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EXAMINING THE ADMISSIBILITY OF ELECTRONIC EVIDENCE UNDER THE BHARTIYA SAKSHYA ADHINIYAM, 2023.

AUTHORED BY - ATHIRA SABARINATHAN

Abstract

Cyber-related offences have increased because of the widespread use of computers and digital media. Electronic evidence is now a crucial component of criminal investigations. However, law enforcement organisations and judicial bodies frequently encounter difficulties in efficiently managing and accessing digital evidence because of the sharp rise in cases involving it. Electronic records must be gathered, stored, transmitted, and presented in compliance with established legal standards to be accepted as legitimate in court. Technological developments have also made traditional crimes like money laundering, criminal breach of trust, and fraud more complex. The Indian Evidence Act of 1872 establishes the guidelines for the admissibility and relevance of evidence in court cases in India. Digital records that record an action or omission and are used in court to prove or refute a fact are referred to as electronic evidence. In addition to comparing its provisions with those of the recently introduced Bhartiya Sakshya Adhinyam, 2023, this paper examines the admissibility of electronic evidence under the Indian Evidence Act, 1872.

INTRODUCTION

Global interest in the technology development is very huge. Accessing a computer resource is within a fingertip; its application is not restricted to any certain organization or social class. Cyberspace emerged because of the development of information technology, providing the global population with access to the internet and all its resources, including data storage and applications. These devices won over the trust of mankind and in turn they started relying more on these devices to store their personal information, e-commerce, communications etc.

This transition surely brought changes in the legal system as crimes related to electronic devices increased rapidly with the increase in technology. New devices are being launched and operated by thousands daily. The ubiquity of computers, impact of information technology on society,

together with the capacity to store and gather data in digital form, have all made it necessary to update Indian law to include the criteria governing the admissibility of advanced proof. The Data Innovation Act, 2000 considering the Unified Countries Commission on Global Exchange Regulation (UNCITRAL) model on electronic business was presented horizontally with the corrections in the Indian Proof Demonstration, 1872, the Indian Punitive Code 1860 and the Financier's Book Proof Demonstration 1891 gives the structure to the exchanges of computerized world. Indian courts have laid out case regulation tending to the utilization of electronic proof considering the adjustment of the law. What is more, judges have shown an insight of the intrinsic "electronic" nature of proof, including a comprehension of its suitability and the legitimate understanding of how electronic proof may be introduced under the steady gaze of the courtroom.

Electronic records mean "data, record or data generates, image or sound stored, received, or sent in an electronic form or microfilm or computer generates micro fiche."¹

Due to the notable increase in e-governance in the public and commercial sectors as well as ecommerce operations, electronic evidence has emerged as a critical component of communication, processing, and recording. Government agencies are becoming progressively open to the introduction of different online governance rules, and regular filings for oversight and management of the sectors which involve electronic medium. The usage of these numerous types of electronic evidence and digital evidence in court cases is growing rapidly. Judges are frequently required to make decisions on the admissibility of electronic evidence at the trial stage, and these decisions have a significant influence on conviction or acquittal of the convict along with the outcome of civil lawsuits. The distinctive characteristics of the evidence and how easily it may be produced or manipulated provide a barrier to acceptance that cannot be overcome with other types of evidence; therefore, the Court is still having to deal with this new electronic frontier. A distinct set of issues and challenges emerges for appropriate authentication when dealing with the various categories of electronic evidence, which include CDs, DVDs, hard drives/memory cards, websites, social network communication, email, instant chat messages, SMS/MMS, and computer-generated documents.²

¹ Section 2(1)(t), The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

² Vivek Dubey, Admissibility of electronic evidence: an Indian perspective. *Forensic Res Criminal Int J.* 2017;4(2):58-63.

ELECTRONIC EVIDENCE: A DOCUMENTARY EVIDENCE.

The admissibility of electronic evidence in legal proceedings is not new in India, but over time, the precautions used to enable the production of documents have undergone significant changes, since the storage and use of electronic information has developed and become more complex.

“Evidence,” according to section of the Indian Evidence Act, 1872³, means and includes “All statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; these are termed as oral evidence and all documents including electronic records produced for the inspection of the court. This is termed documentary evidence.”

“Regarding the documentary evidence, in Section 59³, for the words “Content of documents” the words “Content of documents or electronic records” have been substituted and Section 65A & 65B⁴ were inserted to incorporate the admissibility of electronic evidence”.⁵

Evidence Primarily consists of three major sections, firstly, the electronic records, secondly the documentary evidence other than electronic records and lastly, the oral evidences.⁶

The expansion of segments 65A and 65B under the second timetable of the IT Act, which lays out a specific cycle for citing proof regarding electronic records, might be the main change to the Proof Demonstration. Segment 65 A gives that the items in electronic records might be demonstrated as per the arrangements of area 65 B. Area 65B connects with the suitability of electronic proof. It gives that any data contained in an electronic record is a report permissible as proof and unique, given that it satisfies the circumstances set all through Segment 65B (2) to 65B (5). In this manner, each piece of electronic proof must be joined by an endorsement given after the agenda under Segment 65B is finished.

The Supreme Court of India in the case of Anvar P. K. v. P. K. Basheer & Ors.⁷ overruled the decision made in the case NCT of Delhi v Navjot Sandhu⁸ also known as the ‘Parliament Attacks Case.’ It was held that the evidentiary admissibility of electronic records correctly

³ Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

⁴ Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

⁵ Vivek Dubey, Admissibility of electronic evidence: an Indian perspective. Forensic Res Criminal Int J. 2017;4(2):58-63.

⁶ Section3, The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India)

⁷ (2014) 10 SCC 473 (India).

⁸ (2005) 11 SCC 600 (India).

reflects the provisions of IEA by reinterpreting the application of Sections 63, 65 and 65B.

The Evidence Act has undergone several amendments, most notably to allow electronic records to be used in Indian courts alongside written documents. Giving electronic recordings the status of papers for the purpose of introducing evidence is one of the important modifications. While section 22A was added to allow for the relevance of oral evidence regarding the contents of electronic records, the definition of "admission"⁹ was changed to include a statement, oral or documentary, or electronic form, that suggests any inference as to any fact in issue or relevant fact. It states that oral declarations about the contents of electronic records are irrelevant unless the authenticity of the generated electronic records are at question.

However, in the case of Anvar P. K. v. P. K. Basheer & Ors.¹⁰ the court did not clarify when the said certificates need to be provided. The issue has yet to be dealt with by the supreme court. Although, the High Court of Rajasthan¹¹ and Delhi¹² have adjudged that the certificated can be provided at a later stage after the filing of a charge sheet in the case of Pravata Kumar Tripathy v. Union of India¹³ the Orissa High Court held that the criteria as laid down under the Anvar P.V. case does not need to be fulfilled while considering the bail application.

Electronic Evidence under IT Act, 2000

Technology belongs to the virtual world which is not real. However, it creates several opportunities for the commission of cybercrimes, likewise creating several forms of evidence to deny or uphold one's civil or any other right. With perpetual expansion on usage and dependency on electronic machines for communication, the admissibility of electronic evidence is gaining momentum in both civil and criminal matters, putting challenges in front of courts while deciding whether the subject matter of these electronic devices is authentic and reliable.

A PC can be an instrument for the commission of an offense, and it tends to be a storehouse of electronic proof. Understanding the significance of PC information to Judges, the Hon'ble High Court on account of Vijendra Kumar Verma v/s Public Assistance Commission, Uttarakhand,

⁹ S. 17 of The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

¹⁰ (2014) 10 SCC 473 (India).

¹¹ Paras Jain v. State of Rajasthan 2015 SCC Online Raj 8331 (India).

¹² Kundan Sing v. State of Delhi 2015 SCC Online Del 13647 (India).

¹³ Pravata Kumar Tripathy v Union of India 2014 SCC Online Ori 407.

and Ors. has seen that the Indian legal executive is doing whatever it may take to apply administration for productive administration of courts. Sooner rather than later, every one of the courts in the nation will be automated. In that regard, the new adjudicators who are being designated are supposed to have fundamental information on PC activity. It will be uncalled for to ignore fundamental information on PC activity to be a fundamental condition for being an adjudicator considering the new improvement being taken on. In this manner, the High Court is of the considered assessment that the necessity of having essential information on PC activity ought not be weakened.

Electronic records are relevant to prove any facts. In *Shafi Mohammad v/s State of Himachal Pradesh*¹⁴, the Hon'ble High Court has held that it will be inappropriate to deny to the law of proof benefits to be acquired by new methods and new gadgets, gave the exactness of the recording can be demonstrated. However, such gadgets are vulnerable to altering, no thorough rule could be set somewhere near which the confirmation of such proof might be judged. Electronic proof was applicable to laying out realities. Logical and electronic proof can be an extraordinary assistant to an examining office.

Electronic records are treated on the same footing as paper records. In common parlance, an electronic record is any data generated or received by a computer during the formation, execution, or completion of an organisations or individual action. Email, messages, word processed documents, electronic spreadsheets, digital images, and databases all are forms of electronic record. The term "Electronic record" has been defined under Section 2(t) of the Information

Technology Act, 2000, as follows:

"Electronic record" means data, record or data generated, image or sound stored, received, or sent in an electronic form or microfilm or computer-generated micro fiche.

Ink is used as an input medium for paper documents. Similarly, in the digital age, all data is entered computers in "binary" format. Data that offers important details about other data is referred to as "meta data." Stated alternatively, it is information about information. Even so, the legal definition of the term "data" has been stated under Section 2(o) of the Information

¹⁴¹⁴ 2018 AIR(SC) 714 (India).

Technology Act as follows:

“Data” implies a portrayal of data, information, realities, ideas, or guidelines which are being ready or have been arranged in a formalized way, and is expected to be handled, is being handled or has been handled in a PC framework or PC organization and might be in any structure (counting PC printouts attractive or optical capacity media, punched cards, punched tapes) or put away inside in the memory of the PC.”

Thus, according to Information Technology Act, 2000, electronic record is the data, record or data generated image or sound, stored, received, or sent, in electronic forms or microfilm or generated by micro-fiche.

There are two distinct and unique regulations pertaining to electronic evidence. According to Section 59, oral evidence may be used to prove any fact, except for information found in written or electronic records. Electronic record may be proven in compliance with prerequisites of Section 65 - B, as stated under Section 65-A. Thus, Section 65-A provides for a special procedure for proving the contents of electronic record. In furtherance thereof, Section 65-B provides for the procedure.

Other relevant provisions of Information Technology Act, 2000 in respect of electronic records are as follows:

- Section 4 – states if any data or matter is delivered or made accessible in an electronic record structure, and open to be unusable for an ensuing reference, will be considered to have fulfilled the prerequisites of regulation which gives that data or some other matter will be recorded as a hard copy or in the composed structure.
- Section 5 – legal recognition of digital signatures is stated.
- Section 6 – related to the use of digital signatures and electronic records in government and its agencies.
- Section 7 – states regarding retention of electronic records. According to the section the reports, records, or data are expected to be held by for a particular period, then, that prerequisite will be considered to have been fulfilled on the off chance that the equivalent is held in electronic structure.
- The data that is saved or transferred has probative value, that is, holds evidentiary significance. Advanced proof is not simply restricted to that tracked down on PCs yet may likewise stretch out to incorporate proof of computerized gadget like telecom or electronic mixed media gadgets. While in this way, it is suitable to understand the

distinctions between a PC, PC and PC organization. About Computer, Computer System and Computer Network Segment 2(1)(i) of the Data Innovation Act, 2000, characterizes 'PC' as a method by which any electronic, attractive, optical, or other fast information handling gadget or framework which performs legitimate calculations and number-crunching and memory capabilities by controlling the electric, attractive or optical information driving forces, and incorporates all information, yield, handling, capacity, PC programming or correspondence offices which are associated or connected with the PC in a PC framework or PC organization.

Section 2(1)(l) of the Information Technology Act, 2000, defines 'Computer System' as a device or collection of devices, including input and output support devices which are programmable, capable of being used in conjunction with external files which contain computer programs, electronic instructions, data storage and retrieval and communication control.

Section 2(1)(j) of the Information Technology Act, 2000, defines 'Computer System', read as under: Computer network means the interconnection of one or more computer through- (i) the use of satellite, microwave, terrestrial line, or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained.

In the case of Syed Asifuddin v State of Andhra Pradesh¹⁵, elaborating on the provisions of Section 2 (i), (j), (l) of the Information Technology Act, the court held that any electronic, magnetic or optical device used for storage of information received through satellite, microwave or other communication media and the devices which are programmable and capable of retrieving any information by manipulations of electronic, magnetic or optical impulses is a computer which can be used as computer system in a computer network.

Admissibility of Electronic Evidence and Proving Evidentiary Value of various E-Records. The evidence which can be admitted in court, that is, legally accepted by court is said to be 'admissible.' The concept of relevancy and probative value of the evidence enables the evidence to be admitted in the court of law.

¹⁵ 2006 (1) ALD Cri 96; 2005 CriLJ 4314 (India).

S. 65B of the Indian Evidence Act, 1872 makes the electronic evidence admissible, it does not dispense with the relevancy and probative value. In the case *State of Utta Pradesh v Raj Narain*¹⁶, the Supreme Court held that the facts should not be received in the evidence unless they are both relevant and admissible. “In *Arjun Panditrao Khotkar* ¹⁷the Hon’ble Supreme Court has observed that Section 65 differentiates between existence, condition, and contents of a document. Whereas existence goes to ‘admissibility’ of document ‘contents’ of a document are to be proved after a document becomes admissible in evidence. Section 22-A of the Evidence Act provides that if the genuineness of the electronic record produced is questioned, oral evidence would be admissible as to the contents of the electronic records. However, the Hon’ble Madras High Court reiterated the same in *Santhoshkumar Vs State rep. by Inspector of Police Perundurai Police Station*¹⁸ wherein it has been held that oral evidence cannot take the place of section 65-B (4) certificate. Further Section 4 of the Information Technology Act also provides that if a document in electronic form is (a) rendered or made available in an electronic form and (b) accessible to be usable for a subsequent reference, then it would be sufficient compliance...”

Moreover, “the electronic evidence is made admissible by the amendment of section 92 of Information Technology Act-2000 in the Indian Evidence Act. Section 3(2) of Indian Evidence Act states that evidence includes all documents including electronic records produced for the inspection of the court. Such documents are called documentary evidence. As stated earlier, the word ‘electronic records’ is defined under section 2(t) of Information Technology Act. It has been held in *Thana Singh Vs Central Bureau of Narcotics*¹⁹ that a digital charge sheet was held to be a document and it can be accepted as electronic record. Hon’ble Supreme Court has directed to supply of charge sheet in electronic form additionally.

As noted in *Anvar P. K. v. P. K. Basheer & Ors.*²⁰ notes that, considering Sections 59 and 65A, any documented evidence in the form of an electronic record under the Evidence Act may only be proved in compliance with the procedures described in Section 65B. The admissibility of the electronic record is covered under Section 65B. These laws are meant to elevate computer generated electronic secondary evidence to the status of sacrosanct. Note that the non-obstante expression appears at the beginning of the Section. Therefore, regardless of the Evidence Act,

¹⁶ (1975) 4 SCC 428 (India).

¹⁷ 2020 (5) CTC 200 (India).

¹⁸ 2021(2) MLJ (CrI) 225 (India).

¹⁹ 2013 2 SCC 590 (India).

²⁰ 2014 10 SCC 473, para.14 (India)

any data in an electronic record that is printed on paper, saved, recorded, or duplicated on optical or magnetic media created by a computer will only be considered a document if the requirements listed in sub-Section (2) are met, without the need for additional evidence or the provision of the original document.

The “very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of 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 to process information for the purposes of any activity regulated 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 form 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(s) had not affected either the record or the accuracy of its contents,
- 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.

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:

- i. There must be a certificate which identifies the electronic record containing the statement,
- ii. The certificate must describe the way the electronic record was produced,
- iii. The certificate must furnish the particulars of the device involved in the production of that record,
- iv. The certificate must deal with the applicable conditions mentioned under Section 65B (2) of the Evidence Act; and the certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

It is further clarified in *Anvar P. K. v. P. K. Basheer & Ors.*²¹ “That the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.”

Provisions for Electronic Evidence under the Bhartiya Sakshya Bill On 11th August 2023, Union Home Minister Amit Shah presented three bills in the Lok Sabha, one of which is the Bhartiya Sakshya Bill. This bill aims to revoke the current Indian Evidence Act, 1872. The Bhartiya Sakshya Bill comprises a total of 167 section, including 23 sections derived from the existing IEA, one completely new section and the removal of five sections.²² The bill establishes the admissibility of electronic or digital records as evidence, giving them the consistent legal weight as physical paper documents. Additionally, the bill suggests modifications to 23 sections and encompasses a total of 170 sections. Within the bill, provisions have been made to broaden the range of secondary evidence, including copies produced through mechanical processes, document, counterparts, and oral depiction of the contents of the document.

Electronic or digital recording is admissible under the new Bill. The legal effect, validity and enforceability of such electronic evidence will be same as that of paper or written records. The content sent of the electronic record shall be in accordance with section 59 of the bill. The produced electronic record must be of such a communication device or computer that was used regularly for the purpose of creating, storing, and processing the information. The person using such a device should have lawful control over the device. The information saved on the computer must be fed to an ordinary course of activity. The computer or the device must be in regular use, if not then the accuracy of the contents must not be hampered. The notice to produce such evidence should be delivered by the court to the party who possesses the evidence in electronic form.²³ In case of electronic signature, the subscriber of the signature must prove that the signature is his or hers.

²¹ 2 2014 10 SCC 473 (India).

²² ivemint, Bhartiya Sakshya Bill to replace Indian Evidence Act, here’ s what may change, mint, August 11, 2023, atpg no. 1.

²³ S. 64, The Bhartiya Sakshya Bill, 2023, No. 47, Acts of Parliament, 2023 (India).

Section 61²⁴ takes admission of the electronic or digital record and states that the electronic or the digital record shall have the same legal effect, validity, and enforceability as that of paper records. The contents of electronic record shall be in accordance with the provisions of Section 59,²⁵ proving them by primary evidence.

Section 63²⁶ states regarding the admissibility of electronic records as any information contained in an electronic record “which is printed on paper, stored, recorded, or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to also be a document, if the conditions mentions in the section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.”²⁷

“The conditions in respect of a computer output shall be the following, namely: —

- (a) the computer output containing the information was produced by the computer or communication device during the period over which the computer was used regularly to create, store or process information for the purposes of any activity regularly carried on over that period by the person having lawful control over the use of the computer or communication device;
- (b) during the period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer or communication device was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”²⁸

²⁴ The Bhartiya Sakshya Bill, 2023, No. 47, Acts of Parliament, 2023 (India).

²⁵ S. 62, The Bhartiya Sakshya Bill, 2023, No. 47, Acts of Parliament, 2023 (India).

²⁶ The Bhartiya Sakshya Bill, 2023, No. 47, Acts of Parliament, 2023 (India).

²⁷ S. 63, The Bhartiya Sakshya Bill, 2023, No. 47, Acts of Parliament, 2023 (India).

²⁸ S. 63(2), The Bhartiya Sakshya Bill, 2023, No. 47, Acts of Parliament, 2023 (India).

Any information that is the form of printed paper, stored, recorder or is copied in optical or magnetic media or semiconductor memory produced by a computer shall be deemed to be a document. Such a document shall be admissible as evidence in the court of law without any proof or production of original documents, only if the person or the owner who recorded the evidence gives a certificate under section 63.

The person or the owner issuing a certificate under section 63 must state the following:

- i. The working condition of the computer while recording the document
- ii. The owner is using the computer legally and in ordinary course of time
- iii. The owner must provide details if other device or computer is also used in the ordinary course of time
- iv. Details of each device or computer should be given by the user if multiple devices or computers are used, construing all the devices as a single unit and their description must also be provided.

The same provisions are stated in the Indian Evidence Act, 1872 as well.²⁹

Conclusion

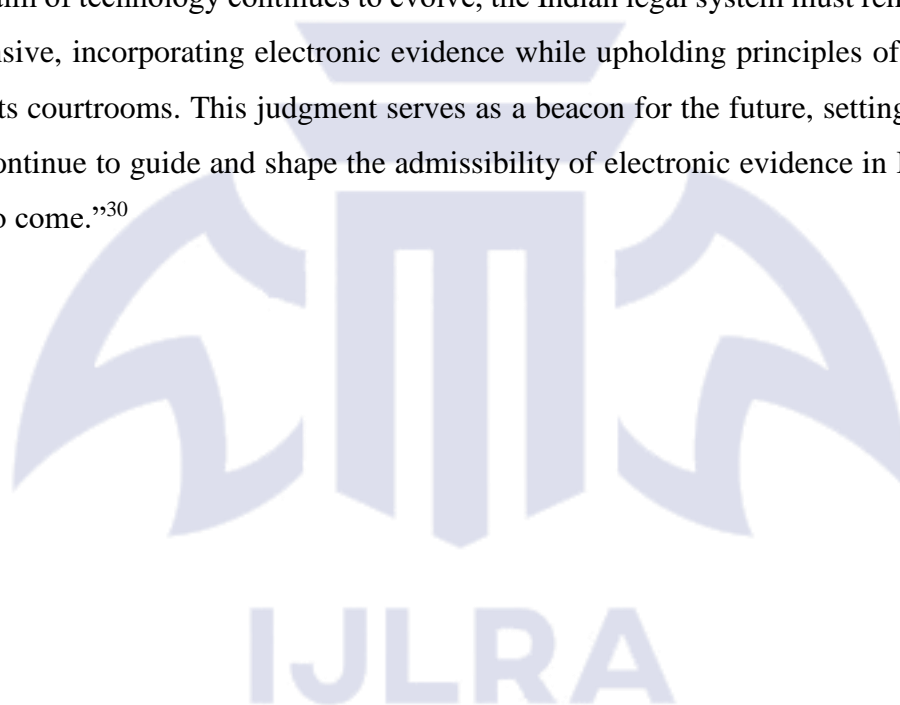
Electronic evidence holds a significant place in modern legal proceedings, as it can provide crucial insights and facts that traditional forms of evidence may not reveal. With the increasing reliance on digital devices and communication platforms, the range of electronic evidence has expanded to encompass emails, text messages, social media posts, GPS data, digital images, and more. Each of these forms of evidence presents its own set of challenges and opportunities for legal professionals. Electronic records in the form of CDRs, CCTV footage to emails is dealt with by the courts nowadays in civil as well as criminal matters on a regular basis. A major alteration was the 2002 revision that recognized electronic evidence as evidence under the IEA and the addition of sections 65A and 65B to govern the admission of electronic evidence. The veracity and dependability of electronic records, in contrast to their physical equivalents, are always questioned for apparent reasons, causing a contradiction between their relevance and admissibility despite their evidential significance. The prosecution would want a lower threshold to convict more defendants, while the defendants would prefer a higher threshold to acquit more defendants regarding the threshold established by the Courts regarding the admissibility of electronic evidence. However, lowering the threshold may lead to more

²⁹ S. 65B, The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

people abusing electronic evidence.

In the Anvar P.V. case, the Supreme Court expressly rejected occurrences in which courts had admitted electronic evidence without following the rules outlined in Section 65B of the Evidence Act. The Anvar P.V. case established an outlook which today is regarded as germane. The Supreme Court's decision has significantly improved the judicial understanding of the admissibility of electronic evidence and addressed historical injustices and abuses brought on by the admission of certified electronic evidence.

“As the realm of technology continues to evolve, the Indian legal system must remain adaptive and responsive, incorporating electronic evidence while upholding principles of fairness and justice in its courtrooms. This judgment serves as a beacon for the future, setting a precedent that will continue to guide and shape the admissibility of electronic evidence in Indian courts for years to come.”³⁰



³⁰ Articles – Manupatra, <https://articles.manupatra.com/article-details/ADMISSIBILITY-OF-ELECTRONICEVIDENCE-UNDER-THE-INDIAN-EVIDENCE-ACT-1872>.