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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 1st June, 2018
+ **RFA 575/2015 & CM No.24719/2018**

M/S. ICICI BANK LTD. Appellant
Through: Mr. Punit K. Bhalla, Advocate.
versus

DILKASH STAR VISION & COMMUNICATION
PVT. LTD. & ORS Respondent
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. A suit for recovery was filed by the Appellant/Plaintiff - ICICI Bank Ltd. (*hereinafter 'Plaintiff Bank'*) for a sum of Rs.5,04,114.88/- against the Respondents/Defendants (*hereinafter, 'Defendants'*). Defendant No.1 is a Private Limited Company, and Defendant Nos.2 and 3 are the directors, in charge of the day to day affairs of Defendant No.1. The said suit of the Plaintiff Bank was dismissed vide judgment dated 5th February, 2015. The present First Appeal arises out of the said judgement dismissing the suit.

2. In the Appeal notice was issued on 25th August 2015. None appeared for the Respondents. Service was thereafter effected by publication. On 7th April 2016, the Appeal was admitted and was listed in the Regular Board.

3. The case in brief of the Plaintiff Bank is that the Defendants had approached the Plaintiff Bank for grant of overdraft credit facility (*hereinafter, 'OD facility'*) in December, 2007 to meet their normal business requirements. The said OD facility to the tune of Rs.4 Lakhs was sanctioned by the Bank. The Defendant agreed to repay the same in terms of the

overdraft facility agreement along with interest “@ 1.75% per annum over/below the sum of the ICICI Bank Benchmark Advance Rate and the Cash Credit Risk Premium prevailing on each day that such OD Facility remains outstanding (the “**Applicable Rate**”)”. Apart from the said interest, the interest tax and other statutory levies, if any, were also to be paid by the Defendants. The Defendant No.1 maintained a current account with the Plaintiff Bank. Over a period it was noticed that the Defendants did not maintain the financial discipline required for availing of the OD facility and accordingly, the Plaintiff Bank called upon the Defendants to exit from the said facility. The Defendants also defaulted from repayment for several months and this resulted in the Plaintiff Bank recalling the OD facility by sending over draft recall notice dated 22nd April, 2014. The Defendants did not reply to the said notice. As per the Plaintiff Bank, the Defendants were liable to pay a sum of Rs.5,04,114.88/- as on 1st April, 2014. The subject suit was then filed praying for recovery of the outstanding sum along with interest @ 24% per annum from the date of filing of the suit till its realisation.

4. Upon summons being issued in the suit, the same were received back with the report that no such person was residing at the address given, and that there was no firm there. Since the Trial Court found that it was not possible to serve the Defendants through ordinary process, service by publication was permitted on 21st August, 2014. On 27th October, 2014, since none appeared for the Defendants, they were proceeded ex-parte. The Plaintiff filed evidence of Mr. Rajiv Verma, Authorized Representative of the Plaintiff Bank as PW-1. The following documents were exhibited by the said witness.

- (i) Ex.PW-1/1 – Power of Attorney in favour of Mr. Rajiv Verma;
- (ii) Ex.PW-1/2 – Original over draft facility agreement duly signed by the representatives of Defendant No.1;
- (iii) Ex.PW-1/3 – Personal, unconditional and irrevocable guarantee given by Defendant No.2 and 3 to the Plaintiff Bank for availing of OD Facility in favour of Defendant No.1;
- (iv) Ex.PW-1/4 – Copy of the overdraft recall notice dated 22nd April, 2014;
- (v) Ex.PW-1/5 – Statement of transaction in current account no.039605000569 for the period from 1st April, 2008 to 31st March, 2014.
- (vi) Ex.PW-1/6 – Certificate under S.2A of the Banker's Books' Evidence Act, 1891 duly signed by the Authorised Representative of the Plaintiff Bank.

5. The Trial Court, thereafter, on 5th February, 2015 dismissed the suit Plaintiff Bank on the following grounds:

- a) That the recall notice has not been proved in accordance with law;
- b) That the service of the recall notice has not been proved, and only an internal document showing dispatch of the same has been placed on record;
- c) That no proof of dispatch of the recall notice vide Speed Post is placed on record;
- d) No witness from the Postal Authorities has been examined to establish service of recall notice;
- e) That the statement of account has not been duly

corroborated/proved in accordance with law.

6. The above analysis by the Trial Court is contrary to the records. A perusal of the trial court record reveals that the original OD facility agreement entered into between the Plaintiff Bank and the Defendant No.1 has been placed on record. It bears the sign and seal of Defendant Nos. 2 and 3 on all pages, and the terms and interest payable as per it, have already been agreed by the Defendants. Thus, there was no doubt that the agreement was, in fact, entered into. Apart from the OD agreement, the directors viz., Mohd. Parwez Khan and Mohd. Firoz Khan have also given personal guarantees and duly executed the same in favour of the Bank. They have also submitted their PAN cards containing their PAN numbers and the defendants could have been easily traced.

7. So far as the over-draft recall notice is concerned, the same is a computer print-out. However, the Plaintiff Bank has attached therewith a bulk dispatch register which bears the bar code of the post office. The chart placed on record which is Mark-X shows despatch of notices by Speed Post AD to a large number of notices including the Defendant no.1. It also has the Number issued by the Post office. Though it is correct that the speed post receipt is not in original on file, it is possible that the Bank has an arrangement with the Post office for dispatch of bulk notices and the bar codes are issued electronically. Even the repeated notices issued by the Trial Court and the High Court at the last known address of the Defendants has not elicited a response from the Defendants. Under these circumstances there is no reason to disbelieve the bank. However, that is not to say that the Bank ought not to have made an effort to trace the defendants. Since the PAN numbers of the Defendants are available on record, their latest contact

details could have been traced. Instead they have been served through publication.

8. The statement of account has been duly exhibited by the Authorised Representative of the Plaintiff Bank. It bears the stamp and signature of the Bank official. The same is retrieved from the records of the Bank. A perusal of the same shows that the bank account has been active. There are several transactions of withdrawals and deposits in this bank account, conducted by the Defendants and the balance DR amount has fluctuated from 1st April, 2008 to 31st May, 2012 between Rs.96,000/- to Rs.5,04,000/-, at which stage the OD facility is claimed to have been stopped. The transactions have been entered into by the Defendants with various parties who are individuals, other banks, cash withdrawals, insurance companies, etc. Deposits also appear to have been made by cash and by cheque payments. Thus, the bank account was quite active. There have been at least 10 to 15 transactions in each month, of withdrawal and deposits. Thus, a perusal of the bank account reveals that there is no reason why the same should be disbelieved.

9. So long as the originals are produced on record and the same are not denied and there is no allegation that the same are forged and fabricated, there can be no reason for the Court to disbelieve the same. The original documents having been placed on record and duly exhibited, the averments in the suit stand proved. The Defendant Nos.2 and 3 have not disputed his signatures on the original agreement, which is placed on record. Thus there is no reason to disbelieve the same.

10. The Trial Court has also erred by holding that the service of the recall notice has not been proved. The same has been sent by Speed Post AD which is sufficient service. The bank could have made the effort to check the

Tracking report and file the same with its evidence, which it has not done. However, that by itself does not mean that the overdraft facility has not been availed of and the outstanding is not payable.

11. The original documents, which have been filed, duly stand proved. The over-draft recall notice is a copy of the original that is claimed to have been dispatched. There is a bar code and a number issued by the Speed Post office which is mentioned in Mark X. The statement of account also bears the signature of the Authorised Representative of the Bank and constitutes as evidence under the Banker's Books Evidence Act, 1891. The Supreme Court in *Shafhi Mohammad v. State of Himachal Pradesh (2018) 2 SCC 801* has held as under:

“26. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V. v. Basheer, this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the Court and the expression “document” is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

.....
29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be

excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate is not always mandatory.

30. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies.

12. Thus, the requirements of Section 65B need to be adapted as per the facts of each case depending upon the witness who is deposing, and are relaxable. Further, the mere non-production of the original recall notice cannot result in dismissal of the suit. This Court has also recently in ***ICICI Bank Ltd. v. Kamini Sharma & Anr. [RFA 297/2015 decision dated 31st January, 2018]*** held:

“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 Defendants and nothing more. The fact that the Defendants have defaulted in making the payments, does not in any*

manner depend upon the existence of the loan recall notice. The Defendants, after service of the said notice, cannot avail of the facility of paying through instalments and have to make the entire payment at one go. The Plaintiff bank could have very well filed the suit for recovery when the Defendants 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.....”

13. The above judgement applies even in the present facts. The Statement of account bearing the signature and seal of the Bank is sufficient to satisfy the requirements of Section 34 of the Evidence Act. The original agreement, the original guarantees duly signed by the Directors, the original print out of the statement of account having been placed on record, the suit is liable to be decreed. Thus, the Trial Court judgment deserves to be set aside.

14. The suit is decreed for a sum of Rs.5,04,144.88/-, which is the last outstanding balance in the Defendant No.1's account. The Plaintiff Bank is also granted interest @ 8% per annum from the date of filing of the suit till the date of payment. The payment shall be made by the Defendants within 12 weeks, failing which the Plaintiff would be entitled to proceed and take steps to seize the vehicle. Further the Defendants would be liable to pay 12% interest per annum on the decretal amount, from the expiry of 12 weeks till the date of payment.

15. The appeal is allowed. Pending application also stands disposed of.

**PRATHIBA M. SINGH
JUDGE**

JUNE 01, 2018/dk