

## Law On Electronic Evidence In India And Its Implications

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### Abstract

This research paper aims to discuss the present law on the electronic evidence in India and its implications. There has been a lot of technological revolutions in the recent past. Electronic gazettes have become part of life of every individual i.e. poor, rich, businessman as well as the criminals. Most of the activities and transactions are being recorded in the electronic forms. The cases of cyber crimes are also increasing day by day in which the criminals are using the electronic devices. This has also increased the importance of the electronic evidence in the Courts proceedings. So there is an urgent and immediate need to reform, evolve and update the existing law on electronic evidence because law has to keep pace with technology. The law regarding electronic evidence was introduced in the Indian Evidence Act by way of amendment in the year 2000. The Information Technology Act, 2000 was also passed which has also made various provisions regarding the electronic record. Various amendments were also made in the existing Indian laws regarding the electronic record. It has become necessary to examine the law on electronic Evidence in India. This paper aims to examine the latest law on electronic evidence and to discuss the difficulties with the present law on electronic evidence.

**Keywords:** Electronic Evidence, Electronic Record, Admissibility, Evidence, the Information Technology Act, the Indian Evidence Act and the presumptions.

## INTRODUCTION

The present century belongs to technological revolutions. Technology has become integral part of life of every individual, every small or big business as well as justice dispensation system. Electronic means of communication are also increasing every day. The technological revolutions have also necessitated amendments in the Indian Laws because law has to keep pace with the technology. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 was adopted by the General Assembly of the United Nations by Resolution A/RES/51/162, dated 30<sup>th</sup> January, 1997. The resolution recommended that all States should give favourable consideration to the Model Law when they enact or revised their laws keeping in view the need for uniformity of the law.

## THE INFORMATION TECHNOLOGY ACT, 2000

The Information Technology Act, 2000 ( Act No.21 of 2000) was enacted to give effect to the resolution dated 30<sup>th</sup> January, 1997 passed by the United Nations to promote efficient delivery of the Government Services by means of electronic records.

This Act came into force w.e.f. 17<sup>th</sup> October, 2000. Initially, this Act was containing 94 Sections, 13 Chapters and 4 Schedules. Sections 91 to 94 of the Information Technology Act, 2000, have already been omitted. Various sections have also been deleted or added by way of amendments done in the years 2002, 2008 and 2009. This Act extends to the whole of India. This Act applies also to any offence or contravention thereof committed outside India by any person. This Act has brought sea changes regarding the electronic evidence and its recognition. Section 4 gives legal recognition to the electronic record. It says that “if any law provides that any information or other matter shall be in writing, or type written or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information is made available in an electronic form”. Since this section contains a non obstante clause, so this section shall prevail on all other laws. So, as per this Section 4, now it cannot be insisted that the document should be only in printed form. This Section has brought a sea changes in the electronic governance. Section 5 provides legal recognition of electronic signatures. Section 6 provides that “if there is any requirement of any law regarding filing of any document in any form, such requirement shall be deemed to have been satisfied if the same is effected by means of electronic form”. Even now the contracts can be executed in an electronic form.

Sections 22 to 34 are general provisions regarding issuance, renewal, cancellation and suspension of various licenses under this Act. Sections 35 to 39 deal regarding issuance of electronic signature certificate, suspension or revocation of electronic signature certificate. Sections 40 to 42 provide about the duties of the subscribers. Chapter IX deals with the penalties, compensation and adjudication of such penalties and compensation. Section-43 says that no person can have access to the computer system or computer network of any other person without the permission of the owner or the Incharge. This section further says that no person can have access, download or damage the computer system or network of any other person without the permission of the person concerned. If any person violate this section, such person is liable to pay damages by way of compensation to the person so affected. Section 43A makes provision of compensation for failure to protect data. Section 44 makes provision for imposing penalty for failure to furnish certain information and return etc. Section 45 is a residuary provision and says that whoever contravenes any rules or regulations made under this Act for the contravention of which no penalty has been separately provided, such person shall be liable to pay a compensation upto twenty-five thousand rupees to the person affected by such contravention. Section 46 makes provision for adjudicating the matters falling in Sections 43 to 45. What factors are to be taken into consideration are provided under Section 47. Chapter X starting from Section 48 to 64 are regarding the Appellate Tribunals for hearing the appeals against the order of the authorities passed under the Act. Section 60 says that the provision of the Limitation Act shall apply to the appeals. The jurisdiction of the Civil Court is barred in such matters under Section 61. Second appeal against the decision of the appellate authority shall lie before the High Court. Some of the contraventions under this Act are made compoundable under Section 63. The recovery of penalty or compensation imposed under this Act shall be done as an arrears of land revenue.

Various illegal acts relating to the computer and electronic devices have been made punishable under this Act. If any person makes tempering with computer source document, the same is punishable upto three years and a fine upto Rupees two lacs as per Section 65. Computer related offences are described under Section 66. If any person sends offensive messages through communication services or through internet etc, the same is punishable under Section 66A. This section was struck down by Supreme Court of India in *Shreya Singhal v. Union of India*<sup>1</sup> on the ground that this section violates article 19 (1) (A) of the Constitution of India and the same invades right of free speech. If any person received stolen computer resource or device, the same is punishable upto three years and a fine of Rupees one lac or both under Section 65B. If any person makes use of electronic signatures password or any other unique identification feature of any person, the same is punishable upto three years and a fine upto Rupees one lac under Section 66C. If any person cheats by impersonation by using computer resource, the same is punishable upto three years and fine upto Rupees one lac under

Section 66D. If any person violates privacy of any other person by using electronic device, the same is punishable upto three years and a fine upto Rupees two lacs. Cyber terrorism has been defined and made punishable under Section 66F upto the imprisonment for life. If any person publishes or transmits any obscene material in electronic form the same is punishable upto five years and a fine upto Rupees ten lacs under Section 67. If any person publishes any material containing sexually explicit etc. in electronic form, the same is punishable upto five years and a fine upto Rupees 10 lacs under Section 67A. If any person publishes any material depicting any sexually explicit acts in electronic form, the same is punishable upto seven years and fine upto Rupees 10 lacs under Section 67B. Section 68 to 69B deal regarding powers of the Government and the various officers.

Section 71 makes provision for penalty for misrepresentation before the authorities under the Act. Section 72 makes provision for penalty for breach of confidentiality and privacy which is punishable upto two years and a fine upto Rupees one lac. If any person discloses any information in breach of lawful contract, the same is also punishable upto three years and a fine upto Rupees one lac. If electronic signature certificate with false particulars is published, the same is punishable under Section 73 upto two years and fine upto Rupees one lac. If any person creates or publishes the electronic signature certificate for any fraudulent or any unlawful purposes, the same is punishable under Section 74 upto to two years and fine upto Rupees one lac. As per Section 75, this Act shall apply for offences or contravention committed outside India. If any computer or any electronic device is used to contravene the provision of this act, such device can be confiscated under Section 76. The offences which are punishable upto three years are made compoundable under Section 77A and the same are bailable and cognizable under Section 77B. Rest of the offences are non bailable. A police officer not below the rank of Inspector shall not investigate any offense under this Act as per Section 78. If the offense is committed by any company under this Act, every person who was Incharge of and responsible for the conduct of business of the company, such person shall be punished under this Act. As per Section 81, the provisions of this Act shall prevail on all other Acts.

We can say that The Information Technology Act, 2000, is a very comprehensive and exhaustive Act. It has been drafted looking into the uses and misuses of the technology as well as the revolution in the technology. On the one hand this Act has given recognition to documents and signatures in electronic form. On the other hand it has created the categories of various offences looking into the misuses of the technology by various miscreants and the criminals. This Act has tried to keep pace with the latest technology.

#### **THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 (BNSS)**

The Code of Criminal Procedure, 1973 was recently repealed and in place thereof The Bharatiya Nagarik Suraksha Sanhita, 2023 (for short to be refereed as BNSS) was enacted by the Parliament. The BNSS came into force w.e.f. 01.07.2024. Various new provisions regarding electronic records have been added and introduced in the BNSS. Section 63 provides that the summons by the Court can be sent through the electronic communications to the parties concerned. Section 105 of the BNSS provides that when there is search and seizure of any property, the same shall be recorded through audio-video electronic means and the police officer concerned shall send the same to the Magistrates concerned. Section 173 of the BNSS provides that the FIR can be got registered through the electronic communication. As per Sections 181 and 183, the statements of the witnesses can be recorded through audio-video electronic means. As per Section 193 final investigation report can also be sent through electronic communication to the Magistrate or the Court concerned. Sections 254,265 and 308 also provide that the evidence of the witnesses can be recorded in the Court through audio-video electronic means. Thus, the BNSS has introduced various new provisions to use the technology during the investigation as well as the trial.

#### **THE INDIAN EVIDENCE ACT, 1872**

When the Information Technology Act,2000, was enacted, the need was felt to make various amendments in the Indian Evidence Act, 1872, so that various provisions may be added in the Indian Evidence Act, 1872 regarding the electronic records. Accordingly, in the year 2000 as well as in 2009, various new Sections were added in the Indian Evidence Act and some of the existing Sections were amended. Section 3 of the Indian Evidence Act, 1872, has defined the term 'document' and after amendment document also includes electronic records. The meaning of word 'document' has been expanded to include within it the electronic records. As per this definition everything that is converted into electronic form can be electronic evidence. For example a C.D is an electronic record, a pen drive, a CCTV footage, a micro clip, memory card, a computer, a mobile phone, a hard disk, a laptop all are part of the electronic record and they can be treated as electronic evidence.

Section 34 of the Indian Evidence Act was containing provisions regarding the entries made in books of account. This section was earlier providing that the entry made in the books of the account regularly kept in the course

of business are relevant when they refer to a matter into which the court has to inquire. There was a need felt that similar provision should be made regarding such entries made in the electronic form. So, this section was amended so as to include the entries made in electronic form within this section. As per Section 45 of the Evidence Act, the opinions of expert are relevant. In order to make similar provision regarding the electronic evidence, new section 45A was added in the year 2009 by way of amendment by Act No.10 of 2009. As per Section 47 of the Indian Evidence Act opinion regarding handwriting and signature of particular person is made relevant under this Section. Similar provision was required to be made regarding the opinion regarding electronic signature. So, Section 47A was added in the year 2000.

New Sections 65A and 65B were also added in the year 2000 which provide that the contents of electronic records may be proved in accordance with the provisions of Section 65B. Section 65-B provides the procedure to prove the contents of the electronic records. If the electronic evidence in original form is produced in the court, the same is made admissible as primary evidence like any other ordinary evidence in the Indian Evidence Act. But when the primary electronic evidence is not produced and only its copy is produced, it has to be proved in accordance with the procedure provided under Section 65B of the Indian Evidence Act. As per the requirement of the procedure of Section 65B of the Indian Evidence Act, one certificate has to be produced regarding the electronic evidence. That certificate has to be given by the person who is owner, incharge or in control of the original electronic device and not by any other person. The certificate itself does not prove the authenticity of the electronic evidence but even then it is indispensable. If the electronic evidence is not accompanied by said certificate, the electronic evidence shall not be admissible in evidence. Even various presumptions under the Indian Evidence Act regarding such electronic evidence shall not be drawn if the said certificate is not furnished with the electronic evidence.

Under Section 73 provision was made for comparison of signature, writing or seals with other admitted or proved signatures etc. Same provision was required to be made regarding the digital signature/ electronic signature. So, Section 73A was added in the year 2000, which provided that in order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct any person to produce such digital signature certificate.

Under the Indian Evidence Act, there are various presumptions regarding the genuineness of various documents. Similar presumptions were required to be made regarding the electronic records. So, Section 81A was added in the year 2000 which says that the Court shall presume the genuineness of electronic record in the Official Gazette. Section 85A was also added in the year 2000 which provides that the Court shall presume that every electronic record purporting to be an agreement containing the electronic signature of the parties was so concluded by affixing the electronic signature. Section 85B was also added for making presumptions regarding the electronic records and electronic signatures. This section says that in any proceeding regarding a secure electronic record, the court shall presume that the secure electronic record has not been altered since the specific point of time to which the secure status relates and that the secure electronic signature is affixed by subscriber with the intention of signing or approving of electronic records. Section 85C was also added for raising presumptions regarding the electronic signature certificate. This Section provides that the Court shall presume that the information listed in a electronic signature certificate is correct if the certificate was accepted by the subscriber. Section 90A was also added in the year 2000 which made presumptions regarding the electronic records which is five years old. This Section says that where any electronic record proved to be five years old and it is produced from any custody the Court in the particular case considers proper, the Court may presume that the electronic signature which purports to be the electronic signature or any particular person was so affixed by him in this behalf. All these presumptions are reputable presumptions.

#### **BHARATIYA SAKSHYA ADHINIYAM, 2023.(BSA)**

Recently, the Indian Evidence Act, 1872 was repealed and in place thereof Bharatiya Sakshya Adhiniyam, 2023 was enacted, which came into force w.e.f. 01.07.2024. Most of the provisions of the Indian Evidence Act, 1872 have been copied in BSA with some minor modifications. However the definition of the term “Document” has been expanded and it has been provided that now document includes electronic and digital records as well. It has been further provided that evidence also includes electronic or digital records. Thus now document and evidence includes electronic as well as digital records. The evidence also includes the statements given electronically before the Court. Earlier digital records was missing from the definition of the documentary evidence. Further sub-section (2) has been added in Section 2 which provides that the words and expressions defined in the Information Technology Act, Bharatiya Nagarik Suraksha Sanhita, 2023 and the Bharatiya Nyaya Sanhita, 2023 shall be deemed to have been defined and assigned the same meaning under the BSA. So now various words and expressions defined under the above said Act or Sanhitas shall be deemed to have been defined under the BSA. Section 57 of the BSA has expanded the scope of primary evidence. Four new explanations i.e. explanation no.4 to 7 have been added in Section 57. It has been provided in these explanations

that when an electronic or digital record is created or stored in multiple files, each of such file is the primary evidence as per explanation-4. Explanation-5 says that when electronic or digital record is produced from proper custody, such record is primary evidence unless it is disputed. Explanation -6 says that when video recording is simultaneously stored in electronic form and transferred to another person, each of the stored recordings is primary evidence. Whereas as per explanation-7 when any electronic or digital record is stored in multiple storage spaces in a computer, each of such automatic stored including temporary files is primary evidence. Thus now the definition of the primary evidence has been expanded as per the these explanations. The documents in electronic or digital form which earlier were not being considered as primary evidence, now the same will be considered as primary evidence in view of these explanations so that the compliance of Section 63 of the BSA is not required for these categories of the primary evidence.

Section 61 of the BSA is a new provision, which provides that “ nothing in this Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to section 63, have the same legal effect, validity and enforceability as paper records.” Section 62 of The BSA also provides that the contents of the electronic record may be proved as per Section 59. Section 59 says that the documents shall be proved by primary evidence except when the same is to be proved by secondary evidence. Section 63 of The BSA corresponds to Section 65B of the Indian Evidence Act 1872 and Section 65B of the Indian Evidence Act 1872 has been similarly reproduced in The BSA after doing some minor changes. The format of the certificate required for electronic evidence has also been prescribed in the Schedule of The BSA which was earlier missing in the Indian Evidence Act, 1872. As per the said format, in the required certificate the hash value of the digital or electronic record has to be stated by the owner, or manager and by the expert witness. In Section 65B of the Indian Evidence Act, the certificate was required from the owner or incharge of the device concerned, but under Section 63 of The BSA, the certificate is also required from an expert also in addition to the certificate required from the owner or incharge of the device concerned. In rest of the provisions no substantial amendments have been done in the BSA.

#### VIEWS OF SUPREME COURT OF INDIA ON ELECTRONIC EVIDENCE

In **Basavaraj R.Patil Vs. State of Karnataka**<sup>2</sup>, it was held by the Supreme Court of India that evidence through video conferencing can be recorded. In **Jagjir Singh vs State of Haryana**<sup>3</sup>, it was stated by the Supreme Court of India that evidence of the witness can be recorded through electronic means. In **Yusafalli Esmail Nagree vs State of Maharashtra**<sup>4</sup>, **R.K. Malkani vs State of Maharashtra**<sup>5</sup> it was stated by the Supreme Court of India that tape recorded conversations are admissible in evidence.

There are diversant views of The Supreme Court of India regarding the admissibility of electronic evidence under Section 65B of the Indian Evidence Act. In **State of Delhi vs. Navjot Sindhu**<sup>6</sup>, which is popularly known as Parliament attack case, it was held by Supreme Court of India that the electronic record which was the print out of various E-mails was admissible in evidence even in absence of certificate as required under Section 65B (4) of the Evidence Act. In **Anvar P.V. Vs. P.K. Basheer & Ors**<sup>7</sup>, the law laid down in the case of State of Delhi vs. Navjot Sindhu was overruled by the Supreme Court of India. It was further held therein that any documentary evidence by way of an electronic record under the Evidence Act, 1872 can be proved only in accordance with the procedure prescribed under Section 65B. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. In **Tomaso Bruno and another vs. State of U.P**<sup>8</sup>, a three judge bench of Supreme Court was deciding a murder case under Section 302 IPC. CCTV footage was not produced, but the person who had seen the CCTV footage was examined. In that context it was held that secondary evidence can be given under Section 65 of the Evidence Act. This was contrary to the law laid down by three judges bench in **Anvar's** case. In **Vikram Singh vs. State of Punjab**<sup>9</sup>, it was held that if the primary evidence is produced in electronic form in that case certificate as required under Section 65B of Evidence Act is not necessary. It was further held that the original tape recording was admissible in evidence without compliance of Section 65B as it was the primary evidence. In **Sonu @ Amar vs. State of Haryana**<sup>10</sup> the Supreme Court of India was hearing an appeal in a case of murder and kidnapping. Several calls were made to the family of deceased by the accused for ransom. CDRs were obtained and exhibited during trial. No objection was taken before the trial Court. It was held that before the Supreme Court in the appeal no objection was allowed against the admissibility of above CDRs on the ground that Section 65B of Evidence Act was not complied with. In **Shafhi Mohid Vs. State of Himachal Pradesh**<sup>11</sup>, it was held that electronic record is admissible in evidence without certificate as required under Section 65B of Evidence Act, if a party is not in a position to produce the said certificate.

In **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal**<sup>12</sup>, the law laid down in **Tomaso Bruno and another vs. State of U.P**<sup>8</sup> as well as in **Shafhi Mohid Vs. State of Himachal Pradesh**<sup>11</sup>, was overruled. Whereas the law laid down in **Anvar's** case was reformed. It was further held that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record. It was further recommended that section



65B of the Evidence Act, 1872, as inserted in the year 2000, is outdated, it was poorly copied from Section 5 of The U.K. Civil Evidence Act, 1968, even when that section 5 was already deleted, and that it is the need of the hour to have a relook at section 65B of the Indian Evidence Act, 1872.

#### **ISSUES IN THE INDIAN LAW ON ELECTRONIC EVIDENCE.**

Indian law on electronic evidence is a very exhaustive and comprehensive. But still there are some actual issues, problems and difficulties in the Indian Laws regarding the electronic evidence. Main issue is regarding section 65B of the Indian Evidence Act, 1872 which is section 63 of The BSA. This section deals regarding the admissibility of the electronic evidence. This section says that notwithstanding anything contained in the Indian Evidence Act, the electronic evidence shall not be admissible in evidence unless the same is proved in accordance with the procedure contained under Section 65B (Section 63 of BSA). The electronic evidence is not admissible in evidence unless the same is supported by the certificate. Even various presumptions under the Indian Evidence Act regarding the electronic evidence shall not be drawn in case the certificate is not furnished. The certificate itself does not prove the authenticity of the electronic evidence. It does not serve any purpose. Even then this certificate is indispensable. In some case it is not possible to obtain the certificate. The certificate is to be given by the person who first time recorded the electronic evidence. Sometimes the occurrence is recorded by the accused himself. Accused cannot be compelled to give such certificate because the accused cannot be compelled to give evidence against himself as provided under Article 20 of Constitution of India. Sometime the person who recorded the video or created the electronic record is not traceable. Sometime the person, who recorded the audio or video recording does not support such stand in the Court and in such cases the certificate is not proved and such person denies that he had given any such certificate. Further, the process for obtaining the certificate is highly cumbersome and it consumes so much time but the same does not fulfill any purpose. In most of the criminal cases the accused are acquitted simply on the ground that the certificate is either not produced or the same is not produced by the person mentioned in the Act itself. Interestingly, section 65B of the Indian Evidence Act (Section 63 of The BSA) was copied from Section 5 of The UK Civil Evidence Act, 1968, which was already repealed by the Civil Evidence Act 1995 on the recommendation of UK Law Commission report presented in September 1993 in the Parliament of UK. Section 65B of the Indian Evidence Act 1872 was added in the Evidence Act in the year 2000, when similar provision in the UK Civil Evidence Act 1968 was repealed. This provision is not only outdated, but it does not keep pace with the latest technology. While enacting the new law i.e. BSA in 2023, the Parliament had ample opportunity to correct the above said mistake, but the mistake once committed in the year 2000 while enacting section 65B of the Indian Evidence Act, 1872 has been repeated while drafting Section 63 of The BSA. Section 63 of The BSA is almost a copy of section 65B of the Indian Evidence Act with some minor changes. Under Section 65B of the Indian Evidence Act, certificate was required only from the owner/incharge of the device concerned, but under section 63 of The BSA, two certificates are required as given in the Schedule i.e. one from the owner or the incharge of the device concerned and another from an expert. Who will be the expert has not been explained in The BSA.

#### **SUGGESTIONS**

From the very beginning Section 65-B of the Evidence Act (Section 63 of The BSA) has not served any purpose. Instead of making the electronic evidence admissible, it is making most of the electronic evidence inadmissible. The views of the Supreme Court of India regarding this Section have not been consistent so far. One view taken in one case is being overruled in the subsequent cases as is clear from the various cases mentioned in earlier paragraphs. This Section is creating a lot of confusion. This section is not only outdated but it also can not keep pace with modern technology. So, only one solution can be there that it should be deleted or properly amended. There are more than one reasons in support of this arguments. Even if the certificate under this section is given, that certificate does not prove the authenticity of the electronic evidence and the authenticity of the electronic evidence has to be proved by the evidence of the scientific expert by sending the electronic devices to the FSL concerned if objection against its authenticity is raised by any party. It is very surprising to note that if electronic evidence in secondary form is proved to be authentic, genuine and without any tempering, that electronic evidence in secondary form shall not be admissible in evidence if either the certificate under Section 65-B of the Indian Evidence Act (Section 63 of the BSA) is not given by the competent person or the compliance of section 65-B (63 of the BSA) is not done. So this provision is creating a negative impact on the admissibility of the electronic evidence. Next reason is that in some cases, it is quite impossible to provide such certificate. Next reason is that for the general public it is not practicable to provide such certificate as per the requirement of this Section which is very technical. Next reason is that some time it is not possible to trace out the person who first recorded the video in his original device. Some time it is not clear as to who will provide such certificate when the data in electronic form is uploaded on the social media or on the cloud etc. by some unknown person. Next reason is that Section 65B of the Indian Evidence Act was poorly copied from Section 5 of the U.K. Civil Evidence Act, 1968. But that Section 5 of the

U.K.Civil Evidence Act,1968 was repealed by the Civil Evidence Act,1995. Even the Supreme Court of India in **Arjun Pandit's case (supra)** has observed that this section was poorly copied from the U.K. law and it recommended to have a relook at this provision. A provision of law which was outdated as per U.K. Law commission report in 1993 and which was repealed in U.K. in 1995, how that provision of law can serve any purpose in India in this 21<sup>st</sup> Century, which is a century of a technological revolution. Even the mistake committed by the law maker while adding section 65-B in the Indian Evidence Act,1872 is not corrected while drafting the Bharatiya Sakshya Adhiniyam, 2023, rather the mistake has been repeated by again similarly copying Section 65B of the Indian Evidence Act while drafting Section 63 of The BSA.

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