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RETROSPECTIVITY AND PRACTICAL CHALLENGES: RECONSIDERING THE ANWAR P.V. V. P.K. BASHEER JUDGMENT IN LIGHT OF THE BHARATIYA SAKSHYA ADHINIYAM

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Abstract: *In August this year, the Hon'ble Supreme Court ("SC") decided to take up the matter of whether the landmark judgment in the context of admissibility of electronic records - the case of Anwar PV v. PK Basheer & Ors., should be applied retrospectively or prospectively. This matter becomes even more important in light of the implementation of the new Bharatiya Sakshya Adhniyam,*[2] *which has widened the ambit for the admissibility of digital and electronic records to quite an extent. Thus, considering this crucial juncture, this paper contends two things. First, it argues that the Anwar judgment needs to be reconsidered in light of the BSA and the issues existent in the said judgment. Second, at this stage at least, the effect of the ruling should only be prospective in nature, considering the myriad practical difficulties in its implementation. By and large, this paper bats for a flexible approach in authentication and admissibility of electronic evidence while maintaining the integrity of the evidence so considered.*

Keywords*: Electronic evidence, Admissibility, Anwar judgment, retrospective application, Bharatiya Sakshya Adhiniyam*

I. INTRODUCTION

The *Anwar PV v. PK Basheer & Ors*[1] ("Anwar judgment") has been a matter of much debate since its rendering in 2014. The judgments contrary to this ruling were struck down again in the *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*,[2] ("*Arjun* judgment") thus reinforcing the validity of the Anwar judgment. The *Arjun* judgment left the question of the retrospectivity or prospectivity of the Anwar judgment open, so as to be decided by the Hon'ble Supreme Court ("SC") later. Quite recently, the Hon'ble SC has decided to take up this matter,[3] which has reopened discussions regarding the Anwar judgment yet again.

Meanwhile, the Bharatiya Sakshya Adhiniyam,[4] ("BSA") which has amended the impugned section 65B of the Indian Evidence Act, 1872[5] ("the Evidence Act") brings in an important dimension worth deliberating upon. It has widened the ambit for the admissibility of electronic and digital records and has some significant implications for the Anwar judgment. Hence, at this important juncture, this paper contends that the Anwar judgment must be applied prospectively. This is primarily owing to the myriad practical difficulties that are already being faced in the implementation of the judgment which will only increase manifold if the judgment is made applicable retrospectively (even the SC in the *Arjun* judgment supported prospective ruling in this case). Furthermore, it argues that the Anwar judgment also requires reconsideration in light of the amended provisions of the BSA. By and large, this paper argues for adopting a more liberal approach in the procedure to be followed for the admissibility of electronic records, considering rapid technological advancements and pragmatic implementation challenges.

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[2] Bharatiya Sakshya Adhiniyam, 2023.
[1] Anwar PV v. PK Basheer & Ors, (2014) 10 SCC 473.
[2] *Arjun* Panditrao Khotkar v. Kailash Kushanrao Gorantyal, 2020 SCC OnLine SC 571.
[3] Anwar PV v. PK Basheer & Ors., Miscellaneous Application No. 1563/2017 in C.A. No. 4226/2012; Amisha Shrivastava, Does 'PV Anwar' Judgment Mandating S.65B Evidence Act Certificate For Electronic Evidence Apply Retrospectively? Supreme Court To Decide LIVELAW (13 Aug 2024 3:07 PM) https://www.livelaw.in/top-stories/does-pv-anwar-judgment-mandating-s65b-evidence-act-certificate-for-electronic-evidence-apply-retrospectively-supreme-court-to-decide-266611
[4] Bharatiya Sakshya Adhiniyam, 2023.
[5] The Indian Evidence Act, 1872.

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II. LEGAL CONTEXT AND FRAMEWORK

Sections 65A and 65B were added via an amendment to the Evidence Act in 2000, in keeping with the Information and Technology Act, 2000.[6] Hence, it would be beneficial to read the term 'electronic record' with Section 2(1)(t) of the IT Act which defines electronic record as "*data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche*".[7] Section 65A merely established that the contents of electronic records must be proved in accordance with section 65B.[8] Section 65B of the Evidence Act laid down the procedure to be followed for the admissibility of such electronic records. After this amendment, various High Courts interpreted this provision in different ways. In Navjot Sandhu[9] and Tomaso[10] cases, it was held that the procedure and production of a certificate under 65B is not a mandatory requirement, and the electronic record can be authenticated via sections like section 63 as well.

However, in the Anwar judgment, the SC overruled these judgments and held that the certificate provided under section 65B of the Evidence Act, being a special provision, prevails over other general provisions.[11] Hence, it forms "a complete code in itself", and its compliance is mandatory to make an electronic record admissible.[12] It further clarified that when an electronic record is presented as primary evidence under Section 62 of the Evidence Act, it remains admissible without the need to fulfil the conditions outlined in Section 65B of the Evidence Act.[13] Hence, a distinction was carved out between primary and secondary evidence- in the former, the certificate under s. 65B was not mandatory, but in the latter, it was. Furthermore, such a certificate had to be made at the time of the production itself (stated in the Navjot case),[14] bringing in the idea of contemporaneity while producing a certificate under Section 65B (4).[15]

Later on, in the *Shahfi*[16] and Sonu judgments,[17] this strict requirement was sought to be relaxed. In the former, the SC held that the requirement of the certificate under Section 65B(4) is procedural in nature and may be relaxed by the court when necessary to serve the interests of justice. This requirement is not deemed mandatory in cases where a party is unable to produce such a certificate.[18] In the Sonu judgment, it was held that the certificate under s.65B was a mere procedural requirement, and the absence of an appropriate certificate is a defect in the mode or method of proof and not directed on the admissibility of the document in evidence.[19]

In 2020, the Hon'ble SC struck down these judgments, which ruled contrary to the Anwar judgment, thus upholding the validity of the Anwar judgment once again in the *Arjun* ruling.[20] Furthermore, the Court observed that the ruling in Tomaso Bruno was *per incuriam*, as it incorrectly concluded that Section 65B did not constitute a complete code.[21] However, it left the question of whether the Anwar judgment should apply prospectively or retrospectively, stating the matter to be worth considering by a three-judge bench of the SC.[22] Hence, this paper will further argue in support of prospective ruling in view of the practical challenges the implementation of the Anwar judgment has been facing and will face if it is applied retrospectively.

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[6] The Information and Technology Act, 2000.
[7] The Information and Technology Act, 2000, §2(1)(t).
[8] The Indian Evidence Act, §65A.
[9] (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.
[10] Tomaso Bruno v. State of Uttar Pradesh, (2015) 7 SCC 178.
[11] *Supra* note 2.
[12] Ibid.
[13] Ibid., ¶24.
[14] *Supra* note 10.
[15] The Indian Evidence Act, 1872, §65B(4).
[16] *Shahfi* Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801.
[17] Sonu v State of Haryana, Crl. App No. 1416/2013, 1653/2014, 1652/2014).
[18] Hardik Gautum, *Sections 65A and 65B of the Indian Evidence Act: A complete code in itself*, BAR & BENCH (2020) https://www.barandbench.com/columns/section-65a-and-section-65b-a-complete-code-in-itself.
[19] Shardul Amarchand Mangaldas, *Supreme Court On Admissibility Of Electronic Records As Secondary Evidence*, MONDAQ (2017) https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/614920/supreme-court-on-admissibility-of-electronic-records-as-secondary-evidence
[20] *Supra* note 3.
[21] Bharat Vasani & Varun Kannan, Supreme Court on the admissibility of electronic evidence under Section 65B of the Evidence Act, Cyril Amarchand Mangaldas (2021) https://corporate.cyrilamarchandblogs.com/2021/01/supreme-court-on-the-admissibility-of-electronic-evidence-under-section-65b-of-the-evidence-act/.
[22] *Supra* note 4.

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A. *Changes in the BSA*

The BSA was implemented on 1 July 2024.[23] It has, *inter alia*, made amendments to the erstwhile section 65B of the Evidence Act[24] (now section 63 of the BSA)[25], having serious implications for the Anwar judgment and the existing jurisprudence on the admissibility of electronic records as a whole. Overall, section 63 of the BSA has widened the ambit of the erstwhile section 65B by making certain changes to it. These include the inclusion of semiconductor memory within the term document,[26] encompassing any communication device within its ambit;[27] replacing the term "occupying a responsible official position with 'the person in charge' and adding the requirement of the signature of an "expert" on the certificate under 63(4).[28] Thus, it becomes clear that the requirement of the signature of an expert has now become mandatory, adding another layer of security but also practical difficulties in getting an expert certification, as will be seen ahead.Furthermore, while the Evidence Act did not provide a format for the expert certificate to be submitted, the BSA in its Schedule provides a specific format for the same,[29] hence improving clarity in the process.

Section 61 of BSA further treats electronic records at par with documentary evidence.[30] Further, section 57 of the BSA construes electronic evidence as primary evidence.[31] Thus, the distinction between primary and secondary evidence seems to have blurred. Therefore, a certificate will have to be required even for primary electronic evidence. However, this does not go down well with the Anwar judgment wherein the Hon'ble SC clarified that the certificate under s.65B, Evidence Act was not required for primary evidence.[32]

Also, the definitions of a document and evidence themselves include electronic digital records under the BSA.[33] Hence, every document and evidence in the whole Sanhita is inclusive of digital and electronic records. These changes prove significant in the validity of the Anwar and *Arjun* judgments, as is discussed ahead.

III. A CRITICAL ANALYSIS

The aforementioned changes in the BSA have a significant bearing on the rationale behind the Anwar and *Arjun* judgments, and hence, this paper argues that primarily, the Anwar judgment (since the *Arjun* judgment was largely a clarification upon the same) needs to be reconsidered to suit the amended provisions.

The mainstay of the Anwar judgment- that sections 65A and 65B form a complete code in itself does not stand in view of the BSA. As has been elaborated in the following portion, the Anwar judgment posits that sections 65A and 65B are special provisions dealing with electronic evidence specifically under the Evidence Act, however, the BSA has included electronic documents within the very definition of the document itself, thus removing this divide. Also, there are also significant issues with the Anwar judgment which might warrant reconsideration, as discussed ahead.

A. Section 63 no longer a complete code for Electronic Records

The SC in the Anwar judgment applied the rule of *Generalia specialibus non derogant* and held that sections 65A and 65B are the complete code on the admissibility of electronic records.[34] This was because other sections, like section 63, were generic provisions and did not include electronic records within their ambit. However, since the definition of document and evidence themselves include electronic digital records under the BSA, every document and evidence in the Sanhita as a whole is inclusive of digital and electronic records. Hence, the argument that the generic provisions like section 63 of the Evidence Act won't be applicable may not hold anymore.[35] Hence, even though Section 63 specifically lays down the procedure for the admissibility of electronic records, the applicability of the other generic provisions

[23] ANI, *New Criminal Laws will take effect from July 1: Union Law Minister Meghwal*, THE ECONOMIC TIMES (Jun. 2024), https://economictimes.indiatimes.com/news/india/new-criminal-laws-will-take-effect-from-july-1-union-law-minister-meghwal/articleshow/111037606.cms

[24] The Indian Evidence Act, 1872, §65B.

[25] Bharatiya Sakshya Adhiniyam, 2023, §63.

[26] Bharatiya Sakshya Adhiniyam, 2023, §63(1).

[27] *Correspondence Table And Comparison Summary Of The Bharatiya Sakshya Adhiniyam, 2023, (BSA) And The Indian Evidence Act, 1872, (IEA)* BUREA OF POLICE RESEARCH AND DEVELOPMENT, https://bprd.nic.in/uploads/pdf/Comparison%20Summary%20BSA%20to%20IEA.pdf

[28] Bharatiya Sakshya Adhiniyam, 2023, §63(4).

[29] Ibid. Sch.

[30] Ibid., §61.

[31] Ibid., §57, Expl.(4),(5),(6),(7).

[32] *Supra* note 2.

[33] Bharatiya Sakshya Adhiniyam, 2023, §2.

[34] *Supra* note 2.

[35] Bharatiya Sakshya Adhiniyam, 2023, §2(d).

cannot be ruled out, and Section 63 cannot be called a complete code in itself.

This is not to say that the principle of *Generalia specialibus non derogant* will not apply; but rather, the application of this principle does not have to rule out all possibilities which exist outside of this provision. Ultimately, as the court itself noted, the idea is to ensure the authenticity and source of such evidence, and since most provisions of the BSA are interlinked, such an exclusive approach will not bode well for delivering complete justice.[36]

Adding on, the SC in the Anwar judgment noted:

"there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective..."[37]

Yet, in order to bring uniformity in the application of section 65B, the SC made adherence to the provision of 65B too rigid to be inclusive of such rapidly transforming times. While holding these sections to be a complete code in themselves,[38] the Court failed to consider possibilities where this code might not be suitable or enough.

Although obtaining a certificate under Section 65B(4) serves a crucial safeguard for ensuring the authenticity of electronic evidence, certain circumstances may necessitate the implementation of additional protective measures. For instance, safeguarding the privacy and confidentiality of information contained in electronic records may require supplementary protocols or guidelines.

Quite recently, in *XXX v. State of Kerala*[39], the Kerala HC introduced specific guidelines for handling digital evidence containing sexually explicit material. These measures were designed to prevent the unauthorised dissemination or leakage of such content, thereby upholding the fundamental constitutional rights of victims.[40] This further showcases that the impugned sections cannot be called "the complete code" on the matter of the admissibility of electronic records.

Furthermore, the recent instances of leaked electronic evidence, such as WhatsApp chats, have underscored the urgent need to implement safeguards for preserving and securing electronic records. In a recent ruling, the Punjab & Haryana HC relied on the *Arjun* judgment to conclude that WhatsApp chats hold no evidentiary value unless accompanied by a Section 65B (4) certificate.[41]

Justice Nariman, in the *Arjun* judgment, also referred to the Report submitted by a five-judge Committee in November 2018, which proposed Draft Rules on the preservation, retrieval and authentication of electronic records. Consequently, additional measures are necessary to ensure the security, retention and confidentiality of electronic evidence. Thus, section 65B alone cannot be deemed complete in itself in addressing these concerns. [42]

B. Other Problems with the Anwar Judgment

Some misinterpretation of section 65B can also be observed in the rendering of the Anwar judgment, thus calling for rectification. Firstly, the SC brought in the rule of contemporaneity while producing a certificate under Section 65B (4);[43] However, a reading of the Evidence Act (not even the BSA) does not showcase such a requirement. This issue has, however, been rectified in the cases of *Kundan Singh* v. *State*,[44] and Paras Jain v. State of Rajasthan, wherein it has been held that one does not have to follow the rule of contemporaneity when it comes to certification of electronic records.[45] More recently, in the *State of Karnataka v. T.Naseer @ Thadiantavida Naseer*[46] the SC has showcased flexibility in the production of the certificate under s.65B if there is some defect in the same, by stating that:

"A certificate under Section 65-B of the Act, which is sought to be produced by the prosecution is not evidence which has been created now. It is meeting the requirement of law to prove a report on record. By permitting the prosecution to produce the certificate under Section 65B of the Act at this stage will not result in any irreversible prejudice to the accused. The accused will have

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[36] *Supra* note 2, ¶15
[37] Ibid.,¶12.
[38] Ibid., ¶19.
[39] 2023 LiveLaw (Ker) 713, W.P. (Crl.) 445/ 2022.
[40] Navya Benny, *Kerala High Court Lays Down Guidelines On Handling Digital Evidence Containing Sexually Explicit Materials*, LIVELAW (7 Dec 2023 5:47 PM) https://www.livelaw.in/high-court/kerala-high-court/kerala-high-court-guidelines-law-enforcement-agencies-courts-handling-sexually-explicit-materials-243958.
[41] Rakesh Kumar Singla v Union of India, CRM-M No.23220 of 2020 (O&M).
[42] *Supra* note 22.
[43] The Indian Evidence Act, 1872, §65B(4).
[44] 2015 SCC OnLine Del 13647.
[45] (2016) 2 RLW 945 (Raj).
[46] 2023 LiveLaw (SC) 965, Crl App No. 3456, (2023) (SLP (CRL.) No. 6548, 2022)

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full opportunity to rebut the evidence led by the prosecution."[47]

The SC also misconstrued the word "shall" as used in section 65B (4). The provision merely states that the certificate "shall be evidence" concerning matters outlined in sub-clauses (a), (b), and (c). Nowhere in section 65B is it explicitly mandated that such a certificate must be submitted for the admissibility of electronic evidence, nor does it prohibit all other methods of authentication.[48]

Moreover, a legal presumption exists that the computed generating the evidentiary output was functioning correctly at the relevant time, unless rebutted by evidence proving otherwise. ,[49] Such a narrow approach would not be suitable. This is because such an approach would render substantially important evidence nugatory owing to mere procedural irregularities in procuring the certificate which fulfils all the said conditions.

In this context, the *Shahfi* judgment deserves mention. The concern therein was that when the party is practically unable to procure a certificate, should the court allow such evidence in the interest of justice? The *Shahfi* court ruled in the affirmative but the SC consequently overruled the same, invoking powers of the court to enable the parties to attain such certification. However, this methodology itself seems flawed.

This is because while overruling the *Shahfi* judgment,[50] the Hon'ble SC in the case of *Arjun*,[51] held that if the person required to furnish the certificate under Section 65B(4) refuses to do so, an application can be made before the judge to compel its production. However, this stance itself seems problematic. This is because in instances where either a defective certificate is issued or where such a certificate is requested but not provided by the relevant authority, the trial judge must summon the individual(s) specified under Section 65B(4) of the Evidence Act, and direct them to furnish the required certificate. However, in civil proceedings, this obligation remains subject to judicial discretion, which must be exercised in accordance with legal principles and the demands of justice on the specific facts of each case.[52] Hence, what was a mandatory condition for the parties now becomes a discretion for the court when a defective certificate is produced. Thus, if the judge deems it fit to not procure the said certificate, would it not still raise questions as to the authenticity of the electronic record? This view, thus, appears discordant with the stringent and mandatory stipulation of the certificate in the Anwar judgment.

Further, the words "any of the following things"[53] have been retained in the BSA as well. This phrase implies that for a certificate to be considered valid, it must meet at least one of the three stipulated conditions. However, in the Anwar judgment, the SC made each of the three conditions necessary for the certificate to be valid.

In the *Arjun* case, Justice Nariman as well as Justice V Ramasubramanian observed that Section 65B, apart from a few minor modifications, closely mirrored Section 5 of the UK Civil Evidence Act, 1968.[54] Notably, the UK had already repealed this provision in 1995. As a result, when section 65B was introduced into the Indian Evidence Act in 2000,[55] India had effectively incorporated a provision that had been discarded from UK law years earlier and had become outdated in view of the rapidly growing technology. Hence, considering today's rapidly changing times and emerging cybercrimes, a relook of this provision is required in India as well.[56]

Hence, in view of the issues with the Anwar judgment both before and after the enforcement of the BSA, this judgment requires a relook in order to better suit it with the new evidence

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[47] Livelaw News Network, *S.65B Evidence Act Certificate Can Be Produced At Any Stage Of Trial: Supreme Court Allows Prosecution Plea In 2008 Bangalore Blasts Case* LIVELAW, (8 Nov 2023 12:31 PM) https://www.livelaw.in/supreme-court/s65b-evidence-act-certificate-can-be-produced-at-any-stage-of-trial-supreme-court-allows-prosecution-plea-in-2008-bangalore-blasts-case-241899?from-login=271241,

[48] Natansh Jain, *PV Anvar v. PK Basheer: A Critique*, RMLNLU LAW REVIEW BLOG (2017) https://rmlnlulawreview.com/2017/08/25/pv-anvar-v-pk-basheer-a-critique/.

[49] *Supra* note 2, ¶18.

[50] *Shahfi* Mohammad v. State of Himachal Pradesh, (2018) 2 SCC 801.

[51] *Arjun* Panditrao Khotkar v. Kailash Kushanrao Gorantyal, 2020 SCC OnLine SC 571.

[52] Prachi Bhardwaj, *SC clarifies law on admissibility of electronic evidence without certificate under Section 65B of Evidence Act, 1872*, SCC TIMES (2020) https://www.scconline.com/blog/post/2020/07/14/sc-clarifies-law-on-admissibility-of-electronic-evidence-without-certificate-under-section-65b-of-evidence-act-1872/ .

[53] Bharatiya Sakshya Adhiniyam, §63(4).

[54] T,he UK Civil Evidence Act, 1968 §5.

[55] The Indian Evidence Act, 1872, §65B.

[56] *Supra* note 22.

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statute as well as the rapidly growing technological arena.

IV.PRACTICAL DIFFICULTIES IN IMPLEMENTATION

Apart from the aforementioned legal issues, the implementation of the Anwar judgment also presents considerable issues in its on-ground implementation. In an empirical study,[57] several grassroots issues with the collection of electronic and cyber-forensic evidence have been noted. These include:

1. Lack of proper training and technical know-how: There are no specific educational qualifications or criteria required for handling digital evidence, with most personnel being selected from diverse academic backgrounds. However, a general graduate level- education is often deemed sufficient. The training provided to police officers remains insufficient for managing electronic evidence, forcing them to rely on forensic laboratories such as the National Cyber Forensic Laboratory (NCFL) or external experts for digital forensic analysis. Furthermore, the existing staff lacks the necessary expertise to effectively handle electronic evidence. Many officers remain unfamiliar with or untrained in modern forensics tools and scientific methodologies that have emerged with technological advancements. Lack of consistent guidelines for collection, acquisition and presentation of electronic evidence and Standard Operating Procedure: There is no uniform procedure for handling electronic evidence to ensure clarity in the process.
2. Infrastructural and Logistical Challenges: Law enforcement agencies frequently encounter obstacles such as inadequate high-speed internet access, insufficient storage for electronic data, and a lack of modern infrastructure to support the proper handling of digital evidence. These deficiencies hinder the efficient investigation and prosecution of cybercrimes.
3. Overburdened forensic laboratories: A limited number of forensic labs are available, and they are responsible for handling cases from numerous police stations. This excessive workload results in significant delays, hampering the timely administration of justice. Currently, the Ministry of Electronics and Information Technology has notified only 15 electronic evidence examiners, an alarmingly low figure given the expanding scope of digital evidence in legal proceedings. The shortage of trained experts further exacerbates trial delays and affects the efficient enforcement of digital evidence-related legal provisions.[58]
4. Inadequate equipment in both traditional and cyber police stations to handle crimes involving electronic devices to deal with the immensity of data in the current age and rapid changes in technology.

Such difficulties have also been recognised in several judgments. In February this year, the SC in *William Stephen v. The State of Tamil Nadu and Anr.*, emphasised the need for the Tamil Nadu government to ensure that police officers receive adequate training on procuring certificates for electronic evidence, as mandated under Section 65B of the Evidence Act.[59]

Furthermore, the importance of training officers is underscored in many judgments.[60] In *Vijesh v. The State of Kerala*,[61] the HC underscored the importance of maintaining the highest standards when copying and handling digital evidence. Observing that the investigating officer had failed to follow the necessary procedures, the Court stated that it is imperative for the State police to develop a comprehensive guide on the best practices for

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[57] Sadhna Gupta & Meghali Das, *Criminal Investigation of Electronic Evidence: Challenges Faced With Digital Forensics*, NFSU JOURNAL OF FORENSIC JUSTICE (2023), https://jfj.nfsu.ac.in/Uploads/EJournal/2/3/(1-16)%20CRIMINAL%20INVESTIGATION%20OF%20ELECTRONIC%20EVIDENCE%20CHALLENGES%20FACED%20WITH%20DIGITAL%20FORENSICS.pdf.

[58] *Notification of Forensic labs as 'Examiner of Electronic Evidence' under Section 79A of the Information Technology Act 2000*, MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY https://www.meity.gov.in/notification-forensic-labs-%E2%80%98examiner-electronic-evidence%E2%80%99-under-section-79a-information-technology.

[59] William Stephen v. The State of Tamil Nadu and Anr., Crl Appl No. 607 (2024), 2024 LiveLaw (SC) 168; Yash Mittal, *State Of TN Must Train Police Officers On Procedure To Obtain Certificate Under S.65B Indian Evidence Act : Supreme Court*, LIVELAW (2024) https://www.livelaw.in/supreme-court/state-of-tn-must-train-police-officers-on-procedure-to-obtain-certificate-under-s65b-indian-evidence-act-supreme-court-250733.

[60] State of Punjab vs. Amritsar Beverages Ltd, AIR 2007 SC 590; Abdul Rahaman Kunji v. State of West Bengal, ¶71; Dilipkumar Tulsidas Shah v. UOI; Prof. K.G.Varghese v. State Of Kerala.

[61] Crl. MC. No.7294, 2015(B).

digital evidence if they intend to combat cybercrime effectively. Further, Cybercriminals remained far ahead of law enforcement, making it crucial to implement urgent training measures to equip officers with the skills needed for successful prosecution.[62]

Furthermore, the *E-Sakshya* app, launched in August this year,[63] and developed by the National Informatics Centre (NIC) with the ambitious aim of helping police record the scene of crime and the search and seizures and then upload them onto a cloud-based platform, is still in a very nascent stage and would face similar hurdles before becoming fully operational.[64]

Hence, applying the Anwar ruling retrospectively will not only exacerbate these existing challenges but also open a pandora's box, where several rulings will be reopened and risk being overturned- not on the basis of substantial argument but on the basis of a procedure that was not even mandatory when they were rendered.

A. In Favour of Prospective Ruling

Though the main argument of the Sonu judgment was overturned,[65] a significant point was noted therein regarding the need to apply the Anwar judgment prospectively.[66] It was held that it would not be in the interests of administrative justice to apply the Anwar judgment retrospectively. This is because before the Anwar ruling, the Navjot ruling, which was struck down consequently, was being followed for nearly a decade. Hence, it is natural that the majority of the cases during that decade wouldn't have adduced the certificate under section 65B, as it was not considered mandatory. Thus, a retrospective application would open a pandora's box and a large number of done and dusted criminal cases would be reopened, revisited and objected to even at appellate stages.[67]

Further batting for the application of the rule of the prospective ruling, the Court in the Sonu case referred to the precedent set in *IC Golak Nath vs State of Punjab*[68] which recognised that legal pronouncements could be applied prospectively, It was emphasised that transactions conducted under prior legal provisions should not be invalidated merely because of subsequent judicial interpretations.[69] In the *Arjun* judgment as well, the SC supported the prospective ruling of the Anwar judgment while leaving it open for the SC to decide the matter later.[70] Hence, in consonance with the above views of the SC itself in the context of the Anwar judgment, it would be apt to apply the Anwar judgment prospectively, so as to also prevent addition to the already existing hurdles in the implementation of the Anwar judgment on the ground.

V. RECOMMENDATIONS AND CONCLUSION

It is crucial to strike a balance between procedural safeguards with effective justice delivery, particularly when addressing electronic evidence. While procedural requirements like the certification under section 65B of the Evidence Act ensure the authenticity of electronic records, rigid adherence to it may impede justice. Hence, a nuanced approach which takes into account technological realities and practical challenges can better serve the ends of justice. This balance demands reforms that make the process less restrictive while safeguarding the authenticity and integrity of the evidence.

Further, retrospective application of the Anwar judgment could prove detrimental. This is because many earlier cases relied on precedents like the Navjot case, which did not mandate certification under section 65B. Hence, it would disrupt settled cases unwarrantedly and

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[62] Vijesh v. State of Kerala, ¶9.

[63] PIB, *Union Home Minister and Minister of Cooperation, Shri Amit Shah launches e-Sakshya, Nyaya Setu, Nyaya Shruti and e-Summon App for three new criminal laws in Chandigarh today*, MINISTRY OF HOME AFFAIRS (Aug. 2024), https://pib.gov.in/PressReleasePage.aspx?PRID=2041322.

[64] Amita George, *eSakshya: A case of the road to hell being paved with good intentions*?, NEW INDIAN EXPRESS (July 2024), https://www.newindianexpress.com/web-only/2024/Jul/17/esakshya-a-case-of-the-road-to-hell-being-paved-with-good-intentions

[65] [65] Sonu v State of Haryana, Crl. App No. 1416/2013, 1653/2014, 1652/2014).

[66] Sonu v State of Haryana, Crl Appl No. 1416/2013, 1653/2014, 1652/2014.

[67] Ibid.

[68] IC Golak Nath vs State of Punjab, (1967) 2 SCR 762

[69] Ibid.; *Electronic Evidence: If Judgment in 'Anvar Case' Is Applied Retrospectively, It Would Adversely Affect Administration Of Justice: SC*, LIVELAW (Jul. 2017, 9:06 AM) https://www.livelaw.in/electronic-evidence-judgment-anvar-case-applied-retrospectively-adversely-affect-administration-justice-sc-read-judgment/?from-login=724751.

[70]

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lead to unnecessary appeals and delays. Thus, the prospective application of the ruling seems pragmatic and would help to ensure procedural clarity without penalising actions taken under earlier interpretations of the section.

Moreover, systemic reforms are essential to address the practical difficulties encountered in the implementation of the Anwar judgment. These may include regular training programs for equipping personnel with the skills to handle newly developed tools and techniques in scientific and digital investigation. It is also crucial to provide proper instruction on managing electronic evidence, covering its identification, collection, acquisition and preservation; making officials aware of the mandatory rules and requirements to ensure admissibility of crucial evidence; ensuring due diligence during investigation so that crucial evidence is not rendered inadmissible owing to mere procedural irregularities and increasing the number of forensic labs and experts and integration of advanced tools like blockchain. For instance, blockchain technology has been incorporated into the Delhi Forensic Science Laboratory (DFSL) and the Delhi Police as part of their e-forensic application to establish an unalterable and transparent record of the chain of custody for evidence. This technology is designed to offer unlimited storage capacity for an infinite period while ensuring both impartiality and transparency in the process.[71] Initiatives like the *E-Sakshya* app are also promising but require time and effort for robust implementation.

Additionally, the law also needs to evolve to keep pace with technological advancements. Drawing inspiration from the American model,[72] if courts adopt flexible authentication mechanisms, like including, *inter alia*, expert testimony, public reports, etc. to authenticate such evidence, it would help corroborate the information stated in the certificate, thus increasing its reliability and accuracy and also helping in keeping up with rapid advancements.[73]

Conclusively, the interplay of law and technology demands judicial and administrative reforms to address challenges encountered in dealing with electronic evidence. Thus, prospective application of the Anwar judgment, better training, infrastructural upgrades and legislative adaptations can help to enhance our justice delivery system. Such an approach would help to balance procedural rigour with pragmatic justice, thus upholding fairness in this digital age.

[71] *Supra* note 60.

[72] Lorraine v. Markel American Insurance Co., 241 FRD 534 (2007). Federal Rules of Evidence, 2015, Advisory Committee's note to Rule 901(b).

[73] Federal Rules of Evidence, 2015, Advisory Committee's note to Rule 901(b).