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### SUPREME COURT CLARIFIES ON THE REQUIREMENT OF A CERTIFICATE UNDER SECTION 65B OF THE EVIDENCE ACT, 1872

6 August 2020

The conflicted interpretation of Section 65B of the Indian Evidence Act, 1872 (Act) by two judgments of the Supreme Court was referred to a three judge Bench of the Supreme Court in the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Ors.* [2020SCCOnLineSC571]. The two Judge Bench decision in *Shafhi Mohammad v. State of Himachal Pradesh* [(2018)2SCC801] (*Shafhi*) required reconsideration in view of the three Judge Bench judgment in *Anvar P.V. v. P.K. Basheer & Ors.* [(2014)10SCC473] (*Anvar*).

#### Facts:

The material facts of the case in brief are that CDs were produced without the written certificate as required under Section 65B(4), which the High Court admitted in evidence while holding that there was "substantive compliance" of the requirement under Section 65B(4) by way of oral evidence in cross-examination. It is also pertinent to mention that all efforts to obtain the certificate were in vain.

#### Contentions:

On behalf of the appellant it was argued that *Shafhi* and judgments following it being contrary to the larger bench judgment in *Anvar*, should be held as not having laid down the correct law that whenever the interest of justice required, the requirement of a certificate could be done away with under Section 65B(4). It was contended that the theory of "substantial compliance" with the provisions of Section was unsustainable in law.

On behalf of the respondent it was argued that Section 65B was a procedural provision, and it could not be the law that even where a certificate is impossible to get, the absence of such certificate should result in the denial of crucial evidence which would point at the truth or falsehood of a given set of facts.

It was argued that *Anvar* could be good law only in situations where it was possible for the party to produce the requisite certificate.

On behalf of the interveners it was argued that *Anvar* required to be clarified to the extent that Sections 65A and 65B being a complete code as to admissibility of electronic records, the "baggage" of primary and secondary evidence contained in Sections 62 and 65 of the Act should not at all be adverted to for admissibility of information contained in electronic records.

**Decision:**

The Supreme Court carried out an in-depth analysis of the law governing electronic records in India and UK wherefrom Section 65B bears its genesis and held inter alia as follows:

- The certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record and overruled the judgment passed in *Shafhi*. Further, the judgment in *Tomaso Bruno v. State of U.P.* [(2015)7SCC178] was declared per incuriam and the judgment in *K. Ramajyam v. Inspector of Police* [(2016)Crl.LJ1542] passed by Madras High Court was also overruled.
- Section 65B(1) couched in a non-obstante clause clarifies that admissibility and proof of information contained in an electronic record must follow Section 65B, being a special provision and Sections 62 to 65 are irrelevant with respect to such electronic records.
- Electronic records may be the original information contained in the "computer" itself and copies made therefrom, such "original" being primary evidence while the copies being secondary evidence. Therefore, the certificate in Section 65B(4) is unnecessary if the original document itself is produced. Such production of the original may be by way of the owner of a laptop, tablet or a mobile phone stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. Such proof however cannot be adduced if the device cannot be physically brought to Court [in such case the only means of proving the information will be in accordance with Section 65B(1) read with Section 65B(4)]. Accordingly, the Court clarified that the last sentence in paragraph 24 of *Anvar* which reads as "...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...", may more appropriately be read without the words "under Section 62 of the Evidence Act".
- The difficulty in obtaining a document can be overcome by various statutory provisions: (i) Section 165 of the Act empowers a Judge to order production of any document or thing in order to discover or obtain proof of relevant facts; (ii) Order XVI of the Civil Procedure Code, 1908 deals with 'Summoning and Attendance of Witnesses' and the Court can issue orders for the production of documents; (iii) Sections 91 and 349 of the Code of Criminal Procedure, 1973.
- In a situation where the certificate has been applied for and the person or authority does not comply with such request, parties can apply to the Court to direct the person to produce the certificate. Even if pursuant to the directions of the Court the certificate cannot be obtained, the alleged disobedience of the law is excused.
- Section 65B is silent as regards when the certificate is to be produced. Though generally the certificate must accompany the electronic record when the same is produced in evidence, though there is some level of discretion that may be exercised depending on the facts of each case. Insofar as criminal trials are concerned, though generally documents are to be filed before commencement of the trial, the Court may exercise discretion and allow production later if no prejudice is caused.
- General directions were also issued to cellular companies and internet service providers to maintain CDRs and other relevant records as per law and it has been directed that appropriate rules and directions should be framed in exercise of the Information Technology Act, 2000.

## **Comment:**

The Supreme Court has cleared the air by settling the much-conflicted position on the interpretation of Section 65B. Though it may appear that the Court has strictly interpreted the provision which may put litigants in jeopardy especially when the party relying upon the electronic evidence is unable to procure the certificate, **the judgement clarifies that if the party has explored all options available under law and despite such efforts is unable to procure the certificate, the Court may excuse such requirement.** In fact, in this very case, the Court admitted electronic evidence without the certificate. Further, in view of the concurring opinion by Justice Ramasubramanian, it may be expected that the legislature amends the existing laws so that the procedure for admissibility of electronic records becomes easier.

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