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

Date of Decision: 3rd April, 2018

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RFA 90/2017

HDFC BANK LTD

..... Appellant

Through: Mr. Punit K. Bhalla, Advocate.
(M:9810080772)

versus

SUHRIT SERVICES PVT LTD & ANR.

..... Respondents

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

CM APPL. 3036/2017 (delay)

1. Delay is condoned subject to costs of Rs.5,000/- to be deposited with the Delhi High Court Legal Services Committee. CM is disposed of.

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2. The present appeal arises out of the impugned judgment and order dated 9th May, 2016 by which the suit filed by HDFC Bank - Appellant/Plaintiff (*hereinafter, 'Plaintiff'*) against the Defendants/Respondents (*hereinafter, 'Defendants'*) was dismissed on the ground that the provisions of Section 65B of the Indian Evidence Act, 1872 (*hereinafter, 'Evidence Act'*) were not complied with.

3. Briefly stated - a suit for recovery was filed seeking recovery of a sum of Rs.8,26,397/- against the Defendant Nos.1 & 2. Defendant No.1 was borrower and Defendant No.2 was co-borrower. Defendant No.1 had applied

for a loan of Rs.15 Lakhs. He entered into a loan agreement/credit facility application form with the Bank. The original loan agreement is exhibited as Ex.PW-1/2 on record. The Bank had disbursed a loan of Rs.15 Lakhs to the Defendants in terms of the loan agreement no.11216814 dated 1st March, 2007. The Defendants had to repay the loan in equal monthly instalments out of which some instalments were in fact paid by the Defendants. There were, however, unpaid outstanding instalments because of which loan recall notice was issued on 21st May, 2010. Despite issuance of the loan recall notice, the Defendants did not make payment of the outstanding amount leading to the filing of the suit.

4. The suit was initially filed under Section XXXVII of CPC which was converted to an ordinary suit by the Trial Court. Initially the order sheets of the Trial Court reveal that the Defendants were not served despite repeated attempts. Since the Defendants could not be served, steps for publication were taken and notice was published in the newspapers “Veer Arjun and Statesman” dated 20th January, 2012. Despite service through publication, none appeared for the Defendants. Vide order dated 10th March, 2015 the Defendants were proceeded ex-parte. Plaintiff/Bank led evidence of Mr. Gopal Ranga, Authorized Representative as PW-1 who filed the affidavit by way of evidence as also the certificate under Section 65B of the Evidence Act. PW-1 exhibited the following documents.

- a) Power of attorney in his favour – Ex.PW-1/1;
- b) Original loan agreement duly signed by the borrower and co-borrower - Ex.PW-1/2
- c) Schedule of payment signed by the borrower and co-borrower along with the promissory note - Ex.PW-1/3;

- d) Office copy of the loan recall notice issued by the learned counsel for Plaintiff Bank along with the original speed post receipt - Ex.PW-1/4 & Ex.PW-1/5;
- e) Certificate issued by the HDFC bank along with the statement of account duly certified under The Bankers' Books Evidence Act, 1891 (*hereinafter, 'Bankers' Books Evidence Act'*) - Ex.PW-1/6;
- f) Certificate under Section 65B of the Evidence Act signed by Mr. Gopal Ranga, the Authorized Representative – Ex.PW-1/7

The Trial court, after perusing the documents on record and the evidence, dismissed the suit of recovery filed by the Plaintiff.

5. In appeal also, none appears for the Respondent/Defendant. Accordingly, the Respondent/Defendant is proceeded ex-parte. A perusal of the documents above shows that the loan documents have been filed in original by the Bank. There is no challenge as to the signatures of the Defendants inasmuch as there is no appearance of the Defendants. The fact that the loan documents were not signed in front of the representative who deposed in the Court, does not take away the genuinity and validity of the loan documents. Statement of account certified under the Bankers' Books Evidence Act shows that various instalments towards repayment of the loan have in fact been received by the Bank. Thus, the fundamental fact that the Defendants took the loan and repaid some part of the loan, is admitted. This being the position, the statement of account which is certified under the Bankers' Book Evidence Act, 1891 by the Principal Officer of the Bank, could not have been ignored or held to be not proved in terms of the Section 65B of the Evidence Act. It has been held recently by this Court in ***ICICI Bank Ltd. v. Kamini Sharma & Anr. [RFA 297/2016 dated on 31st***

January, 2018] as under:

*“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. The Supreme Court in **Anvar P.V. v. P.K. Basheer AIR 2015 SC 180** (hereinafter, ‘Anvar v. Basheer’), while addressing the issue of admissibility of electronic evidence and Section 65B of the Evidence Act held as under:*

“13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic

record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned Under Sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions Under Section 65B(2). Following are the specified conditions Under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned Under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of

electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A - opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

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22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia special bus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the

certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

15. The above judgement was followed in **Harpal Singh v. State of Punjab AIR 2016 SC 5389** and by a Division Bench of this Court in **Kundan Singh v. State I (2016) CCR1 (Del.)**. A Single Judge of this Court, relying on **Anvar v. Basheer (supra)**, in **ELI Lilly v. Maiden Pharmaceuticals 2017 (161) DRJ 65** held as under:

“18. Though the ratio of **Anvar P.V. supra**, to me, appears to require the certificate/affidavit under Section 65-B of the Evidence Act to accompany the electronic record when produced in the Court, and a learned Single Judge of this Court also in **Ankur Chawla vs. Central Bureau of Investigation** opining so acquitted the petitioner/accused therein (though the SLP is pending in the Supreme Court) but a Single Judge of the High Court of Rajasthan in **Paras Jain Vs. State of Rajasthan** did not agree with the judgment of this Court in **Ankur Chawla supra** observing that "when legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured alongwith the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable". A Division Bench of this Court in **Kundan Singh Vs. State** also, on a reading

of *Anvar P.V. supra*, disagreed with the view taken in *Ankur Chawla supra* and held that the words "produced in evidence" did not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under Section 65-B(4). It was held that all that is necessary is that the person giving the certificate under Section 65-B(4) should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in Section 65-B(2), identify the electronic record, describe the manner in which computer output was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer. It was further held that emails are downloaded and computer output, in the form of paper prints, are taken every day; these emails may become relevant and important electronic evidence subsequently; it is difficult to conceive and accept that the emails would be inadmissible, if the official who downloaded them and had taken printouts had failed to, on that occasion or simultaneously record a certificate under Section 65-B.

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20. It thus but has to be held that the plaintiffs are entitled to file the certificate under Section 65-B of the Evidence Act, even subsequent to the filing of the electronic record in the Court. Order XI Rule 6 of CPC as applicable to commercial suits is also not found to provide to the contrary."

In the present case, the Plaintiff bank has filed the

certificate under Section 65B through its witness and also certified all the copies of electronic records including bank statements etc., Thus the requirements under Section 65B have been fulfilled.

16. There is however some serious re-thinking required on the manner in which electronic documents are to be proved. In each case where electronic documents are involved, it would be impractical to expect the parties to produce the primary evidence which would be the medium on which the document is stored, considering that electronic documents could be stored on hard drives, hard disks, CPUs, micro-processors, cameras, telephones, etc. Certificates under Section 65B accompanying the printouts have simply become standard formats. Cross examination on these certificates can involve debates on model of computer, printer, questions as to who took printouts etc. Courts, therefore, need to take a pragmatic attitude in these cases. Unless there is a serious challenge to the electronic documents i.e., tampering, forgery, hacking, misuse of an email address, change in contents etc., usually printouts of electronic documents ought to be allowed to be read in evidence. The complex procedure laid down for proving of electronic documents can prove to be extremely cumbersome and can have enormous impact especially in commercial transactions, as it has had in the present case.”

6. The Trial Court appears to have taken an over-technical approach in this matter by holding that in view of the defects in the certificate under Section 65B of the Evidence Act, the suit is liable to be dismissed. The Authorised Representative of the Bank has also created greater confusion in his cross examination by not recognizing the signatures in the 65B certificate. A comparison of the signatures in the 65B certificate with

evidence by way of affidavit clearly shows that the same Authorised Representative has signed both the documents. The Statement of account being a document proved under the Bankers' Books Evidence Act, there was no requirement to even go into the issue of Section 65B of the Evidence Act. This is the settled position in law. Recently the Supreme Court, in ***Shafhi Mohammad v. State of Himachal Pradesh, [SLP(Crl.) No.2302/2017 dated 30th January, 2018]***, has held that the requirement of Section 65B of the Evidence Act is not always mandatory and that requirement of the said certificate, which is a procedural requirement, can be relaxed by Courts in the interest of justice. The Supreme Court observed as under:

“11. The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronics 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 absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.

12. 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 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.”

7. A perusal of the trial court record in this case reveals that all the original loan documents have been filed. Principal Officer of the Bank has certified the statement of account. Disbursement of the loan itself is not disputed. Repayment of some instalments is also not disputed. Under such circumstances, the Trial Court was in error in dismissing the suit. The impugned judgment is accordingly set aside. The suit is decreed for the outstanding sum of Rs.6,95,370/- along with *pendente lite* interest @ 8% per annum from the date of filing of the suit till date of realisation.

8. Appeal is allowed in the above terms.

APRIL 03, 2018/dk

**PRATHIBA M. SINGH
JUDGE**