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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 300/2015**

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

versus

GURDEV SINGH ..... Respondent
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Present appeal arises out of judgment and order dated 7th March, 2015 by which the suit filed by Appellant-ICICI Bank (*hereinafter 'Plaintiff bank'*) was dismissed.

Brief Background

2. Plaintiff bank filed a suit under Order XXXVII of the Code of Civil Procedure, 1908 (*hereinafter, 'CPC')* for recovery of an amount of Rs.4,63,982.20 from the Respondent/Defendant (*hereinafter, 'Defendant').* The allegations in the plaint are that the Defendant applied for and obtained a credit card from the Bank which was duly delivered. The Bank made payments to various establishments where the Defendant had used the credit card and sent monthly credit card statements to the Defendant. The Defendant was highly irregular in making payments, and despite repeated

reminders, he failed to make payment of the claimed amount. The Plaintiff bank was thereafter forced to issue a legal notice dated 5th September, 2013.

3. Along with the plaint, the Plaintiff bank enclosed the following documents:

- Credit card statements duly certified as per the Bankers' Books Evidence Act, 1891 (*hereinafter, BBE Act')* for the period from April, 2007 to 27th September, 2008.
- Certified credit card statements for May 2008, July 2008 and August, 2008.
- Original ICICI bank application form taken by the Defendant in two names, his personal name and as the proprietor of M. S. Tours and Travels, F-299, Sector -40, Noida.
- Terms and conditions governing credit card facilities.
- Copies of statement of accounts and supporting documents as per the BBE Act.
- Demand legal notice issued by the Bank's counsel dated 5th September 2013.

4. On 12th May, 2014 the Trial Court records that the service report of the Defendant was received back with the report of refusal. On 2nd September 2014, the certified copy of the statement of account was called for under the BBE Act, which was duly filed by the Plaintiff bank. The suit was dismissed on 7th March, 2015 on the following grounds:

i. Only a photocopy of the demand legal notice was filed.
ii. Dispatch of the demand/legal notice was not shown.
iii. No witness from the postal department was examined.

iv. Statement of Account was not proved as per Section 65B of the Indian Evidence Act, 1872 (*hereinafter, 'Evidence Act')*.

v. The proximity of the date of demand legal notice and the filing of the suit does not appear to create a cause of action.

vi. Trial Court does not have jurisdiction.

5. Along with the plaint, the Plaintiff bank filed certified copies of credit card statements for various periods ranging from 27th April 2007. The transactions, however, appear to have ended in the statement for the period from 27th June, 2008 to 15th July, 2008. The statement of accounts duly certified under the BBE Act was also filed at page 81 of the list of documents. On 7th August, 2014, the Trial Court passed the following order:

> *"Today, the matter is fixed for further arguments on the effect of non-appearance of the defendant within the stipulated period as per Order 37 CPC.*
>
> *Further arguments heard.*
>
> *Suit of the plaintiff is U/o 37 CPC and the summons issued to the defendant for appearance received back with the report of refusal. The report of refusal is dated 02.04.2014 and till date, the defendant has not put his appearance in the present case. Since the defendant has not put his appearance within the stipulated period as per Order 37 CPC, the plaintiff bank is entitled to the decree of recovery of amount from the defendant but in order to determine that how much amount is due to the plaintiff bank from the defendant, the statement of account maintained by the plaintiff bank during the normal course of business duly certified U/s 65 of Indian Evidence Act is required.*
>
> *Accordingly, the plaintiff is directed to place on record the above said document on or before*

> *25.08.2014 and a decree for recovery of amount from the defendant will be passed in favour of the plaintiff and against the defendant on 25.08.2014 as per the amount due to the plaintiff from the defendant according to the copy of the statement of account as stated above in this order.*
>
> *To come up on 25.08.2014.*"

6. Again on 2nd September 2014, the Trial Court passed the following order:

> "*Certificate U/s 65-B of the Indian Evidence Act on behalf of the plaintiff filed.*
>
> *To come up for filing of duly certified copy of the statement of account under Bankers' Book Evidence Act and for consideration of the petition filed by the plaintiff on 11.09.2014.*"

7. The Plaintiff bank then filed a certificate under Section 65B of the Evidence Act on 2nd September 2014, along with a fresh statement duly certified under the BBE Act, along with copies of the credit card statements which were sent to the Defendant.

8. The original credit card application form was on record. A perusal of the transactions, which have been undertaken by the Defendant, as reflected in the credit card statement shows that the credit card has been used for payments of telephone bills, purchase of petrol, restaurant payments, shopping at Big Bazaar etc. It is quite evident that the Defendant has been using the credit card on a regular basis and availing the services of the Plaintiff bank. The Plaintiff bank has obviously made payments for these transactions to honour the credit card issued by it. Outstanding balance of the Defendant has been duly certified by the Plaintiff bank. The said evidence has gone completely unrebutted, and the Defendant has refused to

accept summons. Under such circumstances, the finding of the Trial Court, that the Plaintiff bank has not be able to establish its case, is completely wrong and contrary to the record. The demand legal notice has been issued by the counsel and is only a reminder to the Defendant to pay up his dues. Irrespective of the existence of the demand legal notice and whether it was dispatched, sent or received, the suit under Order XXXVII of the CPC would be maintainable. To maintain a suit for recovery it is not essential to issue a legal notice for the sum due.

9. Insofar as the certification under Section 65B of the Evidence Act is concerned, the principal officer of the Plaintiff bank at the branch in Jhandewalan Extension, New Delhi, has filed the certificate. This is the very branch at which the Defendant had submitted his application for credit card. As per the plaint, the application for credit card was accepted at the branch located at Jhandewalan, New Delhi and the acceptance of the credit card was also communicated from there. Thus, the trial court in Delhi had jurisdiction to entertain and try the suit under Section 20 of the CPC.

10. Defendant has acknowledged the receipt of the credit card and also used the same for his payments, and under such circumstances the only dispute, if any, would be as to whether the Defendant has made any payments, and if so, would any adjustments have to be given. For this purpose, the Defendant has to obviously appear. If the Defendant does not appear, the Plaintiff bank's case goes unrebutted. Plaintiff bank has discharged the burden upon it to establish its case, and hence the Trial Court was clearly erroneous in dismissing the suit.

11. Vide a separate judgement rendered in RFA 297/2015, this Court has pronounced on certification required under Section 65B of the Evidence Act

as also the adequacy of the certification under the BBE Act. The reasoning in the said judgements would also apply in the present case. The certificate given by the authorised representative of the Plaintiff bank under Section 65B is adequate and supports the statement of account relied upon by the Plaintiff bank. The original legal notice would obviously be in possession of the Defendant and non filing of the same would not non-suit the Plaintiff bank. The proximity of the issuance of legal notice to the filing of the plaint does not mean that the suit lacks a cause of action. So long as the amounts remain due and unpaid, the cause of action to file the suit for recovery would exist and the Trial court has clearly erred on this issue as well.

12. In conclusion, the suit is decreed for a sum of Rs.4,63,982.20/- with *pendent lite* and future interest @ 8% per annum.

13. The appeal is, accordingly, allowed.

PRATHIBA M. SINGH, J.
Judge

JANUARY 31, 2018/*dk*