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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 23rd May, 2018

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RFA 401/2015 & CM No.21791/2018

M/S ICICI BANK LIMITED

..... Appellant

Through: Punit K. Bhalla, Advocate.

versus

NIHARIKA CHHABRA

.....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 18th 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 dismissed the suit on the ground that the original loan recall notice dated 11th February, 2014 was not filed by the Bank.

2. In the present appeal, notice was issued on 25th May, 2015. Initially the Respondent/Defendant (*hereinafter*, 'Defendant') was unserved as no process fee was filed. However, thereafter, the Defendant was unserved as she had left the place. Steps were taken for serving the Defendant through publication. Service was finally recorded as having been completed by the order of the Registrar dated 9th November, 2017.

Brief Background

3. The Defendant (*hereinafter*, 'Defendant') approached the Plaintiff bank for financing of the purchase of a vehicle under loan-cum-

hypothecation scheme for a sum of Rs.7,25,000 /-. The Defendant agreed to repay the loan amount in 60 equal monthly instalments (*hereinafter*, 'EMI') of Rs.15,870/- each. The loan was duly sanctioned and was disbursed on 15th 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 Ford FIESTA bearing registration No. HR-72A-7180. 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 for recovery for the sum of Rs.7,34,704.27/-

5. In the suit, summons were issued on 20th May, 2014 and 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 sell the vehicle without permission of the Court. Repeated attempts were made to serve the Defendant, and finally, the Defendant was served through publication. Meanwhile, as per the report dated 29th August, 2014, the vehicle was duly seized by the court Receiver and kept in the yard of ICICI Bank Ltd at Gurgaon.

6. The Defendant appeared through counsel before the Trial Court on multiple occasions as recorded in orders dated 20th September, 2014 7th November, 2014, 22nd November, 2014, 1st December, 2014, and 17th

December, 2014. On 1st December, 2014, on the submission of the Defendant that there is possibility of settlement in the matter, it was referred to the National Lok Adalat, however on 6th December, 2014, the Judge, National Lok Adalat recorded that there was no settlement in the matter. On 17th December, 2014, on the submission made by the counsels for the parties, the Trial Court referred the matter to the Mediation Centre at the Tis Hazari Courts, but to no avail. The Defendant stopped appearing before the Trial Court thereafter and on 3rd February, 2015 the Defendant was proceeded ex-parte. The Plaintiff bank led evidence by way of affidavit of Sh. Laxman Gaur, the authorized representative as PW-1. The said PW-1 exhibited, along with his affidavit, the following documents:

- (i) Ex.PW-1/1 - Power of Attorney authorizing him to depose;
- (ii) Ex.PW-1/2 - the Original Credit Facility application form along with the terms and conditions of the loan;
- (iii) Ex.PW-1/3 - Unattested deed of Hypothecation;
- (iv) Ex. PW-1/4 - Irrevocable Power of Attorney;
- (v) Ex. PW-1/5 – Loan Disbursement Memo;
- (vi) Ex. PW-1/6 –Statement of accounts dated 24.04.2014;
- (vii) Ex. PW-1/6A- Certificate U/s 65B of the Indian Evidence Act, 1872;
- (viii) Ex. PW-1/7- Loan Recall Notice dated 11th February, 2014 along with the Bar Code issued by the postal authorities.

7. The statement of account is duly accompanied with a certificate under Section 65B (Ex.PW-1/6A) of the Indian Evidence Act, 1872 (*hereinafter*, '*Evidence Act*'). On the basis of these documents, the Plaintiff bank prayed for a decree in the suit.

8. The Trial Court, however, dismissed the suit of the Plaintiff Bank primarily on the ground that the original recall notice was not filed and no receipt or service of the same was proved on record. The Trial Court held that the Plaintiff did not produce anyone from the Postal Authorities to establish the despatch and receipt of the loan recall notice.

9. The above analysis of the Trial Court is contrary to the records. A perusal of the documents placed on record clearly establishes that the Plaintiff bank has taken all steps necessary to establish its case. The loan documents, which are filed in original, bear the signatures of the Defendant. The factum of release of the loan amount and the possession of the vehicle having been taken by the Defendant is not in dispute. Despite all the original documents being on record, the Trial Court proceeded on an erroneous assumption that the original loan recall notice dated 11th February, 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 grounds on which the suit has been dismissed seek to ignore the original documents filed on record. The suit has been dismissed by adopting an over-technical approach even on Section 65B of the Evidence Act.

11. Banks and financial institutions, which disburse loans to citizens, operate on the trust and faith that the citizens who avail of loans would pay back the same honestly and with diligence. Banks hold the money of the public in trust with them, and the financial cycle of investments, deposits and loans are essential for the functioning of the economy. If people, who avail loans, default in payment of the same and also avoid the Court processes, there would be enormous distress in the system.

12. Courts also have a duty to safeguard public money and by applying completely incorrect principles of procedure and evidence, suits filed by these financial institutions cannot be dismissed in this manner. A perusal of the documents filed in this case shows that the Bank filed the entire set of original documents on record. The statement of accounts clearly shows that the Defendant paid several of the instalments but defaulted in some of the instalments. The Plaintiff bank, having placed all the original documents on record except the loan recall notice, has established its case.

13. The reasoning of the Trial Court that the original recall notice was not filed, and receipt of service of the loan recall notice was not proved, is completely untenable. The Plaintiff Bank had attached a copy of the bulk despatch register which bears the bar code of the post office. The chart placed on record, which is Mark-Y, shows despatch of the notices to a large number of noticees including the Defendant. It also has the Number issued by the Post office for dispatch of bulk notices and the bar codes are issued electronically. Thus, the Trial Court has applied the provisions of the Evidence Act in a completely incorrect manner. The findings of the Trial Court, which start from internal page 5, do not take any of the other original documents filed by the Plaintiff bank into consideration. Apart from mentioning these documents as part of the Plaintiff bank's case, the Trial Court does not note that these original documents are filed and that the Plaintiff bank has discharged its onus to show that the loan has actually been disbursed. The fact that several of the instalments were paid by the Defendant is itself evidence of the loan having been disbursed by the Plaintiff bank and availed of and enjoyed by the Defendant.

14. This Court has in a similar case, ***ICICI Bank Ltd. v. Kamini Sharma***

& Anr. [RFA 297/2015 decision dated 31st January, 2018] (hereinafter, 'Kamini Sharma') held, in respect of filing of original documents as under:

"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.....”

15. In ***Kamini Sharma (supra)***, this Court has analysed the manner in which Section 65B of the Evidence Act needs to be applied considering the judgements of the Supreme Court in ***Anvar P.V. v. P.K. Basheer AIR 2015 SC 180*** (hereinafter, ‘*Anvar v. Basheer*’) and ***Harpal Singh v. State of Punjab AIR 2016 SC 5389***. Recently, 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.*

16. Thus the conditions under Section 65B are relaxable. In the present case, the Plaintiff bank has filed the certificate under Section 65B of the Evidence Act through its witness and also certified all the copies of electronic records including bank statements etc., The statement of accounts is duly accompanied by a certificate under Section 65B of the Evidence Act. The witness of the Plaintiff bank PW-1 has appeared before the Court and

has tendered his evidence. There is no reason to disbelieve his deposition. Thus the requirements under Section 65B of the Evidence Act have been fulfilled.

17. The documents on record clearly reveal that the Defendants availed of the loan and have failed to repay part of the same. Thus, the judgment of the Trial Court is unsustainable, erroneous and contrary to law. The impugned judgment/order is set aside.

18. The suit is decreed for the sum of Rs.7,34,704.27/- with interest @ 8% per annum from date of filing suit till date of payment. The payment shall be made by the Defendant within 12 weeks, failing which the Defendant would be liable to pay 12% interest per annum on the decretal amount, from the expiry of 12 weeks till the date of payment.

19. The appeal is allowed in the above mentioned terms. Pending applications stand disposed of.

PRATHIBA M. SINGH, J.
Judge

MAY 23, 2018/dk