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

Date of Decision: 1st June, 2018

+ **RFA 572/2015 & CM No.24679/2018**

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

ASHOK SHARMA 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.5,96,913/- against the Respondent/Defendant, Mr. Ashok Kumar (*hereinafter, 'Defendant'*) under Order XXXVII CPC. The said suit was dismissed vide judgment dated 7th May, 2015 against which the present Appeal has been filed. Notice was issued in the Appeal on 25th August 2015. Initially the Defendants were unserved as no process fee was filed. However, thereafter the Defendants were unserved as they had left the place. Steps were then taken for serving the Defendants through publication. Service was finally recorded as having been completed by the order of the Registrar dated 12th February 2018.

2. The case in brief of the Plaintiff Bank is that the Defendant is proprietor of M/s. Fibro Insulation. He approached the Plaintiff Bank for grant of overdraft credit facility (*hereinafter, 'OD facility'*) in August, 2007 to meet his normal business requirements. The said OD facility to the tune of Rs.5 Lakhs was sanctioned by the Plaintiff 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 Defendant. The Defendant maintained a current account with the Plaintiff Bank. Over a period it was noticed that the Defendant did not maintain the financial discipline required for availing of the OD facility and accordingly, the Plaintiff Bank called upon the Defendant to exit from the said facility. The Defendant 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 9th December, 2013. The Defendant did not reply to the said notice. As per the Plaintiff Bank, the Defendant was liable to pay a sum of Rs.5,96,913/- as on 1st December, 2013. The subject suit was then filed praying for recovery of the outstanding sum along with interest @ 18% per annum from the date of filing of the suit till its realisation.

3. On 6th June, 2014, upon hearing learned counsel for the Plaintiff Bank the suit was treated as an ordinary suit for recovery instead of the suit under Order XXXVII CPC. Upon summons being issued, the same were received back with the report that the Defendant had left the given address. Since the Trial Court found that it was not possible to serve the Defendant through ordinary process, service by publication was permitted. On 23rd January, 2015, since none appeared for the Defendant, he was proceeded ex-parte. The Plaintiff filed evidence of Mr. Bhaskar Mishra, 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. Bhaskar Mishra;
- (ii) Ex.PW-1/2 – Original over draft facility agreement duly signed by the Defendant.
- (iii) Ex.PW-1/3 – Original over draft recall notice dated 9th December, 2013.
- (iv) Ex.PW-1/4 – Proof of dispatch of Ex.PW-1/3
- (v) Ex.PW-1/5 – Statement of transaction in current account no.003705006087 for the period from 1st April, 2008 to 1st March, 2014.

4. The Plaintiff has also placed on record a certificate under Section 65B of the Indian Evidence Act, 1872 (*hereinafter, 'Evidence Act'*) in support of the statement of accounts of the Defendant. The said certificate has been exhibited as **Ex.PW-1/6** and is duly signed by Mr. Bhaskar Mishra, Principal Officer of the Bank. On 30th April, 2015, he tendered his evidence and since the Defendant was ex-parte, the Court put questions to the witness. In response to the Court's questions, he stated that the statement of account was retrieved from the centralized system of the Bank, which was controlled by the Mumbai team and the same was retrieved by the Mumbai team and mailed to the Delhi office. He submitted that the main server of the Bank is located in Mumbai. The witness stated that he is deposing on the basis of the official record of the Bank. The Trial Court, thereafter, dismissed the suit on the following grounds:

- a) That the loan recall notice has not been certified under Section 65B of the Indian Evidence Act.
- b) That the loan recall notice along with the tracker printed from

the Bank's record and the bar code are not proved.

- c) That statement of account is not sufficient to prove that the amount is due.
- d) That the original credit facility application form was not signed in the presence of the witness who appeared, on behalf of the Plaintiff Bank.
- e) That the suit has not been filed in the court of proper jurisdiction.

5. Thereafter, the Trial Court made the following observations.

*“(19) The issue regarding increase in the number of Non Performing Assets (NPAs) of the Banks is a matter of serious concern, having a direct bearing on the National Economy and has recently been a subject matter of a hot debate in the Indian Parliament and concerns have also been expressed by the RBI on the mounting number of Non Performing Assets by the day, due to **sanctioning of loans by the banks without verification and counter guarantee**. In fact the RBI has also carried out Forensic Investigations in many private Sector Banks (PSBs) to detect the debt to equity norms in order to verify the Integrity and Accuracy in classification on Non Performing Assets with specific focus on review of loans having an outstanding of Rupees Ten Lacs and below and priority sector loans. The defendant in the present case being exparte, there is an increasing onus upon this Court to exercise caution in order to prevent any legal abuse since the possibility of filing the recovery suits by the banks to evade such investigations by bringing the cases within the category of suit filed cases of willfull defaults in order to write off the Non Performing Assets, cannot be ruled out. The Suit filed cases of willfull default like the present case before this Court are treated as a separate category as per the RBI guidelines. It is in*

this background that it is necessary for the Court to ascertain whether the suit filed by the plaintiff bank by resorting to the legal process is genuine or just a mere formality only to resolve a hard loan by putting a willfull defaulter tag on the same by bringing it in the category of court filed cases and later by writing off the Non Performing Assets, which directly affects the National Economy.

(20) Merely because the defendant has not appeared in the Court and was proceeded exparte, does not mean that every word stated by the witnesses of the plaintiff and every document on which it places its reliance is to be taken as gospel truth. Rather under the given circumstances the court is obligated to be more vigilant so as to ensure that there is no abuse of process of law and the Public Interest is safe guarded. In the present case, admittedly the account of the defendant had not been operated for a long time compelling the plaintiff to issue a notice of foreclosure (which notice and whose service they have no been able to prove) and hence must have been declared a Non Performing Asset in accordance with the Banking Guidelines. Further, RBI's Master circular updated on 1.7.1994 on Loans and Advances, Statutory and other restrictions which provides a framework of the Rules/Regulations/Instructions issued to Schedule Commercial Banks on statutory and other restrictions on loans and advances requires taking of security/guarantee and banks are obligated to implement these instructions to adopt adequate safeguards in order to ensure that banking activities undertaken by them run on sound, prudent and profitable lines. Hence, in order to establish that the loan advanced by them was a bonafide transaction, it was necessary for the plaintiff bank to first establish that these Instructions and Guidelines were followed and meticulously adhered to, which the plaintiff bank in the present case has miserably failed to establish. In

this background, there is every possibility that the present suit has been filed only to get a stamp of legality on their act of declaring this account of the defendant as Non Performing Asset in order to avoid any audit or other legal objections by the Reserve Bank of India/Government Agencies by bringing it within the category of court filed cases in order to write [sic] off the NPAs at a larger stage, or else there is no reason why the entire proceedings conducted by the Plaintiff Bank would be mere eye wash.”

6. The above analysis by the Trial Court is contrary to the records. The Trial Court appears to have considered various extraneous factors in coming to its conclusion. It is quite surprising as to how the Trial Court perceives the dismissal of the suit for recovery filed by a Bank to be in public interest. A perusal of the trial court record reveals that the original OD facility agreement entered into between the Plaintiff Bank and the Defendant has been placed on record. It bears the sign and seal of the Defendant on all pages, and the terms and interest payable as per it, have already been agreed by the Defendant. Thus, there was no doubt that the agreement was, in fact, entered into.

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 along with the seal of the post office. The copy of the letter, along with the seal of the post office clearly reveals that the said letter has, in fact, been dispatched. There is no reason to doubt the dispatch of these letters when the same bear the seal of the post office dated 10th December, 2013. The statement of account has been duly proved by the Principal Officer of the Bank, who has obtained the

same from the server of the ICICI Bank located in Mumbai and has certified the same under Section 65B of the Evidence Act. A perusal of this statement of account reveals that there are several transactions of withdrawals and deposits in this bank account, conducted by the Defendant and the balance DR amount has fluctuated from 1st April, 2008 to 1st June, 2012 between Rs.4,21,000/- to Rs.5,96,000/-, at which stage the OD facility is claimed to have been stopped. The transactions have been entered into by the Defendant 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 12 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.

8. The question put by the Court to the witness also proved that the witness was deposing truthfully. The fact that he may not have witnessed the Defendant's signing the documents, does not render the documents fraudulent or unbelievable. In large organizations like the Plaintiff Bank, when the Principal Officer is deposing as a witness, it cannot be expected that the said Principal Officer would be witnessing the signatures of all the customers on the original documents that have been produced. 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 finding of the Trial Court that as the witness had not personally witnessed the Defendant signing the agreement, the same cannot be

believed, is a completely incorrect approach. The Defendant has not disputed his signatures on the original agreement, which is placed on record. Thus there is no reason to disbelieve the same.

9. The Trial Court has also erred by holding that the service of the recall notice has not been proved. It clearly appears that the Trial Court ignored the original seal of the post office appearing below the bar code in the bulk dispatch register printout, which has been placed on record.

10. The documents, which have been filed, duly stand proved. The over-draft recall notice is a copy of the original that must have been dispatched. The same bears the bar code of the post office along with the original register and thus, satisfies the conditions of Section 65B of the Evidence Act. Moreover, the mechanical application of Section 65B is also the wrong approach. The certificate under Section 65B clearly supports the statement of account [Ex.PW-1/5] placed on record. The statement of account also bears the signature of the Principal Officer of the Bank and constitutes as evidence under the Banker's Books Evidence Act, 1881. 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.”*

11. Thus, the requirements of Section 65B need to be adapted as per the facts of each case depending upon the witness who is deposing. 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.....”

12. Thus, the conditions under Section 65B of the Evidence Act are relaxable. The original agreement, the original dispatch register and the original print out of the statement of account having been placed on record, the suit is liable to be decreed.

13. Insofar as the question of jurisdiction is concerned, it is not in dispute that the loan was disbursed from the ICICI Bank, Videocon Towers, Jhandewalan Extension, New Delhi, office. The question of jurisdiction was recently determined by this Court in **ICICI Bank Ltd. v. Astha Kumar (2015) 224 DLT 651**, where it was observed as under:

12.3 As regards the point about territorial location of respondents' bank is concerned, without doubt, it form a part of the cause of action, as dishonor of cheque(s) would have occurred at that place. Having said so, the payee would receive intimation of dishonour only upon being informed by his bank, which could be located, in given circumstances at a different place. Besides, a loan transaction has two components, disbursement and repayment. Both, form a vital part of the cause of action. To say one part is substantial, while the other is not, and hence, for a court to proceed to refrain from exercising jurisdiction; is to my mind, a failure to appreciate the true scope and import of the expression

cause of action.

12.4 In any event, in an action, such as a suit, a court cannot refuse to exercise jurisdiction on the ground that a substantial part of the cause of action does not arise within its jurisdiction. That is the preserve of the court exercising writ jurisdiction. The writ court invokes this principle, which is often referred to as doctrine of forum conveniens, not for the reason that it does not have jurisdiction but for the reason that it takes upon itself not to exercise jurisdiction, in a given fact situation; writ being an extra ordinary remedy the grant of relief by the court being in the realm of its discretionary jurisdiction. In this regard, observations of the Supreme Court in Kusum Ingots and Alloys Ltd. v. Union of India (2004) 6 SCC 254 in paragraph 30 at page 265, are extracted below:

“.... Forum Conveniens:

We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. (See Bhagar Singh Bagga v. Dewan Jagbir Sawhany, AIR 1941 Cal; Mandal Jalan v. Madanlal, (1945) 49 CWN 357; Bharat Coking Coal Limited v. Jharia Talkies & Cold Storage Pvt. Ltd. (1997) CWN 122; S.S Jain & Co. v. Union of India (1994) CHN 445; New Horizon Ltd. v. Union of India, AIR 1994 Delhi 126)...

(emphasis is mine)

12.5 As to how a court exercising civil jurisdiction is to proceed in the matter, the observations of Karnataka High Court in D. Munirangappa v. Amidayala

Venkatappa AIR 1965 Kant 316, being relevant are extracted hereinafter:

“..... (4) Under Section 9 of the Code of Civil Procedure, the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Therefore, every Civil Court will have jurisdiction subject to the provisions mentioned in the Code to try the suit within its cognizance. This jurisdiction exists unless it has been specifically taken away by a statute, either expressly or impliedly. Section 20, clause (c), C.P.C which is material for the purpose states that-

“Subject to the limitation aforesaid every suit shall be instituted in a Court within the local limits of whose jurisdiction-

(a) X X X

(b) X X X

(c) the cause of action, wholly or in part, arises.”

Thus, it is clear that every suit has to be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. It would not be right as has been done by the Court below to proceed to examine the extent of the cause of action or to try to find out the percentage of the cause of action. If a part of the cause of action arises within the local limits of the jurisdiction of a Court, then such a Court would have jurisdiction to entertain and try such a suit, irrespective of the extent of the cause of action. It is in my opinion wholly wrong to state that a very small fraction of the cause of action accrued within the jurisdiction of the Tumkur Court, which would not entitle the plaintiff to institute a suit in that Court. This

process of examining the cause of action would be wholly wrong in view of Section 20, Clause (c), which provides that every suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. The words 'in part' have not been defined. Even a fraction of a cause of action is a part of the cause of action and therefore, if a part of the cause of action accrues within the local limits of the jurisdiction of Tumkur Court then it must be held that that Court has the jurisdiction to entertain the suit. The provisions of clause (c) of Section 20 of the Code of Civil Procedure are based on broad principle to avoid the multiplicity of the proceedings and inconvenience to the parties. If the reasoning adopted by the Courts below is accepted as correct, it would lead to many inconvenient results which the legislature sought to avoid by enacting the provisions of clause (c) of Section 20 of the Code of Civil Procedure. For these reasons I hold that the Courts below were wrong in taking the view they took and thus declining to exercise the jurisdiction vested in them by law...."

(emphasis is mine)

12.7 In so far as the observations vis-à-vis the statement of account is concerned, in my view, there is a factual error committed by the trial court, in as much as the statement of account placed on record bears a stamp of the Videocon Tower, Jhandewalan Extn., New Delhi. No doubt, the printed part of the statement of account does not expound where the branch is located except stating that it is a Delhi branch, the trial court could not have ignored the stamp on the document, especially, when it is accompanied by an assertion made by the appellant in paragraph 12 of the plaint that the payments were made within the territorial

jurisdiction of the concerned court. As indicated above, the trial court at this stage was required to accept the veracity of the assertions made in the plaint by the appellant.”

This judgment was considered and followed by this Court on 7th March, 2018 in **ICICI Bank Ltd. v. Yogesh Grover [RFA 31/2017]** and **ICICI Bank Ltd. v. Vishal Baisla [RFA 8/2017]**.

14. The Jhandewalan office is the Branch Office of ICICI Bank in Delhi. Since the ICICI Bank carries on business from Videocon Tower, Jhandewalan Extension, the Trial Court accordingly had jurisdiction to hear the case. Though other branches of ICICI Bank may be involved, it does not mean that the address of the Principal Office is irrelevant.

15. This Court wishes to add that the approach of the Trial Court has been flawed. Paragraphs 19 & 20 of the trial court judgment, extracted hereinabove, clearly appear to be unwarranted remarks made in respect of NPAs. It is not clear as to how the Trial Court comes to the conclusion that the banking guidelines have not been followed and the attempt by the Bank is to bring this dispute in the category of *‘court filed cases in order to off the NPA at a later stage’*. This part of the judgment is completely speculative and perverse. Moreover, if the Trial Court believes the present dispute to be involving an NPA, the suit ought to have been decreed. The Trial Court has, in effect, left the Plaintiff Bank remediless by dismissing the suit. Thus, the Trial Court judgment deserves to be set aside. The suit is decreed for a sum of Rs.5,96,913/-, which is the last outstanding balance in the Defendant’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 Defendant within 12 weeks, failing which the Plaintiff would

be entitled to proceed and take steps to seize the vehicle. Further 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.

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

PRATHIBA M. SINGH
JUDGE

JUNE 01, 2018/dk

