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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 15th January, 2018
Date of decision : 31st January, 2018

\+ **RFA 299/2015**

M/S ICICI BANK LIMITED ..... Appellant
Through: Mr. Punit K. Bhalla & Ms. Chetna Bhalla, Advocates. (M-9810080772)

versus

KAPIL DEV SHARMA ..... Respondent
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present appeal arises out of the impugned judgment/order dated 19th February, 2015 by which the suit for recovery filed by the Appellant/Plaintiff bank (*hereinafter, 'Plaintiff bank'*) was dismissed. The primary ground on which the suit had been dismissed was that the Plaintiff bank had failed to file the original loan recall notice dated 10th April, 2014 in the Trial court.

Brief Background

2. The Respondent/Defendant (*hereinafter, 'Defendant'*) approached the Plaintiff bank for financing of the purchase of a vehicle under loan cum hypothecation scheme for a sum of Rs.4,18,000/-. The Defendant agreed to repay the loan amount in 60 equal monthly instalments (*hereinafter, 'EMI'*) of Rs.9,246/-. The loan was duly sanctioned and was disbursed on 25th July,

2012 to the dealer from whom the vehicle was to be purchased by the Defendant, after deducting usual processing fee and stamp duty charges. All the loan documents were executed by the Defendant.

3. Upon payment by the bank to the dealer, the Defendant secured a loan for the Vehicle BEAT Diesel/LT bearing registration No. HR-51AT-4449. Various cheques were issued by the Defendant for payment of the instalments, which were dishonoured/returned unpaid with the remarks "***Refer to drawer/insufficient funds***", when presented by the Plaintiff bank. Accordingly, the Plaintiff bank filed a suit for recovery for the sum of Rs.3,77,008.04/-.

4. In the suit, repeated attempts were made to serve the Defendant. Directions were passed on 21st May, 2014, appointing a representative of the Plaintiff bank as receiver with the direction to take possession of the vehicle from the Defendant along with an undertaking that the Plaintiff bank would not sell the vehicle without permission of the Court. Despite repeated attempts, the Defendant could not be served. Finally, the Defendant was served through publication but failed to appear. On 6th January, 2015, the Defendant was proceeded ex-parte. The Plaintiff bank led evidence by way of affidavit of Mr. Laxman Gaur, the authorized representative as PW-1. The said PW-1 exhibited, along with his affidavit, the following documents:

(i) Ex.PW-1/1 - Power of Attorney authorizing him to depose;

(ii) Ex.PW-1/2 - the original credit facility application form along with the terms and conditions of the loan;

(iii) Ex.PW-1/3 - Unattested deed of hypothecation;

(iv) Ex.PW-1/4 - irrevocable Power of Attorney;

(v) Ex.PW-1/5 - loan recall notice;

(vi) Ex.PW-1/6 - postal receipt;

(vii) Ex.PW-1/7 - statement of account duly certified under The Bankers' Books Evidence Act, 1891 (*hereinafter, 'BBE Act')*;

5. The statement of account is duly accompanied with a certificate under (Ex. PW-1/8) Section 65B of the Indian Evidence Act, 1872 (*hereinafter, 'Evidence Act'*). On the basis of these documents, the Plaintiff bank prayed for a decree in the suit.

6. A perusal of the documents placed on record clearly establishes that the Plaintiff bank has taken all steps necessary to establish its case. The loan documents, which are filed in original, bear the signatures of the Defendant. The factum of release of the loan amount and the possession of the vehicle having been taken by the Defendant is not in dispute. Despite all the original documents being on record, the Trial Court proceeded on an erroneous assumption that the original loan recall notice dated 10th April, 2014, has not been placed on record and only a photocopy of the same has been placed on record. It is actually unfathomable as to how the loan recall notice, issued to the Defendant, could be produced in original by the Plaintiff bank. The original of the said notice would obviously be with the Defendant. This can hardly be a ground to dismiss the suit of the Plaintiff bank by adopting a technical approach.

7. Banks and financial institutions, which disburse loans to citizens, operate on the trust and faith that the citizens who avail of loans would pay back the same honestly and with diligence. Banks hold the money of the public in trust with them, and the financial cycle of investments, deposits and loans are essential for the functioning of the economy. If people, who

avail loans, default in payment of the same and also avoid the Court processes, there would be enormous distress in the system.

8. Courts also have a duty to safeguard public money and by applying completely incorrect principles of procedure and evidence, suits filed by these financial institutions cannot be dismissed in this manner. A perusal of the documents filed in this case shows that there is nothing more that the Plaintiff bank could have done apart from taking all the steps to serve the Defendant and placing the entire set of original documents on record. The statement of accounts clearly shows that the Defendant paid several of the instalments but defaulted in some of the instalments. The breakup of the amount claimed by the Plaintiff bank in the suit is as under:

5 equal monthly instalments paid but cheques bounced.	- Rs. 46,230/-
Late payment and cheque bouncing charges	- Rs. 7,166/-
Total	= Rs. 53,396/-
Unpaid future instalments as on 24th April, 2014	- Rs. 3,69,840/-

9. As per the statement of accounts, the Defendant paid a total amount of Rs.1,38,690/- in 15 instalments. The remaining instalments remain unpaid. The loan recall notice clearly informs the Defendant that in aggregate Rs.3,55,700.70/- was due as on 5th April, 2014 and as on 24th April, 2014, the total liability of the Defendant was Rs.3,77,008.04/-. The Plaintiff bank, having placed all the original documents on record except the loan recall notice, has proved its case beyond any doubt.

10. The reasoning of the Trial Court that the original recall notice was not filed, and receipt of service of the loan recall notice was not proved, is

completely untenable. The Trial Court has applied the provisions of the Evidence Act in a completely incorrect manner. The findings of the Trial Court, which start from internal page 9, do not take any of the other original documents filed by the Plaintiff bank into consideration. Apart from mentioning these documents as part of the Plaintiff bank's case, the Trial Court does not even care to note that these original documents are filed and that the Plaintiff bank has discharged its onus to show that the loan has actually been disbursed. The fact that several of the instalments were paid by the Defendant, is itself evidence of the loan having been disbursed by the Plaintiff bank and availed of and enjoyed by the Defendant. The receiver appointed by the Court submitted a report on 3rd September, 2014 that the BEAT Diesel/LT bearing registration No. HR-51AT-4449 is untraceable. This matter calls for some serious consideration, inasmuch as the Defendant appears to have completely gone off the radar. The vehicle is untraceable and the Defendant could not be traced as well. Such cases call for some severe remedies to be taken in order to ensure that persons who avail of loans do not default in such a negligent manner and also escape the consequences.

11. The filing of original documents is a requirement under law for a particular reason i.e., the originals constitute primary evidence and copies constitute secondary evidence. In most commercial transactions, the documents are not even disputed. The requirement of filing original documents ought to be insisted upon only when the parties actually dispute the documents which are on record. It should not be easy for any party to dispute the documents which actually relate to it and bear proper signatures. Insistence of filing of original documents when documents are not disputed

causes enormous delay in adjudication of commercial disputes. The Court ought to bear in mind that original documents are required when allegations as to their genuinity or existence are raised and not in a technical manner in all situations.

12. In most civil disputes, documents exchanged between the parties, documents bearing signatures, correspondence exchanged between the parties, etc. are not disputed. It is the effect and interpretation thereof which is usually a matter of dispute. In such cases, the insistence of production of original documents and going through the entire journey of admission/denial etc., leads to unnecessary waste of judicial time, as also a lag in the dispensation of justice. Apart from these documents, there are other documents, for example publicly available documents etc., which should be accepted, unless and until there is a reason to doubt their authenticity. The insistence of filing original documents can result in injustice as is evident from the present case.

13. In commercial transactions, like the one in the present case i.e., a suit for recovery based on a loan transaction, the journey of procedure has resulted in complete injustice. The final result i.e., dismissal of the suit only on the basis of the original of the loan recall notice not being on record is unsustainable. It ought to be borne in mind that a loan recall notice results in consequences for the person who has availed the loan. The Plaintiff bank could have maintained the suit for recovery even in the absence of the loan recall notice so long as the disbursement of loan and availing of the same is admitted. In this case, all the loan documents in original are placed on record. The loan recall notice is merely a document which takes away the luxury of payments in instalments granted to the Defendant and nothing

more. The fact that the Defendant has defaulted in making the payments, does not in any manner depend upon the existence of the loan recall notice. The Defendant, after service of the said notice, cannot avail of the facility of paying through instalments and has to make the entire payment at one go. The Plaintiff bank could have very well filed the suit for recovery when the Defendant defaulted on making the payments. The loan recall notice merely gives closure to the entire transaction and nothing more.

14. Section 34 of the Evidence Act clearly provides that the books of accounts maintained in electronic form are relevant. Under Section 62 of the Evidence Act, original documents constitute primary evidence. In the context of electronic evidence, printouts of electronic documents are considered as secondary. However, judicial notice needs to be taken of the fact that most accounts today are not maintained in paper form, but electronic form. The primary evidence could be the server on which the statement of accounts is stored. These servers may store the statement of accounts of multiple clients in the hard drive. It would be an impossibility to require the Plaintiff bank to produce the hard drive of the server in every suit for recovery filed by it. Under such circumstances, the Plaintiff bank has no option but to produce the secondary evidence i.e., a printout of statement of accounts, duly certified by a responsible official of the bank along with a certificate under Section 65B of the Evidence Act. Needless to add, the certificate under Section 65B of the Evidence Act has now become a usual practice in almost all of the suits, inasmuch as, in every such suit, parties are bound to place reliance on electronic documents. The mere fact, that the printout is being filed as secondary evidence along with the necessary certificate, does not make it any less valid. The said accounts statement

would be rebuttable if any discrepancy is found or pointed out. But in the absence of the same, there is no reason as to why the statement of accounts filed by the Plaintiff bank should be disbelieved. The Supreme Court in ***Anvar P.V. v. P.K. Basheer AIR 2015 SC 180*** *(hereinafter, 'Anvar v. Basheer'),* while addressing the issue of admissibility of electronic evidence and Section 65B of the Evidence Act held as under:

> *"13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned Under Sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions Under Section 65B(2). Following are the specified conditions Under Section 65B(2) of the Evidence Act:*
> *(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*
> *(ii) The information of the kind contained in electronic record or of the kind from which the information is*

derived was regularly fed into the computer in the ordinary course of the said activity;
(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:
(a) There must be a certificate which identifies the electronic record containing the statement;
(b) The certificate must describe the manner in which the electronic record was produced;
(c) The certificate must furnish the particulars of the device involved in the production of that record;
(d) The certificate must deal with the applicable conditions mentioned Under Section 65B(2) of the Evidence Act; and
(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to

electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65B of the Evidence Act are not complied with, as the law now stands in India.
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22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia special bus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in

terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

15. The above judgement was followed in ***Harpal Singh v. State of Punjab AIR 2016 SC 5389*** and by a Division Bench of this Court in ***Kundan Singh v. State I (2016) CCR1 (Del.).*** A Single Judge of this Court, relying on ***Anvar v. Basheer (supra),*** in ***ELI Lilly v. Maiden Pharmaceuticals 2017 (161) DRJ 65*** held as under:

*"18. Though the ratio of **Anvar P.V. supra**, to me, appears to require the certificate/affidavit under Section 65-B of the Evidence Act to accompany the electronic record when produced in the Court, and a learned Single Judge of this Court also in **Ankur Chawla vs. Central Bureau of Investigation** opining so acquitted the petitioner/accused therein (though the SLP is pending in the Supreme Court) but a Single Judge of the High Court of Rajasthan in **Paras Jain Vs. State of Rajasthan** did not agree with the judgment of this Court in **Ankur Chawla supra** observing that "when legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured alongwith the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable". A Division Bench of this Court in **Kundan Singh Vs. State** also, on a reading of **Anvar P.V. supra**, disagreed with the view taken in **Ankur Chawla supra** and held that the words "produced in evidence" did not postulate or propound a ratio that the computer output when reproduced as a*

paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under Section 65-B(4). It was held that all that is necessary is that the person giving the certificate under Section 65-B(4) should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in Section 65-B(2), identify the electronic record, describe the manner in which computer output was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer. It was further held that emails are downloaded and computer output, in the form of paper prints, are taken every day; these emails may become relevant and important electronic evidence subsequently; it is difficult to conceive and accept that the emails would be inadmissible, if the official who downloaded them and had taken printouts had failed to, on that occasion or simultaneously record a certificate under Section 65-B.

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20. It thus but has to be held that the plaintiffs are entitled to file the certificate under Section 65-B of the Evidence Act, even subsequent to the filing of the electronic record in the Court. Order XI Rule 6 of CPC as applicable to commercial suits is also not found to provide to the contrary."

In the present case, the Plaintiff bank has filed the certificate under Section 65B through its witness and also certified all the copies of electronic records including bank statements etc., Thus the requirements under Section 65B have been fulfilled.

16. There is however some serious re-thinking required on the manner in which electronic documents are to be proved. In each case where electronic documents are involved, it would be impractical to expect the parties to

produce the primary evidence which would be the medium on which the document is stored, considering that electronic documents could be stored on hard drives, hard disks, CPUs, micro-processors, cameras, telephones, etc. Certificates under Section 65B accompanying the printouts have simply become standard formats. Cross examination on these certificates can involve debates on model of computer, printer, questions as to who took printouts etc. Courts, therefore, need to take a pragmatic attitude in these cases. Unless there is a serious challenge to the electronic documents i.e., tampering, forgery, hacking, misuse of an email address, change in contents etc., usually printouts of electronic documents ought to be allowed to be read in evidence. The complex procedure laid down for proving of electronic documents can prove to be extremely cumbersome and can have enormous impact especially in commercial transactions, as it has had in the present case.

17. The Code of Civil Procedure, 1908 and the Evidence Act though have undergone several amendments over the years, in the area of production of documents, they continue to insist on primary evidence being the admissible evidence. This can result in enormous injustice, due to delay, in commercial cases. It is for this reason that in several jurisdictions the production of original documents is dispensed with unless there is challenge raised to the authenticity and existence or contents of a document. One such example is the Civil Evidence Act, 1995 in the United Kingdom which reads as under:

> ***"1995 Chapter 38***
> ***8. Proof of statements contained in documents***
> *(1) where a statement contained in a document is admissible as evidence in a civil proceedings, it may be proved –*

(a) by the production of that document, or
(b) whether or not that document is still in existence, by production of a copy authenticated in such manner as the court may approve.
(2) It is immaterial for this purpose how many removes there are between a copy and the original.

9. Proof of records of business or public authority.
(1) A document is shown to form part of the records of a business of public authority may be received in evidence in civil proceedings without further proof.
(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.
For this purpose –
(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and
(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.
……..”

18. A perusal of the above provisions shows that copies of documents are acceptable in Courts and are to be authenticated in the manner which the Court may approve. Courts in UK can prescribe the manner in which a document is to be proved, if the copy which is filed is challenged or questioned. If the records relied upon are part of the records of a business or part of the records of a public authority, the same can be filed along with the certificate signed by a responsible officer belonging to the business or the public authority. Thus, discretion has been vested with the court to entertain copies of documents and whether originals need to be insisted upon in each

case.

19. The loan recall notice in this case could not have been produced in original by the Plaintiff bank. All the other original documents, namely loan documents etc., have been ignored by the Trial Court. No reason exists to disbelieve the statement of accounts filed by the Plaintiff bank which is duly certified under the BBE, Act which is as per the provisions of Section 34 of the Evidence Act and Section 4 of the BBE Act. The insertion of Section 2A to the BBE Act deals with printouts of bank statements and the copies that are certified are deemed to be certified copies under the said Act. This provision is similar to Section 65B of the Evidence Act. A Single Judge of this Court in ***Om Prakash v. Central Bureau of Investigation 2017 VII AD (Del) 649*** held as under:

> *"5.18. A conjoint reading of Section 34 of the Indian Evidence Act, Sections 2(8), 2A and 4 of the Banker's Book Evidence Act and the various pronouncements of the Supreme Court lead to the conclusion that firstly, the prosecution is required to lead admissible evidence to prove the entries in the books of accounts and after having led admissible evidence link the same with other evidence on record to prove the guilt of the accused beyond reasonable doubt. Thus, in case the statements of accounts exhibited on record are accompanied by certificate as envisaged under Section 2A of the Bankers' Books Evidence Act, the statements of accounts would be admissible in evidence. An objection as to the person exhibiting the said statements of account i.e. an objection to the mode of proof and not admissibility, has to be taken at the time of exhibition of the documents. Therefore if certified copies of the statements of accounts have been exhibited as per the requirement of Section 2A of the Act, the statement of account would be admissible and*

> *in case no objection to the witness proving the same is taken at the time when the document is exhibited, the document would be validly read in evidence. However, if the statements of accounts have been exhibited without the necessary certificate as contemplated under Section 2A of the Act, the same being inadmissible in evidence, even in the absence of an objection taken as to the mode of proof during trial, this Court cannot read the same in evidence even though marked as an exhibit."*

20. The statement of accounts is duly accompanied by a certificate under Section 65B of the Evidence Act. The witness of the Plaintiff bank PW-1 has appeared before the Court and has tendered his evidence. There is no reason to disbelieve his deposition. The documents on record clearly reveal that the Defendant availed of the loan and has failed to repay part of the same. Thus, the judgment of the Trial Court is unsustainable, erroneous and contrary to law. The impugned judgment/order is set aside.

21. The suit is decreed for the sum of Rs.3,77,008.04/- with *pendente lite* interest @ 8% per annum from the date of filing of the suit.

22. The appeal is allowed.

PRATHIBA M. SINGH, J.
Judge

JANUARY 31, 2018/*dk*