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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-6772-2015 (O&M)

Date of decision : 09.03.2018

Rajeev Kumar

... Petitioner(s)

Versus

Pawan Kumar and another

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rajan Bansal, Advocate
for the petitioner.

Mr. Deepak Garg, Advocate
for respondent No.1.

AMIT RAWAL, J. (ORAL)

The petitioner-plaintiff is aggrieved of the impugned order dated 29.09.2015, whereby at the final stage of the suit, an application dated 11.05.2015 (Annexure P-1) at the instance of respondent No.1/defendant under the provisions of Order 18 Rule 17 of the Code of Civil Procedure, for recalling the plaintiff (PW-5) for further cross-examination, has been allowed.

Learned counsel for the petitioner-plaintiff submits that the petitioner-plaintiff filed the suit for possession by way of redemption on the premise that the property was mortgaged to the respondent-defendant as per registered mortgage deed dated 13.08.1997 vide Registration No.2182 dated 13.08.1997 for a consideration of ₹15,000/-. The plaintiff concluded the evidence in the aforementioned suit on 26.02.2014, whereas the evidence of

the defendant was concluded on 12.02.2015. The application in hand was submitted on 11.05.2015 to place on record the alleged conversation recorded on the telephone on 26.02.2014, which according to the defendant was in existence and in knowledge. Even otherwise, the application was bereft of the compliance of the provisions of Section 65-B(2) of the Indian Evidence Act as the original mobile and device, whereby the aforementioned conversation was recorded and CD was prepared, had not been produced nor accompanied by any certificate. In support of his contentions, he relied upon the *ratio decidendi* culled out by Hon'ble Supreme Court in **“Anvar P.V. V/s P.K. Basheer and others” 2014(10) SCC 473.**

He further submitted that CD was brought on record as Mark D-1, but the same could not be produced in accordance with law. The present application was an afterthought and to delay the adjudication of the suit, much less, fill up the lacuna, which is not permissible in law, thus, urges this Court for setting aside the impugned order, under challenge, which has been based upon the illegality and perversity.

Learned counsel for the respondent No.1/defendant submits that the aforementioned conversation is necessary and essential for the adjudication of the case and, whether the suit property was mortgaged or on rent or whether the execution of the mortgage deed was a ploy to wriggle out of the provisions of the prevailing Rent Act. This is what the import of the impugned order is, thus, urges this Court dismissal of the present revision petition, particularly when the CD is already on record as Mark D-1.

I have heard the learned counsel for the parties and appraised

the paper book and of the view that there is force and merit in the submissions of Mr. Bansal, for, the conditions as envisaged under Section 65-B(2) of the Indian Evidence Act, had not been complied with. For the sake of brevity, the provisions of 65-B (2) of the Act read thus:-

“(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—
(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

The contents of the application moved on behalf of the respondent No.1/defendant reads thus:-

- 1. That the above noted suit is pending in this Hon'ble Court and is now fixed for today.*
- 2. That the plaintiff himself appeared as his own witness as PW5 on 06.01.2014. His cross-examination was completed on 26.02.2014.*
- 3. That after 26.02.2014, the plaintiff during conversation with the defendant admitted the fact that the shop in*

dispute is on rent with the defendant and the defendant is occupying the same as a tenant. The said conversation was video recorded by the defendant himself on his mobile phone from which a CD was prepared which has been produced in the Hon'ble Court during the statement of the defendant as Mark D-1. The said CD as very material for right decision of this suit for doing justice between the parties.

4. *That the aforesaid CD is to be put to the plaintiff and he is to be cross-examined regarding the conversation recorded in the said CD. The plaintiff is to be confronted with the statement video recorded in the said CD which would be helpful for the Hon'ble Court in finidng out the truth and to do the justice. For that purpose the plaintiff is required to be further cross-examination for which he is liable to be recalled. A duly sworn affidavit is attached herewith.*

It is, therefore, prayed that the plaintiff may kindly be ordered to be recalled for further cross-examination by the defendant by way of acceptance of this application. May 11.2015.”

Neither any affidavit, document, mobile phone nor the instrument though which the CD was prepared, or a certificate from the concerned Department or a person, who had undertaken that exercise, which is essential requirement of law, have been placed on record,. The provisions of Section 65(B) of the Indian Evidence Act, came to be debated upon by Hon'ble Supreme Court in the judgment cited supra. For the sake of brevity, para Nos.13 to 16 of the same read thus:-

“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.”*

In my view, the trial Court remained oblivious of the
aforementioned provisions of Act, but heavily relied upon the judgment

rendered by this Court in **“Paramjit V/s Prem Pal @ Mehar Pal and**

others” 2014(1) Civil Court Cases 349 (P&H).

In the aforementioned decision, it was a case where the party in examination-in-chief had stated that original Will was on the file, but in cross-examination stated that it was not on the file and it is, in that aspect of the matter, the application was moved to clarify the existence of the Will, thus, the facts as well as the *ratio decidendi* culled out in *Paramjit's case* (supra) are not applicable to the facts and circumstances of the present case.

For the foregoing reasons, the impugned order dated 29.09.2015 (Annexure P-3), under challenge, is not sustainable in the eyes of law, much less, suffers from illegality, thus, it is hereby set aside. Accordingly, the present revision petition stands allowed.

09.03.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No