

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2021

CORAM:

THE HON'BLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

Crl.O.P. No.20479 of 2017
and
Crl. M.P.No.12294 of 2017

M/s. Karishmaa Foundation Pvt. Ltd.,
Rep. by Mr. Rakesh P. Sheth, Managing Director,
Having office at No.340, 1st South Main Road,
Kapaleeswar Nagar, Neelankarai,
Chennai - 600 115.

...Petitioner

Vs.

M/s. Suryadev Alloys & Power Pvt. Ltd.
rep by S. Ganesan, Marketing Manager,
No.7, 3rd Floor, Golden Conclave,
No.184, P.H. Road, Kilpauk,
Chennai - 600 010

...Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C., to set aside the order passed on 07.09.2017 in C.C. No.2443 of 2014 by the learned Magistrate IVth Fast Track Court, George Town, Chennai and pass orders accordingly.

For Petitioner : Mr.Nithyaeshnataraj
(For Nithyash and Vaibhav)

For Respondent : Mr. A. Thirumaran

O R D E R

This Criminal Original petition has been filed under Section 482 Cr.P.C. to set aside the order passed on 07.09.2017 in C.C. No.2443 of 2014 by the learned Magistrate IVth Fast Track Court, George Town, Chennai and pass orders accordingly.

2.The case of the petitioner is that the complainant/respondent herein has filed compliant in C.C. No.2443

of 2013 against the petitioner herein before the learned Metropolitan Magistrate Court No.IV, Chennai, stating as follows:

2.1. The Complainant is a Registered Private Limited Company in the name and style of M/s Suryadev Alloys and Power Private Limited. The Accused-2 being the Managing Director of M/s. Karishmaa Foundation Pvt. Ltd.,/Accused-1, has Purchased steel goods on various dates on various invoices from the Complainant company. As on date, the petitioner company is having the total out standing due of Rs.90,46,488.39/- (Rupees Ninety Lakhs Forty Six Thousand Four Hundred Eighty Eight and Thirty Nine Paise Only). On repeated demands and request in order to discharge the due as part of its liability, the accused-2 has issued a Cheque bearing No.390877, dated 30-09-2013 for an amount of Rs.15,40,286/- (Rupees Fifteen Lakhs Forty Thousand Two Hundred Eighty Six Only) drawn on "Canara Bank, Kasturba Nagar, Chennai-600 020, in favour of the complainant and also the accused-2 had made an assurance to the complainant that necessary arrangements were made to honour the above said cheque at the time of presentation. On believing the accused's assurance, the complainant had presented the above said cheque before his banker, The Jammu & Kashmir Bank Ltd., Chennai, on 30.09 2013, for collection and en-cashment. However, the same was returned as unpaid due to "Insufficients Balance" in his bank account, to that effect a memorandum was issued to the Complainant by his banker with an endorsement "Insufficients Balance", on 03-10-2013. Having received the information from his banker, the complainant has sent a legal notice dated on 07-10-2013, by registered post, to the accused, calling upon to discharge the entire Cheque amount of Rs. 15,40,286/ (Rupees Fifteen Lakhs Forty Thousand Two Hundred and Eighty Six Only), within fifteen days from the date of receipt of the notice. Even though the said notice was duly received by the accused on 09-10-2013, they had failed and neglected to pay the above said Cheque amount within the stipulated period and till date nor sent any reply. The accused had issued the above said Cheque knowing the insufficient funds in the accused bank account, and consequences thereof. Thus the accused had committed an offence U/s.138 of Negotiable Instruments Act, as amended by the Act of 55 of 2002 and therefore, complainant/respondent herein made the private complaint in C.C. No.2443 of 2014 before the IVth Fast Track Court, George Town, Chennai against the petitioner company. In the above mentioned Calender Case, the respondent/complainant had filed the proof affidavit for marking of documents wherein Exhibits P1 to P10 had been marked. During the cross examination of the complainant on 30.08.2017, the respondent/complainant had marked the 3rd document as Exhibit P.3 which was printed document taken from E-mail. Hence, the petitioner submitted that since the procedure established by law under the Indian Evidence Act has not been followed, the said document must be eschewed from

evidence. As the respondent/complainant himself admitted in the cross examination that the document No.Ex.P3 was printed out from the e-mail, the petitioner had filed the petition under 65(B) of the Indian Evidence Act to eschew the document No.Ex.P3 from the evidence of the complainant in the Hon'ble Metropolitan Magistrate Court No.IV, Chennai. After filing the above said petition, the petitioner's counsel appeared and argued the matter regarding the Section 65(B) of the Evidence Act. But, the learned Metropolitan Magistrate IV, returned the petition on 07.09.2017 with written order stating that "How this petition for eschewing of the evidence is maintainable, when the eschewing of evidence is alien to the Criminal law?" Being aggrieved by the said written order, the petitioner has filed the present Criminal Original Petition under Section 482 Cr.P.C. seeking to set aside the aforesaid order passed on 07.09.2017 in C.C. No.2443 of 2014 by the learned Magistrate, IV Fast Track Court, George Town, Chennai.

3. The learned counsel for the petitioner would submit that it is well settled law that if the procedure established by law is not followed for the marking of a electronic document, the same would have to be eschewed and the petitioner reserves his right to initiate appropriate action against the respondent/complainant under Section 195 r/w 340 of Cr.P.C. for the reasons stated above is maintainable and applicable for Criminal Law. The order of the Trial Court is perverse since Criminal Courts also have power to eschew evidence.

4. The learned Counsel relying on the Judgment in Criminal Appeal No.1418 of 2013 in the case of "Sonu @ Amar Vs. State of Haryana" contends that the electronic document is not admissible unless it is accompanied by a certificate as contemplated under Section 65(B)(4) of the Indian Evidence Act, for which the observations of the Supreme Court in the aforesaid case is as follows:

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23. Mr. Luthra contended that the CDRs are not admissible under Section 65B of the Indian Evidence Act, 1872 as admittedly they were not certified in accordance with sub-section (4) thereof. He placed reliance upon the judgment of this Court in Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 by which the judgment of this Court in State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 was overruled. In Navjot Sandhu (supra) this court held as follows:

Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under

the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.

In Anvars case, this Court held as under:

22. The evidence relating to electronic record, as noted hereinbefore, 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 65-A 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 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu, 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 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B 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 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. 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.

In view of the law laid down in the case of Anvar, Mr. Luthra submitted that the CDRs are liable to be eschewed from consideration....

....It would be relevant to refer to another case decided by this Court in PC Purshothama Reddiar v. S

Perumal, (1972) 1 SCC 9. The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that:

Before leaving this case it is necessary to refer to one of the contentions 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.

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36. For the aforementioned reasons, the judgment of the High Court confirming the Trial Court is upheld. The appeals are dismissed.

Having considered the aforesaid observations made by the Hon'ble Supreme Court, this Court by its order dated 22.09.2017 granted interim order in favour of the petitioner herein by observing that "in the present case, the petitioner's application under Section 65(B) of the Evidence Act to eschew the Document No.P3 has been returned as not maintainable. In view of the above Judgment of Apex Court, the reason for returning the document is unacceptable".

5. Further, the learned counsel for the petitioner has relied on the Judgment of the Supreme Court in the case of "Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others'" reported in (2020) 7 Supreme Court Cases 1 wherein it was held as follows:

"24. It is now appropriate to examine the manner in which Section 65B was interpreted by this Court. In Anvar P.V. (supra), a three Judge Bench of this Court, after setting out Sections 65A and 65B of the Evidence Act, held:

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B 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, company owning the mine is liable to prosecution. No question of violation of Article 14 therefore arises. 2 70. Perusal of the opinion of the Full Bench in B.R. Gupta-I [Balak Ram Gupta v. Union of India, AIR 1987 Del 239] would clearly indicate with regard to interpretation of the word any in Explanation 1 to the first proviso to Section 6 of the Act which expands the scope of stay order granted in one case of landowners to be automatically extended to all those landowners, whose lands are covered under the notifications issued under Section 4 of the Act, irrespective of the fact whether there was any separate order of stay or not as regards their lands.

The logic assigned by the Full Bench, the relevant portions whereof have been reproduced hereinabove, appear to be reasonable, apt, legal and proper. (emphasis added) 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 65-B(2). 11 Following are the specified conditions under Section 65- B(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.

15. Under Section 65-B(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 65-B(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.

16. 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.

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

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

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20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be

governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

21. In State (NCT of Delhi) v. Navjot Sandhu a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows:

(SCC p. 714) 150. According to Section 63, secondary evidence means and includes, among other things, copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65. It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic

record.

22. The evidence relating to electronic record, as noted hereinbefore, 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 65-A 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 65-A and 65-B. 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, 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 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

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25. Though in view of the three-Judge Bench judgments in Tomaso Bruno and Ram Singh [1985 Supp SCC 611] , it can be safely held that electronic evidence is admissible and provisions under Sections 65-A and 65-B 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 65-B(4).

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., 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.

27. The term electronic record is defined in Section 2 (1) (t) of the Information Technology Act, 2000 as follows:

2.(1)(t) electronic record means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

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 under Section 65- B(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 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.

37. It may be noted that the judgments referred to in paragraph 21 of Shafhi Mohammed (supra) are all judgments before the year 2000, when Amendment Act 21 of 2000 first introduced Sections 65A and 65B into the Evidence Act and can, therefore, be of no assistance on interpreting the law as to admissibility into evidence of information contained in electronic records. Likewise, the judgment cited in paragraph 22, namely Tukaram S. Dighole v. Manikrao Shivaji Kokate

(2010) 4 SCC 329 is also a judgment which does not deal with Section 65B."

38. Much succour was taken from the three Judge Bench decision in Tomaso Bruno (supra) in paragraph 23, which, as has been stated hereinabove, does not state the law on Section 65B correctly. Anvar P.V. (supra) was referred to in paragraph 24, but surprisingly, in paragraph 26, the Court held that Sections 65A and 65B cannot be held to be a complete Code on the subject, directly contrary to what was stated by a three Judge Bench in Anvar P.V. (supra). It was then clarified that the requirement of a certificate under Section 64B(4), being procedural, can be relaxed by the Court wherever the interest of justice so justifies, and one circumstance in which the interest of justice so justifies would be where the electronic device is produced by a party who is not in possession of such device, as a result of which such party would not be in a position to secure the requisite certificate.

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Two Latin maxims become important at this stage. The first is *lex non cogit ad impossibilia* i.e. the law does not demand the impossible, and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.

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50. We may hasten to add that Section 65B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. (supra), this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the

requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

51. In a recent judgment, a Division Bench of this Court in *State of Karnataka v. M.R. Hiremath* (2019) 7 SCC 515, after referring to *Anvar P.V.* (supra) held:

16. The same view has been reiterated by a two-Judge Bench of this Court in *Union of India v. Ravindra V. Desai* [(2018) 16 SCC 273]. The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in *Sonu v. State of Haryana* [(2017) 8 SCC 570], in which it was held: 32. 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.

17. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65-B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

The learned counsel for the petitioner further submitted that in view of the aforesaid observations of the Apex Court, it makes clear that the petitioner's application under Section 65(B) of the Evidence Act to eschew the Document No.P3 ought not to have returned and to have been considered by the Court below. Hence, the order dated 07.09.2017 passed by the Court below in C.C. No.2443 of 2014 is liable to be set aside.

6. The learned counsel for the petitioner would further submit that in the cross examination, the complainant deposed as follows:

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"எ.பி. 3 பர்சேஸ் ஆர்டரில் முதலாவது எதிரி நிறுவணம் எங்களுக்கு கொடுத்தது என்றால் சரிதான். அதில் முதலாவது எதிரி நிறுவனத்தின் சீலோ அதன் அனுமதி பெற்ற அலுவலரது கையொப்பமோ உள்ளதா என்றால், அது குறிப்பாக கையொப்பம் செய்யப்பட்டதாக சாட்சி கூறுகிறார்.

எ.பி. 3 நிறுவனமானது முதலாவது எதிரி நிறுவனத்தால் உரிய முறையில் கையொப்பம் செய்யப்படவில்லை என்று சொன்னால் சரிதான். அது எதிரி நிறுவனத்திலிருந்து ஈமெயில் மூலமாக அனுப்பப்பட்டது என்று சாட்சி கூறுகிறார்."

From the above deposition made by the complainant, the said Purchase order Ex.P3 is said to have been sent through E-mail from the petitioner's company wherein there is no seal and signature of the petitioner company. While being so, the Purchase order -Ex.P3 has been marked without any certificate is against the applicability of procedural requirement under Section 65B(4) of the Evidence Act. In the absence of certificate, the document which constitutes electronic data, cannot be deemed to be a valid evidence and has to be ignored from consideration. The contents of electronic records ie. e-mail, may be proved in accordance with the provisions contained in Section 65 B of the Indian Evidence Act, since there is possibility to fabricate the contents of the electronic records. Hence, there is no certificate enclosed with the Ex.P.3, ie. Purchase order to prove its bona-fide, while there are more chances to modify the contents received from E-mail. In view of the above, the order dated 07.09.2017 in C.C. No.2443 of 2014 passed by the learned Magistrate, IV Fast Track Court, George Town, Chennai is against the Indian Evidence Act and liable to be set aside.

7.Per contra, the learned Counsel for the respondent would submit that the proof required in a criminal case cannot be waived by the accused. the petitioner-accused has raised objection pertains to inadmissibility of the document since it is generated from electronic device which cannot be applicable in the Criminal case while the complainant is capable to produce the same.

8. Further, the learned Counsel for the respondent has relied upon the Judgment in the case of Union of India & Others Vs. CDR. Ravindra V. Desai reported in (2018) 16 Supreme Court Case 273 wherein it has been observed as follows:

"18. We are in agreement with the aforesaid findings. Learned counsel for the appellants rightly argued that non-production of the certificate under Section 65-B of the Indian Evidence Act, 1872 on an earlier occasion was a curable defect which stood cured. Law in this behalf has been settled by the judgment of this Court in Sonu alias Amar v. State of Haryana, which can be traced to the following discussion in the said judgment:

32. It is nobodys 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 65-B(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 1 (2017) 8 SCC 570 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 CrPC, 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. (emphasis added)"

The learned counsel for the respondent submitted that in view of the above, the required certificate under Section 65B(4) is unnecessary if the Electronic data has been taken print out as it is received through Email sent by the petitioner-accused herein.

9. Heard the learned counsel for the petitioner and the learned counsel for the respondent as well as perused the material available on records.

10. Having considered the observations in the Judgments relied on by the learned counsel on both sides, whether non-production of the certificate under Section 65-B of the Indian

Evidence Act, 1872 is a curable defect which stands cured cannot be decided at this juncture. Law in this behalf has been settled by the judgment of this Court in "Sonu alias Amar Vs. State of Haryana". The objection is that the said documents were marked before the trial court without a certificate as required by Section 65-B(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 filing an application later. However, 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 e-mail being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency, if pointed out earlier. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken at the trial stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the Trial stage because the matter 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, if any. Hence, whether it is mandatory to produce certificate while marking the electronic data ie. E-mail received from the petitioner herein, being taken from electronic device as exhibits before the Trial Court since it is produced at the time of filing and the admissibility can be decided by the Court while deciding the issue.

11. Further, 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 is the stand taken by the respondent.

12. It is pertinent to point out that the petitioner has challenged the return made by the court below. Whether a document can be accepted as evidence or not, the admissibility of such document can be decided only at the time of concluding the evidence by the trial court. At this juncture, if the court has returned the same, the petitioner is at liberty to raise the same as an objection at the time of argument whether to admit the document or to eschew the evidence and this Court cannot interfere with the same at this stage. Admittedly, the

complaint was filed in November, 2013, proof affidavit was filed by the respondent on 25.10.2016, cross examination took place between 11.04.2017 to 30.08.2017, that being the case, the petitioner had came up with the petition to eschew the document No.P3, from the evidence of the complainant only after cross examination of the complainant and surprisingly, the petitioner also states that he had the knowledge only after cross examination of the complainant. Hence he pleaded order passed by the court below is liable to be set aside.

13. In view of the above discussions, this Court is not inclined to interfere with the order passed by the learned Magistrate, IV Fast Track Court, George Town, Chennai on 07.09.2017 in C.C.No.2443 of 2014. However, it is left open to the parties to canvass their case by producing all the citations [which were referred by them before this Court] in support of their respective contentions before the trial court. Since the case is of the year 2014, the trial court, viz., learned Magistrate, IV Fast Track Court, George Town, Chennai shall complete the trial in C.C.No.2443 of 2014 by taking into consideration the submissions as well as the citations referred by the parties and dispose of the said case within a period of six months from the date of receipt of a copy of this order. It is needless for this Court to make a significant mention that the parties are directed not to take unnecessary adjournments.

In the result, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petition is closed if any.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

Lbm / ssd

To:

1. The Magistrate, IVth Fast Track Court,
George Town, Chennai
2. The Public Prosecutor,
High Court of Madras, Chennai.

CrI.O.P. No.20479 of 2017
and CrI. M.P.No.12294 of 2017

JPL(CO)
SU(21/01/2022)