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THE BHARATIYA SAKSHYA ADHINIYAM: A FRAMEWORK FOR ADMITTING ELECTRONIC EVIDENCE IN INDIA

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ABSTRACT

The Bharatiya Sakshya Adhiniyam, 2023 marks a significant shift in India's legal landscape, particularly concerning electronic evidence. A legislation aimed at governing the admissibility of electronic evidence in Indian courts, marks a significant milestone in the country's legal framework. This paper aims at an in-depth analysis of the Act, highlighting its key provisions, implications and challenges. To conclude, the Bharatiya Sakshya Adhiniyam, 2023, provides a comprehensive framework for ensuring the authenticity and integrity of electronic evidence in India. By addressing the unique challenges posed by digital data, the Act ensures that electronic records are admissible, reliable and accorded the same legal standing as traditional forms of evidence.

Key Words: The Bharatiya Sakshya Adhiniyam, electronic evidence, admissibility, digital data, electronic records.

INTRODUCTION

The move from the Indian Evidence Act (IEA), 1872 to the Bharatiya Sakshya Sanhita (BSS), 2023 marks a momentous change in India's legal landscape, replicating the need for transformation and acclimatising to the changes in society, governance and technology. This journey lengths over a century and has perceived the evolution of legal norms surrounding evidence, were swayed by factors such as colonialism, judicial reforms and digitalization.

The advent of digital technology has revolutionised the way information is generated stored and transmitted as a result, electronic evidence has become an increasingly important aspect of legal proceedings worldwide. In Bharath, the Bharatiya Sakshya Adhiniyam 2023 has been enacted to provide a framework or admitting electronic evidence in Indian courts. Currently, digital evidence

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has urbanized and emerged as a foundation stone in the modern legal framework which is considerably modifying the process of the litigation, investigation and judicial proceedings are piloted. Electronic evidence includes –social media interactions, photos, files, emails, and even metadata too. All of these play a very vital role in either proving or disproving a case. Furthermore, digital evidence can be temporary, capable of being deleted or changed with ease. However, even when deleted, hints of digital evidence often remain on devices, which can be accessible through advanced forensic tools. For example, metadata, which can provide information about the creation, transmission of digital files and modification can reveal crucial details.

The admissibility of digital evidence in the courts hinges on its authenticity and relevance in accordance with the rules of evidence. The Information and Technology Act of 2000 had laid down provisions for validating the electronic records as valid forms of evidence. According to section 65B of the Indian Evidence Act (IEA) introduced through Information Technology Act provides statutory basis for the admissibility of electronic records as a piece of evidence. In a landmark judgement in *Anvar P.V. v. P.K. Basheer*² (2014), where in the Supreme Court of India ruled that digital evidence, such as phone records and emails, must strictly comply with section 65B. The *Bharatiya Sakshya Adhiniyam* addresses the growing significance of digital evidence.

ELECTRONIC AND DIGITAL EVIDENCE UNDER INDIAN EVIDENCE ACT

The Courts constantly requires evidence to rely on the facts in issue cited before it. Concurrently, the Courts also require definite rules to be placed as evidence before it. According to section 65A of Indian Evidence Act³ the electronic records have to be proved in accordance with Section 65B which states about the admissibility of electronic evidence. Supreme Court stated in a judgement that there is a requirement of a certificate in accordance with the section 65B (4) of the Indian Evidence Act, 1872 which is the ‘condition precedent’ to the admissibility of the evidence of electronic records.⁴ Section 65 A & 65 B was inserted into the Evidence Act through Indian Evidence (Amendment) Act, 2000 and became a part of the Chapter V of the Act which deals

² AIR 2015 Supreme Court 180, 2014 AIR SCW 5695

³ Indian Evidence Act, 1872

⁴ *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*, 2020 SCC Online SC 571

with the documentary evidence. Indian Evidence (Amendment) Act, 2000 introduced certain changes, such as expanding the definition of documentary evidence to include electronic records. Under Section 65A of the Evidence Act, the contents of electronic records have to be proved as evidence in accordance with the requirements of Section 65B. Both Sections 65A and 65B were inserted through the Indian Evidence (Amendment) Act, 2000, to form part of Chapter V of the Indian Evidence Act, which deals with documentary evidence. Information Technology Act defines the term Electronic Record as – Sec 2 (t) States that

“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.”

Information Technology Act, 2000 makes it clear that electronic record means record/data generated through computer generated micro fiche, electronic form or micro film image or sound stored, sent or received in an electronic form. There are two special and separate provisions deal with electronic evidence -- Section 59 of Indian Evidence Act , states that all facts, except the insides of electronic records or documents, could be proved by oral evidence – as it is based on the fundamental principle as best evidence rule. Section 65-A affords that the contents of electronic records may be proved in accordance with the provisions of Section 65-B. Thus, Section 65-A provides for a special procedure for proving of contents of electronic record. In furtherance thereof, Section 65-B provides for the procedure.

Hon’ble Supreme Court has emphasized on the distinction between primary and secondary evidence is certainly applicable to electronic records as well⁵, information contained in the computer is considered as primary evidence and the output from the computer which contains such information is treated as secondary evidence. In a situation which is contingent on the original electronic record to be produced in the court , then the owner of the device may testify and prove that the device in question on which the original information is stored first is either owned or operated by him. In the event of the electronic record is a part of the computer network/computer system and where it is not possible to physically bring the system to the Court, the only way to prove the information contained in such an electronic records is through 65 A & 65 B of Indian Evidence Act. This criterion is also mandatory to provide info to the investigating agency.

⁵ Arjun Panditrao Khotkar v. Kailash Kishanrao Gorantyal, (2020) 7 SCC 1

CHANGES INTRODUCED UNDER THE BHARATIYA SAKSHYA ADHINIYAM

ELECTRONIC EVIDENCE AS PRIMARY EVIDENCE

Bharatiya Sakshya Adhiniyam (BSA) defines a document which includes electronic records such as server logs, e-mails, laptops or smartphones, documents on computers, IP address-locational evidence, websites and voice mail messages which are stored on electronic/digital devices. Consequently, electronic evidence is now being classified as primary evidence. The stored copy of electronic/digital records which is produced from a proper custodian is to be treated as primary evidence.

Section 65 A & 65 B of Indian Evidence Act, 1872 and the corresponding sections 62 & 63 of the Bharatiya Sakshya Adhiniyam maintain the conditions of admissibility of electronic evidence with a few modifications. Bharatiya Sakshya Adhiniyam provides for the certificate where it is to be provided by a person in charge of the communication device or managing such relevant activities including an expert. It affords that such certificate is supposed to be produced at every instance where such evidence is submitted for admission there by the further requirements could make the process of presenting the electronic evidence more time-consuming and its purpose remains unclear. The position of primary evidence and secondary evidence is retained in BSA where the primary electronic evidence is admissible per se,⁶ whereas the secondary evidence is admissible complemented by a certificate attesting the same. It may be noted that the copies of electronic evidence including any stored up temporary files in different devices is now to be considered as primary evidence. The point of ambiguity here is when an electronic would be a requisite to be supported by a certificate in accordance with the section 63 of BSA. Additionally, it is also not clear who would meet the requirements to be such an expert.

MAINTENANCE OF DATA INTEGRITY

Data integrity is specifically been recognized under BSA which states that an electronic record or digital record is made from 'proper custody', such digital or electronic records is a primary evidence unless and until it is disputed. The BSA contains a standard format of the certificate to be produced

⁶ Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal AIR 2020 Supreme Court 4908, AIR Online 2020 SC 641

as evidence in accordance with section 63. The party tendering the certificate of electronic evidence in (part A) along with an expert (part B) now obligates recording of the hash value of the electronic evidence during the times of submission of such a certificate. One gap under BSA is that it misses the mark to provide suitable safeguards in storing, collection and disposing of digital and electronic evidences during the investigation processes including dealing with confidential and privileged information that may be collected during the investigation process.

OTHER KEY CHANGES

The most welcoming change being introduced in BSA is oral evidence which now includes any of those statements given electronically by witnesses as well. This will facilitate witnesses including experts to record statements and to be cross-examined, to take part in trial proceedings through audio & video thereby allowing more convenience, flexibility to expediting trials in India. Another noteworthy change is that the scope of Indian Evidence Act, 1872 is limited to the jurisdiction of India, the Bharatiya Sakshya Adhiniyam, 2023 does away with this limitation, ostensibly with a view to eliminate the barriers to admissibility of electronic evidence that may be generated or stored outside India.

CONCLUSION

The changes brought by Bharatiya Sakshya Adhiniyam, 2023 to electronic evidence indicate an appreciation of the ever-increasing importance of digital evidence in legal proceedings, and are praiseworthy on that account. However, in practice, they could create more difficulties than they seek to address. There is an imminent need for precision on what electronic evidence would constitute ---Viz.. Primary versus Secondary evidence, as the latter is subject to the requirement of producing an authenticating certificate under Section 63 of the BSA.

The BSA is a overlooked opportunity as it fails to address several other areas relevant to electronic evidence, such as, inter alia, expounding the proper chain of custody for electronic evidence, providing assistance in relation to the safe storage and disposal of electronic evidence, setting apart the privileged and confidential information, and addressing questions in relation to the probability of self-incrimination which is inherently linked with the seizure of electronic data from a person. While the Bharatiya Sakshya Adhiniyam, 2023 is a step forward towards launching a

framework for electronic evidence, it is a precarious step, and would benefit from judicial/legislative intervention in order to provide some much-needed certainty.