

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7329 OF 2015**

Nyati Builders Pvt Ltd

..Petitioners

Vs

Mr. Rajat Dinesh Chauhan and
Ors

.. Respondents

Mr. Rohan Sawant a/w Mr S.Abhishek, i/b IC Legal, Advocates for
Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 18/12/2015

PC:

1. Not on Board. At the request of Mr. Sawant, taken up for admission. Heard Mr. Rohan Sawant, learned counsel for the petitioners.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendant no.1', have challenged the Judgment and order dated 15.9.2014 passed by the learned 3rd Jt. Civil Judge, Senior Division, Pune below Exhibits 96 and 99. By that order, the learned trial Judge permitted respondents no.1 and 2, hereinafter referred to 'plaintiffs', to furnish fresh certificate as contemplated under section 65B (2) and (4) of the Indian Evidence Act, 1872 (for short, 'Act'). After submission of the said certificate, the e-mails will be treated as a primary document and will be admitted in

evidence as a proved document.

3. Mr.Sawant strenuously contended that on 5.10.2011, the learned trial Judge passed order on application Exh.59. The application Exh.59 was filed by defendant no.2 praying for “not exhibiting copies of computer output of email correspondence filed by the plaintiffs. On the same day, learned trial Judge passed following order.

“The document is exhibited subject to objection, its admissibility will be decided at the time of final argument”.

4. Mr. Sawant submitted that by that order, the learned trial Judge specifically kept objection as regards admissibility open to be decided at the time of final argument. In other words, objection as regards admissibility of document was to be decided while deciding the suit itself and not in earlier point of time. He submitted that the plaintiffs did not challenge the order dated 5.10.2011. It is, therefore, not open to the trial Court to decide the admissibility of the document in midway of the suit. The application Exh.96 filed by the plaintiffs was to permit them to lead secondary evidence in the form of printouts already produced and exhibited at Exhibits 63 to 79 as per section 65 of the Act. Application Exh.99 was filed by the plaintiffs for filing on record certificate in the form of an affidavit under section 65B

(4) of the Act. However, by the impugned order, the learned trial Judge has treated e-mails as a primary document and admitted them in evidence as a proved document. He submitted that the learned trial Judge was not justified in admitting e-mails in the evidence, that too, as a primary document. He lastly submitted that at any rate the document so produced and admitted in evidence cannot be treated as a primary evidence. In support of this submission, he relied upon the decision of Anvar P.V. Vs P.K.Basheer, (2014) 10 SCC 433 and in particular paragraph 22 thereof.

5. I have considered the submissions advanced by Mr Sawant. I have also perused the material on record. Section 59 of the Act lays down that all facts, except the contents of document or electronic records, may be proved by oral evidence. Section 62 gives meaning of the expression 'primary evidence'. Section 63 deals with secondary evidence. Section 65 provides cases in which secondary evidence relating to documents may be given. Section 65-A lays down special provisions as to evidence relating to electronic record and section 65-B deals with admissibility of electronic records. In the case of Anvar P.V. (supra), Apex Court has observed in paragraph 22 thus :

“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 specialibus 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 State (NCT of Delhi) V Navjot Sandhu case (2005) 11 SCC 600, 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.”

6. Perusal of the above extracted portion clearly shows that electronic record **by way of secondary evidence** shall not be admissible in evidence unless the requirements under section 65B are satisfied.

7. Mr. Sawant submitted that when the plaintiff filed electronic record, they did not file certificate in terms of section 65B and therefore the learned trial Judge was not justified in admitting electronic record in evidence.

8. Perusal of the impugned order shows that at the time of filing the electronic record the plaintiffs did not file certificate containing the details in terms of section 65B (4). The learned trial Judge, therefore, did not admit those documents on 5.10.2011 and kept the issue open. The plaintiffs, thereafter filed

application Exh.99 seeking permission to produce the fresh certificate under section 65B (4) and the learned trial Judge permitted the plaintiffs to file fresh certificate in compliance of requirements of Section 65B (4).

9. Mr. Sawant submitted that the plaintiffs did not challenge the order dated 5.10.2011 and, therefore, it will operate as res judicata. This aspect was considered by the learned trial Judge in paragraph 16. The learned trial Judge observed that issue of admissibility of the e-mails was kept open at the stage of final hearing. In other words, e-mails were neither discarded nor admitted in evidence. In view thereof, the order passed on 5.10.2011 did not finally decide issue of admissibility of e-mails on record. Principle of res judicata will not be applicable as the learned trial Judge did not decide the said issue on merits and it was in fact kept open at the stage of final argument.

10. Mr. Sawant submitted that in any case the learned trial Judge was not justified in passing the impugned order and ought to have considered this aspect only at the time of final hearing of the suit. It is not possible to accept this submission as no provision was pointed out prohibiting the plaintiffs from applying for admitting the documents subject to compliance of requirements of section 65B (4).

Section 65-B(1) reads thus:

“65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this 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 (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.”

Perusal of the above provision shows that if the conditions mentioned in Section 65B are satisfied in relation to the information and computer in question, it shall be admissible in any proceedings without any further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

11. In view thereof, I do not find that the learned trial Judge has committed any error in admitting e-mails in evidence.

12. That leaves me to consider the contention advanced by Mr Sawant that the learned trial Judge should not have treated as primary evidence. In view of paragraph 22 of the decision of Apex Court in Anvar P.V. Case (supra), the learned trial Judge should have treated these e-mails as secondary evidence. Subject to this modification, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

13. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order affecting the decision of the case, may be set forth as a ground of objection in Memorandum of Appeal as contemplated by Section 105(1) of C.P.C

(R.G.KETKAR, J.)