

# Dispute Resolution Hotline

August 26, 2020

## SUPREME COURT: REQUIREMENT OF CERTIFICATE PRE-REQUISITE FOR PRODUCING ELECTRONIC RECORDS

- Sections 65A and 65B of the Evidence Act constitute a complete code on admissibility of evidence of electronic records.
- Certificate under Section 65B (4) is essential for admissibility of electronic records in nature of secondary evidence and can be sought at any stage, including at any stage of trial.
- In case of inability to produce certificate, parties can file an application seeking direction to concerned persons to furnish certificate under Section 65-B (4).

The Supreme Court in a recent judgment of *Arjun Pandit Rao v. Kailash Kushanrao*,<sup>1</sup> held that certificate under Section 65B (4) of the Evidence Act ("**Act**") is essential for admissibility of electronic records. The certificate constitutes evidence for identification of an electronic record and provides particulars of any device involved in the production of that electronic record, 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 ("**Certificate**")<sup>2</sup>.

### BACKGROUND

A Division Bench of the Supreme Court, in the same matter, had referred the question to a larger bench in July 2019.<sup>3</sup> As a result, the Supreme Court clubbed both the matter, appeal against a judgment of the Bombay High Court, to determine the correct position of law amidst its two conflicting decisions<sup>4</sup>.

Two election petitions were filed by the Respondents before the Bombay High Court challenging the election of Arjun Panditrao Khotkar, the Returned Candidate ("**Appellant**") to the Maharashtra Legislative Assembly for the term commencing November 2014. One election petition was filed by the defeated candidate Kailash Kishanrao Gorantyal ("**Respondent**"), whereas the other was filed by Chaudhary, an elector. The Respondents relying on video camera footage contended that the election was void due to delay in presentation of nomination forms. The Bombay High Court admitted the electronic evidence, even in the absence of the requisite Certificate, as the party was in 'substantial compliance' of the requirements under the applicable provisions and declared the election void. ("**Impugned Judgment**")

### Conflicting Decisions

The issue relating to furnishing of the Certificate under Section 65B (4) has come up before the Supreme Court on several occasions in the past. In *Anvar PV v. PK Basheer* (2014), the Supreme Court held that any documentary evidence by way of an electronic record can be proved only in accordance with the procedure prescribed under Section 65B of the Act. Section 65B deals with the admissibility of the electronic record to determine the veracity or reliability of the evidence and is mandatory. Later, in 2018, a Division Bench of the Supreme Court in *Shafhi Mohammad v. State of Himachal Pradesh* held that requirement of a certificate under Section 65 B (4) is procedural and can be relaxed in the interest of justice provided a party is not in possession of the device.

### ISSUES

The Supreme Court was faced with two major questions in the present case.

- Ascertaining the validity of the Appellant's election.
- Settling the position of law relating to furnishing of Certificate for electronic evidence under Section 65B of the Act due to its conflicting rulings on the issue.

### JUDGMENT

- The Supreme Court upheld the Impugned Judgment as Bombay High Court relied upon other evidence as well, apart from the evidence in the form of electronic record, to arrive at the conclusion.
- The Supreme Court held that Certificate under Section 65B is a condition precedent to the admissibility of evidence by way of electronic record,<sup>5</sup> thereby upholding the judgment in *Anvar P.V.* and overruling the 'clarification' in *Shafhi Mohammed*.<sup>6</sup> In addition to this, the Supreme Court overruled the decision of the Madras High Court in *K. Ramajyam* which held that evidence *aliunde* can be given through a person who was in-charge of a computer device in the place of the Certificate.<sup>7</sup> The Supreme Court also overruled the judgment in *Tomasia Bruno*<sup>8</sup> which was per incuriam and held that Section 65A and 65B are clarificatory and procedural in nature and cannot be held to be a complete code on the subject. Further, it also held that requirement of certificate under Section 65B is not always mandatory.

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3. The Supreme Court stated that Section 65B (1) differentiates between (i) 'original document' - which is the original electronic record contained in the computer in which the original information is first stored; and (ii) the computer output containing such information, which then may be treated as evidence of the contents of the 'original document'. This differentiation is appreciated in legal terms in the manner of the categorisation of evidence. The Supreme Court clarified that Certificate is not necessary if the 'original document' itself is produced (as a primary evidence). This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. However, in all other cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, the only means of providing information contained in such electronic record can be through in accordance with Section 65B (1) together with production of the requisite Certificate under Section 65B (4) of the Act.<sup>9</sup>
4. The Supreme Court also dealt with the issue of inability of a party in producing a certificate who is not in possession of the electronic device. While analysing this aspect, the Supreme Court answered this in the backdrop of the Evidence Act,<sup>10</sup> the Code of Civil Procedure,<sup>11</sup> and the Code of Criminal Procedure,<sup>12</sup> that a judge has sufficient powers and jurisdiction to order production of any document. An application can always be made for production of such Certificate in cases in which there is a refusal to grant the Certificate. Such party is said to have completed his legal obligations to procure the Certificate. The Court perused the following maxims - *lex non cogit ad impossibilia* i.e. 'the law does not demand the impossible', and *impotentia excusat legem* i.e. 'when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused'. The Supreme Court relied on a series of judgments that have applied this maxim in similar legal positions.<sup>13</sup>
5. The Supreme Court held that electronic evidence has to be furnished at the latest before the trial begins.<sup>14</sup> However, the exercise of power by courts in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused in a criminal trial. Similarly, if it is the accused who desires to produce the requisite Certificate, this too will depend upon the facts of the case and discretion to be exercised by the Court in accordance with law.<sup>15</sup> If hearing in a trial is not yet over, the requisite certificate can be directed to be produced at any stage, so that information contained in electronic record can be admitted and relied upon in evidence.<sup>16</sup>
6. The Supreme Court also issued general directions to cellular companies and internet service providers to maintain CDRs and other relevant records for the concerned period (in tune with Section 39 of the Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period. This is directed to be applicable to all criminal trials.<sup>17</sup> This will permit the parties to summon such records at the stage of defence evidence or in the event such data is required to cross-examine a particular witness.
7. The Supreme Court also referred to a report of the five-judge committee constituted in 2018 which suggested Draft Rules for the Reception, Retrieval, Authentication and Preservation of Electronic Records. The Court opined that these Draft Rules must be given statutory force to guide courts in regard to preservation and retrieval of electronic evidence.<sup>18</sup> Further, the Bench also held that pursuant to Section 67C of the Information Technology Act, suitable rules for the retention of data involved in trial of offences, their segregation, rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data should be framed to avoid corruption.
8. Justice V. Ramasubramanian also wrote his judgment in agreement with conclusions reached at by Justice Nariman and *inter alia* concluded that it is the need of the hour to relook at Section 65 (B) of the Act.

## ANALYSIS

The Supreme Court ruling settles the storm on the significance and interpretation of Section 65 (B) of the Act and furnishing of certificates for production of electronic records in evidence. Directions issued to cellular companies and internet service providers to maintain records, which can be summoned if required, is certainly an enabling provision which will ensure that a party has an option to obtain and rely on evidence to substantiate their contentions.

The Supreme Court reiterated the distinction between primary and secondary evidence for electronic records. However, it may not work under a bright-line rule for electronic records as much it does for paper documents. It remains to be seen if the legislature in its attempt to fine tune the legislations revise Section 65B to be abreast of changing time and development of technology.

— Payel Chatterjee & Sahil Kanuga

You can direct your queries or comments to the authors

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<sup>1</sup> Civil Appeal No. 20825-20826 of 2017 - Judgment dated July 14, 2020.

<sup>2</sup> Section 65B (4), Evidence Act, 1872.

<sup>3</sup> Civil Appeal No. 20825-20826 of 2017 - Order dated July 26, 2019.

<sup>4</sup> Anvar PV v. PK Basheer (2014) 10 SCC 473 and Shafhi Mohammad v. State of Himachal Pradesh (2018) 2 SCC 801

<sup>5</sup> Cited Vikram Singh and Anr. v. State of Punjab and Anr., (2017) 8 SCC 518.

<sup>6</sup> 59 of the judgment.

<sup>7</sup> K. Ramajyam v. Inspector of Police, (2016) Cri. LJ 1542.

<sup>8</sup> Tomaso Bruno and Anr. v. State of Uttar Pradesh, (2015) 7 SCC 178.

<sup>9</sup> 31 of the judgment.

<sup>10</sup> Section 165, Evidence Act, 1872.

<sup>11</sup> Order XVI, Code of Civil Procedure, 1908.

<sup>12</sup> Section 91, Code of Criminal Procedure, 1973.

<sup>13</sup> In Re Presidential Poll, (1974) 2 SCC 33; Cochin State Power and Light Corporation v. State of Kerala (1965) 3 SCR 187; Raj Kumar Dubey v. Tarapada Dey and Ors. (1987) 4 SCC 398.

<sup>14</sup> 52 of the judgment.

<sup>15</sup> 54 of the judgment.

<sup>16</sup> Cited Paras Jain v. State of Rajasthan, (2015) SCC OnLine Raj 8331; and Kundan Singh v. State, (2015) SCC OnLine Del 13647.

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