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CASE COMMENT ON ARJUN PANDITRAO KHOTKAR V. KAILASH KUSHANRAO GORANTYAL & OTHERS, [2020] 7 S.C.R. 180

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BRIEF FACTS OF THE CASE

Dispute over election of Mr. Arjun Panditrao Khotkar (Appellant) in the Maharashtra State Legislative Assembly, 2014 (101 – Jalna constituency) :

This case arose from an election dispute in the Maharashtra State Legislative Assembly election for the 101-Jalna constituency in the year 2014. Mr. Arjun Panditrao Khotkar (belonging to Shiv Sena party) won a seat from the Jalna constituency by a slim margin of 296 votes over his rival, Mr. Kailash Kushanrao Gorantyal (belonging to Congress party). Mr. Arjun Panditrao Khotkar secured 45,078 votes, whereas Mr. Kailash Kushanrao Gorantyal secured 44,782 votes.

GENERAL DETAILS

Title	: Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Others
Case Number	: Civil Appeal No. 020825 – 020826/2017, Registered on 01.12.2017
Court	: Hon'ble Supreme Court of India.
Citation	: [2020] 7 S.C.R. 180 / 2020 INSC 453
Corum	: Hon'ble Mr. Justice Rohinton Fali Nariman Hon'ble Mr. Justice S. Ravindra Bhat Hon'ble Mr. Justice V. Ramasubramanian

Appellant	:	Mr. Arjun Panditrao Khotkar
Respondents	:	01 Mr. Kailash Kushanrao Gorantyal
		02
		03 Mr. Vijay Shamlal Chaudhary
		04
		05 Mr. Abdul Rashid Aziz
		06 Mr. Arvind Bajirao Chavan
		07
		08 Mr. Gorantyal Kailash Kishanrao
		09
		10 Mr. Thakur Kushalsinh Nandkishorsingh
		11
		12 Mr. Ravi Haribhau Raut
		13
		Mr. Kolate Bakiram Ankusharo
		Mr. Khaled Bin Naser

	14	Chaus
	15	Mr. Dhansingh
	16	Pratapsingh
	17	Suryawanshi
	18	Mr. Feroz Hkan Samad Khan
		Mr. Bansode Sudam Shankarrao
		Mr. Kailas Kisanrao Ghorpade
		Mr. Farukh Ilahi Khan
		Mr. Lahane Dadaro Vitthalrao
		Mr. Sandip Uttamrao Kharat
		Mr. Dnyaneshwar Nade
		Adv. Dnyaneshwer Manikrao Wagh
Date of Judgment	:	14 th July, 2020

and outside the office). According to the Respondents, the nomination papers were offered at 03:53 p.m. (i.e. beyond 03:00 p.m.), as a result of which it was clear that they were filed after the stipulated time.

4. For video recording to be admitted as evidence, they needed to be accompanied by a certificate under section 65B(4) of the Indian Evidence Act, 1872, which certifies the authenticity of the electronic records.
5. The Election Commission and the Returning Officer were asked multiple times by the High Court to produce these recording along with the required certificate. Despite repeated attempts by the Petitioners and directions from the Hon'ble High Court, Bombay, the certificate was not furnished.
6. In light of this, the Hon'ble Bombay High Court admitted the video evidence without the certificate, relying on the oral testimony of the Returning Officer, who confirmed that videos were recorded as part of official election documentation. The Hon'ble Bombay High Court deemed this to be 'substantial compliance' with Section 65 B and declared Mr. Arjun Panditrao Khotkar's election invalid based on the video evidence.

Proceeding before Hon'ble High Court, Bombay

:

1. Two election petitions were filed challenging the election of Mr. Arjun Panditrao Khotkar before the Hon'ble Bombay High Court : Election Petition No. 6 of 2014 (filed by the defeated Mr. Kailash Kushanrao Gorantyal) and Election Petition No. 9 of 2014 (filed by Mr. Vijay Chaudhary, an elector in the said constituency). These petitions were filed under Sections 80 and 81 of the Representation of the People Act, 1951.
2. It was Petitioners allegation that Mr. Arjun Panditrao Khotkar's nomination form (i.e. Form Nos. 43 and 44) was filed after the stipulated deadline of 03:00 p.m. on 27.09.2014 and, therefore, should have been rejected by the Returning Officer.
3. The Petitioners relied on video recording from the Returning Officer's office (inside

Appeal before Hon'ble Supreme Court of India :

Mr. Arjun Panditrao Khotkar appealed to the Supreme Court arguing that the Hon'ble High Court erred in admitting electronic evidence without the mandatory Section 65B certificate.

Reference Order dated 26.07.2017

1. The appeal brought up an important legal question regarding the admissibility of electronic evidence. The Supreme Court also noted a conflict between previous judgments namely of Shafhi Mohammad v. State of Himachal Pradesh [(2018) 2 SCC 801] and Anvar P.V. v. P.K. Basheer & Ors., [(2014) 10 SCC 473].

2. Judgment of Anvar P.V. v. P.K. Basheer & Ors. mandated a Section 65B certificate, but subsequent cases like Shafhi Mohammad v. State of Himachal Pradesh allowed flexibility in cases where obtaining the certificate was difficult or impossible.
3. Given this inconsistency, the case was referred to a larger bench of three judge to clarify the law regarding Section 65B and to decide whether a certificate is indispensable for the admissibility of electronic records.

ISSUE 6	:	Does the judgment in Anvar P.V. v. P.K. Basheer & Ors., which mandates a Section 65B(4) certificate, represent the correct legal position, or can the requirement be relaxed as suggested in subsequent cases such as Shafhi Mohammad v. State of Himachal Pradesh?
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ISSUES

ISSUE 1	:	Whether a certificate under Section 65B(4) of the Indian Evidence Act, 1872 is mandatory for the admissibility of electronic records ?
ISSUE 2	:	Whether oral testimony or other forms of evidence be considered as 'substantial compliance' with the requirement of Section 65B(4) in the absence of the actual certificate ?
ISSUE 3	:	In circumstances where a party is not able to produce certificate under Section 65B(4) of the Indian Evidence Act, 1872 after all possible attempts, should they still be required to provide a Section 65B(4) certificate for the admissibility of electronic evidence?
ISSUE 4	:	At what stage in a trial should the certificate under Section 65B(4) be produced ?
ISSUE 5	:	Is Section 65B of the Evidence Act, 1872 a complete code for the admissibility of electronic evidence, or can other sections, such as Sections 62 and 65 dealing with primary and secondary evidence, also apply?

APPELLANT'S ARGUMENT

Reference made to Anvar P.V. v. P.K. Basheer & Others, (2014) 10 SCC 473 – Appellant argued that as per the aforementioned case, a certificate under Section 65B(4) is a mandatory requirement for the admissibility of electronic evidence. The video recordings, which were central to the Bombay High Court's decision, should not have been admitted in the absence of this certificate.

Wrong admission of electronic evidence made by Hon'ble High Court, Bombay – The Appellant argued that relaxing the certification requirement would open doors to unreliable evidence being admitted, creating risks of forgery, manipulation, and reduced integrity of electronic records in court.

RESPONDENTS ARGUMENT

Reference made to Shafhi Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801 –

The Respondents referred to the judgment of Shafhi Mohammad v. State of Himachal Pradesh, which allowed some flexibility with the Section 65B certification requirement when the evidence was not in the possession of the party submitting it. They argued that this flexibility should apply in their case, given that the Election Commission and Returning Officer refused to issue the certificate despite multiple requests.

Oral testimony of the Returning Officer for admission of electronic evidence – The oral testimony of the Returning Officer, who verified that the recordings were authentic and made in

the ordinary course of business, amounted to “substantial compliance” with Section 65B. They contended that such testimony should be sufficient for admitting the recordings when the certification could not be obtained due to third-party refusal.

JUDGMENT

Hon’ble Judges of the Supreme Court, after going through the facts of the case, the issues raised and arguments made by the parties, held as follow :

Certificate under Section 65-B(4) of the Indian Evidence Act, 1872 –

1. The original information contained in the ‘computer’ is primary evidence and ‘copies made therefrom’ is secondary evidence.
2. **The certificate required under Section 65-B (4) is a condition precedent to the admissibility of secondary evidence by way of electronic record.**

Circumstances where certificate under Section 65-B (4) is not necessary –

1. Certificate under Section 65-B (4) is unnecessary if the original document itself is produced and this can be done by the owner of a laptop, computer, computer tablet or even mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is stored, is owned/or operated by him.
2. However where the ‘computer’ happens to be part of a ‘computer system’ or ‘computer network’ and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be accordance with section 65-B(1), together with the requisite certificate under Section 65-B(4).

Person competent to give certificate and Interpretation of word ‘and’ in Section 65B(4) Of The India Evidence Act, 1872

1. The person who gives the certificate can be anyone out of the several persons who occupy a ‘responsible official position’ in relation to the operation of the relevant device, as also the person who may otherwise be in the ‘management of relevant activities’ spoken under Section 65-B (4).
2. The word ‘and’ between knowledge and belief under Section 65-B (4) must be read as ‘or’, as a person cannot testify the best of his knowledge and the belief at the same time.

Application of Maxims – lex non cogit ad impossibilia and impotentia Excusat legem to Section 65B(4) of The Indian Evidence Act, 1872

1. Meaning – *lex non cogit ad impossibilia* implies that law does not demand the impossible and *impotentia Excusat legem* implies that when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.
2. In a circumstance where the requisite certificate has been applied for from the person or authority concerned, and the person or authority either refuses to give such certificate or does not reply to the Court for its production or when one such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate is said to have done all that he can possibly do to obtain the requisite.

Stage at which certificate under Section 65-B(4) must be admitted –

1. The stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet and the electronic evidence i.e. the computer output, has to

be furnished at the latest before the trial begins. However, depending on the facts of each case, the court exercising discretion seeing that the accused is not prejudiced by want of a fair trial, may in appropriate cases allow the prosecution to produce such certificate at a later point in time.

2. However, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage must not result in serious or irreversible prejudice to the accused.

Tabular Analysis of each issue

<p>ISSUE 1 : Whether a certificate under Section 65B(4) of the Indian Evidence Act is mandatory for the admissibility of electronic records?</p>	<p>Yes. The certificate required under Section 65-B (4) is a condition precedent to the admissibility of secondary evidence by way of electronic record.</p>
<p>ISSUE 2 : Whether oral testimony or other forms of evidence be considered as 'substantial compliance' with the requirement of Section 65B(4) in the absence of the actual certificate ?</p>	<p>No.</p>
<p>ISSUE 3 : In circumstances where a party is not able to produce certificate under Section 65B(4) of the Indian Evidence Act, 1872 after all possible attempts, should they still be required to provide a Section 65B(4) certificate for the admissibility of electronic evidence?</p>	<p>The certificate required under Section 65-B (4) is a condition precedent to the admissibility of secondary evidence by way of electronic record. But only in rare cases, where all efforts to secure the certificate have been exhausted the</p>

	<p>court this requirement may be excused, provided that it does not impede justice.</p>
<p>ISSUE 4 : At what stage in a trial should the certificate under Section 65B(4) be produced ?</p>	<p>Ideally the certificate should accompany the record initially, but late production is allowed if it does not impede justice.</p>
<p>ISSUE 5 : Is Section 65B of the Evidence Act a complete code for the admissibility of electronic evidence, or can other sections, such as Sections 62 and 65 dealing with primary and secondary evidence, also apply?</p>	<p>Yes. Section 65B exclusively deals with admissibility of electronic evidence, barring reliance on Section 62 and 65.</p>
<p>ISSUE 6 : Does the judgment in Anvar P.V. v. P.K. Basheer & Ors., which mandates a Section 65B(4) certificate, represent the correct legal position, or can the requirement be relaxed as suggested in subsequent cases such as Shafhi Mohammad v. State of Himachal Pradesh?</p>	<p>Anvar P.V. v. P.K. Basheer & Ors represents the correct legal position.</p>

List of cases – overruled, held incuriam and modified :

<p>Anvar P.V. v. P.K. Basheer & Others</p>	<p>(2014) 10 SCC 473</p>	<p>Modified - Modifications made in last sentence of the judgment – '...if an electronic</p>
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		record as such is used as primary evidence under Section 62 of the Evidence Act.. This will be read without the words "under Section 62 of the Evidence Act".
Shafhi Mohammad v. State of Himachal Pradesh	(2018) 2 (Cri) 704	Overruled
Shafhi Mohammad v. State of Himachal Pradesh	(2018) 2 SCC (Civ) 346	Overruled
Rajendra Kumar Meshram v. Vanshmani Verma	(2016) 10 SCC 715	Overruled
K. Ramajayam v. State	2016 SCC OnLine Mad 451	Overruled
Tomaso Bruno v. State of Uttar Pradesh	(1025) 7 SCC 178	Held partly incuriam
State (NCT of Delhi) v. Navjot Sandhu	2005 SCC (Cri) 1715	Partly overruled

OPERATIVE PART OF THE JUDGMENT -

After all these observations, the Hon'ble Supreme Court dismissed the matter with cost of Rs. Two Lakh, to be paid by the Appellant.

PRESENT STATUS OF THE JUDGMENT

Validity of the judgment -

This case, till date i.e. 14.11.2024, has not been overruled by any other judgment. It stands binding on all courts as enshrined under Article 141 of the Constitution of India.

Modifications made to Section 65B after enactment of Bhartiya Sakshya Adhiniyam, 2023-

After enactment of the Bhartiya Sakshya Adhiniyam, 2023 admissibility of electronic evidence is covered under Section 63.

Following changes are made to Section 65B (now 63) -

- Subsection (1) - words "or semiconductor memory" "or any communication device or otherwise stored, recorded, or copied in any electronic form" is added.
- Subsection (2) - words "communication device", "create" are added.
- Subsection (3) - word "computer" is replaced by "by means of one or more computers or communication devices," and new clauses (a) to (e) are added.
- Subsection (4) - words "that is to say" are replaced by "shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:". The words "or a communication device referred to in clauses (a) to (e) of sub-section (3)" are added to clause (b) of subsection (4), and in clause (c), the words "person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities" are replaced by "person in charge of the computer or communication device or the management of the relevant activities". The words "and an expert" and "in the certificate specified in the schedule" are added.

- Subsection (5) – Clause (b) of subsection (5) is excluded and now (c) corresponds to (b), where words "communication device" and "or by other electronic means as referred to in clauses (a) to (e) of sub- section (3).

CONCLUSION

Previously, instances where evidence was introduced through an electronic medium were rare in the judiciary. However, with advancements in technology, electronic devices have become an integral part of daily life, making their use as evidence in court more commonplace and unsurprising. The issue with presenting electronic evidence lies in the risk of manipulation, as such devices can be easily tampered with. Therefore, it is crucial to ensure that electronic evidence is authentic and unaltered, and this is where the certificate under Section 65B of the Evidence Act becomes essential. This case establishes a systematic procedure for admitting electronic evidence in court and clarifies ambiguities from prior judgments. It provides a clear interpretation of Section 65B, highlighting its significance in verifying digital evidence. Consequently, this case will serve as a guide for courts accepting electronic evidence, safeguarding against manipulation and supporting the delivery of justice to the citizens of India.

GRASP - EDUCATE - EVOLVE