



# ELECTRONIC EVIDENCE

PRESENTED BY –

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SPECIAL P.P.

# EVIDENCE

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As per Section 3 of Indian Evidence Act,

***"Evidence".—**"Evidence" means and includes—*

- (i) all statements including statements given electronically which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence;
- (ii) all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence;



# Locard's Exchange Principle

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As per Wikipedia, In forensic science, **Locard's exchange principle** holds that the perpetrator of a crime will bring something into the crime scene and leave with something from it, and that both can be used as forensic evidence. .... He formulated the basic principle of forensic science as: "Every contact leaves a trace".

Paul L. Kirk expressed the principle as follows:

"Wherever he steps, whatever he touches, whatever he leaves, even unconsciously, will serve as a silent witness against him. Not only his fingerprints or his footprints, but his hair, the fibers from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen he deposits or collects. All of these and more, bear mute witness against him. This is evidence that does not forget. It is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical evidence cannot be wrong, it cannot perjure itself, it cannot be wholly absent. Only human failure to find it, study and understand it, can diminish its value."

# Welcoming science.....

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Justice Stephen Breyer of the US Supreme Court said, "Science in the Courtroom", "In this age of science, science should expect to find a warm welcome, perhaps a permanent home, in our courtrooms... Our decisions should reflect a proper scientific and technical understanding so that the law can respond to the needs of the public."



# Universality of electronic evidence

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*Reading the various definitions of “electronic record”, “data” and “electronic form” in the I.T. Act, 2000 as amended in 2008 along with the definition of ‘document’ in BSA, it becomes Crystal-clear that computer images, text and sound videos, whether on a computer file, blog, web-site or e-mail, are all documents.*

# Welcoming Electronic Records/Evidence

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- Section 3. Authentication of Electronic Records
- Section 3-A. Electronic Signature Authentication
- Section 4 of IT Act : Legal Recognition of Electronic Records.
- Section 5. Legal recognition of Electronic Signature.
- Section 10-A. Validity of contracts formed through electronic means.

: Section 4 of IT Act :

## Legal Recognition of Electronic Records

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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.



# Nature of Electronic Evidence

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- ✓ *Electronic evidence is information either stored in standalone device or transmitted through networking resources.*
- ✓ *Electronic evidence is, by its very nature, fragile, sensitive and easily alerted if necessary causations are not maintained.*
- ✓ *It can be easily be altered, damaged, or destroyed by improper handling or improper examination.*
- ✓ *The nature of electronic evidence has posed huge challenges for its admissibility in courtroom.*
- ✓ *Chain-of-custody is the documentation of collection, preservation and analysis of evidence or roadmap of electronic evidence traveled through various medias.*



# Relevance and Admissibility

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Construction by pleadings, proof by evidence: proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence.

**Anvar P.V. vs. P.K. Basheer and Others**

**(2014) 10 SCC 473**

# Section 54 of BSA

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All facts, except the contents of documents may be proved by oral evidence.



# Section 62 of BSA

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Special provisions as to evidence relating to electronic record.—The contents of electronic records may be proved in accordance with the provisions of section 63.

**Doctrines of Interpretation of statute on the phrase:  
“may be”**

# Section 63 of BSA

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(1) Notwithstanding anything contained in this Adhiniyam, 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 be also a document, if the conditions mentioned in this 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.



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(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

- (a) the computer output containing the information was produced by the computer or communication device ~~during the period over which the computer or Communication device 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 said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer or Communication device 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 or Communication device in the ordinary course of the said activities.

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(3) Where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by means of one or more computers or communication device, whether—

- (a) in standalone mode; or
- (b) on a computer system; or
- (c) on a computer network; or
- (d) on a computer resource enabling information creation or providing information processing and storage; or
- (e) through an intermediary,

all the computers or communication devices used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer or communication device; and references in this section to a computer or communication device shall be construed accordingly.



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(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or a communication device referred to in clauses (a) to (e) of sub-section (3);
- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

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and purporting to be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the certificate specified in the Schedule.

(5) For the purposes of this section,—

- (a) information shall be taken to be supplied to a computer or communication device if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) a computer output shall be taken to have been produced by a computer or communication device whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment or by other electronic means as referred to in clauses (a) to (e) of sub-section (3).





## PART B

(To be filled by the Expert)

I, \_\_\_\_\_ (Name), Son/daughter/spouse of \_\_\_\_\_ residing/employed at \_\_\_\_\_ do hereby solemnly affirm and sincerely state and submit as follows:—

The produced electronic record/output of the digital record are obtained from the following device/digital record source (tick mark):—

Computer / Storage Media ☐ DVR ☐ Mobile ☐ Flash Drive ☐

CD/DVD ☐ Server ☐ Cloud ☐ Other ☐

Other: \_\_\_\_\_

Make & Model: \_\_\_\_\_ Color: \_\_\_\_\_

Serial Number: \_\_\_\_\_

IMEI/UIN/UID/MAC/Cloud ID \_\_\_\_\_ (as applicable)

and any other relevant information, if any, about the device/digital record \_\_\_\_\_ (specify).

I state that the HASH value/s of the electronic/digital record/s is \_\_\_\_\_ obtained through the following algorithm:—

☐ SHA1:

☐ SHA256:

☐ MD5:

☐ Other \_\_\_\_\_ (Legally acceptable standard)

(Hash report to be enclosed with the certificate)

(Name, designation and signature)

Date (DD/MM/YYYY): \_\_\_\_\_

Time (IST): \_\_\_\_\_ hours (In 24 hours format)

Place: \_\_\_\_\_

DIWAKAR SINGH,  
Joint Secretary & Legislative Counsel to the Govt. of India.

THE SCHEDULE  
[See section 63(4)(c)]

CERTIFICATE

PART A

(To be filled by the Party)

I, \_\_\_\_\_ (Name), Son/daughter/spouse of \_\_\_\_\_  
residing/employed at \_\_\_\_\_ do hereby solemnly affirm and  
sincerely state and submit as follows:—

I have produced electronic record/output of the digital record taken from the following  
device/digital record source (tick mark):—

Computer / Storage Media ☐ DVR ☐ Mobile ☐ Flash Drive ☐

CD/DVD ☐ Server ☐ Cloud ☐ Other ☐

Other: \_\_\_\_\_

Make & Model: \_\_\_\_\_ Color: \_\_\_\_\_

Serial Number: \_\_\_\_\_

IMEI/UIN/UID/MAC/Cloud ID \_\_\_\_\_ (as applicable)

and any other relevant information, if any, about the device/digital record \_\_\_\_\_ (specify).

The digital device or the digital record source was under the lawful control for regularly  
creating, storing or processing information for the purposes of carrying out regular  
activities and during this period, the computer or the communication device was working  
properly and the relevant information was regularly fed into the computer during the  
ordinary course of business. If the computer/digital device at any point of time was not  
working properly or out of operation, then it has not affected the electronic/digital  
record or its accuracy. The digital device or the source of the digital record is:—

Owned ☐ Maintained ☐ Managed ☐ Operated ☐

by me (select as applicable).

I state that the HASH value/s of the electronic/digital record/s is \_\_\_\_\_  
obtained through the following algorithm:—

☐ SHA1:

☐ SHA256:

☐ MD5:

☐ Other \_\_\_\_\_ (Legally acceptable standard)

(Hash report to be enclosed with the certificate)

(Name and signature)

Date (DD/MM/YYYY): \_\_\_\_\_

Time (IST): \_\_\_\_\_ hours (In 24 hours format)

Place: \_\_\_\_\_





# What should be there in 65B of INDIAN EVIDENCE ACT

*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.*

# Section 90 and 93 of BSA

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90. Presumption as to electronic messages.—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. .

93. Presumption as to electronic records five years old.—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 electronic signature which purports to be the electronic signature of any particular person was so affixed by him or any person authorised by him in this behalf. Explanation.—The Explanation to section 81 shall also apply to this section.



# Very Nature of digital evidence..

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- ❖ *The most important criticism on digital evidence is that digital evidence can be easily altered.*
- ❖ *However in US v. Bonallo (858 F. 2d 1427 - 1988 - Court of Appeals, 9th 2002) a US court ruled that "the fact that it is possible to alter data contained in a computer is plainly insufficient to establish untrustworthiness".*

## Evolution of judgements in accepting Electronic Evidence and its Relevancy and Process of Admissibility

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In *R. v. Maqsd Ali*, [1965] All. E.R. 464., Marshall, J., observed thus:- C "We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.

**Ram Singh & Ors vs Col. Ram Singh, 1986 AIR, 3 1985 SCR Supl. (2) 399**



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- In Yusufalli Esmail Nagree v. State of Maharashtra [1967] 3 S.C.R. 720, this Court, speaking through Bachawat, J. Observed thus:
  - "If a statement 'is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape RECORDING is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.
  - The tape was not sealed and was kept in the custody of Mahajan The absence of sealing naturally gives rise to the argument that the recording medium might have been tempered with before it was replayed."

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**R. M. Malkani vs State Of Maharashtra (1973 AIR 157, 1973 SCR (2) 417)**

Tape recorded conversation is admissible, provided first the conversation is relevant to the matters in issue, secondly, there is identification of the voice and thirdly, the accuracy of the tape-recorded conversation is proved by eliminating the possibility of erasing the tape-recorder. The tape-recorded conversation is, therefore, a relevant fact under section 8 of the Evidence Act and is admissible under s. 7 of the Evidence Act.

**Ram Singh & Ors vs Col. Ram Singh (1986 AIR, 3 1985 SCR Supl. (2) 399)**

It is clear from decided cases that tape recorded evidence is admissible provided the originality and the authenticity of the tape are free from doubt.

# N. Sri Rama Reddy, etc. v. V.V.Giri [1971] 1 S.C.R. 399

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In the case of N. Sri Rama Reddy, etc. v. V.V.Giri [1971] 1 S.C.R. 399,  
the following observations were made:

"Having due regard to the decisions referred to above, it is clear that a previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality.



## State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru (2005) 11 SCC 600

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65. It may be that the certificate containing the details in sub-Section (4) of Section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 & 65.

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Next, it was contended that the printouts/call records have not been proved in the manner laid down by Section 63, 65A & 65B of the Evidence Act. This point has been dealt with while dealing with the case of Afzal and we have upheld the admissibility and reliability of the call records.

# Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329

It is well settled that tape-records of speeches are "documents" as defined in Section 3 of the Evidence Act and stand on no different footing than photographs. (See: **Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra & Ors.**<sup>4</sup>). There is also 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 and, therefore, **(1976) 2 SCC 17** such evidence has to be received with caution. Though it would neither be feasible nor advisable to lay down any exhaustive set of rules by which the admissibility of such evidence may be judged but it needs to be emphasised 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.



## Anvar P.V. versus P.K. Basheer, (2014) 10 SCC 473

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- ❖ 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.
- ❖ An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.



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- ❖ Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. ....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 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).

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- ❖ Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.



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The evidence relating to electronic record, as noted hereinbefore, 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 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. 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 [[State \(NCT of Delhi\) v. Navjot Sandhu, \(2005\) 11 SCC 600 : 2005 SCC \(Cri\) 1715](#)], does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied.

# **Tomaso Bruno & Anr vs State Of U.P**

## **(2015) 7 SCC 178**

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*“25. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents strictu sensu are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.”*



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26. Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of *Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra, (2012) 9 SCC 1*, wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of *State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600*, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

# Sonu alias Amar vs State of Haryana (2017) 8 SCC 570

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The interpretation of Section 65B (4) by this Court by a judgment dated 04.08.2005 in Navjot Sandhu held the field till it was overruled on 18.09.2014 in Anvar's case. All the criminal courts in this country are bound to follow the law as interpreted by this Court. Because of the interpretation of Section 65B in Navjot Sandhu, there was no necessity of a certificate for proving electronic records. A large number of trials have been held during the period between 04.08.2005 and 18.09.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in Anvar's case has to be retrospective in operation unless the judicial tool of 'prospective overruling' is applied. However, retrospective application of the judgment is not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage. Attempts will be made to reopen cases which have become final."



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“This Court did not apply the principle of prospective overruling in Anvar’s case. The dilemma is whether we should. This Court in *K. Madhav Reddy v. State of Andhra Pradesh*, (2014) 6 SCC 537 held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in the case of Anvar is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of justice. As Anvar’s case was decided by a Three Judge Bench, propriety demands that we refrain from declaring that the judgment would be prospective in operation. We leave it open to be decided in an appropriate case by a Three Judge Bench. In any event, this question is not germane for adjudication of the present dispute in view of the adjudication of the other issues against the accused.”

# Shafi Mohammad vs The State Of Himachal Pradesh (2018 SCC OnLine SC 233)

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Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1 and *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 SCC 600.

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7) Though in view of Three-Judge Bench judgments in *Tomaso Bruno* and *Ram Singh* (supra), it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(h).



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(8) Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In *Anvar P.V.* (supra), this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression “document” is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

# Requirement of certificate under Section 65B(h) is not always mandatory.

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11) The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.



The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

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*(12) Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.*

State By Karnataka Lokayukta Police Station, Bengaluru

Versus

M. R. Hiremath

(2019 SCC OnLine SC 734)

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- *The conversation between the complainant and the respondent was recorded on the spy camera in the course of which, it has been alleged, there was some discussion in regard to the amount to be exchanged for the completion of the work.....*
- *.....The first respondent then filed a discharge application under section 239 of the CrPC before the Special Judge, Bengaluru. The trial judge dismissed the application by an order dated 5 December, 2016. This order was questioned in revision before the High Court. The revision was rejected on the ground of maintainability. The respondent instituted a petition under Section 482 of the CrPC which has resulted in the impugned order of the learned Single Judge dated 27 April 2017.*
- *.....The fundamental basis on which the High Court proceeded to quash the proceedings is its hypothesis that Section 65B, which requires the production of a certificate for leading secondary evidence of an electronic record mandate the production of such a certificate at this stage in the absence of which, the case of the prosecution is liable to fail.*



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- The provisions of Section 65B came up for interpretation before a three judge Bench of this Court in *Anvar P.V. v P.K. Basheer* Interpreting the provision, this Court held :
  - “Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. “

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The same view has been reiterated by a two judge Bench of this Court in **Union of India and Others v CDR Ravindra V Desai (2018) 16 SCC 272**

The Court emphasised that non-production of a certificate under Section 65B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in **Sonu alias Amar v State of Haryana (2017) 8 SCC 570**, in which it was held :

“The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency.”



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*Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.*

## M/s. ICICI Bank Limited vs. Gaurav & Anr. (2018 SCC OnLine Del 9539)

12. This Court has in a similar case, *ICICI Bank Ltd. v. Kamini Sharma* [RFA 297/2015 decision dated 31<sup>st</sup> January, 2018] (hereinafter, ‘Kamini Sharma’) held, in respect of filing of original documents and statements of accounts as under:

.....

14. *Section 34 of the Evidence Act clearly provides that the books of accounts maintained in electronic form are relevant. Under Section 62 of the Evidence Act, original documents constitute primary evidence. In the context of electronic evidence, printouts of electronic documents are considered as secondary. However, judicial notice needs to be taken of the fact that most accounts today are not maintained in paper form, but electronic form. The primary evidence could be the server on which the statement of accounts is stored. These servers may store the statement of accounts of multiple clients in the hard drive. It would be an impossibility to require the Plaintiff bank to produce the hard drive of the server in every suit for recovery filed by it. Under such circumstances, the Plaintiff bank has no option but to produce the secondary evidence i.e, a printout of statement of accounts, duly certified by a responsible official of the bank along with a certificate under Section 65B of the Evidence Act. Needless to add, the certificate under Section 65B of the Evidence Act has now become a usual practice in almost all of the suits, inasmuch as, in every such suit, parties are bound to place reliance on electronic documents. The mere fact, that the printout is being filed as secondary evidence along with the necessary certificate, does not make it any less valid. The said accounts statement would be rebuttable if any discrepancy is found or pointed out. But in the absence of the same, there is no reason as to why the statement of accounts filed by the Plaintiff bank should be disbelieved.....”*



# Police and Criminal Evidence (England) Act, 1984

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## Section 65B of the Indian Evidence Act and Section 69 of the Act in England:

“280. In England this positive mandate was statutorily enacted and the prosecution had to show by positive and affirmative evidence that it was safe to rely upon the document produced by a computer from out of its memory. The Police & Criminal Evidence Act, 1984 was enacted. But, while interpreting Section 69 of the said Act, the courts took a practical approach and gave an interpretation where computer generated record could be proved by a statement, made by an employee unfamiliar with the precise details of the operation of the computer, that the print out was retrieved from the computer memory and the computer was not malfunctioning. Section 69 reads as under:

“(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown -

- (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer.
- (b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and
- [c] that any relevant conditions specified in rules of Court under sub-section (2) below are satisfied.

(2) Provision may be made by the rules of Court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.”

# Foreign situation

**281.** In *R.V. Shepherd*, 1993 A.C. 380. Lord Griffiths, dealing with the defence argument held:—

“The principal argument for the defendant starts with the proposition that the store detective was not a person occupying a responsible position in relation to the operation of the computer within the meaning of paragraph 8(d) of Schedule 3 to the Act and, therefore, was not qualified to sign a certificate for the purpose of providing proof of the matters contained in section 69(a). This I accept. Although the store detective understood the operation of the computer and could speak of its reliability she had no responsibility for its operation.

I cannot, however, accept the next step in the defendant's argument which is that oral evidence is only acceptable if given by a person who is qualified to sign the certificate. The defendant does not go so far as to submit that evidence must be given by a computer expert but insists that it must be someone who has responsibility for the operation of the computer; either the operator or someone with managerial responsibility for the operation of the computer.

Documents produced by computers are an increasingly common feature of all business and more and more people are becoming familiar with their uses and operation. Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.”

**282.** Statement by the witness that when the computer was working they had no trouble with operation of central computer was held sufficient in discharge of the affirmative burden.



# Electronic evidence and foreign laws

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**285.** In *DPP v. Mc. Kewon*, (1997) 1 Criminal Appeal 155, Lord Hoffman, applying Section 69 of the Police and Criminal Evidence Act, 1984 in relation to the inaccuracy in the time display in the computer print out, held:—

The purpose of section 69, therefore, is a relatively modest one. It does not require the prosecution to show that the statement is likely to be true. Whether it is likely to be true or not is a question of weight for the justices or jury. All that section 69 requires as a condition of the admissibility of a computer-generated statement is positive evidence that the computer has properly processed, stored and reproduced whatever information it received. It is concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered as evidence of a fact which it states.

The language of section 69(1) recognises that a computer may be malfunctioning in a way which is not relevant to the purpose of the exclusionary rule. It cannot therefore be argued that any malfunction is sufficient to cast doubt upon the capacity of the computer to process information correctly. The legislature clearly refused to accept so extreme a proposition. What, then, was contemplated as the distinction between a relevant and an irrelevant malfunction? It seems to me that there is only one possible answer to that question. A malfunction is relevant if it affects the way in which the computer processes, stores or retrieves the information used to generate the statement tendered in evidence. Other malfunctions do not matter. It follows that the words “not such as to affect the production of the document or the accuracy of its contents” must be read subject to the overall qualification that the paragraph is referring to those aspects of the document or its contents which are material to the accuracy of the statement tendered in evidence.”

## Contd...

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**286.** The Law Commission in England reviewed the law relating to computer generated evidence. It summed up the major problem posed for the rules of evidence by computer output in the words of Steyn, J.:— “Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer. ... if computer output cannot relatively readily be used as evidence in criminal case, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have “bugs”.\_\_\_\_\_ Realistically, therefore, computers must be regarded as imperfect devices.”



## Contd....

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**290.** Experience has shown to us that development in computer network ing, access, control, monitoring and systems security are increasingly making it difficult for computer errors to go undetected. Most computer errors are immediately detected or resultant error in the date is immediately recorded. In a court of law it would be impractical to examine the intricacies of computer functioning and operations. To put it in the words of the Law Commission report in England:—

“Determined defence lawyers can and do cross-examine the prosecution's computer expert at great length. The complexity of modern systems makes it relatively easy to establish a reasonable doubt in a juror's mind as to whether the computer was operating properly. Bearing in mind the very technical nature of computers, the chances of this happening with greater frequency in future are fairly high. We are concerned about smoke-screens being raised by cross-examination which focuses in general terms on the fallibility of computers rather than the reliability of the particular evidence. The absence of a presumption that the computer is working means that it is relatively easy to raise a smoke-screen.”

# In USA, it is Federal Rules of Evidence

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- ❖ This process “mirror imaging” or “forensics copying,” and this methodology is admissible in court (*State v. Cook*, 777 N.E.2d 882 (Ohio Ct. App. 2002)).
- ❖ The court recognized the importance of creating hashes to prove the data were not modified. (*Taylor v. State*, 93 S.W.3d 487, 507 (Tex. App. 2002)).



# Assessment of Electronic Evidence in France

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As per Art. 384. 3 of the Spanish Civil Procedure Act, in Spain, the rule of assessing electronic evidence says except in the case of public electronic documents, law does not oblige the Judge to have proof of the facts or data that the electronic evidence collects.

For assessment of electronic evidence, following parameters of the electronic evidence have to be adjudicated by the Judge:

- i) Integrity of the content,
- ii) Authenticity of its origin.

# Castle v. Cross R v. Shephard.

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The Court held, the print-out was admissible evidence. **(Castle v. Cross)**

So long as it could be shown that the computer was functioning properly and was not misused, a computer record can be admitted as evidence. **(R v. Shephard.)**

For electronic evidence, the witness providing such testimony may be the person who created the electronic document or maintains the evidence in its electronic form **(United States v. Barlow, 568 F.3d 215, 220 (5th Cir. 2009))**

Witness authenticating electronic evidence must “*provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so.*” **(Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 545 (D. Md. 2007)).**



# Some other USA judgements

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A proponent must establish 11-step processes for authenticating computer-generated or stored records and they are:

(1) The business uses a computer. (2) The computer is reliable. (3) The business has developed a procedure for inserting data into the computer. (4) The procedure has built-in safeguards to ensure accuracy and identify errors. (5) The business keeps the computer in a good state of repair. (6) The witness had the computer readout certain data. (7) The witness used the proper procedures to obtain the readout. (8) The computer was in working order at the time the witness obtained the readout. (9) The witness recognizes the exhibit as the readout. (10) The witness explains how he or she recognizes the readout. (11) If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact. (In re **Vee Vinhnee, 336 B.R. 437, 446 (B.A.P. 9th Cir. 2005)**)

Contd...

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- ✓ “A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original” **(Federal Rules of Evidence 1003)**



LATEST JUDGHEMENT BY HON'BLE APEX COURT

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**2020 SCC OnLine SC 571**

**ARJUN PANDITRAO KHOTKAR**

**VS.**

**KAILASH KUSHANRAO GORANTYAL AND ORS.**

**IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION  
CRIMINAL APPEAL NO. OF 2025 (Arising out of SLP (Criminal) No.4646 of 2025)  
... KAILAS S/O BAJIRAO PAWAR vs. THE STATE OF MAHARASHTRA**

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19. As far as admissibility of video recording i.e., Compact Disc (CD) is concerned, the author of the video i.e., SW No.2 not only deposed that he recorded the video, but he also gave a certificate, as contemplated under sub section (4) of Section 65B of the Evidence Act, to make the CD admissible in evidence. Interestingly, the High Court did not dispute that the electronic record was duly exhibited as there existed a certificate envisaged under sub-section (4) of Section 65B. However, strangely, the High Court opined that the video would become relevant only if it is played during deposition of each witness so that the witness could explain its contents in his own words resulting in a transcript of the video. In our view, this is a strange and unacceptable reasoning for the simple reason that the CD is an electronic record and once the requirement of Section 65B is fulfilled it becomes an admissible piece of evidence, like a document, and the video recorded therein is akin to contents of a document which can be seen and heard to enable the Court to draw appropriate inference(s). No doubt, there may be an occasion where to appreciate contents of a video an explanatory statement may be needed, but that would depend on the facts of a case. However, it is not the requirement of law that the contents of the video would become admissible only if it is reduced to a transcript in the words of a witness who created the video or is noticed in the video. Besides that, in the instant case, the search and seizure operation was sought to be proved by oral evidence of witnesses. The video, therefore, was perhaps to corroborate the oral testimony. Even the judgment of the trial court makes it clear that the video was played in court in the presence of all accused as well as both sides counsels and the presiding officer, upon seeing the video, could spot and confirm the presence of witnesses as well as the accused at the time of search and seizure. In such circumstances, in our view, a re-trial is not required only to explain the video.



**CIVIL APPEAL NOS.11339-11342 OF 2018**  
**ADDITIONAL DIRECTOR GENERAL ADJUDICATION, DIRECTORATE OF**  
**REVENUE INTELLIGENCE**

**vs.**

**SURESH KUMAR AND CO. IMPEX PVT. LTD. & ORS.**

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- 40. Applying the two maxims referred to above, this Court proceeded to take the view that though Section 65B4 is mandatory, yet it would all depend on the facts of each case, how the same could be said to have been duly complied with.
- 46. At this stage, we must also look into the observations made by this Court in the case of “Kum. Shubha @ Shubhashankar vs. State of Karnataka and Another,” reported in 2025 SSC online SC 1426 relied upon by the learned counsel appearing for the revenue. We quote:
- “A certificate not given in the prescribed format per se will not make it invalid, especially when the authenticity of these marked documents is not in dispute.”

# Journey continues.....

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*“[t]he potentially limitless application of computer technology to evidentiary questions will continually require legal adaptation.”*

**Penny v. Commonwealth, 370 S.E.2d 314, 317 (Va. Ct. App. 1988)**



**THANKS FOR PAYING  
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