

**INTERNATIONAL JOURNAL OF LEGAL AFFAIRS AND
EXPLORATION**

Volume 2| Issue 3

2024

REVISITING THE ADMISSIBILITY OF ELECTRONIC EVIDENCE IN INDIA: A STUDY

Naishadha Mekala

3rd Year BBA LL.B (H) Student of Mahindra University

ABSTRACT

The 21st Century has revolutionized various sectors globally, including India, through the advent of Information Technology (IT). IT brought a significant impact on many fields and areas of work, and one such area is the judiciary. The Information Technology Act, 2000, gave the assurance and confidence to the judiciary to consider and rely on electronic evidences in legal matters. Bharatiya Sakshya Adhiniyam, 2023 discusses electronic evidence and its admissibility in legal matters. It recognises electronic evidence as primary evidence while meeting certain criteria for it to be admissible in the court of law.

Electronic evidence encompasses various digital records such as emails, server logs, multimedia messages, which have become extremely crucial in today's legal proceedings. Sections 61, 62 & 63 of BSA address the admissibility of electronic evidence, ensuring that it holds the same weightage as that of the traditional documents presented as evidence. Despite such multiple attempts, there are several challenges faced by the electronic evidence level of admissibility. Such challenges like authenticating and tampering of electronic evidence and its technical complexities make it difficult for electronic evidences to prove its admissibility and acceptability. However, the IT Act, 2000 makes the work a little easy by assuring the legal recognition of electronic evidence by having experts appointed to validate the presented electronic records before the court submissions.

The paper concludes that while electronic evidence has become an integral part of the court proceedings, certain stringent measures shall be taken to safeguard its integrity and confidentiality. Effective strategies are necessary to prevent issues like tampering, authenticity and misuse, in order to ensure that the electronic evidence is reliable evidence and is an unambiguous component of the Indian legal framework.

1. INTRODUCTION

The 21st century had turned the tables for all the countries across the world, including India. It brought in the technology, which put many things in place and made things easy. The introduction of Information Technology into different fields like business, communication, government and private services etc. played a pivotal role.

The creation of IT gave individuals the opportunity and a chance to access, store and analyse data, increasing their dependency on electronic means. Therefore, this growing dependency on electronic means communication, commerce etc, had brought in a need for Information Technology laws and regulations including the admissibility of electronic evidences in matters of civil and criminal matters in India.¹ The necessity to store all the information in the electronic mode, bring in the evolution and evaluation of the concept of electronic evidence.

Electronic evidence is commonly known as digital evidence or computer evidence. It includes any electronic records on emails, server logs, documents on computers, laptops or smartphones, messages, websites, locational evidence and voice mail messages stored on digital devices. The Bharatiya Sakshya Adhiniyam, 2023 states that such documents as listed above will have the same validity and legal effects in the eyes of law, bringing in the same level of enforceability as well. Therefore, as per BSA, under section 57 it is stated that such electronic or digital evidence shall be henceforth considered as 'primary evidence'. However, Bharatiya Sakshya Adhiniyam also further states the admissibility of such electronic evidences stated above. The admissibility of the electronic evidence is discussed under section 61 of BSA where it is clearly states and is quoted that "such evidences or records are explicitly deemed admissible in evidence, challenging any denial solely on the grounds of their electronic nature."²

2. ELECTRONIC EVIDENCE:MEANING

Electronic evidence can also be referred to as 'digital evidence' or 'computer evidence'. It is that evidence which from its physical form turns into a binary form i.e. digital audio or digital photography. The definition of electronic evidence consists of three elements:

¹ SSRN,

<https://deliverypdf.ssrn.com/delivery.php?ID=695120099066114005030096116076065092097036019031031092110084124090071087089115064093056035048125008059096096015067025065124123038022089021065117031081116117104087070058005001081067082081067085125114000120090012090082095019004113065021000021109103029123&EXT=pdf&INDEX=TRUE> (last visited, 4th Mar. 2024)

² Sec. 61, Bharatiya Sakshya Adhiniyam

- Includes all forms of evidence which can be stored in a digital form i.e. in broad sense a computer.
- Includes other forms of devices other than computers, in which data can be stored and recorded like mobiles, smart cards, navigation systems.
- Limits data to information that is relevant to the process leading to a dispute, regardless of the nature of the disagreement is decided by an arbitrator, regardless of the form and level of the assessment.

After the technological developments and introduction of the electronic evidence, the judges in the court often pass their judgments based on the admissibility of electronic documents as evidence, which eventually affects the outcome of the proceedings. The court usually face difficulty to pass judgments based on the electronic evidences presented due to its various and unique features i.e. there are various categories under electronic evidence devices such as CD, DVD, hard drive, website data, social media communication, emails, snapshot chat messages, SMS or MMS and computer-generated documents. While all of these possess uniqueness from the other, it creates a problem with respect to usage and authentication to various set of views.³

3. ELECTRONIC EVIDENCE AND BHARTIYA SAKSHYA ADHINIYAM

Evidence is defined under *Section 2(e)* of BSA and includes:

- (1) All statements made before the court by the witness through an electronic mode with respect to matters of fact under inquiry. Such statements are called as *oral statements*.⁴
- (2) All documents and records including the electronic records produced before the court for inspection. Such documents are called *Documentary evidence*.⁵

Section 61, 62 and 63 of BSA talks about the admissibility of electronic evidence. As per *section 61* the admissibility of the electronic device cannot be denied based on the mere reason that it is electronic or digital record. Therefore, such records have the same legal effect, validity and enforceability as any other document as per *section 63* of BSA.⁶

³ SSRN,

<https://deliverypdf.ssrn.com/delivery.php?ID=490074106114121085127083005019095104041021014087045043087031002025124096014086006075048120001122008096009117096066087001029083008007035089016081086064094069001017120024034042092091016071097069124120026105119117117118074097072025102107124087122083114007&EXT=pdf&INDEX=TRUE> (last visited 10th May, 2024)

⁴ Bharatiys Sakshya Adhinyam, Sec.2(e)

⁵ *Id.*

⁶ Bharatiys Sakshya Adhinyam, Sec. 63

Indian law considers all electronic evidence to be unreliable hearsay evidence, unless they abide by the newly-added sections. This is evidenced by the practice of deeming electronic evidence inadmissible unless they do not fulfil the conditions laid down by Section 63.

Section 15 of BSA defines admissions as a statement which is oral or documentary or contained in an electronic form made with respect to any fact in issue or relevant fact and which is made by any of the persons.⁷

4. ELECTRONIC EVIDENCE AS PRIMARY EVIDENCE

Electronic evidence is considered as primary evidence under Bharatiya Sakshya Adhiniyam. Those documents itself produced for the inspection of the court is known as primary evidence.

Earlier only the physical documents or records were considered as primary evidence. But however, with gradual technology developments, the courts also started to consider the electronic documents or records as primary evidence since currently the world is running on electrical devices.

Section 57 of BSA provides that electronic evidence is considered as primary evidence and further lays down the conditions to be fulfilled to consider an electronic evidence as primary evidence, which are:

- When an electronic record is created or stored simultaneously or sequentially in various files, in such a case each file is to be considered as primary evidence.
- Electronic evidence should be produced before the authority by a proper custody for it to be considered as primary evidence. However, it can be considered as primary evidence only if such evidence is not under any dispute.
- When a video recording is also stored in an electronic form and transmitted or broadcast or transferred to another, then each such recordings is considered as primary evidence.
- When a digital record is stored in multiples storage spaces in a computer, then every such storage including the temporary files are considered as primary evidence.⁸

⁷ Bharatiys Sakshya Adhiniyam, Sec. 15

⁸ Bharatiys Sakshya Adhiniyam, Sec. 57

However, despite electronic evidence being considered as primary evidence under BSA, it still has to issue a “certificate of authentication” to the BSA. This shall be followed in order to prevent the tampering of the electronic evidence.⁹

Effects of considering electronic evidence as primary evidence:

Positive Effects

- 1) *Efficiency*: Electronic evidence can often be more efficiently collected, stored, and presented.
- 2) *Accuracy*: Electronic evidence such as digital records or communications can provide precise and accurate information.
- 3) *Accessibility*: compared to that of other evidences which have high chances of misplacement, electronic evidences can be easily accessed and stored. Its modes of accessibility are more. They can be accessed easily compared to normal physical evidence.
- 4) *Verifiability*: While the physical evidence takes time to verify its originality and admissibility, electronic evidence can sometimes be more easily verifiable through metadata, digital signatures etc.

Negative Effects

- 1) *Authentication challenges*: Electronic evidence can be more susceptible to challenges regarding its authenticity and integrity i.e. there are high chances of an electronic evidence to be tampered.
- 2) *Complexity*: Electronic evidence, particularly in cases involving digital forensics or complex data analysis, can introduce technical complexities that may be challenging for judges and juniors to understand.
- 3) *Privacy Concerns*: With growing technology, infringement of privacy on the electronic platforms has also increased. It is somewhat connected to tampering of the electronic evidence by which the content of the evidence is reached out to and tampered invading the privacy and leading to privacy concerns.

⁹ <https://www.khaitanco.com/thought-leaderships/Hit-Refresh-Part-3-of-3-Law-of-Evidence-gets-a-Contemporary-Makeover-Key-Highlights-of-Bharatiya-Sakshya-Adhiniyam-2023-BSA#:~:text=This%20includes%20electronic%20records%20on,enforceability%20as%20any%20other%20documen>
[t](#)

4) *Dependence on Technology*: Excessive usage of electronic evidence is forcing the mankind to depend on technology more than what is actually required, changing the old-time methods of only physical evidences.

5. LEGAL RECOGNITION OF ELECTRONIC EVIDENCE UNDER THE INFORMATION TECHNOLOGY ACT, 2000

Section 2(t) of IT Act, 2000 defines “*electronic record*” as any record or generated data, image or its stored, received or transmitted in electronic or microfilm format or computer-generated microfilm.¹⁰

Legal recognition of Electronic Record under *Section 4* of the IT Act:¹¹

- Are displayed or available in an electronic form
- Accessible for use by another reference¹²

Section 79A of IT Act, 2000 further mandates the Central Government to appoint an examiner of electronic evidence to provide an expert opinion before such document is presented before the court.

6. ADMISSIBILITY OF ELECTRONIC EVIDENCE

The admissibility of electronic evidence is dealt under *Section 61, 62 & 63* of the Bharatiya Sakshya Adhinyam.

This Act introduced a sense of equality in the validity and admissibility of electronic evidences.

Section 61 lays down that no digital evidence can be quashed on the mere fact that it is electronic evidence and not physical evidence i.e. the traditional documents. However, such document or records can have the same legal effect as to that of a traditional document only when it fulfils all the conditions mentioned under section 63 to prove the admissibility, validity and enforceability of the said electronic documents or record.¹³

Section 62 lays down that the contents of the electronic evidence can only be proved in accordance with the provisions and conditions laid down in section 63 of BSA.¹⁴

¹⁰ Sec 2(t), Information Technology Act, 2000

¹¹ Sec 4, Information Technology Act, 2000

¹² *Supra Note 3*

¹³ Sec 61, Bharatiya Sakshya Adhinyam, 2023

¹⁴ Sec 62, Bharatiya Sakshya Adhinyam, 2023

Section 63 - The provisions of this section acts as an exception to the 'best evidence rule' which considers original evidence as the ultimate and superior in nature.¹⁵ The section on the contrary, considers digital evidence admissible even without producing the original.

This section lays down the conditions to prove the admissibility of electronic evidence, which are as follows:¹⁶

- Any information taken from the computer when printed on paper, stored, or recorded in a semiconductor memory which is a product by the computer or any other digital device or stored in any other form of electronic evidence shall be considered as a document if it satisfies the conditions and the information and computer in question. Therefore, in such cases there is no need to provide any proof or original documents as evidence.
- The computer output containing the information was produced by the computer or communication device during the period over which the computer or Communication device was used regularly to create, store or process information.
- Throughout the material time when the computer was functioning properly or the during the period when the system was not working properly or was inoperative did not affect the electronic filing or the accuracy of content.
- The information gathered or produced from the information entered in the computer during the performance of the said activities.¹⁷

Therefore, adhering to the conditions provided by Section 63 of the BSA, electronic evidence can be considered as a document with admissibility and enforceability

7. JUDICIAL INTERPRETATION ON ADMISSIBILITY OF ELECTRONIC EVIDENCE

In the case of *Abdul Rahaman Kunji v. The State of West Bengal*¹⁸ the Calcutta High Court while deciding the admissibility of email information held that any information printed or downloaded directly from the email account of that person fulfils the conditions provided in section 63 of BSA

¹⁵ NUSRL Criminal Law Blog, <https://cclnusrl.wordpress.com/2022/11/07/admissibility-of-electronic-evidence-in-india-an-unending-saga-of-uncertaintypankaj-jhajhra/> (last visited 15th May, 2024)

¹⁶ Sec 63, Bharatiya Sakshya Adhiniyam, 2023

¹⁷ *Supra Note 10*

¹⁸ *Abdul Rahaman Kunji v. The State of West Bengal* MANU/WB/0828/2014

and is considered as a enforceable document and is admissible in the court of law. However, a certificate shall be produced along with the printout of the information.¹⁹

Initially in the case of *State (NCT Delhi) v. Navjot Sandhu* it was held that producing a certificate along with the electronic evidence is not a mandatory obligation.²⁰ However, in the case of *Anvar PV v. Basheer* the Supreme Court revisited the case of *Navjot Sandhu* and ruled that production of a certificate is a 'condition precedent' for admissibility of electronic evidence as per section 65B of Indian Evidence Act (Section 63 of BSA).²¹

Supporting to the judgment given in *Anvar PV v. Basheer*, court in the case of *Sanjaysinh Ramarao Chavan v. Dattatray Gulabrao Phalke* ruled that "source and authenticity are the two key factors for electronic evidence".²²

However, in *Shafhi Mohammad V. State of Himachal Pradesh*²³, the divisional bench had ruled that a certificate while providing the electronic documentary evidence as per Section 63(4) of BSA where the certificate shall be signed by the person in charge of the said electronic device and by an expert, can be waived if it is required to act in the interests of justice. This flexibility allows the court where in order to provide justice the parties are required to produce electronic evidence even if they don't own the evidence or cannot obtain the necessary certificate.²⁴

Finally in the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors*, the Hon'ble Supreme Court held that certificate required to be produced under Section 65B of IEA (Section 63 of BSA) is a condition precedent to the admissibility of evidence in the form of electronic evidence. Therefore, it is mandatory to produce a certificate in cases when the computer device where the information is stored cannot be produced directly in the court in the form of original information.²⁵

¹⁹ Rostumlegal, <https://www.rostrumlegal.com/electronic-evidence-understanding-through-case-laws/> (last visited 15th May,2024)

²⁰ *State (NCT Delhi) v. Navjot Sandhu* 2005 11 SCC 600

²¹ *Anvar PV v. Basheer* AIR 2014 10 SCC 473

²² *Sanjaysinh Ramarao Chavan v. Dattatray Gulabrao Phalke* 2015 3 SCC 123

²³ *Shafhi Mohammed v. State of Himachal Pradesh* 2018 (1) S.C.Cr.R. 473

²⁴ NUSRL Criminal Law Blog, <https://cclnusrll.wordpress.com/2022/11/07/admissibility-of-electronic-evidence-in-india-an-unending-saga-of-uncertainty-pankaj-jhajhra/> (last visited 15th May,2024)

²⁵ *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors* 2020 7 SCC 1

8. CONCLUSION AND SUGGESTIONS

With the technology becoming part of the legal system, the courts shifted from traditional documents to electronic evidences. The courts started accepting the digital evidences, and they are considered admissible and enforceable under section 63 of BSA.

Electronic evidences are further considered as a primary evidence and not secondary evidence. However, to be considered as primary evidence, the evidence must fulfil the conditions given under section 57 of BSA.

The recent case of leakage of electronic evidence (in the form of Whatsapp chats) also highlights the need to devise safeguards to retain electronic records. In a recent judgement, the Punjab & Haryana High Court had referred to *Arjun v. Kailash* and concluded that Whatsapp chats shall have no evidentiary value until a certificate is produced under *Section 65B(4)* of Evidence Act which now is *Section 63* under the Bharatiya Sakshya Adhiniyam.

The researcher suggests that confidentiality of contents of electronic or digital records shall be protected with more effective measures in order to prevent tampering or misusing the evidence. There is an urgency of brining into place multiple measures to ensure safety, retention and confidentiality of information obtained in the form of electronic evidence.