

Electronic Evidence Under Bsa 2023 Comparative Study With Evidence Act (1872)

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Abstract

In ancient times Hindu Dharma Shastra acknowledged the concept of evidence which means to find the truth between the contentions of parties. Manu and Yajnavalkya asked the king to find what the truth while giving justice was. In addition to that Vasistha came out with three kinds of evidence: Lekhya (Documentary evidence), Sakshi evidence (witness), Bhakti evidence (possession), and Divya (ordeals).¹ In later days, during the Muslim period, the law of evidence was recognized under Muslim Jurisprudence, which was well recognized by the book of Sir Abdul Rahim. British era entrusted² with commercial and political powers, then the Crown seized authority. It was noted that in this era, problems and disputes were frequently brought before the British Court since British India lacked an efficient legal system. For this reason, the British government felt the need for consistent policies and procedures during their presidency. towns in the corporations of Bombay, Madras, and Calcutta. Therefore, King George I awarded a charter to the East India Company. However, the province areas are subject to oral evidence and customary proofs burdened by many conditions; as a result, there was chaos and confusion throughout the administration of justice. This situation created an urgent need for codified legal regulations that emerged in 1835, and although the first Act about the law of evidence was established, it was insufficient at the time. Following that, in 1868, Sir Henry Mayne, the commission's chairwoman, created the draft, although it did not help the Indian people in accordance with the stated conditions. The draft was then created by Sir James Fitz James Stephan in 1870, and it was chosen by the committee, the High Court, and the legislature after an opinion was presented. And on September 1st, 1872, it was passed into law as the Evidence Act. It persisted for more than a century.

The Indian Evidence Act of 1872 (IEA) was superseded by the Bharatiya Sakshya Adhiniyam, 2023 (BSA). It relates to the modern, needs-driven requirements of today and offers the admissibility of an electronic or digital record as evidence, which makes the trial process easier in the courtroom and confers the same legal effect, logic, credibility, and applicability as other documents.

Keywords: Electronic, Digital, Sakshya Adhiniyam, Primary, Secondary, Misuse, Forensic, Expertise

Research Methodology- The study focus on comparative study of the Indian Evidence Act, 1872 with prevailing amended Act - the Bharatiya Sakshya Adhiniyam, 2023. Hence “Doctrinal” research methodology is most appropriate and called.

¹ https://www.allahabadhighcourt.in/event/TheIndianJudicialSystem_SSDhavan.html (Part A: Judicial System in Ancient India, n.d.)

² <https://www.lawctopus.com/academike/concept-historical-background-evidence/> (Kumar, 2015)

Introduction

Modernized digital age Since 1984, the Federal Bureau of Investigation (FBI)³ and other law enforcement agencies of the United States of America (USA) started developing programs about computer evidence due to the occurrence of computer crimes. These crimes gave birth to the Computer Analysis and Response Team⁴ (CART), which acts as police, to collect and preserve the criminal activities stored in the offender's computer device(s). In the landmark case of a rogue program affecting thousands of computers, later called as “Morris worm case”⁵ The Federal Bureau Investigated the case and confirmed that Mr. Morris, who was a first-year graduate student in Cornell University's computer science Ph.D. program, was behind the program who exploited the security defects, which was a violation of the federal law called Computer Fraud and Abuse Law of 1986. This wave of cyber evolution, due to globalization, reached the Indian continent after the mid-1990s. This invited the surge in technology as well as cybercrime, which was a new phenomenon, dealt with by the Information Technology Act of 2000. It was developed based on the United Nations Model Law on Electronic Commerce from 1996 (UNCITRAL Model)⁶ in order to guarantee the legal conduct of digital transactions and the decrease of cybercrimes. In addition to these provisions, one of the primary provisions was under Sections 65A & 65B of the Amendment Act of 2000 to the Indian Evidence Act, of 1872,⁷ which dealt with worries about whether computerized data are authentic and if they can be modified for use in court. Now, let's look in depth at the meaning of the digital evidence.

Meaning of Digital or Electronic Evidence

The Information Technology Act of 2000 (“IT Act”), specifies “*electronic evidence*”, under the explanation title of Section 79A that any such electronic record which has a [proactive value, (which means a piece of information which can be used to ascertain the incident at hand.⁸)], which was put into storage or channel away in the form of electrons. In addition to these provisions, one of the landmark cases of Google India Private Limited vs. Visakha Industries and Ors. (10.12.2019 - SC)⁹. There was a mention of the term “Record”, which can be created by two methods in the state of India; (i) By State Government by use of its executive power and (ii) by use of any body constituted by State Government such as local or corporations. BSA under Section 2(d) of BSA defines “Document” to include electronic and digital code. The Section speaks about two records i.e. electronic as well as digital records. The former originates and exists directly in a computer system and later is a digitized version of a physical document.¹⁰ Sec 2(1) (e) includes the communication done in electronic mode, it considered oral evidence as well as electronic or digital record for documentary evidence acknowledged as Section 3 of IEA only electronic records which were documentary evidence.

Documents For Inspection

³ Welcome to fbi.gov — FBI. (n.d.). Retrieved August 27, 2024, from <https://www.fbi.gov/>

⁴ Computer Analysis and Response Team (CART): The microcomputer as evidence | Office of Justice Programs. (n.d.). <https://www.ojp.gov/ncjrs/virtual-library/abstracts/computer-analysis-and-response-team-cart-microcomputer-evidence>

⁵ United States of America, Appellee, v. Robert Tappan Morris, Defendant-appellant, 928 F.2d 504 (2d Cir. 1991) :: Justia. (n.d.). Retrieved August 27, 2024, from <https://law.justia.com/cases/federal/appellate-courts/F2/928/504/452673/>

⁶ UNCITRAL Model Law on Electronic Commerce (1996) With Additional Article 5 Bis as Adopted in 1998 | United Nations Commission On International Trade Law, n.d.

⁷ Indian Evidence (Amendment) Act, 2000, Act No. 45 of 2000 § 65A, 65B (2000).

⁸ Probative Value | Wex | US Law | LII / Legal Information Institute, n.d.

⁹ MANU/SC/1708/2019

¹⁰ Digital Vs Electronic Records Management Explained, n.d.

To be considered evidence, it can be said that a document must be produced and proven in accordance with the law. It is up for trial to determine whether such evidence is pertinent, irrelevant, admissible, or not.¹¹ Such documents are called primary evidence, covered under Section 62 of IEA and under Section 57 of BSA, include four additional explanations to the definitions of primary evidence. The one of the few words which are added in explanation 4 as per below:

- “Explanation 4 *or sequentially in multiple files*”: The court to consider digital or electronic documents as primary sources of evidence. The scenarios it covers, which mirror contemporary digital realities, include electronic files saved in different places or formats as well as video recordings stored and delivered concurrently.
- “*Unless it is disputed*”: Mandates the court to consider the digital or electronic documents as primary sources of evidence, when these records were produced from a proper chain of custody. To apply these provisions, the Bureau of Police Research and Development (Ministry of Home Affairs)¹², came out with a standard operating procedure manual for an audio-video recording of the scene of a crime. This SOP was aimed in order to lessen the load on courts and jails while ensuring timely justice in a time-bound way, evidence-based swift trial, and fair trial. The SOP mandates audio video recording shall be presented “*without delay*” to the District Magistrate, Sub-Divisional Magistrate, or First Class Judicial Magistrate, to form a proper chain of custody.
- “*Video recording is simultaneously stored*”: Acknowledged as primary evidence, when video at that time is stored as well as broadcasted or transmitted or transferred to another person(s), which may include a live feed of any social media application(s).
- “*Automated storage*”: Is acknowledged as primary evidence, when kept in various computer resource storage areas, each of these automatically generated storage spaces, including temporary files.

Electronic Record Admissibility

The BSA under Section 2(e)(2), includes the “*statement given electronically*”. This is accepted as under Section 2(e)(i), as Oral evidence. This new provision was contrary to Section 3(1) of IEA, where a statement was considered as oral evidence only if witnesses were permitted to speak in court. In the case of *Dr Kumar Saha v. Dr Sukumar Mukherjee*¹³ where, the Hon’ble Supreme Court, in 2011, permitted recording statements and conduct cross-examination of a witness through the medium of “*internet conferencing*”. This method was later adopted by various District/Trial Courts in India to collect evidence of under-trial prisoners for safety reasons. This judgment later became a set of norms which helped the judicial spear to incorporate technological advances in its day-to-day work. This new beginning also comes with various risks including perjury, which is as per the below paragraph.

One of the cases heard by the Hon’ble Supreme Court, recognized the development of technology, in the *State of Maharashtra v. Praful B. Desai*¹⁴, where the witness was a US based doctor, who was allowed to record the statement electronically in the court. It was observed by the court that in such cases there is a possibility that the witness is being coached/tutored/prompted, due to lack of control of a Court. This possibility if becomes true then it is a loss of justice. To remedy this, the Hon’ble Supreme Court, came out with a solution as per follows, which states that “*as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has*

¹¹Hardeep Singh vs. State of Punjab, 2014 (3) SCC 92: 2014 Cri. LJ 1118: 2014 (1) Crimes 133: AIR 2014 SC 1400: 2014 (1) Scale 241: JT 5 2014 (1) SC 412: 2014 (1) Ker. LT 336: 2014 (2) ALD (Cri) 152 (SC).

¹².BPR&D:(n.d.). Retrieved August 27, 2024, from <https://bprd.nic.in/>

¹³ (2011) 13 SCC 98

¹⁴ 2003 (4) SCC 601

an extradition treaty with India and under whose laws contempt of Court and perjury are also punishable.”¹⁵

A digital or electronic record cannot be excluded from admissibility under Section 61 of the BSA in the line of requirements outlined in Section 63 are fulfilled. The BSA under Section 63(1), includes “or any communication device or otherwise stored, recorded or copied in any electronic form”, which means computer output can be accepted either in “printed paper” or “stored” which is stored on a memory of a computer. This activity is also called “Computer Output”. The Ministry of Home Affairs in its Standard Operating Procedure for Audio Visual Recording of Scene of Crime, specified two categories. The First category is covered under Section 180 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) which is aimed to record statements of victims and witnesses, mandatory audio video search and seizure and for other procedures like identification parade, property disposal. The Second category covered digital devices which can be seized such as mobile, social media accounts, emails, computers, CCTV cameras etc. To admit the evidence from these two categories, Section 63(4), mandates a unified certificate from an expert. To reduce or eliminate the lacuna National Informatics Centre (NIC), developed software named “e-Sakshya” which uses blockchain technology.

Electronic Signature Certificates

We often use digital signatures and electronic signatures interchangeably, but it is not the same. The crux of the difference is that the digital signature uses a public key and the electronic signature uses a private key. The Information Technology (IT) Act, of 2000, Information Technology (Certifying Authorities) Rules, 2000.¹⁶ The electronic signature and certificate are expressly mentioned in Section 2(1)(t) of the IT Act and the governance is done through the Electronic Signature or Electronic Authentication Technique and Procedure Rules, 2015 (“ESEATPR”).¹⁷ In the current scenario, Section 41(2) of BSA is now a new combined version of Section 47 of IEA, which acknowledges the Electronic Signature Certificate issued by the Certifying Authority. The Central Government provided the Trusted Third Party Online Electronic Signature Service of CA through a website named eSign.¹⁸

The IT Act, under the First Schedule, recognizes the following documents which can be signed by electronic signatures:

- Negotiable instruments except a cheque;
- Power-of-attorney;
- Trust deeds;
- any other testamentary documents including will; and
- Contractual documents such as conveyance.

In one of the cases of the Hon’ble Delhi High Court, in Trimex International FZE Ltd v. Vedanta Aluminum Ltd¹⁹ The court upheld the validity by saying “the electronic signature has the same validity as a written signature”. This concept of law has been taken forward by the central government in Section 66 of BSA, which speaks about the burden of proof which may arise if the

¹⁵ Bhartiya Sakshya Adhinyam, 2023 - A Dynamic Shift to the Digital Era - ELP Law. (n.d.). Economic Laws Practice. <https://elplaw.in/leadership/bhartiya-sakshya-adhinyam-2023-a-dynamic-shift-to-the-digital-era/>

¹⁶ GOVERNMENT OF INDIA, Department of Electronics & Information Technology, & Controller of Certifying Authorities. (2000). ESign – Online Electronic Signature Service. In eSign [Report]. Controller of Certifying Authorities. <https://cca.gov.in/sites/files/pdf/esign/esignbrochure1.5.pdf>

¹⁷ Kumar, A. (2016, April 27). Notification [Press Release]. The Gazette Of India : Extraordinary; Controller Of Publications, Delhi. <https://www.meity.gov.in/writereaddata/files/Electronic%20signature%20rules%202016.pdf>

¹⁸ ESign | CCA. (n.d.). <https://cca.gov.in/eSign.html>

¹⁹ Srinivasan, B. (2011). Formation of Contract Through Emails in India: A Case Comment on Trimex v. Vedanta. SSRN Electronic Journal. <https://doi.org/10.2139/ssrn.2060866>

court observes when the unsecured eSign is affixed on the documents. If the situation is contrary, i.e. secure eSign was used, then the court shall presume that the used eSign belonged to the signer if proven contrary. This presumption was aligned with the “*authentication*” goal desired by the legislator.

Foreign Judicial Records

The old Section 86 of IEA and Section 88 of the BSA have undergone minor changes, including some text adjustments and section renumbering. Section 86 of the IEA originally included language from the British period, referring to “*any country not forming part of India or of Her Majesty’s Dominions*”. This text was replaced in Section 88 of the BSA 2023 with “*any country beyond India*” to refer to certified copies of foreign judicial records issued by a responsible authority of the Central Government. The new Section 88 of the BSA 2023 has updated and renumbered the sections, removing outdated British-era language and replacing it with more appropriate terms. The old Section 86 of the IEA mentioned “*Her Majesty’s Dominions*” for judicial records but did not specify that these records were from outside India. The new BSA now clarifies this by stating ‘any country beyond India’ to ensure the accuracy of foreign judicial record copies.

Electronic Record Preservation

The Court shall presume the integrity of electronically signed records is true if the documents in question are five years old and are obtained through the proper channel of custody as discussed above. This presumption of court can only be challenged if they are not obtained through a proper chain of custody.

Conclusion

We have seen that ancient and traditional concept of Evidence reached with today's “Electronic and Digital Age”. Due to tremendous development of digitalization, people are getting quick service by one click globally. India is a developing country and marching towards a welfare society. Whenever the changes take place there will be advantages and disadvantages with the such change also with the legal system of the country. Therefore the Indian Government has taken the very rational step with the new changes introduced by adjusting the most appropriate, efficient and empirical approach. The IEA was replaced by the BSA. It was made effective from 1st July, 2024, consisting of 170 Sections in total instead of 167 Sections of IEA. In the BSA, changes were made because there was an absolutely urgent need and situations created due to the modernized digital age.