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LEGAL UPDATE

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Supreme Court rules on admissibility of electronic record as secondary evidence in trials

Certificate under Section 65B of the Indian Evidence Act 1872 – A Prerequisite with some exceptions

Electronic devices are here to stay. In legal proceedings, one needs to rely on electronic evidence and in the recent Supreme Court ("**SC**") reference ruling, in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal & Ors.*[1], the SC has clarified the legal position in this regard. It has held that certification under Section 65B (4) of the Indian Evidence Act, 1872 is a necessary prerequisite to producing electronic record which is sought to be introduced as secondary evidence in trials with some exceptions.

The three judge bench of the SC therefore laid rest to the apparent dichotomy that had emerged due to its' conflicting verdicts in *Anvar P.V. v. P.K. Basheer & Ors.*[2] and *Shafhi Mohammad v. State of Himachal Pradesh*[3]. Although in *Anvar P.V.*, the SC had held that such certification is mandatory, *Shafhi Mohammad* left a gaping hole in stating that such requirement was merely procedural and could be done away with in the interest of justice.

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Section 65B of Evidence Act

Section 65B, which has its genesis in Section 5 of the UK Civil Evidence Act, was introduced by way of amendment in the year 2000, deals with admissibility of electronic records and envisages two scenarios. Firstly, production of electronic record which is printed on paper, stored, recorded, etc. may be treated as primary evidence and directly admissible in proceedings. Secondly, in cases of production of electronic evidence where it is physically impossible to bring a computer system to the Court and the record ought to be treated as secondary evidence. Such secondary evidence would additionally require a certificate under Section 65B (4) ("**said provision**") issued by a person occupying an official position in relation to the device and such person identifies and describes the manner of production of the electronic record before it can be admitted as evidence.

Various SC judgments

In *Anvar P.V.*, a three judge bench of SC held that the Section 65B was a complete code in itself and the Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if the requirements under the aforesaid section are not complied with, and therefore in cases of CD, VCD, chip, etc. the same shall be accompanied by a certificate in terms of the said provision obtained at the time of taking the document without which the secondary evidence pertaining to the electronic record is inadmissible. However, if the original electronic record is itself produced as primary evidence, no such certificate would be required. This was also followed subsequently by a three judge bench of the SC in *Vikram Singh & Anr.* v. *State of Punjab & Anr.*[4]

However, a discordant note was struck early by the SC in *Tomaso Bruno & Anr.* v. *State of Uttar Pradesh*[5] which alluded to the judgment of *State v. Navjot Sandhu*[6] (a judgment specifically overruled by *Anvar P.V.*) and sought to bypass the said provision by stating that secondary evidence for electronic records could also be led under Section 65[7], thereby ignoring the fact that Section 65B was already reckoned to be a complete code in itself.

The major controversy then arose out of the judgment of the Division Bench of the SC in *Shafhi Mohammad* wherein it was held that requirement of a certificate under the said section was merely procedural and could be relaxed by the court wherever interest of justice so justifies, such as a situation when a party who is not in the possession of such device and would not be in a position to secure such

certificate. The SC despite mentioning *Anvar P.V.*, heavily relied on judgments prior to 2000 and on *Tomaso Bruno.*

Recent SC Reference Ruling

The SC was conscious of the difficulties expressed in *Shafhi Mohammad*, of a situation arising when the party desirous of producing electronic record as secondary evidence was unable to obtain the necessary certificate by virtue of not being in possession of the electronic device. The SC however noted that adequate powers in this regard were bestowed on judges under law to ensure summoning and production of witnesses[8] and an application ought to be made to a Judge for production of certificate under the said provision when such person refuses to give it.

However, the SC was quick to enter a caveat here. In the above fact scenario when a person is unable to themselves obtain a certificate and thereafter makes an application to the Judge, such person has done all he can possibly do to obtain the requisite certificate. In such a situation, two Latin maxims become important, (i) *lex non cogit ad impossibilia* (the law does not demand the impossible) and (ii) *impotentia excusat legem* (when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused). Therefore, production of certificate in certain cases could be excused.

The SC also stated that the said provision does not speak of the stage at which such certificate must be furnished to the Court and the trial judge ought to exercise discretion in calling upon a party to produce such certificate, in accordance with relevant civil / criminal laws, so long as the hearing in the trial is not yet over.

It is pertinent to note that the clarifications pertaining to the said provision and certificate are not necessary if the original document is itself produced or the owner of the device stepping into the witness box and attesting to the electronic record produced. However, in cases where it is physically impossible to bring such a device to Court, the only means of providing such information can be in accordance with Section 65B (1) together with a certificate under Section 65B (4). The SC therefore specifically overruled the earlier judgments of *Shafhi Mohammad* and *Tomaso Bruno*.

> *With the ever growing dependency on electronic devices, this judgment is a step in the right direction to*

quell the earlier judicial confusion and till necessary rules are framed, ensure that uniformity of procedure will be followed by trial courts in admitting electronic record as secondary evidence.

Conclusion

Justice Nariman emphasized the requirement for framing of suitable rules under the Information Technology Act, 2000 for preservation, retrieval and production of electronic record and issued general directions to cellular companies and ISPs to maintain electronic records.

Deference must also be paid to the concurring judgment of Justice V. Ramasubramanian who stated that other jurisdictions (USA, UK and Canada) had amended their laws regarding electronic evidence from time to time to avoid confusions and conflicts. Pertinently, Section 5 of the UK Civil Evidence Act upon which Section 65B was extensively based and introduced in India in 2000, had already been repealed by the UK in 1995 owing to various criticisms of the law regarding enforceability and stifling development of technology. Electronic records were therefore liberated from special rules of evidence in civil cases with similar changes in criminal laws. Justice Ramasubramanian opined that major jurisdictions of the world had come to terms with the development of technology and had finetuned their legislations, whereas India has been swinging from one extreme to another from *Navjot Sandhu* to *Anvar P.V.* to *Tomaso Bruno* to *Shafhi Mohammad* and therefore, urged that it is the need of the hour that there is a relook at Section 65B of the Indian Evidence Act which has created a huge judicial turmoil.

With the ever growing dependency on electronic devices, this judgment is a step in the right direction to quell the earlier judicial confusion and till necessary rules are framed, ensure that uniformity of procedure will be followed by trial courts in admitting electronic record as secondary evidence.

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[1] Civil Appeal Nos. 20825-20826 of 2017 decided by the Supreme Court of India on 14 July 2020

[2] (2014) 10 SCC 473

[3] (2018) 2 SCC 801

[4] (2017) 8 SCC 518

[5] (2015) 7 SCC 178

[6] (2005) 11 SCC 600

[7] Section 65, Indian Evidence Act – Rules of procedure governing secondary evidence relating to documents

[8] Section 165 of the Indian Evidence Act, 1872; Order XVI of Civil Procedure Code, 1908 and; Section 91 and Section 349 of the Code of Criminal Procedure, 1973.

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