence and it has to be proved in order to satisfy the admissibility of the evidence.
- Thirdly, the principle of Per Incuriam has been arbitrarily overlooked as Tomaso Bruno and Shafhi Mohammad has not paid heed to what was mentioned in the case of Anvar P.V. and since in the Anvar case, the bench was larger than that which presided in the two aforesaid cases, thereby per incuriam to the Anvar P.V. case. This means that the ruling given in Arjun Panditrao case may not be conclusive as tomorrow, even a smaller bench can overrule it as the same had happened in the past.
- Fourthly, since the courts have given enormous importance to the value of a certificate under section 65B (4) of the IEA, but the same may also come out to be faulty or false, then in such circumstances what would be a 'check' on the authenticity of the certificate has not been laid down anywhere. This means that the court has to be abided by what has been given in the

[23] (2015) 3 SCC 123

certificate, even though such information has been given by someone who is 'pretending' to be an official person over the computer system.

- Lastly, what if the accused person is in the possession of the computer or any other device, then even after availing section 91[24] of Code of Criminal Procedure, 1973, he does not give certificate or presents himself before the court to give testimony as to the electronic evidence. Over the top, he is having an immunity under section 131[25] of the IEA whereby he cannot be compelled to produce any electronic records under his control. Also, by virtue of Article 20(3)[26] of the Indian Constitution, an accused cannot be compelled to produce any document or give any statement to inculpate himself. Thus, the court is left with one option that to look into the electronic record itself in the light of the requirements mentioned under section 65B (2) of the IEA.

ANNEXURE

S. NO.	CASE NAME	CITATION	JUDGES INVOLVED	RATIO DECIDENDI

[24] S.91- Summons to produce document or other thing.
(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.
(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.
(3) Nothing in this section shall be deemed-
(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or
(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.
[25] S.131- Production of documents or electronic records which another person, having possession, could refuse to produce—No one shall be compelled to produce documents in his possession or electronic records under his control, which any other person would be entitled to refuse to produce if they were in his possession, or control, unless such last-mentioned person consents to their production.
[26] Article 20- Protection in respect of conviction for offences
(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence
(2) No person shall be prosecuted and punished for the same offence more than once
(3) No person accused of any offence shall be compelled to be a witness against himself

1.	STATE (NCT OF DELHI) V. NAVJOT SANDHU ALIAS AFSAN GURU	(2005) 11 SCC 600	P. VENKATARAMA REDDI & P.P. NAOLEKAR	THE COURT SAID THAT IF THE ORIGINAL EVIDENCE (CALL RECORDS) CANNOT BE PRODUCED BEFORE THE COURT, THE SAME CAN BE PROVED THROUGH A SECONDARY EVIDENCE WITHOUT COMPLYING WITH THE REQUIREMENTS U/S 65B (4). HOWEVER, IT IS TO BE SHOWN THAT THE COMPUTER IS WORKING PROPERLY AND TO PROVE THAT, AN EXPERT IS NOT REQUIRED (S. 45), RATHER ANY PERSON WHO IS FAMILIAR WITH THE WORKING OF SUCH COMPUTER CAN GIVE A TESTIMONY IN THE COURT AS A WITNESS.
2.	ANVAR P.V. V. P.K. BASHEER & ORS.	(2014) 10 SCC 473	R.M. LODHA, C.J., KURIAN JOSEPH &	WHERE THE ORIGINAL ELECTRONIC RECORD

			ROHINTAN FALI NARIMAN	(PRIMARY EVIDENCE) HAS BEEN PRODUCED, THEN, NO NEED TO COMPLY WITH THE REQUIREMENTS OF SECTION 65 B OF THE INDIAN EVIDENCE ACT. ON THE OTHER HAND, IF A SECONDARY ELECTRONIC RECORD (LIKE CD, DVD, ETC, WHERE THE STATEMENT HAS BEEN COPIED) IS BEING PRODUCED, THEN, SUCH ELECTRONIC RECORD SHALL BE ACCOMPANIED BY A CERTIFICATE U/S 65 B (4) AND IN THE ABSENCE OF SUCH CERTIFICATE, THE ELECTRONIC EVIDENCE WILL NOT BE ADMITTED.
3.	TOMASO BRUNO & ANR. V. STATE OF UTTAR PRADESH	(2015) 7 SCC 178	ANIL R. DAVE, KURIAN JOSEPH & R. BANUMATHI	THE COURT ALLOWED THE PRODUCTION OF A SECONDARY ELECTRONIC

				EVIDENCE UNDER SECTION 65 OF THE ACT AND SECTION 65B WAS MERELY CONSIDERED AS A 'GOOD LAW' FOR PROSECUTION AND THE INVESTIGATING AGENCY.
4.	HARPAL SINGH V. STATE OF PUNJAB	(2017) 1 SCC 734	DR. A.K. SIKRI & AMITAVA ROY	THE COURT CLEARLY HELD THAT A SECONDARY EVIDENCE IN THE FORM OF AN ELECTRONIC RECORD CANNOT BE ADMITTED UNLESS THE REQUIREMENTS OF SECTION 65B ARE FULFILLED, PARTICULARLY THE CERTIFICATE U/S 65B (4) AS THE SAME WAS NOT PRODUCED IN THE PRESENT CASE.
5.	VIKRAM SINGH & ANOTHER V. STATE OF PUNJAB & ANOTHER	(2017) 8 SCC 518	DIPAK MISRA, R. BANUMATHI & ASHOK BHUSHAN	THE COURT HELD THAT WHERE THE ORIGINAL TAPE-RECORDED CALLS HAVE BEEN PRODUCED, THEN

				THERE IS NO NEED TO PRODUCE A CERTIFICATE TO SUPPORT THE SAME U/S 65B (4). ALSO, SUCH CERTIFICATE WILL BE REQUIRED WHERE A SECONDARY EVIDENCE HAVE BEEN PRODUCED.
6.	SONU ALIAS AMAR V. STATE OF HARYANA	(2017) 8 SCC 570	S.A. BOBDE & L. NAGESWARA RAO	HERE, THE QUESTION WAS TWO-FOLD, WHERE ONE PART WAS DEALING WITH MODE OF PROOF AND THE OTHER WITH ADMISSIBILITY OF EVIDENCE. IF THE QUESTION IS TO THE NON-PRODUCTION OF CERTIFICATE U/S 65B (4), I.E. MODE OF PROOF, THEN THE SAME HAS TO BE RAISED AT THE TRIAL STAGE AND NOT AT THE APPELLATE STAGE. BUT IF THE QUESTION IS REGARDING THE ADMISSIBILITY OF

				EVIDENCE, THE SAME CAN BE RAISED AT THE APPELLATE STAGE AS WELL.
7.	SHAFHI MOHAMMAD V. STATE OF HIMACHAL PRADESH	(2018) 2 SCC 801	ADARSH KUMAR GOEL & ROHINTAN FALI NARIMAN	THE LAW RELATING TO THE MUST REQUIREMENT OF PRODUCING A CERTIFICATE U/S 65 B (4) WAS RELAXED, PROVIDED WHERE A PARTY IS NOT HAVING THE POSSESSION OF THE DEVICE WHEREFROM SUCH ELECTRONIC RECORD WAS PRODUCED.
8.	UNION OF INDIA & ORS. V. CDR. RAVINDRA V. DESAI	(2018) 16 SCC 273	DR. A.K. SIKRI & ASHOK BHUSHAN	WHERE IF A CERTIFICATE U/S 65B (4) HAS NOT BEEN PRODUCED AT AN EARLIER STAGE, THEN THE SAME IS A CURABLE DEFECT AND CAN BE CURED AT A LATER STAGE.
9.	STATE OF KARNATAKA V. M.R. HIREMATH	(2019) 7 SCC 515	DR. D.Y. CHANDRACHUD & HEMANT GUPTA	THE CASE WAS MORE INCLINED TOWARDS THE DETERMINATION OF STAGE AT WHICH THE EVIDENCE

				NEEDS TO BE ADDUCED. SINCE THE HIGH COURT RULED THAT THE SECONDARY EVIDENCE OF THE ELECTRONIC RECORD (SPY CAMERA) WAS NOT PRODUCED WITH THE CERTIFICATE U/S 65B (4) AT THE TIME OF FILING OF 'CHARGE-SHEET', THE SAME WILL NOT BE CONSIDERED, BUT THE SAME WAS OVERRULED BY THE SUPREME COURT. THE COURT STATED THAT THE NEED OF SUCH CERTIFICATE WOULD ARISE WHEN THE ELECTRONIC RECORD WILL BE PRODUCED AT THE TRIAL FOR EVIDENCE.
10.	RAJENDER V. STATE (NCT OF DELHI)	(2019) 10 SCC 623	MOHAN M. SHANTANAGOUDAR & AJAY RASTOGI	THE COURT SIMPLY STATED THAT IF ANY OBJECTION HAS TO BE RAISED REGARDING THE MODE AND

				METHOD OF PROOF, I.E. THE NON-PRODUCTION OF CERTIFICATE U/S 65B (4) IN THE PRESENT CASE, THE SAME HAS TO BE RAISED AT THE TRIAL AND NOT AT THE APPELLATE STAGE FOR THE FIRST TIME.
11.	ARJUN PANDITRAO KHOTKAR V. KAILASH KUSHANRAO GORANTYAL & ORS.	(2020) SCC 571	R.F. NARIMAN, S. RAVINDRA BHAT & V. RAMASUBRAMANIAN	OVERRULED THE JUDGMENTS OF SHAFHI MOHAMMAD AND TOMASO BRUNO STATING THEM TO BE BAD IN NATURE AND PER INCURIAM. THE COURT REAFFIRMED THE FINDINGS OF THE ANVAR CASE BY STATING THAT IF THE ORIGINAL DOCUMENT OR PRIMARY EVIDENCE IS ITSELF PRODUCED, THEN THERE IS NO NEED TO COMPLY WITH SECTION 65 B (4). BUT IF SUCH IS ACTUALLY NOT THE

				CASE, THEN, THE INFORMATION CAN BE BROUGHT THROUGH THE PROCEDURE LAID DOWN IN SECTION 65 B (1) WITH ALONGSIDE CERTIFICATE U/S 65 B (4).

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