IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 84 of 2007

Date of decision: 03.01.2019.

Virender Partap Negi **.....Appellant.**

Versus

Union of India & Anr. **.....Respondents.**

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?[1] ***Yes.***

For the Appellant: **Mr. Dibender Ghosh, Advocate.**

For the Respondents: **None for respondent No. 1.**

Mr. Navlesh Verma and Mr. S. K. Banyal, Advocates, for respondent No. 2.

Justice Tarlok Singh Chauhan, Judge (Oral)

The defendant is the appellant, who aggrieved by the judgments and decrees passed by the learned Trial Court and as modified by the learned first Appellate Court, whereby the suit of the plaintiffs/respondents for recovery of Rs.43,355/- alongwith interest at the rate of 6% per annum (as modified by first appellate court) was decreed, has filed the instant appeal.

2. The defendant was the franchisee holder of STD PCO installed at main bazaar Reckong Peo and an amount of Rs.43,355/- was arrears towards the outstanding telephone bills.

[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?Yes***

The defendant was requested to pay this amount but to no avail. Hence, the suit.

3. The defendant contested the suit by filing written statement wherein preliminary objections regarding locus standi, maintainability, cause of action, non-joinder of necessary parties were taken. On merits, it was averred that the plaintiffs have nothing to recover from the defendant as he has paid all the dues that were recoverable from him. It was also averred that the plaintiffs had been over-charging the defendant on many occasions and despite repeated requests the officials of the plaintiffs had refused to adjust this amount.

4. The learned Trial Court after framing issues and recording evidence, decreed the suit as aforesaid and the appeal filed by the defendant against such judgment and decree also came to be dismissed by the learned first Appellate Court, constraining him to file the instant Regular Second Appeal

5. On 21.09.2007, the appeal was admitted on the following substantial questions of law:-

> *"1. Whether the document can be relied in evidence, which is prepared in electronic machine, without required certificate as per the provisions of the Information and Technology Act, 2000?*
>
> *2. Whether the documents which are, electronic record, is required to be proved as per the provisions of Section 65B of the Indian Evidence Act?"*

> *3. Whether interest can be granted in a suit for recovery of money beyond the provision of Section 34 of the Code of Civil Procedure Code?*

I have heard learned counsel for the parties and have gone through the records of the case.

Substantial Questions No. 1 & 2

6. It is vehemently argued by Shri Debinder Gosh, learned counsel for the appellant that the suit of the plaintiffs could not have been decreed solely on the basis of the bill that was produced on record, as this bill was not admissible in evidence in view of Section 65B of the Indian Evidence Act. He would contend that electronic record can be admitted in evidence only if requirements under Section 65B are satisfied. In order to buttress his submission, strong reliance is placed upon Hon'ble three Judges Bench decision of the Hon'ble Supreme Court in ***Anvar P. V. vs. P. K. Basheer and others AIR 2015 SC 180***, wherein it has been held as under:-

> *"19. 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 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B 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.*

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 , 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."

7. Obviously, there can be no quarrel with the proposition as has been held by Hon'ble Supreme Court, however, the moot question is whether the judgment is at all applicable to the facts of the case. The reason being that non-production of the certificate under Section 65B of the Indian Evidence Act on an earlier occasion is a curable defect, which stands cured at the time of marking of the documents as the defendant never ever objected to the exhibiting / marking of the same during the course of trial.

8. Similar issue came up before the Hon'ble Supreme Court in ***Sonu alias Amar vs. State of Haryana (2017) 8 SCC 570***, wherein it was observed as under:-

> *"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 tothat 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.”

9. Similar reiteration of law can be found in another recent judgment of the Hon’ble Supreme Court in ***Union of India vs. CDR Ravindra V. Desai AIR 2018 SC 2754.***

10. Additionally and apart from the above, it would be noticed that the defendant has not specifically raised this plea before the learned first Appellate Court, therefore, is precluded from doing so.

Accordingly, both the substantial questions of law are answered against the appellant/defendant.

Question No. 3

11. As observed above, the learned Trial Court had granted future interest at the rate of 18% per annum, which according to the plaintiffs could not be granted beyond 6% per annum. However, what appears to have been conveniently ignored by the defendant is that the judgment and decree passed by the learned Trial Court was modified to the extent that instead of 18% per annum, the plaintiffs were held entitled to interest at the rate of 6% per annum, which is strictly in consonance with Section 34 of the Code of Civil Procedure.

This substantial question of law is answered accordingly.

12. In view of the aforesaid discussion and questions wise findings, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

3rd January, 2019 **(Tarlok Singh Chauhan)**
(sanjeev) **Judge**