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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 23rd May, 2018

+ **RFA 662/2015 & CM No.21796/2018**

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

SHYAM SUNDER SHARMARespondent
Through:

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (ORAL)

1. The present appeal arises out of the impugned judgment/order dated 3rd June, 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 26th April, 2011 was not filed by the Bank.

2. In the present appeal, notice was issued on 7th October, 2015. Thereafter, the appeal was admitted vide order dated 17th February, 2016. Initially, the Respondent/Defendant (*hereinafter, 'Defendant'*), remained unserved due the process fee not being filed, but thereafter it was because there was 'no such person' at the last known address. Thus, steps were taken to serve the Defendant through publication. Service was finally recorded as having been completed as per 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.3,05,000/-. The Defendant agreed to repay the loan amount in 58 equal monthly instalments (*hereinafter*, 'EMI') of Rs.7,188/-. The loan was duly sanctioned and was disbursed on 17th February, 2007 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 SANTRO/XL bearing registration No. DL2CAD7003. 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. 3,18,124.16/-.

5. In the suit, summons were issued on 5th July, 2011 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. On 19th April, 2012 the Defendant appeared before the court in person. He filed a memo dated 2nd April, 2012 duly signed by him to the following effect:

"It is submitted as under:-

- 1. That the above noted case is pending disposal before this Hon'ble court, and is fixed for 15.5.2012.*
- 2. That as per orders of the Hon'ble Court, the receiver Sh. Praveen Yadav has taken the vehicle in possession. The orders were passes on 22.9.2012 by the Hon'ble Court.*

3. That the applicant is regd. owner of the vehicle. He has settled the matter with the plaintiff/bank. He paid one instalment on 25.5.2011 and the applicant/defendant has to pay a sum of Rs.1,65,000/-. The applicant wants to pay the same in instalments. The case is likely to be compromised. His father died and could not pay the instalments. Now he is ready to pay the amount.

It is therefore prayed that the vehicle may be returned to the applicant and he be allowed to pay the amount in instalments after settlement/compromise or pass any other order which the Hon'ble Court may deem fit and proper”

6. He thus made a statement that he is ready to settle the dispute with the Plaintiff bank and is ready to pay the amount in instalments. Accordingly, the Court directed that the matter be placed before the Mediation Cell to settle the matter. However, mediation failed between the parties. Thereafter, the Defendant stopped appearing before the court. The Plaintiff, on 26th September, 2012, filed an application under Order XXXIX Rule 6 CPC seeking leave to sell the vehicle, seized by the Receiver appointed by the Court, lying in the yard of the Plaintiff bank in Kundli, Sonipat. Despite repeated attempts, the Defendant could not be served in the application. On 28th January, 2015, taking note of the fact that the Defendant had first put in appearance in the suit, the Trial Court held that no fresh notice of the application under Order XXXIX Rule 6 needs to be served on him. Accordingly, the Court allowed the application of the Plaintiff bank and permitted sale of the vehicle and directed adjustment of the sale proceeds towards the outstanding amount. On 31st March 2015, the Defendant was proceeded ex-parte in the suit. The Plaintiff bank led the evidence of Mr.

Laxman Gaur, the authorized representative as PW-1. PW-1 exhibited, along with his affidavit, the following documents:

- (i) Ex.PW-1/1 – Copy of Power of Attorney authorizing him to depose;
- (ii) Ex.PW-1/2 - Original Credit Facility Application Form along with the terms and conditions of the loan;
- (iii) Ex.PW-1/3 – Original unattested Deed of Hypothecation;
- (iv) Ex.PW-1/4 – Original Irrevocable Power of Attorney;
- (v) Ex.PW-1/5 and Ex.PW- 1/6 – Printout of Loan Recall Notice dated 26th April, 2011 along with the Bar code issued by the postal authorities;
- (vi) Ex.PW-1/7 - Statement of account duly certified under The Bankers' Books Evidence Act, 1891 (*hereinafter*, '*BBE Act*') dated 31.05.2011;
- (vii) Ex. PW-1/8- Certificate U/s 65B of the Indian Evidence Act, 1872;

7. This statement of account is duly accompanied with a certificate under Section 65B (PW-1/8) 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. Apart from the documents exhibited by the Plaintiff's witness, the memo filed by the Defendant that the matter is settled, extracted above as also a letter dated 23rd September 2011 of the Plaintiff bank are extremely relevant. The original memo appearing at page 193 of the Trial Court record, along with the letter of the Plaintiff bank dated 23rd September, 2011 shows that the matter was in fact settled between the parties and the Bank had

agreed to accept a sum of Rs. 1,65,000/- in full and final settlement and the payment was to be made by 30th September 2011. However, the Defendant thereafter stopped appearing in the matter.

9. PW-1 was questioned by the Court and in his statement, he stated that the loan recall notice is a computer generated document. He deposed that the main server of the Bank is located in Mumbai and the statement of account was retrieved from the centralised server. He stated that a statement of account can be generated from any of the authorised branches of the Bank. He stated in his affidavit that the car which was seized was sold by the Plaintiff bank for a sum of Rs. 1,08,600/-. The permission for sale was given by the Trial Court on 28th January 2015 which is subsequent to the settlement letter dated 23rd September, 2011.

10. The Trial Court dismissed the suit of the Plaintiff Bank on the following grounds:

- That they failed to prove the recall notice in accordance Section 65B of the Evidence Act, and had only filed a printout/scanned copy of the notice on record;
- That the service of the notice also not having proved and no proof showing despatch of the same via Speed Post was not placed on record;
- That all documents relied upon by the Plaintiff Bank's witness were computer generated and were not proved in accordance with Section 65B of the Evidence Act;
- That the suit was not filed in the court of competent jurisdiction.

11. 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 26th April, 2011, has not been placed on record and only a scanned copy of the same has been placed on record. The original of the said notice would obviously be with the Defendant. Moreover, the Defendant having put in appearance and admitted the claim of the Plaintiff bank, the suit could not have been dismissed.

12. Further the Trial Court erroneously holds that the amount retrieved from the sale of the car was not mentioned in the statement of account. The witness filed his affidavit on 30th May 2015. The statement of account was filed with the Plaint, on 13th June 2011. In the affidavit the Plaintiff Bank's witness has disclosed the amount recovered from the sale of the car. Thus, the fact that this amount recovered is not mentioned in the statement of account could not have been held against the Plaintiff Bank. The approach of the Trial Court is completely erroneous and seeks to impute lack of bonafides which is untenable. The approach of the Trial Court appears to be to somehow non-suit the Bank. The grounds on which the suit has been dismissed seek to ignore the original documents filed on record, including the statement of the Defendant himself. The suit has been dismissed by adopting an over-technical approach even on Section 65B of the Evidence Act.

13. 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.

14. 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 has taken all the steps to serve the Defendant and has also placed 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 proved its case beyond any doubt.

15. 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 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 12, 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 even care to 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.

16. 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.....”

17. 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.*"

18. Thus, the requirements 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., Thus the requirements under Section 65B of the Evidence Act have been fulfilled.

19. Insofar as jurisdiction is concerned, the present case is clearly covered

by the decision in *ICICI Bank Ltd. v. Astha Kumar (2015) 224 DLT 651* by a Ld. Single Judge of this Court and also reiterated on 7th March, 2018 in *ICICI Bank Ltd. v. Yogesh Grover [RFA 31/2017]* and *ICICI Bank Ltd. v. Vishal Baisla [RFA 8/2017]*.

20. The loan documents clearly mention Delhi as the disbursing office and the office of the Bank at Jhandewalan Extension, New Delhi as the Bank's address. Thus, a part of the cause of action arises in Delhi and the Trial Court was wrong in holding that it did not have jurisdiction. The Trial Court after observing that the screening of the application form and documents were done at the office at Jhandewalan Extension, could not have held that it did not have jurisdiction. Section 20 CPC is clearly applicable.

21. 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. The documents on record clearly reveal that the Defendants availed of the loan and have failed to repay part of the same. The Trial Court has not considered the settlement memo and the letter of the Plaintiff Bank accepting the settlement. Since the Plaintiff Bank has accepted to settle the dispute with payment of amount of Rs.1,65,000/- and has thereafter sold the car, it is liable to be held bound by the letter dated 23rd September 2011. These are documents which establish the Defendant's liability and in fact constitute admissions. Thus, the judgment of the Trial Court is unsustainable, erroneous and contrary to law. The impugned judgment/order is set aside.

22. The suit is decreed for the sum of Rs.56,400/- with interest @ 8% per annum from 30th September 2011 till date. 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.

23. The appeal is allowed in the above mentioned terms. Pending application stands disposed of.

PRATHIBA M. SINGH, J.
Judge

MAY 23, 2018/dk

