



## ADMISSIBILITY OF ELECTRONIC RECORDS AS SECONDARY EVIDENCE UNDER SECTION 65B OF THE INDIAN EVIDENCE ACT: RECENT JUDICIAL APPROACHES

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### I. INTRODUCTION

With the intention to modernize the evidentiary practices and enable courts in India to deal with the advances in technology, the Indian Evidence Act, 1872 (hereinafter 'IEA') was amended by virtue of section 92 of the Information Technology Act, 2000 (hereinafter 'IT Act'). Accordingly, sections 3 and 59 were amended and sections 65A and 65B were inserted to incorporate the admissibility of electronic evidence.<sup>1</sup> Any information, be a text, photograph or phone logs, created and stored inside the device is an electronic record as per section 2(t) of the IT Act<sup>2</sup> and is a "document" under section 3 of the IEA and therefore admissible before a court as an electronic evidence. Further, according to section 59, electronic evidence can be proved by documentary evidence only—whether primary or secondary (section 61) and not by oral evidence.<sup>3</sup>

In most of the cases, the computer or digital camera (used for creating or storing electronic data) itself is not produced before the court as evidence, either a printout is taken or CDs/ DVDs are prepared to be produced as secondary evidence before the court in place of primary evidence. Thereafter, as per sections 65A and 65B, the functionality of such computer needs to be established and the person who has transferred these photographs and produced them needs to certify.<sup>4</sup> Further, under sections 61 to 65, the word "document or content of documents" have not been replaced by the word "electronic documents or content of electronic documents", making the intention of the legislature to be explicitly clear i.e. not to extend the applicability of section 61 to 65 to the electronic record.<sup>5</sup>

In view of this scenario, any documentary evidence by way of an electronic record under the IEA can be proved only in accordance with the procedure prescribed under section

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<sup>1</sup> Amendment Act 21 of 2000, s. 92 and the Second Schedule: s. 3 "all documents produced for the inspection of the Court" was substituted by "all documents including electronic records produced for the inspection of the Court"; in sec. 59, phrase "content of documents" was substituted by "content of documents or electronic records". See also, Neeraj Arora, "Admissibility of Electronic Evidence: Challenges for Legal Fraternity", available at: <http://www.neerajaarora.com/admissibility-of-electronic-evidence-challenges-for-legal-fraternity/> (last visited on October 20, 2018)

<sup>2</sup> S. 2(1)(t), the Information Technology Act, 2000: "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;

<sup>3</sup> Under s. 22A, however, it was provided that oral evidence with respect to contents of electronic records is relevant only when genuineness of the record is in question; also s. 45A was inserted in the IEA, which provides that opinion of Examiner of Electronic Evidence will be relevant fact when the Court has to form an opinion on any matter relating to information in electronic form; See also, Kumar Askand Pandey, "Appreciation of Electronic Evidence: A Critique of Judicial Approach", 6 *RMLNLJ* 24 (2014), available at: <https://www.scconline.com/Members/SearchResult2014.aspx> (last visited on Oct. 23, 2018).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

65B.<sup>6</sup> Therefore, a person, who was responsible in handling of the computer or digital camera and who took the print out or photograph and transferred it to the media, needs to certify that how the printout or storage was done and the functionality requirements under section 65 B (2) was complied with.<sup>7</sup>

Section 65B(4)<sup>8</sup> lists additional non-technical qualifying conditions to establish the authenticity of electronic evidence requiring the production of a certificate by a person occupying a responsible official position and was responsible for the computer on which the electronic record was created, or is stored. Therefore, the issuer of the certificate must identify the original electronic record, describe the manner of its creation, describe the device that created it and certify compliance with the conditions of section 64B(2) and 64B(4). Sections 59-65 including section 64A and section 65B therefore, was to provide a complete code on conditions of admissibility of electronic record.<sup>9</sup>

However, despite the good intentions behind this amendment, the provision has been controversial, primarily because different High Courts have treated electronic evidence under section 65B inconsistently and arbitrarily.<sup>10</sup> Different courts have been demanding different methods for the fulfilment of the conditions laid down in section 65B therefore, there has been no uniformity. This variation in practice not only causes grave inconvenience to the litigants, but also facilitates possibilities for the derailment of justice.

## II. REQUIREMENT OF CERTIFICATE UNDER SECTION 65B-CERTIFICATE OR NO CERTIFICATE: DIFFERENT INTERPRETATIONS BY DIFFERENT COURTS

<sup>6</sup> E-Pathshala module on Digital Evidence- Broad Principles, *available at: [http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp\\_content/law/07\\_information\\_and\\_communication\\_technology/10\\_digital\\_evidence-broad\\_principle/et/7566\\_et\\_10\\_et.pdf](http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/07_information_and_communication_technology/10_digital_evidence-broad_principle/et/7566_et_10_et.pdf)* (last visited on Oct. 18, 2018)

<sup>7</sup> Aratrika Chakraborty and Anuradha Parihar, "A Techno Legal Analysis of Admissibility of Digital Photographs as Evidence & Challenges", 13 *International Journal of Law* 3 (2017). "S. 65B (2) gives the technical conditions for admissibility. (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 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."

<sup>8</sup>*Id.* at s. 65 B(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 management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purpose 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."

<sup>9</sup>*Supra* n. 6.

<sup>10</sup> Aradhya Sethia, "Where do we stand on 'secondary electronic evidence?'," *available at: <https://spicyip.com/2014/10/guest-post-where-do-we-stand-on-secondary-electronic-evidence.html>* (last visited on Oct. 21, 2018).

The dispute regarding whether a certificate under section 64B is mandatory or not and whether it is the only way one may satisfy the conditions under this section has long been the bone of contention. The test for admissibility under section 65B was considered for the first time in 2003 in *State v. Mohd. Afzal*<sup>11</sup> wherein the Division Bench of the Delhi High Court was called upon to determine whether the call records in evidence had been admitted in accordance with section 65B. It was contended by the appellant-accused that CDRs (call detail records) were inadmissible as the certificate as per section 65B (4) was not submitted by prosecution. This contention was rebutted by the prosecution on the grounds that the conditions under section 65B (2) had been met through oral testimony. The Delhi High Court accepted the argument of the prosecution and noted that, “the certificate under section 65B (4) was merely an alternative mode of proof and compliance with section (1) and (2) of section 65B is sufficient to make admissible and prove electronic records.”<sup>12</sup> “Comparing computer output under section 65B to secondary documentary evidence under section 65(d), the Court held that the oral evidence was equally sufficient and the lack of certificate was not an automatic bar.”<sup>13</sup>

*State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*,<sup>14</sup> where the entire conspiracy theory was based on the intercepted call records of the accused persons, accused submitted that no reliance could be placed on the mobile telephone call records as no certificate under section 65B (4) was produced by the prosecution. The two judges bench of the Supreme Court held that “call records of cellular phones are admissible in evidence under section 7 of the IEA and there is no specific bar against the admissibility of the call records of telephones or mobiles.” Further the court held that secondary evidence of such calls can be led under sections 63 and 65 of the IEA:

“Irrespective of the compliance with 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. It may be that the certificate containing the details in sub section (4) of section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, sections 63 and 65.”<sup>15</sup>

After this decision, admissibility of electronic evidence depended on judicial discretion. Some High Courts continued to demand for certificates, others based it on oral testimony or applying alternate ways for establishing admissibility of electronic records.<sup>16</sup> In *R.K Anand v. Delhi High Court*,<sup>17</sup> the Supreme Court was considering the admissibility of recordings on some microchips and CDs. It was a case where the microchip was preserved by a popular TV channel studio and the court believed that it could not have been tampered with and therefore, the authenticity of the CDs could be relied upon.

<sup>11</sup>*State v. Mohd. Afzal* (2003) 107 DLT 385.

<sup>12</sup>*Ibid.*

<sup>13</sup>Ashwini Vaidialingam, “Authenticating Electronic Evidence: S. 65B, Indian Evidence Act, 1872”, 8(1&2) *NUJS Law Review* 43(2015).

<sup>14</sup>*State (NCT of Delhi) v. Navjot Sandhu* (2005) 11 SCC 600.

<sup>15</sup>*Id.* at 715, available at: <https://www.scconline.com/Members/SearchResult2014.aspx>.(last visited on Oct. 22, 2018).

<sup>16</sup>*Societe Des Products Nestle SA v. Essar Industries* (2006) 33 PTC 469 (Del).

<sup>17</sup>(2009) 8SCC 106.

After a series of conflicting judgments given by various High Courts and trial courts, a three judges bench of the Supreme Court in *Anwar P.V. case*<sup>18</sup> overruled the *Navjot case*<sup>19</sup> and settled the law on the admissibility of electronic evidence. Placing reliance on the *non obstante clause* in section 65B of the IEA, the Court held that the special provisions under sections 65A and 65B will prevail over the general law on secondary evidence under sections 63 and 65 of the IEA.<sup>20</sup> Therefore, for an electronic record to be admissible as secondary evidence in the absence of the primary, the mandatory requirement of section 65B certification is required to be complied with. The Supreme Court categorically held that the IEA does not contemplate or permit the proof of an electronic record by oral evidence if requirements under section 65B of the IEA are not complied with, as the law now stands in India.

“Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act IEA. The very caption of section 65A of the Evidence Act IEA, read with sections 59 and 65B 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 IEA that is a complete Code in itself. Being a special law, the general law on secondary evidence under section 63 read with section 65 of the IEA has to yield.”<sup>21</sup> *Generalia specialibus non derogant*, special law will always prevail over the general law. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record.<sup>22</sup>

In 2014 and 2015, judges of the different High Courts and trial courts placed vehement reliance upon the ratio of the *Anwar* judgment in matters related to admissibility of electronic evidence. The Bombay High Court in *Balasaheb Gurling Todkari v. State of Maharashtra*<sup>23</sup> held that “the CDRs cannot be admitted in evidence in the absence of the requisite certificate as per section 65B.” Similarly, in the case of *Faim v. State of Maharashtra*,<sup>24</sup> the Bombay High Court held that “it was mandatory for the prosecuting agency to produce the certificate in terms of section 65B obtained at the time of collecting document(CDR).”

Similarly, in *Jagdeo Singh v. State*,<sup>25</sup> quoting *Anwar*,<sup>26</sup> the Delhi High Court was satisfied that “the intercepted telephone calls presented in the form of CDs before the trial court which were then examined by the forensic expert did not satisfy the requirements of section 65B of the IEA and cannot be looked into by the Court for any purpose whatsoever.”<sup>27</sup>

The importance of role played by sections 65A and 65B of the IEA with regard to the admissibility of electronic records was reiterated by the Supreme Court in *Harpal Singh @ Chhota v. State of Punjab*.<sup>28</sup> The prosecution in this criminal appeal produced printed copies of relevant records but failed to adduce a certificate as required under section 65-B (4) of the Act. The High Court dismissed the plea of inadmissibility of such call details by observing

<sup>18</sup>*Anwar v. Basheer* (2014) 10 SCC 473.

<sup>19</sup>*Supra* note 14.

<sup>20</sup>*Ibid.*

<sup>21</sup>*Supra* n. 17 at para 19.

<sup>22</sup>*Id.* at para 22.

<sup>23</sup>2015 SCC Online Bom. 3360.

<sup>24</sup>2015 SCC Online Bom. 5842

<sup>25</sup> 2015 SCC Online Del 7229

<sup>26</sup>*Supra* n. 17.

<sup>27</sup>*Supra* n. 3.

<sup>28</sup>(2017) 1 SCC 734.

that all the stipulations contained under section 65 of the IEA had been complied with. However, the Supreme Court, going by the decision of this court in *Anwar P.V.*,<sup>29</sup> ordaining an inflexible adherence to the enjoinders of sections 65B(2) and (4) of the Act, refused to sustain the High Court's finding on the issue. The Court held that "where the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of section 65B (2) had been complied with, in absence of a certificate under section 65B (4), the secondary evidence has to be held inadmissible in evidence." However, upholding the sentence, the court added that the charges against the accused persons, including the appellants, stand proved beyond reasonable doubt, even without considering the call details.

Though the Supreme Court ruling in *Anwar* and above case has clearly and unequivocally stated that any electronic evidence in secondary form filed without meeting the requirements of section 65B(4) will be inadmissible, a two judge bench in *Sonu v. State of Haryana*<sup>30</sup> has expressed doubts over this principle. The bench noted that the law laid in *Anwar* judgment has not clarified whether the judgment is to be applied prospectively or retrospectively also. Since this question has been left open in *Anwar* decision, it will be used to reopen or challenge the admissibility of evidence in pending trials where the requirements under section 65B were not complied with according to the bench. The Court in *Sonu*<sup>31</sup> case held the requirements of section 65B to be relating to method of/mode of proof (objection to which cannot be raised at appellate stage) despite *Anwar* holding that non-compliance with section 65B strikes at the very admissibility of the evidence.<sup>32</sup> This decision by a two judge bench cannot overrule larger bench decision but these observations will definitely affect and delay all other pending trials and appeals across the country.<sup>33</sup>

Earlier too, in *Abdul Rahaman Kunji v. State of W.B.*<sup>34</sup>, a Division Bench of the Calcutta High Court, while deciding the admissibility of e-mail, held that "an e-mail downloaded and printed from the e-mail account of the person can be proved by virtue of section 65B read with section 88A of the IEA. The oral testimony of the witness who had downloaded and printed the said mails is sufficient to prove the electronic communication even in absence of a certificate in terms of section 65 B of the IEA."<sup>35</sup>

The *Anwar* ruling was further diluted by its interim order in *Shafi Mohammad v. State of Himachal Pradesh*<sup>36</sup> wherein it observed that that "a party, who is not in the possession of a device which has produced an electronic document, cannot be required to produce a certificate under section 65B of the IEA." The Court further held that the requirement of producing a certificate under section 65B can be relaxed in the interest of justice by the court.

<sup>29</sup>*Supra* n. 17.

<sup>30</sup>(2017) 8 SCC 570.

<sup>31</sup>*Ibid.*

<sup>32</sup> Anuj Beri, Sonali Malik, *et. al.*, "India: Supreme Court On Admissibility Of Electronic Records As Secondary Evidence", available at: <http://www.mondaq.com/india/x/614920/trials+appeals+compensation/Supreme+Court+on+Admissibility+of+Electronic+Records+as+Secondary+evidence> (last visited on Oct. 23, 2018)

<sup>33</sup>*Ibid.*

<sup>34</sup>2014 SCC OnLine Cal 18816. See also, *Ram Kishan Fauji v. State of Haryana*, 2015 SCC OnLine P&H 5058.

<sup>35</sup>*Supra* n. 3.

<sup>36</sup> SLP (Crl.) No. 2302 of 2017, available at: [https://supremecourtfindia.nic.in/supremecourt/2017/6212/6212\\_2017\\_Judgement\\_30-Jan-2018.pdf](https://supremecourtfindia.nic.in/supremecourt/2017/6212/6212_2017_Judgement_30-Jan-2018.pdf) (last visited on Oct. 23, 2018).

Diluting the ratio of *Anwar* ruling, it further held that “electronic evidence is admissible under the Act. Sections 65A and 65B are merely clarificatory and procedural in nature and cannot be held to be a complete code on the subject. This interim decision seems to have restricted the applicability of the statutory certificate required under 65B(4) of the Act or may have carved out an exception to applicability thereof.”<sup>37</sup> This judgment may provide sanctity to considerably significant evidence that was earlier not taken into account in view of being procedurally uncertified in accordance with Section 65B(4) of the Act. It will be interesting to observe how the other court(s) interpret the view taken by the Apex Court.<sup>38</sup>

It is being argued by some that this interim decision by a two judges bench in a SLP although cannot technically overrule a three judge bench decision of 2014 but will facilitate production of false evidence and change the onus of proving that it is inadmissible on the defence.<sup>39</sup> The *Anwar* judgement had clearly segregated ‘admissibility’ from ‘genuineness’ and had indicated how the two should be handled by the Court. The current order has completely ignored this part of the *Anwar* judgment and is not a correct interpretation.<sup>40</sup>

### III. TIME OF PRODUCTION OF CERTIFICATE UNDER SECTION 65B

Although the *Anwar* judgment to a very large extent clarified the position relating to section 65B certification, but it did not specify anything on time of filing of such certificate i.e., whether the said certificate is required to be filed with the charge sheet or it can be submitted at the later stage, during the trial. In the absence of any Supreme Court ruling, this issue was addressed by Delhi and Rajasthan High Courts taking the view that the said certificate can be filed at a later stage. In the case of *Kundan Singh v. State*,<sup>41</sup> an appeal against murder conviction where the chain of events were created using electronic evidence, the section 65B certificate pertaining to the CDR of the accused was not submitted along with the charge sheet. It was submitted by the nodal officer of the concerned telecom agency at the time of his re-examination only.

The division bench of the Delhi High Court was required to decide as to whether a certificate under sub-section (4) to section 65B must be issued simultaneously with the production of the computer output or it can be issued and tendered when the computer output itself is tendered to be admitted as evidence in the court or, as in the present case, by the official when the accused was recalled to give evidence. The Court referred to the Supreme Court judgment in *Anwar* on the issue. To quote: <sup>42</sup>

“The expression used in the said paragraph is when the electronic record is ‘produced in evidence.’ Earlier portion of the same sentence emphasizes the importance of certificate under section 65B and the ratio mandates that the said certificate must accompany the electronic record when the same is produced in evidence”.

<sup>37</sup>Rajiv Shanker Bhatnagar, *et al.*, Supreme Court elucidates upon the scope & necessity of certificate under section 65B of the Indian Evidence Act, 1872 *available at*: <http://www.mondaq.com/india/x/677072/trials+appeals+compensation/Supreme+Court+Elucidates+Upon+The+Scope+Necessity+Of+Certificate+Under+Section+65B+Of+The+Indian+Evidence+Act+1872and> <https://www.khaitanco.com/PublicationsDocs/Khaitan%20&%20Co-Ergo-Update-23Feb2018RB.pdf?cv=1> (last visited on Oct. 23, 2018).

<sup>38</sup>*Ibid.*

<sup>39</sup>Vijayashankar Na, “Recipe for corruption in Judiciary- Supreme Court judgement” in *Shafhi Mohammad v. State of Himachal Pradesh*, *available at*: <https://www.naavi.org/wp/recipe-for-corruption-in-judiciary-supreme-court-judgement-in-shafhi-mohammad-v-state-of-himachal-pradesh/> (last visited on Oct. 24, 2018).

<sup>40</sup>*Ibid.*

<sup>41</sup>2015 SCC Online Del. 13647.

<sup>42</sup>*Supra* n. 17.

According to the Delhi High Court, “the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to section 65B. This is not so stated in section 65B or subsection (4) thereof. Of course, it is necessary that the person giving the certificate under sub-section (4) to section 65B should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in sub-section (2), identify the electronic record, describe the manner in which ‘computer output’ was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer. The Delhi High Court held that *Anwar case* does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under section 311Cr PC<sup>43</sup> or, at the appellate stage under section 391 Cr PC.”<sup>44</sup> The Division Bench refused to accept the legal ratio of *Ankur Chawla v. C.B.I.*<sup>45</sup> that “the certificate must be issued when the computer output was formally filed in the court and certificate under section 65B cannot be produced when the evidence in the form of electronic record is tendered in the court as evidence to be marked as an exhibit.”

On a similar note, in *Paras Jain v. State of Rajasthan*,<sup>46</sup> the single judge bench highlighted a well settled legal position that “the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record. Thus, in all the cases where the police has not filed the certificate under section 65B, the prosecution agency can file the certificate by way of supplementary charge sheet under section 173(8) of Cr PC. It is a statutory right which does not even require the prior permission of the magistrate. While coming out with this deduction, the Court reasoned that when legal position is that an additional evidence, oral or documentary, is allowed to be produced during the course of trial, if in the opinion of the court its production is essential for the proper disposal of the case, how it can be held that the certificate as required under section 65-B of the IEA cannot be produced subsequently in any circumstances, if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. According to the court it is only an irregularity, a defect which is curable, not going to the root of the matter.” It is also pertinent to note that in the present case, the certificate was produced along with the charge-sheet but it was not in a proper form. However, later during the course of hearing of these petitions, it was produced in the prescribed form.

In *Kundan Singh*<sup>47</sup> case the Delhi High Court, in a part of the judgment, also considered the hearsay rule in the context of electronic evidence. Since the CDRs were in question, the court distinguished between electronic records automatically created and those requiring human intervention.

The Delhi High Court observed that “in *Anwar*, the Supreme Court noticed the difference between relevancy and admissibility which is examined at the initial stage and genuineness, veracity and reliability of evidence which is seen by the court subsequently. Thus, the ratio and dictum in *Anwar P.V* is premised on the difference between admissibility

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<sup>43</sup>CrPC, s. 311 reads: Power to summon material witness, or examine person present at any stage of any inquiry, trial or other proceeding under this Code.

<sup>44</sup>*Id.*, s. 391 reads Appellate court may take further evidence itself or direct the Magistrate to take it if it thinks necessary.

<sup>45</sup>2014 SCC Online Del. 6461.

<sup>46</sup>2015 SCC Online Raj. 8331.

<sup>47</sup>*Supra* n. 40.

and veracity or evidentiary value. The Supreme Court dealt with the aspect of admissibility in strict legal sense, without confusing it with evidentiary value /correctness of contents.”

Analysing the Anwar judgment, the High Court of Delhi drew observation that section 65B nowhere states that the contents of the computer output shall be treated as the truth of the statement. It only deals with the admissibility of secondary evidence in the case of an “electronic records” and not with the truthfulness or veracity of the contents. Mere admission or admissibility of the electronic record would not mean that the contents of the electronic record have been proved beyond doubt and that they are automatically proved when the document is marked exhibit. Mere marking of a document as exhibit does not dispense with the proof of its contents.<sup>48</sup> Section 65B simply authenticates the computer output, it will only show and establish that the computer output is the print out or media copy, etc. of the computer from which the output is obtained.

To put it simply, the Court held that “section 65-B remains an issue of admissibility, not reliability. The court has still to rule out when challenged or otherwise, the possibility of tampering, interpolation or changes from the date the record was first stored or created in the computer till the computer output is obtained. The courts must rule out that the records have not been tampered and read the data or information as it originally existed.”

The Delhi High Court held that “evidence may be offered for different purposes and there is difference between a ‘factum of statement’ and ‘truth of a statement.’<sup>49</sup> Thus, electronic record produced as a statement as a tangible in form of a CD, print out on paper, etc. as a fact in itself, must be distinguished from electronic record, which is produced to prove truth of the matter it asserts or correctness of contents for the latter postulates adjudication of veracity and credibility of the information by the person who has made a statement offering or producing the document for its truth.”

Where an electronically generated record is entirely a product of functioning of a computer system or computer process like call record details or a report generated on a fax, it is not hit by the hearsay rule. Computer generated telephone records are not similar to a statement by a human declarant and, therefore, cannot be treated as hearsay and the credibility and evidentiary value is determined on the reliability and accuracy of the process involved.

In *Avadut Waman Kushe v. State of Maharashtra*,<sup>50</sup> the Bombay High Court judge observed that “a perusal of the provision of section 65-B(4) shows that, there is nothing in the provision that specifies the stage of production of the certificate. Rather the Court inferred that the indication therein is otherwise, as the provision of section 65-B is about admissibility of electronic record and not production of it.” Further, from the opening words of section 65-B(4)- “In any proceedings where it is desired to give statement in evidence”, it is clear that the certificate can be filed at the time the record is tendered in evidence. It need not be filed at the time of production of the electronic record, definitely not at the stage of filing of the charge sheet which is the preliminary stage of the proceedings, and the subsequent filing of the certificate cannot reduce its effectiveness. The writ petition was accordingly dismissed by the Court.

<sup>48</sup>*Sait Tarajee Khimchand v. Yelamarti Satyam*, AIR 1971 SC 1865; *Narbada Devi Gupta v. Birendra Kumar Jaiswal* (2003) 8 SCC 745 and *Mohd. Yusuf v. D.*, AIR 1968 Bom. 112.

<sup>49</sup>This distinction has been recognised and accepted in several judgments like *J.D. Jain v. State Bank of India*, AIR 1982 SC 673 and *S.R. Ramaraj v. Special Courts, Bombay* (2003) 7SCC 175.

<sup>50</sup>2016 SCC Online Bom. 3236.

Again, in *Eli Lilly and Company v. Maiden Pharmaceuticals Ltd.*,<sup>51</sup> a suit filed for injunction in case of infringement of trademark and passing off in 2007, the issue before the High Court of Delhi was whether the certificate or affidavit as required under section 65-B must be filed along with the electronic evidence, or it can be filed subsequently also, when the evidence extracted from the electronic record had already been filed in the court.

The counsel for the plaintiffs, in response to the objections raised by the defendant counsel on filing of some documents for the first time with the affidavit, contended that the need for filing an affidavit under sections 65-A and 65-B of the IEA arose only because of the creation of separate commercial courts after coming into force of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Commercial Courts Act) *w.e.f.* October 23, 2015.<sup>52</sup> It was also argued that the plaintiffs have filed the computer printouts as well as CDs of the electronic record at the appropriate time and the affidavit aforesaid under sections 65-A and 65-B is in support thereof.<sup>53</sup>

Although the ratio in *Anwar*, according to the reading of Endlaw J., required the certificate/affidavit under section 65-B of the Evidence Act to accompany the electronic record when produced in the court, the later judgment of a single judge of High Court of Rajasthan and Division Bench of High Court of Delhi added more clarity on the issue. In *Paras Jain v. State of Rajasthan*,<sup>54</sup> the judge observed that “when additional evidence, oral or documentary, can be produced during the course of trial, if in the opinion of the court it is essential for the proper disposal of the case, how can the certificate under section 65B be denied subsequently, if the same was not submitted along with the electronic record and not produced with the charge sheet in the court. It can be considered a curable irregularity not going to the root of the matter.” Further, the Division Bench of the High Court of Delhi in *Kundan Singh v. State*<sup>55</sup> held that “the words ‘produced in evidence’ did not postulate that the computer output when reproduced as paper print out/optical/magnetic media must be simultaneously certified by an authorised person under section 65-B(4).”

<sup>51</sup>2016 SCC Online Del. 5921.

<sup>52</sup>*Id.* at para 8.-Attention was also drawn to sub-rules (1), (2), (5) and (6) of Order XI R. 6 of the CPC as applicable to commercial disputes by the plaintiff.

<sup>53</sup>Deepa Kharb, “Cyber Law”, 51 *ASIL* 439-454 (2015). See, para 16 reads: It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, 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. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice; *Supra* n. 17.

Para 17. Only if the electronic record is duly produced in terms of s. 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation; resort can be made to s. 45A – opinion of examiner of electronic evidence.

Para 22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under s. 63 read with s. 65 of the Evidence Act shall yield to the same. *Generaliaspecialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of ss. 59 and 65A dealing with the admissibility of electronic record. Ss. 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Ss. 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu case* (*supra*), does not lay down the correct legal position. It requires to be overruled and we do so. 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 terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

<sup>54</sup>2015 SCC Online Raj. 8331.

<sup>55</sup>2015 SCC Online Del. 134647.

According to the Court, “all that is required is that the person giving the certificate under section 65-B(4) should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in section 65-B(2), identify the electronic record, describe the manner in which computer output was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer.”

It thus had to be held, according to the single judge, that “the plaintiffs are entitled to file the certificate under section 65-B of the IEA, even subsequent to the filing of the electronic record in the court. Order XI Rule 6 of Code of Civil Procedure, 1908 (CPC) as applicable to commercial suits is also not found to provide to the contrary. It was also held that section 65-B of the IEA and the interpretation therein applies to civil suits also. However, the Court, concurring with the recent judgements referred above, added a word of caution here that the late filing of the certificate should be allowed only if the party makes out a case for reception thereof. If the party so producing the said certificate/affidavit is unable to satisfy the court as to the reasons for which the certificate/affidavit was not filed at the appropriate time, may run the risk of the certificate/affidavit being not permitted to be filed and resultantly the electronic record, even if filed at the appropriate time, remaining to be proved, to be read in evidence. Not only so, even if the delayed filing of the said certificate/affidavit is permitted by the court, the party producing the same may run the risk of being not able to prove the said electronic record.”

Further, there is one more possibility that the person in a position to identify the electronic record and to give particulars of the device involved in the production of the electronic record and as to other matters prescribed in section 65-B(2) and in Order XI Rule 6(3) of the CPC may not be subsequently available (situation discussed later in the survey in the case of *Saidai Duraisamy v. Stalin*<sup>56</sup> or with frequent changes in technology, the device involved in the production of electronic record may not be identifiable and the certificate/affidavit may not withstand the cross-examination by the opposing counsel on the said facts, leading to the electronic record being not read in evidence and the plea taken on the basis thereof remaining to be proved.

Thus, merely because it has been held that the certificate/affidavit under section 65-B and/or order XI Rule 6 of CPC can be filed at a subsequent stage, does not mean that the parties to a litigation do not file such certificate/affidavit along with electronic record produced before the court. The proof of the said certificate/affidavit, unlike other documents, will be much more stringent. However, it will be open to the counsel for the defendant to cross-examine the deponent of the said affidavit and the proof of the said affidavit under sections 65-A and 65-B of the IEA shall be subject to such cross-examination and if it is found that the deponent of the affidavit was not a competent person to issue the certificate/affidavit, needless to state, the electronic record tendered in evidence shall also not be read.

#### IV. WHO MAY ISSUE A CERTIFICATE UNDER SECTION 65B

A peculiar situation anticipated by Endlaw J. in *Eli Lilly*<sup>57</sup> came up for consideration before the High Court of Madras in *Saidai Duraisamy v. Stalin*.<sup>58</sup> The High Court took

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<sup>56</sup>2016 SCC Online Mad. 23264.

<sup>57</sup>*Supra* n. 50.

<sup>58</sup>*Supra* n. 55.

cognizance of this application filed by the petitioners in an election petition praying for the issue of 'subpoena' to an Assistant Returning Officer to give evidence/issue certificate for the purpose of proving the 15 CDs marked as exhibit under section 65B of the IEA. The situation arose as the person marked as the competent person to issue certificate under section 65B (4), the then returning officer, could not be summoned at the address furnished.

The application was opposed by the respondents contending that issue of subpoena, a time delay tactics by petitioners, would amount to abuse of process of law and illegal for two reasons:

- (i) the plaintiff has merely submitted the CDs in the court without certificate required under section 65-B of IEA, hence making it inadmissible;
- (ii) the Assistant Returning Officer sought to be summoned by the Petitioner who was working with the Returning Officer at that time and could not be served in the addresses furnished, was not identified by C.W.2 as a person competent to issue certificate, hence not competent to issue certificate.

The Court observed that "in terms of section 65-B when a statement has to be produced in evidence, it should be accompanied by a certificate showing compliance with the conditions of sub-section (2) of section 65-B of the Act. An electronic evidence without a certificate cannot be proved by means of oral evidence and also the opinion of an expert under section 45-A of the IEA, cannot be resorted to make such electronic evidence admissible. Section 45-A can only be availed once the provisions of section 65-B are very much fulfilled." Therefore, compliance of the ingredients of section 65-B are now mandatory for relying upon any electronic record in a case.

Further, the court observed that "an objection as to the mode of proof ought to be taken before a document is admitted and marked as exhibit. However, when the document is accepted before a court of law/trial court, the party against whom it is being brought on record is entitled to question it on the ground of its inadmissibility."

If after the admission of a particular document it is later found to be irrelevant and inadmissible in the eyes of law, it may be rejected at any stage of the suit as per Order 13 Rule 3 of CPC.<sup>59</sup> The Court therefore directed the registry to issue subpoena to the concerned official.<sup>60</sup>

## V. CONCLUSION

Electronic records in the form of CDRs, CCTV footage to emails are dealt by the courts nowadays in civil as well as criminal matters on a regular basis. Recognition of electronic evidence as evidence under the IEA through amendment in 2002 and introduction of sections 65A and 65B to provide for the admissibility of electronic evidence was a major change. Despite their evidentiary relevance, the accuracy and reliability of electronic records, in contrast to their physical counterparts is always suspected for obvious reasons, creating conflict between their relevancy and admissibility.

<sup>59</sup> CPC,1908- Order XIII: Production, Impounding and Return of Documents- Rule 3. Rejection of irrelevant or inadmissible documents-

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

<sup>60</sup>Deepa Kharb, "Cyber Law", *52 Annual Survey of Indian Law* 401-423(2016).

Judicial pronouncements by various high courts and the Supreme Court of India have tried to elucidate the scope of the provisions applicable to electronic documents. However, there has been a significant lack of consistency in practice in this regard. An attempt by *Anwar* decision to address this problem and to standardise by explaining and laying down the requirements under section 65B has been short lived and recent approaches adopted by high courts and the Supreme Court in this regard have diluted the ratio.

Though we cannot be oblivious to the inevitable technological advancements and restrict ourselves to the methods proposed by *Anwar*, new authentication methods in addition to certificates obtained in lawful manner can be adopted to address the issue is not properly addressed by this judgment.