

## A DETAILED ANALYSIS OF SECTION 65B OF THE INDIAN EVIDENCE ACT: ADMISSIBILITY OF ELECTRONIC EVIDENCE

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### ABSTRACT

*This study examines the evolution of the laws governing the admissibility of electronic evidence under Section 65B of the Indian Evidence Act, 1872 over time, as determined by a number of Supreme Court rulings. The author tries to discuss the current state of the laws regarding the use of electronic records as evidence. This article provides a general overview of the most recent Supreme Court case, Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors. Through this article, the author attempts to break down and analyse the judgement with regard to precedents and identify legal gaps present in the existing rules governing the admissibility of electronic evidence.*

**Keywords:** Electronic Evidence, E-Records, Section 65B, Indian Evidence Act, Certification.

### INTRODUCTION

In modern society, advances in technology are dramatically changing the way people work, communicate, and connect. Many operations have been digitized and the use of electronic devices has increased significantly. As a result, much information about an individual's employment, communication and other daily activities is stored in digital form. Because these records can be used to prove or disprove the existence of material facts or circumstances in a particular case, the laws of evidence must be amended accordingly to recognize and include records as admissible evidence. had. The two parts 65A and 65B dealing with electronic evidence and how and when electronic evidence may be admissible in Indian courts are contained in the Indian Evidence Act, 1872 which sets out the laws of evidence in India.<sup>1</sup>

Section 65A of the Indian Evidence Act lays down the rule that the contents of electronic evidence may be proved in accordance with the provisions of Section 65B which

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<sup>1</sup>AradhyaSethia, 'Rethinking Admissibility of Electronic Evidence' International Journal of Law and Information Technology (Oxford University Press, 2016)<<https://academic.oup.com/ijlit/article-abstract/24/3/229/2404491>> accessed on 15 June, 2023

comprehensively discusses the electronic devices and the circumstances in which any electronic evidence is recorded. It also talks about the use of technological gadgets for recording evidence.<sup>2</sup>

Section 65 B deals with the admissibility of electronic records. It has its genesis in Section 5 of the UK Civil Evidence Act, which was introduced by way of an amendment made by the proposal of the Law Commission of the United Kingdom in the year 2000.<sup>3</sup>

The Judiciary Commission stressed the need for new legislation regulating the submission of electronic evidence in court. He questioned whether current procedures offered "true security" and admitted that advances in technology had made the rules in place at the time inadequate.

Simply put, Section 65B stipulates he has two scenarios.

First, the creation of electronic records that are printed, stored, recorded, etc. on paper are treated as primary evidence and are directly admissible in legal proceedings. Second, in electronic evidence production cases where it is physically impossible to bring a computer system into court, records should be treated as secondary evidence. Such secondary evidence must be signed by personnel responsible for supervising the use of the device or related operations. Only then will it serve as evidence based on the information it contains.

Interpreted from the original law, Section 65B(1) defines computer output as any electronic device capable of storing, processing, or transmitting information, such as a computer, mobile phone, tape recorder, or video recorder. When this section is read in conjunction with section 2 of the Information Technology Act 2000, it can be assumed that electronic evidence is also involved.<sup>4</sup>

The requirements that must be met if certain parts or statements of the electronic record are offered at the hearing of a case are set out in section 65B(4). This clause stipulates that all electronic records provided as evidence must be accompanied by a certificate certifying their authenticity. The certificate should be attached to an electronic record such as a CD or USB stick.

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<sup>2</sup> Indian Evidence Act, 1872

<sup>3</sup> Civil Evidence Act, 1972

<sup>4</sup> Information and technology Act, 2000

The certificate must also address the conditions specified in section 65B(2), explain how the electronic record was created, and list details of the device used to create the record. I have. Finally, the certificate must be signed by a person who holds an official position and is responsible for operating the electronic device in question. You should only state that the certificate is made to the best of your knowledge and belief.<sup>5</sup>

Essentially, all of these measures are taken to ensure the legitimacy and provenance of all electronic records used as evidence. Without such controls, the entire electronic evidence-based process can lead to the mockery of justice, as electronic records are susceptible to falsification, alteration, transport, deletion, etc.<sup>67</sup>

### **PREVIOUS INTERPRETATIONS OF SECTION 65B THROUGH A TIMELINE OF CASES**

Before the recent Supreme Court case between Arjun Panditrao Kotkar and Kailash Kushanrao Gorantiyar & Ors. Electronic evidence admissibility law has evolved over time through a number of landmark decisions.

State (NCT of Delhi) v. Navjot Sandhu was the first major Supreme Court decision on the admissibility of electronic records in 2005, introducing secondary evidence of electronic records under Sections 63 and 65. said there is no limit Regardless of whether it meets the requirements of Section 65B.<sup>8</sup>

The Supreme Court reversed this decision in Anvar PV. upon. v. PK Basheer & Others 2014, stating that Sections 63 and 65 do not apply to secondary evidence in the form of electronic records, as Sections 65A and 65B only provide for this type of evidence. I'm here. The court held that sections 65A and 65B constitute the full norm governing the admissibility of information in electronic records and that electronic records submitted as secondary evidence may not require written certification under section 65B. It has been found that it is not permitted unless it meets the requirements of section 65B, including 65B, met. Further, it was

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<sup>5</sup> Aditya Mehta, Arjun Sreenivas and Swagata Ghosh, 'Section 65B Of The Indian Evidence Act, 1872: Requirements For Admissibility Of Electronic Evidence Revisited By The Supreme Court' (*Mondaq*, 2021) <<https://www.mondaq.com/india/civil-law/1035072/section-65b-of-the-indian-evidence-act-1872-requirements-for-admissibility-of-electronic-evidence-revisited-by-the-supreme-court>> accessed 15 July, 2023

<sup>6</sup> Ashwini Vaidiaingam, 'Authenticating electronic evidence: Section 65B, Indian Evidence Act, 1872' (*SSRN* 2020) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3694275](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694275)> accessed 15 July, 2023

<sup>7</sup> Olivier Leroux, 'Legal admissibility of electronic evidence' (*Taylor & Francis*, 2004) <<https://www.tandfonline.com/doi/pdf/10.1080/1360086042000223508>> cessed 16 July, 2023

<sup>8</sup> *State vs Navjot Sandhu* [2005] 11 SCC 600

ruled that the Evidence Act does not provide for or permit the use of oral evidence to prove electronic records unless the requirements of Section 65B are met. However, when the same electronic record is used as primary evidence under Section 62, it is accepted as evidence without having to meet the requirements set out in Section 65B.<sup>9</sup>

In *Tomaso Bruno and Anr. v. State of Uttar Pradesh 2015*, a three-judge bench of the Supreme Court held that secondary evidence in support of the content of the Article 65 document could be brought. The two judgments of the Supreme Court disagreed with this decision. However, the Supreme Court did not rely on Section 65B(4) or the legal principles established in *Anvar P.V. v. P.K. Basheer & Others* in its ruling. The Supreme Court, on the other hand, cited *State (NCT of Delhi) v. Navjot Sandhu*, which was expressly overturned in *Anvar P.V. v. P.K. Basheer & Others*.<sup>10</sup>

The Supreme Court ruled in *Shafhi Mohammed v. State of Himachal Pradesh 2018* that the certification requirements of Section 65B(4) are procedural in nature and not necessarily mandatory; A party may not request to provide a Section 65B certificate if the party does not control the device from which the document was created. The Court held that the procedural requirements of section 65B(4) should only apply where the electronic evidence is presented by the person responsible for the device in question and is therefore entitled to provide the necessary certification. made a judgment. However, Sections 63 and 65 cannot be excluded if the person does not own the device.<sup>11</sup>

**ARJUN PANDITRAO KHOTKAR VS. KAILASH KUSHANRAO GORANTYAL AND ORS. ON 14 JULY, 2020**

The factual background of this case is that Sri Arjun Panditrao Khotkar (Appellant), the successful Shiv Sena candidate, narrowly won the state legislative election and lost to the National Congress candidate Sri Kailash. - Mr. Kushanrao Gorantyal took office, Mr. Sri Vijay Chowdhury, a voter in his constituency, and one other (respondent). An objection was filed on the grounds that Smt. Mutha, a returning officer (RO) of the Electoral Commission, received the applicant's nomination documents after the deadline, and the defendants found that this did not comply with the law and, therefore, the nomination of the applicant for election was subject to refusal.

<sup>9</sup>*Anvar PV vs PK Basheer*[2014] 10 SCC 473.

<sup>10</sup>*Tomaso Bruno & Anr vs State Of U.P.*[2015]SCC OnLine All 4139

<sup>11</sup>*Shafhi Mohammed vs State of Himachal Pradesh*[2018] SCC 705

Defendants sought to use video camera recordings inside and outside the RO office to support their claims. After the Supreme Court ordered the submission of the original video recordings of the two days allotted for submitting nomination documents, the Electoral Commission submitted the video compact disc (VCD) to the court. These VCD recordings made it very clear that the nominations were submitted after the deadline. It should be noted, however, that despite the defendant's request, the RO office refused to provide a certificate under section 65B(4) of the Act with her VCD.

The main issue for the Supreme Court to decide was whether the VCD could be used as evidence without such certification. Interestingly, on cross-examination, a representative from the RO office admitted that there were no complaints about the effectiveness of the video cameras installed there. She also admitted that cameras were frequently used to capture events in RO's offices and VCDs of the footage were made daily. The VCD was nevertheless recorded in the Electoral Commission documents. In light of this cross-examination evidence, the Supreme Court ruled that the statutory conditions regarding the reliability of electronic evidence were met. The Court found that the requirement for the production of a Section 65B(4) certificate had been materially met and that oral testimony of this kind was not prohibited by Section 65B. The Supreme Court allowed the admission of the CD and VCD as evidence after concluding that the requirement to submit a section 65B certificate was "substantially satisfied."

The case was then appealed to be heard at the Supreme Court where it was sent to a full bench for further consideration. In the appeal before the Supreme Court, the main contention was that a written and signed 65B (4) certificate was required for the admissibility of electronic records in accordance with a previous decision by three Justices in Anvar P.V. v. P.K. Basheer and no oral evidence could be introduced in support thereof.

It was therefore argued that without such a certificate he would not have admitted the VCD as evidence. Anvar P.V. and the ruling in Shafhi Mohammad v. State of H.P., in which two additional Supreme Court justices held that the certification requirements of Section 65B(4) were not necessarily mandatory and could be relaxed for the interest of justice. Judgments were made, both with two judges. The issue was clarified by a three-judge committee in Arjun Panditrao, as there appeared to be a contradiction between the interpretation of Article 65B by the three judges in Anvar and the two judges of Shafi. change The decision in Anvar, which held that Sections 65A and Section 65B fully govern the admissibility of electronic

evidence under the Act, to the exclusion of the regular procedures provided in other parts of the Act, was upheld by three Justices of the Supreme Court. The Shafhi observations were declared per incuriam. In all instances where the original electronic record (as stored on a computer device) cannot be produced before the Court, it was decided that a 65B (4) certificate was necessary.<sup>12</sup>

## **BREAKDOWN OF THE JUDGEMENT**

### **1. A special code, Sections 65A and 65B governs both primary and secondary evidence of electronic records.**

The Supreme Court held that the admissibility and certification of information contained in electronic records must comply with the special provisions of section 65B as to the manner and that the non-mandatory provision of section 65B(1) supersedes section 62. made a verdict. Section 65 of the Evidence Act includes evidence of information contained in electronic records.

### **2. The certificate under Section 65B (4) is only necessary when using electronic records as secondary evidence, or "computer output."**

In accordance with Anvar P.V., it was determined in Arjun Panditrao that the original document itself—that is, the original "electronic record" contained in the "computer" in which the information is first stored—would suffice as the necessary certificate under Section 65B (4) of the Evidence Act. The Supreme Court also clarified that owners of laptops, computers, or mobile phones can prove originals by testifying in court and certifying that the device in question is their property. On the other hand, the Supreme Court found compliance with section 65B to be an essential requirement of admissibility in the case of "computer output" as secondary evidence for electronic records. In this connection, it has been pointed out that if a "computer" is part of such a system, it becomes physically impossible to find and manufacture a "computer system" or "computer network". Accordingly, the only way to certify the information contained in such electronic records is to submit the required Section 65B(4) certification.

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<sup>12</sup>*Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors.*, [2020] 14 SCC 796.

**3. Anvar PV, which was delivered by a larger bench, prevails over Shafhi Mohammed and Tomaso Bruno.**

According to the Supreme Court, Shafhi Mohammed misstates the law and contradicts the ruling in Anvar P.V. Furthermore, it was decided that Tomaso Bruno was per incuriam and thus overruled for mentioning Navjot Sandhu but not Anvar P.V. It also stated that Tomaso Bruno does not accurately state the law and cannot be relied upon

**4. A party who is unable to obtain the certificate as required by Section 65B (4) may apply to the Court for a summons to the party qualified to attest to the contents of the certificate.**

Moreover, the Court found that in Arjun Panditrao's particular circumstances, despite the best efforts of the parties to obtain the necessary proof under section 65B(4) of the Evidence Act, the relevant authorities through the courts, or He acknowledged that he had refused to acquire it under various pretexts.

At this point, the Court decided that the Latin proverbs "lex non cogitadimpossibilia" (the law does not require the impossible) and "impotentiaexcusatLegem" (claiming obedience) was not applicable. Therefore, the parties should be exempt from the mandatory strictness of Section 65B(4).

**5. With certain exceptions, the certificate under Section 65B (4) must typically be produced with the electronic record when it is produced in evidence.**

The Supreme Court upheld Anvar P.V.'s decision. The ruling states that in most cases, the certificate must be submitted with the electronic record when presented as evidence. However, the trial judge should summon the person named in section 65B(4) and require that the certificate be issued by that person, and at that stage: I made one thing more clear. If a party seeking to rely on an electronic record cannot obtain a certificate, the record will be presented as evidence without the required certificate. The Supreme Court hastened to add that in civil cases, discretionary powers must be exercised according to the law and judicial standards based on the facts of the case.

It also determined that all documents contained in the indictment must be delivered to the defendant at the time of prosecution. It is at this time that documentary evidence is admissible

in criminal proceedings. Accordingly, the certification and electronic evidence or computer output required by Section 65B(4) must be presented at least before the hearing begins. This clarified the law established in the State of Karnataka v. M.R. Hiremath to some extent. The court added that prosecutors should not be allowed to fill gaps in criminal proceedings, as cases against defendants are presumed to have been filed before the trial began. The only situation where this general rule does not apply is when the Public Prosecutor's Office "accidentally" fails to provide the required documents. The court may, where appropriate, allow the prosecutor to present the certificate at a later date.<sup>13</sup>

The court ultimately decided that, subject to the limitations established for criminal trials, the certificate under Section 65B (4) could be filed at any point during the trial, prior to the conclusion of the hearing, at which point the data present in the electronic record could be admitted and used as evidence and with these remarks, the Supreme Court reaffirmed that Section 65B (4)'s certificate requirement is a prerequisite to the admissibility of evidence in the form of an electronic record and that Section 65B (4)'s provisions are an essential part of the law. According to R.F. Nariman J, "Secondary evidence is only admissible if it is led in accordance with the instructions and not in any other way, according to Section 65B (4) of the Evidence Act. If this were to be decided, Section 65B (4) would be useless."<sup>14</sup>

### **LOOPHOLES IN THE SUPREME COURT JUDGEMENT AND THE LAW AS MENTIONED IN SECTION 65B OF THE INDIAN EVIDENCE ACT, 1872**

Through the judgement in the *Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors.*, it is noticed that there are still many loopholes that require to be filled so that the Indian judiciary adopts a more nuanced and informed approach to electronic evidence in order to ensure that the admissibility standards are appropriate and consistent.

Criticism of judgments is based on reliance on circumstantial evidence, with Supreme Court judgments relying heavily on circumstantial evidence, circumstantial evidence is considered less reliable than direct evidence, and the admissibility of electronic evidence It points out that it is considered too lenient as a standard for It was also found that the ruling did not

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<sup>13</sup> A. K. Upadhyay, 'Settlement of confusion in the mandates of certification of electronic evidence and the Arjun Panditrao Khotkar case' (*The Daily Guardian*, 2020) <<https://thedailyguardian.com/settlement-of-confusion-in-the-mandates-of-certification-of-electronic-evidence-and-the-arjun-panditrao-khotkar-case/>> accessed 20 July, 2023

<sup>14</sup> Gaurav Mahajan and Saksham Babbar, 'Decoding the SC decision in "Arjun Panditrao Khotkar V/s Kailash Kushanrao Gorantyal and others"' (*Axfait*, 2021) <<https://www.axfait.com/post/decoding-the-sc-decision-in-arjun-panditrao-khotkar-v-s-kailash-kushanrao-gorantyal-and-others>> accessed 20 July, 2023



consider technical aspects of electronic evidence, such as the possibility of falsification or manipulation of data. This has raised concerns that courts may not fully understand the implications of the evidence presented in the case. In addition, the judgment did not provide clear guidance on the admissibility of electronic evidence in India, and all decisions to date have adopted inconsistent approaches, leaving room for further ambiguity. , there was also a lack of guidance on the admissibility of electronic evidence.

Furthermore, as mentioned in Section 65B, several legal loopholes have been identified regarding the admissibility of electronic evidence in India.

- **Ambiguity in the definition of electronic evidence:** The definition of electronic evidence in the Indian Evidence Act, 1872 may lead to confusion and ambiguity regarding the admissibility of electronic evidence in court.

- **Difficulty in authenticating:** Because electronic evidence is often stored and processed by computers and other digital devices, questions can arise as to its authenticity and reliability. Proving the authenticity of electronic evidence can be difficult, especially if the device has been tampered with or the data altered.

- **Inadequate storage and retrieval arrangements:** Current Indian law does not provide adequate provisions for the storage and retrieval of electronic evidence. This can lead to important evidence being lost or destroyed, making it difficult to rely on electronic evidence in court.

Although electronic evidence is becoming increasingly important in court proceedings, there are several loopholes in current Indian law that make it difficult to rely on electronic evidence in court. Efforts are needed to fill these gaps and improve the legal framework for the admissibility of electronic evidence in India.<sup>15</sup>

## CONCLUSION

The purpose of Section 65-B of the Evidence Act of 1872 was to facilitate the creation of electronic records in court. But complicated procedures and conflicting court decisions have created more confusion than clarity. Laws aimed at the realization of justice, especially

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<sup>15</sup>B. Indulia 'The decision in Arjun Panditrao: Admissibility of electronic evidence in India continues to face Hurdles', (SCC Blog, 2021) <<https://www.sconline.com/blog/post/2021/06/07/electronic-evidence-2/>> accessed 20 July, 2023

procedural law, must not impede the administration of justice. Laws must be flexible and adaptable to changing circumstances. In the recent Arjun Panditrao Kotkar case, the Supreme Court emphasized mandatory findings under Section 65B(4). Today it is common to record crime scenes, street riots and other incidents with mobile phones. However, it is against the legislative body's intent to make these records illegal because of the complex procedures set out in section 65B(4). It is therefore imperative that the Indian Parliament review these provisions and provide an easy way to approve electronic records to enable timely trials.

