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

Date of decision: 1st June, 2018

\+ **RFA 400/2015 & CM No.24680/2018**

M/S ICICI BANK LIMITED ..... Appellant

Through: Punit K. Bhalla, Advocate

versus

AJEET KUMAR TRIPATHI .....Respondent

Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (ORAL)

1. The present appeal arises out of the impugned judgment/order dated 16th February, 2015 by which the suit for recovery filed by the Appellant/Plaintiff bank (*hereinafter, 'Plaintiff bank'*) was dismissed. The judgement of the Trial Court dismisses the suit on the ground that the Plaintiff bank did not adduce evidence and the case of the Plaintiff was thus not proved. The Trial Court also observes that the original loan recall notice dated 12th March, 2014 was not filed by the Bank.

2. In the present appeal, notice was issued on 29th May, 2015. Initially, the Respondent/Defendant (*hereinafter, 'Defendant'*) was not served and the report of the Registry continued to remain `Awaited.' Thereafter, however, the Defendant remained unserved as he had 'left the place'. Steps were taken for serving the Defendant through publication. Service was completed through publication, as recorded in the order of the Registrar dated 9th November, 2017.

Brief Background

3. The Defendant approached the Plaintiff bank for financing of the

purchase of a vehicle under loan-cum-hypothecation scheme for a sum of Rs.3,30,000/-. The Defendant agreed to repay the loan amount in 60 equal monthly instalments (*hereinafter, 'EMI'*) of Rs.7,361/- each. The loan was duly sanctioned and was disbursed on 10th April, 2013 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.

4. Upon payment by the bank to the dealer, the Defendant secured a loan for the Vehicle Suzuki SWIFT/LXI bearing registration No. DL3CCC0215. Initially the Defendants made several payments but thereafter various cheques which were issued by the Defendant for payment of the instalments, were dishonoured/returned unpaid with the remarks "***Refer to drawer/insufficient funds***". The Plaintiff bank then filed a suit under Order XXXVII CPCP for recovery for the sum of Rs.3,22,771/-

5. In the suit, on 24th July, 2014, the Plaintiff Bank submitted that the suit may be treated as an ordinary suit and summons were issued to the Defendant. On the same date, the Trial Court appointed 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 Receiver would keep it in safe custody and that the Plaintiff bank would not transfer the vehicle without permission of the Court. It is unclear from the Trial Court record if the Receiver took possession of the vehicle. There is no report filed by the Receiver. Repeated attempts were made to serve the Defendant, and finally, the Defendant was served through publication. On 3rd February, 2015, the Defendant was proceeded ex-parte in the suit and the Plaintiff was directed to file its evidence.

6. On 16th February, 2015, the Trial Court noted that despite opportunity being given to the Plaintiff Bank, they have neither filed an affidavit of evidence nor produced any witness to adduce evidence and prove the documents annexed with the Plaint. It also noted that no original documents i.e., the Power of Attorney issued in favour of Authorised Representative, loan recall notice and service of the same have been placed on record. The Trial Court, on the same day, also dismissed the application of the Plaintiff Bank seeking exemption from personal appearance of the Authorised Representative, who was out of station at that time, due to failure of Plaintiff Bank to file the affidavit of evidence by 12th February, 2015.

7. Thus, the Trial Court dismissed the suit of the Plaintiff on the following grounds:

- Failure of Plaintiff Bank to adduce evidence within stipulated time i.e., by 12th February, 2015;
- That the certified copies of the Statement of Accounts are only corroborative evidence and they by themselves cannot create any liability;
- That the Plaintiff Bank failed to produce and prove the original loan recall notice, as also the fact that it was duly served on the Defendant;
- That documents relied upon by the Plaintiff Bank are not accompanied with a certificate under Section 65B of the Evidence Act, and hence are not proved.
- That the suit has not been filed in the court of proper jurisdiction.

8. A perusal of the trial court record reveals that the Plaintiff was given one opportunity to file the affidavit by way of evidence which was not done due to the authorised representative being out of station. Moreover, it is seen

from the record that the first opportunity for filing evidence was given on 3rd February 2015 and evidence was to be filed by 12th February 2015. An application was filed by the Plaintiff that the Authorised Representative was on official leave and hence could not appear before the Court on 16th February 2015. However, the Trial Court dismissed the said application and proceeded to dismiss the suit on the same day.

9. A perusal of the trial court record reveals that there are several original documents which have been filed including the Loan documents signed by the Defendant, printout of the statement of account, Original deed of hypothecation, loan recall notice dated 12th March 2014 etc., Since the Plaintiff's witness did not appear the same could not be exhibited. Despite all the original documents being on record, the Trial Court proceeded on an erroneous assumption that the original loan recall notice dated 12th March, 2014, has not been placed on record and only a photocopy of the same has been placed on record. The original of the said notice would obviously be with the Defendant.

10. The Plaintiff bank has proceeded in a recalcitrant manner as is evident from a reading of the Grounds of Appeal. There is not a single ground relating to the non-appearance of the witness. The Appeal proceeds on the basis that the evidence has been filed and documents are exhibited, which is in fact not so. The Plaintiff bank ought to be careful in future so that such lapses are not repeated.

11. The dismissal of the suit is a summary dismissal. Since only one opportunity has been given to the Bank to file its evidence and there was a genuine reason for the non-filing of evidence, this court is of the opinion that the Plaintiff bank can be given one more opportunity to lead evidence,

may be subject to terms. The amounts recoverable by a bank involves public money and hence a summary dismissal of this nature does not serve the ends of justice. Since the original documents are already on record, the suit is remanded back to the Trial Court to afford one last opportunity to the Plaintiff to lead the evidence. The parties are directed to appear before the Trial Court on 30th July, 2018. If the trial court deems it appropriate, fresh notice may be issued to the Defendant as there has been considerable lapse of time. Even in this Appeal the defendant was not served by ordinary modes but was ultimately served by publication. The Trial Court shall not be bound by any of the observations in the impugned judgement. The Trial Court shall decide the suit in accordance with law.

12. Appeal is allowed subject to payment of Rs. 10,000/- as costs to the Delhi Advocates Welfare Trust. Pending applications stand disposed of.

PRATHIBA M. SINGH, J.
Judge

JUNE 01, 2018/*dk*