

Critical Analysis of Evidentiary Issues in Selected IP Court-Judgements

Module 3 – Issues related to Admissibility of Electronic evidence

Relevant provisions of the Indian Evidence Act, 1872

- ❖ Specific provisions on admissibility of electronic evidence (Sections 65A and 65B) were inserted into the Indian Evidence Act by the Information Technology Act, 2000.
- ❖ **Section 65A:** Special provisions as to evidence relating to electronic record –
 - *“The contents of electronic records may be proved in accordance with the provisions of section 65B.”*
- ❖ **Section 65B:** Admissibility of electronic records –
 - *“...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 or any contents of the original or of any fact stated therein of which direct evidence would be admissible”*

The nature and manner of Admission of Electronic Records

- ❖ *Anvar P.V. v. P.K. Basheer & Ors.*, (2014) 10 SCC 473 -
 - Appeal in a suit for setting aside an election under the Representation of the People Act, 1951.
 - The Appellant had submitted CDs as evidence in support of its claim that the songs, announcements and speeches made by the Respondent amounted to corrupt practices.
 - The Appellant had not submitted any certificate under Section 65B, in support of the CDs adduced as evidence.
 - One of the principal issues arising for consideration in the appeal - What is the nature and manner of admission of electronic records?

Anvar P.V. v. P.K. Basheer (Contd.)

❖ **Supreme Court's observations on Section 65B:**

- Any documentary evidence by way of an electronic record under the Evidence Act, can be proved only in accordance with the procedure prescribed under Section 65B.
- The admissibility of an electronic record (called “computer output”), depends on the satisfaction of the four conditions under Section 65B(2).
- In the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record is inadmissible.
- The above safeguards are taken to ensure the source and authenticity of the electronic records sought to be used as evidence. Since electronic records are more susceptible to tampering, alteration, transposition, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Anvar P.V. v. P.K. Basheer (Contd.)

❖ **HELD:**

- The appellant has not produced any certificate in terms of Section 65B in respect of the CDs, therefore, the same cannot be admitted in evidence.
- Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches falls to the ground.
- *“The situation would have been different had the appellant adduced primary evidence...Had those CDs used for objectionable songs or announcements been duly got seized...and...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 65B of the Evidence Act are not satisfied.”*

Judgments subsequent to Anwar P.V.

- ❖ ***Shafhi Mohammad v. The State of Himachal Pradesh***, AIR 2018 SC 714 –
 - “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 65B(4) of the Evidence Act. **The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.**”
 - It was accordingly held that 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.
- 6 ❖ ***Arjun Panditrao Khotkar v. Kailash Kishanrao Goratyal***, I.A. No.134044 of 2019 in C.A. Nos. 20825-20826 of 2017 (Supreme Court, July 14 2020) -
 - “it is the need of the hour that there is a relook at Section 65B of the Indian 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”

Submission of Electronic Evidence under S. 65B in IP Cases

- ❖ ***Burberry Limited & Anr. v. 99 Labels.Com & Ors.***, (2017) 71 PTC 482 -
 - Suit filed seeking permanent injunction restraining infringement of trademarks and passing off.
 - An affidavit was filed under Section 65B along with documents showing screenshots of a website mouthshut.com, a consumer review website. The affidavit was taken on record and the Court took into consideration the screenshots which showed a large number of complaints from consumers stating that the defendants' website is selling damaged and counterfeit products of various companies on a large scale.

- ❖ ***N. Ranga Rao & Sons Private Limited v. Sriman Industries***, 2019 SCC OnLine Mad 29007 -
 - In this trademark infringement suit, the Defendant claimed prior use of its mark and submitted supporting invoices.
 - It was observed that – *“the invoices were created at the later point of time by taking printouts. When the print outs are taken from the computer it acquire the character of secondary evidence...from which computer the print out was taken and who was in-charge of the computer and whether the computer was in operative, whether First Defendant was in-charge of the computer, absolutely there is no evidence whatsoever. Therefore...under section 65B of the Indian Evidence Act, 1872, the document cannot be given much importance”*

At what stage of proceedings is 65B Certificate to be filed?

- ❖ *Eli Lilly and Company & Anr. v. Maiden Pharmaceuticals Limited*, 2016 SCC OnLine Del 5921 -
 - The suit had been filed seeking permanent injunction to restrain trademark infringement and passing off in 2007, and issues were framed in 2009.
 - In 2016, the Plaintiffs filed affidavit by way of examination-in-chief, of their constituted attorney and the suit was listed for tendering of the Affidavit into evidence.
 - Along with the Affidavit, the Plaintiffs also submitted an Affidavit under Section 65B of the Evidence Act.
 - The Defendants contested that the 65B Certificate cannot be filed at this stage and the same should have been filed along with the electronic record.
 - Plaintiffs' admitted position was that no 65B Certificate/Affidavit had been filed by them at the time of filing electronic record in support of the claim in the suit.

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Eli Lilly and Company & Anr. v. Maiden Pharmaceuticals Limited (Contd.)

❖ HELD –

- Reliance was placed on *Kundan Singh vs. State* [2015 SCC OnLine Delhi 13647], where, on a reading of *Anvar P.V.*, Delhi HC held that the words "*produced in evidence*" did not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under Section 65-B(4).
- It was held that the plaintiffs are entitled to file the certificate under Section 65-B of the Evidence Act, even subsequent to the filing of the electronic record in the Court.
- This would be permissible only if the party makes out a case for late filing of documents beyond the prescribed time. If the party so producing the said certificate/affidavit is unable to satisfy the Court as to the reasons for which the certificate/affidavit was not filed at the appropriate time, may run the risk of the certificate/affidavit being not permitted to be filed.

Eli Lilly and Company & Anr. v. Maiden Pharmaceuticals Limited (Contd.)

- The affidavit filed under Sections 65-A and 65-B of the Evidence Act was permitted to be taken on record.
- It was held that it will be open to the counsel for the defendant to cross-examine the deponent of the said affidavit and the proof of the said affidavit under Sections 65-A and 65-B of the Evidence Act shall be subject to such cross-examination.

THANK YOU!

Questions?

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