

## SOCIAL NETWORKING SITES AND ADMISSIBILITY OF EVIDENCE IN FAMILY LAW CASES

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### **Abstract**

*Technology which is for all good of the mankind sometimes brings with it some warnings, which if not taken seriously can lead to unpleasant consequences. Social networking sites are one such thing which has brought mega transformation in the society. A social networking site can be a good way to meet others who share similar interests and goals. They can be a way to interact with or meet people who haven't met before. There is a technological detachment that is becoming today's reality. Social networking sites are faintly obliterating the significance of communications that one used to have with his near ones and are disengaging them from the social environment around them. This eventually leads to a looming feeling of segregation which prevails in today's society.*

*A person today hardly spends quality time with his friends rather he uses technology to contact them such as texting or instant messaging or commenting on their status updates/pictures etc., consequently spend less time with them face to face. While interacting socially and communicating in person with others all kinds of personality traits are experienced by the individual, such as cooperation, competition, imitation, bargaining, voting, and bluffing etc. It is due such experiences that a person's social personality develops. It should not shock anyone that face-to-face interaction is demonstrated by studies to comfort us and furnish us with some significant feeling of prosperity whether the cooperation is with companions or with any relaxed associates.*

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## **1. INTRODUCTION**

In the era of social networking sites the evidence retrieved from such sites can prove to be treasure of information in a case involving family law issues. Such sites are good for bringing people together and stay connected and share information. It is this information that can be valuable in the court of law in order to deliver justice. According to online audience measurement site *Vizisense*, India's social networking population is estimated to be at 35 million people.<sup>2</sup>

Evidently, courts need to adjust to society's growing fascination with social media. For past sometime now, there has been sharp increase in the presentation of evidence from social networking sites to seek remedy in family courts. While some of the reasons may be absurd — a woman wanted to divorce her husband after he refused to change his relationship status on Facebook, therefore, the courts are beginning to take such evidence seriously.<sup>3</sup>

### **1.1. Digital Evidence and admissibility as per Indian Laws**

Evidence retrieved from such locations can be used in a variety of ways in family law cases. Digital or electronic evidence is any probative material kept or transferred in digital form that a party to a court action may use at trial, and it includes evidence recovered from social networking sites. However, one concern associated with such evidence is its relevance, credibility, and validity, which must be managed by the court. "Valuable information that is stored or transferred in binary form" is what digital evidence is.<sup>4</sup> In any instance, such evidence includes information retrieved from PCs as well as evidence obtained from digital devices used for telecommunication or multi-media. Messages, digital pictures, ATM transaction logs, MS Word, reports, instant chat histories, papers saved from accounting applications, spreadsheets, online programme histories databases, and other electronic evidence can be uncovered. PC memory contents, computer

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<sup>2</sup> Harsimran Singh, Social networking ke side-effects Beware: An Innocuous Message On Twitter Or Facebook Could Land You In Jail, Cost You Your Job Or Even Marriage, *The Economic Times Mumbai*, Feb 3, 2010.

<sup>3</sup> Ekatha Ann John, Social network logs into divorce battles, *The Times Of India, Social*, Nov 1, 2014

<sup>4</sup> Carrie Morgan Whitcomb, An Historical Perspective of Digital Evidence: A Forensic Scientist's View, *International Journal of Digital Evidence*, Spring 2002 Volume 1, Issue 1, pp 4.

backups, computer printouts, Global Positioning System tracks, electronic door lock logs, digital video or audio records, and so on.<sup>5</sup>

According to the new amendment to Information Technology Act, 2000, the status, messages, remarks, tweets and so on have been made admissible as electronic evidence. Moreover the burden of proof of such posts has been laid on the user of such accounts. Electronic records are included in the definition of "evidence" under the amendment, and "documentary evidence" is defined to encompass all electronic records presented for court inspection. Oral evidence refers to all statements that the court authorises to be made in front of it. Documentary evidence refers to all archives, including electronic data, that are admissible in court. The phrase 'electronic records' has the same meaning as it has under the Information Technology Act. The phrase 'admission' today now refers to an oral, written, or electronic declaration that expresses an opinion about any fact being discussed, as well as anything else important. The Supreme Court ruled in *State of Maharashtra v. Dr. Praful B. Desai*<sup>6</sup> that, in addition to oral and documentary evidence, electronic records can be entered as evidence under section 3 of the Indian Evidence Act.

A statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned, is an admission, according to Section 17 of the Indian Evidence Act, 1872. The Indian Evidence Act's new Section 22-A allows for the admissibility of spoken evidence relating to the contents of electronic recordings. When oral admissions about the contents of electronic documents are significant, it specifies. Unless the authenticity of the electronic record produced is in issue, oral admissions about the contents of electronic records are irrelevant.<sup>7</sup> Under the Second Schedule to the Information Technology Act of 2000, new sections 65-A and 65-B are added to the Evidence Act. Section 65-A stipulates that the contents of electronic records may be proved in accordance with Section 65-B's provisions. The Indian Evidence Act, Section 65B, governs the admissibility of electronic documents as evidence in a court of law.

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<sup>5</sup> Adv. Prashant Mali , Electronic Evidence/ Digital Evidence & Cyber Law in India, retrieved from <https://www.linkedin.com/pulse/electronic-evidence-digital-cyber-law-india-adv-prashant-mali->, Visited on 3.7.2021.

<sup>6</sup> (2003) 4 SCC 601.

<sup>7</sup> Section 22A in The Indian Evidence Act, 1872

Admissibility of electronic records<sup>8</sup>:

Any information contained in an electronic record that is printed on paper, stored, recorded, or replicated on optical or magnetic media produced by a computer is presumed to be a document (under the Evidence Act) if the conditions set forth in Section 65B(2) are met. If the conditions under Section 65B(2) are satisfied, without proof or production of the original, the paper on which an electronic record's information is printed, or the optical or magnetic media produced by the computer on which such information is stored, recorded, or copied, shall be admissible in any proceeding as evidence of any contents of the original or of any fact stated therein, for which direct evidence would be admissible.

When a statement in evidence is sought under Section 65B, Section 65B(4) mandates the issuance of a certificate that identifies the electronic record containing the statement and describes how it was created, among other things, and specifies the device that was used to make the electronic record in order to prove that it was created by a computer, either by a person in a responsible official position for the operation of the relevant device or the administration of the relevant activities, whichever is appropriate.

One might not put much importance on the fact that his/her posts might turn the matters relating to the family court's case against him/her.

## **1.2. Social Networking Sites and evidence retrieved**

And when a person is into not-so-innocent activities on social networking site then that certainly can end up making him lose the case. As per the advisory issued by the matrimonial lawyers one must stay away from such activities when the family life is on the edge. It is no wonder very easy to connect with the opposite sex on a social networking site but it can ruin one's family life. Mrunalini Deshmukh, an ace lawyer has stated that there have been so many cases recently where spouses have used a picture saved earlier as evidence although that picture. People have

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<sup>8</sup> Section 65B -The Indian Evidence Act, 1872

made contact with their exes or classmates and initiated a flirtation that has resulted in troubles.<sup>9</sup> One must maintain his/her ethics and steer clear of getting too up and close with anyone on social networking site.

One may not realize that the outcome of the post on LinkedIn, Twitter, Facebook etc. relating to his/her new job or promotion can be injurious in case for the maintenance or alimony. The result can be the payment of more money. This can happen in a case where a husband denies that he cannot afford to pay the exaggerated amount of alimony to his wife because he does not earn that much, on the other hand, he posts the pictures of his vacation on any social networking site. The court will certainly take notice of the fact that if he can afford to go on a vacation then he certainly can afford to pay more alimony/maintenance.

Evidently, evidence from social networking sites can be used in the family law case while deciding upon the issues related to children. For instance in child custody matters, the question of a particular parent being more appropriate for the custody of the children, in a number of cases the inappropriate photographs of the parents have been used in the court of law to prove the character, nature, temperament, life style to be unfit for granting the custody of the child. There have been orders of the family courts restraining the parent from posting the pictures or information about his/her children on social networking sites. And also, restraining them from contacting their children and access to any kind of information regarding the children via any social networking site can be strict to the extent that the parent be ordered not to send any friend request to the child. The tweets and messages on social networking sites can be used to expose an individual's state of mind.

If an individual's post mention his or her drinking habit to an extent then that can be used to show him or her as an alcoholic in the court of law. Photos of a parent can be used in order to show that a parent has been indulging in certain activities which are against the parenting order. A father got the custody of the child when he showed bawdy photos of mother and her boyfriend playing a semi-automatic weapon which could be dangerous when done in front of the child and

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<sup>9</sup> <https://www.facebook.com/SSGEM/posts/371300612916890>, Visited n 10.6.2021

is a display of irresponsible behaviour on the part of a parent. The social networking sites have also been used in order to decide upon the consent related issues of the children in such cases.

### **1.3. Court communication through Social networking sites**

Social networking sites have been used for a novel purpose of serving the orders of the court on a party which is either avoiding the proceedings or is untraceable. In a case from Adelaide, Australia, the family court had ordered a paternity test be conducted on an absconding father via social networking site. The man was not possibly be contacted to go through a paternity test, but because he was a regular Facebook user, the Judge ordered the serving of the documents electronically through using Facebook's private messaging service.<sup>10</sup>

According to a survey conducted by the American Academy of Matrimonial Lawyers, 81 percent of family law practitioners have noticed a rise in the use of social media sites as evidence in divorce and child custody cases.<sup>11</sup>

But the legal issues involved in every case vary and so will the evidence. If for instance, adultery is ground for divorce, then the evidence must pertain to the same. Now it is very hard to obtain evidence of the same because such activities are meant to be secretive. However on the social networking sites such evidence can be inferred via photos and posts. This is helpful for both the client and the lawyers to prove the wrong. While evidence-worthy images and information shared on Facebook may not be grounds for divorce on their own, material combined with other types of proof may result in an unfavorable conclusion.<sup>12</sup> There can be instances that might hint towards such activities which break the sanctity of a relationship but are not able to stand on their feet all by themselves in the court of law. So they need corroboration and this support can be attained through the evidence retrieved from social networking sites. It can happen that the evidence that is retrieved from such a profile is not direct but indirectly it hints towards the temperament, nature, character, finances, moral/immoral activities, habits, travels of the concerned

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<sup>10</sup> <https://www.ndtv.com/world-news/legal-notice-can-be-sent-via-facebook-too-419898> visited on 03/07/2021

<sup>11</sup> <https://www.shortlawfirm.com/articles/social-networking-s-role-in-family-law-cases/>, Visited on 03.07.2021

<sup>12</sup> <https://www.findlaw.com/family/divorce/facebook-divorce.html>, Visited on 04.07.2021

person. So in an indirect corroborative way such evidence can prove to be decisive in family law cases, depending on the facts and circumstances of each case.

#### **1.4. Significance of such evidence and admissibility**

The printouts, screenshots of the communications on Whatsapp, Facebook, and Google Talk etc. can be used as evidence in the court of law. In a case from Bengaluru the wife used to prove infidelity via a trail of communications exchanged on Whatsapp with his girlfriend. In earlier times this was hard to be reached upon.

Usually such activities were done through telephones. Now proving such a thing would be very difficult and the court would have to rely on the eve's dropping and other corroborative evidence. But, now the snapshots of the present and also past can be used for the impeachment against not only the parties but the witnesses as well.

It is also possible to retrieve the deleted material from any computer/ smartphone/digital camera through certain software.

4,000 divorce lawsuits were filed in Bangalore district jurisdiction in 2013, and the number has already surpassed 1,500 in 2014. 40 percent of the cases are for divorces based on adultery and extramarital affairs.<sup>13</sup> A technology expert from a metropolitan city in India notice a pattern in his engineer wife's out station trips. She was often accompanied by the same colleague every time who was himself married. He then looked for evidence via her social networking account and e-mails and got the pictures and exchanged messages. He was granted divorce on charges of adultery. In another case, a banker wife got hold of chat messages with sexual undertones in order to prove that her high-end officer husband was a womanizer. The chat messages were considered as circumstantial evidence of adultery and she was granted divorce. The circumstantial evidence is evidence which is based on reasoning. It is the facts which are otherwise not related but when put together infer a conclusion which further is significant for the delivery of justice. Such evidences

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<sup>13</sup> 7 <https://timesofindia.indiatimes.com/city/bengaluru/Adultery-cases-on-the-rise-Chat-trails-give-divorce-lawyers-new-age-ammunition/articleshow/37141369.cms>, Visited on 02.07.2021

might include the information and testimony presented by either of the parties which direct towards a certain conclusion that would indirectly set up a fact or event which was in question to be proved. One such example could be that if a person in family court case is avoiding the amount payable as maintenance and around the same time is noticed being on shopping spree, that would be taken as circumstantial evidence of the culpability. For circumstantial evidence to be admissible the Hon'ble Supreme Court in *Ashok Kumar v. State of Madhya Pradesh*<sup>14</sup>, held-

- (1) *The conditions resultant in the deduction of guilt must be established lucidly and decisively.*
- (2) *Such circumstances must be of explicit bent accurately hinting at the guilt of accused.*
- (3) *The circumstances when put cumulatively together must lead to a chain so full that no getaway from driving the conclusion of the guilt of the all probable guilt of the accused.*
- (4) *The circumstantial evidence in order to uphold conviction must be absolute and unqualified of justification leading to any other proposition than that of the guilt of the accused and also must be conflicting with his innocence.*

As with every technology, it may be both enabling and disabling: in this case, individuals indulging in affairs of the heart should keep an eye on their BBMs and G-chats when sending sweet nothings.<sup>15</sup> In another case from New Delhi, the husband lied about his business trips on a regular basis, but his wife caught him Tweeting about his wonderful evening and the place where he was truly with his pals, as he said, "Having a great time with friends over beer, I am in town, come over and join me."

Earlier it used to get difficult to prove adultery due to lack of evidence so the detour of cruelty used to be taken. But now, one can very conveniently prove the allegation of adultery itself and get justice. Social networking sites are helping adduce evidence of not just adultery but also other ground of divorce as well, such as bigamy, cruelty. In earlier days the sole type of evidence on which the court had to rely on was the injury marks on the body of the victim. But now a wide range of evidences can be procured from a social networking profile of either. "Most of the

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<sup>14</sup> AIR 1989 SC 1890

<sup>15</sup> Saswati Mukherjee B, Adultery cases on the rise: Chat trails give divorce lawyers new-age ammunition, The Times of India, Bengaluru, Jun 25, 2014.

evidences now are from the virtual world”, said D Prasanna, former president of Women Lawyers Association. When a husband fumes out on Twitter by writing, “I hate my wife”, it can be accepted in the court as circumstantial evidence. The reason is that when anything of this sort is written in a public domain then that can be treated as an instance of mental cruelty. It is the circumstantial evidence which endeavours to establish the facts in question by laying other facts and manages for an occasion as to its existence. But such evidence cannot be the sole turning point rather such comments have to be read within the context and intention has to be comprehended out of it.

The Hon'ble Supreme Court observed in *Hanumant v. State of Madhya Pradesh*<sup>16</sup> that *when dealing with circumstantial evidence, there is always the risk of suspicion replacing legal proof. It's vital to remember that in circumstantial evidence situations, the circumstances from which the conclusion of guilt is to be drawn must first and foremost be fully acknowledged, and the entire set of facts must be based solely on the accused's perception of guilt. There could be a chain of evidence as long as the eye can see, leaving no rational justification for a decision that the accused is innocent. There's a good chance it's a hint at the accused's guilt.*

An innocent comment can also be dangerous but only if it fits in the context and proves the intention with which it was written.

It is not only the opposite party's posts that can be helpful rather in order to prove a certain allegation any post from another friend's posts could also do the harm. So eventually it can be said that an old post that you might not be aware of can also be a weapon against you. In a case from Chennai when 27-year-old husband was told to provide some evidence in the family court to prove his allegation that his wife was “immoral”, he showed a zoomed in photo of a young female in a sleeveless shirt and jeans along with a male in the backdrop. This picture was from the college days of the wife and was posted on Facebook by her friend. The court seemed to be convinced with that. Recent instances in the domain of Family Law have shown that material posted on Facebook can be used against parties in court proceedings, and the Court will not hesitate to employ the long arm of the law to serve court documents on such social networks.<sup>17</sup>

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<sup>16</sup> AIR 1995 SC 343.

<sup>17</sup> <https://www.scfamilylaw.com/introducing-social-media-into-evidence-in-family-court> visited on 03.07.2021

Social networking sites have been helpful in unearthing the offence of bigamy in a number of cases. A bigamist has been jailed after his first wife uncovered his secret second family when he was tagged on Facebook doing an ice bucket challenge.<sup>18</sup> The first wife of four years of marriage came across a video of his ice bucket challenge on the social networking site which had the caption “uncle Andrew and auntie Philippa”. She then discovered the pictures of the wedding itself. In another case a man who was leading a double life was prosecuted for bigamy as photos of his second marriage came on Facebook.<sup>19</sup> In another American case the first wife came to know about the second marriage when her husband’s second marriage status popped up in the Facebook’s “people you may know” notification. In this case the husband and wife were not even friends online but they had many common friends so eventually the wife got the notification of about this person who had a lot common with her and she might want to become friends with him. This is a way that has been created to enlarge one’s social circle online.

Now as per the recent developments in the Information Technology Act, 2000 any hilarious status/message/comment/post/tweet which was rather impromptu can end up a person in jail and if such a person is going through a rocky phase of family life then it might help the opposite party in an easy divorce. Such innocent post can be put in the right context in order to be used in a family law case. This is an advancement that has not been observed by the majority of users of the social networking sites. When two people start the proceedings of divorce, child custody or maintenance etc. they need to be cautious of what is being posted by them online. Even the posts made by them earlier in time can be damaging for them. Even if such posts have been deleted then also they can be retrieved. Computers have got the details of the places one has been to via internet. For example any one undergoing the family court proceedings creates a profile on some dating website but then deletes it, still the information regarding the same can be retrieved from the computer.

Computer forensics or digital forensics is the branch of forensic science that deals with the retrieving of the legal evidence from the computers and digital storage mediums. As per the computer forensics it depends on what kind of program or software one is using and the

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<sup>18</sup> <https://www.telegraph.co.uk/news/newstoppers/howaboutthat/11542202/Bigamist-caught-when-he-is-tagged-on-Facebook-doing-ice-bucket-challenge.html>, Visited on 03.07.2021

<sup>19</sup> <https://metro.co.uk/2015/02/13/its-really-complicated-wife-finds-out-husband-is-a-bigamist-on-facebook-5062001/>, Visited on 03.07.2021

information can be retrieved completely or partly, and in some cases it will take some time to retrieve the complete data from the computer. Once a history is deleted from the computer there stay at least two other records in the computer which can still be retrieved with the help of the professionals. Moreover when a social networking site is being used and any evidence is required from its database then that can also be asked for from that particular website.

Digital evidence is typically larger, more difficult to destroy, more easily manipulated, replicated, potentially more expressive, and more immediately available.<sup>20</sup> Millions of photos are uploaded on Facebook every day, and billions of other content is shared amongst the users every month. It was due to this astounding sum of communications being exchanged on social networking sites that it was apprehended that such sites are a precious arsenal of probable evidence.

But, as mentioned earlier also, the issue attached with such evidence is the question of verifiability and authenticity. It means that the information on such sites is not easily verifiable and also the authentication is not effortless. Moreover there is high likelihood of impersonation and digital fabrication on such sites. Generally, when such evidence is seen from the legal angle it entails supplementary substantiation that will connect it with its alleged author in order to be allowed in the court of law.

As mentioned earlier the digital evidence is considered like any other document which is presented in the court of law so it has to go through the same requirements for authenticity as usual/other documents. Although online transactions are more prone to be fabricated but still they are analysed on per case basis and the evidence's weight and accuracy is judged as per each case differently. There is a need for authentication because anyone can impersonate anyone and access the other's account on computer or mobile phone. The security of the password also is a big issue. These days people are logged in on their phones 24x7 and might sometimes leave it unattended. Well, the hackers don't even need an unattended phone to access the information in it. As a result, demonstrating that a message or photograph originated from a certain account or device without other authenticating evidence is insufficient proof of authorship or portrayal.<sup>21</sup>

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<sup>20</sup> South Australian Law Reform Institute / Final Report 1 / October 2012, pp 17

<sup>21</sup> Richard Raysman & Peter Brown, 'Authentication of Social Media Evidence', (2011) New York Law Journal, <http://www.newyorklawjournal.com/>, Visited on 04.07.2021.

### 1.5. Admissibility of such evidence as Primary Evidence

The primary evidence, according to Section 62 of the Indian Evidence Act, is the top-most class of evidence. It is the evidence that, in all feasible circumstances, provides the crucial hint in a disputed fact and establishes through documentary evidence by presenting an actual document in court.<sup>22</sup> It signifies that the document/evidence is produced for scrutiny in a court of law.

### Conclusion

Many lawyers have stated that the time spent on social networking sites has out passed the time spent for indulging in immoral activities online. It can be said that the partners in crime are bonding to the maximum via social networking sites and are being caught in the web via social networking sites only. It has become convenient to access the incriminating evidence, particularly when technology reigns in the love matters as well.

In some cases the evidence is direct as getting the printouts of the unambiguous communication between the two culprits. While in other instances it can be circumstantial.

While evidence-worthy images and information communicated on Facebook may not be grounds for divorce on their own, material combined with other types of proof may result in an unfavourable result.<sup>23</sup>

For instance exact evidence of extramarital affair is not available but there can be some information that point towards it. A lawyer Satish Maneshinde stated that,

*“While a social networking site does not show proof of a relationship, uploaded material can reveal an individual's predisposition towards another and can be used in court. He went on to say that in a single year, he came across at least 200 percent of these*

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<sup>22</sup> <https://www.legalindia.com/different-kinds-of-evidences-witnesses-under-the-indian-evidence-act/>, Visited on 04.07.2021

<sup>23</sup> <https://www.findlaw.com/family/divorce/facebook-divorce.html>, Visited on 04.07.2021

*types of incidents. Under the Indian Evidence Act, electronic content can also be used as a "document."*<sup>24</sup>

The posts on the social networking sites can be used as indirect or circumstantial evidence in court cases. Tweets, status, posts, pictures, messages etc. that are accepted as secondary evidence in courts actually are equally significant as primary evidence. In divorce cases the allegations that could not be proved earlier are now proved with the help of evidence procured via social networking sites.

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<sup>24</sup> Electronic Evidence and Judicial Approach , Rajasthan State Judicial Academy; Section 3 (a), The Indian Evidence Act, 1872.