

**DISTRICT AND SESSIONS COURT,
AURANGABAD.**

WORKSHOP ON

CIVIL

**"Section 52 and 53-A of the Transfer of Property Act r/w Sec. 17 and 49
of the Registration Act, the effect of unregistered documents and
impounding of documents."**

CRIMINAL

**"Recording of evidence and proving contents of electronic media with
relevant to provisions of Information Technology Act, Evidence Act and
Criminal Manual."**

Held on 18th October, 2015

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"Recording of evidence and proving contents of electronic media with relevant to provisions of Information Technology Act, Evidence Act and Criminal Manual."

Introduction

The era of Information technology has brought new methods and modes of commission of crime. Each time a crime is committed whether in physical form or in cyber space, the success of prosecution largely depends on the quality of evidence presented at the trial . With the sophistication in Information technology, the weapons of commission of crime are changing thereby posing a serious challenge before the investigation agencies to collect and preserve the evidence. A conviction or acquittal largely depends on the quality of evidence produced by the prosecution.

The advent information technology has brought into existence a new kind of document called the electronic record.The Indian Evidence Act, 1872 and Information Technology Act, 2000 grants legal recognition to electronic records and evidence submitted in form of electronic records.

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Electronic evidence and its Admissibility

The evidentiary value of an electronic record totally depends upon its quality. The Indian Evidence Act, 1872 has widely dealt with the evidentiary value of the electronic records. According to section 3 of the Act, “evidence” means and includes all documents including electronic records produced for the inspection of the court and such documents are called documentary evidence. Thus the section clarifies that documentary evidence can be in the form of electronic record and stands at par with conventional form of documents.

The evidentiary value of electronic records is widely discussed under section 65A and 65B of the Evidence Act, 1872. The sections provide that if the four conditions listed are satisfied any information contained in an electronic record which is printed on paper, stored, recorded or copied in an optical or magnetic media, produced by a computer is deemed to be a document and becomes admissible in proceedings without further proof or production of the original, as evidence of any contents of the original or any facts stated therein, which direct evidence would be admissible.

The four conditions referred to above are:

- (1) The computer output containing such information should have been produced by the computer during the period when the computer was used regularly to store or process information for

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the purpose of any activities regularly carried on during that period by the person having lawful control over the use of the computer.

(2) During such period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of such activities.

(3) Throughout the material part of such period, the computer must have been operating properly. In case the computer was not properly operating during such period, it must be shown that this did not affect the electronic record or the accuracy of the contents.

4) The information contained in the electronic record should be such as reproduces or is derived from such information fed into the computer in the ordinary course of such activities.

It is further provided that where in any proceedings, evidence of an electronic record is to be given, a certificate containing the particulars prescribed by 65B of the Act, and 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 would be sufficient evidence of the matters stated in the certificate.

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While more and more documents were electronically stored, the hearsay rule faced new challenges in the matter of digital documents. **In Anvar v. P. K. Basheer dated 18 September, 2014**, the Supreme Court noted that “there is a revolution in the way that evidence is produced before the court”. When electronically stored information was treated as a document in India before 2000 , secondary evidence of these electronic ‘documents’ was adduced through printed reproductions or transcripts, and the authenticity was certified. The signatory would identify signature in court and be open to cross examination by meeting the conditions of both sections 63 and 65 of the Evidence Act. When the creation and storage of electronic information grew more complex, the law had to change more substantially. By the Information Technology Act, 2000 new definitions are given to the words “data”, “electronic record”, and “computer”.New Section 22-A has been inserted into Evidence Act, to provide for the relevancy of oral evidence regarding the contents of electronic records. It provides that oral admissions regarding the contents of electronic records are not relevant unless the genuineness of the electronic records produced is in question. Section 59 of the Evidence Act is amended by the IT Act to exclude electronic records and inserted section 65A and section 65B , instead of submitting electronic records to the test of secondary evidence as contained in sections 63 and 65. Section 65A has given the right to prove the contents of electronic records in accordance with the

provisions of section 65B. Section 65A of the Evidence Act is for electronic records just as section 61 does is for documentary evidence. A procedure, distinct from the one for oral evidence is formulated, to ensure electronic records obeys the hearsay rule. section 65A is a special law that stands apart from the documentary evidence procedure in sections 63 and 65. Any probative information stored or transmitted in digital form is digital evidence or electronic evidence.

The case of [State v. Navjot Sandhu](#) (2005) 11 SCC 600 is popularly called the parliament attack case, which lead to the conviction of the Respondent under various provisions of the Indian Penal Code and the Prevention of Terrorism Act, 2002. One of the pieces of evidence relied by the prosecution and subsequently forming the basis of conviction were the call records of the accused. In appeal before the Supreme Court has occasion to adjudicate on the admissibility of the call records as electronic evidence. The Court held that printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service providing Company can be led into evidence through a witness who can based on his personal knowledge. This would make the call records admissible. The Supreme Court went further on to state that irrespective of the compliance of the requirements of Section 65B of the Evidence Act which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence

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under the other provisions of the Evidence Act, namely Sections 63 & 65. The Court held that merely because a certificate containing the details in sub-Section (4) of Section 65B is not filed in the instant case, 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 & 65 identify the signatures of the certifying officer or otherwise speak to the facts.

ANVAR P.V. VERSUS , P.K. BASHEER AND OTHERS (MANU /SC/0834/2014).

In this significant judgment, the Supreme Court has settled the controversies arising from the various conflicting judgments as well as the practices being followed in the various High Courts and the Trial Courts as to the admissibility of the Electronic Evidences. The Court has interpreted the Section 22A, 45A, 59, 65A & 65B of the Evidence Act and held that secondary data in CD/DVD/Pen Drive are not admissible without a certificate U/s 65 B(4) of Evidence Act. It has been elucidated that electronic evidence without certificate U/s 65B cannot be proved by oral evidence and also the opinion of the expert U/s 45A Evidence Act cannot be resorted to make such electronic evidence admissible. The judgment would have serious implications in all the cases where the prosecution relies on the electronic data and particularly in the cases of anticorruption where the reliance is being placed on the audio-video recordings which are being forwarded in the

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form of CD/DVD to the Court. In all such cases, where the CD/DVD are being forwarded without a certificate U/s 65B Evidence Act, such CD/DVD are not admissible in evidence and further expert opinion as to their genuineness cannot be looked into by the Court as evident from the Supreme Court Judgment. 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.

In the aforesaid Judgment, the Court has held that Section 65B of the Evidence Act being a 'not obstante clause' would override the general law on secondary evidence under Section 63 and 65 of the Evidence Act. The Section 63 and Section 65 of the Evidence Act have no application to the secondary evidence of the electronic evidence and same shall be wholly governed by the Section 65A and 65B of the Evidence Act.

The Constitution Bench of the Supreme Court overruled the judgment laid down in the **State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru[(2005) 11 SCC 600** by the two judge Bench of the Supreme Court. The court specifically observed that the Judgment of Navjot Sandhu supra, to the extent, the statement of the law on admissibility of electronic evidence pertaining to electronic record of this Court, does not lay down correct position and required to be overruled.

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In the case of **Sanjaysing Ramrao v. Dattatray Gulabrao** [**MANU/SC/0040/2015**], the Hon'ble Apex Court has considered the admissibility of transcript of a recorded conversation and concluded that without source there is no authenticity for the translation. Source and authenticity are key factors of electronic evidence. The judgment in P.V. Anwar's case was relied.

In **Jagdeo Singh v. The State**[**MANU/DE/0376/2015**], the Hon'ble Delhi High Court held that the secondary evidence without certificate under section 65B is in admissible and can not be looked into by the court for any purpose. The Hon'ble court was considering the admissibility of intercepted telephone call in a CD with record of call details.

The Hon'ble Karnataka High Court in the case of **P. Padmanabh v. Syndicate Bank** [**AIR 2008 Karnataka 42**], was pleased to held that when the link between ATM entries and ledger entries snapped and the earlier were not independent of later, the correctness of ledger entries not proved as per law, the certified copy of ledger entries was held to be not admissible.

The Karnataka High Court in the case of **M/s. V.S. Lad and Sons v. State of Karnataka** [**2009 Cri.L.J. 3760**] was pleased to held

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that satellite sketches in support of allegations in FIR are admissible. But those sketches are to be proved in trial. The accused are entitled to rebut them. It was a case of illegal mining operation encroaching forest area in-contravention lease agreement between the petitioner and the forest authorities. The petitioners have moved the Hon'ble High Court for quashing of FIR.

The Hon'ble Calcutta High Court in the case of **Abdul Rehaman v. The State of West Bengal [MANU/WB/0828/2014]** held that an e-mail down loaded and printed from an e-mail account of a person can be proved as per section 65B and 88A of the Evidence Act. The testimony of a witness who has carried out the procedure of down loading and printing is sufficient to prove the communication.

Thus, the only options to prove the electronic record/evidence is by producing the original electronic media as Primary Evidence court or it's copy by way secondary evidence U/s 65A/65B of Evidence Act. Thus, in the case of CD, DVD, Memory Card etc. containing secondary evidence, 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.

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Standard of Proof about the authenticity and accuracy of electronic evidence

There is no doubt that the new techniques and devices are the order of the day. Audio and video tape technology has emerged as a powerful medium through which a first hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence. At the same time, with fast development in the electronic techniques, the tapes/cassettes are more susceptible to tampering and alterations by transposition, excision, etc. which may be difficult to detect. In case of **Tukaram S.Dighole vs Manikrao Shivaji Kokate on 5 February, 2010**, a cassette placed before the Court was discarded from evidence. This was the cassette produced from the custody of an Election Commissioner's office. It was taken to be a public document. It was held that mere production of the audio cassette even certified by the Election Commissioner is not conclusive of the fact that what is contained in the cassette was true and correct. This is on par with the certified copy of any document produced from public record. Such a document would show that it was a document filed in the public office and is a true production of whatever was filed in the public office. It however cannot prove the truth of the contents of the document merely by the production of even its certified copy by the public office. Consequently, in that case when the party who produced the record did not lead any **evidence** to prove that the

cassette produced on record was a true reproduction of the original speeches by the Respondent or his agent, which he was incumbent to be proved either himself or through his witness who is the maker of the record, it was held not to be considered in **evidence. It was held by Hon'ble Supreme Court that the "standard of proof" in the form of electronic evidence should be "more accurate and stringent" as compared to other documentary evidence.** "If a stringent test of proof is not applied a serious prejudice is likely to be caused to the successful candidate whose election would not only be set aside, he may also incur disqualification to contest an election for a certain period, adversely affecting his political career. "Thus a heavy onus lies on the election petitioner to prove the charge of corrupt practice in the same way as a criminal charge is proved," the apex court ruled. Thus, in the absence of any cogent evidence regarding the source and the manner of its acquisition, the authenticity of the cassette was not proved and it could not be read in evidence despite the fact that the cassette is a public document."

Electronic Records-Provisions under the Information Technology Act, 2000."

The silent provisions of Information Technology Act, in respect of electronic records are as follows;

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Section 2(t) of the Act defines Electronic Record as under:

It 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.

2. The word “Data” used in the definition of electronic record is separately defined in section 2(o) of the Act as follows :

“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.

3. Section 3 : **Authentication of electronic records.**

(1) Subject to the provisions of this section, any subscriber may authenticate an electronic record by affixing his digital signature.

(2) The authentication of the electronic record shall be effected by the use of a asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record.

4. **Section 4 : Legal recognition of electronic records.**

Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

- a) rendered or made available in an electronic form; and
- b) accessible so as to be usable for a subsequent reference.

5. **Section 5 : Legal recognition of electronic signature.**

Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied., if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.

6. **Section 6 : Use of electronic records and electronic signature in Government and its agencies.**

(1) Where any law provides for-

(a) the filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in a particular manner;

(b) The issue or grant of any licence, permit, sanction or approval by whatever named called in a particular manner;

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(c) the receipt or payment of money in a particular manner, then, notwithstanding anything contained in any other law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, issue, grant, receipt or payment, as the case may be, is effected by means of such electronic form as may be prescribed by the appropriate Government.

7. **Section 7 : Retention of electronic records.**

(1) Where any law provides that documents, records or information shall be retained for any specific period, then, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, if-

(a) the information contained therein remains accessible so as to be usable for a subsequent reference;

(b) the electronic records is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;

(c) the details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record.

8. **Section 7A : Audit of Documents etc in Electronic form :-**

Where in any law for the time being in force, there is a provision for audit of documents, records or information, that provision shall also be applicable for audit of documents, records or information processed and maintained in electronic form.

9. Section 10A : **Validity of contracts formed through electronic means** (Inserted by ITAA 2008):-

Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

10. Section 11 : **Attribution of electronic records.**

An electronic record shall be attributed to the originator -

- (a) if it was sent by the originator himself;
- (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
- (c) by an information system programmed by or on behalf of the originator to operate automatically.

11. Section 14 : **Secure electronic records.**

Where any security procedure has been applied to an electronic record at a specific point of time, then such record shall be deemed to be a secure electronic record from such point of time to the time of verification.

12. Section 79A : **Central Government to notify Examiner of Electronic Evidence.**

The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other

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authority specify, by notification in the official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.

Explanation:

For the purposes of this section “Electronic form evidence” means any form of probative value i.e. either stored or transmitted in electronic form or includes computer evidence, digital audio, digital video, cell phones, digital fax machines.

Presumption as to Electronic Records

1. Sections 85A, 85B, 88A, 90A and 85C deals with the presumptions as to electronic records.

Section 85 A

2. As regards presumption to electronic agreements, this section is incorporated. It says that every electronic record of the nature of an agreement is concluded as soon as a digital signature is affixed to the record. Section 85A has been added in order to ensure the validity of e-contracts. But there are some restrictions as regards the presumptive value. The presumption is only valid to electronic records that are five years old and electronic messages that fall within the ambit of Section 85B, Section 88A and Section 90A of Indian Evidence Act.

Section 85 B

3. This provides that the court shall presume the fact that the record in question has not been put to any kind of alteration, in case contrary has not been proved. The secure status of the record may be demanded till a specific time. The digital signature should also be presumed to have been affixed with an intention of signing and approving the electronic record. Further it has been provided that the section should not be misread so as to create any presumption relating to the integrity or authenticity of the electronic record or digital signature in question.

Section 88 A

4. Section 88 A provides that:

“The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such message was sent”.

This section is self-explanatory as it purports to follow the basic rules of a valid hard-copy agreement. The words “may presume” authorize the court to use its discretionary power as regards presumption. Sections 85A and 85B contained the words “shall

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presume” which expressly excluded this discretionary power of the court.

Section 90 A

5. In case of an electronic record being five years old, if proved to be in proper custody, the court may presume that the digital signature was affixed so as to authenticate the validity of that agreement. The digital signature can also be affixed by any person authorized to do so. For the purpose of this section, electronic records are said to be in proper custody if they are in the custody of the person with whom they naturally be. An exception can be effected in case circumstances of a particular case render its origin probable.

Section 85 C

6. As far as a digital signature certificate is concerned, the court shall presume that the information listed in the certificate is true and correct. Inclusion of the words “shall presume” again relates to the expressed exclusion of the discretionary power of the court.

Rules under Criminal Manual for production, Use and Recording of Tape Recorded Evidence

The tools of modern technology like tape records, video films, DNA tests, Polygraph test(lie detection), etc. make the probability of truth highly certain. It is a general rule of evidence that all such evidence is admitted which helps the court in arriving at the truth.

Since the tape - records are prone to tampering, the time, place and accuracy of the recording must be proved by a competent witness. It is necessary that such evidence must be received with caution. The Court must be satisfied, beyond reasonable doubt that the record has not been tampered with. The Supreme Court in the case of **Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra and others, 1976 (2) SCC 17 : (AIR 1975 SC 1788)** has observed as under:

“the tape - records of speeches are "documents", as defined by S.3 of the Evidence Act and are admissible in evidence on satisfying the following conditions:

Admissibility :- A tape recorded statement is admissible in evidence, subject to the following conditions -

(1) The voice of the speaker must be identified by the maker of the record or other persons recognizing his voice. Where the maker is unable to identify the voice, strict proof must be required to determine whether or not it was the voice of the alleged speaker.

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- (2) The accuracy of the tape recorded statement must be proved, by the maker of the record by satisfactory evidence: direct or circumstantial.
- (3) Possibility of tampering with, or erasures of any part of, the tape-recorded statement must be totally excluded.
- (4) The tape recorded statement must be relevant.
- (5) The recorded cassette must be sealed and must be kept in safe or official custody.
- (6) The voice of the particular speaker must be clearly audible and must not be lost or distorted by other sounds or disturbances.

After recording the statements by the proper authority, it must be deposited in the record room according to the rules.

While the transcription of the tape recorded statement is made by the stenographer, the authority who is recording the statement must remain continuously. He has no legal authority to leave the room leaving the cassette with steno since there is every possibility of tampering of such evidence.

The Honourable the Chief Justice and Judges, with the previous approval of the Governor under Article 227 of the Constitution of India, are pleased to make the following rules regarding recording of the tape-recorded evidence in Court :-

- (1) These Rules may be called the Rules for the Production, Use and Recording of the Tape-Record Evidence in Courts.

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- (2) These Rules came into force with effect from 1st August, 1978.
- (3) The party producing the tape-recorded evidence shall also produce the transcript of the tape record along with the tape.
- (4) The Court or its authorized officer who is to accept the tape should accept only such tapes as are under the seal of the party producing them.
- (5) Court or such officer shall hear the tape record in order to verify whether the transcript produced along with the tape is correct or not and endorse such verification on the transcript record under his signature with date.
- (6) The tape shall be kept in safe custody in a cover under the seal of the Court. In case the tape is replayed or the seal is broken for any reason, the tape shall be re-sealed.
- (7) The Notice of production of the tape together with the transcript shall be served on the other side through the Court.
- (8) Any party to the proceeding may apply to the Court to hear the tape-record.
- (9) The tape-record would be played within the hearing and sight of an officer appointed by the Court for that purpose and as far as possible in the presence of the other side or its Advocate. The court on receipt of application may grant the necessary permission. However, the tape shall ordinarily not be played on 3rd or 4th occasion, unless the Court specifically permits hearing of the same. The Court while granting such permission should bear in mind that repeated use and

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play of the tape may affect the tape and its audibility. The Court may also permit any party to record the voice on the tape, produced in the Court, on another tape.

(10) Every Court shall maintain a record showing as to how, when and why the seal of the tape-record was opened and when the tape-record has been re-sealed. Such record shall be kept in the proceedings along with the tape record and its transcript.

(11) The tape in a sealed cover together with its transcript shall be given a separate exhibit.

(12) In Criminal cases where appeal lies to the High Court and when the tape record is not in English, either wholly or in part, the transcript must be accompanied by an agreed or official English translation of the said transcript or part thereof, as the case may be.

(13) In case of discrepancy or doubt, the Court may direct the tape to be re-played and the transcript record shall be corrected if the Court so directs.

(14) While preparing the paper book for appeal to the High Court the Lower Court shall include therein the transcript in English under Rule 12, and a copy of record referred to in Rule 10 above.

(15) The rules as to the production, preservation and destruction of the Court record should mutatis mutandis apply to the tapes.

(16) The above rules (Rules Nos.1 to 15) are framed for guidance of the Courts and they should be followed as far as possible and subject to the provisions of the Evidence Act and Code of Civil Procedure.

The prelude can be summarized by noting that the admissibility of electronic evidence has to be decided within the parameter of section 65B of the Evidence Act and its exposition in P.V. Anvar's case. Briefly without a certificate under section 65B of Indian Evidence Act the evidence of electronic record is not admissible. Any expert opinion and ocular testimony could not compel the court to look into such evidence without the certificate.

“The digital revolution is far more significant than the invention of writing or even of printing”.

Douglas Engelbart