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# (2020) 7 Supreme Court Cases 1 : (2020) 4 Supreme Court Cases (Civ) 1 : (2020) 3 Supreme Court Cases (Cri) 1 : (2020) 2 Supreme Court Cases (L&S) 587 : 2020 SCC OnLine SC 571

## In the Supreme Court of India

(BEFORE R.F. NARIMAN, S. RAVINDRA BHAT AND V. RAMASUBRAMANIAN, JJ.)

ARJUN PANDITRAO KHOTKAR . . Appellant;

*Versus*

KAILASH KUSHANRAO GORANTYAL AND OTHERS . . Respondents.

Civil Appeals Nos. 20825-826 of 2017† with Nos. 2407 of 2018† and 3696 of 2018†, decided on July 14, 2020

A. **Evidence Act, 1872 — S. 65-B(4) r/w Ss. 65-B(1) & 65-A and S. 22-A — (1) Production of certificate under S. 65-B(4) — Mandatory, but only in case of secondary evidence i.e. where primary evidence is not lead/original not produced — Oral admission e.g. by stepping into the witness box qua such document/electronic record — Non-consideration of, as compliance with such mandatory requirement of production of the S. 65-B(4) certificate**

**— (2) Primary and secondary evidence qua electronic records/documents — Distinguished between — Original electronic document — How can be produced in court and proved**

**— (3) Ruling in *Shafhi Mohammad*, (2018) 2 SCC 801 that Ss. 65-A and 65-B are not a complete code on the subject and that the requirement of a certificate under S. 64-B(4), being procedural, can be relaxed by court wherever the interest of justice so justifies, overruled and ruling in *Anvar P.V.*, (2014) 10 SCC 473, followed with clarification — Clarifying the ruling, held, the last sentence in para 24 in *Anvar P.V. case* which reads as "... if an electronic record as such is used as primary evidence under S. 62 of the Evidence Act ..." be read *without* the words "under S. 62 of the Evidence Act"**



**— (4) Requirement to produce S. 65-B(4) certificate in case of secondary evidence — When can be dispensed with by court (*see* Shortnote *B*)**

**— Held, the certificate required under S. 65-B(4) is a condition precedent to the admissibility of secondary evidence by way of electronic record i.e. as laid down in *Anvar P.V. case*, and incorrectly "clarified" in *Shafhi Mohammad case* — Further, oral evidence in the place of such certificate cannot suffice, as S. 65-B(4) is a mandatory requirement of the law and clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise — Further, S. 65-B differentiates between the original information contained in the "computer" itself and copies made therefrom — The former being primary evidence, and the latter being secondary evidence**

**— Held, the required certificate under S. 65-B(4) is unnecessary if the original document itself is produced and 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 device concerned, on which the original information is first stored, is owned and/or operated by him — However, 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, then the only means of providing information contained in such electronic record can be in accordance with S. 65-B(1), together with the requisite certificate under S. 65-B(4)**

**— Held (*per V. Ramasubramanian, J., supplementing*), what is laid down in S. 65-B as a precondition for the admission of an electronic record, resembles what is provided in the second part of S. 136 of the Evidence Act, and going by the requirements of S. 136, the computer output becomes admissible if the fact sought to be proved is relevant, but such a fact is admissible only upon proof of some other fact, namely, that it was extracted from a computer**

**used regularly, etc. — Information Technology Act, 2000, Ss. 2(1)(i), (j), (l), (o), (r) and (t)**

**(Paras 20 to 47, 61, 73.1 & 73.2; and 76 to 84)**

B. **Evidence Act, 1872 — S. 65-B(4) r/w S. 165 — Requirement to produce certificate under S. 65-B(4) in case of secondary electronic evidence — Dispensation of, where the party does everything in his power to obtain the requisite certificate from the appropriate authorities, including directions from the court to produce the requisite certificate, and still no such certificate is forthcoming e.g. where authorities concerned wilfully refuse, on some pretext or the other, to give such certificate — Requirement of "the party does everything in his power to obtain the requisite certificate" — When can be considered as having been complied with — 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 — Applicability of**

**— Held, in a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions of the Evidence Act, CPC or CrPC — Further, once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a**



summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate

**— Election petitions were filed by the respondents challenging the election of the returned candidate (the RC) alleging late presentation of nomination forms by the RC i.e. *after* the stipulated time of 3 p.m. — Video recordings were produced and also the Returning Officer of the Election Commission was examined but no written certificate as required by S. 65-B(4) of the Evidence Act was furnished by any of the election officials — In present case, on facts, held, respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom respondents had no control, must be relieved of the mandatory obligation of having produced the S. 65-B(4) certificate — Civil Procedure Code, 1908 — Or. 16 Rr. 6, 7 and 10 — Criminal Procedure Code, 1973 — Ss. 91 and 349 — Representation of the People Act, 1951 — Ss. 80 and 81 — Election — Conduct of Election — Candidature — Nomination/Nomination paper — Filing/Presentation of Nomination paper**

**(Paras 47 to 52)**

C. **Evidence Act, 1872 — S. 65-B(4) r/w S. 165 and Ss. 91, 207 & 311 CrPC — Certificate under S. 65-B(4) in a criminal case — Production of, generally prior to the commencement of trial — Permission to produce such certificate at a later point i.e. after commencement of trial — When grantable — Balancing of the rights of the parties — Must not result in serious or irreversible prejudice to the accused nor affect his right to a fair trial**

**— Held, the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet and the electronic evidence i.e. the computer output, has to be furnished at the latest before the trial begins — However, depending on the facts of each case, the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, may in appropriate cases allow the prosecution to produce such certificate at a later point in time — Subject to the balancing of the rights of the parties, and preventing serious or irreversible prejudice to the accused, so long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence — However, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage must not result in serious or irreversible prejudice to the accused — Criminal Trial — Proof — Electronic evidence — Criminal Procedure Code, 1973, Ss. 91, 207 and 311**

**(Paras 52 to 59)**

D. **Evidence Act, 1872 — Ss. 65-B(4), 39 & 45-A and 67-C of the IT Act, 2000 — Licence for Provision of Unified Access Services, 2007/Licence Agreement for Unified Licence and Licence Agreement for Provision of Internet Service — Directions issued qua maintenance of CDRs and other relevant records by cellular companies and internet service providers**

**— Directions issued to cellular companies and internet service providers to maintain CDRs**

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Page 3 Thursday, July 22, 2021
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**and other relevant records for the period concerned (in tune with S. 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period — Further,**



this direction to be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licences, or under S. 67-C of the IT Act

**— Held, appropriate rules and directions should be framed in exercise of the IT Act, by exercising powers such as in S. 67-C of the IT Act and also framing 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 metadata to avoid corruption — Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justices' Conference in April 2016 — Information Technology Act, 2000 — S. 67-C — Telecommunications Laws — Interception/Tapping of communications/Forensic use of Mobile phone/Satellite phone/GPS data — Criminal Trial — Clues and Tell-Tale Signs/Forensics — Mobile phone/Satellite phone/GPS data**

**(Paras 63, 64, 73.3 and 73.4)**

E. **Evidence Act, 1872 — S. 65-B(4) — Certificate under S. 65-B(4) — Who can give — Held, the person who gives the certificate can be anyone out of several persons who occupy a "responsible official position" in relation to the operation of the relevant device, as also the person who may otherwise be in the "management of relevant activities" spoken of in S. 65-B (4) — Further, the word "and" between knowledge and belief in S. 65-B(4) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time**

**— Civil Procedure Code, 1908 — Or. 16 Rr. 6, 7 and 10 — Criminal Procedure Code, 1973 — Ss. 91 and 349 — Interpretation of Statutes — Subsidiary Rules — Conjunctive or disjunctive — "And" when to be read as "or" — Evidence Act, 1872 — S. 14 — Testifying to the best of one's knowledge *and* belief — Whether possible**

**(Para 60)**

F. **Evidence Act, 1872 — Ss. 65-A and 65-B — Held, the special provisions of Ss. 65-A and 65-B are a complete code in themselves when it comes to admissibility of evidence of information contained in electronic records**

**(Para 36)**

G. **Evidence Act, 1872 — Ss. 65-B and 65 — Secondary evidence of contents of electronic document, held, cannot be led under S. 65, for instance to make CCTV footage admissible — *Tomaso Bruno*, (2015) 7 SCC 178, held per incuriam on this point — Ss. 65-A and 65-B are a complete code when it comes to admissibility of evidence of information contained in electronic records and secondary evidence of contents of electronic document can only be led in the manner explained in this judgment, in compliance with S. 65-B (*see* Shortnotes *A* and *B*)**

**(Paras 37, 40, 41 and 73.1)**

H. **Evidence Act, 1872 — Ss. 65-B(4) and 165 — Certificate under S. 65-B(4) — Production of — Power of court to direct — Held, an application can always be made to a Judge for production of such a certificate from the requisite person under S. 65-B(4) in cases in which such person refuses to give it — Civil Procedure Code, 1908 — Or. 16 Rr. 6, 7 and 10 — Criminal Procedure Code, 1973, Ss. 91 and 349**

**(Para 45)**



I. **Evidence Act, 1872 — S. 65-B(4) — Requirements for valid certificate under — Conditions specified in Ss. 65-B(4)(a) to (c), held, are cumulative in nature**

**— Certificate under S. 65-B(4) "doing *any* of the following things" under cls. (a) to (c), held,**

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**must be read as doing *all* of the following things, as "any" can mean "all" given the context — Thus, held, conditions mentioned in S. 65-B(4) are cumulative — Interpretation of Statutes — Construction of Words and Phrases — Conjunctive or disjunctive — "Any" when means "all"**

**(Para 25)**

J. **Election — Representation of the People Act, 1951 — S. 100(1)(d) — Improper acceptance of the nomination — When is sufficient for a declaration that the election is void — Pleading and proof that the result of the election of the returned candidate was materially affected — When not required**

**— Held, where the person whose nomination has been improperly accepted is the returned candidate himself, it may be readily conceded that the conclusion has to be that the result of the election would be "materially affected", without there being any necessity to plead and prove the same**

**(Para 72)**

Two election petitions were filed by the present respondents before the High Court under Sections 80 and 81 of the Representation of the People Act, 1951, challenging the election of the present appellant, namely, *APK*, who is the returned candidate (the RC).

The entirety of the case before the High Court had revolved around four sets of nomination papers that had been filed by the RC. It was the case of the present respondents that each set of nomination papers suffered from defects of a substantial nature and that, therefore, all four sets of nomination papers, having been improperly accepted by the Returning Officer of the Election Commission, one *M* (the RO), the election of the RC be declared void. In particular, it was the contention of the present respondents that the late presentation of Nomination Forms Nos. 43 and 44 by the RC — inasmuch as they were filed by the RC *after* the stipulated time of 3 p.m. on 27-9-2014 — rendered such nomination forms not being filed in accordance with the law, and ought to have been rejected.

Given the fact that allegations and counter-allegations were made as to the time at which the nomination forms were given to the RO, and that videography was available, the High Court, by its order dated 16-3-2016, ordered the Election Commission and the officers concerned to produce the entire record of the election of this Constituency, including the original video recordings. A specific order was made that this electronic record needs to be produced along with the "necessary certificates". In compliance with this order, such video recordings were produced by the Election Commission, together with a certificate issued with regard to the CDs/VCDs.

The High Court held in the impugned judgment that the CDs that were produced by the Election Commission could not be treated as an original record and would, therefore, have to be proved by means of secondary evidence. Finding that no written certificate as is required by Section 65-B(4) of the Evidence Act was furnished by any of the election officials, and more particularly, the RO, the High Court then held:

Page: 6

> "*69*. In substantive evidence, in the cross-examination of *M*, it is brought on the record that there was no complaint with regard to working of video cameras used by the office. …
>
> … Thus, on the basis of her substantive evidence, it can be said that the conditions mentioned in Section 65-B of the Evidence Act are fulfilled and she is certifying the electronic record as required by Section 65-B(4) of the Evidence Act. It can be said that Election Commission, the machinery avoided to give certificate in writing as required by Section 65-B(4) of the Evidence Act. But, substantive evidence is brought on record of competent officer in that regard. When the certificate expected is required to be issued on the basis of best of knowledge and belief, there is evidence on oath about it of *M*. Thus, there is something more than the contents of certificate mentioned in Section 65-B(4) of the Evidence Act in the present matters. Such evidence is not barred by the provisions of Section 65-B of the Evidence Act as that evidence is only on certification made by the responsible official position like RO. She was in charge of the management of the relevant activities and so, her evidence can be used and needs to be used as the compliance with the provision of Section 65-B of the Evidence Act. The High Court holds that there is compliance with the provision of Section 65-B of the Evidence Act in the present matter in respect of aforesaid electronic record and so, the information contained in the record can be used in the evidence."

In *Shafhi Mohammad*, (2018) 2 SCC 801 by an order dated 30-1-2018 made by two Judges of the Supreme Court, it was stated:

"... we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by 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 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."

The central issue involved in this reference was whether the two-Judge Bench decision of the Supreme Court in *Shafhi Mohammad case* required reconsideration i.e. whether requirement of a certificate could be done away with under Section 65-B(4) of the Evidence Act, 1872?

Answering the reference, and overruling *Shafhi Mohammad case*, the Supreme Court

*Held* :

***Per curiam***

Sections 65-A and 65-B occur in Chapter V of the Evidence Act which is entitled "Of Documentary Evidence". Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary evidence except in the circumstances hereinafter mentioned. Section 65 of the Evidence Act

Page: 7

is important, and states that secondary evidence may be given of "*the existence, condition or contents of a document in the following cases*...".

(Para 20)

Section 65 differentiates between existence, condition and contents of a document. Whereas "existence" goes to "admissibility" of a document, "contents" of a document are to be proved after a document becomes admissible in evidence. Section 65-A speaks of "contents" of electronic records being proved in accordance with the provisions of Section 65-B. Section 65-B speaks of "admissibility" of electronic records which deals with "existence" and "contents" of electronic records being proved once admissible into evidence.

(Para 21)

The subject-matter of Sections 65-A and 65-B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65-A indicates that "special provisions" as to evidence relating to electronic records are laid down in this provision. The marginal note to Section 65-B then refers to "admissibility of electronic records".

(Para 22)

Under sub-section (4) of Section 65-B, a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities", whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, "doing *any* of the following things...." must be read as doing *all* of the following things, it being well settled that the expression "any" can mean "all" given the context. This being the case, the conditions mentioned in Section 65-B(4) must also be interpreted as being cumulative.

(Para 25)

*Banwarilal Agarwalla* v. *State of Bihar*, (1962) 1 SCR 33 : AIR 1961 SC 849 : (1961) 2 Cri LJ 12, *relied on*

*Om Parkash* v. *Union of India*, (2010) 4 SCC 17 : (2010) 2 SCC (Civ) 1, *affirmed*

*Balak Ram Gupta* v. *Union of India*, 1987 SCC OnLine Del 227 : AIR 1987 Del 239; *Chief Inspector of Mines* v. *Lala Karam Chand Thapar*, AIR 1961 SC 838 : (1961) 2 Cri LJ 1, *cited*

An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc. the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. If an electronic

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record as such is used as primary evidence the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act.

(Para 26)

*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108, *clarified* and *followed* (clarification being qua deletion of the expression "*under Section 62 of the Evidence Act*")

*State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715, *held, overruled on this point*

*State* v. *Mohd. Afzal*, 2003 SCC OnLine Del 935 : (2003) 71 DRJ 178, *cited*

In UK law, as at present, no distinction is made between computer generated evidence and other evidence either qua the admissibility of, or the attachment of weight to, such evidence.

(Para 31)



Section 65-B of the Evidence Act, 1872 sub-section (1) begins with a non obstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "… *without further proof or production of the original* …" make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed document" now becomes admissible in evidence *without further proof or production of the original* as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

(Para 32)

The non obstante clause in Section 65-B(1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65-B, which is a special provision in this behalf — Sections 62 to 65 being irrelevant for this purpose. However, Section 65-B(1) clearly differentiates between the "original" document — which would be the original "electronic record" contained in the "computer" in which the original information is first stored — and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65-B differentiates between the original information contained in the "computer" itself and copies made therefrom — the former being primary evidence, and the latter being secondary evidence.

(Para 33)

Quite obviously, the requisite certificate in Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the IT Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65-B (1), together with the requisite certificate under Section 65-B(4).

(Para 34)

*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108, *clarified* and *followed*

*Vikram Singh* v. *State of Punjab*, (2017) 8 SCC 518 : (2017) 3 SCC (Cri) 641, *referred to*

*Vikram Singh* v. *State of Punjab*, (2010) 3 SCC 56 : (2010) 2 SCC (Cri) 26, *cited*

The special provisions of Sections 65-A and 65-B of the Evidence Act are a complete code in themselves when it comes to admissibility of evidence of information contained in electronic records, and a written certificate under Section 65-B(4) is a sine qua non for admissibility of such evidence when secondary evidence of an electronic record/document is sought to be led, as explained above.

(Para 36)

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What is clear from *Tomaso Bruno*, (2015) 7 SCC 178, is that the binding three-Judge Bench decision in *Anvar P.V.*, (2014) 10 SCC 473 was not referred to at all. In fact, the two-Judge Bench decision in *Navjot Sandhu*, (2005) 11 SCC 600 was adverted to in *Tomaso Bruno case*, which was a judgment specifically overruled on this point by *Anvar P.V. case*. It may also be stated that Section 65-B(4) was



also not at all adverted to in *Tomaso Bruno case*. Hence, the declaration of law in *Tomaso Bruno case* following *Navjot Sandhu case* that secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act to make CCTV footage admissible would be in the teeth of *Anvar P.V. case* and cannot be said to be a correct statement of the law on this point, being per incuriam.

(Paras 37, 40, 41 and 73.1)

*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108, *followed*

*Tomaso Bruno* v. *State of U.P.*, (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54, *held per incuriam on this point* (to the extent that secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act to make CCTV footage admissible)

*State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715; *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra*, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481, *cited*

The major premise of *Shafhi Mohammad*, (2018) 2 SCC 801 that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.

(Para 45)

*Ram Singh* v. *Ram Singh*, 1985 Supp SCC 611; *R.* v. *Maqsud Ali*, (1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA); *R.* v. *Robson*, (1972) 1 WLR 651 (CCC); *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826, *distinguished*

*Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865; *Shafhi Mohd.* v. *State of H.P.*, (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704, *overruled*

However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is *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.

(Para 47)

*Presidential Poll, In re*, (1974) 2 SCC 33; *Chandra Kishore Jha* v. *Mahavir Prasad*, (1999) 8 SCC 266; *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)*, (2002) 8 SCC 237; *Raj Kumar Yadav* v. *Samir Kumar Mahaseth*, (2005) 3 SCC 601; *Cochin State Power & Light Corpn. Ltd.* v. *State of Kerala*, (1965) 3 SCR 187 : AIR 1965 SC 1688, *relied on*

*Raj Kumar Dey* v. *Tarapada Dey*, (1987) 4 SCC 398; *B.P. Khemka (P) Ltd.* v. *Birendra Kumar Bhowmick*, (1987) 2 SCC 407; *Hira Tikkoo* v. *State (UT of Chandigarh)*, (2004) 6 SCC 765, *affirmed*

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*Tarapada Dey* v. *District Registrar, Hooghly*, 1986 SCC OnLine Cal 101 : AIR 1987 Cal 107, *cited*

On an application of the aforesaid maxims to the present case, it is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

(Para 51)

Section 65-B does not speak of the *stage* at which such certificate must be furnished to the court. Such certificate must accompany the electronic record when the same is produced in evidence. This is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of CrPC.

(Para 52)

*State of Karnataka* v. *M.R. Hiremath*, (2019) 7 SCC 515 : (2019) 3 SCC (Cri) 109 : (2019) 2 SCC (L&S) 380, *affirmed*

*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108, *clarified* and *followed*

*Union of India* v. *Ravindra V. Desai*, (2018) 16 SCC 273 : (2020) 1 SCC (Cri) 669 : (2019) 1 SCC (L&S) 225; *Sonu* v. *State of Haryana*, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663; *M.R. Hiremath* v. *State*, 2017 SCC OnLine Kar 4970, *cited*

The stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. Section 207 CrPC, is mandatory. Therefore, the electronic evidence i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement.

(Para 54)

In terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate



cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.

(Para 56)

*CBI* v. *R.S. Pai*, (2002) 5 SCC 82 : 2002 SCC (Cri) 950, *relied on*

Subject to the caveat laid down in paras 52 and 56 as to the balancing of the rights of the parties, so

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long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.

(Para 59)

*Paras Jain* v. *State of Rajasthan*, 2015 SCC OnLine Raj 8331; *Kundan Singh* v. *State*, 2015 SCC OnLine Del 13647 : (2016) 1 DLT (Cri) 144, *clarified* and *approved*

*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108; *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715, *cited*

The person who gives this certificate can be anyone out of several persons who occupy a "responsible official position" in relation to the operation of the relevant device, as also the person who may otherwise be in the "management of relevant activities" spoken of in Section 65-B(4). Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65-B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief". [Obviously, the word "and" between knowledge and belief in Section 65-B(4) must be read as "or", as a person cannot testify to the best of his knowledge *and* belief at the same time.]

(Para 60)

*K. Ramajayam* v. *State*, 2016 SCC OnLine Mad 451 : 2016 Cri LJ 1542, *overruled*

The certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

(Para 61)

*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108, *followed*

*Taylor* v. *Taylor*, (1875) LR 1 Ch D 426, *approved*

*Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865, *overruled*

The Department of Telecommunication's licence conditions [i.e. under the "Licence for Provision of Unified Access Services" framed in 2007, as also the subsequent "Licence Agreement for Unified Licence" and the "Licence Agreement for Provision of Internet Service"] generally oblige internet service providers and providers of mobile telephony to preserve and maintain electronic call records and records of logs of internet users for a limited duration of one year. Therefore, if the police or other individuals (interested, or party to any form of litigation) fail to secure those records — or secure the records but fail to secure the certificate — within that period, the production of a post-dated certificate (i.e. one issued after commencement of the trial) would in all probability render the data unverifiable. This places the accused in a perilous position, as, in the event the accused wishes to challenge the genuineness of this certificate by seeking the opinion of the Examiner of Electronic Evidence under Section 45-A of the Evidence Act, the electronic



record (i.e. the data as to call logs in the computer of the service provider) may be missing.

(Para 63)

To obviate this, general directions are issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the period concerned (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period. The parties concerned can then summon such records at the stage of defence evidence, or in the event such data is required to cross-examine a particular witness. This direction shall be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licences, or under Section 67-C of the IT Act.

(Para 64)

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*Kailash Kishanrao Gorantyal* v. *Arjun Panditrao Khotkar*, 2017 SCC OnLine Bom 9168, *affirmed*

*Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*, 2017 SCC OnLine SC 1983, *referred to*

***On the requirement of pleadings and particulars qua the election being "materially affected"***

Where the person whose nomination has been improperly accepted is the returned candidate himself, it may be readily conceded that the conclusion has to be that the result of the election would be "materially affected", without there being any necessity to plead and prove the same.

(Para 72)

*Vashist Narain Sharma* v. *Dev Chandra*, (1955) 1 SCR 509 : AIR 1954 SC 513; *Jagjit Singh* v. *Dharam Pal Singh*, 1995 Supp (1) SCC 422, *relied on*

*Mairembam Prithviraj* v. *Pukhrem Sharatchandra Singh*, (2017) 2 SCC 487; *Durai Muthuswami* v. *N. Nachiappan*, (1973) 2 SCC 45, *affirmed*

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***Per V. Ramasubramanian, J. (supplementing)***

**I. *Reasons for the acrimony behind Section 65-B***

Documentary evidence, in contrast to oral evidence, is required to pass through certain checkposts, such as : (*i*) admissibility, (*ii*) relevancy, and (*iii*) proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these checkposts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three checkposts, changes. Generally and theoretically, admissibility depends on relevancy. Under Section 136 of the Evidence Act, relevancy must be established before admissibility can be dealt with. Therefore, if we go by Section 136, a party should first show relevancy, making it the first checkpost and admissibility the second one. But some documents, such as those indicated in Section 68 of the Evidence Act, which pass the first checkpost of relevancy and the second checkpost of admissibility may be of no value unless the attesting witness is examined. Proof of execution of such documents, in a manner established by law, thus constitutes the third checkpost. Here again, proof of execution stands on a different footing than proof of contents.

(Para 76)

There are three parts to Section 136. The first part deals with the discretion of the Judge to admit the evidence, if he thinks that the fact sought to be proved is



relevant. The second part of Section 136 states that if the fact proposed to be proved is one, of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned. But this rule is subject to a small concession, namely, that *if the party undertakes to produce proof of the last mentioned fact later and the court is satisfied about such undertaking, the court may proceed to admit evidence of the first mentioned fact*. The third part of Section 136 deals with the relevancy of one alleged fact, which depends upon another alleged fact being first proved.

(Para 79)

What is laid down in Section 65-B as a precondition for the admission of an electronic record, resembles what is provided in the second part of Section 136.

(Para 81)

If we go by the requirements of Section 136, the computer output becomes admissible if the fact sought to be proved is relevant. But such a fact is admissible only upon proof of some other fact, namely, that it was extracted from a computer used regularly, etc. In simple terms, *what is contained in the computer output can be equated to the first mentioned fact and the requirement of a certification can be equated to the last mentioned fact, referred to in the second part of Section 136 read with Illustration (b) thereunder*.

(Para 83)

But Section 65-B(1) starts with a non obstante clause excluding the application of the other provisions

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and it makes the certification, a precondition for admissibility. While doing so, it does not talk about relevancy. In a way, Sections 65-A and 65-B, if read together, mix up both proof and admissibility, but not talk about relevancy. Section 65-A refers to the procedure prescribed in Section 65-B, *for the purpose of proving the contents of electronic records*, but Section 65-B speaks entirely about *the preconditions for admissibility*. As a result, Section 65-B places admissibility as the first or the outermost checkpost, capable of turning away even at the border, any electronic evidence, without any enquiry, if the conditions stipulated therein are not fulfilled.

(Para 84)

**II. *How the courts dealt with evidence in analogue form without legislative interference and the shift***

It is a matter of fact and record that courts all over the world were quick to adapt themselves to evidence in analogue form, within the framework of archaic, centuries old rules of evidence. It was not as if evidence in analogue form was incapable of being manipulated. But the courts managed the show well by applying time tested rules for sifting the actual from the manipulated.

(Para 86)

Stephen Mason:"*Electronic Evidence and the Meaning of "Original""*, 79 Amicus Curiae 26 (2009), *referred to*

The facility of operating in anonymity in the cyber space, has made electronic records more prone to manipulation and consequently to a greater degree of suspicion. Therefore, lawmakers interfered, sometimes making things easy for courts and sometimes creating a lot of confusion. But over a period of time, certain jurisdictions have come up with reasonably good solutions.

(Para 96)

*S. Pratap Singh* v. *State of Punjab*, (1964) 4 SCR 733 : AIR 1964 SC 72; *Yusufalli Esmail Nagree* v. *State of Maharashtra*, (1967) 3 SCR 720 : AIR 1968 SC 147 : 1968 Cri LJ 103; *N. Sri Rama Reddy* v. *V.V. Giri*, (1970) 2 SCC 340; *R.M. Malkani* v. *State of Maharashtra*, (1973) 1 SCC 471 : 1973 SCC (Cri) 399; *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra*, (1976) 2 SCC 17; *Ram Singh* v. *Ram Singh*, 1985 Supp SCC 611; *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826; *Sapporo Maru* v. *Statue of Liberty*, (1968) 1 WLR 739 : (1968) 2 All ER 195; *Harry Parker Ltd.* v. *Mason*, (1940) 2 KB 590 (CA); *R.* v. *Burr & Sullivan*, 1956 Crim



LR 442; *Hopes & Lavery* v. *H.M. Advocate*, 1960 Crim LR 566; *R.* v. *Mills*, (1962) 1 WLR 1152 : (1962) 3 All ER 298 (CCA); *R.* v. *Maqsud Ali*, (1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA); *R.* v. *Pettigrew*, (1980) 71 Cr App R 39; *Castle* v. *Cross*, (1984) 1 WLR 1372; *R.* v. *Robson Mitchell & Richards*, 1991 Crim LR 360, *referred to*

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**III. *Legislative developments in USA, UK and Canada on the admissibility of electronic records***

When our lawmakers passed the Information Technology Bill in the year 2000, adopting the language of Section 5 of the UK Civil Evidence Act, 1968 to a great extent, the said provision had already been repealed by the UK Civil Evidence Act, 1995 and even the Police and Criminal Evidence Act, 1984 was revamped by the 1999 Act to permit hearsay evidence, by repealing Section 69 of PACE, 1984.

(Para 112)

The major jurisdictions of the world have come to terms with the change of times and the development of technology and fine-tuned their legislations. Therefore, it is the need of the hour that there is a relook at Section 65-B of the Evidence Act, introduced 20 years ago, by Act 21 of 2000, and which has created a huge judicial turmoil, with the law swinging from one extreme to the other in the past 15 years.

(Para 120)

*Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*, (2020) 3 SCC 216 : (2020) 2 SCC (Cri) 34, *reference answered*

*State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715; *Anvar P.V.* v. *P.K.*

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Page 12 Thursday, July 22, 2021
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Appeals dismissed with costs VN-D/64920/CVRL

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70. (1962) 1 SCR 33 : AIR 1961 SC 849 : (1961) 2 Cri LJ 12, *Banwarilal Agarwalla* v. *State of Bihar* 2

71. AIR 1961 SC 838 : (1961) 2 Cri LJ 1, *Chief Inspector of Mines* v. *Lala Karam Chand Thapar* 2

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Page 17 Thursday, July 22, 2021
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72. 1960 Crim LR 566, *Hopes & Lavery* v. *H.M. Advocate* 66f

73. 1956 Crim LR 442, *R.* v. *Burr & Sullivan* 6

74. (1955) 1 SCR 509 : AIR 1954 SC 513, *Vashist Narain Sharma* v. *Dev Chandra* 60*d-e*, 60*e-f*, 61e

75. (1950) 2 KB 466, *Nicholas* v. *Penny* 81a

76. (1940) 2 KB 590 (CA), *Harry Parker Ltd.* v. *Mason* 66e

77. (1875) LR 1 Ch D 426, *Taylor* v. *Taylor* 56a

The Judgments* of the Court were delivered by

**R.F. NARIMAN, J.** (*Nariman, J. for himself, Ravindra Bhat and Ramasubramanian, JJ.; Ramasubramanian, J. supplementing as well*)— IA No. 134044 of 2019 for intervention in CAs Nos. 20825-26 of 2017 is allowed.

**2.** These civil appeals have been referred to a Bench of three Hon'ble Judges of this Court by a Division Bench reference order dated 26-7-2019[1], dealing with the interpretation of Section 65-B of the Evidence Act, 1872 ("the Evidence Act") by two judgments of this Court. In the reference order, after quoting from *Anvar P.V.* v. *P.K. Basheer*[2] (a three-Judge Bench decision of this Court), it was found that a Division Bench judgment in *Shafhi Mohammad* v. *State of H.P.*[3] may need reconsideration by a Bench of a larger strength.

**3.** The brief facts necessary to appreciate the controversy in the present case, as elucidated in Civil Appeals Nos. 20825-26 of 2017, are as follows:

**3.1.** Two election petitions were filed by the present respondents before the Bombay High Court under Sections 80 and 81 of the Representation of the People Act, 1951, challenging the election of the present appellant, namely, Shri Arjun Panditrao Khotkar [who is the returned candidate (hereinafter referred to as "the RC") belonging to the Shiv Sena Party from 101-Jalna Legislative Assembly Constituency] to the Maharashtra State Legislative Assembly for the term commencing November 2014. Election Petition No. 6 of 2014 was filed by the defeated Congress (I) candidate Shri Kailash Kishanrao Gorantyal, whereas Election Petition No. 9 of 2014 was filed by one Shri Vijay Chaudhary, an elector in the said constituency. The margin of victory for the RC was extremely narrow, namely, 296 votes, the RC having secured 45,078 votes, whereas Shri Kailash Kishanrao Gorantyal secured 44,782 votes.

**3.2.** The entirety of the case before the High Court had revolved around four sets of nomination papers that had been filed by the RC. It was the case of the



present respondents that each set of nomination papers suffered from defects of a substantial nature and that, therefore, all four sets of nomination papers, having been improperly accepted by the Returning Officer of the Election Commission, one Smt Mutha (hereinafter referred to as "the RO"), the election of the RC be declared void. In particular, it was the contention of the present respondents that the late presentation of Nomination Forms Nos. 43 and 44 by the RC — inasmuch as they were filed by the RC *after* the stipulated time of 3.00 p.m. on 27-9-2014 — rendered such nomination forms not being

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filed in accordance with the law, and ought to have been rejected.

**3.3.** In order to buttress this submission, the respondents sought to rely upon video-camera arrangements that were made both inside and outside the office of the RO. According to the respondents, the nomination papers were only offered at 3.53 p.m. (i.e. beyond 3.00 p.m.), as a result of which it was clear that they had been filed out of time. A specific complaint making this objection was submitted by Shri Kailash Kishanrao Gorantyal before the RO on 28-9-2014 at 11.00 a.m., in which it was requested that the RO reject the nomination forms that had been improperly accepted. This request was rejected by the RO on the same day, stating that the nomination forms had, in fact, been filed within time.

**4.** Given the fact that allegations and counter-allegations were made as to the time at which the nomination forms were given to the RO, and that videography was available, the High Court, by its order dated 16-3-2016[4], ordered the Election Commission and the officers concerned to produce the entire record of the election of this Constituency, including the original video recordings. A specific order was made that this electronic record needs to be produced along with the "necessary certificates".

**5.** In compliance with this order, such video recordings were produced by the Election Commission, together with a certificate issued with regard to the CDs/VCDs, which read as follows:

"*Certificate*

This is to certify that the CDs in respect of video recording done on two days of filing nomination forms of date 26-9-2014 and 27-9-2014 which were present in the record are produced.

sd/-
Asst. Returning Officer 101, Jalna Legislative Assembly Constituency/Tahsildar Jalna

sd/-
Returning Officer 101, Jalna Legislative Assembly Constituency/Tahsildar Jalna"

**6.** Transcripts of the contents of these CDs/VCDs were prepared by the High Court itself. Issues 6 and 7 as framed by the High Court (and its answers to these issues) are important, and are set out in the impugned judgment



dated 24-11-2017[5], and extracted hereinbelow : (*Kailash Kishanrao Gorantyal case*[5], SCC OnLine Bom para 26)

"*26. … Issues* | | *Findings*

| | | |
|---|---|---|
| 6. | Whether the petitioner proves that the nomination papers at Sl. Nos. 43 and 44 were not presented by respondent/returned candidate before 3.00 p.m. on 27-9-2014? | Affirmative. (Nomination papers at Sl. Nos. 43 and 44 were not presented by RC before 3.00 p.m. of 27-9-2014.) |
| 7. | Whether the petitioner proves that the respondent/returned candidate submitted original Forms A and B along with nomination papers only on 27-9-2014 after 3.00 p.m. and along with nomination paper at Sl. No. 44? | Affirmative. (A, B Forms were presented after 3.00 p.m. of 27-9-2014.)" |

**7.** In answering Issues 6 and 7, the High Court recorded : (*Kailash Kishanrao Gorantyal case*[5], SCC OnLine Bom para 66)

"*66.* Many applications were given by the petitioner of Election Petition No. 6 of 2014

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to get the copies of electronic record in respect of aforesaid incidents with certificate as provided in Section 65-B of the Evidence Act. The correspondence made with them show that even after leaving of the office by Smt Mutha, the government machinery, in charge of the record, intentionally avoided to give certificate as mentioned in Section 65-B of the Evidence Act. After production of the record in the Court in this regard, this Court had allowed[4] to Election Commission by order to give copies of such record to applicants, but after that also the authority avoided to give copies by giving lame excuses. It needs to be kept in mind that the RC is from political party which has alliance with ruling party, BJP, not only in the State, but also at the Centre. It is unfortunate that the machinery which is expected to be fair did not act fairly in the present matter. The circumstances of the present matter show that the aforesaid two officers tried to cover up their mischief. However, the material gives only one inference that Nomination Forms Nos. 43 and 44 with A, B Forms were presented before the RO by RC after 3.00 p.m. of 27-9-2014 and they were not handed over prior to 3.00 p.m. In view of the objection of the learned counsel of the RC to using the information contained in aforesaid VCDs, marked as Articles A-1 to A-6, this Court had made an order on 11-7-2017[6]



that the objections will be considered in the judgment itself. These VCDs are already exhibited by this Court as Exts. 70 to 75. Thus, if the contents of the aforesaid VCDs can be used in the evidence, then the petitioners are bound to succeed in the present matters."

**8.** The High Court then set out Sections 65-A and 65-B of the Evidence Act, and referred to this Court's judgment in *Anvar P.V.*[2] The Court held in para 71 of the impugned judgment[5] that the CDs that were produced by the Election Commission could not be treated as an original record and would, therefore, have to be proved by means of secondary evidence. Finding that no written certificate as is required by Section 65-B(4) of the Evidence Act was furnished by any of the election officials, and more particularly, the RO, the High Court then held[5] : (*Kailash Kishanrao Gorantyal case*[5], SCC OnLine Bom para 75)

"*75*. In substantive evidence, in the cross-examination of Smt Mutha, it is brought on the record that there was no complaint with regard to working of video cameras used by the office. She has admitted that the video cameras were regularly used in the office for recording the aforesaid incidents and daily VCDs were collected of the recording by her office. This record was created as the record of the activities of the Election Commission. It is brought on the record that on the first floor of the building, arrangement was made by keeping electronic gadgets like VCR players, etc. and arrangement was made for viewing the recording. It is already observed that under her instructions, the VCDs were marked of this recording. Thus, on the basis of her substantive evidence, it can be said that the conditions mentioned in Section 65-B of the Evidence Act are fulfilled and she is certifying the electronic record as required by Section 65-B(4) of the Evidence Act. It can be said that the Election Commission, the machinery avoided to give certificate in writing as required by Section 65-B(4) of the Evidence Act. But, substantive evidence is brought on record of competent officer in that regard. When the certificate expected is required to be issued on the basis of best of knowledge and belief, there is evidence on oath about it of Smt Mutha. Thus, there is something more than the contents of certificate mentioned in Section 65-B(4) of the Evidence Act in the present matters. Such evidence is not barred by the provisions of Section 65-B of the Evidence Act as that evidence is only on certification made by the responsible official position like RO. She was in charge of the management of the relevant activities and so, her evidence can be used and needs to be used as the

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compliance with the provisions of Section 65-B of the Evidence Act. This Court holds that there is compliance with the provisions of Section 65-B of the Evidence Act in the present matter in respect of aforesaid electronic record and so, the information contained in the record can be used in the evidence."

Based, therefore, on "substantial compliance" of the requirement of giving a certificate under Section 65-B of the Evidence Act, it was held that the CDs/



VCDs were admissible in evidence, and based upon this evidence it was found that, as a matter of fact, the nomination forms by the RC had been improperly accepted. The election of the RC was, therefore, declared void in the impugned judgment[5].

**9.** Shri Ravindra Adsure, learned advocate appearing on behalf of the appellant, submitted that the judgment in *Anvar P.V.*[2] covered the case before us. He argued that without the necessary certificate in writing and signed under Section 65-B(4) of the Evidence Act, the CDs/VCDs upon which the entirety of the judgment rested could not have been admitted in evidence. He referred to *Tomaso Bruno* v. *State of U.P.*[7], and argued that the said judgment did not notice either Section 65-B or *Anvar P.V.*[2], and was therefore *per incuriam*. He also argued that *Shafhi Mohammad*[3], being a two-Judge Bench of this Court, could not have arrived at a finding contrary to *Anvar P.V.*[2], which was the judgment of three Hon'ble Judges of this Court. In particular, he argued that it could not have been held in *Shafhi Mohammad*[3] that whenever the interest of justice required, the requirement of a certificate could be done away with under Section 65-B(4). Equally, this Court's judgment dated 3-4-2018, reported as *Shafhi Mohd.* v. *State of H.P.*[8], which merely followed the law laid down in *Shafhi Mohammad*[3], being contrary to the larger Bench judgment in *Anvar P.V.*[2], should also be held as not having laid down good law. He further argued that the Madras High Court judgment in *K. Ramajayam* v. *State*[9], being contrary to *Anvar P.V.*[2], also does not lay down the law correctly, in that it holds that evidence *aliunde*, that is outside Section 65-B, can be taken in order to make electronic records admissible. In the facts of the present case, he contended that since it was clear that the requisite certificate had not been issued, no theory of "substantial compliance" with the provisions of Section 65-B(4), as was held by the impugned judgment[5], could possibly be sustained in law.

**10.** Ms Meenakshi Arora, learned Senior Advocate appearing on behalf of the respondents, has taken us in copious detail through the facts of this case, and has argued that the High Court has directed the Election Commission to produce before the Court the original CDs/VCDs of the video recording done at the office of the RO, along with the necessary certificate. An application dated 16-8-2016 was also made to the District Election Commission and RO as well as the Assistant RO for the requisite certificate under Section 65-B. A reply was given on 14-9-2016, that this certificate could not be furnished since the matter was sub judice. Despite this, later on, on 26-7-2017 her client wrote to the authorities again requesting for issuance of certificate under Section 65-B, but by replies dated 31-7-2017 and 2-8-2017, no such certificate



was forthcoming. Finally, after having run from pillar to post, her client applied on 26-8-2017 to the Chief Election Commissioner, New Delhi, stating that the authorities were refusing to give her client the necessary certificate under Section 65-B and that the Chief Election Commissioner should therefore ensure that it be given to them. To this communication, no reply was forthcoming from the Chief Election Commissioner, New Delhi. Given this, the High Court at several places had observed in the course of the

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impugned judgment that the authorities deliberately refused, despite being directed, to supply the requisite certificate under Section 65-B, as a result of which the impugned judgment correctly relied upon the oral testimony of the RO herself. According to Ms Arora, such oral testimony taken down in the form of writing, which witness statement is signed by the RO, would itself amount to the requisite certificate being issued under Section 65-B (4) in the facts of this case, as was correctly held by the High Court.

**11.** Quite apart from this, Ms Arora also stated that — independent of the finding given by the High Court by relying upon CDs/VCDs — the High Court also relied upon other documentary and oral evidence to arrive at the finding that the RC had not handed over nomination forms directly to the RO at 2.20 p.m. (i.e. before 3 p.m.). In fact, it was found on the basis of this evidence that the nomination forms were handed over and accepted by the RO only *after* 3.00 p.m. and were therefore improperly accepted, as a result of which, the election of the appellant was correctly set aside.

**12.** On law, Ms Arora argued that it must not be forgotten that Section 65-B is a procedural provision, and it cannot be the law that even where a certificate is impossible to get, the absence of such certificate should result in the denial of crucial evidence which would point at the truth or falsehood of a given set of facts. She, therefore, supported the decision in *Shafhi Mohammad*[3], stating that *Anvar P.V.*[2] could be considered to be good law only in situations where it was possible for the party to produce the requisite certificate. In cases where this becomes difficult or impossible, the interest of justice would require that a procedural provision be not exalted to such a level that vital evidence would be shut out, resulting in manifest injustice.

**13.** Shri Vikas Upadhyay, appearing on behalf of the intervenor, took us through the various provisions of the Information Technology Act, 2000 along with Section 65-B of the Evidence Act, and argued that Section 65-B does not refer to the stage at which the certificate under Section 65-B(4) ought to be furnished. He relied upon a judgment of the High Court of Rajasthan as well as the High Court of Bombay, in addition to *Kundan Singh* v. *State*[10] of the Delhi High Court, to argue that the requisite certificate need not necessarily be given at the time of tendering of evidence but could be at a subsequent stage of the proceedings, as in cases where the requisite certificate is not forthcoming due



to no fault of the party who tried to produce it, but who had to apply to a Judge for its production. He also argued that *Anvar P.V.*[2] required to be clarified to the extent that Sections 65-A and 65-B being a complete code as to admissibility of electronic records, the "baggage" of primary and secondary evidence contained in Sections 62 and 65 of the Evidence Act should not at all be adverted to, and that the drill of Sections 65-A and 65-B alone be followed when it comes to admissibility of information contained in electronic records.

**14.** It is now necessary to set out the relevant provisions of the Evidence Act and the Information Technology Act, 2000. Section 3 of the Evidence Act defines "document" as follows:

> "**3.** … "***Document***".— "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, intended to be used, or which may be used, for the purpose of recording that matter."

"Evidence" in Section 3 is defined as follows:

> "**3.** … "***Evidence***".— "Evidence" means and includes—
>
> (1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

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such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the court;

such documents are called documentary evidence."

**15.** The Evidence Act also declares that the expressions "certifying authority", "electronic signature", "electronic signature certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure digital signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act.

**16.** Section 22-A of the Evidence Act, which deals with the relevance of oral admissions as to contents of electronic records, reads as follows:

"**22-A.** ***When oral admission as to contents of electronic records are relevant***. —Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question."

**17.** Section 45-A of the Evidence Act, on the opinion of the Examiner of Electronic Evidence, then states:

"**45-A.** ***Opinion of Examiner of Electronic Evidence***.—When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence

Page: 24

referred to in Section 79-A of the Information Technology Act, 2000 (21 of 2000), is a relevant fact.

*Explanation*.—For the purposes of this section, an Examiner of Electronic Evidence shall be an expert."

**18.** Sections 65-A and 65-B of the Evidence Act read as follows:

"**65-A.** ***Special provisions as to evidence relating to electronic record***.—The contents of electronic records may be proved in accordance with the provisions of Section 65-B.

**65-B.** ***Admissibility of electronic records***.—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (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 of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(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 during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(*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 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

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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.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (*a*) of sub-section (2) was regularly performed by computers, whether—

(*a*) by a combination of computers operating over that period; or

(*b*) by different computers operating in succession over that period; or

(*c*) by different combinations of computers operating in succession over that period; 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,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings 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—

(*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;

(*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 device or the management of the relevant activities (whichever is appropriate) 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.

(5) For the purposes of this section,

(*a*) information shall be taken to be supplied to a computer 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*) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

*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."

**19.** The following definitions as contained in Section 2 of the Information Technology

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Act, 2000 are also relevant:

"**2. (1)(*i*)** "**computer**" means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or



optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network;

**(*j*)** "**computer network**" means the inter-connection of one or more computers or computer systems or communication device through—

(*i*) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and

(*ii*) terminals or a complex consisting of two or more inter-connected computers or communication device whether or not the inter-connection is continuously maintained;

* * *

**(*l*)** "**computer system**" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions;

* * *

**(*o*)** "**data**" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

* * *

**(*r*)** "**electronic form**" with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

* * *

**(*t*)** "**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;"

**20.** Sections 65-A and 65-B occur in Chapter V of the Evidence Act which is entitled "Of Documentary Evidence". Section 61 of the Evidence Act deals with the proof of contents of documents, and states that the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act defines primary evidence as meaning the document itself produced for the inspection of the court. Section 63 of the Evidence Act speaks of the kind or types of secondary evidence by which documents may be proved. Section 64 of the Evidence Act then enacts that documents must be proved by primary evidence except in the circumstances



hereinafter mentioned. Section 65 of the Evidence Act is important, and states that

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secondary evidence may be given of "*the existence, condition or contents of a document in the following cases …*".

(emphasis supplied)

**21.** Section 65 differentiates between existence, condition and contents of a document. Whereas "existence" goes to "admissibility" of a document, "contents" of a document are to be proved *after* a document becomes admissible in evidence. Section 65-A speaks of "contents" of electronic records being proved in accordance with the provisions of Section 65-B. Section 65-B speaks of "admissibility" of electronic records which deals with "existence" and "contents" of electronic records being proved once admissible into evidence. With these prefatory observations let us have a closer look at Sections 65-A and 65-B.

**22.** It will first be noticed that the subject-matter of Sections 65-A and 65-B of the Evidence Act is proof of information contained in electronic records. The marginal note to Section 65-A indicates that "special provisions" as to evidence relating to electronic records are laid down in this provision. The marginal note to Section 65-B then refers to "admissibility of electronic records".

**23.** Section 65-B(1) opens with a non obstante clause, and makes it clear that any information that is contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document, and shall be admissible in any proceedings without further proof of production of the original, as evidence of the contents of the original or of any facts stated therein of which direct evidence would be admissible. The deeming fiction is for the reason that "document" as defined by Section 3 of the Evidence Act does not include electronic records.

**24.** Section 65-B(2) then refers to the conditions that must be satisfied in respect of a computer output, and states that the test for being included in conditions 65-B(2)(*a*) to 65-B(2)(*d*) is that the computer be regularly used to store or process information for purposes of activities regularly carried on in the period in question. The conditions mentioned in sub-sections (2)(*a*) to (2)(*d*) must be satisfied cumulatively.

**25.** Under sub-section (4), a certificate is to be produced that identifies the electronic record containing the statement and describes the manner in which it is produced, or gives particulars of the device involved in the production of the electronic record to show that the electronic record was produced by a computer, by either a person occupying a responsible official position in relation to the operation of the relevant device; or a person who is in the management of "relevant activities" — whichever is appropriate. What is also of importance is that it shall be sufficient for such matter to be stated to the "best of the knowledge and belief of the person stating it". Here, "doing *any* of the following things …" must be read as doing *all* of the following things, it being



well settled that the expression "any" can mean "all" given the context (*see*, for example, this Court's judgments in *Banwarilal Agarwalla* v. *State of Bihar*[11] and *Om Parkash* v. *Union of India*[12]). This being the case, the conditions mentioned in Section 65-B(4) must also be interpreted as being cumulative.

**26.** It is now appropriate to examine the manner in which Section 65-B was interpreted by this Court. In *Anvar P.V.*[2], a three-Judge Bench of this Court, after setting out Sections 65-A and 65-B of the Evidence Act, held : (SCC pp. 483-86, paras 14-18 & 20-24)

> "*14*. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence

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in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

(*i*) The electronic record containing the information should have been produced by the computer during the period over which the same



was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(*ii*) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(*iii*) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(*iv*) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

*15*. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(*a*) There must be a certificate which identifies the electronic record containing the statement;

(*b*) The certificate must describe the manner in which the electronic record was produced;

(*c*) The certificate must furnish the particulars of the device involved in the production of that record;

(*d*) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and

(*e*) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

*16*. It is further clarified that 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.

*17*. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to

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Page 27 Thursday, July 22, 2021
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Page: 30

the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.

*18*. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

* * *

*20*. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

*21*. In *State (NCT of Delhi)* v. *Navjot Sandhu*[13] a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows : (SCC p. 714)

'*150*. According to Section 63, "secondary evidence" means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed[14] at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.'

Page: 31

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

*22*. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63

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Page 28 Thursday, July 22, 2021
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and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in *Navjot Sandhu case*[13], does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc. the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

*23*. The appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

*24*. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not



satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."

**27.** Shri Upadhyay took exception to the language of para 24 in this judgment. According to the learned counsel, primary and secondary evidence as to documents, referred to in Section 61 to Section 65 of the Evidence Act, should be kept out of admissibility of electronic records, given the fact that Sections 65-A and 65-B are a complete code on the subject.

**28.** At this juncture, it is important to note that Section 65-B has its genesis in Section 5 of the Civil Evidence Act, 1968 (UK), which reads as follows:

"**5.** ***Admissibility of statements produced by computers***.—(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in sub-section (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are—

(*a*) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

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(*b*) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(*c*) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(*d*) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in sub-section (2)(*a*) above was regularly performed by computers, whether—

(*a*) by a combination of computers operating over that period; or

(*b*) by different computers operating in succession over that period; or



(*c*) by different combinations of computers operating in succession over that period; 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,

all the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings 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—

(*a*) identifying the document 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 document as may be appropriate for the purpose of showing that the document was produced by a computer;

(*c*) dealing with any of the matters to which the conditions mentioned in sub-section (2) above relate,

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) 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.

(5) For the purposes of this Part of this Act—

(*a*) information shall be taken to be supplied to a computer 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*) where, in the course of activities carried on by any individual or body, 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*) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any

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Page 30 Thursday, July 22, 2021
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appropriate equipment.

(6) Subject to sub-section (3) above, in this Part of this Act "computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process."



**29.** It may be noticed that sub-sections (2) to (5) of Section 65-B of the Evidence Act are a reproduction of sub-sections (2) to (5) of Section 5 of the Civil Evidence Act, 1968, with minor changes[15]. The definition of "computer"



under Section 5(6) of the Civil Evidence Act, 1968 was not, however, adopted by Section 2 (*i*) of the Information Technology Act, 2000, which as noted above, is a "means and includes" definition of a much more complex and intricate nature. It is also important to note Sections 6(1) and (5) of the Civil Evidence Act, 1968, which state as follows:

"**6.** ***Provisions supplementary to Sections 2 to 5***.—(1) Where in any civil proceedings a statement contained in a document is proposed to be given in evidence by virtue of Section 2, 4 or 5 of this Act it may, subject to any rules of court, be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

* * *

(5) If any person in a certificate tendered in evidence in civil proceedings by virtue of Section 5(4) of this Act wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both."

**30.** Section 6(1), in essence, maintains the dichotomy between proof by "primary" and "secondary" evidence — proof by production of the "document" itself being primary evidence, and proof by production of a copy of that document, as authenticated, being secondary evidence. Section 6(5), which gives teeth to the person granting the certificate mentioned in Section 5(4) of the Act, by punishing false statements wilfully made in the certificate, has not been included in the Evidence Act. These sections have since been repealed by the Civil Evidence Act, 1995 (UK), pursuant to a UK Law Commission Report published in September 1993 (Law Com. No. 216), by which the strict rule as to hearsay evidence was relaxed, and hearsay evidence was made admissible in the circumstances mentioned by the Civil Evidence Act, 1995. Sections 8, 9 and 13 of this Act are important, and are set out hereinbelow:

"**8.** ***Proof of statements contained in documents***.—(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved—

(*a*) by the production of that document, or

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Page 31 Thursday, July 22, 2021
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(*b*) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.

(2) It is immaterial for this purpose how many removes there are between a copy and the original.

**9. *Proof of records of business or public authority***.—(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.

For this purpose—

(*a*) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and

(*b*) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.

(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(4) In this section—

"**records**" means records in whatever form;

"**business**" includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

"**officer**" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

"**public authority**" includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.

(5) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or description of documents or records."

Section 13 of this Act defines "document" as follows:

"**13.** … "**document**" means anything in which information of any description is recorded, and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;"

**31.** Section 15(2) of this Act repeals enactments mentioned in Schedule II therein; and Schedule II repeals Part I of the Civil Evidence Act, 1968 — of which Sections 5 and 6 were a part. The definition of "records" and "document" in this Act would show that electronic records are considered to be part of "document" as defined, needing no separate treatment as to



admissibility or proof. It is thus clear that in UK law, as at present, no distinction is made between computer generated evidence and other evidence either qua the admissibility of, or the attachment of weight to, such evidence.

**32.** Coming back to Section 65-B of the Evidence Act, sub-section (1) needs to be analysed. The sub-section begins with a non obstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a

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Page 32 Thursday, July 22, 2021
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SCC Online Web Edition: http://www.scconline.com

deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "… *without further proof or production of the original* …" make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the section, the "deemed document" now becomes admissible in evidence *without further proof or production of the original* as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

**33.** The non obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65-B, which is a special provision in this behalf — Sections 62 to 65 being irrelevant for this purpose. However, Section 65-B(1) clearly differentiates between the "original" document — which would be the original "electronic record" contained in the "computer" in which the original information is first stored — and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65-B differentiates between the original information contained in the "computer" itself and copies made therefrom — the former being primary evidence, and the latter being secondary evidence.

**34.** Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the court, then the only means of proving information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). This being the case, it is necessary to clarify what is contained in the last sentence in para 24 of *Anvar P.V.*[2] which reads as "… *if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act …*". This may more appropriately be



read without the words "*under Section 62 of the Evidence Act,…*". With this minor clarification, the law stated in para 24 of *Anvar P.V.*[2] does not need to be revisited.

**35.** In fact, in *Vikram Singh* v. *State of Punjab*[16], a three-Judge Bench of this Court followed the law in *Anvar P.V.*[2], clearly stating that where primary evidence in electronic form has been produced, no certificate under Section 65-B would be necessary. This was so stated as follows : (SCC pp. 531-32, paras 25-26)

> "*25*. The learned counsel contended that the tape-recorded conversation has been relied on without there being any certificate under Section 65-B of the Evidence Act, 1872. It was contended that audio tapes are recorded on magnetic media, the same could be established through a certificate under Section 65-B and in the absence of the certificate, the document which constitutes electronic record, cannot be deemed to be a valid evidence and has to be ignored from consideration. Reliance has been placed by the learned counsel on the judgment of this Court in *Anvar P.V.* v. *P.K. Basheer*[2]. The conversation on the landline phone of the complainant situate in a shop was recorded by the complainant. The same cassette containing conversation by which ransom call was made on the landline phone was handed over by the complainant in original to the police. This Court in its judgment dated 25-1-2010[17] has referred to the aforesaid fact and has noted the said fact to the following effect : (*Vikram Singh case*[17], SCC p. 61, para 5)

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Page 33 Thursday, July 22, 2021
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'*5*. … The cassette on which the conversations had been recorded on the landline was handed over by Ravi Verma to SI Jiwan Kumar and on a replay of the tape, the conversation was clearly audible and was heard by the police.'

*26*. The tape-recorded conversation was not secondary evidence which required certificate under Section 65-B, since it was the original cassette by which ransom call was tape-recorded, there cannot be any dispute that for admission of secondary evidence of electronic record a certificate as contemplated by Section 65-B is a mandatory condition."[18]

**36.** Despite the law so declared in *Anvar P.V.*[2], wherein this Court made it clear that the special provisions of Sections 65-A and 65-B of the Evidence Act are a complete code in themselves when it comes to admissibility of evidence of information contained in electronic records, and also that a written certificate



under Section 65-B(4) is a sine qua non for admissibility of such evidence, a discordant note was soon struck in *Tomaso Bruno*[7]. In this judgment, another three-Judge Bench dealt with the admissibility of evidence in a criminal case in which CCTV footage was sought to be relied upon in evidence. The Court held : (*Tomaso Bruno case*[7], SCC pp. 191-92, paras 24-25)

"*24*. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents stricto sensu are admitted as material evidence. With the amendment to the Evidence Act in 2000, Sections 65-A and 65-B were introduced into Chapter V relating to documentary evidence. Section 65-A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65-B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65-B of the Evidence Act. Sub-section (1) of Section 65-B makes admissible as a document, paper printout of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65-B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW 13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

*25*. The production of scientific and electronic evidence in court as contemplated under Section 65-B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra*[19], wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in *State (NCT of Delhi)* v. *Navjot Sandhu*[13], the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers."

**37.** What is clear from this judgment is that the judgment of *Anvar P.V.*[2] was not referred to at all. In fact, the judgment in *State (NCT of Delhi)* v. *Navjot Sandhu*[13] was adverted to, which was a judgment specifically overruled

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Page 34 Thursday, July 22, 2021
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by *Anvar P.V.*[2] It may also be stated that Section 65-B(4) was also not at all adverted to by this judgment. Hence, the declaration of law in *Tomaso Bruno*[7] following *Navjot Sandhu*[13] that secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act to make CCTV footage admissible would be in the teeth of *Anvar P.V.*[2] and cannot be said to be a correct statement of the law. The said view is accordingly overruled.

**38.** We now come to the decision in *Shafhi Mohammad*[3]. In this case, by an order dated 30-1-2018 made by two Judges of this Court, it was stated : (SCC pp. 808-11, paras 21-30)

> "*21*. We have been taken through certain decisions which may be referred to. In *Ram Singh* v. *Ram Singh*[20], a three-Judge Bench considered the said issue. English judgments in *R.* v. *Maqsud Ali*[21] and *R.* v. *Robson*[22] and American Law as noted in *American Jurisprudence* 2d (Vol. 29) p. 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording, it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.
>
> *22*. In *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*[23], the same principle was reiterated. This Court observed that new techniques and devices are the 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.
>
> *23*. In *Tomaso Bruno* v. *State of U.P.*[7], a three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an



investigating agency. Reference was made to the decisions of this Court in *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra*[19] and *State (NCT of Delhi)* v. *Navjot Sandhu*[13].

> *24*. We may, however, also refer to the judgment of this Court in *Anvar P.V.* v. *P.K. Basheer*[2], delivered by a three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65-B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65-B of the Evidence Act was required to be followed and a contrary view taken in *Navjot Sandhu*[13] that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65-B of the Evidence Act.
>
> *25*. Though in view of the three-Judge Bench judgments in *Tomaso Bruno*[7] and *Ram Singh*[20], it can be safely held that electronic evidence is admissible and provisions under Sections 65-A and 65-B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the court being satisfied about its authenticity and

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Page 35 Thursday, July 22, 2021
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procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65-B(4).

*26*. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In *Anvar P.V.*[2], this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

*27*. The term "electronic record" is defined in Section 2(1)(*t*) of the Information Technology Act, 2000 as follows:

> '**2. (1)(*t*)** "**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;'



*28*. The expression "data" is defined in Section 2(1)(*o*) of the Information Technology Act as follows:

> '**2. (1)(*o*)** "**data**" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;'

*29*. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

*30*. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by 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 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."

**39.** It may be noted that the judgments referred to in para 21 of *Shafhi Mohammad*[3] are all judgments before the year 2000, when Amendment Act 21 of 2000 first introduced Sections 65-A and 65-B into the Evidence Act and can, therefore, be of no assistance on interpreting the law as to admissibility into evidence of information contained in electronic records. Likewise, the judgment cited in para 22, namely, *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*[23] is also a judgment which does not deal with Section 65-B. In fact, para 20 of the said judgment states the issues before the Court as follows : (SCC p. 336)

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Page 36 Thursday, July 22, 2021
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"*20*. However, in the present case, the dispute is not whether a cassette is a public document but the issues are whether:



(*i*) the finding by the Tribunal that in the absence of any evidence to show that the VHS cassette was obtained by the appellant from the Election Commission, the cassette placed on record by the appellant could not be treated as a public document is perverse; and

(*ii*) a mere production of an audio cassette, assuming that the same is a certified copy issued by the Election Commission, is per se conclusive of the fact that what is contained in the cassette is the true and correct recording of the speech allegedly delivered by the respondent or his agent?"

The second issue was answered referring to judgments which did not deal with Section 65 -B at all.

**40.** Much succour was taken from the three-Judge Bench decision in *Tomaso Bruno*[7] in para 23, which, as has been stated hereinabove, does not state the law on Section 65-B correctly. *Anvar P.V.*[2] was referred to in para 24, but surprisingly, in para 26, the Court (in *Shafhi Mohammad case*[3]) held that Sections 65-A and 65-B cannot be held to be a complete code on the subject, directly contrary to what was stated by a three-Judge Bench in *Anvar P.V.*[2] It was then "clarified" that the requirement of a certificate under Section 64-B(4), being procedural, can be relaxed by the court wherever the interest of justice so justifies, and one circumstance in which the interest of justice so justifies would be where the electronic device is produced by a party who is not in possession of such device, as a result of which such party would not be in a position to secure the requisite certificate.

**41.** Quite apart from the fact that the judgment in *Shafhi Mohammad*[3] states the law incorrectly and is in the teeth of the judgment in *Anvar P.V.*[2], following the judgment in *Tomaso Bruno*[7] — which has been held to be *per incuriam* hereinabove — the underlying reasoning of the difficulty of producing a certificate by a party who is not in possession of an electronic device is also wholly incorrect.

**42.** As a matter of fact, Section 165 of the Evidence Act empowers a Judge to order production of any document or thing in order to discover or obtain proof of relevant facts. Section 165 of the Evidence Act states as follows:

"**165. *Judge's power to put questions or order production*.**—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of



the court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be

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Page 37 Thursday, July 22, 2021
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entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Sections 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

**43.** Likewise, under Order 16 of the Civil Procedure Code, 1908 ("CPC") which deals with "Summoning and Attendance of Witnesses", the court can issue the following orders for the production of documents:

"**6. *Summons to produce document***.—Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

**7. *Power to require persons present in court to give evidence or produce document***.—Any person present in court may be required by the court to give evidence or to produce any document then and there in his possession or power.

* * *

**10. *Procedure where witness fails to comply with summons***.—(1) Where a person has been issued summons either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the court—

(*a*) shall, if the certificate of the serving officer has not been verified by the affidavit, or if service of the summons has affected by a party or his agent, or

(*b*) may, if the certificate of the serving officer has been so verified,

examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any court, touching the service or non-service of the summons.

(2) Where the court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may, in its discretion, issue a warrant, either with or



without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under Rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property."

**44.** Similarly, in the Code of Criminal Procedure, 1973 ("CrPC"), the Judge conducting a criminal trial is empowered to issue the following orders for production of documents:

"**91. *Summons to produce document or other thing***.—(1) Whenever any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such court or officer, such court may issue a summons, or such officer a written order, to the person in whose

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Page 38 Thursday, July 22, 2021
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possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(*a*) to affect Sections 123 and 124 of the Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(*b*) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

* * *

**349.** ***Imprisonment or committal of person refusing to answer or produce document***.—If any witness or person called to produce a document or thing before a criminal court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the court requires him to produce, and does not, after a reasonable opportunity has been given to him so to do, offer any reasonable excuse for such refusal, such court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the Presiding Magistrate or Judge commit him to the custody of an officer of the court for any term not exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal, he may be dealt with according to the provisions of Section 345 or Section 346."



**45.** Thus, it is clear that the major premise of *Shafhi Mohammad*[3] that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.

**46.** Resultantly, the judgment dated 3-4-2018 of a Division Bench of this Court reported as *Shafhi Mohd.* v. *State of H.P.*[8], in following the law incorrectly laid down in *Shafhi Mohammad*[3], must also be, and is hereby, overruled.

**47.** However, a caveat must be entered here. The facts of the present case show that despite all efforts made by the respondents, both through the High Court and otherwise, to get the requisite certificate under Section 65-B(4) of the Evidence Act from the authorities concerned, yet the authorities concerned wilfully refused, on some pretext or the other, to give such certificate. In a fact-circumstance where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is *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. This was well put by this Court in *Presidential Poll, In re*[24] as follows : (SCC pp. 49-50, paras 14-15)

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Page 39 Thursday, July 22, 2021
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"*14*. If the completion of election before the expiration of the term is not possible because of the death of the prospective candidate it is apparent that the election has commenced before the expiration of the term but completion before the expiration of the term is rendered impossible by an act beyond the control of human agency. The necessity for completing the election before the expiration of the term is enjoined by the Constitution in public and State interest to see that the governance of the country is not paralysed by non-compliance with the provision that there shall be a President of India.

*15*. The impossibility of the completion of the election to fill the vacancy in the office of the President before the expiration of the term of office in the case of death of a candidate as may appear from Section 7 of the 1952 Act does not rob Article 62(1) of its mandatory character. The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat*



*legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses. The law does not compel one to do that which one cannot possibly perform. 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.' Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance with the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (See *Broom's Legal Maxims*, 10th Edn. at pp. 162-63 and *Craies on Statute Law*, 6th Edn. at p. 268.)"

It is important to note that the provision in question in *Presidential Poll, In re*[24] was also mandatory, which could not be satisfied owing to an act of God, in the facts of that case. These maxims have been applied by this Court in different situations in other election cases — See *Chandra Kishore Jha* v. *Mahavir Prasad*[25] (at paras 17 and 21); *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)*[26] (at paras 130 and 151) and *Raj Kumar Yadav* v. *Samir Kumar Mahaseth*[27] (at paras 13 and 14).

**48.** These Latin maxims have also been applied in several other contexts by this Court. In *Cochin State Power & Light Corpn. Ltd.* v. *State of Kerala*[28], a question arose as to the exercise of an option of purchasing an undertaking by the State Electricity Board under Section 6(4) of the Electricity Act, 1910. The provision required a notice of at least 18 months before the expiry of the relevant period to be given by such State Electricity Board to the State Government. Since this mandatory provision was impossible of compliance, it was held that the State Electricity Board was excused from giving such notice, as follows : (1965) 3 SCR 187, at p. 193 : AIR pp. 1691-92, para 8

"*8*. Sub-section (1) of Section 6 expressly vests in the State Electricity Board the option of purchase on the expiry of the relevant period specified in the licence. But the State Government claims that under sub-section (2) of Section 6 it is now vested with the option. Now, under sub-section (2) of Section 6, the State Government would be vested with the option only 'where a State Electricity Board has not been constituted, or if constituted, does not elect to purchase the undertaking'. It is common case that the State Electricity Board was duly constituted. But the State Government claims that the State Electricity Board did not elect to purchase the undertaking. For this purpose, the State Government relies upon the deeming provisions

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Page 40 Thursday, July 22, 2021
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of sub-section (4) of Section 6, and contends that as the Board did not send to the State Government any intimation in writing of its intention to exercise the option as required by the sub-section, the Board must be deemed to have elected not to purchase the undertaking. Now, the effect of sub-section (4) read with sub-section (2) of Section 6 is that on failure of the Board to give the notice prescribed by sub-section (4), the option vested in the Board under sub-section (1) of Section 6 was liable to be divested. Sub-section (4) of Section 6 imposed upon the Board the duty of giving after the coming into force of Section 6 a notice in writing of its intention to exercise the option at least 18 months before the expiry of the relevant period. Section 6 came into force on 5-9-1959, and the relevant period expired on 3-12-1960. In the circumstances, the giving of the requisite notice of 18 months in respect of the option of purchase on the expiry of 2-12-1960, was impossible from the very commencement of Section 6. The performance of this impossible duty must be excused in accordance with the maxim, *lex non cogitia ad impossibilia* (the law does not compel the doing of impossibilities), and sub-section (4) of Section 6 must be construed as not being applicable to a case where compliance with it is impossible. We must, therefore, hold that the State Electricity Board was not required to give the notice under sub-section (4) of Section 6 in respect of its option of purchase on the expiry of 25 years. It must follow that the Board cannot be deemed to have elected not to purchase the undertaking under sub-section (4) of Section 6. By the notice served upon the appellant, the Board duly elected to purchase the undertaking on the expiry of 25 years. Consequently, the State Government never became vested with the option of purchasing the undertaking under sub-section (2) of Section 6. The State Government must, therefore, be restrained from taking further action under its notice, Ext. G, dated 20-11-1959."

**49.** In *Raj Kumar Dey* v. *Tarapada Dey*[29], the maxim *lex non cogit ad impossibilia* was applied in the context of the applicability of a mandatory provision of the Registration Act, 1908, as follows : (SCC pp. 402-03, paras 6-7)

> "*6*. We have to bear in mind two maxims of equity which are well settled, namely, *actus curiae neminem gravabit* — An act of the court shall prejudice no man. In *Broom's Legal Maxims*, 10th Edn., 1939 at p. 73 this maxim is explained that this maxim was founded upon justice and good sense; and afforded a safe and certain guide for the administration of the law. The above maxim should, however, be applied with caution. The other maxim is *lex non cogit ad impossibilia* (*Broom's Legal Maxims*, p. 162) — The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities,



and the administration of laws must adopt that general exception in the consideration of all particular cases.

> *7*. In this case indisputably during the period from 26-7-1978 to December 1982 there was subsisting injunction preventing the arbitrators from taking any steps. Furthermore, as noted before the award was in the custody of the court, that is to say, 28-1-1978 till the return of the award to the arbitrators on 24-11-1983, arbitrators or the parties could not have presented the award for its registration during that time. The award as we have noted before was made on 28-11-1977 and before the expiry of the four months from 28-11-1977, the award was filed in the court pursuant to the order of

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Page 41 Thursday, July 22, 2021
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the court. It was argued that the order made by the court directing the arbitrators to keep the award in the custody of the court was wrong and without jurisdiction, but no arbitrator could be compelled to disobey the order of the court and if in compliance or obedience with court of doubtful jurisdiction, he could not take back the award from the custody of the court to take any further steps for its registration then it cannot be said that he has failed to get the award registered as the law required. The aforesaid two legal maxims — *the law does not compel a man to do that which he cannot possibly perform* and *an act of the court shall prejudice no man* would, apply with full vigour in the facts of this case and if that is the position then the award as we have noted before was presented before the Sub-Registrar, Arambagh on 25-11-1983 the very next one day of getting possession of the award from the court. The Sub-Registrar pursuant to the order of the High Court on 24-6-1985 found that the award was presented within time as the period during which the judicial proceedings were pending that is to say, from 28-1-1978 to 24-11-1983 should be excluded in view of the principle laid down in Section 15 of the Limitation Act, 1963. The High Court[30], therefore, in our opinion, was wrong in holding that the only period which should be excluded was from 26-7-1978 till 20-12-1982. We are unable to accept this position. 26-7-1978 was the date of the order of the learned Munsif directing maintenance of status quo and 20-12-1982 was the date when the interim injunction was vacated, but still the award was in the custody of the court and there is ample evidence as it would appear from the narration of events hereinbefore made that the arbitrators had tried to obtain the custody of the award which the court declined to give to them."

(emphasis in original)

**50.** These maxims have also been applied to tenancy legislation — see *B.P. Khemka (P) Ltd.* v. *Birendra Kumar Bhowmick*[31] (at para 12), and have also been applied to relieve authorities of fulfilling their obligation to allot plots when such plots have been found to be unallottable, owing to the contravention



of the Central statutes — see *Hira Tikkoo* v. *State (UT of Chandigarh)*[32] (at paras 23 and 24).

**51.** On an application of the aforesaid maxims to the present case, it is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

**52.** We may hasten to add that Section 65-B does not speak of the *stage* at which such certificate must be furnished to the Court. In *Anvar P.V.*[2], this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

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Page 42 Thursday, July 22, 2021
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**53.** In a recent judgment, a Division Bench of this Court in *State of Karnataka* v. *M.R. Hiremath*[33], after referring to *Anvar P.V.*[2] held : (*M.R. Hiremath case*[33], SCC p. 523, paras 16-17)

> "*16*. The same view has been reiterated by a two-Judge Bench of this Court in *Union of India* v. *Ravindra V. Desai*[34]. The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in *Sonu* v. *State of Haryana*[35], in which it was held : (*Sonu case*[35], SCC p. 584, para 32)
>
> > '*32*. … The crucial test, as affirmed by this Court, is *whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency*.'



> *17*. Having regard to the above principle of law, the High Court[36] erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."

(emphasis in original)

**54.** It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. Section 207 CrPC, which reads[37] as follows, is mandatory. Therefore, the electronic evidence i.e. the computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement.

**55.** In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought



not to be allowed to fill up any lacunae during a trial. As recognised by this Court in *CBI* v. *R.S. Pai*[38], the only exception to this general rule is if the prosecution had "mistakenly" not filed a document, the said document can be allowed to be placed on record. The Court held as follows : (SCC p. 85, para 7)

> "*7*. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the

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Page 43 Thursday, July 22, 2021
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report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court."

**56.** Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.

**57.** The High Court of Rajasthan in *Paras Jain* v. *State of Rajasthan*[39], decided a preliminary objection that was raised on the applicability of Section 65-B to the facts of the case.

**57.1.** The preliminary objection raised was framed as follows : (SCC OnLine Raj para 3)

"*3*. (*i*) Whether transcriptions of conversations and for that matter CDs of the same filed along with the charge-sheet are not admissible in evidence even at this stage of the proceedings as certificate as required under Section 65-B of the Evidence Act was not obtained at the time of procurement of said CDs from the service provider concerned and it was not produced along with charge-sheet in the prescribed form and such certificate cannot be filed subsequently."



**57.2.** After referring to *Anvar P.V.*[2], the High Court held : (*Paras Jain case*[39], SCC OnLine Raj paras 15-23)

"*15*. Although, it has been observed by the Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced along with the charge-sheet and if it is not produced along with the charge-sheet, doors of the court are completely shut and it can not be produced subsequently in any circumstance. Section 65-B of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the court. One of the principal issues arising for consideration in the above case before the Hon'ble Court was the nature and manner of admission of electronic records.

*16*. From the facts of the above case, it is revealed that the election of the respondent to the Legislative Assembly of the State of Kerala was challenged by the appellant Shri Anwar P.V. by way of an election petition before the High Court of Kerala and it was dismissed vide order dated 16-11-2011 by the High Court and that order was challenged by the appellant before the Hon'ble Supreme Court. It appears that the election was challenged on the ground of corrupt practices committed by the respondent and in support thereof some CDs were produced along with the election petition, but even during the course of trial certificate as required under Section 65-B of the Evidence Act was not produced and the question of admissibility of the CDs as secondary evidence in the form of electronic record in absence of requisite certificate

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Page 44 Thursday, July 22, 2021
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was considered and it was held that such electronic record is not admissible in evidence in absence of the certificate. It is clear from the facts of the case that the question of stage at which such electronic record is to be produced was not before the Hon'ble Court.

*17*. It is to be noted that it has been clarified by the Hon'ble Court that observations made by it are in respect of secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act and if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence without compliance with the conditions in Section 65-B of the Evidence Act.

*18*. To consider the issue raised on behalf of the petitioners in a proper manner, I pose a question to me whether an evidence and more particularly evidence in the form of a document not produced along with the charge-sheet cannot be produced subsequently in any circumstances. My answer to the question is in negative and in my opinion such evidence can be produced subsequently also as it is well-settled legal position that the goal



of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record.

*19*. Relevant portion of sub-section (1) of Section 91 CrPC provides that whenever any court considers that the production of any document is necessary or desirable for the purposes of any trial under the Code by or before such court, such court may issue a summons to the person in whose possession or power such document is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons. Thus, a wide discretion has been conferred on the court enabling it during the course of trial to issue summons to a person in whose possession or power a document is believed to be requiring him to produce before it, if the court considers that the production of such document is necessary or desirable for the purposes of such trial. Such power can be exercised by the court at any stage of the proceedings before judgment is delivered and the court must exercise the power if the production of such document is necessary or desirable for the proper decision in the case. It cannot be disputed that such summons can also be issued to the complainant/informer/victim of the case on whose instance the FIR was registered. In my considered view, when under this provision court has been empowered to issue summons for the producment of document, there can be no bar for the court to permit a document to be taken on record if it is already before it and the court finds that it is necessary for the proper disposal of the case irrespective of the fact that it was not filed along with the charge-sheet. I am of the further view that it is the duty of the court to take all steps necessary for the production of such a document before it.

*20*. As per Section 311 CrPC, any court may, at any stage of any trial under the Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Under this provision also wide discretion has been conferred upon the court to exercise its power and paramount consideration is just decision of the case. In my opinion, under this provision it is permissible for the court even to order production of a document before it if it is essential for the just decision of the case.

*21*. As per Section 173(8) CrPC carrying out a further investigation and collection of additional evidence even after filing of charge-sheet is a statutory right of the police and for that prior permission of the Magistrate is not required. If during the course of such further investigation additional evidence, either oral or documentary, is collected

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Page 45 Thursday, July 22, 2021
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by the police, the same can be produced before the court in the form of supplementary charge-sheet. The prime consideration for further investigation and collection of additional evidence is to arrive at the truth and to do real and substantial justice. The material collected during further investigation cannot be rejected only because it has been filed at the stage of the trial.

*22*. As per Section 231 CrPC, the prosecution is entitled to produce any person as a witness even though such person is not named in the charge-sheet.



*23*. When legal position is that additional evidence, oral or documentary, can 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, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form."

**58.** In *Kundan Singh*[10], a Division Bench of the Delhi High Court held : (SCC OnLine Del para 50)

"*50*. *Anvar P.V.*[2] partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in *Navjot Sandhu*[13], holding that Section 65-B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65-B(4) is mandatory. *Anvar P.V.*[2] does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 CrPC or, at the appellate stage under Section 391 CrPC. Evidence Act is a procedural law and in view of the pronouncement in *Anvar P.V.*[2] partly overruling *Navjot Sandhu*[13], the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65-B."

**59.** Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence.

**60.** It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a "responsible official position" in relation to the operation of the relevant device, as also the person who may otherwise be in the "management of relevant activities" spoken of in sub-section (4) of Section 65-B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65-B(4) makes it clear that it is sufficient that such person gives the requisite certificate to the "best of his knowledge and belief". [Obviously, the word "and" between knowledge and belief in Section 65-B(4) must be read as "or", as a person cannot testify to the best of his knowledge *and* belief at the same time.]

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Page 46 Thursday, July 22, 2021
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**61.** We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.*[2], and incorrectly "clarified" in *Shafhi Mohammad*[3]. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in *Taylor* v. *Taylor*[40], which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.

**62.** In view of the above, the decision of the Madras High Court in *K. Ramajayam*[9], which states that evidence *aliunde* can be given through a person who was in charge of a computer device in the place of the requisite certificate under Section 65-B(4) of the Evidence Act is also an incorrect statement of the law and is, accordingly, overruled.

**63.** While on the subject, it is relevant to note that the Department of Telecommunication's licence conditions [i.e. under the "Licence for Provision of Unified Access Services" framed in 2007, as also the subsequent "Licence Agreement for Unified Licence" and the "Licence Agreement for Provision of Internet Service"] generally oblige internet service providers and providers of mobile telephony to preserve and maintain electronic call records and records of logs of internet users for a limited duration of one year[41]. Therefore, if the police or other individuals (interested, or party to any form of litigation) fail to secure those records — or secure the records but fail to secure the certificate — within that period, the production of a post-dated certificate (i.e. one issued after commencement of the trial) would in all probability render the data unverifiable. This places the accused in a perilous position, as, in the event the accused wishes to challenge the genuineness of this certificate by seeking the opinion of the Examiner of Electronic Evidence under Section 45-A of the



Evidence Act, the electronic record (i.e. the data as to call logs in the computer of the service provider) may be missing.

**64.** To obviate this, general directions are issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the period concerned (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period. The parties concerned can then summon such records at the stage of defence evidence, or in the event such data is required to cross-examine a particular witness. This direction shall be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licences, or under Section 67-C of the Information Technology Act, which reads as follows:

> "**67-C.** ***Preservation and retention of information by intermediaries***.—(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.
>
> (2) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine."

**65.** It is also useful, in this context, to recollect that on 23-4-2016, the Conference of the Chief Justices of the High Courts, chaired by the Chief Justice of India, resolved to create a uniform platform and guidelines governing the reception of electronic evidence. The Chief Justices of Punjab and Haryana and Delhi were required to constitute a committee to "frame Draft Rules to serve as model for adoption by High Courts". A five-

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Page 47 Thursday, July 22, 2021
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Judge Committee was accordingly constituted on 28-7-2018[42]. After extensive deliberations, and meetings with several police, investigative and other agencies, the Committee finalised its report in November 2018. The report suggested comprehensive guidelines, and recommended their adoption for use in courts, across several categories of proceedings. The report also contained Draft Rules for the Reception, Retrieval, Authentication and Preservation of Electronic Records. In the opinion of the Court, these Draft Rules should be examined by the authorities concerned, with the object of giving them statutory force, to guide courts in regard to preservation and retrieval of electronic evidence.

**66.** We turn now to the facts of the case before us. In the present case, by the impugned judgment dated 24-11-2017[5], Election Petition No. 6 of 2014 and Election Petition No. 9 of 2014 have been allowed and partly allowed respectively, the election of the RC being declared to be void under Section 100 of the Representation of the People Act, 1951, inter alia, on the ground that as nomination papers at Serial Numbers 43 and 44 were not presented by the RC before 3.00 p.m. on 27-9-2014, such nomination papers were improperly



accepted. However, by an order dated 8-12-2017[43], this Court admitted the election appeal of the appellant, and stayed the impugned judgment and order[5].

**67.** We have heard this matter after the five-year Legislative Assembly term is over in November 2019. This being the case, ordinarily, it would be unnecessary to decide on the merits of the case before us, as the term of the Legislative Assembly is over. However, having read the impugned judgment[5], it is clear that the learned Single Judge was anguished by the fact that the Election Commission authorities behaved in a partisan manner by openly favouring the appellant. Despite the fact that the reason given of "substantial compliance" with Section 65-B(4) in the absence of the requisite certificate being incorrect in law, yet, considering that the respondent had done everything in his power to obtain the requisite certificate from the appropriate authorities, including directions from the Court to produce the requisite certificate, no such certificate was forthcoming. The horse was directed to be taken to the water to drink — but it refused to drink, leading to the consequence pointed out in para 51 of this judgment (supra).

**68.** Even otherwise, apart from evidence contained in electronic form, the High Court arrived at the following conclusion : (*Kailash Kishanrao Gorantyal case*[5], SCC OnLine Bom paras 54-55)

> "*54*. The evidence in cross-examination of Smt Mutha shows that when Labade was sent to the passage for collecting nomination forms, she continued to accept the nomination forms directly from intending candidates and their proposers in her office. Her evidence shows that on 27-9-2014 the last nomination form which was directly presented to her was Form 38 of Anand Mhaske. The time of receipt of this form was mentioned in the register of nomination forms as 2.55 p.m. In respect of subsequent nomination forms from Sl. Nos. 39 to 64, the time of acceptance is mentioned as 3.00 p.m. Smt Mutha admits that the candidates of Nomination Form Nos. 39 to 64 (Form No. 64 was the last form filed) were not present before her physically at 3.00 p.m. At the cost of repetition, it needs to be mentioned here that form numbers of RC are 43 and 44. The oral evidence and the record like register of nomination forms does not show that Form Nos. 43 and 44 were presented to RO at 2.20 p.m. of 27-9-2014. As per the evidence of Smt Mutha and the record, one Arvind Chavan, a candidate having Form Nos. 33, 34 and 35 was present before her between 2.15 p.m. and 2.30 p.m. In nomination form register, there is no entry showing that any nomination form was received at 2.20 p.m. Form Nos. 36 and 37 of Sunil Khare were entered in the register at 2.40 p.m. Thus, according to Smt Mutha, Form No. 38, which

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Page 48 Thursday, July 22, 2021
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was accepted by her directly from the candidate was tendered to her at 2.55 p.m. of 27-9-2014 and after that she had done preliminary examination of Form No. 38 and check list was given by her to that candidate. Thus, it is not possible that



Form Nos. 43 and 44 were directly handed over to Smt Mutha by RC at 2.20 p.m. or even at 3.00 p.m. of 27-9-2014.

*55*. Smt Mutha (PW 2) did not show the time as 2.20 p.m. of handing over the check list to RC and she showed the time as 3.00 p.m., but this time was shown in respect of all forms starting from Sl. Nos. 39 to 64. Thus, substantive evidence of Smt Mutha and the aforesaid record falsifies the contention of the RC made in the pleading that he had handed over the nomination forms (Form Nos. 43 and 44) directly to RO prior to 3.00 p.m., at 2.20 p.m."

**69.** Thus, it is clear that apart from the evidence in the form of electronic record, other evidence was also relied upon to arrive at the same conclusion. The High Court's judgment therefore cannot be faulted.

**70.** Shri Adsure, however, attacked the impugned judgment[5] when it held that the improper acceptance of the nomination form of the RC himself being involved in the matter, no further pleadings and particulars on whether the election is "materially affected" were required, as it can be assumed that if such plea is accepted, the election would be materially affected, as the election would then be set aside. He cited a Division Bench judgment of this Court in *Rajendra Kumar Meshram* v. *Vanshmani Prasad Verma*[44], wherein an election petition was filed against the appellant, inter alia, on the ground that as the appellant — the returned candidate — was a government servant, his nomination had been improperly accepted. The Court held that the requirement of Section 100(1)(*d*) of the Representation of People Act, 1951, being that the election can be set aside only if such improper acceptance of the nomination has "materially affected" the result of the election, and there being no pleading or evidence to this effect, the election petition must fail. This Court stated : (SCC p. 719, paras 9-11)

"*9*. As Issues 1 and 2 extracted above, have been answered in favour of the returned candidate and there is no cross-appeal, it is only the remaining issues that survive for consideration. All the said issues centre round the question of improper acceptance of the nomination form of the returned candidate. In this regard, Issue 6 which raises the question of material effect of the improper acceptance of nomination of the returned candidate on the result of the election may be specifically noticed.

*10*. Under Section 100(1)(*d*), an election is liable to be declared void on the ground of improper acceptance of a nomination if such improper acceptance of the nomination has materially affected the result of the election. This is in distinction to what is contained in Section 100(1)(*c*) i.e. improper rejection of a nomination which itself is a sufficient ground for invalidating the election without any further requirement of proof of



material effect of such rejection on the result of the election. The above distinction must be kept in mind. Proceeding on the said basis, we find that the High Court[45] did not endeavour to go into the further question that would be required to be determined even if it is assumed that the appellant returned candidate had not filed the electoral roll or a certified copy thereof and, therefore, had not complied with the mandatory provisions of Section 33(5) of the 1951 Act.

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*11*. In other words, before setting aside the election on the above ground, the High Court ought to have carried out a further exercise, namely, to find out whether the improper acceptance of the nomination had materially affected the result of the election. This has not been done notwithstanding Issue 6 framed which is specifically to the above effect. The High Court having failed to determine the said issue i.e. Issue 6, naturally, it was not empowered to declare the election of the appellant returned candidate as void even if we are to assume that the acceptance of the nomination of the returned candidate was improper."

**71.** On the other hand, Ms Meenakshi Arora cited a Division Bench judgment in *Mairembam Prithviraj* v. *Pukhrem Sharatchandra Singh*[46]. In this judgment, several earlier judgments of this Court were cited on the legal effect of not pleading or proving that the election had been "materially affected" by the improper acceptance of a nomination under Section 100(1)(*d*)(*i*) of the Representation of People Act, 1951. After referring to *Durai Muthuswami* v. *N. Nachiappan*[47] and *Jagjit Singh* v. *Dharam Pal Singh*[48], this Court then referred to a three-Judge Bench judgment in *Vashist Narain Sharma* v. *Dev Chandra*[49] as under : (*Mairembam Prithviraj case*[46], SCC p. 504, para 25)

"*25*. It was held by this Court in *Vashist Narain Sharma* v. *Dev Chandra*[49] as under : (AIR p. 515, para 9)

'*9*. The learned counsel for the respondents concedes that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the petitioner but he argues that the question can arise in one of three ways:

(*1*) where the candidate whose nomination was improperly accepted had secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes,

(*2*) where the person referred to above secured more votes, and



(*3*) *where the person whose nomination has been improperly accepted is the returned candidate himself*.

It is agreed that in the first case the result of the election is not materially affected because if all the wasted votes are added to the votes of the candidate securing the highest votes, it will make no difference to the result and the returned candidate will retain the seat. In the other two cases it is contended that the result is materially affected. *So far as the third case is concerned it may be readily conceded that such would be the conclusion* ...' "

(emphasis in original)

This Court then concluded : (*Mairembam Prithviraj case*[46], SCC p. 505, para 26)

"*26*. Mere finding that there has been an improper acceptance of the nomination is not sufficient for a declaration that the election is void under Section 100(1)(*d*). There has to be further pleading and proof that the result of the election of the returned candidate was materially affected. But, there would be no necessity of any proof in the event of the nomination of a returned candidate being declared as having been improperly accepted, especially in a case where there are only two candidates in the fray. If the returned candidate's nomination is declared to have been improperly accepted it would mean that he could not have contested the election and that the result of the election of the returned candidate was materially affected need not be proved further."

**72.** None of the earlier judgments of this Court referred to in *Mairembam Prithviraj*[46] have been adverted to in *Rajendra Kumar Meshram*[44] cited by Shri Adsure. In particular,

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Page 50 Thursday, July 22, 2021
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the judgment of three Judges of this Court in *Vashist Narain Sharma*[49] has specifically held that where the person whose nomination has been improperly accepted is the returned candidate himself, it may be readily conceded that the conclusion has to be that the result of the election would be "materially affected", without there being any necessity to plead and prove the same. The judgment in *Rajendra Kumar Meshram*[44], not having referred to these earlier judgments of a larger strength binding upon it, cannot be said to have declared the law correctly. As a result thereof, the impugned judgment[5] of the High Court is right in its conclusion on this point also.



**73.** The reference is thus answered by stating that:

**73.1.** *Anvar P.V.*[2], as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in *Tomaso Bruno*[7], being per incuriam, does not lay down the law correctly. Also, the judgment in *Shafhi Mohammad*[3] and the judgment dated 3-4-2018 reported as *Shafhi Mohd.* v. *State of H.P.*[8], do not lay down the law correctly and are therefore overruled.

**73.2.** The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. 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 device concerned, on which the original information is first stored, is owned and/or operated by him. In 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, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in *Anvar P.V.*[2] which reads as "*... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ...*" is thus clarified; it is to be read without the words "*under Section 62 of the Evidence Act,...*". With this clarification, the law stated in para 24 of *Anvar P.V.*[2] does not need to be revisited.

**73.3.** The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

**73.4.** Appropriate rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67-C, and also framing 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 metadata to avoid corruption. Likewise, appropriate rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after considering the report of the Committee constituted by the Chief Justices' Conference in April 2016.

**74.** These appeals are dismissed with costs of INR one lakh each to be paid by Shri Arjun Panditrao Khotkar (i.e. the appellant in CAs Nos. 20825-26 of 2017) to both Shri Kailash Kushanrao Gorantyal and Shri Vijay Chaudhary.

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Page 51 Thursday, July 22, 2021
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**V. RAMASUBRAMANIAN, J.** (*supplementing*)— While I am entirely in agreement with the opinion penned by R.F. Nariman, J. I also wish to add a few lines about (*i*) the reasons for the acrimony behind Section 65-B of the Evidence Act, 1872 (hereinafter "the Evidence Act"), (*ii*) how even with the existing rules of procedure, the courts fared well, without any legislative interference, while dealing with evidence in analogue form, and (*iii*) how after machines in analogue form gave way to machines in electronic form, certain jurisdictions of the world changed their legal landscape, over a period of time, by suitably amending the law, to avoid confusions and conflicts.

## I. *Reasons for the acrimony behind Section 65-B*

**76.** Documentary evidence, in contrast to oral evidence, is required to pass through certain checkposts, such as (*i*) admissibility, (*ii*) relevancy and (*iii*) proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these checkposts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three checkposts, changes. Generally and theoretically, admissibility depends on relevancy. Under Section 136 of the Evidence Act, relevancy must be established before admissibility can be dealt with. Therefore if we go by Section 136, a party should first show relevancy, making it the first checkpost and admissibility the second one. But some documents, such as those indicated in Section 68 of the Evidence Act, which pass the first checkpost of relevancy and the second checkpost of admissibility may be of no value unless the attesting witness is examined. Proof of execution of such documents, in a manner established by law, thus constitutes the third checkpost. Here again, proof of execution stands on a different footing than proof of contents.

**77.** It must also be noted that whatever is relevant may not always be admissible, if the law imposes certain conditions. For instance, a document, whose contents are relevant, may not be admissible, if it is a document requiring stamping and registration, but had not been duly stamped and registered. In other words, if admissibility is the cart, relevancy is the horse, under Section 136. But certain provisions of law place the cart before the horse and Section 65-B appears to be one of them.

**78.** Section 136 which confers a discretion upon the Judge to decide as to the admissibility of evidence reads as follows:

> "**136. *Judge to decide as to admissibility of evidence***.—When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.
>
> If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the court is satisfied with such undertaking.



> If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

**79.** There are three parts to Section 136. The first part deals with the discretion of the Judge to admit the evidence, if he thinks that the fact sought to be proved is relevant. The second part of Section 136 states that if the fact proposed to be proved is one, of which

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evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned. But this rule is subject to a small concession, namely, that *if the party undertakes to produce proof of the last mentioned fact later and the court is satisfied about such undertaking, the court may proceed to admit evidence of the first mentioned fact*. The third part of Section 136 deals with the relevancy of one alleged fact, which depends upon another alleged fact being first proved. The third part of Section 136 has no relevance for our present purpose.

**80.** Illustration (*b*) under Section 136 provides an easy example of the second part of Section 136. Illustration (*b*) reads as follows:

> "(*b*) It is proposed to prove, by a copy, the contents of a document said to be lost.
>
> The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced."

**81.** What is laid down in Section 65-B as a precondition for the admission of an electronic record, resembles what is provided in the second part of Section 136. For example, if a fact is sought to be proved through the contents of an electronic record (or information contained in an electronic record), the Judge is first required to see if it is relevant, if the first part of Section 136 is taken to be applicable.

**82.** But Section 65-B makes the admissibility of the information contained in the electronic record subject to certain conditions, including certification. The certification is for the purpose of proving that the information which constitutes the computer output was produced by a computer which was used regularly to store or process information and that the information so derived was regularly fed into the computer in the ordinary course of the said activities.

**83.** In other words, if we go by the requirements of Section 136, the computer output becomes admissible if the fact sought to be proved is relevant. But such a fact is admissible only upon proof of some other fact, namely, that it was extracted from a computer used regularly, etc. In simple terms, *what is contained in the computer output can be equated to the first mentioned fact and the requirement of a certification can be equated to the last mentioned fact, referred to in the second part of Section 136 read with Illustration (b) thereunder*.

**84.** But Section 65-B(1) starts with a non obstante clause excluding the application of the other provisions and it makes the certification, a precondition for admissibility. While doing so, it does not talk about relevancy. In a way, Sections 65-A and 65-B, if read together, mix up both proof and admissibility,



but not talk about relevancy. Section 65-A refers to the procedure prescribed in Section 65-B, *for the purpose of proving the contents of electronic records*, but Section 65-B speaks entirely about *the preconditions for admissibility*. As a result, Section 65-B places admissibility as the first or the outermost checkpost, capable of turning away even at the border, any electronic evidence, without any enquiry, if the conditions stipulated therein are not fulfilled.

**85.** The placement by Section 65-B, of admissibility as the first or the border checkpost, coupled with the fact that a number of "computer systems" [as defined in Section 2(*l*) of the Information Technology Act, 2000] owned by different individuals, may get involved in the production of an electronic record, with the "originator" [as defined in Section 2(*za*) of the Information Technology Act, 2000] being different from the recipients or the sharers, has created lot of acrimony behind Section 65-B, which is evident from the judicial opinion swinging like a pendulum.

**II. *How the courts dealt with evidence in analogue form without legislative interference and the shift***

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Page 53 Thursday, July 22, 2021
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**86.** It is a matter of fact and record that courts all over the world were quick to adapt themselves to evidence in analogue form, within the framework of archaic, centuries old rules of evidence. It was not as if evidence in analogue form was incapable of being manipulated. But the courts managed the show well by applying time tested rules for sifting the actual from the manipulated.

**87.** It is no doubt true that the felicity with which courts adapted themselves to appreciating evidence in analogue form was primarily due to the fact that in analogue technology, one is able to see and/or perceive something that is happening. In analogue technology, a wave is recorded or used in its original form. When someone speaks or sings, a signal is taken directly by the microphone and laid onto a tape, if we take the example of an analogue tape recorder. Both, the wave from the microphone and the wave on the tape, are analogue and the wave on the tape can be read, amplified and sent to a speaker to produce the sound. In digital technology, the analogue wave is sampled at some interval and then turned into numbers that are stored in a digital device. Therefore, what are stored, are in terms of numbers and they are, in turn, converted into voltage waves to produce what was stored.

**88.** The difference between something in analogue form and the same thing in digital form and the reason why digital format throws more challenges, was presented pithily in an article titled "Electronic Evidence and the Meaning of "Original" ",[50] by Stephen Mason (Barrister and recognised authority on electronic signatures and electronic evidence). Taking the example of a photograph in both types of form, the learned author says the following:

> "For instance, a photograph taken with an analogue camera (that is, a camera with a film) can only remain a single object. It cannot be merged into other photographs, and split off again. It remains a physical object.

Page: 66

A photograph taken with a digital camera differs markedly. The digital object, made up of a series of zeros and the number one, can be, and frequently is, manipulated and altered (especially in fashion magazines and for advertisements). Things can be taken out and put in to the image, in the same way the water droplets can merge and form a single, larger droplet. The new, manipulated digital image can also be divided back into its constituent parts.

> Herein lies the interesting point : when three droplets of water fuse and then separate into three droplets, it is to be questioned whether the three droplets that merge from the bigger droplet were the identical droplets that existed before they merged. In the same way, consider a digital object that has been manipulated and added to, and the process is then reversed. The original object that was used remains (unless it was never saved independently, and the changes made to the image were saved in the original file), but another object, with the identical image (or near identical, depending on the system software and application software) now exists. Conceptually, it is possible to argue that the two digital images are different : one is the original, the other a copy of the original that was manipulated and returned to its original state (whatever "original" means). But both images are identical, apart from some additional metadata that might, or might not be conclusive. However, it is apparent that the images, if viewed together, are identical — will be identical, and the viewer will not be able to determine which is the original, and which image was manipulated. In this respect, the digital images are no different from the droplets of rain that fall, merge, then divide : there is no telling whether the droplets that split are identical to the droplets that came together to form the larger droplet."

**89.** That courts did not have a problem with the evidence in analogue form is established by several judicial precedents, in UK, which were also followed by our courts. A

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device used to clandestinely record a conversation between two individuals was allowed in *Harry Parker Ltd.* v. *Mason*[51] in proving fraud on the part of the plaintiff. While *Harry Parker*[51] was a civil proceeding, the principle laid down therein found acceptance in a criminal trial in *R.* v. *Burr & Sullivan*[52]. The High Court of Judiciary in Scotland admitted in evidence, the tape record of a conversation between the complainant and a blackmailer, in *Hopes & Lavery* v. *H.M. Advocate*[53]. A conversation recorded in police cell overheard without any deception, beyond setting up a tape recorder without warning, was admitted in evidence in *R.* v. *Mills*[54].

**90.** Then came *R.* v. *Maqsud Ali*[21] where Marshall, J. drew an analogy between tape-recordings and photographs and held that *just as evidence of things seen through telescopes or binoculars have been admitted, despite the*



*fact that those things could not be picked up by the naked eye, the devices used for recording conversations could also be admitted, provided the accuracy of the recording can be proved and the voices recorded properly identified*.

**91.** Following the above precedents, this Court also held in *S. Pratap Singh* v. *State of Punjab*[55], *Yusufalli Esmail Nagree* v. *State of Maharashtra*[56], *N. Sri Rama Reddy* v. *V.V. Giri*[57], *R.M. Malkani* v. *State of Maharashtra*[58], *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra*[59], *Ram Singh* v. *Ram Singh*[20] and *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*[23], that tape records of conversations and speeches are admissible in evidence under the Evidence Act, subject to certain conditions. In *Ziyauddin Burhanuddin Bukhari*[59] and *Tukaram S. Dighole*[23] this Court further held that tape records constitute "document" within the meaning of the expression under Section 3 of the Evidence Act. Thus, without looking up to the lawmakers to come up with necessary amendments from time to time, the courts themselves developed certain rules, over a period of time, to test the authenticity of these documents in analogue form and these rules have in fact, worked well.

**92.** There was also an important question that bothered the courts while dealing with evidence in analogue form. It was as to whether such evidence was direct or hearsay. In *Sapporo Maru* v. *Statue of Liberty*[60], the film recording of a radar set of echoes of ships within its range was held to be real evidence. The Court opined that there was no distinction between a photographer operating a camera manually and the observations of a barometer operator or its equivalent operation by a recording mechanism. The Judge rejected the contention that the evidence was hearsay.

**93.** But when it comes to a computer output, one of the earliest of cases where the Court of Appeal had to deal with evidence in the form of a printout from a computer was in *R.* v. *Pettigrew*[61]. In that case, the printout from a computer operated by an employee of the Bank of England was held to be hearsay. But the academic opinion about the correctness of the decision was sharply divided. While Professor Smith[62] considered the evidence in this case as direct and not hearsay, Professor Tapper[63] took the view that the printout was



partly hearsay and partly not. Professor Seng[64] thought that both views were plausible.

**94.** But the underlying theory on the basis of which academicians critiqued the above judgment is that wherever the production of the output was made possible without human intervention, the evidence should be taken as direct. This is how the position was explained in *Castle* v. *Cross*[65], in which the printout from the Intoximeter was held to be

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Page 55 Thursday, July 22, 2021
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direct and not hearsay, on the ground that the breath alcohol value in the printout comprised information produced by the Intoximeter without the data being processed through a human brain.

**95.** In *R.* v. *Robson Mitchell & Richards*[66], a printout of telephone calls made on a mobile telephone was taken as evidence of the calls made and received in association with the number. The Court held:

> "*where a machine observes a fact and records it, that record states a fact. It is evidence of what the machine recorded and this was printed out. The record was not the fact but the evidence of the fact*".
>
> (emphasis supplied)

**96.** But the facility of operating in anonymity in the cyber space, has made electronic records more prone to manipulation and consequently to a greater degree of suspicion. Therefore, lawmakers interfered, sometimes making things easy for courts and sometimes creating a lot of confusion. But over a period of time, certain jurisdictions have come up with reasonably good solutions. Let us now take a look at them.

## III. *Legislative developments in USA, UK and Canada on the admissibility of electronic records*

### *Position in USA*

**97.** The Federal Rules of Evidence (FRE) of the United States of America as amended with effect from 1-12-2017 recognise the availability of more than one option to a person seeking to produce an electronic record. Under the amended rules, a person can follow either the traditional route under Rule 901 or the route of self-authentication under Rule 902 whereunder a certificate of authenticity will elevate its status. Rules 901 and 902 of FRE read as follows:

> "**901.** ***Authenticating or identifying evidence***.—(*a*) *In General*. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> (*b*) *Examples*. The following are examples only —not a complete list—of evidence that satisfies the requirement:
>
> (1) *Testimony of a witness with knowledge*. Testimony that an item is what it is claimed to be.



> (2) *Non-expert opinion about handwriting*. A non-expert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
>
> (3) *Comparison by an expert witness or the trier of fact*. A comparison with an authenticated specimen by an expert witness or the trier of fact.
>
> (4) *Distinctive characteristics and the like*. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
>
> (5) *Opinion about a voice*. An opinion identifying a person's voice—whether heard first-hand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
>
> (6) *Evidence about a telephone conversation*. For a telephone conversation, evidence that a call was made to the number assigned at the time to:
>
> (A) a particular person, if circumstances, including self-identification, show that

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Page 56 Thursday, July 22, 2021
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the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence about public records*. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence about ancient documents or data compilations*. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence about a process or system*. Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods provided by a statute or rule*. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

**902. *Evidence that is self-authenticating***.—The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic public documents that are sealed and signed*. A document that bears:

(A) a seal purporting to be that of the United States; any State, district, commonwealth, territory, or insular possession of the United



States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic public documents that are not sealed but are signed and certified*. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents*. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a Secretary of a United States embassy or legation; by a Consul General, Vice-Consul, or Consular Agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final

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Page 57 Thursday, July 22, 2021
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certification.

(4) *Certified copies of public records*. A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rules 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) *Official publications*. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and periodicals*. Printed material purporting to be a newspaper or periodical.

(7) *Trade inscriptions and the like*. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.



(8) *Acknowledged documents*. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial paper and related documents*. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions under a federal statute*. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) *Certified domestic records of a regularly conducted activity*. The original or a copy of a domestic record that meets the requirements of Rules 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection —so that the party has a fair opportunity to challenge them.

(12) *Certified foreign records of a regularly conducted activity*. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows : the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

(13) *Certified records generated by an electronic process or system*. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) *Certified data copied from an electronic device, storage medium, or file*. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11)."

**98.** An important decision in the American jurisprudence on this issue was delivered by Chief Magistrate Judge of District of Maryland in *Lorraine* v. *Markel American Insurance*

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Page 58 Thursday, July 22, 2021
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*Co.*[67]. In this case, Paul Grimm, J. while dealing with a challenge to an arbitrator's decision in an insurance dispute, dealt with the issue whether emails discussing the insurance policy in question, were admissible as evidence. The Court, while extending the applicability of Rules 901 and 902 of FRE to electronic evidence, laid down a broad test for



admissibility of electronically stored information.[68] This decision was rendered in 2007 and the FRE were amended in 2017.

**99.** Sub-rules (13) and (14) were incorporated in Rule 902 under the amendment of the year 2017. Until then, a person seeking to produce electronic records had to fall back mostly upon Rule 901 [except in few cases covered by sub-rules (11) and (12) of Rule 902]. It means that the benefit of self-authentication was not available until then [until the advent of sub-rules (13) and (14), except in cases covered by sub-rules (11) and (12)]. Nevertheless, the introduction of sub-rules (13) and (14) in Rule 902 did not completely exclude the application of the general provisions of Rule 901.

**100.** Rule 901 applies to all evidence across the board. It is a general provision. But Rule 902 is a special provision dealing with evidence that is self-authenticating. Records generated by an electronic process or system and data copied from an electronic device, storage medium or file, are included in sub-rules (13) and (14) of Rule 902 of the Federal Rules of Evidence.

**101.** But FRE 902 does not exclude the application of FRE 901. It is only when a party seeks to invoke the benefit of self-authentication that Rule 902 applies. If a party chooses not to claim the benefit of self-authentication, he is free to come under Rule 901, even if the evidence sought to be adduced is of an electronically stored information (ESI).

**102.** In an article titled "E-Discovery : Authenticating Common Types of ESI Chart", authored by Paul W. Grimm (the Judge who delivered the verdict in *Lorraine*[67]) and co-authored by Gregory P. Joseph and published by Thomson Reuters (2017), the learned authors have given a snapshot of the different methods of authentication of various types of ESI (electronically stored information). In a subsequent article (2018) titled "Admissibility of Electronic Evidence" published under the caption "Grimm-Brady Chart" (referring to Paul W. Grimm and Kevin F. Brady) on the website "complexdiscovery.com", a condensed chart is provided which throws light on the different methods of authentication of ESI. The chart is reproduced in the form of a table, with particular reference to the relevant sub-rules of Rules 901 and 902 of the Federal Rules of Evidence as follows:



| *Sl. No.* | *Types of ESI* | *Potential Authentication Methods* |
|---|---|---|
| *1.* | Email, Text Messages, and Instant Messages | • Witness with personal knowledge [901(*b*)(1)]<br>• Expert testimony or comparison with authenticated examples [901(*b*)(3)]<br>• Distinctive characteristics including circumstantial evidence [901(*b*)(4)]<br>• System or process capable of proving reliable and dependable result [901(*b*)(9)]<br>• Trade inscriptions [902(7)]<br>• Certified copies of business record [902(11)] |

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Page 59 Thursday, July 22, 2021
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| | | |
|---|---|---|
| | | • Certified records generated by an electronic process or system [902(13)]<br>• Certified data copied from an electronic device, storage medium, or file [902(14)] |
| 2. | Chat Room Postings, Blogs, Wikis, and Other Social Media Conversations | • Witness with personal knowledge [901(*b*)(1)]<br>• Expert testimony or comparison with authenticated examples [901(*b*)(3)]<br>• Distinctive characteristics including circumstantial evidence [901(*b*)(4)]<br>• System or process capable of proving reliable and dependable result [901(*b*)(9)]<br>• Official publications [902(5)]<br>• Newspapers and periodicals [902(6)]<br>• Certified records generated by an electronic process or system [902(13)]<br>• Certified data copied from an electronic device, storage medium, or file [902(14)] |
| 3. | Social Media Sites (Facebook, LinkedIn, Twitter, Instagram, and Snapchat) | • Witness with personal knowledge [901(*b*)(1)]<br>• Expert testimony or comparison with authenticated examples [901(*b*)(3)]<br>• Distinctive characteristics including circumstantial evidence [901(*b*)(4)]<br>• Public records [901(*b*)(7)]<br>• System or process capable of proving reliable and dependable result [901(*b*)(9)]<br>• Official publications [902(5)]<br>• Certified records generated by an electronic process or system [902(13)]<br>• Certified data copied from an electronic device, storage medium, or file [902(14)] |
| 4. | Digitally Stored Data and Internet of Things | • Witness with personal knowledge [901(*b*)(1)]<br>• Expert testimony or comparison with authenticated examples [901(*b*)(3)]<br>• Distinctive characteristics including circumstantial evidence [901(*b*)(4)]<br>• System or process capable of proving reliable and dependable result [901(*b*)(9)]<br>• Certified records generated by an electronic process or system [902(13)]<br>• Certified data copied from an electronic device, storage medium, or file [902(14)] |



| | | |
|---|---|---|
| 5. | Computer Processes, Animations, Virtual Reality, and Simulations | • Witness with personal knowledge [901(*b*)(1)]<br>• Expert testimony or comparison with authenticated examples [901(*b*)(3)]<br>• System or process capable of proving reliable and dependable result [901(*b*)(9)]<br>• Certified records generated by an electronic process or system [902(13)] |

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Page 60 Thursday, July 22, 2021
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| | | |
|---|---|---|
| 6. | Digital Photographs | • Witness with personal knowledge [901(*b*)(1)]<br>• System or process capable of providing reliable and dependable result [901(*b*)(9)]<br>• Official publications [902(5)]<br>• Certified records generated by an electronic process or system [902(13)]<br>• Certified data copied from an electronic device, storage medium, or file [902(14)] |

**103.** It is interesting to note that while the Evidence Act is of the year 1872, the Federal Rules of Evidence were adopted by the order of the Supreme Court of the United States exactly 100 years later, in 1972 and they were enacted with amendments made by the Congress to take effect on 1-7-1975. Yet, the Rules were found inadequate to deal with emerging situations and hence, several amendments were made, including the one made in 2017 that incorporated specific provisions relating to electronic records under sub-rules (13) and (14) of FRE 902. After this amendment, a lot of options have been made available to litigants seeking to rely upon electronically stored information, one among them being the route provided by sub-rules (13) and (14) of FRE 902. This development of law in the US demonstrates that, unlike in India, law has kept pace with technology to a great extent.

***Position in UK***

**104.** As pointed out in the main opinion, Section 65-B, in its present form, is a poor reproduction of Section 5 of the UK Civil Evidence Act, 1968. The language employed in sub-sections (2), (3), (4) and (5) of Section 65-B is almost in pari materia (with minor differences) with sub-sections (2) to (5) of Section 5 of the UK Civil Evidence Act, 1968. However, sub-section (1) of Section 65-B is substantially different from sub-section (1) of Section 5 of the UK Civil Evidence Act, 1968. But it also contains certain additional words in sub-section (1), namely, "*without further proof or production of the original*". For easy comparison and appreciation, sub-section (1) of Section 65-B of the Evidence Act and sub-section (1) of Section 5 of the UK Civil Evidence Act, 1968 are presented in a tabular form as follows:

| *Section 65-B(1), Indian Evidence Act, 1872* | *Section 5(1), Civil Evidence Act, 1968 [UK]* |
|---|---|
| "**65-B. *Admissibility of electronic records***.—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (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 of any contents of the original or of any fact stated therein of which direct evidence would be admissible." | "**5. *Admissibility of statements produced by computers***.—(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in sub-section (2) below are satisfied in relation to the statement and computer in question." |

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Page 61 Thursday, July 22, 2021
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**105.** But the abovementioned Section 5 of the UK Act, 1968 was repealed by the Civil Evidence Act, 1995. Section 15(2) of the Civil Evidence Act, 1995 repealed the enactments specified in Schedule II therein. Under Schedule II to the 1995 Act, Part I of the 1968 Act containing Sections 1-10 were repealed. The effect is that when Section 65-B was incorporated in the Evidence Act, by Act 21 of 2000, by copying sub-sections (2) to (5) of Section 5 of the UK Civil Evidence Act, 1968, Section 5 itself was not there in the UK statute book, as a result of its repeal under the 1995 Act.

**106.** The repeal of Section 5 under the 1995 Act was a sequel to the recommendations made by the Law Commission in September 1993. Part III of the Law Commission's Report titled "The Hearsay Rule in Civil Proceedings" noted the problems with the 1968 Act, one of which concerned computer records. Paras 3.14 to 3.21 in Part III of the Law Commission's Report read as follows:

*Computer records*

*3.14.* A fundamental mistrust and fear of the potential for error or mechanical failure can be detected in the elaborate precautions governing computer records in Section 5 of the 1968 Act. *The Law Reform Committee had not recommended special provisions for such records, and Section 5 would appear to have been something of an afterthought with its many safeguards inserted in order to gain acceptance of what was then a novel form of evidence*. Twenty-five years later, technology has developed to an extent where computers and computer-generated documents are relied on in every area of business and have long been accepted in banking and other important record-keeping fields. *The conditions have been widely criticised, and it has been said that they are aimed at operations based on the type of mainframe operations common in the mid 1960s, which were primarily intended to process in batches thousands of similar transactions on a daily basis*.

*3.15.* So far as the statutory conditions are concerned, there is a heavy reliance on the need to prove that the document has been produced in the normal course of business and in an uninterrupted course of activity. *It is at*



*least questionable whether these requirements provide any real safeguards in relation to the reliability of the hardware or software concerned*. In addition, they are capable of operating to exclude wide categories of documents, particularly those which are produced as the result of an original or a "one off" piece of work. Furthermore, they provide no protection against the inaccurate inputting of data.

*3.16.* We have already referred to the overlap between Sections 4 and 5. If compliance with Section 5 is a prerequisite, then computer-generated documents which pass the conditions set out in Section 5(2) "shall" be admissible, notwithstanding the fact that they originated from a chain of human sources and that it has not been established that the persons in the chain acted under a duty. In other words, the record provisions of Section 4, which exist to ensure the reliability of the core information, are capable of being disapplied. In the context of our proposed reforms, we do not consider that this apparent discrepancy is of any significance, save that it illustrates the fact that Section 5 was something of an afterthought.

*3.17. Computer-generated evidence falls into two categories. First, there is the situation envisaged by the 1968 Act, where the computer is used to file and store information provided to it by human beings. Second, there is the case where the record has itself been produced by the computer*, sometimes entirely by itself but possibly with the involvement of some other machine. Examples of this situation are computers which are fed information by monitoring devices. A particular example is automatic stock control systems, which are now in common use and which allow for purchase orders to be automatically produced. Under such systems evidence of contract

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Page 62 Thursday, July 22, 2021
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formation will lie solely in the electronic messages automatically generated by the seller's and buyer's computers. *It is easy to see how uncertainty as to how the courts may deal with the proof and enforceability of such contracts is likely to stifle the full development and effective use of such technology*. Furthermore, uncertainty may deter parties from agreeing that contracts made in this way are to be governed by English law and litigated in the English courts.

*3.18.* It is interesting to compare the technical manner in which the admissibility of computer-generated records has developed, compared with cases concerning other forms of sophisticated technologically produced evidence, for example radar records (see *Sapporo Maru* v. *Statue of Liberty*[60]). In *Statue of Liberty case*[60] radar records, produced without human involvement and reproduced in photographic form, were held to be admissible to establish how a collision of two ships had occurred. It was held that this was "real" evidence, no different in kind from a monitored tape recording of a conversation. Furthermore, in these cases, no extra tests of reliability need be met and the common law rebuttable presumption



is applied, that the machine was in order at the material time. The same presumption has been applied to intoximeter printouts (*Castle* v. *Cross*[65]).

*3.19.* There are a number of cases which establish the way in which courts have sought to distinguish between types of computer-generated evidence, by finding in appropriate cases that the special procedures are inapplicable because the evidence is original or direct evidence. As might be expected, case law on computer-generated evidence is more likely to be generated by criminal cases of theft or fraud, where the incidence of such evidence is high and the issue of admissibility is more likely to be crucial to the outcome and hence less liable to be agreed. For example, even in the first category of cases, where human involvement exists, a computer-generated document may not be considered to be hearsay if the computer has been used as a mere tool, to produce calculations from data fed to it by humans, no matter how complex the calculations, or how difficult it may be for humans to reproduce its work, provided the computer was not "contributing its own knowledge" (*R.* v. *Wood*[69]).

*3.20. There was no disagreement with the view that the provisions relating to computer records were outdated and that there was no good reason for distinguishing between different forms of record keeping or maintaining a different regime for the admission of computer-generated documents*. This is the position in Scotland under the 1988 Act. Furthermore, we were informed of fears that uncertainty over the treatment of such records in civil litigation in the United Kingdom was a significant hindrance to commerce and needed reform.

*3.21. Consultees considered that the real issue for concern was authenticity that this was a matter which was best dealt with by a vigilant attitude that concentrated upon the weight to be attached to the evidence, in the circumstances of the individual case, rather than by reformulating complex and inflexible conditions as to admissibility*.

(emphasis supplied)

**107.** In Part IV of the 1993 Report, titled "Recommendations for Reform", Para 4.43 dealt with the recommendations of the Law Commission in relation to computer records. Para 4.43 of the Law Commission's Report along with Recommendations Nos. 13, 14 and 15 are reproduced for easy reference:

(*b*) *Computerised records*

*4.43.* In the light of the criticisms of the present provisions and the response on consultation, we have decided to recommend that no special provisions be made in respect of computerised records. This is the position in Scotland under the 1988 Act

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Page 63 Thursday, July 22, 2021
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and reflects the overwhelming view of commentators, practitioners and others. That is not to say that we do not recognise that, as familiarity with and confidence in the inherent reliability of computers has grown, so has concern over the



potential for misuse, through the capacity to hack, corrupt, or alter information, in manner which is undetectable. We do not underestimate these dangers. However, the current provisions of Section 5 do not afford any protection and it is not possible to legislate protectively. Nothing in our proposals will either encourage abuse, or prevent a proper challenge to the admissibility of computerised records, where abuse is suspected. Security and authentication are problems that experts in the field are constantly addressing and it is a fast evolving area. The responses from experts in this field, such as the CBI, stressed that, whilst computer-generated information should be treated similarly to other records, such evidence should be weighed according to its reliability, with parties being encouraged to provide information as to the security of their systems. We have proposed a wide definition for the word "document". This will cover documents in any form and in particular will be wide enough to cover computer-generated information.

We, therefore, *recommend that:*

*13. Documents, including those stored by computer, which form part of the records of a business or public authority should be admissible as hearsay evidence under Clause 1 of our draft Bill and the ordinary notice and weighing provisions should apply.*

*14. The current provisions governing the manner of proof of business records should be replaced by a simpler regime which allows, unless the court otherwise directs, for a document to be taken to form part of the records of a business or public authority, if it is certified as such, and received in evidence without being spoken to in court. No special provisions should be made in respect of the manner of proof of computerised records.*

*15. The absence of an entry should be capable of being formally proved by affidavit of an officer of the business or authority to which the records belong.*

(emphasis in original)

**108.** The above recommendations of the Law Commission (UK) made in 1993, led to the repeal of Section 5 of the 1968 Act, under the 1995 Act. The rules of evidence in civil cases, insofar as electronic records are concerned, thus got liberated in UK in 1995 with the repeal of Section 5 of the UK Civil Evidence Act, 1968.

**109.** But there is a separate enactment in the UK, containing the rules of evidence in criminal proceedings and that is the Police and Criminal Evidence Act, 1984. Section 69 of the said Act laid down rules for determining when a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein. Section 69 of the said Act laid down three conditions (there are too many negatives in the language employed in Section 69). In simple terms, they require that it must be shown : (*i*) that there are no reasonable grounds for believing that the statement is not inaccurate because of improper use of the computer; (*ii*) that at all material times the computer was operating properly; and (*iii*) that the additional conditions specified in the rules made by the court are also satisfied.



**110.** The abovementioned Section 69 of the Police and Criminal Evidence Act, 1984

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Page 64 Thursday, July 22, 2021
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(PACE) was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. This repeal was also a sequel to the recommendations made by the Law Commission in June 1997 under its report titled "Evidence in Criminal Proceedings : Hearsay and Related Topics". Part 13 of the Law Commission's Report dealt with computer evidence in extenso. The problems with Section 69 of the 1984 Act, the response during the consultative process and the eventual recommendations of the UK Law Commission are contained in Paras 13.1 to 13.23. They are usefully extracted as follows:

*13.1.* In *Minors*[70] Steyn, J. summed up the major problem posed for the rules of evidence by computer output : (WLR p. 443)

"Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer. … If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have "bugs". … Realistically, therefore, computers must be regarded as imperfect devices."

*13.2.* The legislature sought to deal with this dilemma by Section 69 of PACE, which imposes important additional requirements that must be satisfied before computer evidence is adduced — whether it is hearsay or not (*Shephard*[71]).

*13.3.* In practice, a great deal of hearsay evidence is held on computer, and so Section 69 warrants careful attention. It must be examined against the requirement that the use of computer evidence should not be unnecessarily impeded, while giving due weight to the fallibility of computers.

*PACE, SECTION 69*

*13.4.* In the consultation paper we dealt in detail with the requirements of Section 69 : in essence it provides that a document produced by a computer may not be adduced as evidence of any fact stated in the document unless it is shown that the computer was properly operating and was not being improperly used. If there is any dispute as to whether the conditions in Section 69 have been satisfied, the court must hold a trial within the trial to decide whether the party seeking to rely on the document has established the foundation requirements of Section 69.

*13.5.* In essence, the party relying on computer evidence must first prove that the computer is reliable — or, if the evidence was generated by more than one computer, that each of them is reliable (*Cochrane*[72]). *This can be proved by tendering a written certificate, or by calling oral evidence*.



It is not possible for the party adducing the computer evidence to rely on a presumption that the computer is working correctly (*Shephard*[71], AC at p. 384-E). It is also necessary for the computer records themselves to be produced to the court (*Burr* v. *DPP*[73]).

*The problems with the present law*

*13.6.* In the consultation paper we came to the conclusion that the present law was unsatisfactory, for five reasons.

*13.7.* First, Section 69 fails to address the major causes of inaccuracy in computer evidence. As Professor Tapper has pointed out, "most computer error is either immediately detectable or results from error in the data entered into the machine".

*13.8. Secondly, advances in computer technology make it increasingly difficult to comply with Section 69 : it is becoming "increasingly impractical to examine (and therefore certify) all the intricacies of computer operation"*. These problems existed even before networking became common.

*13.9.* A third problem lies in the difficulties confronting the recipient of a computer-

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Page 65 Thursday, July 22, 2021
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produced document who wishes to tender it in evidence : the recipient may be in no position to satisfy the court about the operation of the computer. It may well be that the recipient's opponent is better placed to do this.

*13.10.* Fourthly, it is illogical that Section 69 applies where the document is tendered in evidence (*Shephard*[71]), but not where it is used by an expert in arriving at his or her conclusions (*Golizadeh*[74]), nor where a witness uses it to refresh his or her memory (*Sophocleous* v. *Ringer*[75]). If it is safe to admit evidence which relies on and incorporates the output from the computer, it is hard to see why that output should not itself be admissible; and conversely, if it is not safe to admit the output, it can hardly be safe for a witness to rely on it.

*13.11.* At the time of the publication of the consultation paper there was also a problem arising from the interpretation of Section 69. It was held by the Divisional Court in *McKeown* v. *DPP*[76] that computer evidence is inadmissible if it cannot be proved that the computer was functioning properly — even though the malfunctioning of the computer had no effect on the accuracy of the material produced. Thus, in that case, computer evidence could not be relied on because there was a malfunction in the clock part of an intoximeter machine, although it had no effect on the accuracy of the material part of the printout (the alcohol reading). On appeal, this interpretation has now been rejected by the House of Lords : only malfunctions that affect the way in which a computer processes, stores



or retrieves the information used to generate the statement are relevant to Section 69 (*Director of Public Prosecutions* v. *McKeown*[77]).

*13.12.* In coming to our conclusion that the present law did not work satisfactorily, *we noted that in Scotland, some Australian States, New Zealand, the United States and Canada, there is no separate scheme for computer evidence, and yet no problems appear to arise*. Our provisional view was that Section 69 fails to serve any useful purpose, and that other systems operate effectively and efficiently without it.

*13.13.* We provisionally proposed that Section 69 of PACE be repealed without replacement. Without Section 69, a common law presumption comes into play (*Phipson*, Para 23-14, approved by the Divisional Court in *Castle* v. *Cross*[65], WLR at p. 1377 B):

> "… 'In the absence of evidence to the contrary, the courts will presume that [mechanical instruments] were in order at the material time.' "

*13.14.* Where a party sought to rely on the presumption, it would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been — in which case the party would have to prove that it was (beyond reasonable doubt in the case of the prosecution, and on the balance of probabilities in the case of the defence). The principle has been applied to such devices as speedometers (*Nicholas* v. *Penny*[78]) and traffic lights (*Tingle Jacobs & Co.* v. *Kennedy*[79]), and in the consultation paper we saw no reason why it should not apply to computers.

*The response on consultation*

*13.15.* On consultation, the vast majority of those who dealt with this point agreed with us. *A number of those in favour said that Section 69 had caused much trouble with little benefit.*

*13.16.* The most cogent contrary argument against our proposal came from David Ormerod. In his helpful response, he contended that the common law presumption of regularity may not extend to cases in which computer evidence is central. He cites the assertion of the Privy Council in *Dillon* v. *R.*[80] that "it is well established that the courts

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will not presume the existence of facts which are central to an offence". If this were literally true it would be of great importance in cases where computer evidence is central, such as Intoximeter cases (*R.* v. *Medway Magistrates' Court, ex p Goddard*[81]). But such evidence has often been permitted to satisfy a central element of the prosecution case. Some of these cases were decided before



Section 69 was introduced (*Castle* v. *Cross*[65]); others have been decided since its introduction, but on the assumption (now held to be mistaken) (*Shephard*[71]) that it did not apply because the statement produced by the computer was not hearsay (*Spiby*[82]; *Neville*[83]). The presumption must have been applicable; yet the argument successfully relied upon in *Dillon*[80] does not appear to have been raised.

*13.17.* It should also be noted that *Dillon*[80] was concerned not with the presumption regarding machines but with the presumption of the regularity of official action. This latter presumption was the analogy on which the presumption for machines was originally based; but it is not a particularly close analogy, and the two presumptions are now clearly distinct.

*13.18.* Even where the presumption applies, it ceases to have any effect once evidence of malfunction has been adduced. The question is, what sort of evidence must the defence adduce, and how realistic is it to suppose that the defence will be able to adduce it without any knowledge of the working of the machine? On the one hand the concept of the evidential burden is a flexible one : a party cannot be required to produce more by way of evidence than one in his or her position could be expected to produce. It could therefore take very little for the presumption to be rebutted, if the party against whom the evidence was adduced could not be expected to produce more. For example, in *Cracknell* v. *Willis*[84] the House of Lords held that a defendant is entitled to challenge an intoximeter reading, in the absence of any signs of malfunctioning in the machine itself, by testifying (or calling others to testify) about the amount of alcohol that he or she had drunk.

*13.19.* On the other hand, it may be unrealistic to suppose that in such circumstances the presumption would not prevail. In *Cracknell* v. *Willis*[84] Lord Griffiths (AC at p. 468 C-D) said:

> "If Parliament wishes to provide that either there is to be an irrebuttable presumption that the breath testing machine is reliable or that the presumption can only be challenged by a particular type of evidence then Parliament must take the responsibility of so deciding and spell out its intention in clear language.
>
> Until then I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible."

But his Lordship went on:

> "... I am myself hopeful that the good sense of the Magistrates and the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that



few defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The Magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a critical eye on evidence such as was produced by *Hughes* v. *McConnell*[85] before being persuaded that it is not safe to rely

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upon the reading that it produces (*Cracknell* v. *Willis*[84], AC at p. 468 D-E).

*13.20.* Lord Goff did not share Lord Griffiths' optimism that motorists would not seek to challenge the analysis by spurious evidence of their consumption of alcohol, but did share his confidence in

> "… the good sense of Magistrates who, with their attention drawn to the safeguards for defendants built into the Act … will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a printout, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure" (*Cracknell* v. *Willis*[84], AC at p. 472 B-C).

*13.21.* These dicta may perhaps be read as implying that evidence which merely contradicts the reading, without directly casting doubt on the reliability of the device, may be technically admissible but should rarely be permitted to succeed. However, it is significant that Lord Goff referred in the passage quoted to the safeguards for defendants which are built into the legislation creating the drink-driving offences. In the case of other kinds of computer evidence, where (apart from Section 69) no such statutory safeguards exist, we think that the courts can be relied upon to apply the presumption in such a way as to recognise the difficulty faced by a defendant who seeks to challenge the prosecution's evidence but is not in a position to do so directly. The presumption continues to apply to machines other than computers (and until recently was applied to non-hearsay statements by computers) without the safeguard of Section 69; and we are not aware of any cases where it has caused injustice because the evidential burden cast on the defence was unduly onerous. Bearing in mind that it is a creature of the common law, and a comparatively modern one, we think it is unlikely that it would be permitted to work injustice.

*13.22.* Finally it should not be forgotten that Section 69 applies equally to computer evidence adduced by the defence. A rule that prevents a defendant from adducing relevant and cogent evidence, merely because there is no positive evidence that it is reliable, is in our view unfair.

*Our recommendation*

*13.23. We are satisfied that Section 69 serves no useful purpose. We are not aware of any difficulties encountered in those jurisdictions that have no equivalent.* We are satisfied that the presumption of proper functioning would apply to computers, thus throwing an evidential burden on to the opposing party, but that that burden would be interpreted in such a way



as to ensure that the presumption did not result in a conviction merely because the defence had failed to adduce evidence of malfunction which it was in no position to adduce. We believe, as did the vast majority of our respondents, that such a regime would work fairly. *We recommend the repeal of Section 69 of PACE. (Recommendation 50)*

(emphasis supplied)

**111.** Based on the above recommendations of the UK Law Commission, Section 69 of the PACE, 1984, was declared by Section 60 of the Youth Justice and Criminal Evidence Act, 1999, to have ceased to have effect. Section 60 of the 1999 Act reads as follows:

> "**60.** ***Removal of restriction on use of evidence from computer records***.— Section 69 of the Police and Criminal Evidence Act, 1984 (evidence from computer records inadmissible unless conditions relating to proper use and operation of computer shown to be satisfied) shall cease to have effect."

**112.** It will be clear from the above discussion that when our lawmakers passed the Information Technology Bill in the year 2000, adopting the language of Section 5 of the UK

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Civil Evidence Act, 1968 to a great extent, the said provision had already been repealed by the UK Civil Evidence Act, 1995 and even the Police and Criminal Evidence Act, 1984 was revamped by the 1999 Act to permit hearsay evidence, by repealing Section 69 of PACE, 1984.

***Position in Canada***

**113.** Pursuant to a proposal mooted by the Canadian Bar Association hundred years ago, requesting all Provincial Governments to provide for the appointment of Commissioners to attend conferences organised for the purpose of promoting uniformity of legislation among the provinces, a meeting of the Commissioners took place in Montreal in 1918. In the said meeting, a Conference of Commissioners on Uniformity of Laws throughout Canada was organised. In 1974, its name was changed to Uniform Law Conference of Canada. The objective of the Conference is primarily to achieve uniformity in subjects covered by existing legislations. The said Conference recommended a model law on Uniform Electronic Evidence in September 1998.

**114.** The above recommendations of the Uniform Law Conference later took shape in the form of amendments to the Canada Evidence Act, 1985. Section 31.1 of the said Act deals with authentication of electronic documents and it reads as follows:

> "**31.1.** ***Authentication of electronic documents***.—Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be."

**115.** Section 31.2 deals with the application of "best evidence rule" in relation to electronic documents and it reads as follows:

> "**31.2.** ***Application of best evidence rule — electronic documents***.—(1) The best evidence rule in respect of an electronic document is satisfied
>
> (*a*) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or



> (*b*) if an evidentiary presumption established under Section 31.4 applies.
>
> ***Printouts***
>
> (*2*) Despite sub-section (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout."

**116.** Section 31.3 indicates the method of proving the integrity of an electronic documents system, by or in which an electronic document is recorded or stored. Section 31.3 reads as follows:

> "**31.3.** ***Presumption of integrity***.—For the purposes of sub-section 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven
>
> (*a*) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
>
> (*b*) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or
>
> (*c*) if it is established that the electronic document was recorded or stored in the

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Page 69 Thursday, July 22, 2021
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usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it."

**117.** Section 31.5 is an interesting provision which *permits evidence to be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored*. This is for the purpose of determining under any rule of law whether an electronic document is admissible. Section 31.5 reads as follows:

"**31.5.** ***Standards may be considered***.—For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document."

**118.** Under Section 31.6(1), matters covered by Section 31.2(2), namely, the printout of an electronic document, the matters covered by Section 31.3, namely, the integrity of an electronic documents system, and matters covered by Section 31.5, namely, evidence in respect of any standard, procedure, usage or practice, may be established by affidavit. Section 31.6 reads as follows:

Page: 86

"**31.6.** ***Proof by affidavit***.—(1) The matters referred to in sub-section 31.2(2) and Sections 31.3 and 31.5 and in regulations made under Section 31.4 may be established by affidavit.

***Cross-examination***

(*2*) A party may cross-examine a deponent of an affidavit referred to in sub-section (1) that has been introduced in evidence

(*a*) as of right, if the deponent is an adverse party or is under the control of an adverse party; and

(*b*) with leave of the court, in the case of any other deponent."

**119.** Though a combined reading of Sections 31.3 and 31.6(1) of the Canada Evidence Act, 1985, gives an impression as though a requirement similar to the one under Section 65-B of Evidence Act, 1872 also finds a place in the Canadian law, there is a very important distinction found in the Canadian law. *Section 31.3(b) takes care of a contingency where the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to produce it. Similarly, Section 31.3(c) gives leverage for the party relying upon an electronic document to establish that the same was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.*

## IV. *Conclusion*

**120.** It will be clear from the above discussion that the major jurisdictions of the world have come to terms with the change of times and the development of technology and fine-tuned their legislations. Therefore, it is the need of the hour that there is a relook at Section 65-B of the Evidence Act, introduced 20 years ago, by Act 21 of 2000, and which has created a huge judicial turmoil, with the law swinging from one extreme to the other in the past 15 years from *Navjot Sandhu*[13] to *Anvar P.V.*[2] to *Tomaso Bruno*[7] to *Sonu*[35] to *Shafhi Mohammad*[3].

**121.** With the above note, I respectfully agree with conclusions reached by R.F. Nariman, J. that the appeals are to be dismissed with costs as proposed.

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† Arising from the impugned Judgment and Order in *Kailash Kishanrao Gorantyal* v. *Arjun Panditrao Khotkar*, 2017 SCC OnLine Bom 9168 (Bombay High Court, Election Petition No. 6 of 2014 with Applications in EPs Nos. 57, 66, 72, 82 and 85 of 2016, dt. 24-11-2017)

* **Ed.**: Nariman, J. delivered the Judgment of the Court for himself, Ravindra Bhat and Ramasubramanian, JJ. Ramasubramanian, J. delivered a supplementing opinion as well.

[1] *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*, (2020) 3 SCC 216 : (2020) 2 SCC (Cri) 34

[2] *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108

[3] *Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC (Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865

[4] *Kailash Kishanrao Gorantyal* v. *Arjun Panditrao Khotkar*, 2016 SCC OnLine Bom 15992

[5] *Kailash Kishanrao Gorantyal* v. *Arjun Panditrao Khotkar*, 2017 SCC OnLine Bom 9168

[6] *Kailash Kishanrao Gorantyal* v. *Arjun Panditrao Khotkar*, 2017 SCC OnLine Bom 9994

[7] *Tomaso Bruno* v. *State of U.P.*, (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54

[8] *Shafhi Mohd.* v. *State of H.P.*, (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704

[9] *K. Ramajayam* v. *State*, 2016 SCC OnLine Mad 451 : 2016 Cri LJ 1542

[10] *Kundan Singh* v. *State*, 2015 SCC OnLine Del 13647 : (2016) 1 DLT (Cri) 144

[11] *Banwarilal Agarwalla* v. *State of Bihar*, (1962) 1 SCR 33 : AIR 1961 SC 849 : (1961) 2 Cri LJ 12:"*3.* The first contention is based on an assumption that the word "any one" in Section 76 means only "one of the directors, and only one of the shareholders". This question as regards the interpretation of the word "any one" in Section 76 was raised in *Chief Inspector of Mines* v. *Lala Karam Chand Thapar*, AIR 1961 SC 838 : (1961) 2 Cri LJ 1 *and it has been decided there that the word "any one" should be interpreted there as "every one". Thus, under Section 76 every one of the shareholders of a private company owning the mine, and every one of the directors of a public company owning the mine is liable to prosecution. No question of violation of Article 14 therefore arises.*" (SCR p. 35 : AIR p. 850, para 3)

(emphasis supplied)

[12] *Om Parkash* v. *Union of India*, (2010) 4 SCC 17 : (2010) 2 SCC (Civ) 1, "*70.* Perusal of the opinion of the Full Bench in *B.R. Gupta-1* [*Balak Ram Gupta* v. *Union of India*, 1987 SCC OnLine Del 227 : AIR 1987 Del 239] would clearly *indicate with regard to interpretation of the word "any" in Explanation 1 to the first proviso to Section 6 of the Act which expands the scope of stay order granted in one case of landowners to be automatically extended to all those landowners, whose lands are covered under the notifications issued under Section 4 of the Act*, irrespective of the fact whether there was any separate order of stay or not as regards their lands. The logic assigned by the Full Bench, the relevant portions whereof have been reproduced hereinabove, appear to be reasonable, apt, legal and proper." (SCC p. 43, para 70)

(emphasis supplied)

[13] *State (NCT of Delhi)* v. *Navjot Sandhu*, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715

[14] *State* v. *Mohd. Afzal*, 2003 SCC OnLine Del 935 : (2003) 71 DRJ 178

[15] Section 69 of the UK Police and Criminal Evidence Act, 1984 dealt with evidence from computer records in criminal proceedings. Section 69 read thus:

> "**69. *Evidence from computer records***.—(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown—
>
> (*a*) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of that computer;
>
> (*b*) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents; and
>
> (*c*) that any relevant conditions specified in rules of court under sub-section (2) below are satisfied.
>
> (2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required."

By Section 70, Sections 68 and 69 of this Act had to be read with Schedule 3 thereof, the provisions of which had

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the same force in effect as Sections 68 and 69. Part I of Schedule 3 supplemented Section 68. Notwithstanding the importance of Part I of Schedule 3, we propose to refer to only two provisions of it, namely:

> "**1.** Section 68(1) above applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied.
>
> * * *
>
> **6.** Any reference in Section 68 above or this Part of this Schedule to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him."

Part II supplemented Section 69 in important respects. Two provisions of it are relevant, namely:

> "**8.** In any proceedings where it is desired to give a statement in evidence in accordance with Section 69 above, a certificate—
>
> (*a*) identifying the document 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 document as may be appropriate for the purpose of showing that the document was produced by a computer;
>
> (*c*) dealing with any of the matters mentioned in Section 69(1) above; and
>
> (*d*) purporting to be signed by a person occupying a reasonable position in relation to the operation of the computer,

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(footnote 15 *contd.*)

shall be evidence of anything stated in it; and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

**9.** Notwithstanding para 8 above, a court may require oral evidence to be given of anything of which evidence could be given by a certificate under that paragraph."

[16] *Vikram Singh* v. *State of Punjab*, (2017) 8 SCC 518 : (2017) 3 SCC (Cri) 641

[17] *Vikram Singh* v. *State of Punjab*, (2010) 3 SCC 56 : (2010) 2 SCC (Cri) 26

[18] The definition of "data", "electronic form" and "electronic record" under the Information Technology Act, 2000 (as set out hereinabove) makes it clear that "data" and "electronic form" includes "magnetic or optical storage media", which would include the audio tape/cassette discussed in *Vikram Singh*, (2017) 8 SCC 518 : (2017) 3 SCC (Cri) 641.

[19] *Mohd. Ajmal Amir Kasab* v. *State of Maharashtra*, (2012) 9 SCC 1 : (2012) 3 SCC (Cri) 481

[20] *Ram Singh* v. *Ram Singh*, 1985 Supp SCC 611 : AIR 1986 SC 3

[21] *R.* v. *Maqsud Ali*, (1966) 1 QB 688 : (1965) 3 WLR 229 : (1965) 2 All ER 464 (CCA)

[22] *R.* v. *Robson*, (1972) 1 WLR 651 (CCC)

[23] *Tukaram S. Dighole* v. *Manikrao Shivaji Kokate*, (2010) 4 SCC 329 : (2010) 2 SCC (Civ) 112 : (2010) 2 SCC (Cri) 826

[24] *Presidential Poll, In re*, (1974) 2 SCC 33

[25] *Chandra Kishore Jha* v. *Mahavir Prasad*, (1999) 8 SCC 266

[26] *Special Reference No. 1 of 2002, In re (Gujarat Assembly Election matter)*, (2002) 8 SCC 237

[27] *Raj Kumar Yadav* v. *Samir Kumar Mahaseth*, (2005) 3 SCC 601

[28] *Cochin State Power & Light Corpn. Ltd.* v. *State of Kerala*, (1965) 3 SCR 187 : AIR 1965 SC 1688

[29] *Raj Kumar Dey* v. *Tarapada Dey*, (1987) 4 SCC 398

[30] *Tarapada Dey* v. *District Registrar, Hooghly*, 1986 SCC OnLine Cal 101 : AIR 1987 Cal 107

[31] *B.P. Khemka (P) Ltd.* v. *Birendra Kumar Bhowmick*, (1987) 2 SCC 407

[32] *Hira Tikkoo* v. *State (UT of Chandigarh)*, (2004) 6 SCC 765

[33] *State of Karnataka* v. *M.R. Hiremath*, (2019) 7 SCC 515 : (2019) 3 SCC (Cri) 109 : (2019) 2 SCC (L&S) 380

[34] *Union of India* v. *Ravindra V. Desai*, (2018) 16 SCC 273 : (2020) 1 SCC (Cri) 669 : (2019) 1 SCC (L&S) 225

[35] *Sonu* v. *State of Haryana*, (2017) 8 SCC 570 : (2017) 3 SCC (Cri) 663

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[36] *M.R. Hiremath* v. *State*, 2017 SCC OnLine Kar 4970

[37] "**207. *Supply to the accused of copy of police report and other documents***.—In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of costs, a copy of each of the following—

(*i*) the police report;

(*ii*) the first information report recorded under Section 154;

(*iii*) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;

(*iv*) the confessions and statements, if any, recorded under Section 164;

(*v*) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (*iii*) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (*v*) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in court."

[38] *CBI* v. *R.S. Pai*, (2002) 5 SCC 82 : 2002 SCC (Cri) 950

[39] *Paras Jain* v. *State of Rajasthan*, 2015 SCC OnLine Raj 8331

[40] *Taylor* v. *Taylor*, (1875) LR 1 Ch D 426

[41] *See*, Clause 41.17 of the Licence Agreement for Provision of Unified Access Services:"The LICENSEE shall maintain all commercial records with regard to the communications exchanged on the network. Such records shall be archived for at least one year for scrutiny by the licensor for security reasons and may be destroyed thereafter unless directed otherwise by the licensor."; Clause 39.20 of the Licence Agreement for Unified Licence:"The licensee shall maintain all commercial records/Call Detail Record (CDR)/Exchange Detail Record (EDR)/IP Detail Record (IPDR) with regard to the 39 communications exchanged on the network. Such records shall be archived for at least one year for scrutiny by the licensor for security reasons and may be destroyed thereafter unless directed otherwise by the licensor. Licensor may issue directions/instructions from time to time with respect to CDR/IPDR/EDR."

[42] The Committee comprised of Rajesh Bindal, S. Muralidhar, Rajiv Sahai Endlaw, Rajiv Narain Raina and R.K. Gauba, JJ.

[43] *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal*, 2017 SCC OnLine SC 1983

[44] *Rajendra Kumar Meshram* v. *Vanshmani Prasad Verma*, (2016) 10 SCC 715

[45] *Vanshmani Prasad Verma* v. *Rajendra Kumar Meshram*, 2015 SCC OnLine MP 7455

[46] *Mairembam Prithviraj* v. *Pukhrem Sharatchandra Singh*, (2017) 2 SCC 487

[47] *Durai Muthuswami* v. *N. Nachiappan*, (1973) 2 SCC 45

[48] *Jagjit Singh* v. *Dharam Pal Singh*, 1995 Supp (1) SCC 422

[49] *Vashist Narain Sharma* v. *Dev Chandra*, (1955) 1 SCR 509 : AIR 1954 SC 513

[50] Stephen Mason, "*Electronic Evidence and the Meaning of "Original"*", 79 Amicus Curiae 26 (2009).

[51] *Harry Parker Ltd.* v. *Mason*, (1940) 2 KB 590 (CA)

[52] *R.* v. *Burr & Sullivan*, 1956 Crim LR 442

[53] *Hopes & Lavery* v. *H.M. Advocate*, 1960 Crim LR 566

[54] *R.* v. *Mills*, (1962) 1 WLR 1152 : (1962) 3 All ER 298 (CCA)

[55] *S. Pratap Singh* v. *State of Punjab*, (1964) 4 SCR 733 : AIR 1964 SC 72

[56] *Yusufalli Esmail Nagree* v. *State of Maharashtra*, (1967) 3 SCR 720 : AIR 1968 SC 147 : 1968 Cri LJ 103

[57] *N. Sri Rama Reddy* v. *V.V. Giri*, (1970) 2 SCC 340 : AIR 1971 SC 1162

[58] *R.M. Malkani* v. *State of Maharashtra*, (1973) 1 SCC 471 : 1973 SCC (Cri) 399 : AIR 1973 SC 157

[59] *Ziyauddin Burhanuddin Bukhari* v. *Brijmohan Ramdass Mehra*, (1976) 2 SCC 17

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Page 73 Thursday, July 22, 2021
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[60] *Sapporo Maru* v. *Statue of Liberty*, (1968) 1 WLR 739 : (1968) 2 All ER 195

[61] *R.* v. *Pettigrew*, (1980) 71 Cr App R 39

[62] Professor Smith was a well-known authority on criminal law and law of evidence; J.C. Smith, "*The Admissibility of Statements by Computer*", 1981 Crim LR 387, 388.

[63] Professor Tapper is a well-known authority on law of evidence; Colin Tapper, "*Reform of the Law of Evidence in Relation to the Output from Computers*", (1995) 3 IntlJ L & Info Tech 87.

[64] Professor Seng is an Associate Professor at the National University of Singapore; Daniel K.B. Seng, "*Computer Output as Evidence*", 1997 Sing JLS 139.

[65] *Castle* v. *Cross*, (1984) 1 WLR 1372

[66] *R.* v. *Robson Mitchell & Richards*, 1991 Crim LR 360

[67] *Lorraine* v. *Markel American Insurance Co.*, 241 FRD 534 (2007)

[68] "*2*. Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered : (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under Rule 401, is it authentic as required by Rule 901(*a*) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (Rules, 1001-1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance."

[69] *R.* v. *Wood*, (1982) 76 Cr App R 23 (CA)

[70] *R.* v. *Minors*, (1989) 1 WLR 441 at p. 443 D-E (CA)

[71] *R.* v. *Shephard*, 1993 AC 380 : (1993) 2 WLR 102 (HL)

[72] *R.* v. *Cochrane*, 1993 Crim LR 48

[73] *Burr* v. *DPP*, 1996 Crim LR 324

[74] *R.* v. *Golizadeh*, 1995 Crim LR 232

[75] *Sophocleous* v. *Ringer*, 1988 RTR 52

[76] *McKeown* v. *DPP*, 1995 Crim LR 69

[77] *Director of Public Prosecutions* v. *McKeown*, (1997) 1 WLR 295 (HL)

[78] *Nicholas* v. *Penny*, (1950) 2 KB 466

[79] *Tingle Jacobs & Co.* v. *Kennedy*, (1964) 1 WLR 638 (CA)

[80] *Dillon* v. *R.*, 1982 AC 484 : (1982) 2 WLR 538 (PC)

[81] *R.* v. *Medway Magistrates' Court, ex p Goddard*, 1995 RTR 206

[82] *R.* v. *Spiby*, (1990) 91 Cr App R 186 (CA)

[83] *R.* v. *Neville*, 1991 Crim LR 288

[84] *Cracknell* v. *Willis*, 1988 AC 450 : (1987) 3 WLR 1082 (HL)

[85] *Hughes* v. *McConnell*, 1985 RTR 244

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