ARJUN PANDITRAO: THE SUPREME COURT'S ATTEMPT TO CLARIFY A HISTORY OF JUDICIAL UNCERTAINTY

1. INTRODUCTION

The evolution of information and communication technology has changed our world tremendously. In the past decade or two, there has been a significant increase in electronic contracts and communications. Communication between parties, across the globe, has become simpler than ever before. As technology has become more portable, greater amounts of information is created, stored, and accessed in a variety of devices. With increasing reliance on electronic contracts, communication, and exchange of documents through electronic means, electronic evidence has assumed great significance. Further, with the increasing impact of technology in every sphere, production of electronic evidence has become vital to prove the liability of an accused or a defendant.

Sections 65A and 65B were inserted into the Indian Evidence Act, 1872 (the "**Evidence Act**") by the Information Technology Act, 2000, creating a deeming fiction of electronic records being considered a 'document' for the purpose of the Evidence Act, subject to satisfaction of the conditions enumerated in Section 65B. The provisions put in place safeguards protecting the source and authenticity of the electronic records, which are by nature, susceptible to tampering and alteration. Electronic record has been defined in the Information Technology Act, 2000 as any data, record or data generated, any image or sound stored, received, or sent in an electronic form or micro-film or computer-generated micro-film.

The law on the mandatory requirement of filing a certificate under Section 65B (4) of the Evidence Act has oscillated between extremes, with the Supreme Court and various High Courts frequently taking contrarian stands on the subject. The Supreme Court, by way of its recent judgment in *Arjun Panditrao*[1], sought to put to rest the raging debate on the mode of proof of electronic records under Section 65B of the Evidence Act. The judgment was rendered pursuant to a reference by a division bench of the Supreme Court on July 26, 2019, which found that the law laid down by the division bench in *Shafhi Mohammad*[2] might need reconsideration in light of the position laid down in *Anvar P.V.*[3]

The Supreme Court, by way of its decision in *Arjun Panditrao*, has held that the correct position in law was that which was laid down by *Anvar P.V.*, along with a few clarifications. However, a closer look would suggest that the Supreme Court has left some crucial questions unanswered, and some others answered only partially. Thus, leaving uncertainty about the mode of proof of electronic records.

[1] *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.*, Civil Appeal Nos. 20825 – 20826 of 2017, 2407 of 2018 and 3696 of 2018, decided on July 14, 2020.
[2] *Shafhi Mohammad v. State of Himachal Pradesh* reported in (2018) 2 SCC 801.
[3] *Anvar P.V. v. P.K. Basheer & Ors*. reported in (2014) 10 SCC 473.

2. THE DICHOTOMY IN THE LAW ON PROOF OF ELECTRONIC RECORDS

The question of admissibility of electronic records in evidence was considered by the Supreme Court in *Navjot Sandhu*[4] in the context of printouts of computerized call records derived from a cell phone. The Supreme Court held that irrespective of compliance with the requirements of Section 65B of the Evidence Act, there is no bar to adducing secondary evidence of an electronic record under Sections 63 and 65 of the Evidence Act.

This view was struck down by a three-judge bench of the Supreme Court in *Anvar P.V*, which ruled that the general provisions of Sections 63 and 65 would have no application in the case of secondary evidence of electronic records, as it is wholly governed by Sections 65A and 65B which are special provisions. Notably, the Court went on to observe that the procedure laid down under Section 65B would only be applicable to secondary evidence, and that electronic records produced as primary evidence would continue to be governed by Section 62 of the Evidence Act.

Thereafter, a three-judge bench of the Supreme Court in *Tomaso Bruno*[5] adverted to *Navjot Sandhu (which was already overruled at that point*), and concluded that secondary evidence of the contents of electronic records could also be led under Section 65 of the Evidence Act. *Tomaso Bruno* conspicuously made no reference to *Anvar P.V*.

It is of relevance to note that *Anvar P.V.* emphasized that the certificate under Section 65B was the *only* mode of proof of electronic record introduced by way of secondary evidence, without which the record would be *inherently inadmissible*. Apart from clarifying that compliance of Section 65B is mandatory pre-requisite to admissibility, this finding is also particularly relevant in the context of the stage at which the admissibility of an electronic record can be objected to, as demonstrated below. The Court in *Anwar P.V.* further held that the evidence relating to electronic record as envisaged under Sections 65A and 65B, being a special law, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Thus, it was held that Sections 63 and 65 of the Evidence Act have no application in the case of secondary evidence by way of electronic record and it would be wholly governed by Sections 65A and 65B of the Evidence Act.

Subsequently, in *Sonu*[6], a division bench of the Supreme Court had occasion to consider the nature of a certificate filed under Section 65B (4) of the Evidence Act, as well as the stage at which the objection regarding proof of electronic records could be taken. The Supreme Court observed that objections regarding admissibility of documents which are *per se* inadmissible can be taken even at the appellate stage, being a fundamental issue. In this context, it was observed that it was nobody's case that an electronic record is inherently inadmissible in evidence, and thus an objection that it was marked before the trial court without the requisite certificate under Section 65B (4) would be an objection relating to mode of proof which is procedural in nature would have to be raised at the trial stage itself, and not later.

On this point, *Sonu* is directly in the teeth of *Anvar P.V.*, which stated, in no uncertain terms, that proof of an electronic record by way of a certificate under Section 65B (4) would go to the very root of admissibility of the electronic record, which would imply that an objection to the non-filing thereof would be maintainable for the first time even on appeal. However, in *Sonu*, the requirement of filing the certificate

[4] *State (NCT of Delhi) v. Navjot Sandhu* reported in (2005) 11 SCC 600.
[5] *Tomaso Bruno & Another v. State of Uttar Pradesh,* reported in (2015) 7 SCC 178.
[6] *Sonu alias Amar v. State of Haryana* reported in (2017) 8 SCC 570.

was reduced down to a mere procedural tic, one that could be cured by satisfying the requirements of Section 63 and 65 of the Evidence Act, the objection to which must be taken at the stage of trial itself.

Significantly, in *Shafhi Mohammed,* a division bench of the Supreme Court held that Section 65A and 65B of the Evidence Act cannot be held to be a complete code, and that the procedural requirement under Section 65B (4) of the Evidence Act is to be applied only when electronic evidence is produced by a person who is in a position to produce such certificate, being in control of the device in question. The Supreme Court went on to hold that where electronic evidence is produced by a party who is not in possession of the device containing the electronic record, procedure under Sections 63 and 65 of the Evidence Act can be invoked, thus concluding that the requirement of certificate under Section 65B (4) is not always mandatory.

By reason of these conflicting judicial pronouncements, there was no clarity on the significance of the certificate under Section 65B (4), as to whether it was a mere procedural formality which could be overcome by the party otherwise satisfying the provisions of Sections 63 and 65 of the Evidence Act (*in terms of Shafhi Mohammed*), or whether it was the mandatory pre-condition for adducing secondary evidence of an electronic record. The stage at which the certificate was required to be filed, as well as the nature of the requirement were also unclear in light of the conflicting judicial pronouncements, and after the reference was made, it was expected that *Arjun Panditrao* would comprehensively lay down the law, thus putting to rest the debate on the subject. However, in attempting to reconcile the apparent conflict between *Anvar P.V.* and *Shafhi Mohammed*, it would appear that the Supreme Court has in effect perpetrated the very wrong it sought to remedy in the position laid down in *Shafhi Mohammed,* while also leaving some other questions unanswered.

3. THE HOLDING IN *ARJUN PANDITRAO*

Arjun Panditrao was concerned with election petitions, in which the main bone of contention was that a party had filed nomination papers beyond the prescribed deadline, which could be proved by video recordings stored on CDs and VCDs. The Petitioner made several applications to get copies of this video recording, along with the certificate under Section 65B of the Evidence Act, but the Election Commission refused to furnish copies of the record, despite a specific direction of the court. The High Court found that there had been "*substantial compliance*" of the requirement of giving a certificate under Section 65B and permitted the CDs and VCDs to be admitted into evidence. The matter went in appeal before the Supreme Court and was further referred to a full bench, whose findings have been summarized below.

3.1 Sections 65A and 65B constitute a special code, which covers both primary and secondary evidence of electronic records

The Supreme Court held that the non-obstante clause in Section 65B (1) makes it clear that admissibility and proof of information contained in electronic record must follow the drill of Section 65B which is a special provision, thus making Sections 62 – 65 of the Evidence Act irrelevant for mode of proof of electronic records.

It was observed that Section 65B (1) of the Evidence Act differentiates between original information contained in the computer itself, and copies made therefrom. The former being primary evidence and the latter being secondary evidence. With this finding, the Supreme Court deleted the words "*under Section 62 of the Evidence Act*" from the last sentence of paragraph 24 of *Anvar P.V.* With these observations and clarifications, the law laid down by *Anvar P.V.* was upheld.

3.2 **The certificate under Section 65B (4) is only required in the case of secondary evidence of electronic records, i.e., "computer output"**

In line with *Anvar P.V.*, it was held in *Arjun Panditrao* that the requisite certificate in terms of Section 65B (4) of the Evidence Act is unnecessary if the original document itself is produced – which would be the original "electronic record" contained in the "computer" in which the information is first stored. The Supreme Court further clarified that the original document can be proved by the owner of a laptop, computer, or mobile phone by stepping into the witness box and proving that the concerned device is owned or operated by him. Whereas in the case of a "computer output", which would be secondary evidence of the electronic record, the Supreme Court reaffirmed that compliance with Section 65B is a mandatory pre-requisite to admissibility.

In this context, it was observed that where the "computer" forms part of a "computer system" or "computer network", it becomes physically impossible to bring and produce such system in Court and thus, the only way of proving information contained in such electronic record would be by means of filing the requisite certificate under Section 65B (4).

3.3 ***Shafhi Mohammed* and *Tomaso Bruno* are overruled, being in conflict with *Anvar P.V.*, which was delivered by a larger bench**

The bench found that majority of the judgments relied upon in *Shafhi Mohammed*, on reliability and admissibility of electronic record, were all delivered prior to the year 2000 when the Evidence Act was amended to introduce Sections 65A and 65B, and thus could be of no assistance in interpreting the law. It further noted that *Tukaram* [7] was not a judgment which dealt with Section 65B and that *Tomaso Bruno* does not lay down the law correctly and hence could not be relied upon.

The Supreme Court held that *Shafhi Mohammed* states the law incorrectly, and is in the teeth of the judgment in *Anvar P.V.* It was further held that *Tomaso Bruno*, in not making any reference to *Anvar P.V.* and adverting to *Navjot Sandhu* is *per incuriam*, and thus, overruled.

3.4 **A party which is unable to obtain the certificate under Section 65B (4) may make an application to the Court seeking to summon the same from the party competent to attest to the contents thereto**

The Supreme Court found that the underlying reason cited by *Shafhi Mohammed* to dilute the law laid down by *Anvar P.V.*, being difficulty in obtaining the certificate in some cases, is wholly incorrect. It was held that it is always open to a party to make an application to the judge seeking production of such a certificate from the requisite person under Section 65B (4) in cases where such person refuses to give it.

Interestingly, the Court went on to observe that in the specific fact situation of *Arjun Panditrao*, despite the best efforts made by the party both through Court and otherwise, to get the requisite certificate under Section 65B (4) of the Evidence Act, the concerned authorities refused to do so on some pretext or the other.

The Court held that at this point, the applicability of the Latin maxims '*lex non cogit ad impossibilia*' (the law does not demand the impossible) and '*impotentia excusat legem*' (when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused) kick in, and thus, the party must be relieved of the mandatory rigor of Section 65B (4) in such cases.

[7] *Tukaram S. Dighole v. Manikrao Shivaji Kokate*, reported in (2010) 4 SCC 329.

The bench, thereafter, went on to cast an obligation on the trial court, in cases where either a defective certificate has been given, or a certificate is refused to be given, to summon the person(s) referred to in Section 65B (4) of the Evidence Act, and require such person(s) to give the requisite certificate.

There is no clarity on whether, in cases where the certificate is not given or remains defective even after an attempt has been made to summon the concerned person, the Court must then independently satisfy itself of the authenticity of the electronic record sought to be produced, or if the party producing such electronic record is required to prove the same by way of expert evidence under Section 45A of the Evidence Act.

3.5 **The certificate under Section 65B (4) must normally accompany the electronic record when it is produced in evidence, subject to certain exceptions**

The Supreme Court reiterated the position laid down in *Anvar P.V.,* that ordinarily, the certificate must accompany the electronic record when it is produced in evidence. It went on to clarify however that in cases where the certificate cannot be procured by the party seeking to rely upon the electronic record, the trial Judge must summon the person(s) referred to in Section 65B (4) and require that the certificate be given by such person(s) and that this ought to be done at the stage when the electronic record is produced in evidence without the requisite certificate. The Supreme Court hastened to add here that this would be subject to discretion being exercised in civil cases, in accordance with law, and in accordance with the requirements of justice on the facts of the case.

It further observed that in criminal trials, the stage of admitting documentary evidence is at the time of filing of charge sheet, at which time, all documents entered in the charge sheet have to be given to the accused. Thus, it would necessarily follow that the electronic evidence, i.e., the computer output, along with the certificate under Section 65B (4) has to be furnished at the latest before the trial begins. To this extent, it clarified the law laid down in *State of Karnataka v. M.R. Hiremath*.[8] In doing so, the court further noted that in a criminal trial it is assumed that the case of the prosecution is concretized against the accused before commencement of the trial and the prosecution ought not to be allowed to fill up any lacunae during the trial. The only exception to this general rule being a case where the prosecution has 'mistakenly' not filed the document. It was held that in such cases where discretion was exercised in favour of permitting evidence to be filed at a later stage, the court may in appropriate cases allow the prosecution to produce the certificate at a later point in time, that is, at the time when the electronic evidence is produced in evidence in such cases.

It was finally held that subject to the caveats laid down in respect of criminal trials, the certificate under Section 65B (4) could be filed at any time during the trial, before hearing is concluded, at which point, the information contained in electronic record can be admitted and relied upon in evidence.

With these observations, the Supreme Court reiterated that the certificate as required under Section 65B (4) is a condition precedent to the admissibility of evidence by way of electronic record, and that the provisions of Section 65B (4) are a mandatory requirement of the law. In the words of R.F. Nariman J, "*…Section 65B (4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner states and not otherwise. To hold otherwise would render Section 65B (4) otiose.*"

[8] *State of Karnataka v. M.R. Hiremath,* reported in (2019) 7 SCC 515.

4. IMPLICATIONS OF *ARJUN PANDITRAO* – WHAT IS THE LAW AS IT STANDS TODAY?

While *Arjun Panditrao* certainly is well-intentioned, one cannot help but notice the glaring inconsistencies within the judgment itself. While on the surface, the law laid down in *Anvar P.V* has been upheld, a closer reading would reveal that the requirement of producing the requisite certificate under Section 65B (4) has been relaxed, in circumstances where a party has not been able to produce it despite his "best efforts" to do so. In doing so, in effect, the law laid down in *Arjun Panditrao* does not completely and conclusively resolve the conflict between *Anvar P.V.* and *Shafhi Mohammed*, but in fact, fuels it, albeit unintentionally.

The relaxation of the rigors of Section 65B (4), in making exception for cases in which the party has sought to produce the certificate but has failed to do so despite "best efforts", has the effect of carving out an exception that the statute simply does not permit. By thereafter adverting to the position in *Anvar P.V.* as good law, and holding that filing of the requisite certificate in terms of Section 65B (4) is a condition precedent to admissibility of electronic records in evidence, the Supreme Court has perhaps unintentionally created more ambiguity than it set out to resolve.

However, a close reading of *Anvar P.V.* and *Arjun Panditrao* would ultimately reveal that the requirement of filing the certificate under Section 65B (4) is not merely procedural, though the judgment in *Sonu* has not been expressly overruled by *Arjun Panditrao*. The position as laid down in *Anvar P.V.* and upheld by *Arjun Panditrao* would necessarily imply that an electronic record is *inherently inadmissible* in evidence in the absence of the requisite certificate under Section 65B (4) of the Evidence Act. This would in turn imply that an objection as to non-filing of the requisite certificate, or a certificate that does not pass the rigors of Section 65B (4) of the Evidence Act, would be an objection on a fundamental issue, being an objection regarding admission of a document which is inherently inadmissible. Such objection would be maintainable, at the first instance, even at the appellate stage. Therefore, although *Arjun Panditrao* does not seem to discuss the proposition of law laid down in *Sonu*, a closer look at the judgment would make it clear that the judgment in *Sonu* is effectively not good law in light of what was already held in *Anvar P.V*.

5. CONCLUSION

Justice Ramasubramanian, in his separate concurring opinion, has pointed out the draconian nature of Section 65B of the Evidence Act, as well as the need for legislative reforms. As pertinently observed, Section 65B of the Evidence Act is closely adapted from Section 5 of the UK Civil Evidence Act, 1968, which was, in fact, repealed five years before it was adopted by India.

Section 65B of the Evidence Act, as it stands today, fails to address the practical difficulties faced by several litigants on account of inability to procure the requisite certificate, where the device from which the electronic record is produced is not within the ownership or control of the party that wishes to produce the record in evidence. Section 65B of the Evidence Act, by way of its mandatory wording, does not provide for any relaxations, which issue *Arjun Panditrao* has attempted to redress by carving out an exception in cases where parties are unable to procure the certificate despite their "best efforts".

Notably, *Arjun Panditrao* also casts an obligation on the Courts to summon the certificate from the person(s) authorized to attest thereto as provided under Section 65B (4), which could potentially result in a mini-trial within the trial itself, thus not only delaying justice to the parties, in some cases by years, but also causing significant expense to the parties. This would also add to pendency of matters before the Courts and add to our already overburdened judiciary's dismal disposal rates.

The answer to these questions, as observed by Justice Ramasubramanian in his concurring opinion, might be in adoption of the UK and Canadian presumption of authenticity of electronic records, which then has to be rebutted by the opposite party with cogent evidence. The Evidence Act as it stands today, presumes the legitimacy of specific electronic records, such as e-gazettes, electronic agreements, electronic signatures. Without further legislative reforms in the mode of proof of electronic records, it is unlikely that the judiciary will be able to do much to address the difficulties of the litigants and Courts alike.

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