Citation: 2019(16)SCALE752

IN THE SUPREME COURT OF INDIA

P. Gopalkrishnan
Vs.
State of Kerala and Ors.

Judges/Coram:
A.M. Khanwilkar and Dinesh Maheshwari, JJ.

Prior History / High Court Status: From the Judgment and Order dated 14.08.2018 of the High Court of Kerala at Ernakulum in Crl. MC No. 1663 of 2018 (MANU/KE/2817/2018)

Case Note:

Criminal - Memory card - Furnishing of copy - Appellant had been arrayed as Accused No. 8 in connection with offence punishable under Sections 342, 366, 376, 506(1), 120B and 34 of Code and Sections 66E and 67A of Act - Investigating officer filed police reports before Judicial First Class Magistrate - All documents noted in said report, were not supplied to the Appellant, namely, electronic record (contents of memory card), Forensic Science Laboratory and findings attached thereto in C.D./D.V.D. - Appellant file application before Magistrate for direction to prosecution to furnish cloned copy of contents of memory card containing video and audio footage/clipping, in same format as obtained in memory card - Magistrate rejected said application - Aggrieved by said decision, Appellant carried matter to High Court - High Court dismissed said petition and confirmed order of Magistrate rejecting stated application filed by Appellant - Hence, present appeal - Whether it was obligatory to furnish cloned copy of contents of such memory card/pen-drive to Accused facing prosecution for alleged offence of rape and related offences.

Facts:

The Appellant had been arrayed as Accused No. 8 in connection with offence registered as First Information Report (FIR) punishable under Sections 342, 366, 37, 506(1), 120B and 34 of the 1860 Code and Sections 66E and 67A of the 2000 Act. The investigating officer filed police reports under Section 173 of the 1973 Code before the Judicial First Class Magistrate. When the Appellant was supplied a copy of the police report, all documents noted in the said report, on which the prosecution proposed to rely, were not supplied to the Appellant, namely, electronic record (contents of memory card), Forensic Science Laboratory reports and the findings attached thereto in C.D./D.V.D. Appellant to file a formal application before the Judicial First Class Magistrate for a direction to the prosecution to furnish a cloned copy of the contents of memory card containing the video and audio footage/clipping, in the same format as obtained in the memory card, alongwith the transcript of the human voices, both male and female recorded in it. The Magistrate rejected the said application, essentially on the ground that acceding to the request of the Appellant would be impinging upon the esteem, decency, chastity, dignity and reputation of the victim and also against public interest. Aggrieved by the said decision, the Appellant carried the matter to the High Court. The single Judge of the High Court dismissed the said petition and confirmed the order of the Magistrate rejecting the stated application filed by the Appellant.

Held, while partly allowing the appeal:

(i) The preliminary objection taken by the Respondent for dismissing the appeal at the threshold because of the disclosure of identity of the victim in the memo of the special leave petition forming the subject matter of the present appeal, it was found that the explanation offered by the Appellant was plausible inasmuch as the prosecution itself had done so by naming the victim in the First Information Report/Crime Case, the statement of the victim under Section 161, as well as under Section 164 of the 1973 Code, and in the charge sheet/police report filed before the Magistrate. Even the objection regarding incorrect factual narration about the Appellant having himself viewed the contents of the memory card/pen-drive does not take the matter any further, once this court recognize the right of the Accused to get the cloned copies of the contents of the memory card/pen-drive as being mandated by Section 207 of the 1973 Code and more so, because of the right of the Accused to a fair trial enshrined in Article 21 of the Constitution of India. [34]

(ii) Instead of allowing the prayer sought by the Appellant in toto, it may be desirable to mould the relief by permitting the Appellant to seek second expert opinion from an independent agency such as the Central Forensic Science Laboratory (CFSL), on all matters which the Appellant may be advised. In that, the Appellant could formulate queries with the help of an expert of his choice, for being posed to the stated agency. That shall be confidential and not allowed to be accessed by any other agency or person not associated with the CFSL. Similarly, the forensic report prepared by the CFSL, after analyzing the cloned copy of the subject memory card/pen-drive, shall be kept confidential and shall not be allowed to be accessed by any other agency or person except the concerned Accused or his authorized representative until the conclusion of the trial. This court were inclined to say so because the State FSL had already submitted its forensic report in relation to the same memory card at the instance of the investigating agency. [37]

(iii) If the Accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen-drive in question, he could request the Magistrate to provide him inspection in Court, if necessary, even for more than once along with his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application was filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it was not an attempt by the Accused to protract the trial. While allowing the Accused and his lawyer or authorized I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pen-drive in any manner. Such multipronged approach may sub serve the ends of justice and also effectuate the right of Accused to a fair trial guaranteed under Article 21 of the Constitution. [43]

(iv) The contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution was relying on the same, ordinarily, the Accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the Accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides. [44]

JUDGMENT

A.M. Khanwilkar, J.

1. Leave granted.

2. The conundrum in this appeal is: whether the contents of a memory card/pen-drive being electronic record as predicated in Section 2(1)(t) of the Information and Technology Act, 2000 (for short, 'the 2000 Act') would, thereby qualify as a "document" within the meaning of Section 3 of the Indian Evidence Act, 1872 (for short, 'the 1872 Act) and Section 29 of the Indian Penal Code, 1860 (for short, 'the 1860 Code')? If so, whether it is obligatory to furnish a cloned copy of the contents of such memory card/pen-drive to the Accused facing prosecution for an alleged offence of rape and related offences since the same is appended to the police report submitted to the Magistrate and the prosecution proposes to rely upon it against the Accused, in terms of Section 207 of the Code of Criminal Procedure, 1973 (for short, 'the 1973 Code')? The next question is: whether it is open to the Court to decline the request of the Accused to furnish a cloned copy of the contents of the subject memory card/pen-drive in the form of video footage/clipping concerning the alleged incident/occurrence of rape on the ground that it would impinge upon the privacy, dignity and identity of the victim involved in the stated offence(s) and moreso because of the possibility of misuse of such cloned copy by the Accused (which may attract other independent offences under the 2000 Act and the 1860 Code)?

3. The Appellant has been arrayed as Accused No. 8 in connection with offence registered as First Information Report (FIR)/Crime Case No. 297/2017 dated 18.2.2017 punishable Under Sections 342, 366, 376, 506(1), 120B and 34 of the 1860 Code and Sections 66E and 67A of the 2000 Act, concerning the alleged incident/occurrence at around 2030 hrs. to 2300 hrs. on 17.2.2017, as reported by the victim.

4. For considering the questions arising in this appeal, suffice it to observe that the investigating officer attached to the Nedumbassery Police Station, Ernakulam, Kerala, after recording statements of the concerned witnesses and collecting the relevant evidence, filed police reports Under Section 173 of the 1973 Code before the Judicial First Class Magistrate, Angamaly. First police report, on 17.4.2017 and the second, on 22.11.2017. When the Appellant was supplied a copy of the second police report on 15.12.2017, all documents noted in the said report, on which the prosecution proposed to rely, were not supplied to the Appellant, namely, (i) electronic record (contents of memory card); (ii) Forensic Science Laboratory (for short, 'the FSL') reports and the findings attached thereto in C.D./D.V.D.; (iii) medical reports; C.C.T.V. footages and (iv) Call data records of Accused and various witnesses etc.

5. It is noted by the concerned Magistrate that the visuals copied and documented by the forensic experts during the forensic examination of the memory card were allowed to be perused by the Appellant's counsel in the presence of the regular cadre Assistant Public Prosecutor of the Court, in the Court itself. After watching the said visuals, some doubts cropped up, which propelled the Appellant to file a formal application before the Judicial First Class Magistrate, Angamaly for a direction to the prosecution to furnish a cloned copy of the contents of memory card containing the video and audio footage/clipping, in the same format as obtained in the memory card, alongwith the transcript of the human voices, both male and female recorded in it. In the said application, the Appellant inter alia asserted as follows:

7. It may be noted that the electronic record in the form of copy of the alleged video footage of the offending act committed by Accused No. 1 on the body and person of the defacto complainant is a crucial and material record relied by the prosecution in this case. It is the definite contention of prosecution that the above electronic record is both the evidence of commission of crime as well as the object of commission of crime and hence indisputably the most material piece of evidence in this case. When the injustice, in not serving such a vital piece of

evidence relied on by the prosecution in the case, was immediately brought to the notice of this Hon'ble Court, without prejudice to the right of Petitioner to obtain copies of the same, the defence side was allowed to watch the alleged video footages by playing the contents of a pen drive in the lap top made available before this Hon'ble Court. Head phones were also provided to the counsel and also to the learned APP who also was throughout present during this proceedings.

8. It is most respectfully submitted that by watching the video footage, although in a restricted environment and with limited facilities in the presence of the Ld. APP and the Presiding Officer, it is shockingly realised that the visuals and audio bytes contained in the video are of such a nature which would completely falsify the prosecution case in the form presently alleged by the prosecution. As a matter of fact the video footage is not at all an evidence of commission of crime as falsely contended by the prosecution but it is rather a clear case of fabricating false evidence with intent to foist a false case. It is submitted that it is after deliberately concealing or withholding the alleged primary evidence viz. the mobile phone stated to have been used by Accused No. 1, by the prosecution in active connivance with Accused No. 1, that the prosecution has produced a memory card which evidently contains only selected audio and video recording.

9. xxx xxx xxx

10. .....The further Verification and close scrutiny of the images and audio with scientific aid will in all probability provide more significant materials necessary to find out the truth behind the recorded images and the extent of tampering and the same could only be unearthed if the mirror copy of the memory card is furnished to the Petitioner which he is entitled to get without any further delay. As the prosecution is fully aware that the tampering could be detected and further female voice could be retrieved by the defense, the prosecution is trying to prevent the supply of the copy of the memory card in any form to the defense. It is illegal and the same will clearly amount to denial of a just and fair trial.

11. xxx xxx xxx

12. A close scrutiny of the contents of mahazar dated 8.3.2017 would show that on 18.2.2017 Accused No. 1 had entrusted a 8 GB memory card to Adv. E.G. Poulose, who had in turn produced the same before the Court of JFCM Aluva. The investigating agency thereafter obtained custody of the above electronic record and later the 8 GB memory card was sent to FSL, where, upon examination, Dr. Sunil S.P., Assistant director (documents), FSL, Thiruvananthapuram has allegedly prepared a report in that regard. The copy of the report has not been furnished to the Petitioner. The mahazar further shows that the contents of Memory card was transferred to a pen drive for the investigation purpose. The above mahazar further categorically states that the pen drive contained the data transferred from memory card and the same relates to the video footage of 17.2.2017 from 22:30:55 to 22:48:40 hrs and it is in order to check and verify whether the voice contained therein belongs to Suni that the voice sample was allegedly taken. The description in the mahazar proceeds as if there is only male voice in the video footage totally screening the fact that the video footage contains many vital and material utterances in female voice. Those utterances were revealed to the Petitioner and his counsel only on 15.12.2017. Everybody present had the benefit of hearing the said clear female voice. As mentioned earlier the Ld. APP was also present. But the investigation agency which should have definitely seen and heard the same has for obvious reason screened the said material aspects from the records. The investigation, it appears did not venture to take steps to compare the female voice in the video footage with the voice of the female involved in this case, for obvious reasons. On viewing and hearing, it is revealed that clear attempt have been made by somebody to delete major portions from the video footage and from the audio recording.

13. It is respectfully submitted that utterances made by the parties involved and seen in the video footage determines the nature of act recorded in the video footage and a transcript of the utterances and human voices in the video footage is highly just and necessary especially in view

of the shocking revelation, found when the video footage was played on 15.12.2017.

14. Yet another aspect which is to be pointed out is the mysterious disappearance of the mobile phone allegedly used for recording the video footage. The strong feeling of the Petitioner is that the investigating agency has not so far stated the truth regarding the mobile phone allegedly used to shot the video footage. The prosecution records itself would strongly indicate that the mobile phone used to record the occurrence (which now turns out to be a drama) was with the Police or with the persons who are behind the fabrication of the video footage as evidence to launch the criminal prosecution and false implication of the Petitioner. It is revolting to common sense to assume that even after conducting investigation for nearly one year by a team headed by a very Senior Police officer like the Addl. DGP of the Stage, during which Accused No. 1 was in the custody of the investigating team for 14 days at a stretch and thereafter for different spells of time on different occasions the original mobile instrument used for recording the video footage could not be unearthed. It appears that the investigating team was a willing agent to suffer the wrath of such a disgrace in order to suppress the withholding of the mobile instrument.

15. It is interesting to note that even in the second final report dated 22.11.2017 the Police has stated that the investigation to obtain the original mobile phone is even now continuing. It is nothing but an attempt to be fool everybody including the Court.

16. It is most respectfully submitted that in view of the startling revelation in the video footage, the Petitioner intends to make request to conduct proper, just and meaningful investigation into the matter so as to ensure that the real truth is revealed and the real culprits in this case are brought to justice. For enabling the Petitioner to take steps in that regard. It is highly just and essential that the cloned copy of the contents of memory card containing the video and audio content in the same format as obtained in the Memory card and the transcript of the human voices recorded in it are produced before Court and copy of the same furnished forthwith to the Petitioner.

17. As mentioned herein before, the prosecution has chosen to furnish only a small portion of the prosecution records on 15.12.2017. The Petitioner is approaching this Hon'ble Court with a detailed petition stating the details of relevant documents which do not form part of the records already produced before this Hon'ble Court and the details of the other documents which are not furnished to Petitioner.

18. It is submitted that the Petitioner as an Accused is legally entitled to get the copies of all documents including the CDs, Video footage etc., and the prosecution is bound to furnish the same to the Petitioner.

19. In the above premises it is respectfully prayed that this Hon'ble Court may be pleased to direct the prosecution to furnish a cloned copy of the contents of Memory Card containing the video and audio content in the same format as obtained in the memory card and the transcript of human voices, both male and female recorded in it, and furnish the said cloned copy of the memory card and the transcript to the Petitioner.

6. The Magistrate vide order dated 7.2.2018, rejected the said application, essentially on the ground that acceding to the request of the Appellant would be impinging upon the esteem, decency, chastity, dignity and reputation of the victim and also against public interest. The relevant portion of the order dated 7.2.2018 reads thus:

Heard both sides in detail.

The Petitioner has also filed reply statement to the objection and counter statement filed by Special Public Prosecutor in the case. The allegation against the Petitioner is that he engaged the first Accused to sexually assault the victim and videograph the same. On receipt of summons the Petitioner entered appearance and was served with the copies of prosecution records. The learned Senior Counsel appearing for the Petitioner requested for the copies of the contents of memory card. The same could not be allowed & the investigation official has already a petition filed objecting the same, with a prayer to permit them to view the same in the court. Hence they were

permitted to view the video footage and subsequent to the same they had filed this petition seeking a direction to the prosecution to furnish the copies of alleged audio and video footage and its transcript. The prosecution strongly opposed the same stating that the same will add insult to the victim who had suffered a lot at the hands of not only the Accused but also the media. Hence they submitted that the Petitioner may be permitted to view the contents of the video during trial.

Here the offence alleged tantamounts to a serious blow to the supreme honour of a woman. So as to uphold the esteem, decency, chastity, dignity and reputation of the victim, and also in the public interest, I am declining the prayer. But so as to ensure fairness in the proceedings and for just determination of the truth, the Petitioner is permitted to inspect the contents of the video footage at the convenience of court.

7. Aggrieved by the above decision, the Appellant carried the matter to the High Court of Kerala at Ernakulam (for short, 'the High Court') by way of Crl. M.C. No. 1663/2018. The learned single Judge of the High Court dismissed the said petition and confirmed the order of the Magistrate rejecting the stated application filed by the Appellant. The High Court, however, after analyzing the decisions and the relevant provisions cited before it, eventually concluded that the seized memory card was only the medium on which the alleged incident was recorded and hence that itself is the product of the crime. Further, it being a material object and not documentary evidence, is excluded from the purview of Section 207 of the 1973 Code. The relevant discussion can be discerned from paragraph 41 onwards, which reads thus:

41. This leads to the crucial question that is to be answered in this case. Evidently, the crux of the prosecution allegation is that, offence was committed for the purpose of recording it on a medium. Memory card is the medium on which it was recorded. Hence, memory card seized by the police itself is the product of the crime. It is not the contents of the memory card that is proposed to be established by the production of the memory card. The acts of sexual abuse is to be established by the oral testimony of the victim and witnesses. It is also not the information derived from the memory card that is sought to be established by the prosecution. Prosecution is trying to establish that the alleged sexual abuse was committed and it was recorded. Though, in the course of evidence, contents of it may be sought to be established to prove that, it was the memory card created by the Accused, contemporaneously recorded on the mobile, along with the commission of offence, that does not by itself displace the status of the memory card as a document. Memory card itself is the end product of the crime. It is hence a material object and not a documentary evidence. Hence, it stands out of the ambit of Section 207 Code of Criminal Procedure.

42. The evaluation of the above legal propositions clearly spells out that, the memory card produced in this case is not a document as contemplated Under Section 307 Indian Penal Code [sic 207 Code of Criminal Procedure.]. In fact, it is in the nature of a material object. Hence, copy of it cannot be issued to the Petitioner herein.

43. Prosecution has a case that, though Accused is entitled for his rights, it is not absolute and even outside Section 207 Code of Criminal Procedure, there can be restrictions regarding the right Under Section 207 Code of Criminal Procedure It was contended that, if the above statutory provision infringes the right of privacy of the victim involved, fundamental right will supersede the statutory right of the Accused. Definitely, in case of Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. MANU/SC/1044/2017 : (2017) 10 SCC 1 (at page 1), the Constitutional Bench of the Supreme Court had held that the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights Under Article 19 does not denude Article 21 of its expansive ambit. It was held that, validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action, but on the basis of its effect on the guarantees of freedom. In Sherin v. John's case (supra), this Court had held that, when there is a conflict between Fundamental Rights of a person and statutory rights of another person, Fundamental Rights will

prevail. The possibility of such contention may also arise. Since that question does not arise in this case in the light of finding Under Section 207 Code of Criminal Procedure I do not venture to enter into that issue.

44. Having considered the entire issue, I am inclined to sustain the order of the court below in Crl. M.P. No. 49 of 2018 in C.P. No. 16 of 2017 dismissing the application, though on different grounds. However, this will not preclude the Court from permitting the Accused to watch the memory card only in Court, subject to restrictions, to prepare defence.

8. The Appellant being dissatisfied, has assailed the reasons which found favour with the trial Court, as well as the High Court. The Appellant broadly contends that the prosecution case is founded on the forensic report which suggests that eight video recordings were retrieved from the memory card and that the video files were found to be recorded on 17.2.2017 between 22:30:55 hrs. and 22:48:40 hrs. The same were transferred to the stated memory card on 18.2.2017 between 09:18 hrs. and 09:20 hrs. Be it noted that the original video recording was allegedly done by Accused No. 1 on his personal mobile phone, which has not been produced by the investigating agency. However, the memory card on which the offending video recording was copied on 18.2.2017 was allegedly handed over by an Advocate claiming that the Accused No. 1 had given it to him. He had presented the memory card before the Court on 20.2.2017, which was sent for forensic examination at State FSL, Thiruvananthapuram. After forensic examination, the same was returned alongwith FSL report DD No. 91/2017 dated 3.3.2017 and DD No. 115/2017 dated 7.4.2017. A pen-drive containing the data/visuals retrieved from the memory card, was also enclosed with the report sent by the State FSL.

9. Be that as it may, the prosecution was obviously relying on the contents of the memory card which have been copied on the pen-drive by the State FSL during the analysis thereof and has been so adverted to in the police report. The contents of the memory card, which are replicated in the pen-drive created by the State FSL would be nothing but a "document" within the meaning of the 1973 Code and the provisions of the 1872 Act. And since the prosecution was relying on the same and proposes to use it against the Accused/Appellant, it was incumbent to furnish a cloned copy of the contents thereof to the Accused/Appellant, not only in terms of Section 207 read with Section 173(5) of the 1973 Code, but also to uphold the right of the Accused to a fair trial guaranteed Under Article 21 of the Constitution of India. The trial Court rejected the request of the Appellant on the ground that it would affect the privacy and dignity of the victim, whereas, the High Court proceeded on the basis that the memory card is a material object and not a "document". It is well known that a cloned copy is not a photocopy, but is a mirror image of the original, and the Accused has the right to have the same to present his defence effectively. In the alternative, it is submitted, that the Court could have imposed appropriate conditions while issuing direction to the prosecution to furnish a cloned copy of the contents of memory card to the Accused/Appellant.

10. Per contra, the Respondent-State and the intervenor (the victim) have vehemently opposed the present appeal on the argument that the Appellant before this Court is none other than the master-mind of the conspiracy. Although he was not personally present on the spot, but the entire incident has occurred at his behest. It is urged that the appeal deserves to be dismissed as the Appellant has disclosed the identity of the victim in the memo of the special leave petition from which the present appeal has arisen. Further, the Appellant has falsely asserted that he had himself perused the contents of the pen-drive and even for this reason, the appeal should be dismissed at the threshold. As a matter of fact, the contents of the pen-drive were allowed to be viewed by the Appellant's counsel and the regular cadre Assistant Public Prosecutor of the Court. The asservation of the Appellant that after viewing the contents of the pen-drive, he gathered an impression that the contents of the memory card must have been tampered with, is the figment of imagination of the Appellant and contrary to forensic report(s) by the State FSL. The definite case of the Respondent is that the memory card seized in this case containing the visuals of sexual

violence upon the victim is a material object and the pen-drive into which the contents of memory card were documented through the process of copying by the State FSL and sent to the Court for the purpose of aiding the trial Court to know the contents of the memory card and the contents of the said pen-drive is both material object as well as "document". It is also urged that the visual contents of the pen-drive would be physical evidence of the commission of crime and not "document" *per se* to be furnished to the Accused alongwith the police report. The contents of the memory card or the pen-drive cannot be parted to the Accused and doing so itself would be an independent offence. Moreover, if a cloned copy of the contents of the memory card is made available to the Accused/Appellant, there is reason to believe that it would be misused by the Accused/Appellant to execute the conspiracy of undermining the privacy and dignity of the victim. It is urged that the Appellant has relied on certain decisions to contend that the contents of the memory card must be regarded as "electronic record" and, therefore, a "document". The exposition in those decisions are general observations and would be of no avail to the Appellant. The Appellant is facing prosecution for an offence of rape, and the trial thereof would be an in-camera trial before the Special Court. To maintain the sanctity and for upholding the privacy, dignity and identity of the victim, it is urged that the Accused/Appellant in such cases can seek limited relief before the trial Court to permit him and his lawyer or an expert to view the contents of the pen-drive in Court or at best to permit him to take a second opinion of expert to reassure himself in respect of the doubts entertained by him. Such indulgence would obviate the possibility of misuse of the cloned copy of the video/audio footage/clipping and the same would be in the nature of a preventive measure while giving a fair opportunity to the Accused to defend himself. The Respondent and the intervenor would urge that the appeal be dismissed being devoid of merits.

11. As aforesaid, both sides have relied on reported decisions of this Court, as well as the High Courts and on the provisions of the relevant enactments to buttress the submissions. We shall refer thereto as may be required.

12. We have heard Mr. Mukul Rohatgi, learned senior Counsel for the Appellant, Mr. Ranjit Kumar, learned senior Counsel for the Respondent-State and Mr. R. Basant, learned senior Counsel for the intervenor.

13. The central issue is about the obligation of the investigating officer flowing from Section 173 of the 1973 Code and that of the Magistrate while dealing with the police report Under Section 207 of the 1973 Code. Section 173 of the 1973 Code ordains that the investigation under Chapter XII of the said Code should be completed without unnecessary delay and as regards the investigation in relation to offences Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the 1860 Code, the same is required to be completed within two months from the date on which the information was recorded by the officer in charge of the police station. The investigating officer after completing the investigation, is obliged to forward a copy of the police report to a Magistrate empowered to take cognizance of the offence on such police report. Alongwith the police report, the investigating officer is also duty bound to forward to the Magistrate "all documents" or relevant extracts thereof, on which prosecution proposes to rely other than those sent to the Magistrate during investigation. Similarly, the statements recorded Under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses, are required to be forwarded to the Magistrate alongwith the police report. Indeed, it is open to the police officer, if in his opinion, any part of the "statement" is not relevant to the subject matter of the proceedings or that its disclosure to the Accused is not essential in the interests of justice and is inexpedient in public interest, to indicate that part of the "statement" and append a note requesting the Magistrate to exclude that part from the copies to be granted to the Accused and stating his reasons for making such request. That discretion, however, is not given to him in respect of the "documents" or the relevant extracts thereof on which the prosecution proposes to rely against the Accused concerned. As regards the documents, Sub-section (7) enables the investigating officer, if in his opinion it is convenient so to do, to furnish copies of all or any of the documents referred to in Sub-section (5) to the Accused. Section 173, as

amended and applicable to the case at hand, reads thus:

173. Report of police officer on completion of investigation.--(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1A) The investigation in relation to an offence Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code (45 of 1860) shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating--

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the Accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody Under Section 170;

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or Section 376E of the Indian Penal Code (45 of 1860).

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed Under Section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this Section that the Accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report--

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded Under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the Accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the Accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the Accused copies of all or any of the documents referred to in Sub-section (5).

(8) Nothing in this Section shall be deemed to preclude further investigation in respect

of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2).

14. Concededly, as regards the "documents" on which the prosecution proposes to rely, the investigating officer has no option but to forward "all documents" to the Magistrate alongwith the police report. There is no provision (unlike in the case of "statements") enabling the investigating officer to append a note requesting the Magistrate, to exclude any part thereof ("document") from the copies to be granted to the Accused. Sub-section (7), however, gives limited discretion to the investigating officer to forward copies of all or some of the documents, which he finds it convenient to be given to the Accused. That does not permit him to withhold the remaining documents, on which the prosecution proposes to rely against the Accused, from being submitted to the Magistrate alongwith the police report. On the other hand, the expression used in Section 173(5)(a) of the 1973 Code makes it amply clear that the investigating officer is obliged to forward "all" documents or relevant extracts on which the prosecution proposes to rely against the Accused concerned alongwith the police report to the Magistrate.

15. On receipt of the police report and the accompanying statements and documents by virtue of Section 207 of the 1973 Code, the Magistrate is then obliged to furnish copies of each of the statements and documents to the Accused. Section 207 reads thus:

207. Supply to the Accused of copy of police report and other documents.--In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the Accused, free of cost, a copy of each of the following:

(i) the police report;

(ii) the first information report recorded Under Section 154;

(iii) the statements recorded under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under Sub-section (6) of Section 173;

(iv) the confessions and statements, if any, recorded Under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in Clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the Accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the Accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

As regards the statements, the first proviso enables the Magistrate to withhold any part thereof referred to in Clause (iii), from the Accused on being satisfied with the note and the reasons specified by the investigating officer as predicated in Sub-section (6) of Section 173. However, when it comes to furnishing of documents submitted by the investigating officer alongwith police report, the Magistrate can withhold only such document referred to in Clause (v), which in his opinion, is "voluminous". In that case, the Accused can be permitted to take inspection of the concerned document either personally or through his pleader in Court. In other words, Section 207 of the 1973 Code does not empower the Magistrate to withhold any "document"

submitted by the investigating officer alongwith the police report except when it is voluminous. A fortiori, it necessarily follows that even if the investigating officer appends his note in respect of any particular document, that will be of no avail as his power is limited to do so only in respect of 'statements' referred to in Sub-section (6) of Section 173 of the 1973 Code.

16. Be that as it may, the Magistrate's duty Under Section 207 at this stage is in the nature of administrative work, whereby he is required to ensure full compliance of the Section. We may usefully advert to the dictum in *Hardeep Singh v. State of Punjab* MANU/SC/0025/2014 : (2014) 3 SCC 92 wherein it was held that:

47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power Under Section 319(1) Code of Criminal Procedure can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 Code of Criminal Procedure, committal, etc. which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 Code of Criminal Procedure, and committing the matter if it is exclusively triable by the Sessions Court ... ...

In yet another case of *Tarun Tyagi v. CBI* MANU/SC/0179/2017 : (2017) 4 SCC 490, this Court considered the purport of Section 207 of the 1973 Code and observed as follows:

8. Section 207 puts an obligation on the prosecution to furnish to the Accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report Under Section 173(5) of the Code. Such a compliance has to be made on the first date when the Accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the Accused with the copy thereof, the Magistrate can allow the Accused to inspect it either personally or through pleader in the Court.

17. It is well established position that when statute is unambiguous, the Court must adopt plain and natural meaning irrespective of the consequences as expounded in *Nelson Motis v. Union of India* MANU/SC/0387/1992 : (1992) 4 SCC 711. On a bare reading of Section 207 of the 1973 Code, no other interpretation is possible.

18. Be that as it may, furnishing of documents to the Accused Under Section 207 of the 1973 Code is a facet of right of the Accused to a fair trial enshrined in Article 21 of the Constitution. In *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* MANU/SC/0268/2010 : (2010) 6 SCC 1, this Court expounded thus:

218. The liberty of an Accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives a right to the Accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the Accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the Accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the Accused.

219. The role and obligation of the Prosecutor particularly in relation to

disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the Accused during investigation such document could be denied in the discretion of the Prosecutor to the Accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the Accused copies of the police report, first information report, statements, confessional statements of the persons recorded Under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated Under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under Sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used Under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report Under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. The right of the Accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the Accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report Under Section 173(2) as per orders of the court. But certain rights of the Accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court Under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the Accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the Accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the Accused in the interest of justice and fair investigation and trial should be furnished to the Accused. Then that document should be disclosed to the Accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the Accused prejudicially.

19. Similarly, in *V.K. Sasikala v. State* MANU/SC/0792/2012 : (2012) 9 SCC 771, this Court held as under:

21. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Code of Criminal Procedure and would travel beyond the confines of the strict language of the provisions of Code of Criminal Procedure and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making

of the request; the efflux of time that has occurred or the prior conduct of the Accused that is material. What is of significance is if in a given situation the Accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the Accused the court must concede a right to the Accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the Accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the Accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced.

20. The next seminal question is: whether the contents of the memory card/pen-drive submitted to the Court alongwith the police report can be treated as "document" as such. Indubitably, if the contents of the memory card/pen-drive are not to be treated as "document", the question of furnishing the same to the Accused by virtue of Section 207 read with Section 173 of the 1973 Code would not arise. We say so because it is nobody's case before us that the contents of the memory card/pen-drive be treated as a "statement" ascribable to Section 173(5)(b) of the 1973 Code. Notably, the command Under Section 207 is to furnish "statements" or "documents", as the case may be, to the Accused as submitted by the investigating officer alongwith the police report, where the prosecution proposes to rely upon the same against the Accused.

21. The High Court adverted to certain judgments before concluding that the memory card would be a material object. For arriving at the said conclusion, the High Court relied on the decision of the King's Bench of United Kingdom in *The King v. Daye* [1908] 2 K.B. 333, wherein Darling J., adding to the majority opinion, had held thus:

...But I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, or clay, and it might be, and often was, on metal. So I should desire to guard myself against being supposed to assent to the argument that a thing is not a document unless it be a paper writing. I should say it is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence.

The High Court also relied on the decision of the Chancery Court in *Grant and Anr. v. Southwester and County Properties Ltd. and Anr.* [1975] Ch. 185, wherein it was observed as follows:

There are a number of cases in which the meaning of the word "document" has been discussed in varying circumstances. Before briefly referring to such cases, it will, I think, be convenient to bear in mind that the derivation of the word is from the Latin "documentum": it is something which instructs or provides information. Indeed, according to Bullokar's English Expositor (1621), it meant a lesson. The Shorter Oxford English Dictionary has as the fourth meaning for the word the following: "Something written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, coin, etc.," and it produces as the relevant quotation: "These frescoes... have become invaluable as documents," the writer being Mrs. Anna Brownell Jameson who lived from 1794 to 1860.

I think that all the authorities to which I am about to refer have consistently stressed the furnishing of information-impliedly otherwise than as to the document itself-as being one of the main functions of a document. Indeed, in In Re Alderton and Barry's Application (1941) 59 R.P.C. 56, Morton J. expressly doubted whether blank workmen's time sheets could be classified as documents within Section 11(1)(b) of the Patent and Design Acts 1907-1939 expressly because in their original state

they conveyed no information of any kind to anybody...

It can be safely deduced from the aforementioned expositions that the basis of classifying Article as a "document" depends upon the information which is inscribed and not on where it is inscribed. It may be useful to advert to the exposition of this Court holding that tape records of speeches[1] and audio/video cassettes[2] including compact disc[3] were "documents" Under Section 3 of the 1872 Act, which stand on no different footing than photographs and are held admissible in evidence. It is by now well established that the electronic record produced for the inspection of the Court is documentary evidence Under Section 3 of the 1872 Act[4].

22. It is apposite to recall the exposition of this Court in *State of Maharashtra v. Dr. Praful B. Desai* MANU/SC/0268/2003 : (2003) 4 SCC 601, wherein this Court observed that the Code of Criminal Procedure is an ongoing statute. In case of an ongoing statute, it is presumed that the Parliament intended the Court to apply a construction that continuously updates its wordings to allow for changes and is compatible with the contemporary situation. In paragraph 14 of the said decision, the Court observed thus:

14. It must also be remembered that the Code of Criminal Procedure is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled Statutory Interpretation, 2nd Edn., p. 617:

It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

* * *

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters.... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

* * *

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.

23. As aforesaid, the Respondents and intervenor would contend that the memory card is a material object and not a "document" as such. If the prosecution was to rely only on recovery of memory card and not upon its contents, there would be no difficulty in acceding to the argument of the Respondent/intervenor that the memory card/pen-drive is a material object. In this regard, we may refer to *Phipson on Evidence*[5], and particularly, the following paragraph(s):

The purpose for which it is produced determines whether a document is to be regarded as documentary evidence. When adduced to prove its physical condition, for example, an alteration, presence of a signature, bloodstain or fingerprint, it is real evidence. So too, if its relevance lies in the simple fact that it exists or did once exist or its disposition or nature. In all these cases the content of the document, if relevant at all, is only indirectly relevant, for

example to establish that the document in question is a lease. When the relevance of a document depends on the meaning of its contents, it is considered documentary evidence.

... ...

Again at page 5 of the same book, the definition of "real evidence[6]" is given as under:

Material objects other than documents, produced for inspection of the court, are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony nor inference is relied upon. Unless its genuineness is in dispute [See Belt v. Lawes, The Times, 17 November 1882.], the thing speaks for itself.

Unfortunately, however, the term "real evidence" is itself both indefinite and ambiguous, having been used in three divergent senses:

(1) ... ...

(2) *Material objects produced for the inspection of the court.* This is the second and most widely accepted meaning of "real evidence". It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing.

(3) ... ...

A priori, we must hold that the video footage/clipping contained in such memory card/pen-drive being an electronic record as envisaged by Section 2(1)(t) of the 2000 Act, is a "document" and cannot be regarded as a material object. Section 2(1)(t) of the 2000 Act reads thus:

(1)(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer-generated micro fiche;

24. As the above definition refers to data or data generated, image or sound stored, received or sent in an electronic form, it would be apposite to advert to the definition of "data" as predicated in Section 2(1)(o) of the same Act. It reads thus:

(1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

On conjoint reading of the relevant provisions, it would be amply clear that an electronic record is not confined to "data" alone, but it also means the record or data generated, received or sent in electronic form. The expression "data" includes a representation of information, knowledge and facts, which is either intended to be processed, is being processed or has been processed in a computer system or computer network or stored internally in the memory of the computer.

25. Having noticed the above definitions, we may now turn to definitions of expressions "document" and "evidence" in Section 3 of the 1872 Act being the interpretation clause. The same reads thus:

3. Interpretation clause.-

Document.- "Document" means 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.

Illustrations

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

Evidence.- "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.

On a bare reading of the definition of "evidence", it clearly takes within its fold documentary evidence to mean and include all documents including electronic records produced for the inspection of the Court. Although, we need not dilate on the question of admissibility of the contents of the memory card/pen-drive, the same will have to be answered on the basis of Section 65B of the 1872 Act. The same reads thus:

65B. Admissibility of electronic records.-(1) Notwithstanding anything contained in this 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 (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 of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(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 during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(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 in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer 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 in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this Section as constituting a single computer; and references in this Section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,--

(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;

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) 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.

(5) For the purposes of this section,--

(a) information shall be taken to be supplied to a computer 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) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.--For the purposes of this Section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

This provision is reiteration of the legal position that 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" and shall be admissible in evidence subject to satisfying other requirements of the said provision.

26. It may be useful to also advert to Section 95(2)(b) of the 1973 Code, which refers to "document" to include any painting, drawing or photograph, or other visible representation. And again, the expression "document" has been defined in Section 29 of the 1860 Code, which reads thus:

29. "Document".--The word "document" denotes 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, as evidence of that matter.

Explanation 1.--It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.--Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage,

shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

27. Additionally, it may be apposite to also advert to the definition of "communication devices" given in Section 2(1)(ha) of the 2000 Act. The said provision reads thus:

(1)(ha) "communication device" means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image.

28. We may also advert to the definition of "information" as provided in Section 2(1)(v) of the 2000 Act. The same reads thus:

(1)(v) "information" includes data, message, text, images sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.

29. Even the definition of "document" given in the General Clauses Act would reinforce the position that electronic records ought to be treated as "document". The definition of "document" in Section 3(18) of the General Clauses Act reads thus:

(18) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

30. It may be apposite to refer to the exposition in Halsbury's laws of England[7] dealing with Chapter - "Documentary and Real Evidence" containing the meaning of documentary evidence and the relevancy and admissibility thereof including about the audio and video recordings. The relevant exposition reads thus:

(12) DOCUMENTARY AND REAL EVIDENCE

1462. Meaning of documentary evidence. The term 'document' bears different meanings in different contexts. At common law, it has been held that any written thing capable of being evidence is properly described as a document[8], and this clearly includes printed text, diagrams, maps and plans[9]. Photographs are also regarded as documents at common law[10].

Varying definitions have been adopted in legislation[11]. A document may be relied on as real evidence (where its existence, identity or appearance, rather than its content, is in issue[12]), or as documentary evidence. Documentary evidence denotes reliance on a document as proof of its terms or contents[13]. The question of the authenticity of a document is to be decided by the jury[14].

1463. The primary evidence rule. Under the 'primary evidence rule' at common law[15], it was once thought necessary for the contents of any private document to be proved by production of the original document[16]. A copy of an original document, or oral evidence as to the contents of that document, was considered admissible only in specified circumstances, namely: (1) where another party to the proceedings failed to comply with a notice to produce the original which was in his possession (or where the need to produce it was so clear that no such notice was required)[17]; (2) where production of the original was shown to be impossible[18]; (3) where the original appeared to have been lost or destroyed[19]; and (4) where a third party in possession of the original lawfully declined to produce it[20]....

xxx xxx xxx

1466. Real evidence. Material objects or things (other than the contents of

documents) which are produced as exhibits for inspection by a court or jury are classed as real evidence[21]. The court or jury may need to hear oral testimony explaining the background and alleged significance of any such exhibit, and may be assisted by expert evidence in drawing inferences or conclusions from the condition of that exhibit[22].

Where a jury wishes to take an exhibit, such as a weapon, into the jury room, this is something which the judge has a discretion to permit[23]. Jurors must not however conduct unsupervised experiments[24], or be allowed to inspect a thing which has not been produced in evidence[25].

Failure to produce an object which might otherwise have been admissible as real evidence does not preclude the admission of oral evidence concerning the existence or condition of that object, although such evidence may carry far less weight[26].

xxx xxx xxx

1471. Audio and video recordings. An audio recording is admissible in evidence provided that the accuracy of the recording can be proved, the recorded voices can be properly identified, and the evidence is relevant and otherwise admissible[27]. However, that evidence should always be regarded with caution and assessed in the light of all the circumstances[28].

A video recording of an incident which is in issue is admissible[29]. There is no difference in terms of admissibility between a direct view of an incident and a view of it on a visual display unit of a camera or on a recording of what the camera has filmed. A witness who sees an incident on a display or a recording may give evidence of what he saw in the same way as a witness who had a direct view[30].

31. In order to examine the purport of the term "matter" as found in Section 3 of the 1872 Act, Section 29 of the 1860 Code and Section 3(18) of the General Clauses Act, and to ascertain whether the contents of the memory card can be regarded as "document", we deem it appropriate to refer to two Reports of the Law Commission of India. In the 42nd Law Commission Report[31], the Commission opined on the amendments to the 1860 Code. Dealing with Section 29 of the 1860 Code, the Commission opined as under:

2.56. The main idea in all the three Acts is the same and the emphasis is on the "matter" which is recorded, and not on the substance on which the matter is recorded. We feel, on the whole, that the Penal Code should contain a definition of "document" for its own purpose, and that Section 29 should be retained.

The said observation is restated in the 156th Report[32], wherein the Commission opined thus:

11.08 Therefore, the term 'document' as defined in Section 29, Indian Penal Code may be enlarged so as to specifically include therein any disc, tape, sound track or other device on or in which any matter is recorded or stored by mechanical, electronic or other means ... ... The aforesaid proposed amendment in Section 29 would also necessitate consequential amendment of the term "document" Under Section 3 of the Indian Evidence Act, 1872 on the lines indicated above.

Considering the aforementioned Reports, it can be concluded that the contents of the memory card would be a "matter" and the memory card itself would be a "substance" and hence, the contents of the memory card would be a "document".

32. It is crystal clear that all documents including "electronic record" produced for the inspection of the Court alongwith the police report and which prosecution proposes to use against the Accused must be furnished to the Accused as per the mandate of Section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen-drive must be furnished to the Accused, which can be done in the form of cloned copy of the memory card/pen-drive. It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the

1973 Code, but also the right of an Accused to a fair trial enshrined in Article 21 of the Constitution of India.

33. We do not wish to dilate further nor should we be understood to have examined the question of relevancy of the contents of the memory card/pen-drive or for that matter the proof and admissibility thereof. The only question that we have examined in this appeal is: whether the contents of the memory card/pen-drive referred to in the chargesheet or the police report submitted to Magistrate Under Section 173 of the 1973 Code, need to be furnished to the Accused if the prosecution intends to rely on the same by virtue of Section 207 of the 1973 Code?

34. Reverting to the preliminary objection taken by the Respondent for dismissing the appeal at the threshold because of the disclosure of identity of the victim in the memo of the special leave petition forming the subject matter of the present appeal, we find that the explanation offered by the Appellant is plausible inasmuch as the prosecution itself had done so by naming the victim in the First Information Report/Crime Case, the statement of the victim Under Section 161, as well as Under Section 164 of the 1973 Code, and in the chargesheet/police report filed before the Magistrate. Even the objection regarding incorrect factual narration about the Appellant having himself viewed the contents of the memory card/pen-drive does not take the matter any further, once we recognize the right of the Accused to get the cloned copies of the contents of the memory card/pen-drive as being mandated by Section 207 of the 1973 Code and more so, because of the right of the Accused to a fair trial enshrined in Article 21 of the Constitution of India.

35. The next crucial question is: whether parting of the cloned copy of the contents of the memory card/pen-drive and handing it over to the Accused may be safe or is likely to be misused by the Accused or any other person with or without the permission of the Accused concerned? In the present case, there are eight named Accused as of now. Once relief is granted to the Appellant who is Accused No. 8, the other Accused would follow the same suit. In that event, the cloned copies of the contents of the memory card/pen-drive would be freely available to all the Accused.

36. Considering the principles laid down by this Court in *Tarun Tyagi* (supra), we are of the opinion that certain conditions need to be imposed in the fact situation of the present case. However, the safeguards/conditions suggested by the Appellant such as to take help of experts, to impose watermarks on the respective cloned copies etc., may not be sufficient measure to completely Rule out the possibility of misuse thereof. In that, with the advancement of technology, it may be possible to breach even the security seals incorporated in the concerned cloned copy. Besides, it will be well-nigh impossible to keep track of the misuse of the cloned copy and its safe and secured custody.

37. Resultantly, instead of allowing the prayer sought by the Appellant in toto, it may be desirable to mould the relief by permitting the Appellant to seek second expert opinion from an independent agency such as the Central Forensic Science Laboratory (CFSL), on all matters which the Appellant may be advised. In that, the Appellant can formulate queries with the help of an expert of his choice, for being posed to the stated agency. That shall be confidential and not allowed to be accessed by any other agency or person not associated with the CFSL. Similarly, the forensic report prepared by the CFSL, after analyzing the cloned copy of the subject memory card/pen-drive, shall be kept confidential and shall not be allowed to be accessed by any other agency or person except the concerned Accused or his authorized representative until the conclusion of the trial. We are inclined to say so because the State FSL has already submitted its forensic report in relation to the same memory card at the instance of the investigating agency.

38. Needless to mention that the Appellant before us or the other Accused cannot and are not claiming any expertise, much less, capability of undertaking forensic analysis of the cloned copy of the contents of the memory card/pen-drive. They may have to eventually depend on some expert agency. In our opinion, the Accused, who are interested in reassuring themselves about the genuineness and credibility of the

contents of the memory card in question or that of the pen-drive produced before the trial Court by the prosecution on which the prosecution would rely during the trial, are free to take opinion of an independent expert agency, such as the CFSL on such matters as they may be advised, which information can be used by them to confront the prosecution witnesses including the forensic report of the State FSL relied upon by the prosecution forming part of the police report.

39. Considering that this is a peculiar case of intra-conflict of fundamental rights flowing from Article 21, that is right to a fair trial of the Accused and right to privacy of the victim, it is imperative to adopt an approach which would balance both the rights. This principle has been enunciated in the case of *Asha Ranjan v. State of Bihar* MANU/SC/0159/2017 : (2017) 4 SCC 397 wherein this Court held thus:

57. The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right Under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognise and accept the right of one which has to be protected.

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61. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right ... ... Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances ... ... Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of Rule of law. ... ...

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86.1. The right to fair trial is not singularly absolute, as is perceived, from the perspective of the Accused. It takes in its ambit and sweep the right of the victim(s) and the society at large. These factors would collectively allude and constitute the Rule of Law i.e. free and fair trial.

86.2. The fair trial which is constitutionally protected as a substantial right Under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote and instil Rule of Law. A fair trial is not what the Accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings.

40. This Court in *Mazdoor Kisan Shakti Sangathan v. Union of India* MANU/SC/0762/2018 : (2018) 17 SCC 324

has restated the legal position in the following terms:

61. Undoubtedly, right of people to hold peaceful protests and demonstrations, etc. is a fundamental right guaranteed Under Articles 19(1)(a) and 19(1)(b) of the Constitution. The question is as to whether disturbances, etc. caused by it to the residents, as mentioned in detail by the NGT, is a larger public interest which outweighs the rights of protestors to hold demonstrations at Jantar Mantar Road and, therefore, amounts to reasonable restriction in curbing such demonstrations. Here, we agree with the detailed reasoning given by the NGT that holding of demonstrations in the way it has been happening is causing serious discomfort and harassment to the residents. At the same time, it is also to be kept in mind that for quite some time Jantar Mantar has been chosen as a place for holding demonstrations and was earmarked by the authorities as well. Going by the dicta in Asha Ranjan [Asha Ranjan v. State of Bihar, MANU/SC/0159/2017 : (2017) 4 SCC 397 : (2017) 2 SCC (Cri.) 376], principle of primacy cannot be given to one right whereby the right of the other gets totally extinguished. Total extinction is not balancing. Balancing would mean curtailing one right of one class to some extent so that the right of the other class is also protected.

41. We are conscious of the fact that Section 207 of the 1973 Code permits withholding of document(s) by the Magistrate only if it is voluminous and for no other reason. If it is an "electronic record", certainly the ground predicated in the second proviso in Section 207, of being voluminous, ordinarily, cannot be invoked and will be unavailable. We are also conscious of the dictum in the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick and Ors.* MANU/SC/0263/1981 : (1981) 2 SCC 109, wherein this Court has restated the cardinal principle that Accused is entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use against him during the trial.

42. Nevertheless, the Court cannot be oblivious to the nature of offence and the principle underlying the amendment to Section 327 of the 1973 Code, in particular Sub-section (2) thereof and insertion of Section 228A of the 1860 Code, for securing the privacy of the victim and her identity. Thus understood, the Court is obliged to evolve a mechanism to enable the Accused to reassure himself about the genuineness and credibility of the contents of the memory card/pen-drive from an independent agency referred to above, so as to effectively defend himself during the trial. Thus, balancing the rights of both parties is imperative, as has been held in *Asha Ranjan* (supra) and *Mazdoor Kisan Shakti Sangathan* (supra). The Court is duty bound to issue suitable directions. Even the High Court, in exercise of inherent power Under Section 482 of the 1973 Code, is competent to issue suitable directions to meet the ends of justice.

43. If the Accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen-drive in question, he can request the Magistrate to provide him inspection in Court, if necessary, even for more than once alongwith his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application is filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it is not an attempt by the Accused to protract the trial. While allowing the Accused and his lawyer or authorized I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pen-drive in any manner. Such multipronged approach may subserve the ends of justice and also effectuate the right of Accused to a fair trial guaranteed Under Article 21 of the Constitution.

44. In conclusion, we hold that the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the Accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the

Court may be justified in providing only inspection thereof to the Accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides.

45. In view of the above, this appeal partly succeeds. The impugned judgment and order passed by the trial Court and the High Court respectively stand modified by giving option to the Appellant/Accused to the extent indicated hitherto, in particular paragraphs 37, 38 and 43.

46. Resultantly, the application filed by the Appellant before the trial Court being Crl. M.P. No. 49/2018 in C.P. No. 16/2017 is partly allowed in the aforementioned terms.

47. We direct the trial Court to ensure that the trial in C.P. No. 16/2017 is concluded expeditiously, preferably within six months from the date of this judgment.

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[1]Tukaram S. Dighole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : (2010) 4 SCC 329

[2]Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra and Ors., MANU/SC/0277/1975 : (1976) 2 SCC 17

[3]Shamsher Singh Verma v. State of Haryana, MANU/SC/1345/2015 : (2016) 15 SCC 485

[4]Anwar P.V. v. P.K. Basheer, MANU/SC/0834/2014 : (2014) 10 SCC 473

[5]Hodge M. Malek, Phipson on Evidence, 19th Edn., 2018, pg. 1450

[6]Hodge M. Malek, Phipson on Evidence, 19th Edn., 2018, pg. 5

[7]Fourth Edition, 2006 reissue, Vol. 11(3) Criminal Law, Evidence and Procedure

[8]R v. Daye [1908] 2 KB 333 at 340, DC, per Darling J.

[9]A tombstone bearing an inscription is in this sense a document (see Mortimer v. M'Callan (1840) 6 M & W 58), as is a coffin-plate bearing an inscription (see R. v. Edge (1842) Wills, Circumstantial Evidence (6th Edn.) 309).

[10]See also Lyell v. Kennedy (No. 3) (1884) 27 ChD 1, 50 LT 730, Senior v. Holdsworth, ex p. Independent Television News Ltd. [1976] QB 23, [1975] 2 All ER 1009, Victor Chandler International Ltd. v. Customs and Excise Comrs. MANU/UKCH/0030/1999 : [2000] 1 All ER 160, [1999] 1 WLR 2160, ChD.

[11]For the purposes of the Police and Criminal Evidence Act 1984, 'document' means anything in which information of any description is recorded: Section 118 (amended by the Civil Evidence Act 1995 Section 15(1), Sch 1 para 9(3)). For the purposes of the Criminal Justice Act 2003 Pt. 11 (Sections 98-141) (as amended) (evidence), the definition is the same (see Section 134(1)), save that for the purposes of Pt. 11 Ch. 3 (Sections 137-141) (which includes the provision relating to refreshing memory (see Section 139; and para 1438 ante)) it excludes any recording of sounds or moving images (see Section 140).

[12]See e.g. R. v. Elworthy (1867) LR 1 CCR 103, 32 JP 54, CCR; Boyle v. Wiseman (1855) 11 Exch. 360. Documents produced by purely mechanical means may constitute real evidence even where reliance is placed on the content: The Statute of Liberty, Sapporo Maru (Owners) v. Statue of Liberty (Owners) [1968] 2 All ER 195, [1968] 1 WLR 739 (film of radar echoes); R. v. Wood (1982) 76 Cr. App. Rep. 23, CA (computer used as calculator); Castel v. Cross [1985] 1 All ER 87, [1984] 1 WLR 1372, DC (printout of evidential breath-testing device). See also Garner v. DPP (1989) Crim. LR 583, DC; R. v. Skinner [2005] EWCA Crim. 1439, [2006] Crim. LR 56, [2005] ALL ER (D) 324 (May). As to real evidence generally see para 1466 post.

[13]R. v. Elworthy (1867) LR 1 CCR 103, 32 JP 54, CCR.

[14]R. v. Wayte (1982) 76 Cr. App. Rep. 110 at 118, CA. The admissibility of a document is, following the general rule, a question for the judge: See para 1360 ante. A document which the law requires to be stamped, but which is unstamped, is admissible in criminal proceedings: Stamp Act 1891 Section 14(4) (amended by the Finance Act 1999 Section 109(3), Sch 12 para 3(1), (5)).

[15]As to the related 'best evidence rule' see para 1367 ante.

[16]As to the admissibility of examined or certified copies of public documents at common law see EVIDENCE vol. 17(1) (Reissue) para 821 et. seq.

[17]A-G v. Le Merchant (1788) 2 2 Term Rep 201n; R. v. Hunter (1829) 4 C & P 128; R. v. Elworthy (1867) LR 1 CCR 103, 32 JP 54, CCR.

[18]Owner v. Be Hive Spinning Co. Ltd. [1914] 1 KB 105, 12 LGR 421; Alivon v. Furnival (1834) 1 Cr. M. & Rule 277.

[19]R. v. Haworth (1830) 4 C & P 254

[20]R. v. Nowaz MANU/UKCR/0020/1976 : (1976) 63 Cr. App. Rep 178, CA. A further possibility was that contents of a document might be proved by an admission or confession: Slatterie v. Pooley (1840) 6 M & W 664

[21]This include animals, such as dogs, which may be inspected to see if they are ferocious (Line v. Taylor (1862) 3 F & F 731) or whether they appear to have been ill-treated, etc. Note however that statements (such as statements of origin) printed on objects may give rise to issues of hearsay if it is sought to rely on them as true: Comptroller of Customs v. Western Lectric Co. Ltd. MANU/UKPC/0006/1965 : [1966] AC 367, [1965] 3 All ER 599, PC.

[22]Expert evidence may often be essential if the court or jury is to draw any kind of informed conclusions from their examination of the

exhibit. It would be dangerous, for example, for a court or jury to draw its own unaided conclusions concerning the identity of fingerprints or the age and origin of bloodstains: Anderson v. R. MANU/SCCN/0050/1970 : [1972] AC 100, [1971] 3 All ER 768, PC.

[23]R. v. Wright [1993] Crim. LR 607, CA; R. v. Devichand [1991] Crim. LR 446, CA.

[24]R. v. Maggs (1990) 91 Cr. App. Rep 243, CA, per Lord Lane CJ at 247; R. v. Crees [1996] Crim. LR 830, CA; R. v. Stewart MANU/SCCN/0092/1988 : (1989) 89 Cr. App. Rep. 273, [1989] Crim. LR 653, CA.

[25]R. v. Lawrence [1968] 1 All ER 579, 52 CR. App. Rep. 163, CCA.

[26]R. v. Francis (1874) LR 2 CCR 128, 43 LJMC 97, CCR; Hocking v. Ahlquist Bros. [1944] KB 120, [1943] 1 All ER 722, DC. See also R. v. Uxbridge Justices, ex. P. Sofaer (1987) 85 Cr. App. Rep. 367, DC. If the object in question is in the possession of the prosecutor or of a third person, its production may generally be compelled by issue of a witness order under the Criminal Procedure (Attendance of Witnesses) Act, 1965 Section 2 (as substituted and amended) or under the Magistrates' Court Act, 1980 Section 97 (as substituted and amended) (see para 1409 ante). The Defendant cannot, however, be served with such an order, lest he be forced to incriminate himself: Trust Houses Ltd. v. Postlethwaite (1944) 109 JP 12.

[27]R. v. Maqsud Ali, R v. Ashiq Hussain MANU/UKCR/0026/1965 : [1966] 1 QB 688, 49 Cr. App. Rep 230, CCA. For the considerations relevant to the determination of admissibility see R. v. Stevenson, R. v. Hulse, R. v. Whitney [1971] 1 All ER 678, 55 Cr. App. Rep 171; R. v. Robson, R. v. Harris [1972] 2 All ER 699, 56 Cr. App. Rep 450. See also R. v. Senat, R. v. Sin (1968) 52 Cr. App. Rep 282, CA; R. v. Bailey MANU/UKCR/0034/1993 : [1993] 3 All ER 513, 97 Cr. App. Rep 365, CA. Where a video recording of an incident becomes available after the witness has made a statement, the witness may view the video and, if necessary, amend his statement so long as the procedure adopted is fair and the witness does not rehearse his evidence: R. v. Roberts (Michael), R. v. Roberts (Jason) [1998] Crim. LR 682, 162 JP 691, CA.

[28]R. v. Maqsud Ali, R. v. Ashiq Hussain MANU/UKCR/0026/1965 : [1966] 1 QB 688, 49 Cr. App. Rep 230, CCA. As to the use of tape recordings and transcripts see R. v. Rampling [1987] Crim. LR 823, CA; and see also Buteria v. DPP (1986) 76 ALR 45, Aust. HC. As to the tape recording of police interviews see para 971 et seq ante; and as to the exclusion of a tape recording under the Police and Criminal Evidence Act, 1984 Section 78 (as amended) (see para 1365 ante) as unfair evidence see R. v. H [1987] Crim. LR 47, Cf R. v. Jelen, R. v. Karz (1989) 90 Cr. App. Rep 456, CA (tape recording admitted despite element of entrapment).

[29]Taylor v. Chief Constable of Cheshire MANU/UKWQ/0046/1986 : [1987] 1 All ER 225, 84 Cr. App. Rep 191, DC.

[30]Taylor v. Chief Constable of Cheshire MANU/UKWQ/0046/1986 : [1987] 1 All ER 225, 84 Cr. App. Rep 191, DC. As to the admissibility of video recordings as evidence identifying the Defendant see also R. v. Fowden and White [1982] Crim. LR 588, CA; R. v. Grimer [1982] Crim. LR 674, CA; R. v. Blenkinsop [1995] 1 Cr. App. Rep 7, CA. A recording showing a road on which an incident had occurred was admitted in R. v. Thomas [1986] Crim. LR 682. As to the identification of the Defendant by still photographs taken by an automatic security camera see R. v. Dodson, R. v. Williams [1984] 1 WLR 971, 79 Cr. App. Rep 220, CA; as to identification generally see para 1455 ante; and as to the admissibility of a copy of a video recording of an incident see Kajala v. Noble (1982) 75 Cr. App. Rep 149, CA.

[31]Forty-Second Report, Law Commission India, Indian Penal Code, June, 1971, 32-35

[32]One Hundred Fifty-Sixth Report on the Indian Penal Code (Volume I), August, 1997, Law Commission of India, Chapter-XI

Citation: MANU /SC /0807 /2019

IN THE SUPREME COURT OF INDIA

State
Vs.
M.R. Hiremath

Judges/Coram:
Dr. D.Y. Chandrachud and Hemant Gupta, JJ.

Case Note:

Criminal - Quashing of proceedings - Challenge thereto - Section 65B of Evidence Act, 1872 and Sections 482 and 239 of Code of Criminal Procedure 1973 (CrPC) -Present appeal arose from a judgment of a learned Single Judge of High Court by which a petition under Section 482 of CrPC was allowed - While doing so, High Court set aside an order of Special Judge, rejecting application of Respondent for discharge under Section 239 of CrPC - Whether a cognizable offence had been made out on basis of which a first information report could be lodged.

Facts:

The case of the prosecution is that, charges were framed for offences punishable under Sections 7, 8, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. The Respondent instituted three successive petitions under Section 482 of CrPC before the High Court for quashing of the criminal proceedings. The first two petitions were dismissed as withdrawn, leaving it open to the Respondent to pursue his remedies for seeking a discharge from the proceedings. The High Court dismissed the third petition. The first Respondent then filed a discharge application under Section 239 of the CrPC before the Special Judge. The trial judge dismissed the application by an order. 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. The learned Single Judge has quashed the proceedings against the Respondent on the ground that (i) in the absence of a certificate under Section 65B of the Evidence Act, secondary evidence of the electronic record based on the spy camera is inadmissible in evidence; (ii) the prosecution is precluded from supplying any certification "at this point of time" since that would be an afterthought; and (iii) the case of the prosecution that apart from the electronic evidence, other evidence is available, is on its face unconvincing. The learned judge then held that, the second Accused who was the subject of the trap proceedings was not shown to have named the Respondent as being instrumental in the episode. On this finding the proceedings have been quashed.

Held, while allowing the appeal

1. 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. [13]

2. 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 that, 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. Section 65B(4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasising this facet of Sub-section (4), the decision in Anvar holds that, the requirement of producing a certificate arises, when the electronic record is sought to be used as evidence. 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. [14]

3. The same view has been reiterated by a two judge Bench of this Court in Union of India and Ors. v. CDR Ravindra V. Desai. 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 in which it was held that, 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. [15]

4. 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. [16]

5. Independent of the electronic record, the prosecution is relying on other material. The existence of such material has been adverted to in the charge-sheet. Details of the documents on which the prosecution sought to place reliance find specific mention in the charge-sheet. [17]

6. P. Sirajuddin emphasized the requirement of a preliminary inquiry, where a public servant is alleged to have committed an act of dishonesty involving a serious misdemeanour. The purpose of a preliminary inquiry is to ascertain whether a cognizable offence has been made out on the basis of which a first information report can be lodged. In view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately. Perhaps, the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR. [20]

7. In the present case, on 15 November 2016, the complainant is alleged to have met the Respondent. During the course of the meeting, a conversation was recorded on a spy camera. Prior thereto, the investigating officer had handed over the spy camera to the complainant. This stage does not represent the commencement of the investigation. At that stage, the purpose was to ascertain, in the course of a preliminary inquiry, whether the information which was furnished by the complainant would form the basis of lodging a first information

report. The purpose of the exercise which was carried out on 15 November 2012 was a preliminary enquiry to ascertain whether the information reveals a cognizable offence. [21]

8. The High Court has erred in coming to the conclusion that, in the absence of a certificate under Section 65B when the charge sheet was submitted, the prosecution was liable to fail and that the proceeding was required to be quashed at that stage. The High Court has evidently lost sight of the other material on which the prosecution sought to place reliance. Finally, no investigation as such commenced before the lodging of the first information report. The investigating officer had taken recourse to a preliminary inquiry. This was consistent with the decision in Lalita Kumari. [22]

9. The High Court ought to have been cognizant of the fact that, the trial court was dealing with an application for discharge under the provisions of Section 239 of the CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that, at the stage of considering an application for discharge, the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. [23]

10. Judgment and order of the High Court is set aside. Appeal allowed. [24]

Ratio Decidendi:

Requirement of producing a certificate arises, when the electronic record is sought to be used as evidence

JUDGMENT

Dr. D.Y. Chandrachud, J.

1. Leave granted.

2. This appeal arises from a judgment of a learned Single Judge of the High Court of Karnataka dated 27 April 2017 by which a petition Under Section 482 of the Code of Criminal Procedure 1973[1] was allowed. While doing so, the High Court set aside an order dated 5 December 2016 of the Special Judge, Bengaluru rejecting the application of the Respondent for discharge Under Section 239 of the Code of Criminal Procedure.

3. The Respondent was at the material time serving as Deputy Commissioner in the Land Acquisition Section of Bangalore Development Authority[2]. BDA had acquired certain lands for the formation of a layout on the outskirts of Bengaluru. The complainant moved the court for denotification of the lands following which, a direction had been issued. Accordingly, the complainant made an application to BDA for denotification of the lands.

4. The case of the prosecution is that on 6 November 2012, the complainant attempted to meet the Respondent (accused No. 1) by whom the file was to be placed before the Denotification Committee. It is alleged that though the complainant was not allowed to meet the Respondent, he met his driver through whom he got to know that such cases were being 'mediated' by the second accused, an advocate purporting to act as the agent of the Respondent. A complaint was lodged with the Lokayukta Police on 8 November 2012 apprehending that a bribe would be asked for by the second accused. The police handed over a spy camera together with the instructions to be followed. It is alleged that a meeting of the second Accused was arranged with a representative of the complainant. On 12 and 13 November 2012, a meeting took place with the second Accused who is stated to have informed the representatives of the complainant of the amount which will be charged for the settlement of the deal. The prosecution alleges that on 15 November 2012 the complainant met the Respondent at about 7.30 pm near the BDA office. 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.

5. On 16 November 2012, a complaint was lodged before the Lokayukta and a first information report was registered. Subsequently, it is alleged that a trap was set up and the second Accused was apprehended while receiving an amount of Rupees five lakhs on behalf of the Respondent towards an initial payment of the alleged bribe. A charge sheet was filed after investigation.

6. Charges were framed for offences punishable Under Sections 7, 8, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988.

7. The Respondent instituted three successive petitions Under Section 482 of Code of Criminal Procedure before the High Court of Karnataka[3] for quashing of the criminal proceedings. The first two petitions were dismissed as withdrawn on 26 February 2013, leaving it open to the Respondent to pursue his remedies for seeking a discharge from the proceedings. The High Court dismissed the third petition.

8. The first Respondent then filed a discharge application Under Section 239 of the Code of Criminal Procedure 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 Code of Criminal Procedure which has resulted in the impugned order of the learned Single Judge dated 27 April 2017.

9. The learned Single Judge has quashed the proceedings against the Respondent on the ground that (i) in the absence of a certificate Under Section 65B of the Evidence Act, secondary evidence of the electronic record based on the spy camera is inadmissible in evidence; (ii) the prosecution is precluded from supplying any certification "at this point of time" since that would be an afterthought; and (iii) the case of the prosecution that apart from the electronic evidence, other evidence is available, is on its face unconvincing. The learned judge then held that the second Accused who was the subject of the trap proceedings was not shown to have named the Respondent as being instrumental in the episode. On this finding the proceedings have been quashed.

10. Assailing the correctness of the judgment of the High Court, Mr. Joseph Aristotle S., learned Counsel appearing for the Appellant, submits that (i) the High Court was manifestly in error in holding that a certificate Under Section 65B was warranted at this stage; (ii) a certificate Under Section 65B would be required to be produced at the stage when electronic evidence is produced in the course of evidence at the trial and hence the stage at which the High Court sought to apply the provision was premature; (iii) the prosecution is relying, apart from electronic evidence pertaining to the spy camera, on other material which prima facie shows the involvement of the first and the second accused; (iv) without considering the nature of that evidence, the High Court prevented the prosecution from placing reliance on such material on the basis of a bald averment that it did not appear to be convincing; (v) in handing over the spy camera to the complainant and the process which followed by recording what transpired at the meeting with the Respondent on 15 November 2012, the investigating officer was only conducting a preliminary inquiry of the nature that is contemplated by the decision of this Court in Lalita Kumari v. Government of Uttar Pradesh MANU/SC/1166/2013 : (2014) 2 SCC 1; and (vi) the purpose of the preliminary inquiry was only to enable the prosecution to ascertain whether a cognizable offence was made out. In other words, the utilization of the spy camera during the course of the preliminary inquiry was in the nature of a pre-trap mahazar which fell within the exceptions which have been carved out in the decision in Lalita Kumari. The investigation, it has been urged, would commence only thereafter having due regard to the provisions contained in Section 154 of the Code of Criminal Procedure.

11. On the other hand, while supporting the view which has been taken by the learned Single Judge of the High Court, Mr. Basava Prabhu Patil, learned Senior Counsel appearing for the Respondent, submits that (i) in the present case the investigation had commenced before the registration of an FIR Under Section 154 of the Code of Criminal Procedure. The events which transpired before 16 November 2012 before the FIR was registered and the collection of material would be inadmissible in evidence; (ii) while the decision of the Constitution Bench in Lalita Kumari allows a preliminary inquiry particularly

in a case involving corruption under the Prevention of Corruption Act, the Trial Court erred in inferring from the decision of this Court that the investigating officer is entitled to collect evidence even before the FIR is lodged; (iii) there is nothing to indicate, even the existence of an entry in the Station Diary; (iv) in consequence, the decision of the trial court was inconsistent with the principle enunciated in Lalita Kumari, which warranted interference by the High Court in exercise of its jurisdiction Under Section 482 of the Code of Criminal Procedure; (v) as a matter of fact the trial against the second Accused has proceeded and despite a lapse of seven years the prosecution has failed to produce a copy of the certificate Under Section 65B of the Evidence Act; and (vi) in the absence of a certificate Under Section 65B, there is an absence of material hence a discharge is warranted Under Section 231 of the Code of Criminal Procedure.

12. These submissions fall for consideration.

13. 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. Section 65B reads as follows:

Section 65(B). Admissibility of Electronic Records-

(1) Notwithstanding anything contained in this 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 (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 of any contents of the original or any fact stated therein of which direct evidence would be admissible.

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

(a) the computer output containing the information was produced by computer during the period over which computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of computer.

(b) during the said period the 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 in the ordinary course of the said activities.

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation for that part of the period, was not such to affect the electronic record or the accuracy of its contents.

(d) The information contained in the electronic record reproduces or is derived from such information fed into computer in ordinary course of said activities.

(3) Where over any period, the function of storing and processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by the computers, whether-

(a) by a combination of computer operating over that period, or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period of time; or

(d) in any other manner involving successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purpose of this Section as constituting a single computer and any reference in the Section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section,

a certificate doing any of the following things, that is to say,--

(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;

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) 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.

(5) For the purposes of this section,--

(a) information shall be taken to be supplied to a computer 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) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.--For the purposes of this Section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

14. 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 MANU/SC/0834/2014 : (2014) 10 SCC 473. 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.

Section 65B(4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasising this facet of Sub-section (4) the decision in Anvar holds that the requirement of producing a certificate arises when the electronic record is sought to be used as evidence. This is clarified in the following extract from the judgment:

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.

(Emphasis supplied)

15. The same view has been reiterated by a two judge Bench of this Court in Union of India and Ors. v. CDR Ravindra V. Desai MANU/SC/0404/2018 : (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 MANU/SC/0835/2017 : (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.

(Emphasis supplied)

16. 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.

17. Apart from the above feature of the case, on which it is abundantly clear that the High Court has erred, we must also notice the submission of the Appellants that independent of the electronic record, the prosecution is relying on other material. The existence of such material has been adverted to in the charge-sheet. Details of the documents on which the prosecution sought to place reliance find specific mention in the charge-sheet particularly at items 15, 25 and 28 to 31. The High Court rejected this submission of the Appellant on the specious assertion that "it is found that, on the face of it, it is not convincing".

18. That leads us to the next limb of a significant submission which has been made on behalf of the Respondent by Mr. Basava Prabu Patil, learned senior Counsel, which merits close consideration. It was urged on behalf of the Respondent that the exercise of the investigating officer handing over a spy camera to the complainant on 15 November 2012 would indicate that the investigation had commenced even before an FIR was lodged and registered on 16 November 2012. This, it has been submitted, is a breach of the parameters which have been prescribed by the judgment of the Constitution Bench of this Court in Lalita Kumari.

19. Before we advert to the decision of the Constitution Bench, it is necessary to note that in the earlier decision of this Court in P. Sirajuddin v. State of Madras MANU/SC/0158/1970 : (1970) 1 SCC 595, the importance of a preliminary inquiry before the lodging of a first information report in a matter involving alleged corruption by a public servant was emphasized. This Court observed:

17. ... Before a public servant, whatever be his status, is publicly charged with acts, of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the Appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge sheet is for someone in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charged sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to-find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report.

20. P. Sirajuddin (supra) emphasized the requirement of a preliminary inquiry, where a public servant is alleged to have committed an act of dishonesty involving a serious misdemeanour. The purpose of a preliminary inquiry is to ascertain whether a cognizable offence has been made out on the basis of which a first information report can be lodged. The

basis of a first information report Under Section 154 of the Code of Criminal Procedure[4] is information relating to the commission of a cognizable offence which is furnished to an officer-in-charge of the police station. It is with a view to ascertain whether a cognizable offence seems to have been implicated in a case involving an alleged act of corruption by a public servant that a preliminary inquiry came to be directed in the judgment of this Court in P Sirajuddin. The decision in P. Sirajuddin was recognized and followed by the Constitution Bench in Lalita Kumari. The Constitution Bench held that while Section 154 of the Code of Criminal Procedure postulates mandatory registration of a first information report on the receipt of information indicating the commission of a cognizable offence yet there could be situations where a preliminary inquiry may be required. Indicating the cases where a preliminary inquiry may be warranted, this Court held:

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The purpose of conducting a preliminary inquiry has been elaborated in the following extract:

Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

21. In the present case, on 15 November 2016, the complainant is alleged to have met the Respondent. During the course of the meeting, a conversation was recorded on a spy camera. Prior thereto, the investigating officer had handed over the spy camera to the complainant. This stage does not represent the commencement of the investigation. At that stage, the purpose was to ascertain, in the course of a preliminary inquiry, whether the information which was furnished by the complainant would form the basis of lodging a first information report. In other words, the purpose of the exercise which was carried out on 15 November 2012 was a preliminary enquiry to ascertain whether the information reveals a cognizable offence.

22. The High Court has in the present case erred on all the above counts. The High Court has erred in coming to the conclusion that in the absence of a certificate Under Section 65B when the charge sheet was submitted, the prosecution was liable to fail and that the proceeding was required to be quashed at that stage. The High Court has evidently lost sight of the other material on which the prosecution sought to place reliance. Finally, no investigation as such commenced before the lodging of the first information report. The investigating officer had taken recourse to a preliminary inquiry. This was consistent with the decision in Lalita Kumari.

23. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 of the Code of Criminal Procedure. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In the State of Tamil Nadu v. N. Suresh Rajan MANU/SC/0011/2014 : (2014) 11 SCC 709, adverting to the earlier decisions on the subject; this Court held:

29. ...At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the Accused has been made out. To put it differently, if the court thinks that the Accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the Accused has committed the offence. The law does not permit a mini trial at this stage.

24. For the above reasons we are of the view that the appeal would have to be allowed. We accordingly allow the appeal and set aside the judgment and order of the High Court dated 24 April 2017 in Criminal Writ Petition No. 3202 of 2017. We accordingly maintain the order passed by the learned trial judge on 5 December 2016 dismissing the discharge application filed by the Respondent.

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[1] 'CrPC'

[2] 'BDA'

[3] Criminal Petition No. 7562/2012, Writ Petition No. 11252/2013 and Writ Petition No. 20394/2013

[4] 154 Information in cognizable cases.-(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf;

Citation: (2018)2SCC 801

IN THE SUPREME COURT OF INDIA

Shafhi Mohammad
Vs.
The State of Himachal Pradesh

Judges/Coram:
A.K. Goel and U.U. Lalit, JJ.

Prior History / High Court Status:

From the Judgment and Order dated 26.06.2014 of the High Court of Himachal Pradesh, Shimla in Criminal Appeal No. 404 of 2009 (MANU/HP/1540/2014)

Case Note:

Law of Evidence - Applicability - Section 63 and 65B(4) of Indian Evidence Act, 1872 - Present appeal filed wherein question of admissibility of videography during investigation was raised - Whether videography of scene of crime or scene of recovery during investigation necessary inspiring confidence in evidence collected - Whether Section 65B(4) of Evidence Act be applicable or not

Facts:

Present appeal filed wherein question of admissibility of videography of scene of crime or scene of recovery during investigation necessary to inspire confidence in evidence collected was raised.

Held, while adjourning the appeal:

(i) 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 was not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act could not be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this was not so permitted, it will be denial of justice to the person who was 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 could not possibly secure. Thus, requirement of certificate Under Section 65B(4) is not always mandatory. Such party could not be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural could be relaxed by the Court wherever interest of justice so justifies. [14] and[15]

ORDER

SLP (Crl.) No. 2302 of 2017:

1. One of the questions which arose in the course of consideration of the matter was whether videography of the scene of crime or scene of recovery during investigation should be necessary to inspire confidence in the evidence collected.

2. In Order dated 25th April, 2017 statement of Mr. A.N.S. Nadkarni, learned Additional Solicitor General is recorded to the effect that videography will help the investigation and was being successfully used in other countries. He referred to the perceived benefits of "Body-Worn Cameras" in the United States of America and the United Kingdom. Body-worn cameras act as deterrent against anti-social behaviour and is also a tool to collect the evidence. It was submitted that new technological device for collection of evidence are order of the day. He also referred to the Field Officers' Handbook by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India. Reference was also made to Section 54-A of the Code of Criminal Procedure providing for videography of the identification process and proviso to Section 164(1) Code of Criminal Procedure providing for audio video recording of confession or statement under the said provision.

3. Thereafter, it was noted in the Order dated 12th October, 2017, that the matter was discussed by the Union Home Secretary with the Chief Secretaries of the States in which a decision was taken to constitute a Committee of Experts (COE) to facilitate and prepare a road-map for use of videography in the crime scene and to propose a Standard Operating Procedure (SOP). However, an apprehension was expressed about its implementation on account of scarcity of funds, issues of securing and storage of data and admissibility of evidence. We noted the suggestion that still-photography may be useful on account of higher resolution for forensic analysis. Digital cameras can be placed on a mount on a tripod which may enable rotation and tilting. Secured portals may be established by which the Investigation Officer can e-mail photograph(s) taken at the crime scene. Digital Images can be retained on State's server as permanent record.

SLP(Crl.) No. 9431 of 2011:

4. Since identical question arose for consideration in this special leave petition as noted in Order dated 12th October, 2017, we have heard learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, assisted by Ms. Ananya Ghosh, Advocate, on the question of admissibility of electronic record. We have also heard Mr. Yashank Adhyaru, learned senior Counsel, and Ms. Shirin Khajuria, learned Counsel, appearing for Union of India.

5. An apprehension was expressed on the question of applicability of conditions Under Section 65B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

6. We have been taken through certain decisions which may be referred to. In Ram Singh and Ors. v. Col. Ram Singh, MANU/SC/0176/1985 : 1985 (Supp) SCC 611, a Three-Judge Bench considered the said issue. English Judgments in R. v. Maqsud Ali, (1965) 2 All ER 464, and R. v. Robson, (1972) 2 ALL ER 699, and American Law as noted in American Jurisprudence 2d (Vol. 29) page 494, were cited with approval to the effect that it will be 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. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was

observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

7. In Tukaram S. Dighole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : (2010) 4 SCC 329, the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive Rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

8. In Tomaso Bruno and Anr. v. State of Uttar Pradesh, MANU/SC/0057/2015 : (2015) 7 SCC 178, a Three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. 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, MANU/SC/0681/2012 : (2012) 9 SCC 1 and State (NCT of Delhi) v. Navjot Sandhu, MANU/SC/0465/2005 : (2005) 11 SCC 600.

9. We may, however, also refer to judgment of this Court in Anvar P.V. v. P.K. Basheer and Ors. MANU/SC/0834/2014 : (2014) 10 SCC 473, delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandh (supra) that secondary evidence of electronic record could be covered Under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.

10. 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).

11. 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.

12. The term "electronic record" is defined in Section 2(t) of the Information Technology Act, 2000 as follows:

Electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

13. Expression "data" is defined in Section 2(o) of the Information Technology Act as follows.

Data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

14. 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.

15. 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.

16. To consider the remaining aspects, including finalisation of the road-map for use of the videography in the crime scene and the Standard Operating Procedure (SOP), we adjourn the matter to 13th February, 2018.

17. We place on record our deep appreciation for the valuable assistance rendered by learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, who was assisted by Ms. Ananya Ghosh, Advocate, as well as by Mr. Yashank Adhyaru, learned senior Counsel, and Ms. Shirin Khajuria, learned Counsel, appearing for Union of India.

Citation: 2018 (3) KHC 725

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Sherin V. John
Vs.
State of Kerala

Judges/Coram:
K. Abraham Mathew, J.

ORDER

K. Abraham Mathew, J.

1. (i) Is an accused entitled to get copy of an electronic record produced in the court by the prosecution as a material object?

(ii) Is the right of an accused to get copies of the documents produced by the prosecution absolute?

The court is called upon to answer these two questions.

2. The petitioner is the accused in a sessions case. He is alleged to have committed the offences under Sections 201 and 302 IPC. The investigating officer produced a 'tablet' (computer), two hard discs of computer, a pen drive and a compact disc, all of which allegedly contain visuals. The petitioner applied for their copies. By the impugned order the learned Sessions Judge dismissed the application. This is challenged.

3. Heard Sri Ravikrishnan, learned counsel for the petitioner and Sri Suman Chakravarthy, learned Senior Public Prosecutor.

4. The articles of which copies were applied for were produced by the investigating officer as material objects. The Sessions Judge took the view that if the petition is allowed and copy of the 'hard disc' is taken, there is every chance of the hash value being changed and it becomes easy for the accused to allege their contents being tampered. Fair trial can well be ensured "by allowing the petitioner and his pleader to inspect and verify the said items at the time of taking evidence", the trial court held.

5. The contention of Sri Revikrishnan, learned counsel for the petitioner, is that the articles produced in the case are not material objects, but electronic records and the petitioner is entitled to their copies as provided in Section 207 of Cr.P.C. Sri Suman Chakravarthy, learned Senior Public Prosecutor, on the other hand, maintains that the things produced in the court are not electronic records, but material objects and there is no statutory provision to issue copies of material objects.

6. Sub section 5 of section 173 of Cr.P.C. provides that the police officer shall forward to the Magistrate along with his report the following documents:

(a) all documents or relevant extracts thereof on which the prosecution propose to rely other than those already sent to the Magistrate during investigation.

(b) the statements recorded under section 161 of all the persons whom the prosecution propose to examine as its witnesses.

7. Section 207 of the Code makes it mandatory for the court to furnish to the accused the following documents:

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under subsection (3) of section 161 of all persons whom the prosecution proposes to examine as its

witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under subsection (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173.

8. The purpose behind Section 207 of the Code is to ensure fair trial. In Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) [MANU/SC/0268/2010 : 2010 (6) SCC (1)], the Supreme Court has observed: "The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (read Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure."

9. In V.K. Sasikala v. State [MANU/SC/0792/2012 : 2012 (9) SCC 771] it has been held in paragraph 17:

"Though it is only such reports which support the prosecution case that required to be forwarded to the court under Section 173(5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualise a situation whether the investigating officer ignores the part of the seized documents which favour the accused and forwards to the court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the court would it not be the duty of the court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution".

10. Adv. Sri Revikrishnan submits that electronic records have been declared documents, by Section 3 of the Indian Evidence Act and the prosecution cannot label them material objects.

11. For a better understanding, the definition of 'evidence' in the Evidence Act may be looked into:

"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."

12. It may appear that the law recognises only two categories of evidence, viz; oral evidence and documentary evidence. If it were correct, how could be material objects like weapons or properties in respect of which offences like theft are committed made part of the evidence. The law recognizes a category of evidence other than oral evidence and documentary evidence. This third category is known as real or physical evidence and it consists of material objects other than documents produced before the inspection of the court. This is the most widely accepted meaning of 'real evidence'. (Phipson on Evidence, 16th Edition South Asian Edition of 2007, Page 5). The meaning of real evidence has been given in the Black's Law Dictionary as follows:

"Physical evidence (such as clothing or a knife wound) that itself plays a direct part in the incident in question."

The terms real evidence and demonstrative evidence are sometimes interchangeably used. The meaning of demonstrative evidence is given in Black's Law Dictionary as physical evidence that one can see and inspect. The Dictionary says that this term sometimes overlaps with and is used as a synonym of real evidence.

13. Existence of the third category of evidence has been recognised by the courts in India also, for which the eleven Judge bench decision of the Supreme Court in State of Bombay v. Kathi Kalu Oghad [MANU/SC/0134/1961 : AIR 1961 SC 1808] is the authority. The court has said: "Evidence has been classified by text writers into three categories, namely (1) oral testimony (2) evidence furnished by documents, and (3)

material evidence." Referring to materials like fingerprint, specimen signature and handwriting, the Apex Court has declared: "they are neither oral, nor documentary evidence, but belong to the third category of material evidence." The court has called it material evidence instead of real evidence. No evidence is required to prove their genuineness since they are taken before the court or pursuant to the orders passed by it. Material things have been referred to in the second proviso to Section 60 of the Evidence Act.

14. Material evidence is not covered by Section 207 Cr.P.C. There is no law providing for issuance of copy of material objects to accused. A copy of a material object can be only its replica. When a material object cannot be produced before the court, there is no provision to produce secondary evidence. But the second proviso to Section 60 of the Evidence Act enables the party concerned to adduce oral evidence in respect of the object.

15. A document has been defined under Section 3 of the Indian Evidence Act as follows:

"'Document' means 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."

16. What is the distinction between a document and a material object. A document cannot exist without a substance like paper, clay, stone, rock, tree, animal. In the case of a document its contents always appear on a material object (substance). A document cannot be divorced from a material object.

17. To accept the submission of the learned counsel Sri Revikrishnan that since the Evidence Act declares electronic records also documents, they can be only documents and not material objects, cannot be accepted. There are certain things which have the characteristics of a document, but are considered material objects. The following illustrations will make it abundantly clear.

(a) A sword upon which name of a person is inscribed.

(b) A gold ring upon which name of a person is inscribed.

(c) A counterfeit currency.

(d) An obscene writing.

(e) An obscene picture.

(f) a photograph in which a male is seen in a compromising position with the wife of his neighbour.

(g) a cheque.

In respect of each of the above things, two situations may arise.

In illustration (a)

(i) The question is whether the accused forged the inscription on the sword. The prosecution has to adduce evidence to prove that he did so.

(ii) The question is whether the accused assaulted the victim with the sword. The prosecution need not prove who made the inscription on it.

In illustration (b)

(i) The question is whether the plaintiff or the defendant is the owner of the gold ring, their names being the same. The parties may have to adduce evidence to prove the person who made the inscription, the circumstances in which he made it etc.

(ii) The question is whether the accused, who does not claim the ownership of the gold ring, committed theft of it. The inscription on it is immaterial.

In illustration (c)

(i) The question is whether the accused made the counterfeit currency. The prosecution has to adduce evidence to prove that he made it.

(ii) The question is whether the accused was found in possession of the counterfeit currency. The prosecution has only to prove that fact, the identity of the person who made it being irrelevant.

In illustration (d)

(i) The question is whether the accused wrote the obscene writing. The prosecution has to prove the fact that it is in his handwriting or that he has signed it.

(ii) The question is whether the accused was in possession of the obscene writing. The prosecution need not establish that he wrote it, the identity of the author being irrelevant. It is required only to prove that the accused was in possession of it.

In illustration (e)

(i) The question is whether the accused drew the obscene picture. The prosecution has to adduce evidence to establish that he did so.

(ii) The question is whether he was in possession of the obscene picture. The prosecution is required only to prove that he was in possession of it, the identity of the person who drew it being irrelevant.

In illustration (f)

(i) The question is whether the photo is genuine. The prosecution has to prove that it is genuine by examining the person who took it.

(ii) The investigating officer seized the photo from the custody of the accused. It is required only to prove the seizure from his custody, the identity of the person who took the photo being irrelevant.

In illustration (g)

(i) The question is whether the accused executed the cheque. The prosecution has to adduce evidence to prove its execution by him.

(ii) The question is whether the accused committed theft of the cheque. The prosecution is required only to prove that he stole it, its genuineness being irrelevant.

In all of the above illustrations, the thing is a document in the first situation. But it cannot be so in the second situation, where it is a material object.

18. In Emperor v. Krishtappa Khandappa [MANU/MH/0030/1925 : AIR 1925 Bom 327] the accused were charged with "having conspired and abetted each other in the felling and removal of twenty sandalwood trees from a Government reserved forest, and further with intending to commit forgery in respect of the trees by impressing thereon certain marks". Accused No. 4 was charged with possession of a counterfeit stamp for the purpose of impressing those marks. The court considered the question whether the letter appeared on the trees constituted a document, for which it interpreted the phrase "any matter expressed or described upon any substance" appearing in Section 29 of the Indian Penal Code, which is identical to the definition of document in the Evidence Act. The court held that the letters imprinted on the trees would be a document within the meaning of Section 29 of the Indian Penal Code. Suppose, there were no letters imprinted on the trees, then the cut down trees would have been only material objects.

19. What is the test to decide whether a thing is a document or a material object when a matter has been expressed or described upon it. In Phipson on Evidence (supra) it is observed that "it must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing."

20. The facts to be proved in the case of a document and a material object are different. Section 67 of the Evidence Act says that the contents of a document can be proved by proving the handwriting or signature of the person who allegedly signed it or wrote it. The section applies only when it is necessary to prove the authenticity of the document, which is clear from the clause "if a document is alleged to be signed or to have been written wholly or in part by any person." This is actually meant by the phrase 'used as a record of a transaction' (see Phipson on Evidence - supra). It follows that only if the thing produced is one the contents of which has to be proved in the manner laid down in Section 67, it is a document. (In the case of photograph the person who took it has to be examined). If that is not necessary, it is only a material object though some matter has been expressed or described upon it. If the identity of the author of the contents, which is necessary to establish its genuineness, is not relevant, it is not a document. In short, the test is the purpose for which the thing upon which a matter has been expressed or described, is produced. That is why in State of Bombay v. Kathi Kalu Oghad [MANU/SC/0134/1961 : AIR 1961 SC 1808] the Supreme Court held that a specimen handwriting or signature or finger impressions taken before a court or by an authority holding investigation are material evidence.

21. In a case where the prosecution only wants to prove possession by the accused of the thing produced in the court like obscene articles, it need not prove the authorship or the truth of the matter expressed or described upon it. Then, it is only a material object. The prosecution only wants the court to draw the inference the court may take from the possession of the accused of the said thing, and nothing more. It becomes the duty of the accused to explain how he happened to be in its possession since it is a matter within his special knowledge as provided in Section 106 of the Evidence Act.

22. To buttress his argument that an electronic record can be considered only a document and the prosecution has to establish its genuineness and it is not sufficient for it to prove its possession by the accused Sri Revikrishnan relies on the decision of a learned Single Judge of this Court in Santhosh Madhavan @ Swami Amritha Chaithanya v. State [2014 KHC 31]. Santhosh Madhavan was charged with having committed the offence of rape as well as some other offences under the Indian Penal Code. Two video cassettes and a multimedia card were seized from the bank locker which was in the exclusive possession of Santhosh Madhavan.

23. The learned Single Judge held:

(i) the video cassettes produced in the case were documents

(ii) the prosecution failed to prove the authenticity of the cassettes

(iii) the prosecution also failed to prove the identity of the persons who appeared in the visuals in the cassettes by examining witnesses, and

(iv) the trial judge committed illegality in viewing the cassettes and taking a decision on the basis of what he saw.

24. In Santhosh Madhavan's case the Chief Judicial Magistrate sent the video cassettes to an executive magistrate (Tahsildar), who was asked to view them and file a report. At the trial the executive magistrate was not examined. The learned Single Judge commented adversely upon the failure of the prosecution to examine the executive magistrate as a witness at the trial. Apparently, the Chief Judicial Magistrate sent the cassettes to the executive magistrate in the light of a circular issued by the Government, K.Dis. 17699/9 LRE dated 9.8.1991. This circular is applicable only to cases registered under the Cinematograph Act. It is not applicable to the cases like Santhosh Madhavan's case, which went unnoticed.

25. In Santhosh Madhavan's case the learned Judge examined the definition of document in the Indian Evidence Act and General Clauses Act, and the views expressed in the Halsbury's Laws of India, Law of Evidence by C.D. Field and in certain decisions of English Courts and of our Supreme Court and held that video cassettes are documents and "it should be established that they are authenticated copies and accurate copies." The learned Judge rejected the argument of the learned Public Prosecutor that since the cassettes were recovered from the exclusive possession of the accused unless he explained how he happened to be in their possession, the court had to draw an inference against him in view of Section 106 of the Evidence Act.

26. The trial judge in Santhosh Madhavan's case held that the persons seen in the visuals in the video cassettes were the accused and the victim after viewing them. The learned Single Judge of this court was of the opinion that though the trial judge had the power to view the cassettes, he should not have relied on them as if they were evidence since they were not made part of the evidence in the case by examining someone to prove their contents. His Lordship observed: "..... it becomes clear that the act of the learned Judge in substituting himself in the place of a witness and entering a conclusive finding on that basis has no sanction of law. If he acts as a witness he has necessarily to offer himself for cross-examination and that has not been done in the case on hand. In fact, the only substantive evidence is the impression formed by the learned Judge by viewing the cassettes."

27. Reliance was placed on the decision of the Supreme Court in Pritam Singh v. State of Punjab [MANU/SC/0119/1955 : AIR 1956 SC 415), from which the following sentences were extracted:

"A Magistrate is certainly not entitled to allow his view or observation to take the place of evidence because such view or observation of his cannot be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same. In the absence of such test having been applied and an explanation sought for from the accused in regard to the same under Section 342, it is not open to the judge to incorporate these observations of his

in the judgment and base his conclusion on the same."

28. In Pritam Singh's case a pair of shoes were recovered from the house allegedly belonging to him. In the course of his examination under Section 313 Cr.P.C. the learned trial judge directed him to try them on his feet. The accused did so and the court found that they fitted his feet. "Realising however that the result of this demonstration would be adverse to his defence, he complained that the shoes were too tight for his feet." It was in this context, the question whether the trial judge was right in doing so arose.

29. From the judgment in Pritam Singh's case it is not clear whether the sentences extracted by the learned Judge who decided in Santhosh Madhavan's case were part of the argument of the learned counsel or the decision of the court. The former appears to be correct because later the court has observed: "This was ocular demonstration and the result of such ocular demonstration could certainly be taken into account by the learned Additional Sessions Judge and the assessors and they were entitled to come to their own conclusions taking into account the further fact that the accused did complain at the time that the shoes were too tight for his feet."

30. Where the prosecution case is that the book produced by it was seized from the accused and it is obscene, it is the duty of the court to read it and decide whether the contents is obscene on not. It cannot delegate it to to someone else. It is, in fact, illegal for it to ask someone else to read it and tell the court whether the contents is obscene or not. Same is the case with an obscene film. The prosecution needs only to prove its possession by the accused.

31. When a material object is produced before the court, the prosecution need not examine anyone to prove its nature or effect unless its nature is such that the court cannot take a decision without expert opinion. It is for the court to take a decision after its examination. The opinion of a police officer or a person other than an expert cannot be admitted in evidence. The court cannot abdicate its power to examine the material object produced before it and delegate it to someone else.

32. In Phipson on Evidence it is stated that material objects when available are "probably the most satisfactory kind of all, since, save for identification or explanation neither testimony nor inference is relied upon. Unless its genuineness is in dispute, the thing speaks for itself."

33. In Raj Kapoor & others v. State (Delhi Administration) & others [MANU/SC/0210/1979 : AIR 1980 SC 258] the Supreme Court observed: "The court will examine the film and judge whether its display, in the given time and clime, so breaches public morals or depraves basic decency as to offend the penal provisions." (emphasis supplied)

34. In Kathi Kalu's case (supra), the eleven judge Bench held that material evidence is "outside the limit of testimony".

35. What is the evidentiary value or probative value of the material objects which have been made part of the evidence in a case? In this context, the definition of 'proved' in the Indian Evidence Act, becomes relevant. It runs as follows:

"Proved". - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

36. The section makes it clear that the court has to reach a conclusion not on the basis of evidence alone. But on the basis of matters before the court. Of course, these matters include evidence. There can be other matters also before the court. The facts like identity of the person who is present before the court or presence or absence of a party before the court are matters before the court. The court need not examine anyone with regard to his identity or presence or absence. It has the authority to ascertain whether the person who is present before it is the one seen in the visuals in the material objects like cassette, compact disc, pen drive.

37. A material object made part of the evidence in the case is a matter before the court. The court has the authority to examine it. The identity of the accused and the victim who are present before the court is also a matter before it. The question whether those persons and the persons seen in the visuals in the cassette marked in evidence in the case are the same persons is one to be answered on the basis of the matters before the court.

38. In Phipson on Evidence it is stated: "material objects when available are probably the most satisfactory kind of all, since, save for identification or explanation neither testimony nor inference is related upon. Unless its genuineness is in dispute, the thing speaks for itself."

39. In Kathi Kalu's case (supra) the eleven Judge Bench held that material evidence is "outside the limit of testimony".

40. The distinction between a document and a material object was not taken into account, the probative value of a material was not taken into consideration and the observations of learned authors and the Supreme Court were not noticed in Santhosh Madhavan's case. The view taken in Santhosh Madhavan's case runs contrary to the one expressed by learned authors and by the Supreme Court.

41. From the foregoing discussion the following conclusions may be reached:

(i) Apart from oral and documentary evidence, there is a third category of evidence called material evidence, which consists of materials other than documents.

(ii) Only copies of documents can be given, but not of material objects.

(iii) When nothing is expressed or described upon a substance, it is only a material object.

(iv) When a matter is expressed or described upon a substance, it may be a document or a material object depending upon the purpose for which it is produced.

(v) If the identity of the author of the matter expressed or described upon a substance is relevant, it is a document; otherwise it is only a material object.

(vi) Where the only purpose for which a material object upon which a matter has been expressed or described is produced is to prove its seizure from the possession of the accused, and it is made part of the evidence by proving its seizure from his possession, the court does not want the testimony of anyone to prove the matter since it has become a 'matter before the court'.

42. The 'tablet' which has been produced before the court below was seized from the petitioner. The prosecution only wants the court to view it and draw the inference that may be taken from its possession by the petitioner.

43. Learned counsel Sri Revikrishnan submits that the 'tablet' seized from the petitioner has been produced by the prosecution not as a material object, but as a document which is clear from the fact that it has cited some witnesses to prove its contents. Immediately after the seizure, the investigating officer apparently viewed its contents in the presence of witnesses and prepared a mahazar. In the Final Report some witnesses have been cited to prove it. That does not make the contents of the 'tablet' a document. The investigating officer prepared the mahazar in the presence of witnesses only to ensure that the seizure was fool-proof and the 'tablet' has been produced before the court as it was. That apart, what is relevant is only the purpose for which it is produced, and not the form. Even where the investigating officer mistakes a material object for a document, the court can hold it as a material object.

44. In the light of the above discussion I hold that the 'tablet' produced before the court is a material object and the petitioner is not entitled to a copy of it. But his counsel shall be allowed to examine it in his presence and take notes in the presence of the prosecutor under the direct supervision of the Chief Ministerial Officer of the court, for which he shall file an application and obtain orders of the court below. The hard discs and the compact disc were not seized from him. So the prosecution has to prove their genuineness and authenticity. They can be only considered documents.

45. Sri Suman Chakkravarthy, learned Senior Public Prosecutor, submits that if copies of the above documents are given, there is every chance of their being circulated or published and tampered with. He relies on the decision of the Delhi High Court in Jasvinder Kalra v. C.B.I [MANU/DE/3629/2010 : 2011 Crl.LJ 1416]. In that case that the contention was that if a copy is issued to the accused of the documents produced in the case, it will affect the security of the state and would put some person's life in danger. The Delhi High Court accepted it and refused to give a copy of it.

46. The Supreme Court had occasion to consider whether the court can refuse to issue copies of documents to the accused for the reason that its contents is likely to be published and it would

affect the security of the nation. In Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick and ors. [MANU/SC/0263/1981 : AIR 1981 SC 917] the argument before the Supreme Court was that if an accused is not supplied with copies, it is impossible for him to defend himself properly and instruct his lawyer to cross-examine the witnesses effectively. This was upheld by the court. But in that case the documents copies of which were applied for were statements of the witnesses recorded under Section 161 Cr.P.C. The documents copies of which have been applied for by the petitioner in this case are not such statements.

47. Sri Suman Chakravarthy submits that there may be cases in which the court has to refuse to furnish copies of documents to the accused. According to him, the right under Section 207 of Cr.P.C is not absolute, which is clear from the 2nd proviso to the section. He also has brought to my notice sub section 6 of Section 173 Cr.P.C. On the other hand, learned counsel Sri Revikrishnan submits that the court cannot add to the items that may be excluded. He relies on the decision of the Supreme Court in Tarun Tyagi v. Central Bureau of Investigation [MANU/SC/0179/2017 : 2017 (4) SCC 490].

48. Sub Section 6 of Section 173 of Cr.P.C. Is extracted below:

"(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request."

49. This provision gives power to the investigating officer to request to the court to refuse to give copies of certain portions of the statements recorded under Section 161 Cr.P.C. though they are irrelevant. The two grounds for refusal are (1) interests of justice and (2) public interest. When such a request is made it is for the court to take a decision. Sri Ravikrishnan submits that this sub section is applicable to statements recorded under Section 161 Cr.P.C. and not to other documents, which is clear from the words 'any part of any such statement.' 'Such statement relates' to statements referred to in clause (b) in sub-section 5. This statement is recorded under Section 161 Cr.P.C. only.

50. The two provisos to Section 207 Cr.P.C which are relevant for the present purpose are as follows:

"Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

51. The statement referred to in clause (iii) in Section 207 is the one recorded under Section 161 of the Code. The first proviso to Section 207 goes with sub section 6 of Section 173. The restriction that may be imposed by the court under the second proviso relates to documents and not statements under Section 161, in which case, the court may allow the accused only to inspect the documents.

52. If a literal interpretation is placed on the words 'such statement' in sub section 6 of section 173 of the Code, no doubt, the court has to hold that the sub section empowers it to refuse to give copies only of the statement recorded under Section 161 of the Code. It is well settled that if literal interpretation leads to absurdity, it should be avoided.

53. It may be examined what would happen if literal interpretation is placed on the words 'such documents'. Take a case where a doctor has issued a certificate for examination of a victim of rape and also has given a statement under Section 161 of the Code giving details of his examination. The court can refuse to give copies of the statement of the doctor recorded under Section 161, but cannot refuse to give copy of his certificate though both are identical statements.

54. It has already been seen that a gold ring or a sword or a counterfeit currency or a tree may be treated as a document in certain circumstances. Is it possible to give copies of these documents. A copy of them can be only their replica. Can the

court make replica of them and deliver to the accused. In such cases it is impossible to comply with Section 207 Cr.P.C. Can the court issue copy of a morphed photo of a girl which is obscene produced before it in a case.

55. If publication of the contents of a document infringes the right to privacy of a person other than the accused in a case, request to issue a copy of it shall be refused, Sri Suman Chakravarthy submits. In my opinion he is right. When there is a conflict between the fundamental right of a person and the statutory right of another, the former shall prevail. In this context the prohibition of disclosure of the identity of the victim contained in Section 228 A of the Indian Penal Code also is relevant.

56. The second proviso to Section 207 of the Code empowers the court to refuse to give copy of a document if it is voluminous. Interests of justice and public interest are better grounds to refuse to give copy of a document to accused.

57. What can be understood from the provisions in the Cr.P.C discussed above is that no prejudice shall be caused to the accused and once that is done, the court can refuse to supply copies of documents and statements on the grounds of interests of justice and public interest.

58. In Satyen Bhowmick's case (supra) the court ordered to supply copies to the accused though it was objected to on the ground of national security because there were safeguards in the statute against the misuse of the copies. In the absence of such safeguards in the statute, in my opinion, the court can refuse to supply to the accused copies of any document on the ground of 'interests of justice' or on 'public interest'.

59. The request of the petitioner to furnish to him copies of the contents of the hard discs, compact disc and pen drive cannot be refused on the ground of interests of justice or public interest.

60. In Tarun Tyagi v. Central Bureau of Investigation [MANU/SC/0179/2017 : 2017 (4) SCC 490] the question how to give a copy of an electronic record came up for consideration. The Supreme Court ordered to supply copy of the electronic records to the accused subject to two conditions. The petitioner also will be issued copies of the electronic records (except the contents of the 'tablet') subject to the said conditions.

61. It will be proper for the legislature to bring in an amendment to Section 207 of the Code of Criminal Procedure to insert a provision that the court can refuse to give the accused copy of any document on the grounds of interests of justice or public interest, which will be clarificatory in nature.

In the result, this Crl.M.C is disposed of

(1) directing the court below to supply copies of the electronic records the petitioner applied for except the contents of the 'tablet' subject to the following conditions:

(a) before supplying the copies, the contents of the records shall be recorded in the court in the presence of the petitioner's counsel as well as the public prosecutor or their representatives and both of them shall attest the veracity thereof so that there is no dispute about the contents later thereby removing the possibility of tampering thereof by the petitioner.

(b) the petitioner shall not make use of the source code contained in the said electronic records or misuse it in any manner and shall give an affidavit of undertaking to this effect in the trial court.

(2) and allowing the counsel for the petitioner to view the contents of the 'tablet' in the presence of the public prosecutor and the petitioner and take notes under the direct supervision of the Chief Ministerial Officer of the court in a closed room in the court building, for which the petitioner shall file an application and obtain orders of the court below.

Citation: 2019 (4) KHC 928

Jisal Rasak
Vs.
The State of Kerala

ORDER

Raja Vijayaraghavan V., J.

1. The petitioner herein is the 2nd accused in C.P. No. 9 of 2019 on the file of the Judicial Magistrate of the First Class-II, Ernakulam. He has been charged for having committed offences punishable under Sections 302, 307, 120B, 143, 148, 341, 506(ii), 323, 326, 201 and 212 of the IPC.

2. In the course of investigation, the investigating officer chanced upon information that the congregation of some of the accused in and around the scene of crime immediately prior to the murder and also of the injured witness being carried away from the location had been captured in three security cams installed at nearby places. The footage was retrieved by following the procedure and the same was forwarded to the Cyber Forensic Lab for analysis and a report was obtained. The footage was produced before Court along with the final report by categorizing the same as a material object.

3. The petitioner approached the learned Magistrate and filed an application seeking to obtain copies of

(a) the CCTV footage relied on by the prosecution,

(b) the FSL report obtained from the Forensic Science Laboratory relating to the CCTV footage and

(c) the report submitted by the investigating agency seeking further investigation.

4. The prosecution vehemently opposed the handing over of the CCTV footage and it was argued that the footage having been produced as a material object, the digital copies of the same cannot be furnished. The learned Magistrate ordered for the issuance of the records, which were requested for, but refused to issue digital copies of the camera footage.

5. The above order is under challenge.

6. Sri. John S. Ralf, the learned counsel appearing for the petitioner, submitted that the learned Magistrate has egregiously erred in concluding that the electronic evidence relied on by the prosecution is a material object and in refusing to furnish copies of the same to the petitioner. He would contend that Section 3 of the Indian Evidence Act, 1872 defines "evidence" as all documents, including electronic records produced for the inspection of the Court. Referring to the relevant provisions of the Information Technology Act, 2000, it was argued that a document under Section 3 of the Indian Evidence Act would definitely include electronic records as defined under Section 2(t) of the Information Technology Act.

7. The learned counsel contended that the video footage produced before Court would clearly show that the petitioner was not there at the scene of crime and that he was roped in later on the basis of cooked up versions given by planted witnesses. Realizing fully well that the footage would destroy the very edifice of the prosecution case insofar as the petitioner is concerned, digital copies of the same is denied to him.

According to the learned counsel, one of the edifices on which the Criminal Justice System in this country is built upon is "fairness in trial". The Code provides an unbridled right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution to make fair disclosure and to supply the documents demanded. He would contend that the concept of fair disclosure would take within its ambit furnishing of a document, which the prosecution relies upon, whether filed in Court or not. Relying on the decision of the Apex Court in Sidhartha Vashisht v. State (NCT of Delhi) MANU/SC/0268/2010 : (2010) 6 SCC 1, it is vehemently urged that even in cases where during investigation, a document is bona fide obtained by the investigating agency, and in the opinion of the Prosecutor concerned is relevant and would help in arriving at the truth, that document should be disclosed to the accused. The learned counsel has filed a detailed statement narrating the evolution of the Information Technology Act, 2000 and the consequential amendments made in the various enactments, including the Indian Penal Code, 1860 and the Indian Evidence Act, 1872, to bolster his submissions.

8. Sri. Suman Chakravarthy, the learned Senior Public Prosecutor, has resisted the submissions advanced by the learned counsel appearing for the petitioner. Relying on a decision of this Court in Sherin V. John v. State of Kerala MANU/KE/0980/2018 : 2018 (3) KHC 725, it was argued that the law recognises a third category of evidence in addition to oral evidence as well as documentary evidence, which is 'real evidence' or 'physical evidence' and it consists of material objects other than documents produced for inspection of the Court. It is urged that material evidence is not covered under Section 207 of the Cr.P.C. and there is no law, which provides for the issuance of a copy of a material object. Alternatively, it is argued that the electronic record having been produced as a material object, it is a piece of real evidence and will not fall in the category of an electronic record or document. If that be the case, the prosecution is not obliged to serve a copy of the same to the accused and for the self-same reason, the accused cannot clamor of prejudice and claim it as a matter of right. He submitted that CCTV footage, videos, photographs etc. may fall into the category of 'documents', but may in certain cases, become a 'material object'. Taking the analogy of an obscene book seized by the police, it is submitted that in the ordinary parlance, though the book may fall into the category of 'document', it is actually a material object and the possession of the same being an offence, the accused is not entitled to a copy. Same is the case with counterfeit currency etc. He would take much pains to point out that an information in an electronic device is a material object as long as it has a direct nexus with the offence committed. The question of privacy is also a consideration to be borne in mind by the Court, contends the learned Senior Public Prosecutor.

9. In view of the questions posed by rival sides, Sri. D. Prem Kamath, a promising young advocate, well versed in cyber law, was requested to assist the Court as Amicus Curiae.

10. Sri. D. Prem Kamath, the learned Amicus Curiae, elucidated on the reasons, which persuaded the legislature to bring in amendments to the Indian Evidence Act, 1872, and to incorporate necessary provisions regarding appreciation of digital evidence. The learned counsel very painstakingly took this Court through the relevant provisions of various enactments and it is persuasively argued that a combined reading of the definitions of "document" and "evidence" together with the provisions of the Information Technology Act unambiguously would lead to the conclusion that CCTV footage is definitely "data", which is an "electronic record" that comes within the definition of "document" and is evidence, as it has been produced for inspection before Court. According to Sri. Prem Kamath, the digital evidence produced before court would fall into the category of 'documentary evidence'.

11. I have considered the submissions advanced and have perused the records.

12. One of the basic principles of a fair hearing in a grave crime is that the

individual charged with a criminal offence be informed of the evidence that supports the allegations that have been formally lodged against him in a Court of law. The provisions of the Code of Criminal Procedure recognize the said right and the accused has a right under Section 173 to obtain the documents made mention of in the said provision. Sub-section (5) of Section 173 is particularly relevant, which reads as under:

"(1) xxxxx xxxxxx

(2) (i) xxxxx xxxxxx

xxxxx xxxxxx

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

13. Thus, it is imperative on the part of the Investigating Officer to forward all documents and relevant extracts, which the prosecution proposes to rely, so as to enable the learned Magistrate to hand over the same to the accused.

14. Section 207 of the Code makes it mandatory for the Court to furnish to the accused the following documents:

"(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173."

15. In Sidhartha Vashisht (supra), the Apex Court held that the Code provides a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution to make fair disclosure. The same view was taken in V.K. Sasikala v. State MANU/SC/0792/2012 : (2012) 9 SCC 771, wherein it was held that though it is only such reports which support the prosecution case that required to be forwarded to the Court under Section 173 (5) of the Cr.P.C., in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. The Apex Court also had occasion to visualize a situation where the investigating officer ignores a part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. In such an event, the Court may have a duty to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution. In other words, it will be the duty of the prosecution to disclose evidence to the accused persons, especially that, which might be potentially exculpatory or otherwise, which may have a negative impact on the weight of the evidence led by the prosecution or such evidence, which may support a proposed defence theory. The same view was taken in Tarun Tyagi v. CBI MANU/SC/0179/2017 : (2017) 4 SCC 490, wherein it was held that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the charge sheet to enable such an accused to demonstrate that no case is made out against him and also to

enable him to prepare his cross-examination and defence strategy.

16. The contention of the learned Senior Public Prosecutor is based on the decision of this Court in Sherin V.John (supra), wherein it was held that material evidence is not covered under Section 207 of the Cr.P.C. It was also held in that case that there is no law providing for issuance of a copy of the material objects to the accused. The following conclusions were arrived at by the learned Single Judge in paragraph No. 41 of the judgment.

"41. From the foregoing discussion the following conclusions may be reached:

(i) Apart from oral and documentary evidence, there is a third category of evidence called material evidence, which consists of materials other than documents.

(ii) Only copies of documents can be given, but not of material objects.

(iii) When nothing is expressed or described upon a substance, it is only a material object.

(iv) When a matter is expressed or described upon a substance, it may be a document or a material object depending upon the purpose for which it is produced.

(v) If the identity of the author of the matter expressed or described upon a substance is relevant, it is a document; otherwise it is only a material object.

(vi) Where the only purpose for which a material object upon which a matter has been expressed or described is produced is to prove its seizure from the possession of the accused, and it is made part of the evidence by proving its seizure from his possession, the Court does not want the testimony of anyone to prove the matter since it has become a 'matter before the Court'."

17. I am of the view that Sherin V. John (supra) was rendered in a different fact situation and the learned Judge, who had decided the petition, had no occasion to consider the provisions of the Information Technology Act, 2000 and the sweeping changes it brought to the provisions of the Indian Evidence Act, 1872.

18. Before delving into those aspects, it would be profitable to have a look at the definition of "real evidence". In Phipson on Evidence, Sixteenth Edition (South Asian), in page No. 5, the learned Author has defined 'real evidence', in the following words:

"Material objects other than documents, produced for inspection of the court are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony or inference is relied upon. Unless its genuineness is in dispute, the things speaks for itself. '

Unfortunately, however, the term 'real evidence' is itself both indefinite and ambiguous having been used in three divergent senses.

(1) EVIDENCE FROM THINGS AS DISTINCT FROM PERSONS

(2) MATERIAL OBJECTS PRODUCED FOR INSPECTION OF THE COURT. This is the second and most widely accepted meaning of 'real evidence'. It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing.

(3) PERCEPTION BY THE COURT (OR ITS RESULT) AS DISTINCT FROM THE FACTS PERCEIVED.

Although the physical production of objects is a valuable factor in juridical proof and of use in terms of technical classification, it is questionable whether the term 'real evidence' is a very helpful one by which to express it. The phrases hardly ever used in practice, material objects being referred to either by name, or, more loosely, as circumstantial evidence. In textbooks, especially when dealing with classification the phrase is occasionally convenient. Which of its meaning then should be

retained? It seems advisable to adhere to the more usual definition, "material objects, other than documents, produced for the inspection of the Court".

19. Thus, essentially, material objects, other than documents produced for the inspection of the court are commonly called real evidence. If the electronic record produced for inspection before the court is a document, the question is whether the accused can be denied a copy of the same.

20. Before proceeding to decide the question raised, it would be apposite to bear in mind that major shifts in the Information Technology landscape from the mid 90's have made the collection and analysis of electronic evidence an increasingly important tool for solving crimes and to bring culprits to justice. Though digital evidence is conceptually the same as any other evidence, it has a much larger scope and the information can be used to pin people and events within the confines of a specific time and space and establish a causality in criminal cases. Great many sensational cases, wherein there is total absence of direct evidence have been solved and the culprits have been brought to book with the aid of electronic evidence. It has to be borne in mind that electronic evidence is volatile, easily altered, damaged or destroyed, time sensitive and not bound by territorial jurisdictions. In almost all cases, call data records, chat messages, security cam videos, whatsapp profiles and facebook status messages provide valuable clues to zero in on the offender and the law enforcement agencies extensively rely on such forms of electronic evidence before court in aid of the prosecution.

21. The importance of production of scientific and electronic evidence in court after complying with the procedural formalities was highlighted by the Apex Court in Tomaso Bruno and Other v. State of U.P. MANU/SC/0057/2015 : 2015 (7) SCC 178, wherein it was held as follows:

"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 stricto 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 fulfillment 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.

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, MANU/SC/0681/2012 : (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, MANU/SC/0465/2005 : (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.

27. The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones

seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made."

22. In Tomaso Bruno (supra), the Apex Court deprecated the prosecution for not producing the CCTV footage and call records which would have been invaluable to establish the prosecution case. In landmark cases such as in Mohd. Ajmal Mohammad Amir Kasab v. State of Maharashtra MANU/SC/0681/2012 : (2012) 9 SCC 1, and in State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru MANU/SC/0465/2005 : (2005) 11 SCC 600, electronic evidence was called in aid to pin point the guilt of the accused. It has to be recognized, therefore, that electronic records are created with every day actions of individuals and in criminal offences, it is extensively used to establish the guilt of the accused.

23. In State v. S.J. Choudhury MANU/SC/2199/1996 : (1996) 2 SCC 428, the Apex Court had occasion to observe that the Indian Evidence Act, 1872 by its very nature is an "ongoing Act". In view of the rapid advances in technology, the extant statutes will have to be interpreted in such a manner so as to increase its acceptability. The courts will not be justified in placing unnecessary roadblocks in the acceptability of evidence, particularly of the digital variety. Keeping in mind these aspects, the legislature enacted the Information Technology Act, 2000 and later harmonized the Evidence Act to seamlessly accept electronic evidence to advance the cause of justice. Conventional means of records and data processing have become outdated and the rules relating to admissibility of electronic evidence and its proof were incorporated into Indian Laws. The legislature, it appears, was cognizant of the fact that if the procedural and substantive laws do not keep pace with the speed of change in the society, the casualty would be the interest of justice.

24. In the above background, we may have a glance at the relevant provisions of the Information Technology Act, 2000.

"Sections 2(t), defines "electronic record" to mean data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. (Micro fiche is nothing but a flat piece of film containing micro-photographs of the pages of a newspaper, catalogue, or other document). In other words, any data, record or data generated, image or sound stored, received or sent in electronic form is an electronic record.

Section 2(r) defines "electronic form" to mean any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. Thus, any relevant information, if retained in the above media, then it can very well be said to be kept in electronic form.

"Information" has been defined under Section 2(v) to include data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.

"Data" has been defined under Section 2(o) to mean a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

25. The Information Technology Act also defines computer resource, computer network, computer system and computer device. Thus, data, information or any other content generated kept stored, sent, received, and communicated through electronic, magnetic, optical and digital media has to be dealt with as per the provisions of the Information Technology Act, 2000 and such electronic evidence can be admitted and proved in courts in accordance with the special provisions as to evidence relating to electronic record as provided under Section 65B of the Indian Evidence Act, 1872.

26. In this context, it would be relevant to take note of the fact that electronic records are not limited to mere computer outputs such as scanned documents or printouts, which are ordinarily used in the course of business. It includes any data, information or other record stored in electronic medium irrespective of when, how or by whom such record was created. It may include sound recordings of intercepted communications or video footage of crimes. It may also comprise of voluminous data stored on cloud services wherein the device and storage infrastructure are indeterminable. It may also be stored in third party storage platforms, or in social media platforms like Facebook, Twitter, Whatsapp etc. or in e-mails and Camera Footage or photographs. Thus the wide scope of obtaining digital evidence yields a commensurate potential for recoverable evidence.

27. Section 4 of the Information Technology Act provides for legal recognition of electronic records. It states that 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.

28. Now, let us have a glance at the relevant provisions of the Indian Evidence Act, 1872.

"Evidence" has been defined to mean and include.-

) 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;

) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."

29. Thus, after the amendment which was brought into effect from 17.10.2010, electronic records have been placed in the category of documentary evidence.

30. Section 22A of the Indian Evidence Act states that oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. Section 59 of the Indian Evidence Act speaks about proof of facts by oral evidence. It states that all facts, except the contents of documents or electronic records, may be proved by oral evidence.

31. A combined reading of Sections 22A and 59 of the Indian Evidence Act would unmistakably show that the contents of electronic records are not expected to be proved by oral evidence. The provisions also say that oral admissions of the contents of electronic records are not relevant, unless its genuineness in question.

32. The provision in the Indian Evidence Act which enables the Court to require for the production of material thing for its inspection is Section. The principle underlying Section 60 is that all facts except the contents of documents may be proved by oral evidence, which must in all cases, be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. The effect of the section is, subject to the proviso, to exclude opinions given at second hand, which is otherwise called heresy. The second proviso to Section 60 reads as follows:

"Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

33. In other words, if the oral evidence refers to the existence or condition of a material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection. Thus, when material objects such as weapon of offence, clothes or other personal items of the victim or any other thing which is referred by the witnesses are produced in Court, it is regarded as a thing and it can be relied on as it is. It is next to impossible to supply copies of the same to

the accused. However, after the advent of technology, the line between categorizing a thing as a 'material thing' or a document has become more or less obliterated. If a hard disk or a magnetic disk containing data is stolen and the same is seized and produced in court, it may sometimes be difficult to categorize it as 'a thing' produced for inspection of the court or a 'document'. One way of distinguishing it is by asking a question as to whether the item is relevant in itself or whether the item is relevant because of the information that can be retrieved from it. In other words, if a material thing is produced in court to rely on the data that it contains, it is probably a document and it has to be regarded as such. On the other hand, if the material thing is brought to court in order to rely on it as it is, it is a thing and may be exhibited as a material object.

34. In Tarun Tyagi (supra) on the allegation that the accused had stolen source codes of a software, a search was conducted in his house and hard disks were seized. At the stage of Section 207 of the Code of Criminal Procedure, all other records except for the cloned copies of the Hard Disk were supplied to the accused. The accused approached the Apex Court and contended that the copies of the hard disks are to be supplied to demonstrate during trial that no case is made out against him. He also contended that the cloned copies are required for enabling him to prepare his cross examination and a proper defense strategy. The CBI opposed the prayer and it was urged that the accused would misuse the same. The Apex Court repelled the contention and the cloned copies of the hard disk were ordered to be supplied to the accused.

35. In view of the above discussion and on a proper understanding of the provisions of the Information Technology Act, 2000 and the Indian Evidence Act, 1872, it can be deduced that the CCTV footage in the instant case is "data" as defined under Section 2(o) of the Information Technology Act, 2000 and it is an electronic record as defined under Section 2(t) of the I.T. Act. If that be the case, the electronic record produced for the inspection of the Court has to be regarded as documentary evidence. In that view of the matter, I am unable to accept the logic of the prosecution in producing the CCTV footage as a material object and in refusing to supply a copy of the same to the accused. I hold that cloned Digital copies of the footage relied on by the prosecution have to be made available to the accused, unless it is impracticable or unjustifiable. For instance, in a case of brutal sexual abuse, if the incident has been videotaped, in view of the element of privacy or to prevent misuse, copy may be refused. In a case in which the accused is being prosecuted for possessing pedophilic material, copies of the same can be refused. In such cases, the Court may grant permission to the counsel or the accused to have a private screening to have a proper defense. Same is the case in a terrorism prosecution, wherein national security interests demands non-disclosure of the digital evidence, which has been collected. These are merely illustrative and not exhaustive. As an adversarial system is followed in our country, the accused is entitled to a copy of the records so that he can bring to the notice of the courts exculpatory material or such other aspects in the prosecution case, which may be to his advantage.

36. At this stage, the question of certification under Section 65B of the Indian Evidence Act was raised by the learned counsel appearing for the petitioner.

37. Any documentary evidence by way of an "electronic record" under the Indian Evidence Act can be proved only in accordance with the procedure prescribed under Section 65B of the Indian Evidence Act, 1872. This is what is provided under Sections 59 and 65A of the Indian Evidence Act. Section 59 provides that all facts except the contents of document or "electronic evidence", may be proved by oral evidence. Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B of the Act. Section 65B deals with the admissibility of "electronic records". Section 65A and Section 65B were introduced into the Evidence Act in 2000 providing special processes for proving copies of extracts of electronic records. It provided a method of certifying the authenticity of the copy and the integrity of the content of such copy. In other words, any electronic record, which is printed, stored, recorded or copies made on to an optical or magnetic media and

produced by a computer will be deemed to be a document only if the conditions set out in Section 65B(1) of the Evidence Act are satisfied and it was held so in Anwar P.V. v P.K. Basheer MANU/SC/0834/2014 : (2014)10 SCC 473. However, in Shafhi Mohammed v. State of H.P. MANU/SC/0331/2018 : (2018) 5 SCC 311 the Apex Court revisited the principles laid down in Anwar P.V. (supra) and it was held that the applicability of procedural requirement under Section 65B(4) of the Evidence Act for furnishing certificate is not always mandatory. Later, in the case of Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (Civil Appeal No(s). 2407 of 2018 and connected cases) by interim order dated 26.7.2019, their Lordships of the Apex Court had ordered that in view of Anwar P.V. (supra), the pronouncement of this Court in Shafhi Mohammad (supra) needs reconsideration and the matter was referred to be considered by a larger Bench. However, in the instant case, the said question is merely academic as Sri. Suman Chakravarthy, the learned Senior Public Prosecutor, submitted that the requisite certification under Section 65B of the Indian Evidence Act has been obtained for the electronic evidence. In that view of the matter, there is no embargo in providing to the accused a copy of the CCTV Footage, which is relied on by the prosecution in the subject case.

38. In the case on hand, I have no doubt in my mind that the investigating agency has committed a grave error by producing the CCTV footage as a material object and also in refusing to give a copy of the same to the accused. The accused is entitled to a digital copy of the CCTV footage, which is relied on by the prosecution to prove the charge. That being the case, the order passed by the learned Magistrate will stand set aside.

39. This petition will stand allowed. The digital copies of the electronic record relied on by the prosecution and sought for by the petitioner shall be issued to him by imposing appropriate safeguards that the jurisdictional court may deem fit and proper.

Before parting, I place on record my deep sense of appreciation to Sri. John S. Ralph, the learned counsel appearing for the petitioner, Sri. Suman Chakravarthi, the learned Senior Public Prosecutor and Sri. D. Prem Kamath, the learned Amicus curiae, for their invaluable assistance.

Citation: AIR 2017 SC 3441

IN THE SUPREME COURT OF INDIA

Sonu
vs.
State of Haryana

Judges/Coram:
S.A. Bobde and L. Nageswara Rao, JJ.

CaseNote:
Criminal - Conviction - Appreciation of evidence - Sections 120B, 201, 302, 328A and 364A of Indian Penal Code, 1860 and Section 65B of Indian Evidence Act, 1872 - Trial convicted Appellants/Accused under Sections 120B, 364A, 302, 328A and 201 read with 120B of Code - High Court confirmed conviction order - Present appeal filed against confirmation of conviction order - Whether order of conviction was justified.

Facts:

The Additional Sessions Judge by his order convicted Accused under Sections 120B, 364A, 302, 328A and 201 read with 120B of Code. All the convicted Accused filed appeals before the High Court. The High Court dismissed all the appeals after a detailed re-appreciation of the material on record. Accused have approached present Court by fling appeals against the confirmation of their conviction and sentence.

Held, while dismissing the appeal:

(i) The dead body was that of deceased as identified by his relatives. The medical evidence shows that the skin was peeled of at several places but the features of the body could easily be made out. There was sufficient evidence on record to suggest that 4th Accused was in constant touch with the other Accused. His mobile phone and the recoveries that were made pursuant to the disclosure statement would clearly prove his involvement in the crime. [20] and[21]

(ii) Call Detail Records (CDRs) did not fall in the said category of documents. An objection that CDRs were unreliable due to violation of the procedure prescribed in Section 65B(4) of Act could not be permitted to be raised at this stage as the objection relates to the mode or method of proof. All the criminal Courts in this country are bound to follow the law as interpreted by present Court. Because of the interpretation of Section 65B of Act in Navjot Sandhu case, there was no necessity of a certificate for proving electronic records. Electronic records without a certificate might have been adduced in evidence. There was no doubt that the judgment of present Court in Anvar's case has to be retrospective in operation unless the judicial tool of prospective overruling was applied. However, retrospective application of the judgment was 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 were taken by the Accused at the appellate stage. Attempts would be made to reopen cases which have become final. [27] and[32]

JUDGMENT

L. Nageswara Rao, J.

1. The Appellants in the above appeals along with Dharmender @ Bunty were found guilty of abduction and murder of Ramesh Jain. They were convicted and sentenced for life imprisonment. Their conviction and sentence was confirmed by the High Court. Accused Dharmender @ Bunty did not file an appeal before this Court. Accused Rampal was convicted Under Section 328 read with 201 Indian Penal Code and was sentenced to 7 years imprisonment. His conviction was also confirmed by the High Court which is not assailed before us.

2. Dinesh Jain (PW-1) approached the SHO, Ganaur Police Station (PW 31) at 01:30 pm on 26.12.2005 with a complaint that his father was missing on the basis of which FIR was registered by PW 31. As per the FIR, Dinesh Jain left the rice mill at 7:00 pm on 25.12.2005 and went home while his father stayed back. As his father did not reach home even at 10:00 pm, he called his father's mobile number and found it to be switched of. He went to the rice mill and enquired about the whereabouts of his father from Radhey, the Chowkidar and was informed that his father left the rice mill at 9:30 pm on his motor cycle bearing Registration No. DL-8-SY-4510. He along with his family members searched for his father but could not trace him. He apprehended that his father might have been kidnapped.

3. After registration of the FIR, PW 31 started investigation by visiting the rice mill and making inquiries. On 28.12.2005 one motor cycle was recovered from a pit near Bai crossing. As the number plate of the vehicle was blurred, PW31 verified the engine number, compared it with the registration certificate to find that the seized motor cycle belonged to Ramesh Jain.

4. On 09.01.2006, Dinesh Jain (PW 1) and Ashok Jain (PW 3) informed PW 31 that a call was received on the mobile phone of PW 1 from a person who identified himself as Bunty and who was speaking in Bihari dialect. He informed them that Ramesh Jain was in his custody and demanded a ransom of Rs. 1 crore for his release. They were also asked to purchase another mobile phone having Delhi network to which future calls would be made. The Investigating Officer (PW31) visited the rice mill belonging to deceased Ramesh Jain on 17.01.2006 and met PW 1, PW3 and Dhir Singh (PW 7). They handed over four threatening letters (Exh. P 1 to P 4), one key ring (Exh. P 9), one silver ring having a precious stone (Exh. P 10) and a piece of cloth of a shirt worn by the deceased on 25.12.2005 when he was kidnapped (Exh. P11). PW 1 and PW 3 informed the Investigating Officer that Bunty called them and told them that they would find the key ring, silver ring, a piece of cloth and cuttings of newspaper near Bai crossing. They collected the said articles from Bai crossing.

5. The Investigating Officer along with SHO Special Cell, Rohini, Delhi constituted three raiding parties on 20.01.2006 on the basis of information that the Accused would visit Tibetan Market. Pawan (A1), Surender (A2) and Dharmender @ Bunty (A3) were arrested at 11:45 pm when they visited the Tibetan Market, Delhi in a Maruti car. Their mobile phones and some cash were recovered from them.

6. On 22.01.2006, Amar @ Sonu (A5) and Parveen (A4) were arrested near the bus stand at Ganaur Chowk, GT Road, Ganaur. Two mobile phones were seized from Sonu (A5). Parveen @ Titu (A4) suffered a disclosure statement during the course of investigation that Ramesh Jain was abducted and a demand of Rs. 1 crore was made from his family members for his release. Parveen (A4) stated that Ramesh Jain was murdered and his dead body was buried at Baba Rude Nath temple in village Kheri Khusnam. In his disclosure statement, Surender (A2) further disclosed that Dr. Rampal administered injections to keep Ramesh Jain unconscious. He further disclosed that Ramesh Jain was murdered on 29.12.2005 and his dead body was buried in a pit at Baba Rude Nath temple. Dharmender @ Bunty (A3) and Surender (A2) also suffered disclosure statements in which they stated that they can identify the place where Ramesh Jain was murdered and buried.

7. The Investigating Officer was led by Parveen (A4), Dharmender (A3) and Surender (A2) to Baba Rude Nath temple in village Kheri Khusnam on 22.01.2006. The room in which Ramesh Jain was confined and murdered was pointed out by A2 to A4. The dead body of Ramesh Jain was exhumed from the place identified by A2 and A4. PW1, PW3, PW6 along with PW11 Jai Chand, SDM

were present at the spot from where the dead body of Ramesh Jain was taken out from the pit.

8. On 24.01.2006, a disclosure statement was made by Parveen (A4) pursuant to which he identified the place where the key ring of the motor cycle, threatening letters and a ring of deceased Ramesh Jain were placed near a sign board at the crossing of village Bai. He further disclosed that he concealed another ring of Ramesh Jain at his house in village Ghasoli at a place which he can only identify. Parveen led the police party to the place where he concealed the golden ring of the deceased which was identified by PW1 and recovered through memo Exh. PT/5. Dharmender @ Bunty (A3) led the police party to a rented room situated at Shashtri Park, Delhi from where the SIM card of mobile No. 9896351091 belonging to deceased Ramesh Jain was recovered from a concealed place. Pursuant to a disclosure statement, he also identified the place where the motor cycle of deceased was thrown after he was abducted. On 30.01.2006, Sonu @ Amar suffered a disclosure statement to the effect that he had concealed the wallet of Ramesh Jain and certain documents like PAN card, diary, three electricity bills, two water bills and his photographs underneath the seat of his shop which were exclusively in his knowledge. The said documents were seized by the Investigating Officer from the shop belonging to Sonu @ Amar (A5). The registration certificate of the motor cycle of deceased Ramesh Jain was recovered from a drawer of the table in the house situated at Begha Road, Ganaur which was occupied by Pawan (A1) pursuant to a disclosure statement by him. A country made pistol with two live cartridges were recovered from the same room situated at Begha Road on the basis of disclosure statement made by Surender (A2).

9. Dr. Ram Pal (A6) surrendered in the Court of Sub Divisional Judicial Magistrate (SDJM), Ganaur on 01.02.2006. He suffered a disclosure statement on the basis of which a syringe which was used for giving injections to keep the deceased unconscious was seized from the roof of Baba Rude Nath temple, village Kheri Khusnam. A spade was also recovered from underneath a cot in his house on the basis of his disclosure statement.

10. The Investigating Officer collected the Call Detail Records (CDRs) of all the mobile phones that were recovered from the accused, mobile phones of the deceased and Dinesh Jain (PW 1) from the Nodal officers of the mobile companies.

11. Accused Manish (A7) who is a cousin of Sonu (A5) surrendered on 12.04.2006 in the Court of SDJM, Ganaur. He is alleged to have assisted A5 in the abduction. He was acquitted by the Trial Court which was confirmed by the High Court which remains unchallenged. The Accused were tried for offences punishable Under Section 120B, 364A, 302, 328A and 201 read with 120B of the Indian Penal Code. In addition, A2 was also charged for committing an offence Under Section 25 of the Arms Act. The Additional Sessions Judge, Sonepat by his judgment dated 11.10.2010 convicted A1 to A5 for the aforesaid offences and sentenced them to life imprisonment. A6 was convicted Under Section 328 and 201 of Indian Penal Code and sentenced to seven years. All the convicted Accused filed appeals before the High Court. Dinesh Jain (PW 1) filed an appeal for enhancement of the sentence of the convicted Appellants. He also challenged the acquittal of Accused Manish (A7). The High Court dismissed all the appeals after a detailed re-appreciation of the material on record. A1, A2, A4 and A5 have approached this Court by fling appeals against the confirmation of their conviction and sentence.

12. We have carefully examined the entire material on record and the judgments of the Trial Court and the High Court. The Trial Court relied on the testimonies of PW1 and PW3, the recoveries made pursuant to the disclosure statements of the Accused and the CDRs of the mobile phones of the accused, the deceased and PW 1 to conclude that the prosecution established that the Accused are guilty beyond reasonable doubt. The Trial Court also discussed the complicity of each of the Accused threadbare. The High Court re-appreciated the evidence and placed reliance on the disclosure statements, the consequential recoveries and the CDRs of the mobile phones to confirm the findings of the Trial Court.

13. Ramesh Jain left his rice mill at 9:30 pm on 25.12.2005. His dead body was exhumed from the premises of the temple in village Kheri Khusnam on the intervening night of 22/23.01.2006. The post mortem examination was conducted by Dr. Pankaj Jain (PW16) on 23.01.2006. He deposed that the process of decomposition was in progress. The skin was peeled of at most places. A muffler was present around the neck of the dead body. Both wrists and ankles were tied by a piece of cloth. The hyoid bone was found fractured. In the opinion of PW 16, Ramesh Jain died of asphyxia. The probable time of death, according to him, was 3/4

weeks prior to 23.01.2006. He also deposed that the process of decomposition would be slower during winter. Dinesh Jain (PW1) deposed that there was a demand of ransom of Rs. 1 crore for the release of his father which was made through a telephone call on 06.01.2006 from a person who identified himself as Bunty and who was speaking in Bihari dialect. He also spoke of the calls that were made from the mobile phone bearing No. 9896351091 belonging to his father on 08.01.2006 and 09.01.2006 by which the ransom demands were repeated. He further stated about the threatening letters received by him at his shop address. He also deposed that he collected a piece of shirt worn by his father on the day of his abduction along with one silver ring and a key ring of the motor cycle of his father at a place specified in a call received by him on 16.01.2006. He was present when the dead body of his father was being taken out and he video-graphed the exhumation. Ashok Jain (PW3) who is the brother of deceased Ramesh Jain, corroborated the evidence of PW1 regarding the demands that were made for payment of ransom for the release of Ramesh Jain.

14. The arrest of A1 to A3 from Tibetan Market, Delhi at 11:45 pm on 20.01.2006 led to several disclosure statements made by the Accused pursuant to which relevant material was recovered. The details of recoveries made from each of the Accused will be discussed later. The dead body of the deceased Ramesh Jain was also recovered pursuant to a disclosure statement made by A2 to A4. The CDRs that were obtained from the Nodal officers of the telephone companies which were exhibited in the Court without objection clearly prove the complicity of all the accused. A detailed and thorough examination of the number of calls that were made between the Accused during the period 25.12.2005 to 20.01.2006 was made by the Courts below to hold the Accused guilty of committing the offences. We do not see any reason to differ from the conclusions of the Courts below on the basis of the evidence available on record. Neither do we see any perversity in the reasons and the conclusion of the Courts below. The jurisdiction of this Court in criminal appeals filed against concurrent findings is circumscribed by principles summarised by this Court in Dalbir Kaur v. State of Punjab MANU/SC/0144/1976 : (1976) 4 SCC 158, as follows:

8. Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:

(*1*) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;

(*2*) that the Court will not normally enter into a re-appraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;

(*3*) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;

(*4*) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(*5*) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence.

15. Admittedly, there is no direct evidence of kidnapping or the murder of Ramesh Jain. This is a case of circumstantial evidence. In a catena of cases, this Court has laid down certain principles to be followed in cases of circumstantial evidence. They are as under:

1. The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

2. The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

3. The circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the Accused and none else.

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the Accused and such evidence should

not only be consistent with the guilt of the Accused but should be inconsistent with his innocence.

(See: Shanti Devi v. State of Rajasthan, MANU/SC/0872/2012 : (2012) 12 SCC 158); (See also: Hanumant v. State of Madhya Pradesh MANU/SC/0037/1952 : (1952) SCR 1091 (P.1097) Sharad Birdhichand Sarda v. State of Maharashtra MANU/SC/0111/1984 : (1984) 4 SCC 116).

16. Applying the above principles to the facts of this case, we find that the following circumstances would lead to the conclusion of guilt against the accused:

A. The deceased was missing from 23.12.2005 and his dead body was dug out from the premises of a temple on 23.01.2006.

B. Demand of ransom for the release of the deceased is proved by the oral testimonies of PW1 and PW3.

C. Disclosure statements of A2 to A4 and the recovery of the dead body from the premises of the temple.

D. Disclosure statements made by the Accused pursuant to which there was recovery of several articles belonging to the deceased including the SIM card of his mobile number, wallet containing his personal belongings, etc.

E. The CDRs of the mobile which clearly show the interaction of the Accused during the period from 25.12.2005 to 20.01.2006 as well as the calls made to PW1 including the calls made from the mobile phone of the deceased.

F. The silver ring, key ring of the motor cycle and a piece of cloth worn by the deceased on 25.12.2005 which were sent to PW1 by the accused.

17. We deem it proper to consider the submissions made by the learned Counsel for the accused.

A1-Pawan (Criminal Appeal No. 1416 of 2013)

18. The registration certificate of motor cycle No. DL-8-SY-4510 of the deceased was recovered from A1 pursuant to the disclosure statement Exh. PDD. The registration certificate was recovered from the drawer of a table lying in the room of his house situated at Begha Road, Ganaur.

19. Mr. D.B. Goswami, learned Counsel appearing for A1 submitted that A1 and A4 are brothers. A4 and A2 were partners in transport business. He submitted that A1 was arrested from his house in his village Ghasoli, District Sonepat. He relied upon the evidence of DW 2 and DW 5 in support thereof. DW2 and DW 5 who are residents of village Ghasoli deposed that police personnel visited the village around 9 am in search of Parveen (A4) on 20.01.2006. They stated that A1 accompanied the police to the police station. He travelled in his own car and the police went in the Govt. Jeep. On the other hand, the case of the prosecution is that A1 was arrested along with A2 and A3 at 11:45 PM on 20.01.2006 at Tibetan Market, Delhi. The police from Rohini Police Station, Delhi were also involved in the raid pursuant to which A1 was arrested. The interested testimonies of DW2 and DW5 do not merit acceptance, especially when the prosecution has proved the arrest and the subsequent recoveries made pursuant to the disclosure statement of A1. The learned Counsel submitted that the application filed by A1 to take his voice sample was rejected by the Trial Court and so he cannot be found fault with for not giving his voice sample. A1 refused to give his voice sample when the prosecution moved the Court. Thereafter, A1 filed an application to take his voice sample and the said application was disposed of by the Trial Court giving liberty to A1 to file again after the prosecution evidence was completed. Therefore, the learned Counsel for A1 is wrong in contending that his application for giving voice samples was rejected by the Court. The learned Counsel further submitted that the CDRs of the mobile phone of A1 would suggest that he was making calls only to A2, A3 and A4. He made an attempt to justify the calls on the ground that A4 was his brother and A2 was his brother's partner. No justification has been given for the 28 calls between him and A3 who is from Bihar and who was making the calls demanding a ransom of Rs. 1 crore from PW 1.

A2-Surender (Criminal Appeal No. 1652 of 2014)

20. A2 was arrested on 20.01.2006 in Tibetan Market, Delhi along with A1 and A3 and was found to be in possession of a mobile phone bearing No. 9813091701 which was used by him for conversing with A1, A3 and A4 between

25.12.2005 to 20.01.2006. Three STD booth receipts Exh. P41, P42 and P43 were recovered from A2. These receipts showed calls being made to mobile No. 9896001906 which belongs to A5 Sonu. He was a resident of Jhinjhana village and the calls made from the STD booth with telephone No. 01398257974 pertain to Jhinjhana. An amount of Rs. 20,000/- was also recovered from him at the time of his arrest. The said amount was supposed to have been given to him by A5 Sonu. Pursuant to his disclosure statement Exh. PCC A2 led the police party to his rented accommodation at Begha Road, Ganaur and a country made pistol with two live cartridges.315 bore were recovered in the presence of PW5 Mohan Lal. He also identified the place of abduction of Ramesh Jain at Ganaur and the place where the dead body was buried at Baba Rude Nath temple in village Kheri Khusnam. Mr. Ram Lal Roy, learned Counsel for A2 doubted the recovery of the country made pistol and cartridges. He submitted that the dead body recovered on 22.01.2006 is that of a priest and not of Ramesh Jain. There is no foundation laid by the defence in support of this contention. There is nothing on record to prove that the dead body is that of a priest. We are of the opinion that the dead body is that of Ramesh Jain as identified by his relatives. The medical evidence shows that the skin was peeled of at several places but the features of the body could easily be made out. PW 16 also deposed that decomposition is slow in winter months. We have perused the photograph of Ramesh Jain and compared it with a photograph of the dead body recovered. We are convinced that the body recovered is that of the deceased Ramesh Jain.

A4-Parveen @ Titu (Criminal Appeal No. 1653 of 2014)

21. The STD booth receipt Exh. P44 showing a call made from STD booth having No. 01398257974 from Shamli village in Uttar Pradesh was recovered from A4 at the time of his arrest on 22.01.2006. As per the receipt, a call was made to mobile No. 9896001906 which belongs to Sonu (A5). Pursuant to the disclosure statement made by him, he identified the place at village Bai crossing on GT Road where he kept the key ring of motor cycle, silver ring belonging to deceased Ramesh Jain and the threatening letters. A golden ring of the deceased was also recovered from his residential house at village Ghasoli. He also made a disclosure statement which led the police to the place where the deceased was wrongfully confined. His SIM card with mobile No. 9812016269 was seized from his residential house. There is sufficient evidence on record to suggest that he was in constant touch with the other accused. His mobile phone and the recoveries that were made pursuant to the disclosure statement would clearly prove his involvement in the crime.

A5-Sonu (Criminal Appeal No. 1418 of 2013)

22. Mr. Sidharth Luthra, learned Senior Counsel appearing for A5 submitted that it is highly improbable that A5 was arrested at a bus stop at Ganaur Chowk, GT Road, Ganaur. According to him, A5 was arrested on 20.01.2006 at 10:15(30) pm from his house. He relied upon the evidence of DW5 and DW8. We do not find any substance in the submission that A5 was arrested on 20.01.2006 itself as it is clear from the testimony of DW8 that no complaint was made regarding the forcible arrest of A5 on 20.01.2006. A disclosure statement was made by A5 which was marked as Exh. PBB pursuant to which there was a recovery of the wallet belonging to the deceased from the shop of A5. A laminated PAN card, one passport size photograph of the deceased, three electricity bills, two water bills and a small diary of Jain Mantras bearing title 'Aanu Purvi' were recovered from underneath the seat of his Aarat shop at Ganaur Mandi. The STD booth receipts which were recovered from A2 Surender and A4 Parveen at the time of their arrest show that they made calls on the mobile No. 9896001906 belonging to A5 on 29th and 30th December, 2005. A5 also received a call from an STD booth in Patna on 06.01.2006. Pursuant to a disclosure statement made by him an Indica car bearing No. DL-3CW-2447 which was used in the abduction was seized. The recoveries made pursuant to the disclosure statements of A5 cannot be relied upon, according to Mr. Luthra. He referred to the six disclosure statements made by A5 between 22.01.2006 and 04.02.2006. He commented upon the improbability of recovery of the wallet from underneath his seat at his shop. He also submitted that the recovery is from a public place accessible to everybody and so the recoveries made cannot be relied upon. We disagree with Mr. Luthra as the recovery of the wallet from underneath his seat is something which is to his exclusive knowledge though other people might have access to his shop.

23. Mr. Luthra contended that the CDRs are not admissible Under Section 65B of the Indian Evidence Act, 1872 as admittedly they were not certified in accordance with Sub-section (4) thereof. He placed reliance upon the judgment of this Court in Anvar P.V. v. P.K. Basheer

MANU/SC/0834/2014 : (2014) 10 SCC 473 by which the judgment of this Court in State (NCT of Delhi) v. Navjot Sandhu MANU/SC/0465/2005 : (2005) 11 SCC 600 was overruled. In Navjot Sandhu (supra) this Court held as follows:

Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in Sub-section (4) of Section 65-B 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 and 65.

In Anvar's case, this Court held as under:

22. 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, 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. 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.

23. The Appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

In view of the law laid down in the case of Anvar, Mr. Luthra submitted that the CDRs are liable to be eschewed from consideration.

24. Mr. Vivek Sood, learned Senior Counsel appearing for the State of Haryana submitted that the CDRs were adduced in evidence without any objection from the defence. He submitted that the Accused cannot be permitted to raise the point of admissibility of the CDRs at the appellate stage. He placed reliance on Padman v. Hanwanta MANU/PR/0104/1915 : AIR 1915 PC 1 in which the Privy Council held that objections regarding admissibility of a document must be raised in the Trial Court. Mr. Sood contended that there can be two classes of objections regarding admissibility of documents. The first class is that a document is per se inadmissible in evidence. The second is where the objection is regarding the method or mode of the proof of the document. He submitted that the objection of the Accused in this case is regarding the mode or method of proof as it cannot be said that the CDRs are per se inadmissible in evidence.

25. Refuting the contentions of the learned senior Counsel for the State, Mr. Luthra submitted that the objection raised by him pertains to inadmissibility of the document and not the mode of proof. He urged that the CDRs are inadmissible without the certificate which is clear from the judgment of this Court in Anvar's case. He refers to the judgment of RVE Venkatachala Gounder v. Arulmigu Visweswaraswami MANU/SC/0798/2003 : (2003) 8 SCC 752 relied upon by the prosecution to contend that an objection relating to admissibility can be raised even at the appellate stage. Mr. Luthra also argued that proof required in a criminal case cannot be waived by the accused. He relied upon a judgment of the Privy Council in Chainchal Singh v. King Emperor MANU/PR/0034/1945 : AIR 1946 PC 1 in which it was held as under:

In a civil case, a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence

He further relied upon the judgment of a Full Bench of the Bombay High Court in Shaikh Farid v. State of Maharashtra MANU/MH/0030/1981 : 1983 CrLJ 487. He also submitted that Section 294 Code of Criminal Procedure which is an exception to the Rule as to mode of proof has no application to the facts of the present case.

26. That an electronic record is not admissible unless it is accompanied by a certificate as contemplated Under Section 65B(4) of the Indian Evidence Act is no more res integra. The question that falls for our consideration in this case is the permissibility of an objection regarding inadmissibility at this stage. Admittedly, no objection was taken when the CDRs were adduced in evidence before the Trial Court. It does not appear from the record that any such objection was taken even at the appellate stage before the High Court. In Gopal Das v. Sri Thakurji MANU/PR/0002/1943 : AIR 1943 PC 83, it was held that:

Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof.

In RVE Venkatachala Gounder, this Court held as follows:

Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a Rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

It would be relevant to refer to another case decided by this Court in PC Purshothama Reddiar v. S. Perumal MANU/SC/0454/1971 : (1972) 1 SCC 9. The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that:

Before leaving this case it is necessary to refer to one of the contentions taken by Mr. Ramamurthi, learned Counsel for the Respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the Respondent now to object to their admissibility.

27. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B(4). It is clear from the judgments referred to *supra* that 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 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.

It is also clear from the above judgments that 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 at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements Under Section 161 of the Code of Criminal Procedure 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.

28. Another point which remains to be considered is whether the Accused is competent to waive his right to mode of proof. Mr. Luthra's submission is that such a waiver is permissible in civil cases and not in criminal cases. He relies upon a judgment of the Privy Council in Chainchal Singh's case in support of the proposition. The Privy Council held that the Accused was not competent to waive his right. Chainchal Singh's case may have no application to the case in hand at all. In that case, the issue was Under Section 33 of the Evidence Act, and was whether evidence recorded in an earlier judicial proceeding could be read into, or not. The question was whether the statements made by a witness in an earlier judicial proceeding can be considered relevant for proving the truth or facts stated in a subsequent judicial proceeding. Section 33 of the Evidence Act allows for this inter alia where the witness is incapable of getting evidence in the subsequent proceeding. In Chainchal Singh, the Accused had not objected to the evidence being read into in the subsequent proceeding. In this context, the Privy Council held that in a civil case, a party can waive proof but in a criminal case, strict proof ought to be given that the witness is incapable of giving evidence. Moreover, the judge must be satisfied that the witness cannot give evidence. Chainchal Singh also held that:

In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence.

The witness, who had deposed earlier, did not appear in the subsequent proceeding on the ground that he was unable to move from his house because of tuberculosis, as deposed by the process server. There was no medical evidence in this regard. The Court observed that the question of whether or not he was incapable of giving evidence must be proved in this context, and in the proof of such a fact it was a condition that statements given in an earlier proceeding can be taken as proved in a subsequent proceeding. Chainchal Singh's case therefore, does not lay down a general proposition that an Accused cannot waive an objection of mode of proof in a criminal case. In the present case, there is a clear failure to object to the mode of proof of the CDRs and the case is therefore covered by the test in R.V.E. Venkatachala Gounder.

29. We proceed to deal with the submission of Mr. Luthra that the ratio of the judgment of the Bombay High Court in Shaikh Farid's case is not applicable to the facts of this case. It was held in Shaikh Farid's case as under:

6. In civil cases mode of proof can be waived by the person against whom it is sought to be used. Admission thereof or failure to raise objection to their tendering in evidence amount to such waiver. No such waiver from the Accused was permissible in criminal cases till the enactment of the present Code of Criminal Procedure in 1973. The Accused was supposed to be a silent spectator at the trial, being under no obligation to open his mouth till the occasion to record his statement Under Section 342 (present Section 313) of the Code arose. Even then he was not bound to answer and explain the circumstances

put to him as being appearing against him. In the case of *Chainchal Singh v. Emperor* MANU/PR/0034/1945 : AIR 1946 PC 1 it was held by the Privy Council that the Accused was not competent to waive his right and the obligation of the prosecution to prove the documents on which the prosecution relied. Resultantly, the prosecution was driven to examine witnesses even when the Accused was not interested in challenging the facts sought to be proved though them. The inconvenience and the delay was avoidable.

7. Section 294 of the Code is introduced to dispense with this avoidable waste of time and facilitate removal of such obstruction in the speedy trial. The Accused is now enabled to waive the said right and save the time. This is a new provision having no corresponding provision in the repealed Code of Criminal Procedure. It requires the prosecutor or the accused, as the case may be, to admit or deny the genuineness of the document sought to be relied against him at the outset in writing. On his admitting or indicating no dispute as to the genuineness, the Court is authorised to dispense with its formal proof thereof. In fact after indication of no dispute as to the genuineness, proof of documents is reduced to a sheer empty formality. The Section is obviously aimed at undoing the judicial view by legislative process.

8. The preceding Section 293 of the Code also dispenses with the proof of certain documents. It corresponds with Section 510 of the repealed Code of Criminal Procedure. It enumerates the category of documents, proof of which is not necessary unless the Court itself thinks it necessary. Section 294 makes dispensation of formal proof dependent on the Accused or the prosecutor, not disputing the genuineness of the documents sought to be used against them. Such contemplated dispensation is not restricted to any class or category of documents as Under Section 293, in which ordinarily authenticity is dependent more on the mechanical process involved than on the knowledge, observation or the skill of the author rendering oral evidence just formal. Nor it is made dependent on the relative importance of the document or probative value thereof. The documents being primary or secondary or substantive or corroborative, is not relevant for attracting Section 294 of the Code. Not disputing its genuineness is the only solitary test therefor.

9. Now the post-mortem report is also a document as any other document. Primary evidence of such a document is the report itself. It is a contemporaneous record, prepared in the prescribed form, of what the doctor has noticed in the course of post-mortem of the dead body, while investigation the cause of the death. It being relevant, it can be proved by producing the same. But production is only a step towards proof of it. It can be received in evidence only on the establishment of its authenticity by the mode of its proof as provided Under Sections 67 to 71 of the Evidence Act. Section 294(1) of the Code enables the Accused also, to waive this mode of proof, by admitting it or raising no dispute as to its genuineness when called upon to do so under Sub-section (1). Sub-section (3) enables the Court to read it in evidence without requiring the same to be proved in accordance with the Evidence Act. There is nothing in Section 294 to justify exclusion of it, from the purview of "documents" covered thereby. The mode of proof of it also is liable to be waived as of any other document.

30. Section 294 of the Code of Criminal Procedure 1973 provides a procedure for fling documents in a Court by the prosecution or the accused. The documents have to be included in a list and the other side shall be given an opportunity to admit or deny the genuineness of each document. In case the genuineness is not disputed, such document shall be read in evidence without formal proof in accordance with the Evidence Act. The judgment in Shaikh Farid's case is not applicable to the facts of this case and so, is not relevant.

The Effect of Overrule

31. Electronic records play a crucial role in criminal investigations and prosecutions. The contents of electronic records may be proved in accordance with the provisions contained in Section 65B of the Indian Evidence Act. Interpreting Section 65B(4), this Court in Anvar's case held that an electronic record is inadmissible in evidence without the certification as provided therein. Navjot Sandhu's case which took the opposite view was overruled.

32. 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.

33. This Court in IC Golak Nath v. State of Punjab MANU/SC/0029/1967 : (1967) 2 SCR 762 held that there is no acceptable reason why it could not restrict the operation of the law declared by it to the future and save transactions that were effected on the basis of earlier law. While referring to the doctrine of prospective overruling as expounded by jurists George F. Canfield, Robert Hill Freeman, John Henry Wigmore and Cardozo, this Court held that when a subsequent decision changes an earlier one, the latter decision does not make law but rather discovers the correct principle of law and the result is that it is necessarily retrospective in operation. As the law declared by this Court is the law of land, it was held that there is no reason why this Court declaring the law in supersession of the law declared by it earlier cannot restrict the operation of the law as declared to the future and save transactions that were affected on the basis of earlier law. While so holding, this Court in Golak Nath laid down the following propositions:

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and, the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

While taking note of the doctrine of 'prospective overruling' in the United States, this Court referred to the decisions concerning the admissibility of evidence obtained by unreasonable search and seizure. In Weeks v. United States 232 U.S. 383 (1914), the US Supreme Court held that evidence obtained by an unreasonable search and seizure has to be excluded in criminal trials. In 1949, the US Supreme Court in Wolf v. Colorado, 338 U.S. 25 (1949) held that the Rule of exclusion laid down in Weeks did not apply to proceedings in State Courts. The judgment in Wolf was over ruled in Mapp v. Ohio, MANU/USSC/0108/1961 : 367 U.S. 643 (1961). Subsequently, the US Supreme Court applied the doctrine of prospective overruling in Linkletter v. Walker MANU/USSC/0207/1965 : 381 U.S. 618 (1965) as it was of the opinion that if Mapp was applied retrospectively it would affect the interest of the administration of justice and the integrity of the judicial process.

34. The effect of overrule of a judgment on past transactions has been the subject matter of discussion in England as well. In R. v. Governor of H.M. Prison Brockhill, ex p. Evans (No. 2), [2000] 4 All ER 15, Lord Slynn dealing with the principle of prospective over ruling observed as under:

The judgment of the Divisional Court in this case follows the traditional route of declaring not only what was the meaning of the Section at the date of the judgment but what was always the correct meaning of the section. The court did not seek to limit the effect of its judgment to the future. I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants. The European Court of Justice, though cautiously and infrequently, has restricted the effect of its ruling to the particular claimant in the case before it and to those who had begun proceedings before the date of its judgment. Those who had not sought to challenge the legality of acts perhaps done years before could only rely on the ruling prospectively. Such a course avoided unscrambling transactions perhaps long

since over and doing injustice to Defendants.

35. 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, MANU/SC/0394/2014 : (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.

36. For the aforementioned reasons, the judgment of the High Court confirming the Trial Court is upheld. The appeals are dismissed.

Citation : (2017)4SCC 490

IN THE SUPREME COURT OF INDIA

Tarun Tyagi
Vs.
Central Bureau of Investigation

Judges/Coram:
A.K. Sikri and R.K. Agrawal, JJ.

CaseNote:
Criminal - Deficient copies of documents - Supply thereof - Section 207 and 238 of Code of Criminal Procedure, 1973 - Appellant preferred application under Section 207/238 of Code, 1976 seeking supply of deficient copies of documents - Magistrate rejected application - Order was challenged by Appellant before High Court - High Court dismissed petition - Whether approach of Courts below was correct in refusing to supply hard disk and compact disk to Appellant

Facts:

On the basis of a complaint lodged by Director/complainant, a First Information Report (FIR) was registered by the Central Bureau of Investigation (CBI) wherein the Appellant was made an accused. In the said FIR, the complainant had alleged that the Appellant had stolen the 'source code' of a software known as 'Quick Recovery' developed by the complainant's company and thereafter put it for sale on the website of the Appellant company under the name 'Prodatadoctor'. Case was registered Under Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B read with Section 14(b)(ii) of the Copyright Act, 1957. The CBI took up the investigation and seized certain documents and material from the office/residential premises of the Appellant. The Appellant moved an application seeking release of the seized property. This application was rejected by the Court of Chief Metropolitan Magistrate. The High Court of Delhi set aside that order and restored the application for release with direction to the concerned Magistrate to deal with the application afresh. In the meantime, the CBI had filed the charge sheet after completing the investigation. The trial court took cognizance of offence Under Section 381 of the Indian Penal Code, 1860, Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B of the Copyright Act, 1957. Insofar as the application of the Appellant for release of the seized property was concerned, the trial court passed the orders thereupon, directing the Investigating Officer to find out as to whether copies of the hard disk in question can be prepared with Unite Protect Software so that the Appellant/accused is unable to use it till the pendency of the case. The Government Examiner of Questioned Documents (GEQD), vide letter addressed to the Investigating officer, opined that cloned copy of the hard disk can be prepared. The Appellant preferred another application Under Section 207/238 of the Code of Criminal Procedure, 1973 (Code) seeking supply of deficient copies of documents, such as hard disk relied upon by the prosecution. The Magistrate rejected this application. This order was challenged by the Appellant before the High Court which, vide impugned judgment, dismissed the petition.

Held, while allowing the appeal:

(i) Section 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report Under Section 173(5) of the Code. Such a compliance has to be made on the first date when

the Accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the Accused with the copy thereof, the Magistrate can allow the Accused to inspect it either personally or through pleader in the Court. [8]

(ii) The CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the Appellant which contained the source code of the data recovery software. Defence of the Appellant was that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution was that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, was the property of the complainant. On the other hand, the Appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the Appellant. It was but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the Appellant. The right to get these copies is statutorily recognised Under Section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an Accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. The only apprehension of the prosecution was that if the documents were supplied at this stage, the Appellant may misuse the same. [10]

(iii) It needed to be ensured that the Appellant, when given the cloned copy of the hard disk, was not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure fair trial by giving due opportunity to the Accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of. In order to comply with the provision of Section 207 of the Code, the hard disks marked Q-2, 9 and 20 be supplied to the Appellant subject to the conditions. Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the Appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the Appellant. The Appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court. [11] and[12]

Disposition:
Appeal Allowed

JUDGMENT

A.K. Sikri, J.

1. On the basis of a complaint lodged by one Mr. Alok Gupta, Director of M/s. Unistal Systems Private Limited (hereinafter referred to as the complainant), a First Information Report (FIR) was registered by the Central Bureau of Investigation (CBI) on July 23, 2007 wherein the Appellant was made an accused. In the said FIR, the complainant had alleged that on or around March 11, 2005, the Appellant had stolen the *'source code'* of a software known as *'Quick Recovery'* developed by the complainant's company and thereafter put it for sale on the website of the Appellant company under the name *'Prodatadoctor'*. Case was registered Under Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B read with Section 14(b)(ii) of the Copyright Act, 1957. The CBI took up the investigation and seized certain documents and material from the office/residential premises of the Appellant

after conducting search and seizure on August 03, 2007. The Appellant moved, sometime in January 2008, an application seeking release of the seized property. This application was rejected by the Court of Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on March 03, 2008. The High Court of Delhi set aside this order in Criminal Misc. Case No. 1518 of 2008, which was preferred by the Appellant against the order of the trial court rejecting this application. The order of the High Court is dated May 18, 2009. By this order, the High Court restored the application for release with direction to the concerned Magistrate to deal with the application afresh. Operative portion of the order reads as under:

2. The submission of learned Counsel for the Petitioner is that the entire business of the Petitioner is affected because of the seizure of all the electronic hardware equipments although incriminating the evidence, if any, may be only on some of them. He further submits that although the chargesheet was filed in June, 2008, no cognizance has yet been taken of the offence, if any, by the learned ACMM.

3. Learned Counsel for the parties were unable to inform the Court whether the opinion of GEQD on the seized electronic hardware equipment has been received by the trial court.

4. In view of the facts as noticed hereinabove, it is directed that the learned ACMM will first and foremost if not done already, consider whether cognizance should be taken of the offence, if any, on the basis of the charge sheet filed. This will be done within ten days of the receipt by the learned ACMM of the certified copy of this order."

2. In the meantime, on June 28, 2006, the CBI had filed the charge sheet after completing the investigation. On May 27, 2009, the trial court took cognizance of offence Under Section 381 of the Indian Penal Code, 1860, Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B of the Copyright Act, 1957. Insofar as the application of the Appellant for release of the seized property is concerned, the trial court passed the orders dated September 03, 2009 thereupon, directing the Investigating Officer to find out as to whether copies of the hard disk in question can be prepared with Unite Protect Software so that the Appellant/accused is unable to use it till the pendency of the case. The Government Examiner of Questioned Documents (GEQD), Directorate of Forensic Science, Hyderabad, vide letter dated January 01, 2009, addressed to the Investigating officer, opined that cloned copy of the hard disk can be prepared.

3. After receipt of this report, the Appellant preferred another application on July 20, 2010 Under Section 207/238 of the Code of Criminal Procedure, 1976 (hereinafter referred to as the 'Code') seeking supply of deficient copies of documents, such as hard disk relied upon by the prosecution, i.e. Q-2, 9 and 20. The learned Magistrate rejected this application vide orders dated November 06, 2013. This order was challenged by the Appellant by filing Criminal Misc. Case Under Section 482 of the Code. The High Court has, vide impugned judgment dated June 13, 2016, dismissed the said petition. It is this order which is the subject matter of challenge in the instant appeal. To put it in nutshell, along with the chargesheet filed by the CBI, various documents are enclosed which include hard disk as well that was seized from the office of the Appellant. These are Q-2, 9 and 20. Though, copies of all other are supplied to the Petitioner, he is not given the aforesaid three disks. The Appellant wants copies of these disks as well. His submission is that as per the report of GEQD, cloned copies of these hard disks can be prepared and, therefore, there is no problem in supplying the same to the Appellant.

4. Before dealing with the aspect in detail, we may take note of the case put up by the CBI in the charge sheet submitted before the trial court after completing the investigation into the matter:

5. The prosecution case is that M/s. Unistel Systems Private Limited (hereinafter referred to as the 'company') is a company established in the year 1995 and the business of the company was to buy, sell, import-export and distribute all types of computer software and related works. The computer software manufactured by the company were all Data Recovery software

related to recovery of lost data in crashed hard disks of the computer with various types of operating systems. The Data Recovery software developed by the company is under the brand name of *'Quick Recovery'*. This software was developed and launched in the year 1999 and later got renamed as *'Quick Recovery Windows'*. The software was a DOS based software and used to work for File Allocation Table (FAT). Subsequently, the software was got upgraded to FAT and New Technology File System (NTFS). This software was developed by a team headed by one Manu Bhardwaj and others in the office premises of the complainant's company and all these persons were employed in the company in the capacity of Programmers. The source code of the software programme *'Quick Recovery for FAT & NTFS'* was stored in the programming room that was networked for the purpose of convenience and was not password protected and easily accessible by the other employees in the office of the company.

6. The Appellant was an employee of the company initially for a brief period of two months, i.e. in October and November 2003. He rejoined the company in June 2004 and worked till end of April 2005. The Appellant had his own website, which he started while working in the complainant's company. The Appellant, with dishonest intention of selling data recovery software, made out with the stolen source code. The website developed by the Appellant was registered with Direct Internet Service of Mumbai. The Appellant, during the period of his employment with the company, had access to the source code of *'Quick Recovery for FAT & NTFS'* and unauthorisedly misappropriated the same from the programming room of the company. After leaving the services of the company, the Appellant formed his own company by the name M/s. Prodata Doctor Private Limited. The Appellant secured the services of one Mr. Vikas Yadav as the Programmer, who was given the stolen source code of *'Quick Recovery for FAT & NTFS'* and was directed to make a recovery software by modifying the stolen code. During investigation, Vikas Yadav made a statement as to how he had prospered the software *'Data Doctor Recovery for FAT & NTFS'* based on the source code of the complainant's company. He further stated that how the Appellant instructed him to remove the name of the company from the Graphical User Interface of the source code while adopting it for the new software *'Data Doctor Recovery for FAT & NTFS'*. He further disclosed that he had developed variant of the software like Data Doctor Recovery for iPOD, Pendrive, Memory Card, Digital Camera, SIM Card, etc. with the help of the stolen source code of the company. During investigation, the stolen source code was recovered from his mail which was sent by the Appellant. The Appellant, after developing the *'Data Doctor Recovery for FAT & NTFS'* out of the stolen source code of the company, put it for sale on his website and remittance was received by him from abroad, through various payment gateways, and the variant software developed by Vikas Yadav was sold through these gateways. As per the CBI, it is also found that the Appellant obtained a total amount of more than ` 5 crores between 2004-2008 due to online sale of the software under the name *'Data Doctor Recovery for FAT & NTFS'*.

7. It is on the basis of the aforesaid allegations in the chargesheet, that the cognizance is taken by the trial court of the offence under various provisions of the Indian Penal Code, Information Technology Act as well as the Copyright Act. Keeping in mind the aforesaid case put up against the Appellant, we now advert to the moot question, namely, whether the approach of the courts below is correct in refusing to supply the hard disk and compact disk to the Appellant herein. Request was made by the Appellant invoking the provisions of Section 207 of the Code. Other relevant provision, aid whereof is taken by the Appellant, is Section 238 of the Code. We would, therefore, like to reproduce these two provisions herein:

207. Supply to the Accused of copy of police report and other documents.-In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

(i) the police report,

(ii) the first information report recorded Under Section 154;

(iii) the statements recorded Under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer Under Sub-section (6) of Section 173;

(iv) the confessions and statements, if any, recorded Under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report Under Sub-section (5) of Section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred t in Clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the Accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

xx xxxx

238. Compliance with Section 207.- When, in any warrant-case instituted on a police report, the Accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207.

8. Section 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report Under Section 173(5) of the Code. Such a compliance has to be made on the first date when the Accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the Accused with the copy thereof, the Magistrate can allow the Accused to inspect it either personally or through pleader in the Court.

9. Learned Counsel for the Appellant referred to the aforesaid provisions and argued that it was his right to receive the documents in question relied upon by the prosecution, in the absence of which the Appellant would not be able to put up his defence effectively. He also submitted that the complainant had filed a suit bearing CS (OS) No. 792 of 2008 against the Appellant seeking to restrain him from using/selling the said/similar software or its versions. The Division Bench of the High Court declined to attach the bank account of the Appellant in which monies were generated from the sale of the disputed software. The said suit came to be dismissed for non-prosecution on October 15, 2014, thus, demolishing the argument of the CBI that the Appellant can misuse the same to the detriment of anyone much less the complainant who claimed to have a copyright in the same. It was pointed out that the CBI, in the second FIR against one Accused Rupesh Kumar, has conceded to supply the mirror image/copies of the CDs, i.e. the questioned documents, and accepted the finding of the courts below wherein it has been held that *'there is no answer from the CBI whether the software is unique and there is no other software in the market for the recovery of lost data'*.

10. It is clear from the above that the CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the Appellant which contained the source code of the data recovery software. Defence of the Appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the Appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the

complainant and the seized material contained the source code developed by the Appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the Appellant. The right to get these copies is statutorily recognised Under Section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an Accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the Appellant may misuse the same.

11. The aforesaid apprehension of the prosecution is based on the opinion of Government Examiner (Expert) who has opined that if the cloned copy of the hard disk was required, then the same could be prepared by the laboratory on supply of new hard disk of 500 GB but such cloned copy could not be write protected. Cambridge Dictionary defines "write protect" in the following manner:

to protect the data on a computer disk so that it cannot be changed or removed by a user.

Likewise, Collins Dictionary defines the term "write protected" as under:

(of a computer disk) having been protected from accidental writing or erasure

In view of this opinion of the Expert, it needs to be ensured that the Appellant, when given the cloned copy of the hard disk, is not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure fair trial by giving due opportunity to the Accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of.

12. We find that CBI, under similar circumstances in the case of Rupesh Kumar, accepted the order of the trial court whereby directions were given to the CBI to supply the hard disk. In the said case, the trial court found that there was no answer from the CBI whether the software in question was unique and there was no other software in the market for the recovery of lost data from the logical cracked hard disk. Number of softwares are available in the market which negated the arguments of CBI that by supplying the mirror image of the documents, the complainant will lose its money and it will be in violation of the Copyright Act, 1957. In that case, the Court took undertaking from the Appellant that he would not misuse the copy of cloned CD. We, thus, are of the opinion that in order to comply with the provision of Section 207 of the Code, the hard disks marked Q-2, 9 and 20 be supplied to the Appellant subject to the following conditions:

(a) Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the Appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the Appellant.

(b) The Appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court.

13. The appeal stands allowed in the aforesaid terms.

Chapter 3

Leading Electronic Evidence in the Court: Critical Analysis and the Stepwise Process

It is widely believed amongst the legal community that electronic evidence is a new breed of evidence, requiring a specialized law governing and regulating the same. There is an apprehension that our law of evidence encapsulated in the Indian Evidence Act of 1872 will not hold good for electronic evidence. Are these beliefs and apprehensions justified?

There are also doubts and apprehensions amongst lawyers as to the process of leading electronic evidence in the Courts. Due to the fast pace of information technology and the general belief that electronic evidence is highly technical, doubts lurk in legal minds. Leading electronic evidence is as simple or complex as any other evidence. It needs to be assimilated that the basic process and legal principles of leading evidence apply to electronic evidence as well. The traditional principles of leading evidence along with certain newly added provisions in the Indian Evidence Act, 1872 through the Information Technology Act, 2000 can be said to constitute the body of law applicable to electronic evidence.

■ CLASSIFICATION & NATURE OF ELECTRONIC EVIDENCE AND SHORTCOMINGS IN THE AMENDMENTS TO THE INDIAN EVIDENCE ACT, 1872

For clearly understanding the process of leading electronic evidence in the Courts, it is necessary to classify and understand the nature of electronic evidence. Electronic evidence can be broadly classified into the following categories: -

- Computer and electronic hardware;
- Computer software;
- Processing in the computer system;
- Electronic communication through E-mail, online chat and Internet telephony;
- Blogs;
- Web-sites;
- Electronic content such as text, images and sound.

Prior to the amendment made therein by the I.T. Act, 2000, the term "evidence" in section 3 of the Indian Evidence Act, 1872 was defined as follows:

> " "Evidence" means and includes –
> (1) all statements which the Courts 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 produced for the inspection of the Court; such documents are called documentary evidence."

The following interesting questions arise:

- Is computer and electronic hardware oral or documentary evidence?
- Where would processing in the computer system and computer software be categorized?
- Are web-sites documentary evidence?
- Where would electronic content (text, images and sound) fall?

The legal status of the aforesaid categories in the Indian Evidence Act, 1872 prior to the amendments made therein

by the Information Technology Act, 2000, is worth noticing. In section 3 of the Indian Evidence Act, 1872, a "fact" means and includes any thing, state of things or relation of things, capable of being perceived by the senses; as well as any mental condition of which any person is conscious. The term "document" has been defined as 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.[1] The illustrations of documents appended to the definition throw light on its broad ambit:

- A writing is a document ;
- Words printed, lithographed or photographed are documents;
- A map or plan is a document;
- An inscription on a metal plate or stone is a document;
- A caricature is a document.

The aforesaid definitions of 'fact' and 'document' show that our law of evidence covers the entire spectrum of things / objects including expression of any matter upon any substance, their state of being and existence, their perception by everyone who is capable of perceiving, as well as any mental condition or state of mind of a person.

The wide ambit of our law of evidence is further confirmed by the definition of the term "proved" according to which, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists[2]. The words "matters before it" show the wide amplitude of the definition. These words go even beyond the definition of "evidence" in section 3 of the Indian Evidence Act, 1872 which prior to the amendment by the I.T. Act, 2000 covered oral evidence and documentary evidence.

1. Section 3 of the Indian Evidence Act, 1872.
2. Definition of "Proved" in Section 3 of the Indian Evidence Act, 1872.

In the light of the aforesaid definitions, each of the aforesaid categories of computer / electronic devices, processes, inputs and outputs clearly constitute evidence under the Indian Evidence Act, 1872 even prior to the amendments therein carried out by the Information Technology Act, 2000.

Computer & electronic hardware are as good evidence as the weapon used in a crime or the clothes of the prosecutrix in a rape case, that have been exhibited as evidence since time immemorial. Firstly, the definition of "evidence" is inclusive and not exhaustive. Moreover, the words "matters before it" in the definition of the term "proved" are wide enough to encompass a broader spectrum than oral and documentary evidence. There is thus no reason to distinguish computer and electronic hardware as new breeds of evidence.

The processing in the computer system / hardware is done by computer software which as a piece of evidence has three dimensions. The working of the software is equivalent to the working of any machine. The other dimension of computer software is that of an object / thing. The encapsulation of computer software in a storage medium such as floppy, CD, hard-disk or pen-drive etc. makes it a thing / object. Yet another dimension of computer software is the written program i.e. the source code and the object code. The written program would clearly fall within the definition of 'document' which implies expression of any matter upon any substance.

Electronic communication, whether through email, online chat or Internet telephony is like any other communication. Whether the electronic communication is instantaneous or non-instantaneous, there should be no difficulty in accepting it from the evidentiary perspective. Blogs are web pages on the Internet on which individuals and communities post their views and other content. In effect, they are publications on the Internet. A web-site is

a web-page on the Internet on which information and data (text, images, audio-visual content) is posted. From the evidentiary perspective, blogs and web-sites have different dimensions. They can be said to be a bundle of software and expression of matter, in the form of text, images and sound. They are documents and processes at different levels, from the evidentiary perspective.

In the Information Technology Act, 2000, an "electronic record" is defined as data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated micro fiche.[3] The word "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.[4] The expression "electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated microfiche or similar device.[5]

Reading the aforesaid definitions of 'electronic record', 'data' and 'electronic form' in the I.T. Act, 2000 along with the definition of 'document' in the Indian Evidence Act, 1872, it becomes *ex-facie* clear that computer images, text and sound stored, whether on a computer file, blog, web-site or email, are all documents. Even though computers use binary language i.e. consisting of zeros and ones, nevertheless, it constitutes expression of matter. As pieces of evidence, blogs, web-sites and computer files consisting of text, images and sound, may have different dimensions. For instance, the exchange of words through sound would be in the nature of oral evidence, the working of the

3. Section 2 (1) (t) of the Information Technology Act, 2000.
4. Section 2 (1) (o) of the Information Technology Act, 2000.
5. Section 2 (1) (r) of the Information Technology Act, 2000.

software enabling the exchange of sounds would be an act as that of a machine, the written software program and storage of content (text, images or sound) would be documents, and the floppy, CD or pen-drive in which the content is stored is a document and an object / thing. From the evidentiary perspective, electronic evidence is like a chameleon that changes colours. In other words, it has numerous dimensions.

In spite of the technology-neutral law of evidence, our lawmakers have redefined the word "evidence"[6] by including 'electronic records' as documentary evidence. The new definition of "evidence" in section 3 reads as follows:

> "Evidence" means and includes –
>
> (1) all statements which the Courts 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.

The words "including electronic records" have been inserted in clause (2) above. Electronic records have thus been classified as documentary evidence. Was the amendment really necessary? The definition of the term "document" is not paper–based. Any expression of matter upon any substance is a document. Whether the content is intelligible or not, it does not matter. For instance, if in a murder case, one of the facts in issue is whether a small child of two was present at the spot where his mother was killed. Some pieces of paper are found nearby with the child's scribbles on them. These would be documents under section 3 of the Indian Evidence Act, 1872 even though the contents make no sense. Similarly, if a piece of paper with scribbles is sealed in an envelope, it would still be a

6. Section 3 of the Indian Evidence Act, 1872, as amended by the I.T. Act, 2000

document. If the child had scribbled on the blackboard, it would be still a document. On a parity of reasoning, a floppy, CD, hard-disk, flash cards, pen-drive and all other storage media containing electronic records have always been documents and hence had evidentiary status under the law. The above amendment to the law was thus not necessary and is only cosmetic in nature. Electronic records were always documents under the Indian Evidence Act, 1872. The Supreme Court in the case of Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra & Ors[7] has also held that tape records of speeches are documents. On a parity of reasoning, electronic records, whether in the form of text, images or sound stored, are also documents, irrespective of the storage media (floppy, CD, pen-drive, hard-disk etc).

From the above analysis it emerges that the amendment to the definition of the term "evidence" can be said to be merely clarifying the pre-existing legal position. However, certain other amendments to the Indian Evidence Act, 1872 by the I.T. Act, 2000 create confusion and open the doors to unnecessary litigation. If only the definition of "evidence" had been amended, it would not have caused any problems as the entire set of provisions applicable to documents or documentary evidence would have *ipso-facto* applied to electronic records as well. But our lawmakers have also amended certain other provisions of the Indian Evidence Act, 1872 thereby adding electronic records alongside documents. Sections 34, 35, 39, 59 and 131 of the Indian Evidence Act, 1872 can be cited as examples in this regard. However, several important provisions applicable to documents have not been amended. For instance, sections 32, 36, 74, 75 and 91 have not been amended thus creating an impression as if the said provisions are not intended to apply to electronic records. To cite an example, section 91 incorporates an important legal principle that if the terms of a contract are reduced in a document, oral evidence cannot be led with respect to the terms of such contract etc.

7. AIR 1975 SC 1788

An impression is created as if the bar of section 91 would apply only if the contract is in a written document but will not apply if the same contract is in the form of an electronic record. This does not appear to be logical. This would create unnecessary confusion amongst the legal community and could also breed unproductive litigation on the interpretation of those provisions that have been left unamended.

■ LEADING ELECTRONIC EVIDENCE: THE STEP-BY-STEP PROCESS

➤ Admissibility and Relevancy

Before leading any piece of evidence in a case, the first question that arises is: Whether the evidence sought to be led is admissible? Admissibility of evidence implies the legal permissibility to adduce the same. Even though the word 'admissibility' is nowhere defined in the Indian Evidence Act, 1872, it is a well-developed legal concept. Evidence that is barred under the Indian Evidence Act can be said to be inadmissible. Examples of inadmissible evidence include confession made to a police officer, hearsay evidence and secondary evidence (unless falling within the exceptions provided in section 65 of the Act).

The concept of relevancy of a fact implies the bearing it has on the case. A fact is said to be relevant to another when it is so connected with the other in any of the ways referred to in the provisions relating to relevancy of facts[8]. Facts that are relevant are exhaustively provided in the Indian Evidence Act, 1872 from sections 6 to 55 in Chapter-II. Section 5 of the Indian Evidence Act, 1872 stipulates that evidence may be given in any suit or proceedings, of the existence or non-existence of every fact in issue and of such other facts declared to be relevant, and of no others. The expression "facts in issue" means and includes any facts

8. Section 3 of the Indian Evidence Act, 1872

from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.[9] In other words, the law bars the reception of evidence of any fact that is not relevant. Hence, whether the fact under consideration, of which evidence is sought to be led, is relevant or not is the second question that requires to be dealt with in a case.

Admissibility and relevancy are distinct legal requirements though in certain situations they exclude one another. Though the relevancy of facts implies the bearing / connection to the case, there are a few exceptions whereby even irrelevant facts or facts that are not relevant have been declared admissible in our law of evidence and hence permitted to be adduced in evidence. For example, section 155 permits the credit of a witness to be impeached. Even though this has no bearing/connection with the facts in issue arising in a case but is declared admissible. Section 165 of the Indian Evidence Act, 1872 empowers the Judge to ask any question, in any form, at any time, from any witness or the parties, about any fact that is relevant or irrelevant. On the other hand, confession made to a police officer may have a direct bearing/connection to the case but on principles of public policy, it is declared inadmissible in evidence.

➤ Proof of Electronic Records

Electronic records have been granted legal status by section 4 of the I.T. Act, 2000 that states as follows:-

> **"4. Legal recognition of electronic records.-** 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-

9. Section 3 of the Indian Evidence Act, 1872

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference."

As discussed earlier, electronic records were documentary evidence even prior to the I.T. Act, 2000. Section 4 merely recognizes electronic records as part of the legal system but they always had evidentiary status. Since electronic records are generated in the computer system, for proving the same by primary evidence as stipulated by section 64 of the Indian Evidence Act, 1872, the computer system would be required to be produced in the Court. Even though the original/primary electronic record would be practically indistinguishable from a copy thereof, the legal distinction between the primary electronic record and its copy remains. A photocopy of a hand-written document is visually distinct from the original thereof. However, even though the original electronic record and its copy (called 'computer output') are practically indistinguishable, the legal distinction cannot be overlooked.

For avoiding inconvenience to litigants, of having to bring the computer system to the Court as proof of the primary electronic record, section 65B has been introduced into the Indian Evidence Act, 1872 vide the I.T. Act, 2000. Section 65B is an exception to the rule of primary evidence in so far as electronic records are concerned. Sub-section (1) of section 65B grants admissibility to the secondary evidence of an electronic record (called 'computer output'), as evidence of the original electronic record, without proof or production of the original. Section 65B(1) stipulates as follows: -

> **"65B. Admissibility of electronic records.** - (1) Notwithstanding anything contained in this 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 (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 of any contents of the original or of any fact stated therein of which direct evidence would be admissible."

The computer outputs permitted to be led as evidence of an electronic record, are-printouts, CD, floppy, pen-drive, flash cards, hard disk and as stored, recorded or copied in other optical or magnetic media. However, certain strict conditions have been laid down in sub-section (2) of section 65 B for the grant of legal admissibility to the computer output which is otherwise secondary evidence. These conditions seek to ensure the credibility of the secondary evidence / computer output of an electronic record. These conditions are as follows: -

"(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(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 in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer 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 in the ordinary course of the said activities".

Sub-section (3) contemplates certain typical situations in this digital age. Most medium and large business enterprises use a combination of computers forming a network of computer systems. This sub-section treats the combination of computers as constituting a single computer thereby implying that the conditions stipulated in sub-

section (2) must be fulfilled with respect to all the computers acting in a combination. As proof of the compliance of the aforesaid conditions, sub-section (4) of section 65 B permits a person occupying a responsible official position in relation to the operation of the relevant device (including the computer system) or the management of the relevant activities, to give a statement in evidence through a certificate thereby identifying the electronic record and dealing with the compliance of the aforesaid conditions.

Section 65B on first look is clear and straightforward. However, the practical application of section 65B poses difficulties in numerous case situations, especially in criminal cases. For instance, if during the course of a criminal investigation, certain printouts of e-mails are seized and are sought to be proved against the accused, compliance of section 65B would not be possible in the absence of the computer system from which such computer outputs were generated. Section 65B has been legislated with only e-commerce and business enterprises in mind but made applicable to all cases including criminal cases.

Rather than laying down mandatory conditions in sub-section (2) of section 65B, the provision should have been simpler. The admissibility to computer outputs (secondary evidence of the original electronic record) should have been granted subject to the simple condition of satisfying the Court as to the authenticity of the computer output. The conditions of sub-section (2) should have been stated as some of the guidelines to determine the authenticity of the computer outputs. Instead of keeping in view the larger picture of our digital society that includes not only e-commerce but also cyber crimes, section 65B has just been bodily lifted from the Customs Act, 1962 which is purely an economic statute.

Even the conditions stipulated in sub-section (2) especially clauses (a), (b) and (d) may not be satisfied though the computer output is an authentic copy of the original

electronic record. For instance, it is not necessary in every case situation that the computer would be used regularly to store or process information for the purposes of any activities regularly carried on, or information of the kind contained in the electronic record, was regularly fed into the computer. If the electronic record from which the computer output is generated, is a solitary electronic record in the computer, can it be said that due to non-compliance of sub-section (2), the computer output would be inadmissible in evidence.

Section 65B in its present form is relevant only to determine the existence of a course of activities on the computer system and may apply to prove entries or correspondence in the ordinary course of business. Such is the limited practical applicability and utility of section 65B. Even for such determination, sections 16 (existence of course of business), 32 (2) (statement made in course of business) and 34 (entries in books of account) of the Indian Evidence Act, 1872 would have sufficed.

In the existing state of affairs, the rule of best evidence can be usefully applied to tide over the shortcomings in section 65B. In the case situation where certain printouts of e-mails (computer outputs) are seized from the accused during a criminal investigation, the recovery and other circumstantial evidence would be proof of the electronic records thereof i.e. the e-mails in original even though section 65B cannot be complied with. Another way to save the electronic evidence collected in criminal investigation from being declared inadmissible due to non-compliance of section 65B, is to read down and interpret the provision in a manner that it would be applicable only where the party leading the relevant piece of evidence, has obtained the computer output from the computer.

➤ Authorship of electronic records

Compliance with the conditions stipulated in section 65B merely grants admissibility to the secondary evidence

i.e. the computer output of an electronic record. However, before the computer output is exhibited as a piece of evidence in the Court, its authorship needs to be proved. Authorship of a document can be proved by numerous methods acceptable to law, depending upon the case situation. In the event the author of the electronic record, for instance an e-mail or an electronic accounting entry, is the same person who gives the certificate under section 65B i.e. a person occupying a responsible official position in relation to the operation of the computer, then the same person would prove the authorship of the electronic record from which the computer output has been generated.

The usual method accepted by law to prove authorship of a document is by examining as a witness, the person who has executed the document, or saw it being executed, or has signed it, or is otherwise qualified and competent to express his opinion about the document in question[10]. Evidence of authorship of a document, proves the presence of the contents therein. The facts and events stated in the document that is proven, must however be independently proved. The contents of a document, other than containing the terms of a contract, by themselves do not *ipso facto* prove the facts and events that are part of the contents. For instance, if 'A' writes a letter to 'B' stating that 'B' has murdered 'X', the murder is not proved merely because it is part of the contents of the proved letter.

■ PROOF OF ELECTRONIC SIGNATURES

Information Technology has made a profound impact on our lives. Apart from completely altering the way we communicate, interact and transact, information technology also has the effect of changing some of our basic acts. Who could imagine two decades back that the act of signing a document would be converted into an external process through the concept of electronic signatures? Initially, the

10. S. Gopal Reddy V. State of Andhra Pradesh [(1996) 4 SCC 596]

I.T. Act, 2000 legally recognized only the "asymmetric crypto system" as the mode of affixing digital signatures. The asymmetric crypto system has been explained in some detail in Chapter-2 while dealing with forgery of digital signatures.

The pace of innovation and invention, in the present world that we live in, cannot be stated better than Alvin Toffler in "Future Shock" that was first published in the year 1970 :

"Indeed, a growing body of reputable opinion asserts that the present movement represents nothing less than the second great divide in human history, comparable in magnitude only with that first great break in historic continuity, the shift from barbarism to civilization."

"It has been observed, for example, that if the last 50,000 years of man's existence were divided into lifetimes of approximately sixty-two years each, there have been about 800 such lifetimes. Of these 800, fully 650 were spent in caves.

Only during the last seventy lifetimes has it been possible to communicate effectively from one lifetime to another - as writing made it possible to do. Only during the last six lifetimes did masses of men ever see a printed word. Only during the last four has it been possible to measure time with any precision. Only in the last two has anyone anywhere used an electric motor. And the overwhelming majority of all the material goods we use in daily life today have been developed within the present, the 800th lifetime."

Since information technology is also continuously evolving to new levels due to inventions and innovation, new forms of electronic signatures have been developed since the I.T. Act, 2000 was conceived. The concept of "asymmetric crypto system"[11] that was legally recognized as "digital signature"[12] by the I.T. Act, 2000, may be replaced in future by better technology modes that are faster and more secure.For instance, the 'Elliptic Curve Cryptography' (ECC) is gaining much popularity over the 'RSA Algorithm' being applied in the country as a "digital

11. Sec. 3 (2) of I.T. Act, 2000.
12. Sec. 2(1)(p) of I.T. Act, 2000.

signature" that has been legally recognized under the I.T. Act, 2000. Certain new techniques / methods of electronic authentication and electronic signatures, such as, digital fingerprinting, facial matching and retinal scans, are also being developed as part of the science of biometrics.

With a view to make the law technology-neutral, rather than a slave to a particular technological mode of signatures, the expressions "electronic signature"[13] and "electronic authentication technique"[14] have been added to the I.T. Act, 2000 alongside "digital signature", by the I.T. (Amendment) Act, 2008. Recognizing the fact that the technology with respect to electronic signatures may evolve with inventions of new techniques, the law has been amended to assimilate any e-signature technology that is in vogue at a given point of time. Section 3A has been added to the I.T. Act, 2000 by the I.T. (Amendment) Act, 2008 which *inter alia* empowers the Central Government to add or omit any electronic signature or electronic authentication technique through a notification in the official gazette.

Consequent to the aforesaid amendments in the I.T. Act, 2000, the words "digital signature" and "digital signature certificate" have been replaced by "electronic signature" and "electronic signature certificate" respectively, in sections 3, 47A, 67A, 85A, 85 B, 85C and 90A of the Indian Evidence Act, 1872. Section 3 of the Indian Evidence Act, 1872 is the interpretation clause; section 47A makes the opinion of the Certifying Authority with respect to electronic signature relevant; section 67A mandates proof of electronic signature of a subscriber; section 85A raises a presumption in favour of electronic signature on an electronic record purporting to be an agreement containing electronic signature; section 85B raises a presumption in favour of secure electronic signature; section 85C raises a presumption in favour of certain information listed in an Electronic Signature Certificate; and section 90A draws a

13. Sec. 2(1)(ta) of I.T. Act, 2000.
14. Sec. 3A of I.T. Act, 2000.

presumption in favour of an electronic signature on an electronic record that is five years old. However, since "electronic signature" is defined as authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature[15], the said provisions of the Indian Evidence Act, 1872 will *ipso facto* apply to "digital signature" as well.

Proof of "digital signature" is governed by section 73A of the Indian Evidence Act, which reads as follows:-

> "Proof as to verification of digital signature.-In order to ascertain whether a digital signatures is that of the person by whom it purports to have been affixed, the Court may direct-
>
> (a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;
>
> (b) any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.
>
> *Explanation* - For the purposes of this section, "Controller" means the Controller appointed under sub-section (1) of section 17 of the Information Technology Act, 2000."

Since "digital signature" is a technical process that is applied to an electronic record, as against the traditional handwritten signatures which is a physical performance of the human hand, proof of the technical process of "digital signature" by application of the process in the Court, has been provided for in the law. However, section 73A is inapplicable to "electronic signature" and "electronic authentication technique" as these cover techniques of the future that may be legally accepted. Hence, it is not possible to lay down the mode of proof of such future techniques that may be legally accepted as "electronic signatures" and "electronic authentication technique".

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15. Sec. 2(1)(ta) of I.T. Act, 2000 inserted by I.T. (Amendment) Act, 2008.

■ PROOF OF ELECTRONIC MAIL

Electronic mail/e-mail has revolutionized communication. In this age, communication of love to high stake business communication, are all done through e-mail. Post boxes will be expensive antiques in the times to come! An e-mail travels at an unimaginable speed to the destination computer, is cost-free and luxuriously simple to send and receive. With the growing use of e-mail, it is becoming a relevant piece of evidence in innumerable cases ranging from criminal conspiracies through e-mail, criminal intimidation, defamation etc. to business/commercial disputes.

Apart from the importance of the mode of proving an e-mail in the Court, its evidentiary value is also a significant legal question. Article 9(2) of the UNCITRAL Model Law recognizes electronic messages as evidence but lays down certain factors to assess their evidentiary value: -

> "Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor."

The vulnerability of manipulation and fabrication of electronic messages, has led to a cautious approach before accepting the veracity of the same as a piece of evidence. For example, it is luxuriously easy to open an e-mail account in the name of another person and correspond through such an account, impersonating as the other person.

The affixation of electronic or digital signature (as the case may be) on an electronic message, identifies the signatory and also makes it impossible to tamper with the contents of the electronic record constituting the electronic message. Digital and electronic signatures go a long way in

enhancing the veracity of the electronic message as to its contents as well as the author of the same.

Section 88 A of the Indian Evidence Act as introduced therein by the I.T. Act, 2000 grants discretion to the Court to presume that an electronic message forwarded by the originator through an electronic mail server to the addressee, corresponds with the message as fed into his computer for transmission. The presumption is based upon the acceptance as to the reliability of the e-mail service provider as well as the electronic process of forwarding the electronic message, as fed into the computer by the originator. However, it is a rebuttable presumption. It is clarified in section 88A itself that the Court shall not make any presumption as to the person by whom such electronic message is sent. The law thus accepts the vulnerability of fabrication of electronic messages.

Recognizing the fact that temporary computer breakdowns or bugs are frequent and electronic communication requires credibility to promote e-commerce and prevent unnecessary legal disputes, section 12 of the I.T. Act, 2000 provides for a mechanism of acknowledgement of receipt of an electronic record. Section 12 *inter alia* provides that where the originator has stipulated that the electronic record shall be binding only on the receipt of an acknowledgement of such electronic record by him (originator), then, unless acknowledgement has been so received, the electronic record shall be deemed to have never been sent by the originator.

Proof of digital or electronic signature (as the case may be) and the acknowledgement process, if made part of an electronic message, enhances its evidentiary value. However, electronic messages on which electronic or digital signatures are not affixed nor is the acknowledgement process applied, evidence as to the identity of the originator, the receipt of the electronic message and the identity of the electronic message would

require proof through circumstantial and/or direct evidence, depending upon the nature of the case and the best evidence available. It is not possible to exhaustively state the pieces of evidence for proving an electronic message in every case. Each case has its own peculiar nature, facts and circumstances. However, the following are broadly some of the pieces of evidence to prove an electronic message in the Court :-

- Evidence of the author of the electronic message;
- Evidence of the sender of the electronic message, if different from the author;
- Proof showing that the electronic message was sent by the originator to the e-mail address of the addressee;
- Evidence to prove the e-mail address of the addressee (earlier correspondence from the said address, letter-head showing the address etc.);
- The acknowledgement, if any, of the receipt of the electronic message by the addressee;
- Proof of the receipt of the electronic message, generated from the computer;
- Proof of e-mail address of the originator through documents, such as previous correspondence etc. in which the originator has stated his e-mail address;
- User logs maintained by the network service providers;
- Other corroborative evidence, direct and/or circumstantial;

Electronic messages on which no digital signatures are affixed nor is the acknowledgement process followed, are like unsigned letters. Circumstantial evidence was accepted by the Supreme Court in the case of Mobarik Ali Ahmed v. State of Bombay[16] as proof of certain unsigned letters and telegrams having been sent by the accused who had denied sending the same. In this case, the appellant was a Pakistani National having his business in Karachi. He

16. 1958 SCR 328

was convicted for the offence of cheating under section 420 IPC. The allegations against him were, he had made false inducements to the complainant at Bombay through letters, telegrams and telephone calls to the effect that he had a ready stock of rice and on receipt of money, he would be in a position to ship the consignment.The complainant believed the representations of the accused. However, the consignment of rice was not supplied. The prosecution relied upon certain letters and telegrams, alleging the same to have been sent by the accused. Many of these letters purportedly bore the signatures of the accused and some of these letters were also undisputed. However, some of the letters were without signatures and it was submitted on behalf of the accused that since neither the complainant nor his witness had seen the accused write any of the letters nor were they acquainted with his handwriting, their deposition did not prove that the letters were attributable to him.

The Supreme Court rejected the submission of the accused and *inter alia* held that proof of authorship of a document can be by direct or circumstantial evidence, depending upon the nature of the case and its peculiar facts and circumstances. It may comprise of direct evidence of a person who saw the document being executed or the signatures being affixed thereon. This may also be proved by proof of handwriting or the signatures, through the evidence of an expert.

The Supreme Court went ahead and stated that a document can also be proved by internal evidence that is afforded by the contents of the document itself. Where the document in dispute is part of a link in the chain of correspondence some of which has been proved to the satisfaction of the Court, this would furnish proof of the other part of the correspondence as well. The recipient of a letter or telegram that is part of the correspondence between the parties, some of which is admitted or accepted by the Court, would be in a reasonably good position to

speak of the authorship of the remaining correspondence that is disputed. His knowledge of the writing or the signatures of the sender would be credible.

The Supreme Court also stated that the judge would also be in a position to determine the authorship of a document that is part of a chain of correspondence, part of which is undisputed or clearly proven. On the basis of circumstantial evidence, the Supreme Court upheld the proof of letters that were without the signatures of the accused, as being part of the chain of correspondence between the parties. Similarly, several telegrams were also attributed to the accused.

Even though electronic messages are vulnerable to fabrication and manipulation, they are admissible pieces of evidence. The evidentiary weight of electronic messages would depend upon the satisfaction and belief of the Court. The test for proving a fact is the belief of the Court that it exists or the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.[17]

Information technology has invaded our lives and is fast replacing traditional modes of communication and documentation. The virtual world is taking over the real world. E-mail has replaced letters sent by post, land-line phones are being replaced by mobile phones and PDAs which are computers too, video conferencing is getting more and more economical and accessible by the day, filecovers containing documents are being replaced by the pen-drive that has the capacity to encapsulate data of an unimaginable size. Lawyers and judges would not require book shelves in the times to come! A laptop computer accompanied with a mobile phone is an office that can move along the golf course with the CEO!

With the exponential growth and pervasiveness of information technology across society, the legal

17. Definition of "Proved" in Section 3 of the Indian Evidence Act, 1872

community, especially consisting of trial court lawyers and judges, who are likely to face a deluge of electronic evidence, may need expertise with respect to admissibility, relevancy, appreciation and proof of electronic evidence. Moreover, information technology is complex and has so many dimensions and components that are interconnected. With the convergence of technologies, complexities will get more and more complex. Lines between different technologies are getting blurred due to convergence. For instance, many mobile phones are also computers and when connected to the Internet, they become part of the global network. A mobile also assumes the function of an audioplayer while playing music or the FM channels, it becomes a cinema screen while playing a film, it becomes a camera while clicking photographs, and it also becomes a folder to take notes. These electronic products can be said to be 'digital chameleons'. The increasing convergence of technologies also increase the complexities from the evidentiary perspective. Responding to the imperative necessity of expert opinion on electronic evidence, section 45A has been introduced into the Indian Evidence Act, 1872 by the I.T. (Amendment) Act, 2008, which reads as follows:-

> "45A. When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000, is a relevant fact.
>
> *Explanation.* – For the purposes of this section, an Examiner of Electronic Evidence shall be an expert."

The "Examiner of Electronic Evidence" would be an agency appointed by the Central or State Government.[18] In the opinion of the author, introduction of Section 45A into the law is amongst the most significant amendments to the law, by the I.T. (Amendment) Act, 2008. Opinions of experts upon a point of foreign law or of science or art, or as to identity of handwriting or finger impression, have been

18. Sec. 79A of I.T. Act, 2000 added by I.T. (Amendment) Act, 2008.

relevant facts since the inception of the law of evidence and well settled principles have developed with respect to expert opinion from the evidentiary perspective.[19] These well settled principles would be substantially applicable to evidence adduced by the "Examiner of Electronic Evidence".

■ PROOF OF COMPUTER PROCESSES AND VALUE OF ELECTRONIC EVIDENCE

Traditionally, our legal system from the evidentiary perspective has been mainly concerned with oral evidence, documentary evidence, things/objects, and human acts that are perceived by the senses. However, in this digital age, computer processes also assume significant importance from the evidentiary perspective. In this context, computer evidence has been broadly classified by certain legal experts and authors between real, hearsay and derived evidence:

- Real evidence refers to computer processes, programs and software. The computations and processes that are done by the computer fall in this category;
- Hearsay evidence refers to the information that is supplied to a computer. The inputs supplied to a computer are covered in this category;
- Derived evidence refers to the output/result that arises out of real and hearsay evidence. It is the output of data that results from the process by computer software.

In the U.K., computer generated evidence is treated as a different class of evidence. The law requires a certificate of authenticity of electronic evidence. Under the U.K. Civil Evidence Act, 1968 as well as the U.K. Police & Criminal Evidence Act, 1984, computer evidence can be admitted provided there is no reasonable ground to believe that the statement in the certificate is inaccurate due to misuse of the computer. Also, the computer must have been operating

19. Sec. 45 of Indian Evidence Act, 1872.

properly at all material times or even if it was not operating properly, it would not have affected the production or the accuracy of the contents. Section 69 of the U.K. Police & Criminal Evidence Act, 1984 contains a negative covenant i.e. unless the evidence sought to be adduced meets the legal requirements, it is not admissible. In the U.S., computer generated evidence has been accepted as an exception to the rule of hearsay. The law in the U.S. contains certain exceptions to the hearsay rule, under which computer generated evidence is covered. However, the Courts in the U.S. have always required satisfaction as to the reliability of such evidence.

However, in our law of evidence, the rule against hearsay evidence is implicitly stated in section 60: Oral evidence must, in all cases whatever, be direct. Documentary evidence has been classified between primary and secondary evidence. The rule against hearsay evidence in documentary evidence, is also implicit in the law. For example, the Supreme Court in the case of Lakshmi Raj Shetty v. State of Tamil Nadu[20] has held that newspaper reports are in the nature of hearsay evidence.

Depending upon the nature of the case, the computer processes that are applied, may also need to be proved to the satisfaction of the Court. The computer processes that are well established and accepted as based upon proven scientific principles need not be proved, as the Court is empowered to take judicial notice of the same without formal proof. However, computer processes that are unconventional and yet to be proven and generally acceptable as scientific, should be proved in the Court. For instance, the entire journey of an electronic message through innumerable computer systems from the origination to the destination, need not be proved for the reason that the transmission of an electronic message by the service provider is generally accepted as credible. On the other hand, a computer process to track hacking to its

20. AIR 1988 SC 1274

source from the target/destination, if used during the criminal investigation, should also be proved in the Court till such a process reaches the requisite level of general acceptability. Before computer evidence can be believed, the Court must be satisfied as to the reliability of the inputs, processes and the output, apart from the attendant circumstances relevant to ascertain the veracity of the evidence. The veracity of the computer processes and their proof enhances the evidentiary value of the output. The manner in which electronic records are maintained, security procedures that are adopted and the credibility of the software used, determine the probative value of electronic evidence, apart from the facts and circumstances surrounding the case before the Court.

RELEVANT PROVISIONS OF INDIAN EVIDENCE ACT, 1872

- Justice Raja Vijayaraghavan*

'Document' as defined under S. 3 of the Indian Evidence Act means -any matter expressed are 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.

'Evidence' as defined under S. 3 of the Indian evidence act means and includes-

1. all statements which 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.

S.17 of the Indian Evidence Act which defines the term 'admission' has been substituted as, a statement, oral or documentary or contained in electronic form.

S.22A has been introduced to the Evidence Act stating that oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. i.e:- There is no relevancy of oral evidence as to the contents of electronic records, unless the genuineness of the electronic record produced is in question.

* Judge High Court of Kerala

Section 59 of the Evidence Act dealing with proof of facts by oral evidence states that, all facts except the [contents of documents or electronic records] maybe proved by oral evidence.

Section 61 Evidence Act provides that contents of documents maybe proved either by primary or secondary evidence.

Sections 62 and 63 of Evidence Act state what primary and secondary evidence respectively is.

The intention of the legislature is explicitly clear i.e. not to extend the applicability of Ss. 61 to 65 Evidence Act to the electronic record.

Whereas, a newly introduced S. 65A categorically states that the contents of electronic records maybe proved in accordance with the provisions of S.65B, requires special procedure for presenting electronic records as admissible in evidence, in a Court of law. It provides for technical and non-technical conditions and the method for presenting electronic records as admissible in evidence, in a Court of law.

65B. Admissibility of electronic records.—

(1) Notwithstanding anything contained in this 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 (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 of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(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 during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(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 in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer 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 in the ordinary course of the said activities.

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

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(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;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) 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.

(5) For the purposes of this section,—

(a) infomation shall be taken to be supplied to a computer 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) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.—For the purposes of this section any reference to information being derived from other information shall

be a reference to its being derived therefrom by calculation, comparison or any other process.

Section 85A of the Evidence Act provides that the court shall presume that every electronic record purporting to be an agreement containing the electronic signature of the parties was so concluded by a fixing the electronic signature of the parties. Section 85B of the Evidence Act enshrines presumption as to electronic records and electronic signature wherein court shall presume, unless the contrary is proved that the secure electronic record has not been altered since the specific point of time to which the secured status relates.

Section 85C of the Evidence Act states the presumption unless contrary is proved that the information listed in an electronic signature certificate is correct.

Section 88A of the Evidence Act stakes that the court may presume that the 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, with a rider that the court shall not make any presumption as to the person by whom such message was sent.

It is also pertinent to note that the definitions of terms- 'electronic form', 'electronic record', and 'information' have been accorded the same meaning respectively assigned to them in the Information Technology Act, 2000.

RELEVANT PROVISIONS OF THE INFORMATION TECHNOLOGY ACT,2000

'Electronic Form' has been defined under S. 2(r) of the Information Technology Act as, with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer-generated micro fiche or similar device.

'Electronic record' has been defined under S. 2 (t) of the Information Technology Act, 2000 meaning, data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated micro fiche.

'Data' has been defined under S. 2(o) of the Information Technology Act, 2000 meaning, a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system a computer network, and may be in any form, (including computer printout is magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

'Computer' has been defined under S. 2(i) of the Information Technology Act, 2000 meaning any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or a computer network.

*‘Computer network’ has been defined under S. 2(j) of the Information Technology Act, 2000 meaning, the inter-collection of one or more computers or computer systems or communication device through-

(i) the use of satellite, microwave, terrestrial line, wired, wireless or other communication media; and

(ii) terminals or a complex consisting of 2 or more inter-connected computers or communication device whether or not the interconnection is continuously maintained

*was substituted by Act 10 of 2009, S. 4(B) for clause (j)

‘Computer system’ has been defined under S. 2(l) of the Information Technology Act, 2000 meaning, a divisor collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programs, electronic instructions, input data and output data that perform logic, arithmetic, data storage and retrieval, communication control and other functions.

‘Information’ as defined under S.2(v) of the Information Technology Act,2000 , includes [data, message, text], image, sound, voice, codes, computer programs, software and data bases or micro film or computer generated micro fiche.

Section 4 of the IT Act provides for legal recognition of electronic records.

To condense it to gain the essence, spirit and applicability - any data is a representation of information, knowledge, facts etc., is an electronic record; it is considered a document and is evidence

when produced for the inspection of the court. Such documents are called documentary evidence. Hence data, which forms part of electronic record which is a document and is evidence when produced for the inspection of the court and such documents are called documentary evidence.

WHAT IS ELECTRONIC EVIDENCE?

In the explanation provided for S. 79A of the Information Technology Act, **'electronic form of evidence'** means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cellphones, digital fax machines.

ADMISSIBILITY OF ELECTRONIC RECORDS IN EVIDENCE BEFORE COURTS

So, electronic records are documents as defined in the Evidence act (S.3) and do not require any oral evidence unless the genuineness of the electronic record produced is in question (S.22A). All facts except the contents of electronic records may be proved by oral evidence. Ss. 61 & 62 regarding what amounts to primary and secondary evidence are silent about electronic records and it is only by S. 65A that the procedure for proving electronic records by virtue of S.65B is laid down. Section 65A of the Evidence Act creates special procedure laid down in S.65B by which electronic records may be admissible in evidence. On a deeper scrutiny, section S. 65A performs the same function for electronic records that section 61 does for documentary evidence.

S.65B is a complete code in itself detailing conditions by fulfilling which alone, can an electronic record shall be deemed to be also a document admissible in evidence in any proceedings without further proof or production of the original.

Section 65B Evidence Act states that any electronic record produced by a computer (the electronic storage device which stores the CCTV footage in the case at hand) also includes a storage device in which information was stored or was earlier stored or continues to be stored.

'SILENT WITNESS' THEORY

The "silent witness theory" has also developed as an alternative approach to authenticating traditional photographs. This theory allows "photographs to substantively 'speak for themselves' after being authenticated by evidence that supports the reliability of the process or system that produced the photographs." The silent witness theory originated in an early twentieth century case from Iowa [State v. Matheson, 103 N.W. 137 (Iowa 1905)]. Wherein the prosecution sought to admit an "x-ray photograph" to demonstrate the location of a bullet lodged near the victim's spine. The defendant objected and argued that the x-ray was not admissible because no witness had personally seen the bullet and could testify that the picture was accurate. The court took note of the skill level of the individual who took the x-ray and then, by judicial notice, recognized that photographs had independent value apart from the testimony of the witnesses. The court allowed the x-ray photograph to enter as direct evidence. Thus by this theory photographic evidence produced by a process whose

reliability is established may be admitted as substantive evidence of what it depicts without the need for an eyewitness of what it depicts and without the need for an eyewitness to verify the accuracy of its depiction. Since then American Courts have applied this theory in various cases.

RELEVANT CASE LAWS IN BRIEF

In Santosh Madhavan Vs. State of Kerala 2014 KHC 31, question whether multimedia cards were admissible in evidence and if so, the criterion to be applied was considered and a single Judge of the High Court of Kerala concluded that photographs, audio, video cassette, all can be treated as falling within the ambit of the term 'document'.

In Tukaram S. Dighole vs. Manikrao Shivaji Kokate, (2010) 4 SCC 329, the Apex Court observed that new techniques and devices are order of the day and though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged.

In Tomaso Bruno and Another vs. State of Uttar Pradesh, (2015) 7 SCC 178,the Apex Court observed that advancement of information technology and scientific temper must pervade the method of investigation and scientific and electronic evidence can be a great help to an investigating agency.

In V.K. Sasikala Vs. State (2012) 9 SCC 771, wherein the scope of handing over documents produced by prosecution and access to the documents in the custody of the Court at the stage of S.313

Cr.P.C. the Apex Court held that the question which arises herein is no longer one of compliance or non-compliance with the provisions of S. 207 Cr.P.C. and travels beyond the confines of the strict language of the provisons of the Cr.P.C. and touches upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Art. 21 of the Constitution.

In Tarun Tyagi Vs. Central Bureau of Investigation (2017) 4 SCC 490, where the accused was charged with unauthorized misappropriation of a source code which he had access to, it was held by the Apex Court that, it is a hallmark of a fair trial that every document relied on by the prosecution has to be supplied to the accused at the time of supply of charge sheet to enable such accused to prepare his cross examination and defense strategy and directed to furnish a cloned copy of the hard disc to ensure that it was not interpolated by the accused in the course of time.

In Sherin V. John Vs. State of Kerala 2018 (3) KHC 725,while considering the questions whether an accused entitled to get copy of an electronic record produced in the court by the prosecution as a material object and Is the right of an accused to get copies of the documents produced by the prosecution absolute, this Court proceeded to conclude that the distinction between document and material object is that the document cannot exist without a substance like paper, clay, stone, rock, tree or animal and that in the case of document, its contents always appear on a material object and ultimately held that the tablet

produced before the court was a material object and petitioner was not entitled to get a copy of it.

In Adv. T.G. Ajith Kumar T.S. Vs. State of Kerala & Anr., Crl.M.C. 4480 /2018,wherein the Investigation Officer produced a CD allegedly containing some visuals, as material object. Petitioner applied for a certified copy of it but was turned down by Magistrate. This Court held that CD not a material object, but an electronic record, directing to issue copy of the CD as per the directions in Shrein's case and Tarun Tyagi's case.

In P. Gopalakrishnan Vs. State of Kerala2018 (4) KHC 437 the Kerala High court held that the memory card seized was the end product of the crime; that it was not the contents or the information derived from the memory card that was proposed to be established by the production of the memory card and hence the memory card produced is not a document as contemplated under S.207 Cr.P.C.

In ARK Shipping Co. Ltd. Vs.CRT Ship Management Pvt. Ltd., 2007 SCC Online Bombay 663, an affidavit was filed in compliance of Sec.65B, Hon'ble High Court said, 'The affidavit, therefore, in the facts and circumstances of the case, is sufficient compliance of Sec.65B of the Evidence Act'.

In Kundan Singh Vs. The State, Crl. Appeal No. 711/2014, the Delhi High Court held that section 60 5B is a specific provision relating to the admissible 80 of attorney record(s) and therefore, production of a certificate under section 65B(4) is mandatory.

In Nyati Builders Pvt. Ltd. Vs. Mr. Rajat Dinesh Chauhan & Ors. 2015 SCC Online Bombay 7578, the Bombay High Court justified the trial court's order allowing the filing of S. 65B certificate at a later stage in a civil suit.

In State of Rajasthan through the Special P.P. Vs. Sri Ram Sharma and Others, S.B. Crl. Misc. Petition No. 4383/2016 dt. 02.09.2016, the Hon'ble High Court of Rajasthan allowed prosecution application filed under Sec. 311 Cr.P.C. for submitting certificate under Sec.65B, prepared by investigation officer after closing of defence evidence, regarding electronic evidence of conversation between complainant and accused, relating to illegal gratification.

Similar view was expressed by Hon'ble High Court of Rajasthan in Paras Jain Vs. State of Rajasthan, S.B. Crl. Revision Petition No. 1329/2014 dt. 04.07.2016, as well as in in Avadut Waman Kushe Vs. The State of Maharashtra, Crl., Writ Petition No. 54/2016 dt. 03.03.2016, before Hon'ble High Court of Bombay. It was argued before Hon'ble Court that considering the provision of Section 65B and the purpose of the certificate, it was necessary for the prosecution to submit the same along with the CD and subsequent filing of the certificate cannot be treated as compliance with the mandatory provision. The Hon'ble High Court of Bombay considered Anvar P.V. Vs P.K. Basheer (supra) and Faim@Lala Ibrahim Khan Vs. The State of Maharashtra that were cited in support of the above argument and held that both these cases simply hold that certificate under Sec.65B is mandatory and no electronic evidence in absence of this certificate can be admitted in evidence. It was also held by the Hon'ble Court that, a perusal

of the provision of Section 65B(4) showed that, there is nothing in the provision that specified the stage of production of the certificate. It further held that the provision of Section 65B is about admissibility of electronic record and not production of it. While discussing the words the opening words of Section 65B(4) are **'In any proceedings where it is desired to give statement in evidence'**, the Honourable Court held that this can only be the stage at which the record is tendered in evidence for being considered it's admissibility Therefore held that the certificate need not be filed at the time of production of the electronic record and that it could be filed at the time, the record is tendered in evidence. The subsequent filing of the certificate cannot reduce it's effectiveness as a safeguard against tampering etc.

In Ignatius Topy Pereira Vs. Travel Corporation (India) Pvt. Ltd. And Another, 2016 SCC online Bom 97, It was held by Hon'ble Bombay High Court that if the certificate under Sec.65B, which was produced, was rejected as not in compliance with the provision, a fresh certificate may be produced in the Court. It has been categorically ruled by all the Hon'ble Courts, that the certificate under Sec.65B can be filed at a later stage during the trial when electronic record is tendered in evidence. It can also be filed invoking discretionary powers of the trial court under Sec.91 and Sec.311 Cr.P.C read with Sec. 165 Evidence Act. The requisite certificate under Sec.65B can also be allowed to be filed at appellate stage under Sec.391 Cr.P.C.

In STATE (NCT OF DELHI) Vs. NAVJOT SANDHU (AIR 2005 SC 3820) more famously known as the Parliament Blast Case, wherein, the proof and admissibility of mobile telephone call records was dealt

with by the Apex Court while considering the appeal. It was submitted on behalf of the appellant/accused that no reliance could be placed on the mobile telephone call records due to the lack of relevant certificate under S.65B(4) of the Evidence Act. The Apex Court held that a cross examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken, was sufficient to prove the call records. In other words, the Apex Court heavily relied on sections 63 and 65 of the Evidence Act and held –

> "*150. ... . It may be that the certificate containing the details in Sub-section(4) of section 65B is not filed in the instance case, but that does not mean that secondary evidence can't be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, sections 63 & 65 of the Evidence Act*".

In ANVAR P.V. Vs., P.K. BASHEER (2014)10SCC 473, while dealing with production of electronic records in evidence the Apex Court stated that only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be taken to Section 45A - opinion of examiner of electronic evidence.

The Apex Court further held the Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65B of the Evidence Act are not complied with, as the law now stands in India. The Apex

Court further held that the law laid down under S. 65B of the Evidence Act being a special provision, the general law on secondary evidence under S. 63 r/w S. 65 of the Evidence Act shall yield to the same based on the Maxim 'Generalia special bus non derogant' meaning a special law will always prevail over the general law. The apex court further held as follows:-

> *" 22. .....To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in NavjotSandhu case (supra), 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 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."*

By this landmark judgment the Apex Court cleared the air with regard to the law relating to admissibility of electronic evidence in courts in India.

In Shafhi Mohammad v. The State of Himachal Pradesh, (2018)2 SCC 801, wherein one of the questions which arose in the course of consideration was, the apprehension whether videography of the scene of crime or scene of recovery during investigation should be necessary to inspire confidence in the evidence collected. The Apex Court held –

> *"(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(4).

(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."

In Anvar PV's case the Full Bench clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), pen drive, removable hard disc 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 could lead to travesty of justice. The Full Bench had clarified that 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 65A and 65B of the Evidence Act.

In Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal, the bench comprising Justice Ashok Bhushan and Justice Navin Sinha on 26th July,2019 observed: "we are of the considered opinion that in view of Anvar P.V. the pronouncement of this court in Shafi Mohammad need reconsideration. With the passage of time, reliance on electronic records during investigation is bound to increase. The Law therefore needs to be laid down in this regard with certainty. We, therefore, consider it appropriate to refer this matter to a larger Bench. Needless to say that there is an element of urgency in the matter."

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ELECTRONIC EVIDENCE — THE GREAT INDIAN QUAGMIRE

by
N.S. Nappinai†

FUNDAMENTALS AND ELECTRONIC EVIDENCE

Authenticity of a document; its integrity — that it has not been tampered with or modified or altered in any manner and its non-repudiation primarily ensure its admissibility, as evidence.[1] Laws across jurisdictions provide modes and methods for accepting such authenticated documents in evidence, such as the originals of documents, in evidence without further processes for proving the same.[2] Laws also provide alternate methodologies for submitting secondary evidence of originals of such of those documents, which may not benefit from the secure levels of authenticity or integrity, as would originals. The rule that permeates global laws of evidence is to not shut out relevant evidence for fear of ease with which its authenticity or integrity may be tampered with.[3]

The UNCITRAL Model Law on Electronic Signatures[4], which the Indian draftsman drew heavily from whilst formulating the laws for proving electronic records, placed substantial weightage to provide for acceptability of electronic documents in the same manner as article-based evidence. Standard forms of proving documents including by identifying creator of a document "*in the act of signing and association of that person with the content of a document was a sine qua non*" are scenarios that the Model law took note of. Processes evolved at the beginning of the decade appear inchoate in the present digitally driven world of internet everywhere.

India's Information Technology Act, 2000 (the IT Act), which also, inter alia, amended the Evidence Act, 1872 (the Evidence Act), despite its late start in codifying laws for the digital domain, restricted its vision to the immediate need for enabling e-commerce. It was no wonder that the

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1 "Admissibility of Electronic Evidence", (2016) 5 SCC J-1 by Justice Kurien Joseph for a detailed analysis of general rules of evidence for appreciating primary and secondary evidence.

2 "Nappinai N. S. (2017). Technology Laws Decoded. Chapter V." for a more detailed analysis on Electronic Evidence.

3 In *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*, (2010) 4 SCC 329, the Supreme Court suggests more stringent proof for electronic evidence. In contrast *K. Ramajayam* v. *Inspector of Police*, 2016 SCC Online Mad 451, the Madras High Court cautions against approaching electronic evidence with excessive caution.

4 <https://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

enactment required an overhaul within eight years of its inception. Such overhaul unfortunately did not encompass a review of the special provisions under the Evidence Act i.e. Section 65-A and Section 65-B and the complexities built into the processes mandated therein.

Electronic records are now created with everyday actions from the moment we wake or possibly even when we sleep, with fitness applications (apps) and devices such as mobile phones and tablets being bedside companions. Devices abound from home to offices in the name of "convenience"[5]. From humble tea kettles to baby monitors, smart homes with their excessively "smart" televisions, refrigerators and digital assistants are constantly recording and storing electronic records.[6] Office environments are no strangers to permeation of computing devices — from the moment we enter, to our exit — with smart entry cards to security monitors to devices facilitating our everyday work.

This article traces the interpretation of Section 65-A and Section 65-B of the Evidence Act from *Navjot Sandhu case*[7] to its overruling in *Anvar P.V.* v. *P.K. Basheer*[8]. The article analyses the fallacy in the judgment of the Supreme Court in *Anvar P.V.* v. *P.K. Basheer*[8] with respect to the interpretation of Section 65-B(4), Evidence Act and points to the need for immediate remedial action. It traces the evolution of interpretation of Section 65-B of the Evidence Act, post-*Anvar* including the recent judgment of the Supreme Court in *Shafhi Mohammad* v. *State of H.P.*[9], to emphasise the need for revisiting *Anvar* and *Shafhi* judgments to correct the erroneous interpretation of Section 65-B(4) of the Evidence Act in both judgments of the Supreme Court. Finally the article also points to the need for urgent legislative review and revisions to Section 65-A and Section 65-B to ease the travails of proving electronic evidence.

SPECIAL PROVISIONS AND LEGISLATIVE INTENT

Electronic records, never were restricted only to those that were mere computer input or outputs in the course of business; or such computer inputs which are stored in computers or networks within the control of the person relying on the same. It includes any data, information or details stored in electronic medium irrespective of when, how or by whom such document is created.

Digital evidence comprises data stored on cloud services, where the device and storage infrastructure are indeterminable; third party storage platforms; social media platforms, which again are hosted in multiple jurisdictions. Mostly emails and CCTV footage or other recordings and

5 Internet of Things (IoT) and developments therein has resulted in permeation of computing devices in everyday life.

6 Nappinai, N, "Dark Side of Internet of Things", (2017) 18 (2) Computer Law Review International pp. 39-45.

7 *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600.

8 (2014) 10 SCC 473.

9 (2018) 5 SCC 311.

imagery forms part of evidence submitted in civil and criminal cases. Evidence may be given even of chat sessions which may be in-game sessions or of data stored automatically by IoT[10] devices such as even fit bits or digital assistants like Amazon Echo.[11] Technological advances like Blockchain and Smart contracts have prompted multiple jurisdictions including USA to amend existing legislations to give authenticity to such electronic documents and to the transactions. The above, by no means, is an exhaustive list.

Computing processes and its permeation in everyday life emphasise the need for robust processes for admission of electronic evidence, as was noted by the Supreme Court in *Tomaso Bruno* v. *State of U.P.*[12]

The plethora of possibilities in terms of electronic evidence makes it imperative to have simple methodologies for proving the same. There is indeed "a revolution in the way the evidence is produced before the court" and it was in need of proper guidance, as observed in *Anvar case*[8].

The legislature, in its wisdom amended the Evidence Act to include two special provisions for electronic evidence, namely, Section 65-A and Section 65-B of the Evidence Act. These provisions lack the simplicity and dynamism of tried and tested provisions such as Section 3 of the Evidence Act and Section 29 of the Penal Code (IPC). These provisions have withstood technological advances over a century and demonstrated unmatched dynamism in its application to etchings in stone as it could have electronic documents. Similarly, existing provisions under Section 63 and Section 65 which included mechanical reproductions could have also been applied for proving copies of electronic documents but this was not done. The draftsman intriguingly resorted to adapt the complicated processes under the UK laws, specifically Section 69 of the Police and Criminal Evidence Act, 1984 (PACE Act), which itself was repealed in April 2000 by Section 60 of the Youth, Justice and Criminal Evidence Act, 1999[8]. It is telling that the provision India drew inspiration from was repealed, as the UK Law Commission observed that the special enactment served "*no useful purpose*"[13].

Irrespective of the rationale and the complexities involved, as was rightly pointed out in *Anvar P.V.* v. *P.K. Basheer*[8] legislative intent prevails and the special provisions under Section 65-A and Section 65-B take primacy over the general provisions. The problems however arise with the Supreme Court misinterpreting Section 65-B(4) of the Evidence Act.

10 Internet of Things.

11 New Hamshire Court orders production of recordings by Amazon Echo: Available At: <https://www.cbsnews.com/news/amazon-echo-judge-orders-company-produce-alexa-recordings-double-murder-case-2018-11-12/>.

12 (2015) 7 SCC 178.

13 Katie Quinn, "Computer Evidence in Criminal Proceedings: Farewell to the Ill-Fated Section 69 of the Police and Criminal Evidence Act 1984", 5 Int'l J Evidence & Proof 174 (2001). (Available at: <https:// heinonline.org/HOL/LandingPage?handle=hein.journals/ intjevp5&div =23&id=&page=>).

Law, as a construct, is intended as an enabler — be it for cohesion of societal frameworks or, as in this case, for procedural processes. It would defy logic if law were to be a stumbling block for innovation, evolution or growth. The vision that enabled the draftsman in 1872 to formulate dynamic provisions, which stood the test of a century, was unfortunately missing in the complicated and impractical processes i.e. under Section 65-A and Section 65-B of the Evidence Act. This was further complicated by the error in the interpretation of Section 65-B (4) of the Evidence Act in *Anvar P.V.* v. *P.K. Basheer*[8].

THE ANVAR RULE

The awakening to the complexities of proving electronic records first started with *State (NCT of Delhi)* v. *Navjot Sandhu*[7] or the "Parliament Attack Case". The mandatory compliance with the provisions of Section 65-A and Section 65-B of the Evidence Act were tested and the Supreme Court held that Section 63 and Section 65 of the Evidence Act may be relied on to prove secondary evidence of electronic records and that Section 65-B(4) was discretionary.

Anvar case[8] overruled the decision in *Navjot Sandhu*[7] nearly a decade later and rightly held that special provisions clearly override the general and that Section 65-A and Section 65-B were a code in themselves. Prior to *Anvar*[7] decision there were some High Court judgments which also enumerated, as above. The Delhi High Court held in *Rakesh Kumar* v. *State*[14] admissibility of copies of computer generated documents were subject to the fulfilment of the conditions specified in Section 65-B(2) and that the certificate under Section 65-B(4) was mandatory. The Kolkata High Court followed the above judgment held in *Abdul Rahaman Kunji* v. *State of W.B.*[15] not only reiterated the need to comply with the special procedures under Section 65-B but also confirmed the ratio in *Anvar*[8] that Section 65-B was a complete code in itself governing the proof of electronic evidence.

The fallacy in *Anvar*[8] judgment however is not with respect to the primacy of Section 65-A and Section 65-B to prove copies of electronic records. It is in the interpretation of Section 65-B(4) for proving electronic records that the Supreme Court erred. By making not only Section 65-B(4) but also Section 65-B(2) in its entirety essential to prove copies or extracts of electronic evidence, certificates under Section 65-B(4) have become mere lip service to the fundamental necessity of proving authenticity and integrity of documents. For, as abovementioned, Section 65-B(2) applies to a limited form of computer generated documents or their copies and not to the plethora of possibilities of electronic records, in the present situation. The error in *Anvar*[8] and the remedial action required are more fully analysed hereunder.

14 2009 SCC OnLine Del 2609 : (2009) 163 DLT 658.
15 2014 SCC OnLine Cal 18816 : (2015) 1 Cal LT 318.

ANALYSIS OF SECTION 65-A AND SECTION 65-B

Section 65-A and Section 65-B were introduced into the Evidence Act in 2000[16] providing special processes for proving copies or extracts of electronic records. The intent behind the said procedures appear to be the same that mandated similar processes under Section 63 and Section 65 of the Evidence Act i.e., providing a method of certifying the authenticity of the copy and the integrity of the contents of such copy.

Originals & Section 65-A

Section 65-A makes it abundantly clear that it is only when copies or extracts are relied upon that the procedures set out in Section 65-B have to be followed. It follows that if originals of electronic records are produced, the same does not require the mandatory compliance with the above complicated processes under Section 65-A or Section 65-B [including the cumbersome process of certification under Section 65-B(4)].

Anvar[8] judgment itself clarified that the special provisions under Section 65-A & Section 65-B applied only to copies or extracts and not when the original electronic document itself was produced. Many judgments including *Vikram Singh* v. *State of Punjab*[17] have reiterated the above to explain that the certificate required under Section 65-B(4) of the Evidence Act is therefore not required, when the original electronic evidence is produced in evidence[18].

"Deemed document" under Section 65-B

Section 65-A stipulates that copies or extracts of electronic records have to be proven through the procedures set out in Section 65-B. Any electronic record, which is printed on article or stored, recorded or copies are made on to an optical or magnetic media, produced by a computer will be "*deemed to be a document*" *only* if conditions set out in Section 65-B(1) Evidence Act are satisfied. This will have to be read with Section 65-B(4) of the Evidence Act. The non-obstante provision therefore does clearly override general provisions under Section 3 of Evidence Act and Section 29 IPC.

Section 65-B(3) provides clarifications on computers and computer systems and Section 65-B(5) sets out clarifications on computer inputs and outputs. The actual process for admission of copies of electronic records in evidence is provided under Section 65-B(2) and Section 65-B(4).

Section 65-B(2) sets out the parameters to be proved with respect to computer inputs or outputs and covers those cases where an electronic

16 W.e.f 17-10-2000.

17 (2017) 8 SCC 518.

18 *HDFC Bank Ltd.* v. *Suhrit Services (P) Ltd.*, 2018 SCC OnLine Del 8220 : (2018) 248 DLT 745; *Karuppasamy* v. *State of T.N.*, 2017 SCC OnLine Mad 1678; *Mohd. Rashid* v. *State*, 2017 SCC OnLine Del 8629; *Jaimin Jewelery Exports (P) Ltd.* v. *State of Maharashtra*, 2017 SCC OnLine Bom 1771; *Om Prakash* v. *CBI*, 2017 SCC OnLine Del 10249 : (2017) 7 AD 649 & *Kishan Tripathi* v. *State*, 2016 SCC OnLine Del 1136.

record is generated from a computer, which is used regularly in the normal course of business.[15]

The four prerequisites, under Section 65-B(2), as summed up by the Supreme Court in *Anvar P.V.* v. *P.K. Basheer*[8] are:

> *14.* … (*i*) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
>
> (*ii*) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
>
> (*iii*) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
>
> (*iv*) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.[19]

Section 65-B(2) therefore clearly applies to such computer inputs or outputs, which a litigant may prove through personal control or charge over the computer resources, which was used to create or receive such electronic document.

Processes mandated under Section 65-B(2) do not allow for proving of third party documents. For, a certificate stating that a third party computer resource was functioning without disruption "to the knowledge" of the person giving such certificate, is patently mere lip-service and, as the UK Law Commission noted with respect to the parent legislation, "it serves no purpose".

The patent errors in Section 65-B(2) makes even proving documents within one's custody difficult. The four sub-sections [Section 65-B(2)(*a*) to (*d*)] are to be read together i.e. ALL four compliance parameters have to be met for proving an electronic record under Section 65-B(2). The legislative limitation therefore that the computer inputs ought to be such that were "*regularly fed into the computer in the ordinary course of business*" clearly indicates a myopic vision of computer usage and electronic evidence being limited to businesses.

The difficulties in complying with the complex provisions under Section 65-B(2) of the Evidence Act become relevant due to the incorrect interpretation of Section 65-B(4) in *Anvar P.V.* v. *P.K. Basheer*[8], which has been continued in all subsequent decisions of the Supreme Court including in *Shafhi Mohammad case*[9], as more fully elaborated hereunder.

19 (2014) 10 SCC 473, 483-84, para 14.

Certificate under Section 65-B(4)

It is expedient to take a look at Section 65-B(4) of the Evidence Act in its entirety, as the necessity for the all-encompassing certificate to admit copies or extracts of electronic evidence is set out therein. Post *Anvar*[8], it was for want of this certificate that many a case, which relied on the Supreme Court's decision in *Navjot Sandhu case*[7] suffered.

The primary fallacy in *Anvar P.V.* v. *P.K. Basheer*[8] lies in its interpretation of Section 65-B(4) to mean that ALL THREE criteria laid down therein ought to be complied with, whereas the legislative intent was that only *ANY* of the three options set out therein ought to be set out in the mandated certificate to prove the authenticity of a copy or extract of an electronic document (emphasis supplied).

Section 65-B(4) reads thus:

> "**65-B. (4)** In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing *any* of the following things, that is to say—
>
> (*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;
>
> (*c*) *dealing with any of the matters to which the conditions mentioned in sub-section (2) relate*,
>
> and purporting to be *signed by a person occupying a responsible official position* in relation to the *operation of the relevant device or the management of the relevant activities* (whichever is appropriate) 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." (emphasis supplied)

The provision therefore only calls for submitting the certificate proving one of the three options i.e. identifying the record and the manner of its production; the device involved in the production of a record to establish that it is a computer output or in compliance with Section 65-B(2).

ERROR IN ANVAR

Anvar P.V. v. *P.K. Basheer*[8] proceeds on the fallacious assumption that the certificate mandated under Section 65-B(4) has to be submitted elaborating ALL of the three parameters set out therein. The parliamentary mandate however was ONLY for ANY of the following to be set out in the certificate and not for all:

(*i*) identifying the electronic record;

(*ii*) providing particulars of the device involved in production of the electronic document;

(*iii*) compliance with the provisions of Section 65-B(2) of the Evidence Act;

The Supreme Court's summation in *Anvar P.V.* v. *P.K. Basheer*[8] however interpreted use of the word "ANY" of the following as "ALL" of the following[8], by holding, as under:

> *15.* Under Section 65-B(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 65-B(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. (emphasis supplied)[20]

The above interpretation took away the flexibility that Section 65-B(4) provides and the simplicity of proving electronic documents thereunder. The legislative intent envisaged under Section 65-B(4) merely requires (*a*) the statement to either identify the electronic record and the manner in which it was produced OR (*b*) give particulars of the device involved in its production to show that it was in fact produced by a computer. The third alternative is for proving as per Section 65-B(2).

The requirements under Section 65-B(4) of the Evidence Act gives sufficient leeway to prove even documents in the custody of third parties or documents stored on cloud or online platforms, where the deponent would not be able to aver with respect to the functioning of the computer or integrity of documents despite disruptions. The only averment needed is to show that the extract or copy relied upon is in fact a computer input or output.

Considering that only the document's authenticity is proven through the Section 65-B(4) certificate and not that of its contents[21], very low thresholds are provided for permitting submission of a copy of an electronic record, in evidence.

By making all three provisions mandatory, the Supreme Court's judgment in *Anvar case*[8] made reliance on electronic records a complicated process. Strict interpretation of Section 65-B(4) clearly points to the fallacy in *Anvar P.V.* v. *P.K. Basheer*[8]. This error therefore requires to be corrected immediately and the legislative intent of allowing proof of ANY one of the three options in Section 65-B(4) of the Evidence Act ought to be reinstated. Unless a clear and specific finding is given by the Supreme Court to correct its error, it is likely to result in throwing out relevant and reliable evidence,

20 (2014) 10 SCC 473, 484, para 15.

21 *Jaimin Jewelery Exports (P) Ltd.* v. *State of Maharashtra*, 2017 SCC OnLine Bom 1771.

which was clearly neither the intent nor purpose of the special provisions under Section 65-A and Section 65-B of the Evidence Act.

THE ANVAR EFFECT

Anvar case[8] did not clarify the other posers for proving electronic records culled out hereinabove i.e. the stage of presenting such certificate or most importantly the person who could issue such certificate. The absence of dynamism in the provision is manifest with the requirement under Section 65-B(4) for the certificate to be "*signed by a person occupying a responsible official position* in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate)".

(emphasis supplied)

Considering the period of nearly ten years of *Navjot case*[7] ruling the roost, there was also no provision for prospective overruling in the *Anvar*[8] decision. Whilst the Supreme Court pointed this out in a two-Judge Bench decision in *Sonu* v. *State of Haryana*[22], it did not refer the matter to a larger Bench for reviewing *Anvar*[8].

Significantly, the Supreme Court itself elaborated in *Sonu case*[22] the effect that *Anvar*[8] decision was likely to have especially in the dispensation of criminal justice. Many criminal prosecutions suffered from the absence of specific "prospective overruling" in *Anvar*[8], as certificates were missing based on parties' reliance on the Supreme Court's judgment in *Navjot Sandhu*[7].

Criminal prosecution under the Prevention of Corruption Act, 1988 were for instance quashed for want of the Section 65-B(4) certificate in *Ankur Chawla* v. *CBI*[23] (subsequently overruled in the judgment of the Delhi High Court in *Kundan Singh* v. *State*[24]). The Punjab and Haryana High Court acquitted in a case of murder tagging the electronic evidence pertaining to call records as "rickety evidence", in *State of Haryana* v. *Shamsher*[25], as the certificate under Section 65-B(4) was not submitted.

In *Sukhvinder Singh* v. *State*[26] prosecution for drug, heavy arms and ammunitions smuggling, allegedly involving an active member of the *Khalistan Zindabad Force*, the Delhi High Court rejected the electronic evidence in CDRs, for want of the Section 65-B(4) certificate. Same was the case in *Vikas Verma* v. *State of Rajasthan*[27] with the Rajasthan High Court

22 (2017) 8 SCC 570.

23 2014 SCC OnLine Del 6461; relying on *Amit Kapoor* v. *Ramesh Chander*, (2012) 9 SCC 460; *Sheoraj Singh Ahlawat* v. *State of U.P.*, (2013) 11 SCC 476; *State of Karnataka* v. *M. Devendrappa*, (2002) 3 SCC 89; *Anur Kumar Jain* v. *CBI*, 2011 SCC OnLine Del 1574; *K.K. Velusamy* v. *N. Palanisamy*, (2011) 11 SCC 275; *Dharambir* v. *CBI*, 2008 SCC OnLine Del 336 : (2008) 148 DLT 289 and *Ashok Tshering Bhutia* v. *State of Sikkim*, (2011) 4 SCC 402.

24 2015 SCC Online Del 13647.

25 2014 SCC OnLine P&H 21316.

26 Criminal Appeal No. 607 of 2014 sub nom *Jagdeo Singh* v. *State*, 2015 SCC OnLine Del 7229.

27 2015 SCC OnLine Raj 396.

rejecting call records. These are merely some illustrative cases, which do not even expose the proverbial tip of the iceberg.

HIGH COURTS ON ELECTRONIC EVIDENCE — POST-ANVAR

Some significant judgments of the High Courts clarified many queries that plagued proving of electronic records including with respect to the stage of producing the certificate under Section 65-B(4) and the person who may give such certificate.

Stage of submitting certificate

The Delhi High Court settled the primary question of the stage at which the certificate under Section 65-B may be filed or relied on in a legal proceeding in *Kundan Singh* v. *State*[24] and also thereby overruled the earlier decision of the same Court to the contrary[28]. The Delhi High Court clarified that the provision itself was clear and that it is necessary to provide this certificate only at the stage of giving evidence and not at the stage of collection of evidence.

The Bombay High Court clarified the same issue in *Avadut Waman Kushe* v. *State of Maharashtra*[29], confirming that there was no necessity for the certificate to be issued at the stage of submission of the documents during investigation or even when charge-sheet was filed in criminal proceedings.

Further clarifications came from the Madras High Court in *K. Ramajayam* v. *Inspector of Police*[30], wherein the Court not only reiterated what the Delhi High Court clarified i.e. that the certificate may be issued at the time of trial but also went on to hold that the person issuing the certificate was not required always to be examined. It was only when the authenticity of the certificate was questioned that cross-examination was required. The Madras High Court also clarified the feasibility of the forensics experts providing such certificate. It finally cautioned against the "… anachronistic mind-set of suspecting and doubting every act of the police, lest the justice delivery system should become a mockery".

Persons in charge

Considering the proliferation of electronic usage, the proviso of Section 65-B(4) of the Evidence Act is quite narrow in prescribing mandatory submission of a certificate "signed by a person occupying a responsible *official position* in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate)" (emphasis supplied). The clarification in the said proviso merely created more opacity to the interpretation of the said provision. *Anvar*[8] judgment was silent on this aspect.

28 *Kundan Singh* v. *State*, 2015 SCC OnLine Del 13647 specifically overrules *Ankur Chawla* v. *CBI*, 2014 SCC OnLine Del 6461.

29 2016 SCC OnLine Bom 3236.

30 2016 SCC OnLine Mad 451.

The Delhi High Court came to the rescue with its clarification in *Kundan Singh* v. *State*[24] that use of the word "officially" "is not intended to mean or be restricted to a person holding an office or employed in public capacity" but only refers to "a person primarily responsible for the management or the use, upkeep or operations of such device".

The Madras High Court in *K. Ramajayam* v. *Inspector of Police*[30] further clarified that a forensic expert may collect the evidence in large servers, feed it into his computers and then issue the certificate describing the source. This further eased the way, especially in submission of Section 65-B(4) certificates in criminal cases, where the accused was certainly not going to give such certificates for electronic evidence collected from his custody nor can prosecution always procure the persons in charge of large storage mediums such as "Google" to submit such certificates. Where certificates are mandated from both such persons, the Madras High Court further held that it is not necessary for the person giving such certificate to be examined as a witness in all instances "unless the Court suspects the integrity of the electronic record that is produced as evidence".

SHAFHI MOHAMMED MISSES THE MARK

The Supreme Court has now had multiple occasions to revisit *Anvar*[8], one of the earliest being the observations in *Sonu* v. *State of Haryana*[22] on the need for prospective overruling, especially when the interests of justice would otherwise be affected.

The exercise that a two-Judge Bench took up in *Shafhi Mohammad* v. *State of H.P.*[9] gave hope for a comprehensive review of Section 65-B and its implementation. The judgment did help substantially in easing proving of electronic documents. It however did not rectify the interpretational error in *Anvar*[8]. Consequently, a two-Judge Bench merely distinguished *Anvar*[8] to provide a backdoor to reintroduce Section 63 and Section 65 of the Evidence Act.

In *Shafhi Mohammad*[9], the Supreme Court took note of the instances, such as those where the documents may be in the custody of the opponent, when a litigant may not be able to submit a certificate under Section 65-B(4), as envisaged under *Anvar*[8] i.e. including compliance with Section 65-B(2) of proving that the device worked properly without disruption. The Supreme Court therefore held that Sections 65-A and 65-B "cannot be held to be a complete code on the subject". It further clarified that the certificate under Section 65-B(4) was necessary "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".

The Supreme Court further held that in such cases i.e. where the person was not in a position to produce the certificate from a person in control, Sections 63 and 65 cannot be deemed to be excluded. The Supreme Court further clarified that the trial court would have the discretion to relax the requirement of the certificate under Section 65-B(4) based on the facts of the case. To sum up, *Shafhi Mohammad*[9] decision states:

(*i*) That Section 65-A and Section 65-B of the Evidence Act are not a code in themselves — it is so only in cases where the electronic document is in the custody of the deponent;

(*ii*) Compliance with Section 65-B is not necessary in all cases, especially for submitting secondary evidence of third-party documents;

(*iii*) In such instances litigants may resort to Section 63 and Section 65 of the Evidence Act;

(*iv*) Whether the Section 65-B(4) certificate was required or not would be left to the discretion of courts.

In effect therefore, a smaller Bench of the Supreme Court than that which decided *Anvar P.V.* v. *P.K. Basheer*[8] brought back the *Navjot Sandhu case*[7] rationale in part by upholding the processes for proving secondary evidence when copies are made through mechanical processes. Apart from the tedious and time-consuming process that such interpretation would entail (of serving notice to produce on innumerable service providers or content hosting platforms), such interpretation by a smaller Bench puts prosecutions at risk. A reading of Section 65-A and Section 65-B clearly seems to support the *Anvar*[8] interpretation of being a complete code in itself rather than the *Shafhi*[9] judgment. Further, leaving the discretion to the Court to decide on the necessity or otherwise of a certificate under Section 65-B(4) will merely result in inconsistency in processes for proving electronic documents and consequently uncertainty in the minds of litigants. Subjective satisfaction of a court is not what the legislature has mandated under the above special provisions.

Whilst the above interpretation did provide some alternatives to vacuous filing of certificates by persons of the functioning of third-party devices, it still missed the mark with respect to the actual interpretation of Section 65-B(4) and its mandate.

A review of sub-clauses (*a*) and (*b*) of Section 65-B(4) would have provided the answer to proving of third-party documents i.e. that the certificate may merely identify the document and how it was produced or simply provide details of the device used to produce the electronic record only to show that it is a computer record. The difficulties noted by the Supreme Court in *Shafhi case*[9] pertain to compliance with Section 65-B(2) of the Evidence Act, which Parliament has not mandated as compulsory — it is merely one of the three options to prove copies or extracts of electronic evidence. To substitute judicial discretion where the legislature has clearly not mandated it, is not only contrary to the provision itself but would also result in total chaos in the implementation of the provision.

TECHNOLOGY AS AN ENABLER

The amendments to the Evidence Act including Section 65-A and Section 65-B were clearly intended to facilitate proving of electronic records. No law is enacted to hamper justice dispensation, especially procedural ones, which are oft quoted to be handmaids of justice.

The interpretation of the above provisions were probably driven by situations prevailing on the said date. The provisions however continue, as they are and it is therefore imperative for the true and correct interpretation to be now implemented to ensure that justice delivery is not impeded.

The various observations of the Supreme Court in *Sonu case*[22] and also in *Shafhi Mohammad*[9] are buttressed in *Tomaso Bruno* v. *State of U.P.*[12], which castigated investigating agencies for ignoring CCTV footage, which could have provided the "best evidence". The observations in *R.* v. *Maqsud Ali*[31] that law of evidence cannot be denied the benefits accruing from new techniques and new devices, sums up the need for urgent review of existing provisions for better implementation. The solution lies within the existing provisions itself i.e. of submitting certificates for permitting secondary evidence of electronic records by identifying the document and manner of its production; or by giving details of the device used to produce the document only to show it is a computer output; or only as an alternative prove based on all four parameters set out in Section 65-B(2) of the Evidence Act. There is no distinction in the existing provision for proving even documents in one's own custody by merely relying on Section 65-B(4)(*a*) or (*b*). To interpret procedural provisions more strictly than is warranted will merely result in inordinate delay in dispensation of justice or worse — leaving out material or best evidence.

It may also be time now for legislators to review the complicated structure of Section 65-B, which draws heavily from the now repealed Section 69 of the UK's Police and Criminal Evidence Act, 1984. Illustrations of simple provisions for relying on electronic evidence abound including those of Sri Lanka. It may therefore be expedient for India to also review existing provisions and provide simple and easy to interpret provisions for relying on electronic records to ensure fair dispensation of justice.

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31 (1966) 1 QB 688 : (1965) 3 WLR 229 (CCA).

MANU/SCOR/21793/2019

IN THE SUPREME COURT OF INDIA

CIVIL APPEAL NO(s). 20825¬20826 OF 2017

Date of Order: 26.07.2019

Appellants: Arjun Panditrao Khotkar

Vs.

Respondent: Kailash Kushanrao Gorantyal and Others

ORDER

In Anvar P.V. vs. P.K. Basheer and others, (2014) 10 SCC 473, a three Judges Bench of this Court held: 16. It is further clarified that the pe on need only to state in the certificate that the same is to the best of his knowledge and belief. 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 1 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.

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20. 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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22. 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.

2. In Shafhi Mohammad vs. State of Himachal Pradesh, (2018) 2 SCC 801, a two Judges Bench decision, it has been held: 20. An apprehension was expressed on the question of applicability of conditions under Section 2 65-B (4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65-B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original.

This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

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24. We may, however, also refer to the judgment of this Court in Anvar P.V. v. P.K. Basheer, delivered by a three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65-B of the Evidence Act was not admissible.

However, for the secondary evidence, procedure of Section 65-B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandhu that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65-B of the Evidence Act.

25. Though in view of the three-Judge Bench judgments in Tomaso Bruno and Ram Singh, it can 3 be safely held that electronic evidence is admissible and provisions under Sections 65-A and 65-B 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 65-B(4).

26. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V., this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the 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.

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29. The applicability of procedural requirement under Section 65-B(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 the 4 absence of certificate under Section 65-B (4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B (4) is not always mandatory.

3. We are of the considered opinion that in view of Anvar P.V. (Supra), the pronouncement of this Court in Shafhi Mohammad (supra) needs reconsideration. With the passage of time, reliance on electronic records during investigation is bound to increase. The law therefore needs to be laid down in this regard with certainty. We, therefore, consider it appropriate to refer this matter to a larger Bench. Needless to say that there is an element of urgency in the matter.

4. Let the records be laid by the Registry before Hon'ble the Chief Justice of India for appropriate directions.
