

## The Bharatiya Adhiniyam Bill, 2023: A primer on the legislation replacing to Indian Evidence Act, 1872<sup>1</sup> (3/3)

### Introduction

1. The Bharatiya Sakshya Bill, 2023 was introduced in the Lok Sabha on August 11, 2023 with the aim to repeal and replace the existing Indian Evidence Act, 1872 (**Evidence Act**) along with two other bills intended to replace the Indian Penal Code, 1860 (**IPC**) and the Code of Criminal Procedure, 1973 (**CrPC**). The Bharatiya Sakshya BSA, 2023 was withdrawn on December 12, 2023, and the Bharatiya Sakshya (Second) Bill was introduced in its stead, with the same aim. The BSA was passed by the Lok Sabha on December 20, 2023, and by the Rajya Sabha on 21 December 2023. It received presidential assent on December 25, 2023. Upon notification it is being referred to as the 'Bharatiya Sakshya Adhiniyam, 2023' (**BSA**).
2. This note summarizes the most notable changes to the Evidence Act which have been brought about by the BSA. The most significant changes in the BSA pertain to consolidation of sections and removal of references from the colonial era, while maintaining a construct largely similar to that of the erstwhile Evidence Act.

### Definitions

3. In terms of notable changes, the definitions under Section 4 of the Evidence Act which defined 'conclusive proof', 'may presume' and 'shall presume' have been included in a consolidated definition clause.<sup>2</sup> The BSA



also provides for interpretation of words used under the BSA but not specifically defined under it.<sup>3</sup> Such words are to have the same meaning for the same words as defined under Information Technology Act, 2000, Bharatiya Nagarik Suraksha Sanhita, 2023 and Bharatiya Nyaya Sanhita, 2023, as the case may be.

### Closely Connected Facts

4. The provisions of Chapter II of the BSA, concerning 'Closely Connected Facts' (which include provisions on evidence of facts in issue and relevant facts,<sup>4</sup> relevancy of facts forming part of the same transaction,<sup>5</sup> facts being occasion, cause or effect of facts in issue,<sup>6</sup>

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<sup>2</sup> Section 2 of the BSA pertains to definitions.

<sup>3</sup> Section 2(2) of the BSA pertains to definitions of words not specifically defined under the BSA.

<sup>4</sup> Section 3 of the BSA pertains to evidence of existence or non-existence of relevant facts.

<sup>5</sup> Section 4 of the BSA pertains to facts forming part of the same transaction.

<sup>6</sup> Section 5 of the BSA pertains to facts that are the occasion, cause or effect of relevant facts, or facts in issue.

facts showing existence of mind,<sup>7</sup> etc.) are identical to equivalent provisions in the Evidence Act.<sup>8</sup> The language of Section 12 of the Evidence Act (which discussed the relevance of facts which enable the court to determine damages) has been modified slightly while remaining same in substance.<sup>9</sup>

5. Similarly, provisions concerning 'Admissions' (including illustrations) have been retained, with a few changes.<sup>10</sup> For instance, 'Admission by party to proceeding or his agent' as discussed in Section 18 of the Act, setting out admissions made by suitor in representative character is structured differently but remains identical in substance.<sup>11</sup>

6. Section 22A of the Evidence Act dealing with oral evidence as to contents of electronic records has now been excluded from the BSA.

## On confessions

7. Notably, in relation to the provisions pertaining to confession, a significant change has been made with respect to Section 24 of the Evidence Act (which provides that any confession made by an accused person if caused by inducement, threat or promise, is irrelevant). Two new provisos have been included which allow for certain types of confessions to be considered relevant.<sup>12</sup>

a. As per the first proviso, a confession can become relevant if the inducement, threat, coercion or promise, has in the opinion of the court, been fully removed.

b. Secondly, a confession if otherwise relevant, does not become irrelevant merely because it was (i) made

under a promise of secrecy; (ii) or is a consequence of a deception practiced on the accused person for obtaining such confession; (iii) or if the accused person was drunk; (iv) or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, (v) or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him. These provisos are likely to require further clarification to ensure the right against self-incrimination is not affected.

8. Sections 25 and 26 of the Evidence Act pertaining confession to a police officer and confession have now been clubbed together,<sup>13</sup> while adding a proviso. As per this new proviso, whenever information is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of police, such information as it relates to the fact discovered, whether it amounts to a confession or not, may be proved. Simply put, by virtue of this provision, information received in custody may be used further for the purpose of investigation or corroboration of other evidence against such information.

## On digital signatures

9. Section 45 of the Evidence Act has been modified, and the new provision<sup>14</sup> specifies that the opinion of examiner of electronic evidence as per Section 79A of the IT Act shall be a relevant fact for information stored digitally. Further, provisions related to opinions concerning handwriting and digital signature previously contained under Sections 47 and 47A of the Evidence Act have been clubbed under a single section without alteration to wording. Consequentially, it may be now

<sup>7</sup> Section 6 of the BSA pertains to facts which show the existence of mind.

<sup>8</sup> Sections 5-8 of the Evidence Act are equivalent to sections 3-6 of the BSA.

<sup>9</sup> Section 12 of the BSA pertains to facts which will enable a court to determine the amount of damages.

<sup>10</sup> Sections 15-17 of the BSA pertain to admissions.

<sup>11</sup> Section 16 of the BSA pertains to admissions made by suitors in a representative character.

<sup>12</sup> Section 22 of the BSA pertains to relevance of confessions.

<sup>13</sup> Section 23 of the BSA pertains to confessions made to police officers.  
<sup>14</sup> Section 39 of the BSA pertains to opinion of the examiner of electronic evidence.

open for courts to consider the opinion of persons acquainted with someone's handwriting<sup>15</sup> as well as their digital signature.<sup>16</sup>

## Facts which need not be proved

10. Chapter III of the BSA, dealing with 'facts which need not be proved' includes amends Section 57 of the Evidence Act. The Section corresponding to Section 57(1) of the Evidence Act has included in its ambit all laws in force in India having extraterritorial operation. Further, the ambit, of the section has been expanded to include international treaties, agreements, and conventions with countries by India, apart from decisions made by India at international associations and other bodies.<sup>17</sup> Notably, the modified section excludes references to seals, proceedings, sovereign concerning the United Kingdom and limits the scope to similar authorities of India. This brings treaties and other authorities concerning India at an international level at par, without regard to similar references from the United Kingdom.

## Primary evidence

11. The provisions of Section 61 of the Evidence Act have been modified, and the new section under the BSA<sup>18</sup> includes additional explanations recognizing that (i) where documents made using a uniform process such as printing, lithography or photography where each is primary evidence of the contents of the rest; but where they are copies of a common original, they are not primary evidence of the contents of the original, (ii) where electronic or digital records are recorded or stored, each file is a primary evidence, (iii) where electronic or digital record is produced from proper custody, such record is primary evidence unless disputed, (iv) where a video recording is stored in electronic form or transmitted, each of the stored recording is primary evidence, and finally (v) where an electronic record is stored in multiple storage spaces



in a computer resource, each such automated storage including temporary files is primary evidence.

## Secondary Evidence

12. Section 63 of the Evidence Act, concerning 'secondary evidence', has been amended and expanded, and the equivalent section<sup>19</sup> contains additional categories including oral admissions, written admissions, and evidence of a person examining a document within the meaning of secondary evidence.
13. The BSA therefore has a broader scope as opposed to secondary evidence under the Evidence Act, as it now includes oral admissions, written admissions and evidence taken by a skilled person from an original document which cannot be examined by the court. To apply and to qualify as secondary evidence however, oral evidence must relate to the original and not a copy thereof.<sup>20</sup> Such additional categories of secondary evidence are expected to assist courts in determining admissibility of documents.

<sup>15</sup> Section 41(1) of the BSA pertains to relevance of opinion by one familiar with another's handwriting

<sup>16</sup> Section 41(2) of the BSA pertains to relevance of opinion by a Certifying Authority.

<sup>17</sup> Section 52(1) discusses facts of which the court shall take judicial notice.

<sup>18</sup> Section 57 of the BSA pertains to 'primary evidence'.

<sup>19</sup> Section 81 of the BSA pertains to presumptions as to Gazettes in electronic or digital record

<sup>20</sup> Illustration (d) of Section 58 of the BSA pertains to oral accounts of a copy.

## Electronic Evidence

14. The contents of Section 65B of the Evidence Act have been simplified and provides for the admissibility of electronic or digital records,<sup>21</sup> and states that the same shall have the same legal effect, validity, and enforceability as paper records. The admissibility of electronic or digital records is subject to fulfilment of certain conditions.<sup>22</sup>

## Public documents

15. Sections 74 and 75 of the Evidence Act have been combined in the BSA,<sup>23</sup> to cover descriptions of both public and private documents, the new provision remains identical in substance to the provisions in the Evidence Act.

## Presumptions as to documents

16. Section 81A of the Evidence Act has been expanded in the new provision, and deals with presumptions as to gazettes in electronic or digital form, and contains an additional explanation of 'proper custody'.<sup>24</sup>
17. Section 82 of the Evidence Act dealing with presumption about documents admissible in England, has now been excluded from the BSA. Section 86 of the Evidence Act which dealt with presumption as to certified copies of foreign judicial records has been modified in the new section<sup>25</sup> to exclude reference to dominions of Great Britain and adopts a nomenclature to indicate documents from any country beyond India. Further, the provisions of Section 88 of the Evidence Act have been altered, and the new section replaces the phrase 'telegraphic messages' with 'electronic messages'.<sup>26</sup>

## Examination of witnesses

18. The section pertaining to examination of witnesses is identical in substance to Section 137 of the Evidence Act, though structured differently.<sup>27</sup> Further, with respect to leading questions, the new section modifies Section 141 of the Evidence Act, which was generic and relied on 'suggestive' character of questions to include specific circumstances as leading questions.<sup>28</sup> The section on refreshing of memory is a verbatim adoption of Section 159 of the Evidence Act, albeit with an alteration of structure.<sup>29</sup> The section concerning production of documents has modified Section 162 of the Evidence Act to impose certain restrictions on what documents can be produced by adopting a proviso which bars the production of any privileged communication between ministers and President of India.<sup>30</sup>

## Conclusion

19. In summation, the primary intent of the Evidence BSA, with some of the changes discussed above appears to be consolidate provisions dealing with different aspects of the same subject matter such as the clubbing of different provisions concerning admissions before police and in custody under one broad section. The BSA pitches for uniform interpretation and application of similar standards to the same subject matters, and bringing experts of electronic evidence at par with other experts for determining relevant facts. However, the effect of certain provisions particularly relating to confessions and production of documents is required to be examined and tested in greater detail given the nature of the intended change.

<sup>21</sup> Section 61 of the BSA discusses admissibility of electronic and digital records.

<sup>22</sup> Section 63 of the BSA discusses conditions governing the admissibility of electronic and digital records.

<sup>23</sup> Section 74 of the BSA pertains to definitions of private and public documents.

<sup>24</sup> Section 81 of the BSA pertains to presumptions as to Gazettes in electronic or digital record

<sup>25</sup> Section 88 of the BSA pertains to presumptions as to certified copies.

<sup>26</sup> Section 90 of the BSA pertains to presumptions as to electronic messages.

<sup>27</sup> Section 142 of the BSA pertains to examination of witnesses.

<sup>28</sup> Section 146 of the BSA pertains to leading questions.

<sup>29</sup> Section 162 of the BSA pertains to refreshing of memory.

<sup>30</sup> Section 165 of the BSA pertains to production of documents.

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