Electronic Evidence & its Appreciation

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1. **Kinds of Evidence (Section 3 of the Evidence Act, 1872):** Evidence is of following kinds:
   (i) Oral Evidence (i.e. statements of witnesses)
   (ii) Documentary Evidence (i.e. contents of documents)
   (iii) Electronic Records (contents in soft forms or voice in computers, CD, mobile, tape recorder, e-mail and other electronic devices)
   (iv) Tangible Objects (sticks, lathis, bamboos, iron rods, swords, spears, knives, pistols, guns, cartridges, metals, explosives, splinters of bombs and other explosive devices, bones, hairs, ornaments, clothes, ropes, wires, poisons, gases, liquids and other tangible objects etc.)

2. **Definition of "Electronic Evidence":** Section 3(2) of the Evidence Act defines the expression "documentary evidence". After passing of the Information Technology Act, 2000, Section 3 of the Evidence Act has been amended and the expression "documentary evidence" now includes electronic records as well to be documentary evidence.

3. **Different Sections in Evidence Act regarding 'electronic evidence':** Following Sections of the amended Evidence Act wef 17.10.2000 provide for electronic evidence:

Section 45-A:	Opinion of Examiner of Electronic Evidence
Section 47-A:	Opinion as to electronic signature which relevant
Section 59:	All facts, except the contents of documents or electronic records, may be proved by oral evidence
Section 65-A:	Special provisions as to evidence relating to electronic record
Section 65-B:	Admissibility of electronic records
Section 67-A:	Proof as to electronic signature
Section 73-A:	Proof as to verification of digital signature
Section 81-A:	Presumption as to Gazettes in electronic forms.
Section 85-A:	Presumption as to electronic agreements.

Section 85-B:	Presumption as to electronic records and electronic signatures.
Section 85-C:	Presumption as to Electronic Signature Certificates
Section 88:	Presumption as to telegraphic messages
Section 88-A:	Presumption as to electronic messages
Section 90-A:	Presumption as to electronic records five years old
Section 131:	Production of documents or electronic records which another person, having possession, could refuse to produce.

4. **Recording of statement of witness or confessional statement of accused u/s 164 CrPC by audio–video electronic means in presence of advocate of accused wef 31.12.2009:** A new Proviso substituted to sub-section (1) of Section 164 CrPC wef 31.12.2009 reads thus: "**Provided** that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in presence of the advocate of the person accused of an offence: **Provided** further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force."

5. **Statement of eye witnesses u/s 164 CrPC to be recorded by audio-video electronic means:** It is necessary that the statements of eye witnesses are got recorded during investigation itself u/s 164 of the CrPC. In view of the amendments in Section 164 CrPC in 2009 w.e.f. 31.12.2009, such statement of witnesses should be got recorded by audio-video electronic means. The eye-witnesses must be examined by the prosecution as soon as possible. Statements of eye-witnesses should invariably be recorded u/s 164 CrPC as per the procedure prescribed thereunder. See: Doongar Singh vs. State of Rajasthan, 2017 SCC OnLine SC 1391 (paras 12 & 13).

6. **Mode of proving contents in primary or secondary electronic devices like DVD, CD, Pen Drive etc:** Evidence like DVDs, CDs, pen drives are admissible in constitutional courts. For instance, any storage device that is primary in nature must be admissible in court. For primary evidence to be submitted as evidence, it is necessary that the data is presented in the court as stored in the DVD itself. In other words, the original media has to be self-generated or recorded and stored in the device directly and not by copying from any other storage device. But if on the other hand, the device on which the data was restored was copied from the original source and then is being presented as a duplicate version, it will be subject to a test and will have to pass the test of authenticity i.e. conditions laid down in Section 65-B of Indian Evidence Act. Whereas,

if a storage device in question is secondary in nature and is a copy of the original one, then it has necessarily to pass the test of validity with respect to the provisions of Section 65(B) as was held in the case of **Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473 (Three-Judge Bench)**. The precedence laid down by the courts in the subsequent years has helped the criminal justice system in delivering justice and it has ensured that the CCTV footage is authentic and can be relied upon. See: Judgment dated 12.02.2016 of Division Bench of Delhi High Court in Kishan Tripathi@ Kishan Painter Vs. State.

7. **Electronic records & their appreciation:** With the passage of the **'Information Technology Act, 2000'** as further amended by the Parliament in the year 2008 (Central Act No. 10 of 2009), the expression "document" now includes **"electronic records"** also**.**

8. **"Compact Disc" is a 'document' in Evidence Act and admissible in evidence as per Section 294(1) CrPC without endorsement of admission or denial by the parties:** Definition of 'document' in Evidence Act, and the law laid down by this Court, as discussed above, we hold that the compact disc is also a document. It is not necessary for the Court to obtain admission or denial on a document under sub-section (1) to Section 294, CrPC personally from the accused or complainant or the witness. The endorsement of admission or denial made by the Counsel for defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of section 294 CrPC. Similarly on a document filed by the defence, endorsement of admission or denial by the public prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. In case it is admitted, it need not be formally proved, and can be read in evidence. In a complaint case such an endorsement can be made by the Counsel for the complainant in respect of document filed by the defence. See: State of UP Vs. Ajay Kumar Sharma, 2016 (92) ACC 981 (SC)*(para 14)*.

9. **CCTV footage admissible in evidence u/s 65-B, Evidence Act:** In the case noted below, the electronic record i.e. CCTV footage and photographs revealed the presence of the injured informant and victim near the mall from where they had boarded the bus. The CCTV footage near the hotel where the victims were dumped showed moving of white coloured bus having green and yellow stripes and the word "Yadav" written on it. The bus exactly matched the discription of the offending bus given by the injured informant and the victim. Evidence of the Computer Cell Expert revealed no tampering or editing of the CCTV

footage. The Supreme Court found the CCTV footage to be craditworthy and acceptable u/s 65-B of the Evidence Act. See: Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench)

10. **An offence of obscenity u/s 292 IPC is covered u/s 67 of the IT Act, 2000**: Where there are two special statutes which contain non obstante clauses, the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause, it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply. The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act, the offender gets out of the net of the IPC (in this case Section 292 IPC). It is apt to note here that electronic forms of transmission are covered by the IT Act which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC. See: Sharat Babu Digumarti v. Govt. of NCT of Delhi AIR 2017 SC 150 (Para 32)

11. **In the event of non obstante clauses in two Act, later Act shall prevail:** Where there are two special statutes which contain non obstante clauses, the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause, it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply. See: Sharat Babu Digumarti v. Govt. of NCT of Delhi AIR 2017 SC 150 (Para 31)

12. **'Facebook' as a public forum facilitates expression of public opinion:** Facebook is a public forum and it facilitates expression of public opinion. Posting of one's grievances against machinary even on govt.

facebook page does not buy itself amount to criminal conduct. A citizen has right to expression under Article 19(1)(a) & (2) of the Constitution of India. See: Manik Taneja Vs. State of Karnataka, (2015) 7 SCC 423.

13. **Whatsapp message not being in public view held not to constitute offence under the SC/ST Act:** In the present case, the convict / appellant had sent certain offending messages to the complainant of the SC community through the Whatsapp but the contents of the messages were not in public view, no assault had occurred nor was the appellant in such a position so as to dominate the will of the complainant. The Supreme Court held that even if the allegations set out by the complainant with respect to the Whatsapp messages and words uttered were accepted on their face, no offence was made out under the SC/ST Act (as it then stood). The allegations on the face of the FIR did not establish the commission of the alleged offences. See: Pramod Suryabhan Pawar Vs. State of Maharashtra, AIR 2019 SC (Criminal) 1489.

14. **Changing chat on facebook from private to public would amount to chat in public view and would attract SC/ST Act:** In the case noted below, the informant stated that her husband/accused harassed and abused her caste on social network site, the facebook. Defence of the accused/husband was that the facebook wall of a member cannot be described as place within 'public view'. Change of privacy settings from public to private makes person's post not accessible to the members other than those befriended with the author. In the present case, the offending post fell foul of Section 3(1)(x) of the SC/ST Act even when the settings were private and punishable. If the befriended member was independent, impartial and not interested in any of the parties, privacy settings on facebook as private or public would make no difference for attracting the SC/ST Act. See: Gayatri alias Apurna Singh Vs. State and Another, 2018 ADR 384.

15. **Intermediary like Google and accused both liable for defamation done in electronic form**: There is no bar u/s 79 of the Information Technology Act, 2000 as it stood before its amendment w. e. f. 27.10.2009 to prosecute a person u/s 500 IPC for having committed defamation by publication through electronic devices. Section 79 did not give immunity from criminal liability under general penal law. The intermediary, in this case the Google, is also liable for criminal liability u/ 500 IPC if it does not remove the defamatory publication despite having power and right to remove it when called upon to do so by the person defamed**.** See: Google India Private Limited Vs. Visaka Industries, (2020) 4 SCC 162

16. **Section 3 (as amended vide the Information Technology (Amendment) Act, 2008) (Central Act No. 10 of 2009):** The expressions, Certifying Authority, electronic signature, Electronic Signature Certificate, electronic form, electronic records, information, secure electronic record, secure electronic signature and subscriber shall have the meanings respectively assigned to them in the Information Technology Act, 2000.

17. **Section 17: Admission defined**: An admission is a statement, (Oral or documentary or contained in electronic form), which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

18. **Section 22-A: When oral admission as to contents of electronic records are relevant:** Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.

19. **Section 34: Entries in books of accounts including those maintained in an electronic form, when relevant**: (Entries in books of accounts including those maintained in an electronic form), regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

20. **Section 35: Relevancy of entry in public record or an electronic record made in performance of duty:** An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, is itself a relevant fact.

21. **Conviction of wife for murder of her husband recorded on parrot's evidence by American Court:** There was a media report in newspapers and the electronic media on 14.07.2017 that a Michigan based Court in America recorded conviction of wife for murdering her husband on the basis of evidence of an African grey parrot. It is for the first time in the judicial history of the world when a parrot was treated as witness and its evidence was relied on by the Court in convicting the accused. The facts of the case were that at the time when the wife of the victim was threatening to shoot her husband, the hushand repeatedly requested her

by saying "don't shoot". The parrot was the only witness to the incident. On being produced in the Court, the parrot repeated the same very words "don't shoot". The said words repeatedly used by the parrot in the Court were so clear and unambigous that the Court believed the parrot's testimony and held the wife guilty of murder of her husband. There is, however, no such instance in India when a bird's testimony has been used in Indian Courts as admissible evidence under Indian laws. The position in India is that a bird cannot be treated as a competent witness in Indian Courts as only the human beings in the existing law of India are treated as witnesses in Courts.

22. **Alleged translated version of voice cannot be relied on without producing its source:** Interpreting Sections 65-A & 65-B of the Evidence Act, it has been held by the Hon'ble Supreme Court that where the voice recorded was inaudible and the voice recorder was not subjected to analysis, the translated version of the voice cannot be relied on without producing the source and there is no authenticity for translation. Source and it authenticity are the two key factors for an electronic evidence. See:
    (i) Harpal Singh Vs. State of Punjab, (2017) 1 SCC 734 (on electronic evidence in the nature of call details)
    (ii) Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke & Others, (2015) 3 SCC 123

23. **Section 66A of the Information Technology Act, 2000 struck down by the Supreme Court in its entirety being violative of Article 19(1)(a) of the Constitution:** Section 66A of the Information Technology Act, 2000 is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. If the Section does not require that such message should have a clear tendency to disrupt public order, such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent - there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or

tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyance, either 'persistently' or otherwise without in any manner impacting public order. Viewed at either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates. Equally, Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which 'incites' anybody at all. Written words may be sent that may be purely in the realm of 'discussion' or 'advocacy' of a 'particular point of view'. Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66A has nothing to do with 'incitement to an offence'. As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject-matters under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2), is declared as unconstitutional. Section 66A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be obscene at all - in fact the word 'obscene' is conspicuous by its absence in Section 66A. If one looks at Section 294 of the Penal Code, the annoyance that is spoken of is clearly defined - that is, it has to be caused by obscene utterances or acts. Equally, under Section 510, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66A which in stark contrast uses completely open ended, undefined and vague language. Incidentally, none of the expressions used in Section 66A are defined. Even 'criminal intimidation' is not defined - and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act. Hence, S. 66A is unconstitutionally vague. Applying the tests of reasonable restriction, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such

right. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total. Thus S. 66A is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of over breadth. See: Shreya Singhal Vs. Union of India, AIR 2015 SC 1523.

24. **Sending offensive message online not punishment u/s 66A of the Information Technology Act, 2000 as Section 66A is constitutionally invalid:** If Section 66A of the Information Technology Act, 2000 is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered. Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. The possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void. Further, Section 66A does not fall within any of the subject-matters contained in Article 19(2) and the possibility of its being applied for purposes outside those subject-matters is clear. Therefore, no part of Section 66A is severable and the provision as a whole must be declared unconstitutional. See: Shreya Singhal Vs. Union of India, AIR 2015 SC 1523.

25. Admissibility and evidentiary value of tape recorded conversation (S. 7, Evidence Act): With the introduction of **Information Technology Act, 2000** "electronic records" have also been included as documentary evidence u/s 3 of the Evidence Act and the contents of electronic records, if proved, are also admissible in evidence. Tape recorded conversation is admissible in evidence provided that the conversation is relevant to the matters in issue, that there is identification of the voice and that the accuracy of the conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible u/s 7 of the Evidence Act. It is also comparable to a photograph of a relevant incident. See: R.M. Malkani Vs. State of Maharashtra, AIR 1973 SC 157.

26. Preconditions for admissibility of tape recorded conversation: A tape recorded statement is admissible in evidence, subject to the following conditions:

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

(2) The accuracy of the tape recorded statement must be proved by the maker of the record by satisfactory evidence: direct or circumstantial.

(3) Possibility of tampering with, or erasure of any part of, the tape recorded statement must be totally excluded.

(4) The tape recorded statement must be relevant.

(5) The recorded cassette must be sealed and must be kept in safe or official custody.

(6) The voice of the particular speaker must be clearly audible and must not be lost or distorted by other sounds or disturbances. See:

(i) Ram Singh & others Vs. Col. Ram Singh, 1985 (Suppl) SCC 611

(ii) State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, 2005 SCC

(Cri) 1715---- (known as Parliament attack case)

Note : *State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, 2005 SCC (Cri) 1715 (known as Parliament attack case) now overruled by a Three-Judge Bench in Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473 (Three-Judge Bench) observing that in the absence of certificate u/s 65-B of the Evidence Act, a secondary evidence of electronic records like CD, VCD, Chip etc. is not admissible in evidence.*

27. **Secondary evidence of electronic records inadmissible unless requirements of Section 65-B are satisfied:** Proof of electronic record is a special provision introduced under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B 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 on secondary evidence under Section 63 and 65 has to yield. An electronic record by way of secondary evidence therefore 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. See:

(i) Anvar P.V. Vs. P.K. Basheer & Others, AIR 2015 SC 180 (Three-Judge Bench)

(ii) Harpal Singh Vs. State of Punjab, (2017) 1 SCC 734

Note: *Decision in State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, 2005 SCC (Cri) 1715 now overruled by a Three-Judge Bench of the Hon'ble Supreme Court vide Anvar P.V. Vs. P.K. Basheer, AIR 2015 SC 180 (Three-Judge Bench).*

28. **Certificate u/s 65-B of Evidence Act must if secondary copy of CD, VCD, chip, CDRs etc. is produced in court:** Proof of electronic record is a special provision introduced by the IT Act, 2000 amending various provisions under the Evidence Act. The very caption of section 65-A of the Evidence Act read with section 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. Further, the evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Special law will always prevail over the general law. Sections 59 and 65-A deal with the admissibility of electronic records. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Section 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by the Supreme Court in *Navjot Sandhu*, (2005) 11 SCC 600, did not lay down the correct legal position, and hence was overruled. An electronic record

by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc, the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. As per *Sonu Vs. State of Haryana,* (2017) 8 SCC 570, an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by the Supreme Court, is whether the defect could have been cured at the stage of marking the documents. If an objection was taken to the CDRs being marked without the certificate, the court could have given the prosecution an opportunity to rectify the deficiency. Further, objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. *Anvar P.V. Vs. P.K. Bashir,* (2014) 10 ACC 473, as clarified, is the law declared by the Supreme Court on Section 65-B of the Evidence Act. The judgment in *Tomaso Bruno Vs. State of U.P.,* (2015) 7 SCC 178, being per incuriam, did not lay down the law correctly. Also, the judgment in *Shafhi Mohammad,* (2018) 2 SCC 801 and *Shafhi Mohammad Vs. State of H.P.,* (2018) 5 SCC 311, did not lay down the law correctly and were therefore overruled. As per *Anvar P.V. Vs. P.K. Bashir,* (2014) 10 ACC 473, case as clarified in *Arjun Panditrao Khotkar Vs. Kailash Kushanrao Goranthyal,* (2020) 7 SCC 1, the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned on which the original information is first stored is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V.* case which reads as "…. if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act…." has been clarified: it is to be read without the words "under Section 62 of the Evidence Act, …". With this clarification, the law stated in para 24 of *Anvar P.V.* case has been affirmed. The general

directions issued in para 64 of *Arjun Panditrao Khotkar Vs. Kailash Kushanrao Goranthyal,* (2020) 7 SCC 1 case are to be followed by courts that deal with electronic evidence to ensure their preservation and production of certificate at the appropriate stage. These directions shall apply in all proceedings till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by the telecom and internet service providers. It must now be taken to have been settled that the decision of the Supreme Court in *Anvar P.V. Vs. P.K. Bashir,* (2014) 10 ACC 473 case as clarified in *Arjun Panditrao Khotkar Vs. Kailash Kushanrao Goranthyal,* (2020) 7 SCC 1 case is the law declared on Section 65-B of the Evidence Act. See: Mohd. Arif Vs. State (NCT of Delhi) (2023) 3 SCC 645, (Three-Judge Bench)

29. **Oral evidence cannot be led in place of certificate required by Section 65-B (4) to prove electronic evidence:** Certificate u/s 65-B(4) of the Evidence Act is mandatory to produce electronic evidence. Oral Evidence in place of such certificate cannot possibly suffice. See: Judgement dated 04.05.2022 of the Hon'ble Supreme Court in Ravinder Singh alias Kaku vs. State of Punjab.

30. **Certificate u/s 65-B required only for secondary tape recorded conversation and not for primary**: Where original tape-recorded conversation of randsom calls was handed over to police, it has been held by a Three-Judge Bench of the Supreme Court that since the original tape-record was primary evidence, therefore, certificate u/s 65-B of the Evidence Act was not required for its admissibility. Such certificate u/s 65-B is mandatory only for secondary evidence and not for the primary evidence i.e. the original tape-recorded conversation. See:
    (i) Arjun Panditrao Khotkar Vs. Kailash Kushan Rao Gorantyal, (2020) 7 SCC 1 (Three-Judge Bench).
    (ii) Vikram Singh Vs. State of Punjab, (2017) 8 SCC 518 (Three-Judge Bench).

31. **Certificate u/s 65-B(4) of the Evidence Act is not always necessary**: In the case noted below, a Two-Judge Bench while distinguishing the Three-Judge Bench decision in P. K. Basheer has held that the requirement of a certificate u/s 65-B (4) of the Evidence Act is not always necessary. A piece of evidence / material object should not be kept out of court's consideration on the ground that the certificate u/s 65-B (4) of the Evidence Act is not available because the ultimate object of a criminal prosecution is to arrive at the truth. See: Shafhi Mohammad Vs. State of H. P., (2018) 2 SCC 801.

Note: *The decision in Shafhi Mohammad Vs. State of H. P., (2018) 2 SCC 801 of the Two-Judge Bench has now been referred on 26.07.2019 by the Supreme Court to a larger Bench.*

32. Mobile phone used in committing offence should be taken into safe custody without delay to prevent destruction or manipulation of data: In a case in which a mobile phone is used for the commission of the crime, the first and foremost thing the police officer should have done was to secure the phone to prevent the destruction or manipulation of data. Given the nature of evidence to be copied, maintaining the evidential continuity and integrity of the evidence that is copied is of paramount importance. See: Kerala in Vijesh v. The State of Kerala and Ors. 2018 (4) Kerala Law Journal 815

33. Conversation on telephone or mobile & its evidentiary value: Call records of (cellular) telephones are admissible in evidence u/s 7 of the Evidence Act. There is no specific bar against the admissibility of the call records of telephones or mobiles. Examining expert to prove the calls on telephone or mobile is not necessary. Secondary evidence of such calls can be led u/s 63 & 65 of the Evidence Act. The provisions contained under the Telegraph Act, 1885 and the Telegraph Rules, 1951 do not come in the way of accepting as evidence the call records of telephone or mobile. See: State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, 2005 SCC (Cri) 1715. (known as Parliament attack case).

Note: *State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, 2005 SCC (Cri) 1715 (known as Parliament attack case) now overruled by a Three-Judge Bench in Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473 (Three-Judge Bench)= AIR 2015 SC 180 (Three-Judge Bench) observing that in the absence of certificate u/s 65-B of the Evidence Act, a secondary evidence of electronic records like CD, VCD, Chip etc. is not admissible in evidence.*

34. Mode of proving contents in mobile, computer, laptop, tablet etc: Required certificate under Section 65B(4) of the Evidence Act is unnecessary if the original document itself is produced. This can be done by the owner of a laptop, computer, computer tablet or even a mobile phone by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only

means of providing information contained in such electronic record can be in accordance with Section 65B(1) of the Evidence Act together with the requisite certificate under Section 65B(4) of the Evidence Act. See: Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors. AIR 2020 SC 4908.

35. Information contained in computers: The printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Such secondary evidence is admissible u/s 63 and 65 of the Evidence Act. See: State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, 2005 SCC (Cri) 1715---- (known as Parliament attack case).

Note: *State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru, 2005 SCC (Cri) 1715 (known as Parliament attack case) now overruled by a Three-Judge Bench in Anvar P.V. Vs. P.K. Basheer, (2014) 10 SCC 473 (Three-Judge Bench)= AIR 2015 SC 180 (Three-Judge Bench) observing that in the absence of certificate u/s 65-B of the Evidence Act, a secondary evidence of electronic records like CD, VCD, Chip etc. is not admissible in evidence.*

36. Cell phone is equivalent to a computer: In the case noted below, it has been held that a cell phone fulfills the definition of a computer under the IT Act and the tampering of the unique numbers i.e. computer source codes/ ESN(Electronic Serial Number) attracts Section 65 of the IT Act. See: Syed Asifuddin and Ors. vs. The State of Andhra Pradesh and Ors. 2005 Cri LJ 4314 (A.P.).

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