



Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings as per Bhartiya Sakshya Adhiniyam, 2023

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ABSTRACT

The Bharatiya Sakshya Adhiniyam, 2023 establishes comprehensive evidentiary standards for fair trials, including admissibility of electronic evidence. Clearer definitions of "Document," Primary Electronic Evidence, and relevant provisions of BSA, 2023 requirements associated with the Information Technology Act, 2000 were developed recently. The Supreme Court of India has addressed electronic data tampering and e-record admissibility, while the Central Government Home Affairs Standing Committee has underlined the necessity of safeguarding digital data integrity and its value. Latest Judicial developments and new provisions on admissibility and mutual admissibility of electronic evidences are examined in the paper.

KEYWORDS: Bhartiya Sakshya Adhiniyam, 2023, Indian Evidence Act, 1872, Admissibility of Evidence & Electronic Evidence, Standing Committee on Home Affairs, 2023, Directive proposal of European Union, Law Commission, 2003, Malimath Committee, Guidelines by Karnataka High Court, State (NCT of Delhi v. Navjot Sandhu alias Afsan Guru (2005), Anvar P.V. v. P.K. Basheer (2014), Tomaso Bruno v. State of Haryana (2017), Shafhi Mohamad v. State of Himachal Pradesh (2018), Arjun Panditrao Khotkar v. Kailash Khushanrao Gorantyal and Ors. (2020)

In 2023, the Bharatiya Sakshya Adhiniyam changed electronic evidence laws. Both Document and Evidence incorporate digital evidence. Bharatiya Sakshya Adhiniyam, 2023 considers electronic records documents. Primary and secondary sources can prove it. Securely preserved electronic or digital records constitute the main evidence. Unless contested, these recordings constitute key evidence. This includes electronic video recordings and transmissions. Automated storage includes temporary files if an electronic or digital record is saved in numerous computer resource locations. Secondary evidence includes documentary and oral testimonials that verify the original. Written confessions and certified document analysts who have reviewed a document with multiple accounts or other papers that are not easily inspectable are now considered Secondary Evidence under the Bharatiya Sakshya Adhiniyam¹.

Under the Bharatiya Sakshya Adhiniyam, 2023, witnesses or accused or victims can testify in electronic form in relation to matters of fact under inquiry, and such statements will be considered as oral evidence².





Electronic or digital records printed or stored in optical or magnetic media which is produced by a computer or a combination of computers or different computers are admissible as evidence under Section 3, Bharatiya Sakshya Adhiniyam, 2023.

Electronic and digital devices are included under Section 2 (d) Illustration (vi). Digital devices includes emails, server logs, computer, laptop, or Smartphone documents, messages, WebPages, locational data, and voicemail messages³. This clarifies the meaning of “Document”.

The Bhartiya Sakshya Adhiniyam, 2023 states that when a video is simultaneously captured electronically and broadcast, aired, or transferred, each recording is major evidence⁴. This clarification will enable investigative authorities to establish cyber criminal responsibility even if the accused deleted the underlying electronic or digital record. Destroying the original electronic or digital record will not help the accused because other electronic or digital evidence can be collected, stored, transmitted, broadcasted, transferred, produced from proper custody, or stored in multiple computer storage spaces.

JUDICIAL DEVELOPMENTS BEFORE THE PASSING OF BHARTIYA SAKSHYA ADHINIYAM, 2023

The Supreme Court of India has often said that electronic and digital evidence can be manipulated and altered, compromising the case. Without proper safeguards, electronic or digital evidence will impede justice.

In *Tomaso Bruno and Another versus State of U.P.*⁵, Supreme Court unequivocally states that relevant electronic evidence is “to be relied solely on the criminal machinery”. Foreign nationals are acquitted in Italian tourist murder cases due to lack of CCTV evidence. This case is a watershed in electronic evidence relevance and admissibility since insufficient use of advanced technology in investigations led to acquittal at the highest level. This case follows the concept which is decided in *Ansar P.V. v. P. K. Basheer & Ors.*⁶, the usual secondary evidence does not apply to electronic evidence.

The Supreme Court ruled that secondary electronic records are inadmissible without a certificate.⁷

The Supreme Court (two-judge bench) ruled in *P.V. Anvar v. P.K. Basheer*, which rejected a two-judge bench ruling, in the case of *State (NCT of Delhi) v. Navjot Sandhu@ Afsan*. The court ruled that electronic documents are inadmissible without a certified certificate under Section 65-B (4) of the Indian Evidence Act, 1872. The court also ruled in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and others*, 2017, that the requirement of certificate under Section 65-B (4) is not necessary for the admissibility of electronic evidence and its submission.

The key is that Section 65-B (4) of the Bharatiya Sakshya Adhiniyam, 2023 does not require a certificate, especially if the person providing electronic evidence does not have the document's source device.





Section 65-B of the Indian Evidence Act covers electronic document acceptance. Subsection (4) of this section requires a certificate from an authority figure who oversees the equipment or operations. The certificate identifies the electronic record and describes its creation. It also specifies the equipment and validates that a computer created the electronic record as part of routine operations.

The text argues that it would be unfair to apply this provision in every case, especially where the party providing the evidence lacks jurisdiction over the electronic document generator. The court should accept digital evidence more liberally in such cases. Section 63 and Section 65 of the Indian Evidence Act require the court to use other verification methods if the party presenting the evidence cannot furnish the certificate. Indirect evidence and document duplication are covered in these sections. This approach is based on judicial fairness and impartiality. Applying the certificate requirement rigidly in all cases may result in the rejection of valid evidence merely because the presenting party cannot get the certificate from the device owner or controller. The court should not disregard legitimate electronic evidence if a party cannot furnish the certificate because they do not control the equipment from which it originated. Instead, it should investigate other authentication and admission mechanisms. This method supports the judicial system's aims of truth and fairness. Courts can avoid unjust convictions by implementing Section 65-B (4) with flexibility to avoid technical exclusion of relevant evidence. It is important to note that this interpretation does not eliminate Section 65-B (4) certification. Instead, it suggests a more sophisticated execution of the law, taking into account electronic evidence in modern judicial proceedings. Alternative methods can be used to validate electronic evidence if the certificate is not available. This view of the law strikes a balance between protecting digital evidence and ensuring parties are not unfairly disadvantaged in their arguments. It recognizes that digital evidence is evolving and that legal systems must adapt.⁸

However, a three-judge court ruled in the case of *Anvar P.V. v. P.K. Basheer* that secondary electronic evidence cannot be included until Section 65-B is met. Without the Section 65-B certificate received at the time of taking the CD, VCD, chip, etc., secondary evidence relative to that electronic record is admissible.⁹

A crime-related memory card is a “document” and not a “material object”. The information engraved determines whether a piece of a “document,” not its location is. As a “matter” and a “substance” together, the memory card contents would constitute a “document”.¹⁰

At final adjudication, the trial court will assess electronic evidence admissibility and proof.¹¹

State (NCT of Delhi) v. Navjot Sandhu aka Afsan Guru started the section 65 B, Indian Evidence Act, 1872¹² When evidence was digital, the Supreme Court ignored the non-obstante provision, which gave Section 65-B obvious precedence over other sections. Section 65-B was used to claim that printouts can be used as secondary evidence because the original servers are not easily transportable. It also used Section 63 to hold that printouts are mechanical copies and can be used as supplementary evidence. The Supreme Court used these two clauses, which were designed for paper





documents when adopted, bypassing the full special procedure provided forth by Section 65-A and Section 65-B, making it optional. This perspective lasted over a decade until the Supreme Court (three-judge panel) in *Anvar P.V. v. P.K. Basheer* rejected Navjot Sandhu precedent and declared 65-B a full code of the subject and obligatory. Diluting this again, Shafhi Mohammad's two-judge bench permitted 65-B exclusions in fair and appropriate cases. The division bench's dissent from the three judges' bench opinion in *Anvar PV* generated uncertainty and judicial legitimacy issues. *Anvar PV*'s excessive rigidity in favor of 65-B was concerning, while *Tomso Bruno and Shafhi Mohammad* case's severe laxity made 65-B essentially otiose. These two extremes kept the legal community on edge, thus the division bench sent Arjun Khotkar to a bigger bench¹³ came as a relief and raised anticipation for clarification. The Arjun Khotkar bench reference raises even more problems than it answers.¹⁴ In this ruling, the Supreme Court again differentiated primary and secondary evidence and found that the original hard drive or CD does not require a 65-B certificate, releasing it. Only the secondary copy of original electronic evidence must comply with 65-B. The judgment extensively mentions international rules but fails to address electronic data technicalities¹⁵

In *Sonu v. State of Haryana*¹⁶ Another dimension was that the certificate under Section 65-B of the Indian Evidence Act, 1872 only applies to evidence presentation and procedural in nature. Thus, an appeal cannot bring issues that were not addressed during electronic record production.

Tomaso Bruno was declared per incuriam and Shafhi Mohama reversed by a three-judge panel in *Arjun Panditrao Khotkar v. Kailash Khushanrao Gorantyal & Ors* (2020) 7 SCC. Section 65-A and Section 65-B govern electronic evidence admissibility under the Act, not other Act procedures, according to Arjun Panditrao. The court needs a 65B (4) certificate if it cannot examine the original electronic record on a computer¹⁷

Both sections 65-A and 65-B of the Indian Evidence Act, 1872 (currently 62 and 63 of *Bharatiya Sakshya Adhinyam, 2023*) control electronic evidence. The Indian Evidence (Amendment) Act, 2000, and *Bharatiya Sakshya Adhinyam, 2023*, consolidated and provided wide evidence guidelines and standards for fair trials, including important parts¹⁸ specific provisions on electronic record evidence and admissibility.

UNITED KINGDOM

These laws¹⁹ originate from Civil Evidence Act, 1968 of UK and The Police and Criminal Evidence Act, 1984. The Civil Evidence Act of 1995 and Criminal Evidence Act of 1999, abolished electronic evidence provisions. The UK acknowledged that its rules had become antiquated and decided to address the reliability of electronic evidence by emphasizing its relevance rather than setting complex and rigorous acceptance standards. Unless there is proof to the contrary, the UK common law assumes mechanical equipment was working correctly at the relevant time. This





assumption is strongly supported by courts.²⁰ The court's response underscores a key issue with the Indian judicial system's electronic evidence handling: using obsolete foreign legislation without considering technology and modern demands. Update India's electronic evidence rules in light of the present scenario. The court's analogy of "fitting a square peg into a round hole" accurately reflects the statute's incompatibility with digital technology. Modern electronic evidence is too complicated for the UK's 1960 certificate requirement. Indian courts may accept and understand electronic evidence without alignment, which may generate logistical and legal concerns. The court's urgent need for a complete review and new laws is vital. Modern electronic evidence includes emails, social media, complicated databases, and cloud data. Legally collecting, conserving, verifying, and exhibiting each involves significant issues. India can ensure its court system can manage digital evidence by modernizing its laws. Implementing this method will boost legal efficiency and electronic evidence verdict correctness. A reform would match India's court system with global norms, enhancing electronic evidence collaboration. It would also improve judicial integrity by giving law enforcement, legal experts, and the judiciary better digital evidence management instructions.²¹

BHARTIYA SAKSHYA ADHINIYAM, 2023

In cases of doubt over the admission of electronic records or evidence, the current statute allows the court to consult an expert or examiner. Moreover, the new law includes the electronics records or digital records as evidence in its definition clause and the admissibility is followed in the same pattern as is in the old law i.e. the primary evidence is preferred over secondary evidence unless and until so required after fulfilling the conditions to consider the admissibility of the secondary evidence.

HOME AFFAIRS STANDING COMMITTEE REPORT, 2023²²

Home Affairs Standing Committee (2023) stressed the need of safeguarding electronic and digital documents' authenticity and trustworthiness owing to their manipulation potential. All electronic and digital evidence collected during an inquiry is proposed to be securely handled and processed according to chain of custody protocols.

GUIDELINES²³

The Karnataka High Court's 2021 decided some guiding principles on searching and seizing electronic data are vital to ensuring digital evidence's reliability and acceptance in court. These proposals primarily address electronic evidence issues and show a growing importance of digital forensics in criminal investigations.

- i. An experienced forensic expert must accompany the search crew. This assures an expert to manage electronic equipment and data. Digital evidence is collected, stored, and examined by forensic experts after specific training. To preserve the evidentiary trail and ensure judicial approval, this is essential.





- ii. Protecting evidence from tampering requires preventing the Investigating Officer from using confiscated electronic devices. Even turning on a device or accessing files might change metadata or delete important data. This regulation protects evidence against tampering.
- iii. For technologically advanced evidence preservation, seize electronic storage devices and place them in Faraday bags. Hard disks and pen drives may store vast amounts of potentially important data. Investigators ensure they can get all relevant information by seizing these gadgets.
- iv. Very impressive Faraday bag use. The stolen equipment cannot be remotely accessed or manipulated because these sophisticated containers block electromagnetic signals. In an age where many devices may be remotely wiped or changed, this is crucial. A court uses Faraday bags to preserve evidence in its original state at seizure.

INCORPORATING PROPOSAL DIRECTIVES OF EUROPEAN UNION²⁴

The EU Draft Directive Proposal wants standard and minimal electronic evidence requirements:

- Electronic evidence should only be used if there is adequate evidence to indicate it has not been tampered with or misrepresented.
- Maintaining evidence integrity from creation to transmission to authorized personnel.
- IT experts required at defendant request.

RECOMMENDATIONS OF LAW COMMISSION, 2003²⁵

- i. Barring evidence obtained via coercion, compulsion, assault, or torture protects human rights and ensures fair court procedures. This is consistent with worldwide norms and supports the premise that criminal investigative procedures should not be justified by desired outcomes. By making such evidence inadmissible, it deters law enforcement from using unethical methods to get information from suspects.
- ii. A balanced approach considers the importance of facts, whether they were gained under police custody or otherwise. This ensures that important evidence is not automatically dismissed because it was found in police possession. However, when the first item is included, it creates a system in which facts are evidence but procedures are carefully examined.
- iii. The idea that police inflict injuries on detainees and that they must give proof is a major legal shift. This acknowledges the unequal power balance between law enforcement and detainees and ensures that police protect and care for them. It might reduce jail staff aggression and encourage more careful inmate treatment.
- iv. A system to legally prosecute police officers who physically hurt detainees and the presumption of their culpability is an effective way to combat custodial violence. The divergence from the usual assumption of innocence shows how seriously the legal system takes police enforcement misbehavior. The Court will consider these criteria before presuming:
 - Custody duration.





- Victim statements on the harm.
- Professional medical assessment.
- Documented magistrate observations.

RECOMMENDATIONS OF MALIMATH COMMITTEE, 2003

A substantial strategic change to address long-standing challenges and reform the criminal justice system is proposed. Consider each of these crucial suggestions:

- i. Implementing social welfare offenses gradually decriminalizes small offenses. This approach understands that not all infractions need penalties or jail time. Small penalties or community service allow the system to concentrate on more severe crimes and encourage offender rehabilitation and societal responsibility.
- ii. Transitioning from adversarial to inquisitorial is important. More aggressive fact-gathering by judges may improve investigations. This must maintain fairness and legality.
- iii. Reduced proof on 'clear and compelling evidence' from 'beyond reasonable doubt' is the most disputed. This may boost guilty verdicts but enhances accusations of unfair convictions. Any alteration must be carefully considered and protected since the criminal justice system has a stringent conviction standard to protect the innocent.
- iv. Exposing confessions to high-ranking police officials is another contentious idea. Authorities may misuse and coerce confessions, yet it may enhance investigations and court proceedings. Vigorous measures are required to achieve voluntary confessions.

CONCLUSION & SUGGESTIONS

Indian electronic evidence law is advanced by the Bhartiya Sakshya Adhiniyam, 2023. The legislature has shown its digitization commitment by strengthening and increasing electronic data acceptance criteria. Especially noteworthy is Section 63's certificate requirement, which verifies electronic evidence submitted in court. Questions remain about Part B of the certificate, which needs an "expert" to certify certain electronic record components. Uncertainties should be resolved via two main methods. The government may first establish extensive expert qualification laws. Expertise may need certain credentials, certificates, or experience. Courts may interpret this clause using legal precedent. Courts may weigh technical knowledge against practical applicability. Balance electronic evidence dependability and legal remedies. An overly strict expert requirement may hinder individuals and small businesses from presenting electronic evidence. Permissiveness may damage evidence and justice. To safeguard the law while making it practical and accessible, lawmakers, judges, lawyers, and technology must collaborate. Create rules, a list of approved specialists, or effective techniques for handling common digital evidence²⁶

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