

Resolving The Conundrum: Section 65B Of Indian Evidence Act, 1872

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Section 65B of Indian Evidence Act: The Verdict of the Apex Court
The Apex Court in the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors.*^[1] brought an end to an ongoing conflict w.r.t. interpretation of Section 65B of Indian Evidence Act, 1872 ("Evidence Act"). The conundrum lies between division bench judgment in the case of *Shafhi Mohammad v. State of Himachal Pradesh*^[2] and *Anvar P.V. v. P.K. Basheer*^[3]. The bench comprising of RF Nariman, S. Ravindra Bhat and V. Ramasubramanian, held that the certificate required u/s 65B (4) is a condition precedent to the admissibility of evidence by way of an electronic record. The Court further clarified that the required certificate u/s 65B (4) is unnecessary if the original document itself is produced.

Introduction - Section 65B of Indian Evidence Act

On July 14th, 2020, a three-judge bench of the Apex Court delivered its decision in the instant case pursuant to a reference made by a two-judge bench of the Apex Court on July 06th, 2019.

Hon'ble Apex Court has *inter alia* held that the decision in *Anvar P.V. v. P.K. Basheer*, with the clarification provided by the Apex Court in *Arjun Panditrao Khotkar*, shall govern the law on Section 65B of Indian Evidence Act, 1872. Consequently, the Hon'ble Apex Court has held the decision in the case of *Shafhi Mohammad* per incuriam. Moreover, the Court issued general directions to be followed by the courts that deal with electronic evidence to ensure their preservation and production of the certificate at the appropriate stage.

The Hon'ble Apex Court has also made recommendations for framing rules/directions in the exercise of powers u/s 67C of the Information Technology Act, 2000 ("IT Act"). Recommendations also include framing suitable rules for the retention of data involved in the trial of offences, rules of the chain of custody, stamping and record maintenance, etc.

Factual Matrix & Procedural Background

Arjun Panditrao Khotkar preferred Civil Appeals with SLP, against the judgment and order of the High Court of Judicature at Bombay, in Election Petition Nos. 6 and 9 of 2014. The High Court had set aside the election of *Arjun Panditrao Khotkar* to Jalna Legislative Assembly Constituency, Maharashtra for a term commencing from November 2014. An important piece of evidence relied upon by the petitioners before the High Court in challenging

this election was video recording from a CCTV camera placed outside the office of the Returning Officer, which was produced pursuant to the direction of the High Court.

However, the officers that produced the video recording in a compact disc ('CD') didn't submit/furnish a certificate u/s 65B of the Evidence Act despite repeated requests from the Petitioners and direction of the High Court. Thereafter, the Returning Officer was cross-examined by the petitioner to check the veracity, authenticity, and integrity of the CDs.

The High Court held *inter alia* that the officers did not produce the certificate u/s 65B (4) of the Evidence Act despite its direction and that the testimonial evidence of the Returning Officer has satisfied the requirement of Section 65B (4) of the Evidence Act. The High Court further held that oral evidence on the contents of an electronic record in place of written certificate u/s Section 65B (4) of Evidence Act, is not barred by the Evidence Act.

The appellant challenged the judgment and order passed by the High Court before the Apex Court on the ground that the electronic record viz. CDs could not have been admitted into evidence without the certificate u/s 65B (4) of Evidence Act. The Appellant relied on the decision of the Apex Court in *Anvar P.V. v. P.K. Basheer*. Initially, the bench, citing *Anvar P.V.*, opined that the decision of the Hon'ble Apex Court in the case of *Shafhi Mohammad* may require reconsideration by a larger bench. Therefore, appeals were accordingly referred to a three-judge bench, which heard them and pronounced its unanimous decision on July 14th, 2020.

Application Of The Statute

Section 3[4] of the Evidence Act defines 'Evidence' to mean and include statements made by the witness and all documents including electronic records. Section 2(1)(t)[5] of the IT Act, defines "electronic record" to mean data, record, image, or sound stored, received, or sent in an electronic form.

Section 65A[6] and 65B of the Evidence Act deals with the proof and admissibility of an electronic record into evidence. Section 65B stipulates that information contained in an electronic record that is printed on a paper or recorded in an optical or magnetic medium produced by a computer ("Computer Output") shall be deemed to be a "document", provided it satisfies the conditions laid down u/s 65B (2) to 65B (4). The same shall be admissible in any proceedings as evidence of the content of the original, without a proof (as to the existence) or production of the original. Section 65B of the Evidence Act, thus, stipulates that the admissibility of an electronic record dealing with "existence" and "content" of such records.

Contention Of The Parties

The appellant contended in the Special Leave Petition that the decision of the High Court was in contravention to the judgment of the Hon'ble Apex Court in the case of *Anvar P.V. v. P.K. Basheer & Ors.*, The appellant further contended that the CDs cannot be admitted as a piece of evidence without furnishing the certificate u/s 65B (4) of Evidence Act. Lastly, the petitioner contended that the theory of "substantial compliance" with the requirement of Section 65B (4) of Evidence Act through the oral evidence of the witness, as held by the Hon'ble High Court, is in contravention to the decision of the Apex Court in the case of *Anvar P.V. v. P.K. Basheer & Ors.* The respondents contended that the officials who provided the CDs

deliberately failed to issue the certificate u/s 65B (4) of Evidence Act despite their repeated requests and direction from the High Court. The oral evidence of the witness which was later reduced into writing and signed by the witness signifies compliance with the requirements of Section 65B (4) of the Evidence Act.

They also contended that in cases of difficulty or impossibility in the production of a certificate u/s 65B (4) of Evidence Act, the same shall not result in the denial of crucial evidence. Further, it was contended by the respondents that *Shafhi Mohammad* is a good law and that *Anvar P.V.* is applicable only in a case where the party can procure the certificate. An intervenor in the appeal contended that Section 65B of Evidence Act does not stipulate the stage at which the certificate u/s 65B (4) of Evidence Act must be produced, therefore, the same may be produced at any stage of the proceedings. The intervenor further sought for a clarification on the decision of the Apex Court in the case of *Anvar P.V.* to the effect that the procedures stipulated u/s 65A and 65B alone shall have to be followed for the admissibility of electronic evidence.

Verdict

The salient features of the decision are as follows:

1. Certificate u/s 65B (4) of the Evidence Act is a condition precedent to the admissibility of evidence by way of electronic record;
2. Oral evidence in place of such certificate cannot satisfy Section 65B (4);
3. So long as the hearing in a trial is not over, the certificate can be directed to be produced;
4. Subject to 5 below, the certificate is not necessary if the original document itself is produced, which can be done by the owner of a computer in the witness box and proving that the computer is owned and/or operated by him; and
5. If the electronic record is on a network then the only way it can only be provided is as per S. 65B (1) and 65B (4).

The Hon'ble Apex Court also overruled *Tomaso Bruno and Anr. v. State of Uttar Pradesh* and *Shafhi Mohammad vs. The State of Himachal Pradesh*.

Conclusion

Sections 65-A and Section 65-B were enacted by the legislature to facilitate the proving of electronic records. However, the procedural wraths and the conflicting judgments of the Apex Court have thrust more questions than answering them. No law is enacted to hamper justice dispensation, especially procedural ones, which are oft-quoted to be handmaids of justice. However, the law cannot be static, it must be dynamic. It must adapt to the changing circumstances. The Apex Court in its instant case of *Arjun Panditrao Khotkar* has clarified that certificate u/s 65B (4) of Evidence Act, 1872 is mandatory in nature.

Recording of any crime scene or a road rage incident on a mobile camera is very much common in today's scenario. However, making the same inadmissible due to the cumbersome process envisaged u/s 65B (4) militates against the intention of the legislature. Therefore, it is high time, that the Indian Parliament reviews existing provisions and provides simple provisions for relying on electronic records to ensure speedy justice.

[1] 2020 SCC OnLine SC 571.

[2] (2018) 2 SCC 801.

[3] (2014) 10 SCC 473.

[4] "Evidence" means and includes –

1. all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
2. all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

[5] "electronic record" means data, record or data generated, image or sound stored, received, or sent in an electronic form or microfilm or computer-generated microfiche.

[6] Special provisions as to evidence relating to an electronic record. – The contents of electronic records may be proved as per the provisions of section 65B.

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