

SUMMARY/GIST OF THE PAPERS ON

SUBJECT :- PROOF OF ELECTRONIC DOCUMENT.

“Education must enable one to sift and weigh evidence, to discern the true from the false, the real from the unreal, and the facts from fiction. The function of education, therefore, is to teach one to think intensively and to think critically.”

.....Martin Luther King.

Introduction:

Today, people are using electronic means of communication and electronic data for inter-changing the business transaction i.e. Banking, Insurance, Consumer Goods, Manufacturing, Engineering and Tele-communication. The various categories of electronic evidence such as website data, social network communication, e-mail, SMS/MMS, surveillance video, audio, ATM transaction reports and computer generated documents poses unique problem and challenges for proper authentication and subject to a different set of views.

Tape records whether electronic evidence ?

Even before we go for the new provisions, the tape recorders were used previously to record the evidence. Though they were not characterized as “electronic document”, in fact they were, still they did not face the difficulties, which we are facing now because of the amended provisions. A brief review of the judgments would explain the situation.

In **Mahavir Prasad Varma vs. Dr. Surinder Kaur, AIR 1982 SC 1043** it was held that it can be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape recorded conversation is indeed no proper evidence and cannot be relied upon. In **S. Partap Singh vs. State of Punjab, AIR 1964 S.C. 72(FB)** it was held that such evidence is not inadmissible merely on the ground of possibility of they being tampered with. The Hon'ble Supreme Court observed in **Yusufalli Esmail Nagree vs. State of Maharashtra, AIR**

1968 SC 147, “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.”

However, in **R.M. Malkani Vs. State of Maharashtra, 1973 Cri.L.J. 228** it was held that the tape is primary and direct evidence of what has been said and recorded . The tape records of speeches were “documents”, as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions :(a) The voice of the person alleged to be speaking must be duly Identified by the maker of the record or by others who knew it.(b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstances, had to be there so as to rule out possibilities of tampering with the record. (c) The subject matter recorded had to be shown to be relevant according to rates of relevancy found in the Evidence Act [see **Ziyauddin Burhanuddin Bukhari -Vs.- Brijmohan Ramdass Mehra and ors. (1975) Sup. S.C.R. 281 & The State of Maharashtra -Vs.- Prakash Vishnurao Mane 1976 Mh.L.J. 73**].

In **Ram Singh vs. Col. Ram Singh, 1985 Supp. SCC 611 AIR 1986 SC 3**) it was held that the proper authority must, by himself speaking indicate the place, time and the name of person making the statement. In all respect written statements made on oath was said to be a better alternative.

In **Chandrakant R. Mehta vs. The State 1993 (3) Bom. C.R.99**. It was observed that if it is to be acceptable after a lapse of time, it must be sealed at the earliest point of time and not to be opened except under order of the court. Failure to produce on the ground that with the passage of time and humidity the audibility had become poor and that piece of evidence was of no avail, no adverse inference can be drawn since failure is explained.

Previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness but also to contradict the evidence, as well as to test the veracity of the witness and also to Impeach his impartiality – [**Ram Singh and ors. Vs. Ram Singh, AIR 1986 SC 3**].

At present also there are rules given in paragraph 24 of Chapter 6 of the Criminal Manual to consider the tape recorded evidence. It was held that the requirement of sealing the recorded conversation would be applicable in criminal cases, but not in civil cases. [**Mrs. Havovi Kersi Sethna Vs. Mr. Kersi Gustad Sethna, AIR 2011 Bom. 283**].

WHAT IS ELECTRONIC DOCUMENT OR DIGITAL EVIDENCE:

The Information Technology Act, 2000 & its amendment is based on the United Nations Commission on International Trade Law (UNCITRAL) model Law on Electronic Commerce. The Information Technology (IT) Act 2000 was amended to allow for the admissibility of the digital evidence. The amendment to The Indian Evidence Act, 1872 & The Indian Penal Code 1860 provides the legislative framework for the transactions in electronic world.

In Oxford English Dictionary(second edition), two definitions are offered, both of which help to explain the meaning of “**digital**”: ‘Relating to or operating with signals or information represented by discrete numeric values of a physical quantity such as voltage or magnetic polarization (commonly representing the digits 0 and 1); designating a signal or information of this kind. Opposed to analogue.’

In Wikipedia :‘**Electronic document** means any computer data (other than programs or system files) that are intended to be used in their computerized form, without being printed (although printing is usually possible).’

“Electronic records” have been defined in the Information Technology Act, 2000 as any data, record or data generated, any image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

The e-Evidence can be found in e-mails, digital photographs, ATM transaction logs, word processing, documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser histories databases, Contents of computer memory, Computer backups, Computer printouts, Global Positioning System tracks, Logs from a hotel’s electronic door locks, Digital video or audio files. Digital Evidence tends to be more voluminous, more difficult to destroy, easily modified, easily duplicated, potentially more expressive and more readily available.

INDIAN EVIDENCE ACT AND ELECTRONIC DOCUMENT

The Indian Evidence Act has been amended by virtue of **Section 92** of Information Technology Act, 2000 (Before amendment). **Section 3** of the Act was amended and the phrase “All documents produced for the inspection of the Court” were substituted by “All documents including **electronic records** produced for the inspection of the Court”.

Regarding the documentary evidence, in Section 59, for the words “Content of documents” the words “Content of documents or **electronic records**” have been substituted

As per amended provision **Sec 3(2)** of evidence Act electronic evidence is documentary evidence. “(2) All documents including **electronic records** produced for the inspection of the Court], such documents are called documentary evidence.”

Section 2(t) of Information Technology Act 2000 provides that “(t) ‘electronic record’ means, “data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;”

For example A digital charge sheet was held to be a document and it can be accepted as an electronic record. Hon'ble Supreme court directed to supply of charge sheet in electronic form additionally [**Thana Singh -Vs.- Central Buruau of Narcotics, (2013) 2 SCC 590**].

Section 4 of the Information Technology Act also provides that if the document in electronic form i.e. CD/DVD etc., is (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference, then it would be sufficient compliance.

Sec.22A declares that “oral evidence as to the contents of **electronic records** are not relevant, unless the genuineness of electronic record produced is in the question.

THE PROOF OF ELECTRONIC EVIDENCE

In Section 61 to 65 Indian Evidence Act, the word “Document or content of documents” have not been replaced by the

word “Electronic documents or content of electronic documents”. Thus, the omission of the word, “*Electronic Records*” in the scheme of Section 61 to 65 signifies the clear and explicit legislative intention, i.e. not to extend the applicability of Section 61 to 65 to the electronic record in view of overriding provision of Section 65-B of the Indian Evidence Act dealing exclusively with the admissibility of the electronic record.

It may be noted that the Section 65-B starts with a non obstante clause. Thus, notwithstanding anything contained in the [Evidence Act](#), any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original.

The four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act :

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
- (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
- (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Section 65B(3) provides following computers shall constitute as single computer.

- i] By combination of computers operating over that period, or
- ii] By different computers operating in succession over that period, or

iii] By different combinations of computers operating in succession over that period, or

iv] In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.

Under [Section 65B\(4\)](#) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied :

- (a) There must be a certificate which identifies the electronic record containing the statement;
- (b) The certificate must describe the manner in which the electronic record was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under [Section 65B\(2\)](#) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

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.

For instance, it is stated by the author of 'Generic requirements for sustaining electronic information over time: Defining the characteristics for authentic records' xxxi, that authenticity can only exist if the three characteristics like **reliability, integrity and usability** are fulfilled. They are set out in BS ISO 15489-1:2001 'Information and documentation; Records management; General '.

In the matter of **Ark Shipping Co. Ltd. Vs. GRT Shipmanagement Pvt. Ltd.** 2007(5) ALLMR 516. Hon'ble Bombay High Court has discussed the necessity of certificate under section 65B of Evidence Act and provided the sample of certificate which is reproduced as under :

1. I state that I was employed in the chartering division of Sahi Oretrans (Pvt) Ltd. (hereinafter for the sake of brevity referred to as

Sahi), a company having its office at 30 Western India House, 3rd Floor, Sir. P.M. Road, Mumbai 400 001. I state that Sahi acted as the ship broker in respect of the charter-party concluded between the petitioners and respondents, above named.

2. I state that being employed in the chartering division of Sahi, I was personally involved in the transaction. I state that being ship brokers all emails were forwarded to the petitioners and the respondents through computer terminals in Sahi's office, by me. In fact, my name appears in almost all the email correspondence.

3. I state that by virtue of my employment I was authorized to use the computer terminals in Sahi's office. Further, the computer terminals used by me were functioning normally at all times. Further, since I was personally involved in the transaction, I in fact personally authored/saw the email correspondence exchanged between the petitioners and the respondents.

4. I hereby produce hard copies of the emails which represent the contract entered into between the parties. The said emails are annexed hereto as Exhibit "A". I crave leave to refer to and rely upon typed/clear copies of the same at the time of hearing, if necessary.

5. I confirm that the contents of the hard copies of the emails are identical to the emails exchanged through the computer terminals operated by me. I further state and confirm that the contents of the hard copies of the emails at Exhibit "A" are identical to the hard copies of the emails filed before the arbitrator, a compilation of which I have perused.

6. Accordingly, I am making this present affidavit to certify that the hard copies of the emails annexed at Exhibit "A" to "A4" hereto are a "true copy"/ reproduction of the electronic record which was regularly fed into/transmitted through my computer terminal in Sahi's office in the ordinary course of activities. I further state that at all times the computer terminals utilized by me were operating properly and there is no distortion in the accuracy of the contents of the hard copies of the emails.

In **Anwar P.V. -Vs.- P.K. Basheer 2014(10) SCC 473** the Hon'ble Supreme Court was pleased to held as under : "The evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Section 63 and 65 have no

application in the case of secondary evidence by way of electronic record; the same is wholly governed by Section 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, does not lay down the correct legal position. It requires to be overruled and we do so”.

PROOF AS TO DIGITAL SIGNATURE [SECTION 67A]:

Except in the case of a secure electronic signature, if the electronic signature of any subscriber is alleged to have been affixed to an electronic record the fact that such electronic signature is the electronic signature of the subscriber must be proved.

As per section S.73A of the Evidence Act, For the purpose of ascertaining whether a digital signature is that of the person by whom it purports to have been affixed, the court may direct that person or the controller or the certifying authority to produce the digital signature certificate. The court may also direct any other person to apply the public key listed in the digital signature certificate and verify the digital signature purported to have been affixed by that person. For this purpose the “controller” means the controller appointed under s.17(1) of the Information Technology Act. 2000.

Mode of proof:

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. It requires

A] Integrity of the data: That is the data as sent or recorded was intact and not tampered with.

B] Integrity of the hardware/software: The hardware and software used to reading, downloading, interpreting, seeing or storing was functioning according to set standards and there was no deviation or its corruption

C] Security of the system: The system used to access such electronic record was secured, and during the particular course of period it was not accessed by any unauthorized person, so as to rule out the possibility of its tampering or malfunctioning.

How to prove various documents:

Electronic Messages :- It includes e-mails, SMS, MMS etc. of messages sent via social networking sites, like whatsapp, twitter etc. Under the provisions of Section 88A, there is a presumption as to such messages. Section 88, 88A, 114(f) of the Evidence Act with section 26 of the General Clause Act are relevant sections for sending and receipt of e-mail and its proof.

E-mails:

To admit emails into evidence, the proponent must show the origin and integrity of emails. He must show who or what originated the email and whether the content is complete in the form intended, free from error or fabrication. In discovery, the proponent needs to prove that the hard copy of the email evidence is consistent with the one in the computer and includes all the information held in the electronic document.

Next stage follows that, before admissibility the document has to meet the requirements of authentication or identification. This is a process of verification that establishes that the document is what it purports to be. i.e. that the email was made by the author indicated therein and is unaltered except for the change in the document generated automatically such as adding the date and time in case of email and address.

The burden is on the person adducing the data message to prove its authenticity by adducing relevant evidence therefore that the document is what it purports to be. In assessing the evidential weight the court shall have regard to the reliability of the manner in which the data message was generated, stored or communicated; the reliability of the manner in which the authenticity of the data message was maintained; the manner in which the originator of the data message or electronic record was identified; and any other relevant factor.

E-mail is a computer output of electronic record and therefore, it is to be proved in the manner prescribed in Section 65-B of the Indian Evidence Act, which requires a certificate to be given by a person occupying responsible position in management of the computer.

Hard Disc is a storage devise. If written, then it becomes electronic record under Evidence Act. Under section 65B it has to be proved that the computer during the relevant period was in the lawful control of the person proving the email [**Babu Ram Aggarwal & Anr. Vs. Krishan Kumar Bhatnagar & Ors. 2013 IAD (Delhi) 441**].

In **Dharambir Vs. Central Bureau of Investigation (148 (2008) DLT 289)**. The court arrived at the conclusion that when Section 65-B talks of an electronic record produced by a computer referred to as the computer output, it would also include a hard disc in which information was stored or was earlier stored or continues to be stored. It distinguished as there being two levels of an electronic record. One is the hard disc which once used itself becomes an electronic record in relation to the information regarding the changes the hard disc has been subject to and which information is retrievable from the hard disc by using a software program. The other level of electronic record is the active accessible information recorded in the hard disc in the form of a text file, or sound file or a video file etc. Such information that is accessible can be converted or copied as such to another magnetic or electronic device like a CD, pen drive etc. Even a blank hard disc which contains no information but was once used for recording information can also be copied by producing a cloned had or a mirror image.

In **Abdul Rahaman Kunji Vs. The State of West Bengal [MANU/WB/0828/2014]** the Hon'ble High Court of Calcutta while deciding the admissibility of email held that an email downloaded and printed from the email account of the person can be proved by virtue of Section 65B r/w Section 88A of Evidence Act. The testimony of the witness to carry out such procedure to download and print the same is sufficient to prove the electronic communication.

In **Jagdeo Singh Vs. The State and Ors. [MANU/DE/0376/2015]** Hon'ble High Court of Delhi, while dealing with the admissibility of intercepted telephone call in a CD and CDR which were without a certificate u/s 65B Evidence Act, observed that the secondary electronic evidence without certificate u/s 65B Evidence Act is inadmissible and cannot be looked into by the court for any purpose whatsoever.

The person who want to rely on e-mails he must fulfill the conditions contained under sub-clause 2 of Section 65 B. This means that a person filing the printout of an email in court can rely upon it as

an original without the need to actually file the original soft copy of it. In the case of **Ark Shipping Co. Ltd. Vs. GRT Ship Management Pvt. Ltd. (2008 (1) ARBLR 317 Bom.** the Hon'ble Court extracted a affidavit under Sec. 65 B by considering fact and circumstances of that case. But in **Vodafone Essar Ltd. Vs. Raju Sud** the court dispensed with the requirement under Sec. 65 B.

CALL RECORDS :

In proving the call records all the above principles are applicable. The determination of movement of a person on the basis of mobile phone was discussed in **Mohd Arif @ Ashfaq -Vs.- State of NCT of Delhi (2011) 13 SCC 621.**

In the matter of **State (NCT of Delhi) Vs. Navjot Sandhu (AIR 2005 SC 3820)** there was an appeal against conviction following the attack on Parliament on December 13, 2001. This case dealt with the proof and admissibility of mobile telephone call records. While considering the appeal against the accused for attacking Parliament, a submission was made on behalf of the accused that no reliance could be placed on the mobile telephone call records, because the prosecution had failed to produce the relevant certificate under Section 65-B(4) of the Evidence Act. The Supreme Court concluded that a cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken was sufficient to prove the call records. It has observed that, "the call records of cellular phones are stored in large servers that cannot be easily moved and produced in court. The court allowed secondary evidence of such matter regardless of compliance with s. 65-B(4). It has to be shown that there was no misuse of the computer and that it was performing properly. Such evidence would vary from case to case. It will be very rarely necessary to call an expert. The burden can be discharged by calling a witness who is familiar with the operation of the computer concerned".

It is held that, "According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable.... Hence, 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 identify the signatures of the certifying officer or otherwise speak to the facts based on his personal knowledge.”

Proof of contents of C.D.

The person intending to prove C.D. is required to prove whether the disputed C.D. was prepared by a combination of a computer operating therein or different computer operating in succession over that period or of different combination of computers. It is not necessary to examine the computer expert for the proof of C.D. in addition to the compliance of provisions of section 65-B.

In **Ankur Chawla Vs. CBI [MANU/DE/2923/2014]**. The Hon'ble High Court of Delhi, while deciding the charges against accused in a corruption case observed that since audio and video CDs in question are clearly inadmissible in evidence, therefore trial court has erroneously relied upon them to conclude that a strong suspicion arises regarding petitioners criminally conspiring with co-accused to commit the offence in question. Thus, there is no material on the basis of which, it can be reasonably said that there is strong suspicion of the complicity of the petitioners in commission of the offence in question.

It is interesting to see the observations of the Hon'ble Supreme Court in **AIR 2010 SC 965** - In order to prove the charge of corrupt practice, the petitioner has filed one Video CD and the court found that new techniques and devices are the order of the day . A first hand information about an event can be gathered and in a given situation may prove to be a crucial piece of evidence by Audio and videotape technology. At the same time, such evidence has to be received with caution as with fast development in the electronic techniques, they are more susceptible to tampering and alterations by transcription, excision, etc. which may be difficult to detect and it emphasized that to rule out the possibility of any kind of tampering with the tape, the standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence. When the accuracy of the recording has not been proved by the petitioner by examining a competent witness, alleged maker of Video CD. The Video CD therefore, is not admissible in evidence.

In the case of **JAGJIT SINGH Vs. STATE OF HARYANA (2006) 11 SCC 1**) the speaker of the Legislative Assembly of the State of Haryana disqualified a member for defection. When hearing the matter, the Supreme Court considered the digital evidence in the form of interview transcripts from the Zee News television channel, the Aaj Tak television channel and the Haryana News of Punjab Today television channel. The court determined that the electronic evidence placed on record was admissible and upheld the reliance placed by the speaker on the recorded interview when reaching the conclusion that the voices recorded on the CD were those of the persons taking action. The Supreme Court found no infirmity in the speaker's reliance on the digital evidence and the conclusions reached by him. The comments in this case indicate a trend emerging in Indian courts: judges are beginning to recognize and appreciate the importance of digital evidence in legal proceedings.

In **K.K. Velusamy Vs. N. Palanisamy, 2011 EQ-SC-0-158** the Hon'ble Supreme Court considered the point of electronic evidence such as – the amended definition in Section 3 of Evidence Act 1872 read with the definition of electronic record in Section 2 clause F of the Information Technology Act, 2000. It includes a compact disk containing an electronic record of conversation. Section 8 of Evidence Act provides that the conduct of any party or of any agent to any party, to any suit, in reference to such a suit or in a reference to any fact in issue therein or relevant thereto, is relevant if such conduct influences or influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto.

A recent judgment of The Hon'ble Supreme Court delivered in **Anvar P.V. versus, P.K. Basheer and Others, in Civil Appeal No. 4226 OF 2012 decided on Sept., 18, 2014**, it was held that the Computer Output is not admissible without Compliance of 65B. It overruled the judgment laid down in the **State (NCT of Delhi) v. Navjot Sandhu alias Afzal 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 is required to be overruled. This judgment has put to rest the controversies arising from the various conflicting judgments and thereby provided a guideline regarding the practices being followed in the various High Courts and the Trial Court as to the admissibility of the Electronic Evidences. The

legal interpretation by the court of the following Sections 22A, 45A, 59, 65A & 65B of the Evidence Act has confirmed that the stored data in CD/DVD/Pen Drive is not admissible without a certificate u/s 65 B(4) of Evidence Act and further clarified that in absence of such a certificate, the oral evidence to prove existence of such electronic evidence and the expert view under section 45A Evidence Act cannot be availed to prove authenticity thereof.

It has been specified in the judgment that Genuineness, Veracity or Reliability of the evidence is looked into by the court subsequently only after the relevance and admissibility is fulfilled. The requirement to ensure the source and authenticity, pertaining to electronic records is because it is more vulnerable to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to mockery of justice.

The original recording in Digital Voice Recorders/mobile phones need to be preserved as they may get destroyed, in such a case the issuance of certificate under section 65B(4) of the Evidence Act cannot be given. Therefore such CD/DVD is inadmissible and cannot be exhibited as evidence, the oral testimony or expert opinion is also barred and the recording/data in the CD/DVD's do not serve any purpose for the conviction.

PROOF OF A PHOTOGRAPH TAKEN FROM DIGITAL CAMERA

As per section 2T of Information Technology Act, 2000, a photograph taken from a digital camera is an electronic record and it can be proved as per section 65-B of the Indian Evidence Act.

PROOF OF OBSCENE SMS SENT THROUGH MOBILE PHONE

As per section 2T of Information Technology Act 2000, 'Mobile' is a computer and SMS in the mobile is an electronic record. So, it is to be proved as per section 65-B of the Indian Evidence Act which requires a certificate issued by a person, occupying responsible position in relation to operation of that device or management of the relevant activities.

In **Rohit Ved Pal Kaushal Vs. State of Maharashtra 2007 EQ-Bombay-0-1329**. Hon'ble High Court held that, sending an incidence vulgar sms and obscene in nature on mobile phone of another

amounts an offence under Section 67 of the I.T. Act. In **Nikhil Ramdas Ratchet Vs. State of Maharashtra, 2006 EQ –Bombay-1884** it was held that the offence under Section 67 of the I.T. Act is cognizable and non-bailable. The offence under Section 72 of the said Act is non-cognizable and can be said to be bailable offence.

ATM

In somewhat different tone, Automated Teller Machines (ATM) was held to be not a computer by itself nor it is a computer terminal in view of citation **2005 AIR Knt. HCR 9**. However in view of the above discussed ruling there is some doubt about this proposition.

Video Conferencing:

In **Amitabh Bagchi Vs. Ena Bagchi (AIR 2005 Cal 11)**- Sections 65-A and 65-B of Evidence Act, 1872 were analyzed. The court held that the physical presence of person in Court may not be required for purpose of adducing evidence and the same can be done through medium like video conferencing. Sections 65-A and 65-B provide provisions for evidences relating to electronic records and admissibility of electronic records, and that definition of electronic records includes video conferencing.

In **State of Maharashtra vs. Dr Praful B Desai (AIR 2003 SC 2053)** the question was involved whether a witness can be examined by means of a video conference. The Supreme Court observed that video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The court allowed the examination of a witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.

In **Twentieth Century Fox Film Corporation Vs. NRI Film Production Associates (P) Ltd. (AIR 2003 KANT 148)** Certain conditions have been laid down for video-recording of evidence:

1. Before a witness is examined in terms of the Audio-Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen. A copy is to be made available to the other side. (Identification Affidavit).

2. The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.
3. The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.
4. The witness should not plead any inconvenience on account of time different between India and USA.
5. Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.
6. Learned Judge is to record such remarks as is material regarding the demenour of the witness while on the screen.
7. Learned Judge must note the objections raised during recording of witness and to decide the same at the time of arguments.
8. After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.
9. The visual is to be recorded and the record would be at both ends. The witness also is to be alone at the time of visual conference and notary is to certificate to this effect.
10. The learned Judge may also impose such other conditions as are necessary in a given set of facts.
11. The expenses and the arrangements are to be borne by the applicant who wants this facility.

In Suvarana Musale vs Rahul Musale 2015 (2) Mh.L.J. 801 in view of section 65A and 65B of the Evidence Act it was held that recording of evidence with help of electronic method and techniques is acknowledged and recognized in judicial system. Petitioner wife was

working in U.S. and has a minor daughter aged 6 yrs , traveling to India for being present physically was expensive and she may face difficulty in getting leave and hurdles in obtaining VISA . An application for recording evidence through video conferencing was allowed.

Proof of the digital signature of a person

Section 67-A of the Indian Evidence Act provides that except in the case of a secure digital signature, if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved. It is necessary to prove it in the manner of proof of electronic record. Section 65-B will be applicable.

In **Bodala Murali Krishna Vs. Smt. Bodala Prathima (2007 (2) ALD 72)**, The court held that, "...the amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were added. These provisions are referred only to demonstrate that the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence."

PRESUMPTIONS OF ELECTRONIC RECORDS :

As per section 81A of the Evidence Act, The Court shall presume the genuineness of every electronic record purporting to be the Official Gazette, or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody. The genuineness of the electronic records purporting to be the Official Gazette or purporting to be the electronic record directed by any law to be kept by a person shall be presumed, provided that it is substantially kept in accordance with the form required by the law and is produced from proper custody.

As per section 85A of the Evidence Act, The Court shall presume that every electronic record purporting to be an agreement containing the digital signatures of the parties was so concluded by affixing the digital signature of the parties.

As per section 85B In any proceedings, involving secure digital signature, the Court shall presume unless the contrary is proved that, (a) the secure digital signature is affixed by subscriber with the intention of signing or approving the electronic record; (b) except in the case of a secure electronic record or a secure digital signature, nothing in this section shall create any presumption relating to authenticity and integrity of the electronic record or any digital signature.

As per section 85C the Court has to presume, unless contrary is proved, that the information listed in a Digital Signature Certificate is correct but it does not apply to the information specified as subscriber information which has not been verified, if the certificate was accepted by the subscriber.

As per section 88A 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. As per explanation, the expressions "addressee" and "originator" shall have the same meanings respectively assigned to them in clauses (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000.

Section 90A of the Evidence Act, prescribes that where any electronic record, purporting or proved to be five years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorized by him in this behalf. Electronic records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper, if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

Miscellaneous

Supplying copy of electronic record :

In **Fatima Riswana -Vs.- State and others, AIR 2005 SC 712** the prosecution was relating to exploitation of certain men and women for the purpose of making pornographic photos and videos in various acts of sexual intercourse and thereafter selling them to foreign

websites. The case was allotted to fast track court presided over by a lady judge. The accused applied for copies of the CDs. The trial court rejected that prayer. The High Court, also rejected such prayer by observing that if their copies are provided, they can be copied further and put into circulation. However, the High Court allowed viewing of the CDs in the chamber of the judge. It was contended on behalf of the accused that it may cause embarrassment to the lady judge. Hence, the matter was directed to be transferred to the court of a male judge. However, the concern of the victim side was not considered. The apex court observed that a judicial officer be it a female or male is expected to face this challenge when call of duty required it. Hence that order was set aside.

In **State of Punjab and others -Vs.- M/s. Amritsar Beverages Ltd. and others**, AIR 2006 SC 2820, section 14(3) of the Punjab General Sales Tax Act provided for inspection of books, documents and accounts and their seizure. The officer seizing the book, account, register or document shall forthwith grant a receipt to a receipt, retaining a copy, affixing signature and seal of the officer on the document and return of the books to the dealer. But, the seized record was cash book, ledger and other registers maintained in a hard disk. Hence, it was not possible to put signature and seal of the official on the seized documents. However, a copy was taken from the hard disk and hard disk was returned.

Allowing use of network for illegal purpose :

In **Sanjay Kumar Kedia -Vs.- Narcotics Control Bureau and Another**, 2008(2) SCC 294 the appellant was arrested for the offences under sections 24 and 29 of the NDPS Act, on the allegations was that he had used the network facilities provided by his companies for arranging the supply of a banned psychotropic substances online. It was claimed that the companies were mere network service providers and there were protected under section 79 of the Information Technology Act from any prosecution. On the basis of the IP address of various websites which used the same IP address of the websites of the accused it was revealed that the accused was supplying drugs by taking online orders. The court found that there was prima facie material showing that the companies of the accused were not acting merely as a network service provider but where actually running Internet pharmacy and dealing with the prescription drugs like Phentermine and Butalbital.

OPINION OF EXAMINER OF ELECTRONIC EVIDENCE

As it is already laid down, provision under section 45A to consider opinion given by an examiner of electronic evidence regarding any information transmitted or stored in any computer resource or any other electronic or digital form is also relevant fact. Court may rely up on the opinion of an examiner who has given in the manner prescribed under **Section 79A** of I.T.ACT.

Further, when the court has to form an opinion as to the electronic signature of any person, the opinion of the certifying Authority which has issued the electronic Signature Certificate is also relevant **U/S 47A** of Evidence Act.

When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 is a relevant fact. However, when there is a conflict of opinion between the experts then the court is competent to form its own opinion with regard to signatures on a document **Kishan Chand Vs. Sita Ram AIR 2005 P&H 156**.

Thus the electronic records are to be proved and appreciated in view of the above rulings.

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LATEST JUDGMENTS OF HON'BLE APEX COURT AND HIGH COURT.

1. The Hon'ble Bombay High Court has held in *Pandurang Bayaji Pisal v. Dagadu Arjuna Jadhav(deceased) by heirs and Lrs. Smt. Bayanabai Baburao Kakade, 2015 (5)Mh.L.J. 228* that;

'The purchasers of the property subsequent to the contract in question were required to plead and prove that they are the bona fide purchasers for valuable consideration, in good faith, without notice of the earlier contract.'

2. The Hon'ble Madras High Court has held in *M. Mohamed Abbas v. The Chief Secretary, Government of Tamil Nadu & others, AIR 2015 Madras,237* that;

'Article 14, 15(1) and 16 prohibits discrimination. There shall be no discrimination, solely based on the ground of religion, race, caste, sex, place of birth. However, Article 15(3) emphasizes that if there is any concession or benefit in favour of women and children, that would not be a discrimination and if it is in favour of the male members, that would be a discrimination, violative of Articles 14 and 15. Article 21 has been interpreted by the Hon'ble Supreme Court so as to maintain proper social justice, accordingly, right to life and personal liberty, guaranteed under Article 21 emphasize for decent living, which should be available to everyone, including Muslim girls, to decide their future by getting proper education and empowerment and also to decide their marital life. Hence, merely referring Articles 25 and 29, the Constitutional safeguards given under Articles 14, 15(3), 16 and 21 cannot be taken away, as the prime objective is towards gender equality.

When the World community is considered as a global village in the modern society and the Constitution emphasizes equal right for men and women, legitimate right of education and empowerment should not be denied for any girl. It is also relevant to note that Shariat Law, never says that marriage should be performed for a girl before she attains the age of 18 years. In olden days Hindus were also accepting “Balya Vivaha” or Child marriage, which is prohibited under the Prohibition of Child Marriage Act. Hence, the Act is not against Muslim religion and that the Prohibition of Child Marriage Act, 2006 would not be detrimental to the Muslim community.

Having considered the facts and circumstances as discussed above, we hold that the provisions of Prohibition of Child Marriage Act, 2006 are in no way against the religious rights guaranteed under Articles 25 and 29 of the Constitution of India. In fact, the same is in favour of all the girl children in getting proper education and empowerment and equal status as that of men in the Society, as guaranteed under Articles 14, 15, 16 and 21 of the Constitution.

1. Mrs.Priyanka Srivastava and another ..Vs.. State of U.P and others
2015(2) Crimes, 179 S.C.
2. Vishal Kaushik ..Vs.. Family Court and another.

AIR 2015 Rajasthan 146.

- (1) 2015 CRI L.J. 3976 S.C.
State of Madhya Pradesh Vs. Madanlal
Held : In case of Rape or Attempt to rape, the compromise or settlement cannot be allowed.
- (2) 2015 CRI L.J. 4186 S.C.
Jogendra Yadav & oths Vs. State of Bihar
Where person summoned as additional accused under Sec.319 of Cr.P.C. cannot avail the remedy of discharge.
- (3) AIR 2015 (NOC) 1226 (Bom)
Animal and birds Charitable Trust & others Vs. Municipal Corporation of Greater Mumbai and others.
Held : using horse driven carriages only for joy-riders solely for human pleasure causing pain, injuries and various diseases to horses is violative of Sec.3, 11. Such activity is avoidable human activity.
- (4) AIR 2015 (NOC) 1132 (Bom)
Bangana Co-operative Housing Society Ltd. Mumbai Vs. Mrs. Vasanti Gajanan Nerulkar

Order 18 Rule 4 of CPC. Once affidavit of examination-in-chief once such Evidence Affidavit is filed, examination-in-chief of deponent has begun. It is not thereafter permissible to withdraw the evidence Affidavit.

- (5) 2015 Cri.L.J. (NOC) 445 (All)
Ramesh Handa Vs. State of U.P.
Section 137 of Cr.P.C.

Permanent exemption from appearance in court cannot be granted on the ground that he is 70 years old, suffering from diabetes, arthritis and schedule to undergo surgery. The attendance of accused is necessary while particular witness are being examined.

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