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## PAVING THE WAY FOR DIGITALIZATION OF EVIDENCE UNDER THE NEW BHARITYA SAKSHYA ADHINIYAM

~ *Apar Apaar Singh*

### ABSTRACT

The Bharatiya Sakshya Adhinyam marks an important step forward for India's legal system, especially in how it manages electronic evidence as technology continues to develop. It replaces the Indian Evidence Act by making it easier and more modern to decide if electronic evidence can be used in court. The Adhinyam includes clearer rules to solve earlier problems, like rigid procedures and doubts about authenticity, helping the legal process keep up with digital changes. This article reviews how electronic evidence has developed in India, from its limited use under the old law to its full inclusion in the new Act. It points out the improvements in efficiency and clarity, and explains how the updated rules make court decisions more accurate and transparent by addressing issues with data reliability. These changes help build public trust in the justice system. The article also discusses how the law is adapting to new technology and the need for ongoing legal reforms so that justice remains practical and effective as technology evolves. Finally, it looks ahead to the future of digital evidence in India and calls for further legislative changes to make the justice system fairer and more effective.

### INTRODUCTION

“Truth is no longer just spoken or written, it now lingers in the quiet trails of data, the tap of a key, and the imprint of a digital step”. “Justice must not stand still while the world moves forward; it must learn to follow these new paths, to see what was once unseen, and to hold firm in its pursuit of what is right.”

The 21st century, famously ‘The Digital Century,’ has brought a complete revolution to the traditional ways of justice being served. Today, evidence is no longer confined to paper trails

or courtroom testimonies; it lives in encrypted messages, metadata, digital transactions, and the vast archives of surveillance footage. The role of digital forensics in criminal investigations was notably demonstrated in the BTK Killer case<sup>1</sup>, where metadata from a floppy disk led to Dennis Rader's arrest after decades of evasion. The growing reliance on digital evidence has highlighted the urgent need for its formal recognition and standardization within legal systems; therefore, there was an urgent need for a formal and structured framework that recognized, authenticated, and regulated the use of digital evidence in legal proceedings, ensuring its reliability and fairness in the pursuit of justice." The previous legislation, 'The Indian Evidence Act, 1872,' though with the passage of time, had incorporated some amendments and aligned itself by judgment, but it still lacked the depth and clarity needed to effectively govern the admissibility and relevancy of the digital evidence. It being a Colonial Era law, lacked the comprehensive provisions for handling digital evidence and therefore could also be termed as dependent legislation in the purview of digital evidence, as it had to borrow provisions from the Information Technology Act, 2000, as dependency led to legal ambiguities, fragmented implementation, and inconsistencies in judicial interpretation. The 'Bhartiya Sakshya Adhinyam, 2023' addresses these shortcomings by recognizing digital evidence as primary evidence. This development represents a substantial advancement, enabling the judicial system to adapt to technological progress and enhance both efficiency and clarity.

## **TRANSITIONAL CLARITY: OVERCOMING CHALLENGES OF DIGITAL EVIDENCE UNDER BHARTIYA SAKSHYA ADHINIYAM, 2023"**

### **THE EVOLUTION: BRIDGING TRADITION AND MODERNITY**

The codified Law of Evidence, also known as a "masterpiece of compression," has today become a tool in the hands of people with the means to drag on adverse litigation for years, so much so that common people have indeed started losing faith in the legal system.<sup>2</sup> As communication evolved, so did the foundation of evidence in the legal system. The ways in which the truth was presented and preserved in courts transformed as messages started to move more quickly and distances became simpler to traverse. As one-on-one physical communication shifted to oral and telephonic interactions, the nature of evidence reflected this change, moving from written records and tangible documents to audio recordings, call logs, and real-time digital changes. In the era of oral testimony, handwritten documents, and inked seals, the evidence

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<sup>1</sup> *Rader v. State*, 218 Tenn. 481, 404 S.W.2d 487 (Tenn. 1966)

<sup>2</sup> Cited 1 Wigmore Treatise (3<sup>rd</sup> Edn), Preface xx.

presented demonstrated the methodical and sluggish pace of communication. The invention of the telegram transformed this process by reducing distances and facilitating almost instantaneous information exchange. Courts were forced to confront the difficulties of authenticating and confirming this contemporary communication for the first revolutionized how people interacted across large distances. As a result, evidence was altered to reflect the rapid, portable, and dynamic nature of communication. Next came the Internet revolution, ushering in an era of emails, encrypted messages, and digital transactions. The sheer volume and complexity of these digital footprints pushed the Indian Evidence Act, 1872, beyond its capacity to adapt. Rooted in a bygone era, the Act relied on fragmented legislative solutions that failed to address the demands of a rapidly changing world. The landmark legislation, Bharatiya Sakshya Adhiniyam, 2023, sheds itself of colonial-era terminologies and references while attempting to bring a modern approach but maintains its soul in the Indian Evidence Act, 1872.<sup>3</sup> It is not that the previous legislation, the Law of Evidence, had lost its relevance or had become otiose; it simply needed to be decked up with the necessities of modern day<sup>4</sup>, which the new legislation duly fulfils. It accepts the facts of the digital era and provides precise guidelines for identifying and verifying digital evidence. By enabling the justice system to keep up with technology advancements, this change helps to close the gap between conventional approaches and the needs of a contemporary and globalized society.

## **RESOLVING EVIDENCE GAPS: BRIDGING TECHNOLOGICAL CHALLENGES**

The Indian Evidence Act, 1872 is a key part of India's legal framework. Since it was written long before modern technology, it struggles to address digital evidence. Here are the main challenges:

- **Digital Evidence Evolution:** When the Indian Evidence Act was created in 1872, digital evidence did not exist. As technology brought new types of evidence like emails and electronic records, the legal system found it hard to keep up. Later laws, such as the Information Technology Act of 2000, tried to fill these gaps, but technology changed faster than the laws could adapt.
- **Non-Recognition of Digital Evidence as Primary Evidence:** For a long time, digital evidence was not accepted as primary evidence because it could be easily changed and was not physical.

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<sup>3</sup> Woodroffe & Amir Ali, Volume 2, Law of Evidence, p.vii(LexisNexis, 21<sup>st</sup> Edition)

<sup>4</sup> Woodroffe & Amir Ali, Volume 2, Law of Evidence, p.vii(LexisNexis, 21<sup>st</sup> Edition)

Courts required certification under Section 65B of the Act, which made the process complicated. Without clear laws, this led to confusion, different court decisions, and problems with using digital evidence in trials.

- **Adapting to Modern Issues:** The Act was made for the needs and problems of the nineteenth century. It did not expect modern challenges like cybercrime, online transactions, or digital privacy. Because of this, there is now a big gap between the law and today's needs.
- **Need for Procedural Efficiency:** The old and rigid procedures of the IEA have caused delays, especially in cases involving technology. These problems show why the law needs updates to match current practices and help clear the backlog in courts.

## THE COURT'S ROLE

The Indian judiciary helped recognize digital evidence even before new laws were in place. Through important judgments, courts updated how evidentiary laws applied to electronic records, making sure justice kept up with technology. By tackling issues like authenticity and admissibility, the judiciary helped close the gap between old legal rules and new types of evidence. Now, let's look at how these decisions led to the *Bharatiya Sakshya Adhinyam, 2023*.

- The *Suhas Katti* case<sup>5</sup> showcased India's judicial adaptability to digital evidence under the Indian Evidence Act, 1872 and IT Act, 2000. In which the court held that electronic records, authenticated via certified copies, were admitted, leading to a conviction for cyber harassment. This precedent emphasized the need for comprehensive reforms, later addressed by the *Bharatiya Sakshya Adhinyam, 2023*.
- In the case of *Utkal Contractors v. State of Orissa*<sup>6</sup>, this issue as to whether Sections 61 to 65 of the Evidence Act apply to electronic evidence was dealt with by the Supreme Court. The Supreme Court held "*that the intention of the legislature was clear for this omission to amend the provisions of Sections 61 to 65. It did not want it to be extended to electronic records.*" As a result, e-evidence is accepted only as a secondary form of evidence and not a primary form in Indian law.

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<sup>5</sup> C.C. No. 4680 of 2004, Metropolitan Magistrate, Egmore, Chennai, decided on 5th November 2004. In the case the accused was convicted for posting obscene and defamatory messages about a woman in a Yahoo chat group, marking the first conviction under Section 67 of the Information Technology Act, 2000.

<sup>6</sup> (1987 AIR 2310, 1988 SCR (1) 314, 1987 SCC (Supp) 751), the Supreme Court clarified that electronic evidence is treated as secondary evidence under Indian law, requiring compliance with Section 65B of the Indian Evidence Act for admissibility.

- Section 65B of the Indian Evidence Act, 1872<sup>7</sup> introduced through the Information Technology Act, 2000, set strict conditions for the admissibility of electronic records, requiring a certificate from the system's controlling authority to verify authenticity. While intended to ensure reliability, this provision often posed significant challenges, as obtaining such certification was difficult, especially when evidence came from thirdparty sources like telecom providers. In *State (NCT of Delhi) v. Navjot Sandhu*<sup>8</sup>, the court initially relaxed this requirement, ruling that phone record printouts could be admitted without Section 65B(4) certification, allowing more flexibility in accepting electronic evidence.
- In *Anvar P. K. v. P. K. Basheer*<sup>7</sup>, the Supreme Court overruled the *Navjot Sandhu* judgment, establishing a high standard for electronic evidence admissibility and emphasizing procedural integrity, stating oral testimony cannot replace certification.
- In the landmark judgment of *Arjun Pandit Rao Khotkar vs. Kailash Kushan Rao Gorantyal*<sup>8</sup> and others, the court concluded that the production of a certificate under Section 65B(4) of the Indian Evidence Act, 1872, is mandatory for the admission of secondary evidence of an electronic record, and no certificate is required for the admissibility of primary evidence of an electronic record.
- The court in the case of *State of Maharashtra vs. Dr. Praful B. Desai*<sup>9</sup> held that "evidence can be both oral and documentary, and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic record. This would be by video conferencing.
- In *Tomaso Bruno & Anr v. State of U.P.* [(2015) 7 SCC 178], the Supreme Court held that the non-production of crucial electronic evidence, such as CCTV footage, call records, and other digital evidence, amounts to withholding the best evidence. The

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<sup>7</sup> [(2014) 10 SCC 473 : 2015 SCC (Cri) 24], the question raised was whether strict compliance with Section 65B of the Indian Evidence Act is necessary for the admissibility of electronic evidence in court.

<sup>8</sup> [(2020) 7 SCC 1 : AIR 2020 SC 4908], the question raised was whether a certificate under Section 65B of the Indian Evidence Act is mandatory for the admissibility of electronic evidence in court: *K Ramajayam vs Inspector of Police, Chennai*, 2016 Cr LJ 1542, para 8 (Mad-DB). Overruled in *Arjun case Supra*, to the extent that evidence aliunde can be given through a person who was in charge of a computer device in the place of requisite certificate under 65B(4) of the Evidence Act

<sup>9</sup> [(2003) 4 SCC 601 : 2003 SCC (Cri) 815 : 2003 SCC OnLine SC 447], the question raised was whether evidence in a criminal trial could be recorded through video conferencing under Section 273 of the Criminal Procedure Code; *R. Central Criminal Court, ex parte Behbehani*, (1994) Crimes LR 352. *R. Central Criminal Court, ex parte Behbehani*, involved the admissibility of evidence obtained from a foreign jurisdiction in a criminal trial

Court emphasized that such omissions are not merely instances of faulty investigation but significantly impact the prosecution case, warranting adverse inferences against it<sup>10</sup>

## THE LEGISLATIVE DEVELOPMENTS

The Bharatiya Sakshya Adhiniyam, 2023, marks a major step in updating evidence laws for the digital age. By treating digital evidence as primary, setting clear rules for what is allowed, protecting the chain of custody, and using new technology, the law makes legal processes clearer and more efficient. These changes help the judiciary keep up with modern challenges and international standards. The following section looks more closely at these important changes.

1. The Landmark Reform-Section 61 of the Bharatiya Sakshya Adhiniyam, 2023, is a significant legal reform that removes longstanding ambiguities regarding the admissibility of electronic records. By explicitly recognizing electronic records within the framework of documentary evidence, it eliminates the confusion that previously required reliance on Section 65B for authentication. This provision streamlines judicial processes, ensuring that digital records are admitted more efficiently, thus modernizing India's evidentiary laws to keep pace with technological advancement.
2. Strengthening Admissibility: Section 63 of the Bharatiya Sakshya Adhiniyam, 2023, strengthens the rules for using electronic records as evidence by clearly stating what is needed for them to be accepted. When digital records are properly verified, they are treated the same as paper documents. This change removes past confusion, makes handling digital evidence clearer, and helps the legal process work more smoothly.
3. Elevating Digital Evidence: Section 57 of the Bharatiya Sakshya Adhiniyam, 2023, brings a major change by clearly stating that electronic records are primary evidence. This ends the old confusion that made digital evidence secondary and often required extra certification under Section 65B. By giving electronic records their own status, Section 57 helps courts work more efficiently.
4. Defining Digital Admissibility— Section 63<sup>16</sup> of the Bharatiya Sakshya Adhiniyam,
5. 2023, redefines the framework for secondary evidence by explicitly addressing electronic records and providing detailed conditions for their admissibility. This

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<sup>10</sup> UP, 2015 Cr LJ 1690 (para 24 to 29) (SC); held partly per incuriam in *Arjun Panditrao Khotkar v Kailash Kushanrao Gorantyal*, AIR 2020 SC 4908 : (2020) 7 SCC 1 to the extent that secondary evidence can also be led.

provision moves beyond the complexities of Section 65B of the Indian Evidence Act, 1872, by outlining how electronic reproductions can qualify as documents: through stringent requirements for authentication, proper device operation, and information processing in the ordinary course of activities. By integrating modern technological realities—such as networked systems, intermediary usage, and advanced digital storage methods—Section 63 ensures uniformity and transparency in judicial processes. This modernization reduces ambiguity, strengthens the reliability of digital evidence, and empowers courts to effectively handle the challenges posed by the digital age.

6. Redefining the definition of documents"— The definition of *documents* under Section 2(1)(d)<sup>11</sup> now explicitly includes electronic records, digital signatures, and other technological formats, moving beyond the traditional focus on physical records. This update acknowledges the shift from traditional paper-based documentation to electronic forms of communication and data storage. It ensures a more comprehensive and adaptable evidentiary framework suited to modern judicial requirements.
7. From Documents to Evidence- "*Evidence' in the first sense it means the content of that testimony. In the second sense means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute*<sup>18</sup>". The definition of *documents* under Section 2(1)(d), now encompassing electronic records and digital formats, directly strengthens Section 2(1)(e)<sup>12</sup>, which broadens the scope of evidence. By formally recognizing digital records as admissible proof, this provision ensures a cohesive and structured framework where the authenticity and reliability of electronic evidence are legally upheld, bridging the gap between traditional and digital forms of evidence.

## CONCLUSION: A STEP TOWARDS MODERNIZING INDIAN EVIDENCE LAW

The enactment of the Bharatiya Sakshya Adhinyam, 2023, signifies a crucial and long-overdue reform that acknowledges the profound transformation in how evidence is created, stored, and presented in the digital age. The deficiencies of the Indian Evidence Act, 1872, in handling electronic records were evident over time to underscore the urgency of adapting the law to

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<sup>11</sup> Cf. the Bharatiya Nyaya Sanhita (Act 45 of 2023), section 2(8) and the General Clauses Act, 1897 (10 of 1897), section 3(18); *Shamsher Singh Verma vs State of Haryana* (2016) 15 SCC 485: 2016 Cr LJ 364, para 14 SC. Compact Disc is a document; *P Gopalkrishnan vs State of Kerala* AIR 2020 SC 1. The contents of the Memory card/ Pendrive must be regarded as a document <sup>18</sup> *Phipson on Evidence*, 20<sup>th</sup> Edition, 1-10, p 4.

<sup>12</sup> The Bharatiya Sakshya Adhinyam, 2023 (Act 47 of 2023), s.2(1)e

digital advancements. Despite efforts by the courts to adapt through the provisions of the Information Technology Act, 2000, the absence of a well-defined and structured legal framework frequently led to confusion in interpretation and challenges in legal procedures.

By formally recognizing digital evidence as primary, this new law clarifies several uncertainties that previously made its admissibility challenging. The strict certification requirement under Section 65B, which often hindered rather than aided the pursuit of justice, has now been simplified. Furthermore, the legislation takes a forward-looking approach by acknowledging the growing relevance of blockchain, artificial intelligence, and cloud computing in legal proceedings. This ensures that the Indian legal system does not merely catch up with technological advancements but is also prepared to evolve alongside them.

Enacting a new law is merely the beginning; the true challenge lies in its practical implementation and successful adoption by the judicial system. The efficacy and effectiveness of the *Bharatiya Sakshya Adhiniyam, 2023*, will hinge on the preparedness of courts, legal practitioners, judges, and law enforcement agencies to competently manage digital evidence. A major obstacle is the limited exposure of many legal professionals to emerging technologies. Judges and lawyers, who were primarily trained in traditional legal frameworks, may find the complexities of digital forensics and electronic evidence difficult to navigate, making structured training and capacity-building essential.

To address this, structured training programs are essential. These programs should emphasize the technical nuances of digital evidence, focusing on its verification, authenticity, and the procedures for establishing its admissibility in court. Strengthening digital forensic infrastructure is equally vital, alongside defining clear procedural protocols for managing electronic records. Legal education initiatives and awareness campaigns will play a pivotal role in ensuring that all stakeholders fully understand the provisions of the new law and are equipped to implement them effectively.

When implemented successfully, these reforms could revolutionize the judicial process, enhancing both its efficiency and transparency. However, without adequate training and resources, the shift to a digital evidence framework risks causing confusion and inconsistencies in legal proceedings. A well-planned, carefully executed transition is essential to ensure that technology is a tool for justice rather than a source of complications.

Ultimately, these reforms are more than a legal update. They show a commitment to making the justice system more accessible, efficient, and reliable. By moving away from outdated colonial-era laws and adopting a digital approach, India is taking an important step toward modernizing its judiciary. Although there are still challenges, this change helps ensure that technology supports the pursuit of justice instead of making it harder.