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Anvar P.V v. P.K. Basheer & Ors (2014 10 SCC 473) Section 65A and 65B- Admissibility of Electronic Records of Indian Evidence Act, 1872

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ABSTRACT

Section 65A and 65B of the Indian Evidence Act, 1872 engrafts the admissibility of electronic records. After the enactment of Information Technology Act, 2000, Section 65A and 65B were added to Chapter V of the Indian Evidence Act, to corroborate standards for admissibility and authentication of electronic evidence in the Courts as a documentary evidence. Before the enactment of Section 65A and 65B Courts followed the Sections 61-65 while considering the admissibility of electronic evidences. After the amendment in 2000 the issue regarding admissibility was raised foremost in State v. Mohd. Afzal¹⁵⁶³, 2003 in which Delhi High Court held that certification is not mandatory for admission of electronic evidence. Thenceforth in the landmark judgement of State (NCT of Delhi) v. Navjot Sandhu¹⁵⁶⁴, 2005 case court have substandard the admissibility criteria mentioned under Section 65B (4) that even if the requirements are not fulfilled electronic evidence can be admitted as a documentary evidence, which created an irregularity in the procedure of admission of electronic evidence. Anvar P.V v P.K Basheer¹⁵⁶⁵, 2014 curb the controversies to the admissibility of electronic

evidences and tried to bring a uniform practice in admissibility requirements and mandated one particular method of practice. Through this paper researcher would be analysing the relevance of Section 65A and 65B for admissibility of electronic evidence through judicial pronouncements.

INTRODUCTION

Section 65A and 65B was inserted to Chapter V of the Indian Evidence Act, 1872 through the Amendment Act 2000 after the enactment of the Information Technology Act, 2000. Prior 2000 Courts used to adopt Section 61 to 65 for the admissibility of electronic evidence which could be proved either as primary evidence or secondary evidence. The major concern arose as to whether the admissibility of certificate envisaged under Section 65B(4) is mandatory or not. In Anvar P.V v P.K Basheer, declared a new law in admission of electronic evidences by overruling Afsan Guru one of the landmark judgement. Supreme Court interpreted the application of 65A and 65B from 63 and 65 of Indian Evidence Act, 1872.

FACTS OF THE CASE

In the general election to the Kerala Legislative Assembly held on 13.04.2011, the first respondent secured highest number of votes and declared elected to Eranad Legislative Assembly Constituency. The appellant contested the election as an independent candidate secured second in terms of votes. The appellant contends to set aside the election under Section 100(1)(b), Section 123(2)(ii) and (4) of The Representation of the People Act, 1951 envisages the corrupt practice committed by election agent with the consent of the candidate inducing the elector to believe through publication false allegation in relation to the personal character reasonably calculated to prejudice the other candidate's election such case the election can be declared to be void. The appellant contends that during election propaganda the agent of respondent with the

¹⁵⁶³ State v Mohd. Afzal, [2003] 107 DLT 385.

¹⁵⁶⁴ State (NCT of Delhi) v Navjot Sandhu, [2005] 11 SCC 600.

¹⁵⁶⁵ Anvar PV v PK Basheer [2014] 10 SCC 473.

consent and knowledge of the respondent printed allegations of the appellant in a leaflet of at least twenty five thousand copies and also during election propaganda the respondent have made objectionable songs and announcements which amounts to commission of corrupt practice under the Section 100(1)(b) of The Representation of the People Act 1951, the electronic evidences such as CD and VCD were also submitted as an evidence. The respondent contends there was no proper fulfilment of requirements under Section 65A and 65B of the Indian Evidence Act, 1872 and did not give consent for printing of leaflet and there was no proper evidence for the same. Thus, the election is not void under Section 100(1)(b) of the Representation of People Act.

ISSUES OF THE CASE

- 1) Whether the respondent's election to the Ernad Legislative Assembly could be set aside void?
- 2) Whether the electronic evidence provided by the appellant is admissible under the Indian Evidence Act?
- 3) Whether the High Court was right in rejecting the election petition?

JUDGEMENT OF THE CASE

The three judge bench decides that there was no proper evidence to infer consent on the part of the respondent in the matter of printing, publication and distribution of leaflet. The electronic evidence 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. Thus, the Supreme Court upheld the decision of High Court and held that election of the respondent could not be set aside under Section 100 of The Representation of the People Act, 1951 as the appeal brought before the Court has not merit.

PRIOR JUDICIAL INTERPRETATION

In State v. Mohd. Afzal, 2003 in which Delhi High Court held that certification is not mandatory for admission of electronic evidence. Thenceforth in the landmark judgement of the division judge decision of Supreme Court State (NCT of Delhi) v. Navjot Sandhu case was notable decision which gave relaxation in admissibility of electronic evidence, by referring Section 63 and 65 of Evidence Act wherein the secondary evidence may be produced without primary evidence in respect to admissibility of electronic evidence, in this case secondary evidence simply means xerox or any other copy of an original file, thus certification is not mandatory. The Supreme Court held that "even if the requirements under section 65B(4) were not satisfied, evidence could be produced under sections 63 and 65 of the Evidence Act." This decision was overruled by Anwar case which set aside a proper code for setting out the admissibility of electronic evidence.

IMPORTANCE OF THE CASE

This case allowed for consideration in appeal to demonstrate nature and manner of admission of electronic evidence only relevant when the evidence is reliable and genuine. The Anwar case have set out a uniform method of admissibility of electronic evidence. Court held that Sections 63 and 65 have no application to electronic evidence as it's dealt under Section 65A and 65B of the Indian Evidence Act. *Generalia specialibus non derogant*, special law will prevail over the general law, the Section 65A and 65B are specific provisions to deal with electronic evidence thus Section 63 and 65 have no application in matters of electronic evidence.

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN POST ANWAR CASE

The Anwar case has sorted out the uncertainty with respect to the admissibility of electronic evidence, it was first time the Supreme Court have mandated certification for electronic evidence post Anwar case in 2015, Jagdeo Singh

v. State¹⁵⁶⁶, High Court of Delhi followed decision of Anvar case and held that electronic evidence shall be accompanied by certificate without which the secondary evidence pertaining to electronic record shall be held inadmissible.

In 2017, Sonu v. State of Haryana¹⁵⁶⁷, two judge bench decision of Supreme Court held that Call Detail Records submitted by police as evidence during investigation cannot be admissible without certification under Section 65B of Evidence Act.

In 2017, Vikram Singh v. State of Punjab¹⁵⁶⁸, three-judge bench Supreme Court decision referred the ruling of Anvar case and held that if the electronic evidence is used as secondary evidence the same is admissible, without compliance with the conditions in Section 65B as in the present case it was held that tape record was primary evidence not secondary evidence, hence certification is not mandatory.

In 2015, Tomaso Bruno v. State of Uttar Pradesh¹⁵⁶⁹ three judge bench decision of Supreme Court held per incuriam that Secondary evidence of contents of document can be also led under Section 65 of the Evidence Act without making any reference to the earlier decision in Anvar v. Basheer. In 2019 State of Karnataka v. M.R. Hiremath¹⁵⁷⁰ Supreme Court held that failure to produce certificate under Section 65B on an earlier occasion is a curable defect.

In 2020, the Shafhi Mohammad v. State of U.P.¹⁵⁷¹ two judge bench decision of Supreme Court diluted the decision in Anvar v. Basheer held that circumstances when party who is not in possession with the device of the document is produced cannot produce certification for the electronic evidences under Section 65B (4). In such cases certification is not mandatory as

Section 65B is mere a procedural provision it can be relaxed wherever interest of justice is in question.

Shafhi Mohammad case was overruled by Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal,¹⁵⁷² three judge bench decision of Supreme Court envisaging that Shafhi Mohammad case does not lay down the correct position of law that but an application to a Judge for production of such certificate mentioned under Shafhi Mohammad case from the requisite person relying upon the Indian Evidence Act, Code of Civil Procedure, 1908 and Criminal Procedure Code, 1973. In Arjun Panditrao case Court also held that Section 65B(1) differentiates the original information contained in the document itself and copies made from them, former being primary document latter being secondary evidence in such case certification is not mandatory as Section 65B(1) is fulfilled.

ANALYSIS OF THE JUDGEMENT

Section 65A of the Indian Evidence Act, 1872 envisages that the special provisions as to evidence relating to electronic record and Section 65B deals with the admissibility of electronic records. In Anvar P.V v. P.K. Basheer case emphasised the importance of applicability of special provisions of Section 65A and 65B dealing with electronic evidences. The court analysed that the very admissibility of electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2) of the Evidence Act:

- i. Electronic record containing the information should have been produced by the computer.
- ii. Electronic information is derived regularly fed into the computer in the ordinary course of the said activity.

¹⁵⁶⁶ Jagdeo Singh v. State, CRL.A. 527 of 2014.

¹⁵⁶⁷ Sonu v. State of Haryana CrI. A. SLP. No. 5438 of 2020.

¹⁵⁶⁸ Vikram Singh v. State of Punjab, Criminal Appeal Nos. 1396-97 of 2008.

¹⁵⁶⁹ Tomaso Bruno v. State of Uttar Pradesh, Criminal Appeal No. 142 of 2015.

¹⁵⁷⁰ State of Karnataka v. M.R. Hiremath, Criminal Appeal No. 819 of 2019.

¹⁵⁷¹ Shafhi Mohammad v. State of U.P., CRL. No. 2302 of 2017.

¹⁵⁷² Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, Civil Appeal Nos, 20825- 20826 of 2017.

- iii. When electronic record is derived there must not be any breakage in the time period.
- 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.

Section 65B(4) envisages about the certification of the electronic record- certificate which identifies the electronic record containing the statement, describe the manner in which the electronic record was produced, furnish the particulars of the device involved in the production of that record and certificate must be signed by the person occupying responsible official position.

In present case petitioner submitted the electronic evidence of allegations made by respondent against petitioner in a form of video which were originally recorded in mobile phones and video camera transferred to computer and transferred to CDs containing election propaganda announcements, interviews and public meetings of respondent's. The petitioner produced CDs without the original record. Prior to Anvar P.V. v. P.K. Basheer case court looked upon the Section 63 and 65 for considering electronic evidence as it is a secondary evidence and not mandated the provisions under Section 65A and 65B. In Anvar P.V. v. P.K. Basheer three bench of Supreme Court mandated to follow the provision laid under Section 65A and 65B shall be fulfilled by overruling the decision of Afsan Guru case by stating that electronic record by way of secondary evidence shall be only admitted if the requirements of Section 65B is fulfilled.

CONCLUSION

Besides the positive aspects of Anvar case it brought out a strict practice of admissibility of electronic evidence. Contrary to Anvar case an array of judgements diluting the legal position of Anvar reinterpreted and criticized the decision by concluding that Section 65B is a mere procedural provision and reduced the

rigid process of admissibility. In supporting to the decision by analysing the language of Section 65B(4) doesn't mandate certification of electronic evidence. Section 59B of the South Australian Evidence Act, 1929 introduced three condition which safeguards from manipulation of the electronic record; accuracy of recording must not be effected, alterations to the computer must be maintained by a reasonable man and accuracy of evidence shall not be effected by inadequate usage of the Computer. Indian Parliament must adopt laws which rationalise the conditions for admissibility of electronic evidence.

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