



Electronic Evidence - JJA

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First Principles in Justice Delivery

- **Access to Justice:** Beyond physicality, without diluting the relevance thereof for a vast sub-continent such as India:
 - Speedy justice,
 - equality of access
 - resources to enable access,
 - knowledge of remedies and rights,
 - awareness about the limitations to such rights leading to informed decisions,
 - pre-litigation solutions,
 - certainty and uniformity in decision – making
 - cost effective systems from inception to enforcement of decisions.
- UN Women's '*Framework For Measuring Access To Justice Including Specific Challenges Facing Women*' : "*accessible, affordable, timely, effective, efficient, impartial, corruption-free and trustworthy, and that apply rules and processes in line with international human rights standards; and the availability of efficient and impartial mechanisms for the enforcement of judicial decisions*" .

- A peek into the new Criminal Major Acts & Cyber

Document under New Laws - India

- Definition of “Document”: India
- WEF: July 1, 2024: Sections 2(8) Bharatiya Nyaya Sanhita, 2023 & Section 2(d) Bharatiya Sakshya Adhiniyam, 2023: Addition - by way of abundant caution?:
- **BNS: 2(8)** “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, **and includes electronic and digital record**, intended to be used, or which may be used, as evidence of that matter.
- **BSA:2(d)** “document” means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by 15 more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter **and includes electronic and digital records. (Old S.29 IPC)**

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Dynamism of Law – Document

- Definition of “Document”:
- Section 2(d) Bharatiya Sakshya Adhiniyam, 2023:
 - “document” means any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by ¹⁵ more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter **and includes electronic and digital records.**
- *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.
 - **An electronic record on emails, server logs, documents on computers, laptop or smartphone, messages, websites, locational evidence and voice mail messages stored on digital devices are documents;**

Evidence under Bharatiya Sakshya Adhiniyam, 2023

- Definition of “**Evidence**”: Section 2(e) Bharatiya Sakshya Adhiniyam, 2023:
- "evidence" means and includes—
 - all statements including statements given electronically which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence;
 - all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence;

Primary challenges to Electronic Evidence

- In Collation, Retention, Evaluation & Appreciation of Electronic Evidence:
- **Authenticity:**
 - Of Author – hand is no longer attached to you;
 - Electronic & Digital Signatures – how safe is it?;
- **Integrity:**
 - How tamper proof is it?
 - Ease of tampering Vs. proof of tampering;
- **Non-repudiation:**
 - Binding nature of evidence;
 - Onus – where does it lie?

Adhiniyam & Electronic

- S.28: Entries in the books of account, including those maintained in an electronic form, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability. (S. 34 IEA);
- S.29: Relevancy of entry in public record or an electronic record made in performance of duty.
- S.31: Relevancy of statement as to fact of public nature contained in certain Acts;
- S. 32: Relevancy of statements as to any law contained in law books including electronic or digital form
- **S.33: Evidence only of relevant portion including of Electronic Records; (39 IEA)**
- **S.39(2): Examiner of Electronic Evidence – Expert; (S.45A IEA)**
- S. 61-63: Special provisions for proving Secondary proof of Electronic Records; (S.65A & S.65B IEA)
- Presumptions:
 - Gazettes in electronic form: S.81;
 - Presumption for Electronic Agreements: S.85;
 - **Presumption on Electronic Records & Electronic Signatures: S.86;**
 - **Presumption as to electronic signature certificates: S.87**
 - **Presumption of originator for electronic messages: S.90**
 - Presumption as to electronic records five years old: S.93;

Burden of Proof - BSA

- S.104: When a person is bound to prove the existence of any fact, burden of proof lies on that person. (S.101 IEA);
- S.105: Burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (Sec. 102 IEA)
- S.106: Burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. (Sec. 103 IEA)
- S.107: When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him (Sec. 106 IEA)

- **India's Path to S.63 BSA**

Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329

*"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"*

State v Navjot Sandhu @ Afsan Guru (SC; 04.08.2005)

- Parliament Attack case – confirmation of sentence by Supreme Court;
- Admissibility of Electronic Evidence; interpretation of S.65B reinstated – proving as Secondary evidence (printouts taken by mechanical process & certified by a responsible official held sufficient in the absence of Certificate under S.65B (4));
- Conviction upheld *inter alia* on evidence pertaining to IMEI nos & materials on laptop seized;

Tomaso Bruno and Anr. v. State of Uttar Pradesh, (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 is relevant to establish facts. Scientific and electronic evidence can be of great help to an investigating agency.

Reversal of Fortunes – Navjot Sandhu Overruled!

- Anvar PV. Vs PK. Basheer and others (SC): (2014):
 - Compliance with entire provision of S.65B including sub clause (4) mandatory;
 - Legislative intent clear and cannot be overlooked;
 - Necessity for certificate emphasized;
 - Clarification of pending cases where trial already completed based on Navjot Sandhu not given;
 - Clarification on separate certificate Vs. inherent certificate absent;

Anvar v. Basheer (2014) 10 SCC 473

- From Navjot Sandhu ((2005) 11 SCC 600) to Anvar:
 - Moving from secondary to special;
 - Impact of the provisions & the decision;
- Beyond Anvar:
- *Kundan Singh v. State: Del High Court (2015);*
- *Paras Jain v. State of Rajasthan (2015);*
- *Ramajayam v. State: Madras High Court;*

Anvar PV v. PK Basheer,

*"...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), 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."*

Shafhi Mohammad Vs. The State Of Himachal Pradesh (2018) 2 SCC 801

- Reversal in Part to the Navjot Sandhu ratio;
- 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.

Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal (2019 SCC OnLine SC 1533) (The Reference)

- Supreme Court: [Order dated 26.07.2019](#)
- Pronouncement in Shafhi Mohammad 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;*
- Also expresses urgency for this;
- From Anvar to Arjun:
<https://www.livelaw.in/columns/from-anvar-to-arjun-a-tale-of-two-anys-other-stories-157264?infinitescroll=1>

Arjun Panditrao & S.63 Bharatiya Sakshya Adhiniyam, 2023

- **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors. (2020) 3 SCC 216**
 - Anvar v. Basheer (2014) 10 SCC 473 affirmed;
 - Shafhi Mohammad Vs. The State Of Himachal Pradesh (2018) 2 SCC 801 (Overruled);
 - *K. Ramajayam v. Inspector of Police* (2016) CrI. LJ 1542: (Overruled with respect to permitting Affidavit in Evidence to be treated as the certificate mandated under S. 65B(4) IEA;
 - *Tomaso Bruno v. State of UP* (2015) 7 SCC 178: *Held to be per incuriam for permitting applicability of Section 65 IEA, whilst leading electronic evidence*;
 - State Vs Navjot Sandhu (2005) 11 SCC 600 (overruled in Anvar);
- Supreme Court relies on the repeals of the UK provisions (S.69 of the Police and Criminal Evidence Act 1984 (UK) (**“PACE Act”**) (**Repealed**) & Section 5 of the Civil Evidence Act 1968 (UK): (**Since Repealed**)) and gives guidance to legislature to possibly follow suit;

- **Analysing S.63 BSA**

S.63?



Bharatiya Sakshya Adhiniyam, 2023 & Arjun Panditrao

- Sections 61 to 63: Electronic Evidence with Sections 62 and 63 replacing S. 65A & 65B IEA:
- *S.61. Nothing in this Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to section 63, have the same legal effect, validity and enforceability as other document.*
- *S.62. The contents of electronic records may be proved in accordance with the 35 provisions of section 63.*

Bharatiya Sakshya Adhiniyam, 2023

- S.63. BSA:
- (1) Notwithstanding anything contained in this ~~Act~~ Adhiniyam, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media **or semiconductor memory which is** produced by a computer **or any communication device or otherwise stored, recorded or copied in any electronic form** (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 or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Bharatiya Sakshya Adhiniyam, 2023

- S.63. BSA: Contd.,
- (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 or communication device during the period over which the computer was used regularly to create, store or process information for the purposes of any activities activity regularly carried on over that period by the person having lawful control over the use of the computer or communication device;
- (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 or communication device 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.

Bharatiya Sakshya Adhiniyam, 2023

- S.63. BSA: Contd.,
- (3) Where over any period, the function of **creating**, storing or processing information for the purposes of any ~~activities~~ **activity** regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by means of one or more computers **or communication device**, whether—
 - (a) ~~by a combination of computers operating over that period in standalone mode~~; or
 - (b) ~~by different computers operating in succession over that period on a computer system~~; or
 - (c) ~~by different combinations of computers operating in succession over that period on a computer network~~; 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,~~
 - (d) on a computer resource enabling information creation or providing information processing and storage; or
 - (e) through an intermediary,
- all the computers **or communication devices** used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer **or communication device**; and references in this section to a computer **or communication device** shall be construed accordingly.

Bharatiya Sakshya Adhiniyam, 2023

- S.63. BSA: Contd.,
- (4) In any ~~proceedings~~ proceeding 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 shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:—~~
 - (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 ~~or a communication device referred to in clauses (a) to (e) of sub-section (3);~~
 - (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~~ **in charge** of the computer ~~or communication device~~ or the management of the relevant activities (whichever is appropriate) **and an expert** 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 **in the certificate specified in the Schedule.**

Bharatiya Sakshya Adhiniyam, 2023

- S.63. BSA: Contd.,
- (5) For the purposes of this section,—
- (a) information shall be taken to be supplied to a computer or communication device 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)~~ (b) a computer output shall be taken to have been produced by a computer or communication device whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment or by other electronic means as referred to in clauses (a) to (e) of sub-section (3).
- ~~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.~~

Summing up S.63

- Substantially retains – flaws and all – S.65B;
- Amendments to S.65B(3) IEA eases understanding and relevance of this portion;
- Flaw of “any” to “all” retained;
- Critical inclusions:
 - Inclusion of Communication Device specifically;
 - Time of submission of certificate purportedly clarified but still retains ambiguity;
 - incorporates need for TWO certificates instead of ONE! (of person in charge of computer AND of an Expert);
 - Need for reproduction of HASH Value in BOTH the Certificates of person in Charge AND of Expert; (through the Schedule Forms)

S.63?



- Further Indian Case Laws

Sonu Vs State of Haryana (2017 (8) SCC 570)

- Supreme Court
- Whether an objection can be raised against the non-submission of a certificate under 65B at the appellate stage?
- Court held that the evidence produced under 65B is not inherently inadmissible therefore objections to it must be raised at the trial stage itself;
- Also observed that Anvar could have adopted prospective overruling but leaves it at that;

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

- A **printed copy of the computer generated call details** kept in usual ordinary course of business and stored in a hard disc of the company server, produced as **secondary evidence**.
- To co-relate the calls made from and to the cellphones involved including those recovered from accused;
- Rejected for want of certificate under Section 65B(4).

Union of India Vs Ravindra V. Desai

2018 SCC OnLine SC 399

- Supreme Court
- Non production of the certificate under Section 65B on earlier occasions was a curable defect that stood cured.
- The SC held that there were no discrepancies in the CDR produced by Vodafone before the AFT, as submitted to the AFT along with the requisite certificate under Section 65B especially since the witness was able to clear all the doubts expressed by the Respondent.
- It was also held that the judgment in Shafhi Mohammad would not apply here

Rajender Vs. State 2019 SCC OnLine SC 1387

- Supreme Court
- The Court held that raising objections relating to the non-production of certificate under Section 65-B(4) relate to the mode and method of proof and cannot be raised at the appellate stage

State of Karnataka v. T. Naseer (2023 SCC Online SC 1447)

- *A certificate under Section 65-B of the Act, which is sought to be produced by the prosecution is not an evidence which has been created now. It is meeting the requirement of law to prove a report on record.*
- *By permitting the prosecution to produce the certificate under Section 65B of the Act at this stage will not result in any irreversible prejudice to the accused. The accused will have full opportunity to rebut the evidence led by the prosecution.*
- *This is the purpose for which Section 311 of the Cr. P.C. is there. The object of the Code is to arrive at truth. However, the power under Section 311 of the Cr. P.C. can be exercised to subserve the cause of justice and public interest. In the case in hand, this exercise of power is required to uphold the truth, as no prejudice as such is going to be caused to the accused."*

- **What Does S.65B Prove?**

Jaimin Jewellery Exports Pvt. Ltd. v. State of Maharashtra, 2017 SCC OnLine Bom 1771

- Bombay High Court:
- Certificate under Section 65B does not prove the **truth or actual correctness of the entries** and **does not dispense with the proof** or genuineness of entries made in such electronic records.
- It **authenticates** the genuineness of the **copy/computer printout** and thus absolves the parties from producing the original;

- **When to be Given?**

State By Karnataka Lokayukta Police Station, Bengaluru Vs. M. R. Hiremath 2019 SCC OnLine SC 734

- Supreme Court: (01.05.2019):
- Production of certificate would arise when the electronic record is sought to be produced in evidence at the trial;
- Reiterates Anvar v. Basheer;
- Allows appeal and reverses High Court finding;
- Relies on UOI v. CDR Ravindra V. Desai (2018):
Non furnishing of certificate – a curable defect;

Pravata Kumar Tripathy Vs. Union of India (C.B.I.) 2014 SCC OnLine Ori 407

- Orissa High Court:
- At the time of consideration of the bail application, it is not necessary to ask the prosecution to first satisfy the fulfillment of all the criteria laid down in case of Anvar P.V v. P.K. Basheer.
- Certificate to be given at the time of trial;

65B certificate - at any stage of trial

Avadut Waman Kushe Vs. State of Maharashtra 2016 SCC OnLine Bom 3236

- Whether the certificate for evidence has to be filed at the time when the evidence is being presented?
- The court held that the certificate can be presented even at a later stage.

Paras Jain Vs. State of Rajasthan 2015 SCC OnLine Raj 8331

- Whether a certificate under Section 65B has to be filed alongwith the chargesheet?
- Held: No. It may be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case.

Antar Singh v. State of M.P. 2019 SCC OnLine MP 1981

- Whether the failure of the prosecution to file the certificate under Section 65-B at the time of filing of charge-sheet, would disentitle the prosecution from filing the certificate at the time of trial?
- The Court observed that the non filing of the certificate of 65-B of Indian Evidence Act on an earlier occasion is a curable defect which can be cured by filing the certificate of 65-B of Indian Evidence Act at a later stage during trial.

- **By Whom?**

Certificate To be Issued By...

- State of Maharashtra Vs. Rajesh 2016 SCC OnLine Bom 2596
 - Bombay High Court:
 - The certificates for Call detail records (CDRs) were issued by the competent officers under Section 65-B;
 - Held to be admissible;
- Dilip Mali Vs. State of Madhya Pradesh 2015 Indlaw MP 186
 - Madhya Pradesh High Court
 - certificate is issued by the photographer who did the photography, the certificate and affidavit is competent under Section 64B(4).

K. Ramajayam Vs. The Inspector of Police 2015 SCC OnLine Raj 8331

- Madras High Court: (partially repealed by Arjun Panditrao)
- Defence will always complain of manipulation, but Courts can reject fanciful objections bearing in mind the principle underlined in Section 114 of the Indian Evidence Act, 1872. De omnibus dubitandum (doubt everything) philosophy may be a road to scientific discoveries, but not for judicial enquiries, where perfect proof is utopian. **The celebrated Jurist late lamented Nani Palkhivala commented,**
- **“Our Legal System has made life too easy for criminals and too difficult for law abiding citizens. A touch here and push there and India may become ungovernable under the present Constitutional Set up.”**
- It is time that we come out of anachronistic mind set of suspecting and doubting every act of the Police, lest the justice delivery system should become a mockery.

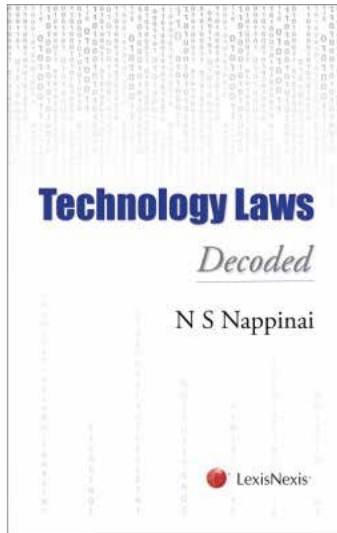
R vs B (Madras High Court)

(DOJ: 30 October, 2024)

- **S.63 Compliance Impediments:** Only a handful of entities notified as experts under [Section 79A](#) IT Act by Central Government and none in Tamil Nadu.
- Since **BSA** has already come into force, very soon there will be need for certificates under [Section 63\(4\)](#) of **BSA** for securing admission of electronic records. If experts are not available in Tamil Nadu, that would result in denial of the right of access to justice which is a fundamental right.
- Directs Central Government to initiate action within 3 months for appointment of experts in State of Tamil Nadu.
- **Cannot rewrite BSA for want of effective measures to implement;**

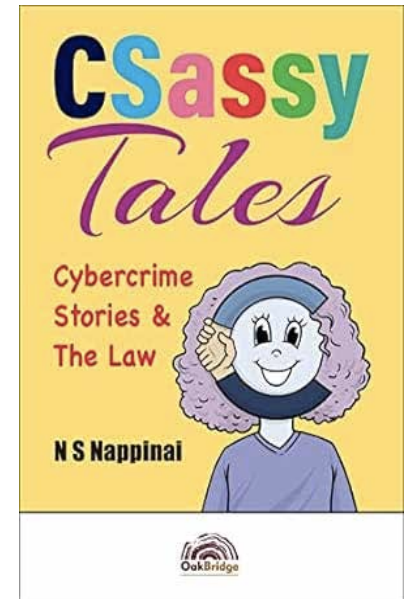
Embracing Technology – With Caution

- *Central Inland Water Transportation Limited v. Brojo Nath Ganguly* ((1986) 3 SCC 156):
 - “Should then our courts not advance with the times?
 - Should they still continue to cling to outmoded concepts and outworn ideologies?
 - Should we not adjust our thinking caps to match the fashion of the day?
 - Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories?”
- *AI For Good: Re: Prajwala Letter Dated 18.2.2015. Violent Videos & Recommendations* (2018) 15 SCC 551);
- Human behind the wheel – applies *pari passu* to Judicial decision making;
- *We cannot eschew technology and need to embrace it, but we have to do so with caution and responsibility. Using AI in law carries the same two warning signs;*



THANK YOU

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