

ERGO

Analysing developments impacting business

HIT REFRESH (PART 3 OF 3): LAW OF EVIDENCE GETS A CONTEMPORARY MAKEOVER – KEY HIGHLIGHTS OF BHARATIYA SAKSHYA ADHINIYAM, 2023 (BSA)

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Introduction

In a move aimed at contemporising the justice delivery system in India, the Bharatiya Sakshya Adhinyam, 2023 (BSA) has been introduced to replace the Indian Evidence Act, 1872 (IEA). While the BSA was published in the Official Gazette on 25 December 2023, due to administrative and logistical reasons, the said enactment is expected to come into force only later in 2024.

In Part III of this ERGO series, we outline some of the significant changes introduced by the BSA which seeks to consolidate rules and principles governing evidence for conduct of fair trials:

➤ **Inclusion of statements given electronically as evidence:**

The ambit of 'evidence' has been broadened to include statements given through electronic mediums. This will enable the appearance of witnesses, accused persons, experts and victims to depose via electronic means in the usual course. This is a welcome change aimed at mitigating logistical challenges for various stakeholders in terms of costs, time and resources.

➤ **Electronic records as documentary evidence:**

In order to keep pace with the digital era, electronic and digital records have been specifically brought under the ambit of 'documentary evidence' in the BSA. This includes electronic records on emails, server logs, documents on computers, laptops or smartphones, messages, websites, locational evidence, and voice mail messages stored on digital devices. The BSA provides that such records will have the same legal effect, validity, and enforceability as any other document.

As a result of such a classification, electronic or digital records are now categorised as 'primary evidence' under Section 57 of the BSA. Under the IEA, primary evidence referred to original records, whereas secondary evidence referred to records that can prove the original records' contents. This clearly acknowledges the shift from traditional paper-based systems to contemporary electronic communication and data storage forms. However, despite electronic records being primary evidence under the BSA, a 'certificate of authentication' (similar to the certificate contemplated under Section 65B of the IEA) is still required to be issued as per the Schedule to the BSA. While such a requirement may be with the aim of preventing tampering, this still raises questions as to the effectiveness of classifying the same as primary evidence.

It is also pertinent to highlight that the BSA has omitted references to its territorial extent, possibly in order to overcome admissibility related challenges pertaining to evidence generated outside India (especially digital evidence).

➤ **Judicial notice of international treaties, agreements and conventions:**

The BSA requires Courts to take judicial notice of international treaties, agreements or conventions with countries by India, or decisions made by India at international associations or other bodies. This is a positive step, especially for international businesses and individuals with foreign dealings, as this will result in the automatic recognition of international principles by Courts which can go a long way in creating a sense of comity and certainty.

➤ **Variation in the meaning of “accomplice”:**

The IEA provides that an accomplice shall be a competent witness against an accused person, and a conviction is not illegal *merely because* it proceeds upon the uncorroborated testimony of an accomplice. On the other hand, while clarifying that an accomplice shall be a competent witness against an accused person, the BSA states that a conviction is not illegal *if* it proceeds on the corroborated testimony of the accomplice.

➤ **Addition of ‘coercion’ as an act causing a confession to become irrelevant:**

Under the IEA, inducement, threat or promise by a person in authority, were recognised as acts that could lead to rendering a confession by an accused person irrelevant. However, the BSA also adds ‘coercion’ as an act causing the invalidation of a confession by an accused. This affords greater protection to accused persons by ensuring that no undue pressure is applied by persons in authority to elicit confessions.

➤ **Non-production of documents containing communication between Ministers and the President of India:**

The BSA provides that no Court can require production before it of any communication between Ministers and the President of India. This is opposed to the IEA, wherein no similar provision was present. The Supreme Court in *People’s Union for Civil Liberties v. Union of India (2004)* had stated that the only immunity from disclosure was of unpublished State documents that pertain to affairs of the State, and where disclosure of the same is against public interest. The introduction of such a *carte blanche* provision could lead to abuse of power since administrative actions can go unchecked in the absence of judicial review.

➤ **Deletion of terms relating to India’s colonial past:**

References to terms such as ‘*public Acts passed by the Parliament of the United Kingdom*’, ‘*her Majesty’s Government*’, etc. have been removed in the BSA. These omissions are an attempt to remove any traces of colonial remains from India’s legal system. Further, outdated words like ‘Vakil’, ‘Pleader’ and ‘Barrister’ have been deleted as they are no longer relevant and are replaced with ‘Advocate’.

Conclusion

Most of the core principles that formed a part of India’s evidence jurisprudence under the 130+ year old IEA, e.g., burden of proof, admissions, relevancy of facts, etc. remain constant under the BSA. Nevertheless, with significant emphasis being accorded to electronic records and their treatment, the enactment of the BSA is certainly a significant step towards aligning India’s legal system to contemporary technological advances. What remains to be seen is as to how quickly and efficiently stakeholders such as Courts, lawyers, litigants and investigating agencies embrace such changes to render the legal system truly contemporary at the ground level. Also, while concerns remain regarding the possible abuse of power on account of the absolute bar on production of communications between Ministers and the President, the judicial recognition of international conventions, inclusion of the term

'coercion' in the context of barred admissions and deletion of long redundant colonial terms are definitely welcome changes under the BSA.

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