

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO. 715 OF 2017

Padmakar S/o Wasudeorao Kasarlewar,
Aged about 59 years, Occ: Business,
R/o Samadhi Ward, Chandrapur,
Tahsil & District : Chandrapur.

.... APPELLANTS.
(Org.plff./Respdt.)

// **VERSUS** //

1. Prabhakar S/o Gopala Wadaskar,
Aged about 36 years, Occu: Business,
2. Ravindra S/o Gopala Wadaskar,
Aged about 31 years, Occ. Business,

Both R/o Lakhmapur (Gadchandur),
Tahsil-Korpana, District-Chandrapur.

.... RESPONDENTS.
(Org.defts/Appellants)

Shri Madhur Deo, Adv. h/f. Shri Rohit Joshi, Advocate for Appellants.
Shri P.M.Pande, Advocate for the Respondent No.1.

CORAM : ANIL S. KILOR, J.
DATE OF RESERVING THE JUDGMENT : 22/11/2021
DATE OF PRONOUNCING THE JUDGMENT : 25/03/2022

JUDGMENT :

1. In this appeal a challenge is raised to the judgment and decree dated 09/08/2017 passed by District Judge-3, Chandrapur in Regular Civil Appeal No. 140 of 2011 allowing the said appeal by reversing the judgment and decree, dated 16/03/2011, passed by the 8th Joint Civil Judge Junior Division, Chandrapur in Regular Civil Suit No. 216 of 2008.

2. The brief facts of the present case are as follows: (The parties are referred to as per their status before the trial Court.)

It is the case of the plaintiff that the defendants' real maternal uncle one Sudhakar Bhongare was his milk vendor since 10 to 12 years. He claims that in July 2005 said Sudhakar came to him and requested for some amount for defendant No.1, thereupon the plaintiff lent Rs.80,000/- to defendant No.1 in presence of Sudhakar and defendant No.2. Thereupon an agreement dated 29/08/2005 had been executed by the defendant No.1 and on which the witnesses had signed.

3. It is the further case of the plaintiff that the defendant No.2 had agreed to act as a guarantor. However, on demand of money back

from the defendant No.1 he did not return the amount. Therefore, an oral report was lodged on 13/06/2008 of which no cognizance was taken by the Police.

4. It is submitted that thereafter he sent a legal notice dated 02/07/2008 by Registered Post. Thereupon Rs.15,000/- was returned but the defendant No.1 kept avoiding to make balance payment. It is submitted that on 30/07/2008 when said Sudhakar came for delivering milk the plaintiff asked him to talk with the defendant No.1 from the mobile phone of the plaintiff's son Omkar. He claims that in the telephonic conversation the defendant No.1 agreed and admitted about the payment of Rs.65,000/- and assured of payment of Rs.25,000/- in March and Rs.25,000/- in the next year in the month of March and remaining payment in one and half month.

5. On failure of the defendant No.1 to make the payment as promised, the suit came to be filed for recovery of the amount.

6. The defendants filed their written statement. It is the case of the defendants that they were in need of money and the need was dis-

closed to Sudhakar who took them to the plaintiff to whom they offered to sell gold chain received by the defendant No.1 in the marriage and after weighing the gold chain the amount was paid and the plaintiff took their signature on Rs.100/- stamp paper on the pretext that while selling gold to the jeweler its amount and price is to be written on the stamp paper which is to be shown to the Police.

7. It is further stated that the stamp paper was brought by the plaintiff himself and their signatures were taken on blank stamp paper which has been misused to suit his claim. It is alleged that the plaintiff wants to grab the ancestral land of the defendants.

8. The learned trial Court after scrutinizing oral as well as documentary evidence, decreed the suit in favour of the plaintiff and thereby it is directed to the defendant No.1 to pay Rs.65,000/- to the plaintiff along with 6% interest from the date of filing of the suit till the realization of the amount.

9. The defendants feeling aggrieved by the said judgment and decree dated 16/03/2021 carried an appeal viz. Regular Civil Appeal No.

140 of 2011 before the District Judge-3, Chandrapur. The learned First Appellate Court, thereupon, allowed the appeal and thereby reversed the judgment and decree dated 16/03/2011 and dismissed the suit filed by the plaintiff, vide impugned judgment and decree dated 09/08/2017 passed in Regular Civil Appeal No. 140 of 2011. The same is under challenge in this appeal.

10. This Court, on 26th October 2021 framed the following substantial question of law :

“Whether both the courts below have rightly considered the scope of Section 65-B of the Evidence Act, while discarding the telephonic conversation between the uncle of the defendant No.1 and defendant No.1, of which memory card and transcript was filed?”

11. I have heard the learned counsel for the respective parties.

12. Shri Deo, learned counsel for the appellant submits that the learned First Appellate Court has not taken into consideration the point involved in the appeal regarding Certificate under Section 65B of the Evidence Act in respect of the electronic evidence produced by the plaintiff relating to telephonic conversation, on the ground that there is no cross-

objection filed by the plaintiff to the said finding. It is submitted that the learned First Appellate Court ought to have considered the said point, by exercising powers under Order 41 Rule 33 of the Code whereunder the First Appellate Court can come to a finding different from the one which has been arrived at by the trial Court even though no appeal or cross-objection has been filed against such finding.

13. It is further submitted that the evidence in relation to the telephonic conversation was submitted before the trial Court by way of memory card of the mobile phone wherein the telephonic conversation was stored. The memory card of the mobile phone in which it was stored was owned by the son of the plaintiff viz. Omkar Kasarlewar, who stepped into the witness box. Thus, according to the learned counsel for the appellant the certificate under Section 65B of the Evidence Act is not required in this case. It is submitted that, however, the learned trial Court discarded the said evidence on the ground that certificate under Section 65B of the Evidence Act was not produced. Whereas, the learned First Appellate Court discarded the said evidence on the ground that no cross-objection was filed. For this purpose, the learned counsel for the appellant is relying upon the judgment of the Hon'ble Supreme

Court of India in the case of *Arujun Panditrao Khotkar ..vs.. Kailash Kushanrao Gorantayal*,¹

14. It is submitted that the telephonic conversation leaves no room for doubt that the loan transaction had taken place between the parties and that the defendant No.1 has failed to repay the amount. It is submitted that the learned lower appellate Court committed error in discarding the said evidence and thereby allowing the appeal.

15. On the other hand, the learned counsel for the respondents/defendants supports the impugned judgment and decree dated 09/08/2017 and submits that in absence of the cross-objection, the learned First Appellate Court has rightly discarded the evidence relating to telephonic conversation. It is further submitted that the impugned judgment and decree was passed by the learned appellate Court after scrutinizing the evidence, oral as well as documentary and thereupon the findings were recorded in detail. Hence, no interference is required.

16. To consider the rival contentions of the parties, I have perused the record and proceedings and the judgment and decrees of both

the Courts below and the authority submitted by the learned counsel for the appellant.

17. In view of the contentions raised by both the parties, it is necessary to first examine whether the learned first Appellate Court is right in discarding the point in respect of Section 65B of the Evidence Act for non-filing of the cross-objection by the plaintiff.

18. The Hon'ble Supreme Court of India in the case of *Mahant Dhangir and another ..vs.. Shri Madan Mohan and others*², has held thus:

"15.The sweep of the power under R. 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words "as the case may require" used in R. 33 of O. 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraints that we could see, may be these: That the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two require-

ments are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under R. 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities.”

19. From the above referred observations made by the Hon’ble Supreme Court of India it is clear that Appellate Court is having wide powers under Order 41 Rule 33 of Code of Civil Procedure to pass any order or decree to meet ends of justice. The only constraints are that the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the Lower Court. If these two requirements are there the Appellate Court can consider any objections against any part of the judgment or the decree of the lower Court.

20. In this case, the learned trial Court has dealt with electronic evidence and it was not considered on the ground that cer-

tificate under Section 65B of the Evidence Act has not been produced. Thus, the said issue was there, however, it was not considered only on the ground that no cross objection was filed by the plaintiff challenging the said findings.

21. In that view of the matter, I have no hesitation to hold that the learned First Appellate Court has committed an error in not considering the point involved in the appeal regarding requirement of certificate under Section 65B of the Evidence Act on the ground that there is no cross-objection to the said findings.

22. Moving to the next point whether certificate under Section 65B is mandatory or not, the said issue is no more *res integra*, in view of the judgment in the case of *Arjun Panditrao Khotkar* (supra), which reads thus:

“52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V., 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 person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(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.

61. We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.*, and incorrectly “clarified” in *Shafhi Mohammed*. Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in *Taylor v. Taylor* (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.”

23. In the light of the law laid down in the case of *Arjun Panditrao Khotkar* (supra) wherein the Hon'ble Supreme Court of India has also considered the judgment in the case of *Anvar P.V...vs..P.K. Basheer*³, the point whether the primary evidence produced by the plaintiff's witness Omkar Padmakar Kasarlewar who is the owner of the mobile in which the telephonic conversation was recorded and the memory card of the same was produced along with CD, is sufficient or certificate of the owner of the phone under Section 65B would require, needs to be decided which has not been decided by the learned appellate Court on the ground that cross-appeal was not filed.

24. The Hon'ble Supreme Court of India in a case of *U. Manjunath Rao ..vs.. U. Chandrasekhar & anr.*⁴ has held that First Appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings sup-

3 (2014) 10 SCC 473

4 (2017) 15 SCC 209

ported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court.

25. In that view of the matter, I am of the opinion that this matter needs to be referred back to the learned first appellate Court for a decision afresh.

26. Accordingly, I have answered the substantial question law and pass the following order:

- i) The appeal is partly allowed.
- ii) The judgment and decree dated 09/08/2017 passed by the learned District Judge-3, Chandrapur in Regular Civil Appeal No.140 of 2011 is hereby quashed and set aside.
- iii) The matter is remanded back to the District Judge-3, Chandrapur for deciding it afresh on restoration of the Regular Civil Appeal to its original number.

- iv) The learned District Judge-3, Chandrapur is requested to decide the appeal as expeditiously as possible and in any case not beyond 31st December 2022.
- v) Record and Proceedings be sent back to the District Judge-3, Chandrapur, forthwith.

The Second Appeal stands **disposed of** accordingly. No order as to costs.

In view of disposal of the Second Appeal, the pending Civil Application(s), if any, shall stand **disposed of**.

(ANIL S. KILOR, J)

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