

EVIDENTIARY VALUE OF SMS, MMS AND E-MAIL*

The era of Information technology has brought new methods and modes of commission of crime. Each time a crime is committed whether in physical form or in cyber space, the success of prosecution largely depends on the quality of evidence presented at the trial. With the sophistication in Information technology the weapons of commission of crime are changing thereby posing a serious challenge before the investigation agencies to collect and preserve the evidence. A conviction or acquittal largely depends on the quality of evidence produced by the prosecution.

The advent information technology has brought into existence a new kind of document called the electronic record. This intangible document is of new species has certain uniqueness as compared to conventional form of documents. This document can be preserved in same quality and state for a long period of time through encryption processes reducing the chance of tampering of evidence. This document can be in various forms like a simple e-mail or short message or multimedia message or other electronic forms.

The Indian Evidence Act, 1872 and Information Technology Act, 2000 grants legal recognition to electronic records and evidence submitted in form of electronic records. According to section 2(t) of the Information Technology Act, 2000 “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. The Act recognizes electronic record in a wide sense thereby including electronic data in any form such as videos or voice messages. The Information technology has made it easy to communicate and transmit data in various forms from a simple personal computer or a mobile phone or other kinds of devices. The Information Technology Amendment Act, 2008 has recognized various forms of communication devices and defines a “communication device” under section 2 (ha) of the Act “communication device” means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image. The Indian IT Act 2000 lays down a blanket permission for records not to be denied legal effect if they are in electronic form as long as they are accessible for future reference.

The Act amends the definition of ‘Evidence’ in s 3, the interpretation clause of the Indian Evidence Act 1872, to state:

‘Evidence’ means and includes

1).....

2) All documents including electronic records produced for the inspection of the Court

Further, in s 4, the IT Act 2000 provides:

Section 4.

Legal Recognition of electronic records - Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

a) rendered made available in an electronic form; and

b) accessible so as to be usable for a subsequent reference.

The evidentiary value of an electronic record totally depends upon its quality. The Indian Evidence Act, 1872 has widely dealt with the evidentiary value of the electronic records. According to section 3 of the Act, “evidence” means and includes all documents including electronic records produced for the inspection of the court and such documents are called documentary evidence. Thus the section clarifies that documentary evidence can be in the form of electronic record and stands at par with conventional form of documents.

The evidentiary value of electronic records is widely discussed under section 65A and 65B of the Evidence Act, 1872. The sections provide that if the four conditions listed are satisfied any information contained in an electronic record which is printed on paper, stored, recorded or copied in an optical or magnetic media, produced by a computer is deemed to be a document and becomes admissible in proceedings without further proof or production of the original, as evidence of any contents of the original or any facts stated therein, which direct evidence would be admissible.

The four conditions referred to above are:

- (1) The computer output containing such information should have been produced by the computer during the period when the computer was used regularly to store or process information for the purpose of any activities regularly carried on during that period by the person having lawful control over the use of the computer.
- (2) During such period, information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of such activities.
- (3) Throughout the material part of such period, the computer must have been operating properly. In case the computer was not properly operating during such period, it must be shown that this did not affect the electronic record or the accuracy of the contents.
- (4) The information contained in the electronic record should be such as reproduces or is derived from such information fed into the computer in the ordinary course of such activities.

It is further provided that where in any proceedings, evidence of an electronic record is to be given, a certificate containing the particulars prescribed by 65B of the Act, and signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities would be sufficient evidence of the matters stated in the certificate.

The apex court in *State v Navjot Sandhu* [1] while examining the provisions of newly added s 65B, held that in a given case, it may be that the certificate containing the details in sub- s 4 of s 65B is not filed, but that does not mean that secondary evidence cannot be given. It was held by the court that the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, ss 63 and 65 of the Indian Evidence Act 1872. Paragraph 150 of the judgment which is apposite, reads as under:

150. According to Section 63, secondary evidence means and includes, among other things, “copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies.

Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of s 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Indian Evidence Act 1872, namely, ss 63 and 65.

It is pertinent to note herein a recent development, that as per the IT Amendment Bill 2008 (passed by both houses of Indian Parliament and yet to be enforced), s 79A empowers the Central Government to appoint any department, body or agency as examiner of electronic evidence for providing expert opinion on electronic form evidence before any court or authority. ‘Electronic form of evidence’ herein means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital, audio, digital video, cellphones, digital fax machines.

Further as per Section 85 B of the Indian Evidence Act, there is a presumption as to authenticity of electronic records in case of secure electronic records (i.e records digitally signed as per Section 14 of the IT Act,2000. Other electronic records can be proved by adducing evidence and presumption will not operate in case of documents which do not fall under the definition of secure electronic records. It is pertinent to point out herein that with the passage of the Information Technology Amendment Act 2008, India would become technologically neutral due to adoption of electronic signatures as a legally valid mode of executing signatures. This includes digital signatures as one of the modes of signatures and is far broader in ambit covering biometrics and other new forms of creating electronic signatures.

The position of electronic documents in the form of SMS, MMS and E-mail in India is well demonstrated under the law and the interpretation provided in various cases. In *State of Delhi v. Mohd. Afzal & Others*[2], it was held that electronic records are admissible as evidence. If someone challenges the accuracy of a computer evidence or electronic record on the grounds of misuse of system or operating failure or interpolation, then the person challenging it must prove the same beyond reasonable doubt. The court observed that mere theoretical and general apprehensions cannot make clear evidence defective and inadmissible. This case has well demonstrated the admissibility of electronic evidence in various forms in Indian courts.

The basic principles of equivalence and legal validity of both electronic signatures and hand written signatures and of equivalence between paper document and electronic document has gained universal acceptance. Despite technical measures, there is still probability of electronic records being tampered with and complex scientific methods are being devised to determine the probability of such tampering. For admissibility of electronic records, specific criteria have been

made in the Indian Evidence Act to satisfy the prime condition of authenticity or reliability which may be strengthened by means of new techniques of security being introduced by advancing technologies.