

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.01.2019

DELIVERED ON : 06.02.2019

CORAM :

THE HON'BLE MRS.V.K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAIWAMY

C.R.P. (NPD) No.3365 of 2018 and

C.M.P.No.19109 of 2018

R.Subramanian

... Petitioner

v.

1. ICICI Bank Ltd
ICICI Bank Towers
45th Floor, West Wing, Plot No.24
Ambattur Industrial Estate, Chennai – 600 058

2. Subhiksha Trading Services Limited
Rep. By its Official Liquidator
High court of Madras
Corporate Bhawan Second Floor
No.29, Rajaji Salai, Chennai – 600 001

3. Cash 'N' Carry Wholesale Traders (P) Ltd.
Govind 1, 7A Kannappan Nagar Extension
Thiruanmiyur, Chennai – 600 041

And also at Flat No.2, 2nd Floor, Habib Complex
5, Durgabai Deshmukh road
R.A.Puram, Chennai – 600 028

4. City Capital Foundation Limited
D-1, Srishti Crescendo
24, Desika Road, Chennai – 600 006
5. Pentagon Trading Services Private Limited
Basement, "Kalyan"
4, Atkinson Road, Vepery
Chennai – 600 007
6. Stone N Sand Builders Private Limited
D-1, Srishti Crescendo
24, Desika Road, Chennai – 600 004
7. Custodial Services (India) Private Ltd
1/17A, Muthukad Road
Kottivakkam, Chennai – 600 041
8. The Hong Kong & Shanghai Banking Corporation Ltd
Nagabrahma Towers
No.76, Cathedral Road, Chennai – 600 086
9. ABN Amro Bank N.V.
Now changed to Royal Bank of Scotland
18, Haddows Road, Chennai – 600 006
10. HDFC Bank Ltd
Mariam Centre, 751-1 B, Anna Salai
Chennai – 600 002
11. Yes Bank Limited
143/1, Nungambakkam High Road
Chennai – 600 034
12. Standard Chartered Bank
5th Floor, 19, Rajaji Salai
Chennai – 600 001
13. Development Credit Bank Ltd
61, Nungambakkam High Road
Chennai – 600 034

14.Federal Bank Ltd
SVS Club Building
No.61, Mount Road, Chennai – 600 002

15.Bank of Baroda
CFS Branch, No.74, Thyagaraya Road
Near Panagal Park, Chennai – 600 017

16.The Official Liquidator
Rep. For M/s. Subhiksha Trading Services Ltd
High Court of Madras
Corporate Bhawan, second Floor
No.29, ,Rajaji Salai, Chennai – 600 001 ... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 19.02.2018 made in R.A.No.30 of 2015 on the file of Debt Recovery Appellate Tribunal at Chennai, reversing the order dated 30.04.2015 made in O.A.No.179 of 2011 on the file of Debt Recovery Tribunal-I, Chennai.

For Petitioner : Mr.R.Subramanian
(Party-In-Person)

For Respondents : Mr.A.L.Somayaji, Senior Counsel
for M/s.Shivakumar & Suresh – for R1
Mr.S.Sathiyarayanan- for R14
Mr.Srinath Sridevan – for R8 & R15
No appearance – for R2 & R11 to R13
Not Ready in Notice – R3 to R7, R9 & R10

ORDER**V.K.TAHILRAMANI, CHIEF JUSTICE**

Challenging the order dated 19.02.2018 passed in R.A.No.30 of 2015 on the file of the Debt Recovery Appellate Tribunal, Chennai, reversing the order dated 30.04.2015 passed in O.A.No.179 of 2011 on the file of the Debt Recovery Tribunal-I, Chennai, the 2nd defendant in O.A.No.179 of 2011, has filed the above Civil Revision Petition.

2. Since the petitioner wanted to argue the above Civil Revision Petition as a party-in-person, he filed a memo dated 31.10.2018 before this Court seeking for such a permission. The petitioner is confined in the Central Prison – II, Puzhal, Chennai in respect of a case under the Prevention of Money Laundering Act, 2002. Taking note of the averments stated in the memo filed by the petitioner, we have permitted him to appear in person and make his submissions in the Civil Revision Petition and accordingly, we directed the Prison Authorities to produce the petitioner before this Court enabling him to make his submissions in the Civil Revision Petition. Pursuant to the directions of this Court, the petitioner was produced by the Prison Authorities and he made his submissions in person before this Court.

3.1 The petitioner is the Managing Director of the 2nd respondent Company, viz., Subhiksha Trading Services Limited [1st defendant in O.A.No.179 of 2011]. The 2nd respondent availed financial assistance from the respondent No.1/bank and the petitioner, who is also the Managing Director of the borrower-company, stood as guarantor for the loan availed by the Company. Since the 2nd respondent committed default in repaying the loan, the respondent No.1/bank filed a suit in O.A.No.179 of 2011 on the file of the Debt Recovery Tribunal-I, Chennai, claiming a total sum of Rs.4066,93,26,627.54 together with interest and for other reliefs.

3.2 The petitioner filed his counter and contested the Original Application. The respondent No.1/Bank also marked documents to prove their claim before the Debts Recovery Tribunal. Among other documents, the respondent No.1 also produced the computer generated bank statement to prove their claim. The Debts Recovery Tribunal, relying upon Section 2(8) of the Bankers' Books Evidence Act, 1891, did not take into consideration the statement of accounts for the reason that the respondent No.1 did not produce the certificate along

with the computer generated statement of accounts. In these circumstances, the Debt Recovery Tribunal-I, Chennai, dismissed the Original Application.

3.3 Challenging the order passed by the Debt Recovery Tribunal-I, Chennai in O.A.No.179 of 2011, the respondent No.1-bank filed an appeal in R.A.No.30 of 2015 before the Debt Recovery Appellate Tribunal, Chennai. The Appellate Tribunal, by order dated 19.02.2018, set aside the order passed by the Debts Recovery Tribunal and allowed the appeal.

3.4 Challenging the order passed by the Debt Recovery Appellate Tribunal, the petitioner has filed the above Civil Revision Petition.

4. Heard the petitioner appearing in person, Mr.A.L.Somayaji, learned Senior Counsel, appearing for the respondent No.1, Mr.S.Sathiyarayanan, learned counsel appearing for the respondent No.14 and Mr.Srinath Sridevan, learned counsel appearing for the respondent Nos. 8 and 15.

5.1 The petitioner appearing in person has raised the following two contentions:-

(i) The first contention is with regard to marking of Ex.A-58, Statement of Accounts, without the certificate. The petitioner, who is also the Managing Director of the 2nd respondent Company relied upon Section 65-B(4) of the Indian Evidence Act and also Section 2(8) of the Bankers' Books Evidence Act, 1891. The petitioner mainly contended that since the statement of accounts marked by the respondent No.1/bank were not accompanied by the certificate, the Debts Recovery Tribunal has rightly rejected the claim made by the respondent No.1-bank, therefore, the Debt Recovery Appellate Tribunal should not have interfered with the order passed by the Debts Recovery Tribunal. Further, the petitioner submitted that in the absence of the statement of accounts, the claim made by the respondent No.1-bank is liable to be rejected.

(ii) The other contention raised by the petitioner is that there is an arithmetical error in the Original application filed by the respondent No.1/bank before the Debts Recovery Tribunal, wherein, the quantum of claim made in prayer-(b), has been mentioned as

Rs.3750,40,46,264.78 instead of Rs.37,50,46,264.78.

5.2 The petitioner appearing in person, in support of his contention, has relied upon the following judgments:-

(i) **2003(8) SCC 752 [R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and another]**, wherein the Hon'ble Supreme Court held as follows:-

"15. The High Court has, by entering into the question of admissibility in evidence of the above said two very material pieces of documentary evidence which were admitted in evidence without any objection when they were tendered in evidence and taken into consideration by the two courts below while evaluating evidence and recording findings of facts, excluded the documents from consideration. Was it permissible for the High Court to do so?

21. The Privy Council in **Padman and Others vs. Hanwanta and Others [AIR 1915 PC 111]** did not permit the appellant to take objection to the admissibility of a registered copy of a Will in appeal for the first time. It was held that this objection should have been taken in the trial court. It was observed:

"The defendants have now appeal to the Majesty in Council, and the case has been argued

on their behalf in great detail. It was urged in the course of the argument that a registered copy of the Will of 1898 was admitted in evidence without sufficient foundation being led for its admission. No objection, however, appears to have been taken in the first court against the copy obtained from the Registrar's office being put in evidence. Had such objection being made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their lordships think that there is no substance in the present contention."

22. Similar is the view expressed by this Court in **P.C.Purushothama Reddiar vs. S.Perumal [1972 (2) SCR 646]**. In this case the police reports were admitted in evidence without any objection and the objection was sought to be taken in appeal regarding the admissibility of the reports. Rejecting the contention it was observed:

"Before leaving this case it is necessary to refer to one of the contention taken by Mr.Ramamurthi, learned counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility – see **Bhagat Ram V. Khetu Ram and Anr. [AIR 1929 PC 110]**."

23. Since documents A30 and A34 were admitted in evidence without any objection, the High Court erred in

holding that these documents were inadmissible being photo copies, the originals of which were not produced. "

(ii) 2004(7) SCC 107 [Dayamathi Bai v Sri K.M. Shaffi],

wherein the Hon'ble Supreme Court held as follows:-

"10. Aggrieved by the decision of the lower appellate Court, K.M. Shaffi, the original plaintiff preferred Second Appeal under section 100 of CPC before the High Court. At the time of admission of the second appeal, following substantial question of law was formulated by the High Court:

"As to whether the lower appellate Court has erred in holding that the certified copies of the sale deed and the gift deed being Exs.P1 and P2 respectively are not admissible in evidence and as such the plaintiff had failed to substantiate his title over the suit schedule property?"

12. Ms. Kiran Suri, learned counsel appearing on behalf of the appellant submitted that once the document becomes incapable of being proved for want of primary evidence, the foundation of secondary evidence must be laid, without which, such secondary evidence was inadmissible. That in the present case, no steps were taken by the plaintiff to produce the original sale deed. That no steps were taken to prove the loss of the original sale deed. That no steps were taken to establish the source from which certified copy was obtained. She submitted that if the

foundation is laid under section 65 and if the plaintiff was able to prove that the original sale deed was lost then the secondary evidence was admissible but in the absence of such a foundation, the High Court erred in holding that the registered certified copy of the sale deed was admissible in evidence as the document produced was more than 30 years old.

13. We do not find merit in this civil appeal. In the present case the objection was not that the certified copy of Ex.P1 is in itself inadmissible but that the mode of proof was irregular and insufficient. Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before the document is marked as an exhibit and admitted to the record (See: Order XIII Rule 3 of Code of Civil Procedure). This aspect has been brought out succinctly in the judgment of this Court in **R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Another** reported in **[(2003) 8 SCC 752]** to which one of us, Bhan, J., was a party vide para 20:

"20. The learned counsel for the defendant-respondent has relied on **Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457]** in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of

law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode

or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to herein above, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

(iii) **2014(10) SCC 473 [Dayamathi Bai v Sri K.M. Shaffi],**

wherein the Hon'ble Supreme Court held as follows:-

"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 specialibus 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 (**[State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600]** , 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.

23. The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground."

(iv) **2017(1) SCC 734 [Dayamathi Bai v Sri K.M. Shaffi],**

wherein the Hon'ble Supreme Court held as follows:-

"56. Qua the admissibility of the call details, it is a matter of record that though PWs 24, 25, 26 and 27 have endeavoured to prove on the basis of the printed copy of the computer generated call details kept in usual ordinary course of business and stored in a hard disc of the company server, to co-relate the calls made from and to the cell phones involved including those, amongst others recovered from the accused persons, the prosecution has failed to adduce a

certificate relatable thereto as required under Section 65B(4) of the Act. Though the High Court, in its impugned judgment, while dwelling on this aspect, has dismissed the plea of inadmissibility of such call details by observing that all the stipulations contained under Section 65 of the Act had been complied with, in the teeth of the decision of this Court in *Anvar P.V.* ([**Anvar P.V. v. P.K.Basheer (2014) 10 SCC 473**]) ordaining an inflexible adherence to the enjoinders of Sections 65B(2) and (4) of the Act, we are unable to sustain this finding. As apparently the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of Section 65B(2) had been complied with, in absence of a certificate under Section 65B(4), the same has to be held inadmissible in evidence.

57. This Court in *Anvar P.V.* (supra) has held in no uncertain terms that the evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with section 65 of the Act would have to yield thereto. It has been propounded that any electric record in the form of secondary evidence cannot be admitted in evidence unless the requirements of Section 65B are satisfied. This conclusion of ours is inevitable in view of the exposition of law pertaining to Sections 65A and 65B of the Act as above.

6.1 Countering the submissions made by the petitioner, Mr.A.L.Somayaji, learned Senior counsel appearing for the respondent No.1/bank submitted that the production of certificate along with the computer generated statement of accounts is not always mandatory. Further, the learned Senior Counsel submitted that in fact a certificate has been produced along with the statement of accounts, which is annexed at page-No.179 of the typed-set of papers filed by the petitioner. Further, the learned Senior Counsel submitted that once a document is marked without any objection, thereafter, the said document cannot be rejected. The learned Senior Counsel submitted that the Debt Recovery Appellate Tribunal has rightly set aside the order passed by the Debts Recovery Tribunal giving valid reasons.

6.2 The learned Senior counsel appearing for the respondent No.1, in support of his contention, has relied upon the following judgments:-

(i) **2010 (11) SCC 1 [Union Of India v. Madras Bar Association]**, wherein the Hon'ble Supreme Court held as follows:-

"45. Though both Courts and Tribunals exercise judicial power and discharge similar functions, there are certain well-recognized differences between courts and

Tribunals. They are :

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are Tribunals. But all Tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a Judicial Member and a Technical Member who is an 'expert' in the field to which Tribunal relates. Some highly specialized fact finding Tribunals may have only Technical Members, but they are rare and are exceptions.

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and Evidence Act, requiring an elaborate procedure in decision making, Tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of Evidence Act.

(ii) 2017 (8) SCC 570 [Sonu @ Amar v. State Of Haryana]

wherein the Hon'ble Supreme Court held as follows:-

"32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be

raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr. P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.

37. The interpretation of Section 65B (4) by this Court by a judgment dated 04.08.2005 in **Navjot Sandhu [State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600]** held the field till it was overruled on 18.09.2014 in Anvar's **[Anvar P.V. v. P.K.Basheer (2014) 10 SCC 473]** case. All the criminal courts in this country are bound to follow the law as interpreted by this Court. Because of the interpretation of section 65B in Navjot Sandhu, there was no necessity of a certificate for proving electronic records. A large number of trials have been held during the period between 04.08.2005 and 18.09.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in Anvar's case has to be retrospective in operation unless the judicial tool of 'prospective overruling' is applied. However, retrospective application of the judgment is not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage. Attempts will be made to reopen cases which have become final.

40. This Court did not apply the principle of prospective overruling in Anvar's case. The dilemma is whether we should. This Court in **K. Madhav Reddy v.**

State of Andhra Pradesh, (2014) 6 SCC 537 held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in the case of Anvar is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of justice. As Anvar's case was decided by a Three Judge Bench, propriety demands that we refrain from declaring that the judgment would be prospective in operation. We leave it open to be decided in an appropriate case by a Three Judge Bench. In any event, this question is not germane for adjudication of the present dispute in view of the adjudication of the other issues against the accused."

(iii) **2018 (2) SCC 801 [Shafhi Mohammad v. The State Of Himachal Pradesh]**, wherein the Hon'ble Supreme Court held as follows:-

"20. An apprehension was expressed on the question of applicability of conditions under Section 65B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such

certificate could not be mandatory. It was submitted that Section 65B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

21. We have been taken through certain decisions which may be referred to. **In Ram Singh and Others v. Col. Ram Singh, 1985 (Supp) SCC 611**, a Three-Judge Bench considered the said issue. English judgments in **R. v. Maqsd Ali, (1965) 2 All ER 464**, and **R. v. Robson, (1972) 2 ALL ER 699**, and American Law as noted in American Jurisprudence 2d (Vol.29) page 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be

proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

24. We may, however, also refer to judgment of this Court in *Anvar P.V. v. P.K. Basheer and Others*, (2014) 10 SCC 473, delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in *Navjot Sandh (supra)* that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.

25. Though in view of Three-Judge Bench judgments in *Tomaso Bruno* and *Ram Singh (supra)*, it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the

electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(4).

29. The applicability of procedural requirement under Section 65B(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 absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B (4) 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 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. The learned counsel appearing for the respective respondents adopted the submissions made by the learned Senior Counsel appearing for the respondent No.1.

8. On a careful consideration of the materials available on record, the submissions made by the petitioner appearing in person and the learned Senior Counsel appearing for the respondent No.1, it could be seen that though the petitioner contended that the respondent No.1 did not produce the certificate along with Ex.A58 statement of accounts, contrary to his contention, he himself has produced the certificate at Page 179 of the typed set of papers. The said certificate has been issued under section 4 of the Bankers' Books Evidence Act, 1891. The petitioner contended that though the certificate was produced by the respondent No.1, which is at page 179 of the typed set of papers filed by him, the respondent No.1 has not enclosed such certificate for all the statement of accounts. On a reading of the certificate, it is clear

that the certificate has been issued in respect of Ex.A-58 statement of accounts produced by the respondent No.1/Bank. The statement of accounts as well as the certificate bears the signature of the authorized signatory of the respondent No.1/Bank. Therefore, when the respondent No.1 has marked the statement of accounts along with the certificate under section 4 of the Bankers' Books Evidence Act, there is no necessity for producing the certificate for each and every page of the statement of accounts.

9. The petitioner contended that with regard to the judgment reported in **2017 (8) SCC 570 (cited supra)** relied upon by the learned Senior Counsel appearing for the respondent No.1, since the said judgment was delivered by two-Judge Bench of the Apex court, it cannot overrule the judgment reported in **2014(10) SCC 473 (cited supra)**, which was rendered by a three-Judge Bench of the Apex Court. According to the petitioner, the judgment reported in **2017 (8) SCC 570 (cited supra)** cannot be relied upon.

10. Since the issue involved in this Civil Revision Petition is with regard to marking of the bank statement of accounts, it would be

appropriate to extract Section 65B (4) of the Indian Evidence Act and Sections 2(8) and 4 of the Bankers' Books Evidence Act, 1891, which reads as follows:-

Section 65B (4) of the Indian Evidence Act

"65B(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of

this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

Section 2(8) of the Bankers' Books Evidence Act, 1891,

"2 (8) ?certified copy? means when the books of a bank,?

(a) are maintained in written form, a copy of any entry in such books together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title; and

(b) consist of printouts of data stored in a floppy, disc, tape or any other electro-magnetic data storage device, a printout of such entry or a copy of such printout together with such statements certified in accordance with

the provisions of section 2A.]

(c) a printout of any entry in the books of a bank stored in a micro film, magnetic tape or in any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such printout as a copy of such entry and such printout contains the certificate in accordance with the provisions of section 2A.]

2A. Conditions in the printout.—A printout of entry or a copy of printout referred to in sub-section (8) of section 2 shall be accompanied by the following, namely:—

(a) a certificate to the effect that it is a printout of such entry or a copy of such printout by the principal accountant or branch manager; and

(b) a certificate by a person in-charge of computer system containing a brief description of the computer system and the particulars of—

(A) the safeguards adopted by the system to ensure that data is entered or any other operation performed only by authorised persons;

(B) the safeguards adopted to prevent and detect unauthorised change of data;

(C) the safeguards available to retrieve data that is lost due to systemic failure or any other reasons;

(D) the manner in which data is transferred from the system to removable media like floppies, discs, tapes or other electro-magnetic data storage devices;

(E) the mode of verification in order to ensure that data has been accurately transferred to such removable media;

(F) the mode of identification of such data storage devices;

(G) the arrangements for the storage and custody of such storage devices;

(H) the safeguards to prevent and detect any tampering with the system; and

(I) any other factor which will vouch for the integrity and accuracy of the system.

(c) a further certificate from the person in-charge of

the computer system to the effect that to the best of his knowledge and belief, such computer system operated properly at the material time, he was provided with all the relevant data and the printout in question represents correctly, or is appropriately derived from, the relevant data.]

Section 4 of the Bankers' Books Evidence Act, 1891

"4. Mode of proof of entries in bankers' books.—Subject to the provisions of this Act, a certified copy of any entry in a banker's books shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

11. The petitioner relied upon the judgment reported in **2014(10) SCC 473 (cited supra)** to support his contention that the statement of accounts marked as Ex.A-58, should accompany the certificate issued by the concerned officer under section 65-B of the Indian Evidence Act. Whereas, the learned Senior Counsel appearing for the respondent No.1 replied upon the judgment reported in **2017 (8) SCC 570 (cited supra)** to support his case that the mode or method of proof is procedural and objections, if not taken at the trial,

cannot be permitted at the appellate stage.

12. In the case on hand, the petitioner has not raised any objection at the time of marking the document. Even, the entries made in the statement of accounts were also not disputed by the petitioner in any manner whatsoever. The Debt Recovery Appellate Tribunal also took into consideration the said fact while reversing the order passed by the Debts Recovery Tribunal. When the learned Senior counsel appearing for the respondent No.1 has relied upon the Apex Court judgment only for the purpose of supporting the case of the respondent No.1, the petitioner cannot raise objections with regard to marking of the document at a later stage, when he did not object to the marking of the document at the earliest point of time. The contention raised by the petitioner that the judgment relied upon by the learned Senior Counsel appearing for the respondent No.1 should not be applied cannot be accepted. Both the judgments, i.e., **2014(10) SCC 473 (cited supra)** and **2017 (8) SCC 570 (cited supra)** were relied upon by the respective parties for different purpose. No doubt, in the judgment reported in **2017 (8) SCC 570 (cited supra)**, two-Judge Bench of the Apex Court also took into consideration the issue

involved in Anvar case (**cited supra**) and ultimately, left the issue with regard to Section 65-B open, to be decided in an appropriate case, by a three-Judge Bench.

13. On a perusal of the Anvar case (**cited supra**), it could be seen that the issue involved in the said judgment is only with regard to Sections 62, 65-A and 65-B of the Indian Evidence Act and not with regard to the rejection of documents marked at the time of trial. Therefore, we are of the considered view that the ratio laid down by the two-Judge Bench of the Apex Court is applicable to the present case. In the said judgment, the Apex Court has categorically stated that if objections with regard to marking of a particular document is not taken at the time of trial, the party cannot be permitted to raise objections with regard to marking of the document at the appellate stage.

14. In the case on hand, though the petitioner had every opportunity to raise objections with regard to marking of Ex.A58 document, for the reasons best known to him, he did not do so. That apart, even the entries made in the statement of accounts were not denied or disputed by the petitioner before the Debts Recovery

Tribunal. In these circumstances, the petitioner cannot be allowed to raise objections with regard to the marking of the documents at any time he wishes.

15. In the judgment reported in **2018 (2) SCC 801 [cited supra]**, the Hon'ble Supreme Court has categorically held that the admissibility of electronic evidence cannot be ruled out on any technicality if the same was relevant. Further, the Apex Court held that the requirement of certificate under Section 65B(4) is not always mandatory. The Apex Court also held that the applicability of requirement of certificate being procedural, can be relaxed by the Court wherever interest of justice so justifies.

16. In the case on hand, as already stated, the Bank has produced the statement of accounts in support of their claim along with a certificate as per Section 4 of the Bankers' Books Evidence Act, 1891, which was not objected or disputed by the petitioner at the time of marking the said document as Ex.A-58. In such circumstances, we are of the considered view that in the interest of justice, even the production of certificate by the respondent No.1 can be relaxed. Thus,

in our opinion, the ratio laid down by the Apex Court in the judgment reported in **2018 (2) SCC 801 [cited supra]**, applies to the present case.

17. The Debts Recovery Tribunal, without examining the matter in a proper manner, erroneously dismissed the Original Application filed by the respondent No.1/Bank.

18. It is pertinent to note that though the borrower, respondent No.2 filed an application to cross examine the witness, the Debts Recovery Tribunal, did not pass any order in the said application, though it was reserved for orders as early as on 10.02.2012. Even without passing orders in the said application, the Debts Recovery Tribunal dismissed the Original Application on 30.04.2015. But, while dismissing the Original Application, the Debts Recovery Tribunal drew adverse inference against the respondent No.1/Bank as though the respondent No.1/Bank refused to offer their witness for cross examination. The Debts Recovery Tribunal, for the reasons best known to it, kept the application filed by the borrower for the cross examination of the respondent No.1/Bank's witness without pronouncing the orders for more than three years. When the fault is

on the Debts Recovery Tribunal in not passing the order in the application for three years, it cannot shift the blame on the respondent No.1/Bank, while dismissing the Original Application. The Appellate Tribunal, taking into consideration all these aspects has rightly set aside the order passed by the Debts Recovery Tribunal and allowed the Original Application against the defendant Nos. 1 to 7. When the defendant Nos. 1 to 7 are liable to pay huge amounts totalling Rs.354,03,26,627.54 together with interest and costs to the respondent No.1/Bank, the claim made by the respondent No.1/Bank cannot be thrown out on technicalities.

19. It is needless to say that respondent No.1/Bank is dealing with the public money and such a huge amount cannot be allowed to go un-recovered from the defaulting borrowers, who have availed the loan as early as on 26.05.2005.

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20. So far as the arithmetical error in the Original Application is concerned, in paragraph 11 of the petition, with regard to Invoice Funding, there is an arithmetical error. Under the caption Invoice

Funding, respondent No.1 has stated that a sum of Rs.30,00,00,000/- was due under principal amount, a sum of Rs.3,57,67,620.76 was due with interest and a sum of Rs.39,278,642.02 was due under liquidity damages. While adding these three figures, respondent No.1 has incorrectly mentioned the total amount as 3750,40,46,264.78, whereas, the total is only Rs.37,50,46,264.78. The total mentioned under the heading Invoice Funding has been claimed by respondent No.1/bank as prayer-(b). Since there is an arithmetical error in totalling the three figures, we are of the view that in prayer-(b), it should be read as 3,75,046,264.78 instead of 37,504,046,264.78. The Debts Recovery Tribunal as well as the Debt Recovery Appellate Tribunal have not gone into these aspects while deciding the matter. The respondent No.1/Bank is entitled to claim a sum of Rs.37,50,46,264.78 instead of Rs.3750,40,46,264.78 mentioned in prayer-(b) of the Original Application in O.A.No.179 of 2011.

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21. For the reasons stated above, we find no ground to interfere with the order passed by the Debt Recovery Appellate Tribunal. Accordingly, the Civil Revision Petition is dismissed. No costs.

Consequently, the connected miscellaneous petition is closed.

(V.K.T., C.J.) (M.D., J.)
06.02.2019

Index : Yes/No

Speaking Order/Non Speaking Order

Rj

To

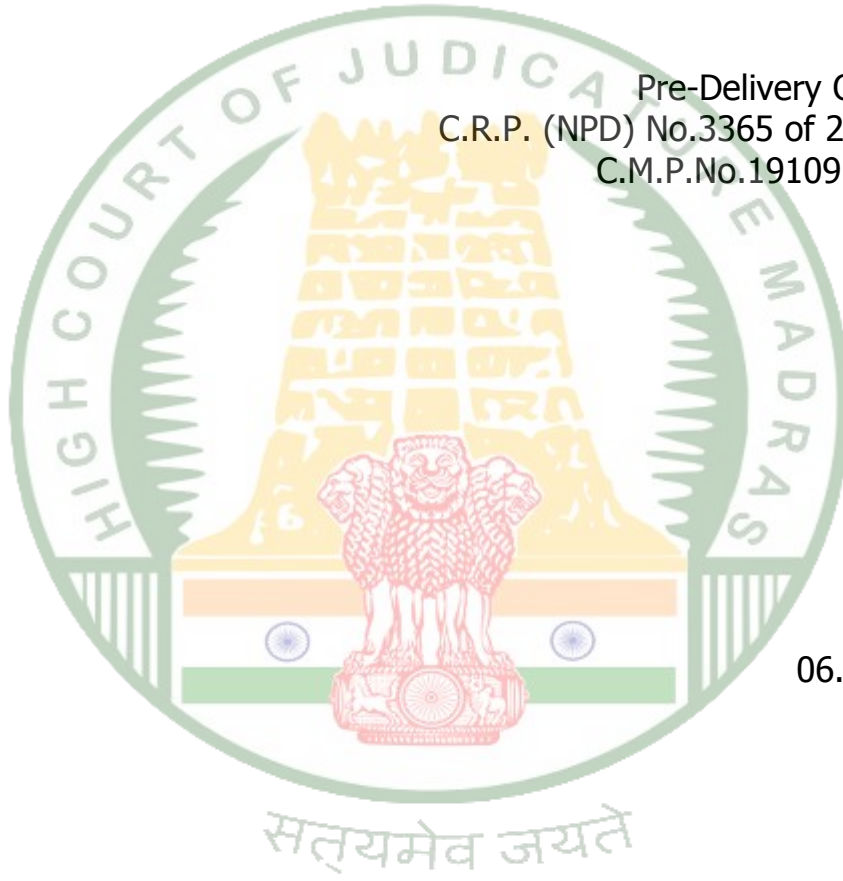
1. ICICI Bank Ltd
ICICI Bank Towers
45th Floor, West Wing, Plot No.24
Ambattur Industrial Estate, Chennai – 600 058
2. Subhiksha Trading Services Limited
Rep. By its Official Liquidator
High Court of Madras
Corporate Bhawan Second Floor
No.29, Rajaji Salai, Chennai – 600 001
3. The Hong Kong & Shanghai Banking Corporation Ltd
Nagabrahma Towers
No.76, Cathedral Road, Chennai – 600 086
4. ABN Amro Bank N.V.
Now changed to Royal Bank of Scotland
18, Haddows Road, Chennai – 600 006
5. .HDFC Bank Ltd
Mariam Centre, 751-1 B, Anna Salai
Chennai – 600 002
- 6 .Yes Bank Limited
143/1, Nungambakkam High Road
Chennai – 600 034

7. Standard Chartered Bank
5th Floor, 19, Rajaji Salai
Chennai – 600 001
8. Development Credit Bank Ltd
61, Nungambakkam High Road
Chennai – 600 034
9. Federal Bank Ltd
SVS Club Building
No.61, Mount Road, Chennai – 600 002
10. Bank of Baroda
CFS Branch, No.74, Thyagaraya Road
Near Panagal Park, Chennai – 600 017
11. The Official Liquidator
Rep. For M/s. Subhiksha Trading Services Ltd
High Court of Madras
Corporate Bhawan, second Floor
No.29, ,Rajaji Salai, Chennai – 600 001

सत्यमेव जयते

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THE HON'BLE CHIEF JUSTICE
AND
M. DURAISWAMY,J.,



Pre-Delivery Order in
C.R.P. (NPD) No.3365 of 2018 and
C.M.P.No.19109 of 2018

06.02.2019

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