

The Concept of Primary evidence and Secondary evidence - and its applicability in the Case of Electronic Documents

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ABSTRACT:

As governance, commerce , and industry move into the 21st century and onto the advanced age, it is basic for the law to keep pace with its subject, and advance compatibles. Whether something is a primary or secondary source often depends upon the topic and its use. A biology textbook would be considered a secondary source if in the field of biology, since it describes and interprets the science but makes no original contribution to it. On the other hand, if the topic is science education and the history of textbooks, textbooks could be used a primary sources to look at how they have changed over time. There exist a few new difficulties under the steady gaze of the courts while tending to electronic proof – its novel character, combined with its powerlessness to simple manufacture and adulteration, and additionally its different new sources (messages, SMS/MMS, internet based life, site information, and so forth.) and their uncertain status in law. Up to this point, electronic narrative confirmation was clubbed together with customary narrative confirmation and was to be showed under Sections 61-65 of the Indian Evidence Act. It was liable to an indistinguishable arrangements from physical archives were, and this made extension for awesome control and mishandle.

1. INTRODUCTION:

As governance, commerce , and industry move into the 21st century and onto the advanced age, it is basic for the law to keep pace with its subject, and advance compatibly. Due to the presence of organizations, exchanges, and interchanges happening in computerized shape, both in the open and private part, there has been a parallel ascent in the quantity of legitimate clashes and elucidations under the watchful eye of the Indian courts that worry electronic proof. These cases are both of common and criminal nature, and the nature and acceptability of confirmation put under the steady gaze of the court in that are of most extreme significance to their definitive outcome. There exist a few new difficulties under the steady gaze of the courts while tending to electronic proof – its novel character, combined with its powerlessness to simple manufacture and adulteration, and additionally

its different new sources (messages, SMS/MMS, internet based life, site information, and so forth.) and their uncertain status in law.

Up to this point, electronic narrative confirmation was clubbed together with customary narrative confirmation and was to be showed under Sections 61-65 of the Indian Evidence Act.

It was liable to an indistinguishable arrangements from physical archives were, and this made extension for awesome control and mishandle. Similarly imperatively, as will be talked about further in this paper, it damaged the gossip govern, which is a basic fundamental of confirmation law. Along these lines, to redress this, and connect the by and large extending hole between the law and the advanced age, the Information Innovation Act of 2000 (in the future 'the IT Act') was sanctioned. This demonstration not just characterized 'electronic record'² yet additionally corrected Section 59 of the Evidence Act³, barring these electronic records, much like archives, from the probative power of oral proof. Be that as it may, rather than just subjecting them to Sections 63 and 654, which clarify the conditions for illustrating reports as optional confirmation, the IT Act embedded Sections 65A and 65B⁵, made particularly to address the evidentiary principles for electronic records.

Objective:

To determine what effect, if any, a nasogastric (NG) tube has on occurrence of anterograde aspiration during objective evaluation of swallowing using both liquid and puree bolus consistencies.

2. The Concept of Primary and Secondary Evidence

2.1 The Hearsay Rule

Before understanding the idea of primary and secondary confirmation in Indian law, it is fundamental to under why there exists a requirement for such a qualification. The Indian Evidence Act has made this qualification through its provisions⁷ in Chapter V of the Act, particularly for narrative (and presently electronic narrative) prove. It is a generally guideline of customary law that oral confirm (that is immediate) might be utilized to demonstrate all types of facts⁸. Narrative confirmation alone has been rejected from being illustrated by oral confirmation in Section 599, and every single other actuality might be demonstrated by oral proof. The explanation behind the production of such a qualification is the Hearsay Rule. Just clarified, the gossip run bars the "utilization of out of court articulations to demonstrate a reality from being conceded as prove in view of the failure of the restricting party to interrogate the producer of the statement".¹⁰ One of the point of interest cases that set out this standard in customary law nations worldwide was that of *R v. Sharp*¹¹, where it was depicted as 'Any affirmation other than one made by a man while giving oral confirmation in the procedures is forbidden as proof of any reality or assessment declared'¹². The reason noise confirm isn't perceived in custom-based law is the way that it is difficult to decide the precision and veracity of such proof, which is normally done by method for interrogation. Since the individual who put forth the expression in question is absent in the trial procedures, it is difficult to

interrogate him, and along these lines such confirmation is prohibited from thought. The noise run in itself is unpredictable and layered, and there exist a few admonitions and exemptions, yet it is superfluous to dig into them in the setting of this exposition.

2.2 DISTINCTION AMONGST PRIMARY AND SECONDARY EVIDENCE

Essential confirmation under the Indian Evidence Act, is what is regarded to be most noteworthy type of prove, regarding precision and esteem. With respect to reports and electronic information, essential proof of the substance of a specific archive is simply the report. It is represented by Segment 62 of the Evidence Act, which directs the subtleties of the same. Optional proof, interestingly, is what is displayed without essential confirmations, consequently the name. Area 63 characterizes and administers auxiliary confirmations in Indian Law. It is a substandard nature of confirmation when contrasted with the previous. Be that as it may, it a basic methods for accommodating the prattle manage with the frequently happening difficulty of securing essential confirmations, for there may exist a few circumstances where the first report or electronic record can't be created under the watchful eye of court. Segment 65 additionally clears up such circumstances, where auxiliary confirmation be utilized rather than essential confirmation due to the non-accessibility of the last mentioned.

3. LEGAL NATURE OF ELECTRONIC EVIDENCE:

Prior to the year 2000, electronic records were dealt with similar to archives under law in India, and were subjected to an indistinguishable principles from narrative confirmation were, under the Indian Evidence Act. Optional confirmation of these electronic reports was showed by means of printed duplicates of the same, the genuineness of which was certified by a skilled signatory. According to Section 65, the signatory could then be subjected to round of questioning to check the veracity and exactness of the reports. This system enabled electronic archives to be illustrated as optional proof, and furthermore consented to the arrangements set down under Sections 63 and 65 of the Evidence Act. Consequently, the Indian lawful framework just adjusted the developing multifaceted nature of innovation to old fashioned arrangements set up by a nineteenth century statute. It was in this way unavoidable, with the uncontrolled development and expansion of innovation, the expanding utilization of computerized mediums to archive and store information, and the innate complexities of the same, that law expected to develop to meet the changing norms of the real world. Subsequently, as specified prior, the parliament presented the Data Technology Act of 2000, which rolled out three noteworthy improvements relevant to this paper. To start with, it characterized 'electronic records' as "information, record or information created, picture or sound put away, gotten or sent in an electronic shape or small scale film or PC created smaller scale fiche". Second, It corrected Section 59 of the Evidence Act to avoid electronic information from the ambit of adduction by oral proof (reapplication of the prattle manage talked about with regards to archives above). Lastly,

rather than enabling these electronic records to be liable to the traditional trial of auxiliary confirmation, it embedded two new arrangements in the Evidence Act – Segments 65A and 65B, as evidentiary guidelines for electronic records.

3.1 SECTIONS 65A AND 65B – NEW EVIDENTIARY RULES FOR:

Electronic Records Area 65A of the Evidence Act set up the way that the substance of electronic records may be illustrated utilizing the arrangements under 65B, consequently making a different strategy for the same –much like Section 61 which plays out a comparative capacity for narrative confirmation. Be that as it may, it is correlated to take note of that the utilization of the word 'may' 13 in the drafting of the arrangement makes an opportunity, without making it obligatory, which later caused uncertainty and issues in execution, as will be later talked about in this paper. Segment 65B is the more substantive arrangement of the two, as it lays out the unique conditions and strategy to demonstrate electronic records as optional proof. Segment 65B (2) features the conditions under which a duplicate of a unique electronic record might be showed. These are, in brief - (an) at the season of the generation of the electronic record, the PC used to make it must be in standard use by its legal client (b) the information contained in the electronic record must have been frequently sustained into the PC over the normal course of exercises; (c) the PC must working appropriately, and if not, such mal-task must not influence the exactness and nature of the data; and, (d) the electronic must be a generation of the first data nourished into the PC. Segment 65B (4) is likewise vital to note, for it sets out extra conditions previously such electronic records can be cited as optional confirmation. It orders the generation of a affirmation from a man in a 'dependable authority position' in connection to the PC in question, recognizing the electronic record being referred to, alongside a depiction of the gadget used to make it, and vouching for adherence of conditions set down in sub area (2) of a similar arrangement.

4. LEGAL POSITION PRE-ANVAR V. BASHEER:

Nonetheless, it is terrible to take note of that these exceptional arrangements (segments 65A and 65B) and the law made in that have once in a while been utilized by Indian courts in the previous a long time since their authorization. Is most frustrating that the reason for this non-selection of the arrangements has not generally included a legitimate position taken by court in the principal occasion. The tragic the truth is that the third-level courts of the Indian framework – the lower level legal and trial courts where prove is found, is to a great degree insensible and clumsy with respect to mechanical changes what's more, headways. Trial court judges just don't have the innovative know-how to appreciate the progressions made by the IT Act, and therefore, keep on treating electronic records as narrative confirmation. They can do this utilizing for a few reasons – the thinking that the utilization of the word 'may' in Section 65A does not block parties from citing electronic records as confirmation through different arrangements, is essential for this situation. The courts accordingly

keep on bypassing Sections 65A and 65B, for the customary Sections 63 what's more, 65 which represent the adduction of narrative confirmation. This training appeared to be probably not going to change, not slightest as a result of the profoundly dug in obliviousness furthermore, mechanical uncouthness of India's lower legal, yet in addition confirmation of this situation of law by different high courts and the Supreme Court. The characterizing case in the Supreme Court was the scandalous Parliament Attacks case¹⁴ where the division seat rejected the resistance's test to the exactness of certain call information records (CDRs) conceded as proof by the indictment, which should be generations of the first electronic records. This challenge was made based on the way that these CDRs did not meet the affirmation prerequisites under Section 65B. In any case, for reasons that suspected to have taken enthusiastic contemplations into account as much legitimate reasoning¹⁵ (given the prominent, psychological oppression character of the case), the court illuminated that that "Independent of the consistence of the prerequisites of Area 65B which is an arrangement managing tolerability of electronic records, there is no bar to showing auxiliary confirmation under alternate arrangements of the Evidence Act, to be specific Sections 63 and 65." Citing the legitimacy of showing such proof under Sections 63 and 65, the court elucidated that Section 65 permits the utilization of optional proof if the first archive is such that it isn't effectively portable. It was said that "It isn't in debate that the data contained in the call records is put away in gigantic servers which can't be effortlessly moved and created in the court." Therefore, it was held that that even on account of non-satisfaction of conditions recommended under Section 65B, electronic records could be showed as narrative proof under Sections 63 and 65 of the Evidence Act.

5. IS THIS NEW POSITION OF LAW TOTALLY IN THE INTERESTS OF EQUITY?

While there is much to celebrate with respect to the position taken by the Supreme Court in *Anvar v. Basheer*, and the dynamic idea of the arrangements that it maintains, there is most likely that such arrangements are as yet overflowing with ambiguities and flaws. There exists not just disarray with the situation of law after *Anvar*²⁰, yet in addition issues in usage of the method under Area 65B, which presently exclusively administers auxiliary electronic confirmation.

5.1 AMBIGUITY WITH RESPECT TO NATURE OF CONFIRMATION:

The first of the few inquiries raised by the *Anvar* judgment is with respect to the idea of confirm itself. The court drew a hazardous qualification between cases where CDs and printouts are essential confirmations, and where CDs and printouts were to be auxiliary confirmations. The mainstream understanding involved that all CDs and printouts would be auxiliary proof. In any case, the court drew a simulated qualification, expressing that if the CDs exhibited were specifically utilized for the tunes and declarations, at that point they would be dealt with as essential confirmation. However, if the CDs presented were created using a computer that already stored such information, then they would become secondary evidence. The definition under 65B does not create a

distinction between CDs, themselves used for announcements and CDs which were created using information fed into a computer - as both may be created by a computer. Thus there exists an ambiguity regarding the very nature of electronic evidence after his judgment.

5.2 HINDRANCES IN FOR WHISTLE-BROWSER:

A second problem foreseen by legal scholars after this judgment is the possible impediments to whistle-blowers who engage in wire-tap leaks to uncover frauds and other means of governmental abuse of power. These wiretap leaks in the past have played an important role in unearthing such instances of corruption or illegality, such as the famous 2G spectrum scam by A.K Raja. These conversations in the past were brought to the attention of the Supreme Court after being recorded on to CDs. However, with the new provisions under 65B (4) which necessitate the production of a certificate from an individual in a responsible official position, it will be immensely difficult for a whistle-blower obtain such a certification without the government finding out of such an attempted act of whistle-blowing.

5.3 CONFLICT BETWEEN PROVISIONS AND THE RIGHT AGAINST SELF-INCRIMINATION:

Another similar problem, created by this same requirement of a certificate, is likely to be cause by conflict between Section 65B (4), and Article 20(3) of the Indian Constitution.²¹ There exist questions regarding the admissibility of electronic evidence seized from the computers of the accused, as a certificate under S.65 (4) B cannot be forcibly taken from him, for he is protected by the right against self-incrimination as guaranteed to him by the Constitution.

6. CONCLUSION:

In conclusion, the importance of the Anvar judgment cannot be underestimated. The need for law to evolve with the fast-growing use of technology in all spheres of life is great, and Sections 65A and 65B contribute to that to a great extent. However, as observed, the problems in the Anvar judgment as well as the new provisions cannot be neglected. Section 65B lays down several strict conditions, non-compliance with which may render extremely important evidence inadmissible. While this beneficial in most cases, there exist several scenarios where such provisions would impede the complete dissemination of justice. This can include one-off cyber-crimes, where the perpetrator of the crime did not regularly feed that particular data into the computer in question, and the same was not used to regularly store such information. In such an instance, the conditions under 65B (4) will not complied with.

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