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IN THE HIGH COURT OF ORISSA AT CUTTACK

OTAPL Nos. 13, 14, 15, 16 and 17 of 2016

Commissioner of Central Excise and Customs, Bhubaneswar-II .... ***Appellant***
(In OTAPL No.13 of 2016)

Mr. Choudhury Satyajit Mishra
Senior Standing Counsel

-versus-

M/s. Shivam Steel Corporation .... ***Respondent***

Mr. Kartik Kurmy, Advocate

Commissioner of Central Excise and Customs, Bhubaneswar-II .... ***Appellant***
(In OTAPL No.14 of 2016)

Mr. Choudhury Satyajit Mishra
Senior Standing Counsel

-versus-

Rajinder Agarwal .... ***Respondent***

Mr. Kartik Kurmy, Advocate

Commissioner of Central Excise and Customs, Bhubaneswar-II .... ***Appellant***
(In OTAPL No.15 of 2016)

Mr. Choudhury Satyajit Mishra
Senior Standing Counsel

-versus-

Ajaya Bansal .... ***Respondent***

Mr. Kartik Kurmy, Advocate

Commissioner of Central Excise and Customs, Bhubaneswar-II .... ***Appellant***

(In OTAPL No.16 of 2016)

Mr. Choudhury Satyajit Mishra
Senior Standing Counsel

-versus-

Ajay Bansal .... ***Respondent***

Mr. Kartik Kurmy, Advocate

Commissioner of Central Excise and Customs, Bhubaneswar-II .... ***Appellant***

(In OTAPL No.17 of 2016)

Mr. Choudhury Satyajit Mishra
Senior Standing Counsel

-versus-

M/s. Bajrang Steel & Alloys Pvt. Ltd. .... ***Respondent***

Mr. Kartik Kurmy, Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN

ORDER
14.12.2022

Order No. ***Dr. S. Muralidhar, CJ.***

08. 1. These appeals by the Commissioner of Central Excise & Customs (hereafter 'Department') raise a common question of law and are accordingly being disposed of by this common judgment.

2. In OTAPL No.13 of 2016, while admitting the present appeal on 11th December, 2017 the following questions of law were framed by this Court for consideration:

"(1) Whether in the facts and circumstances of the case, when the Investigating Officers have never taken the print out of Sundarlal ledger account from the computer, rather seized the said document from the residential premises of the Accountant of the Respondent, under such admitted fact, the Tribunal is correct in observing that the said document cannot be used as evidence for not satisfying the conditions laid down in Section 36-B (2) of the Central Excise Act, 1944?

(2) Whether in the present facts and circumstances of the case, the Tribunal is correct in applying the observations of the Hon'ble Supreme Court made in the case of *Anvar P.V.* to the present case, without considering the fact and circumstances on which the Hon'ble Apex Court has delivered the said judgment?

(3) Whether under the facts and circumstances of the case, the Tribunal is correct in law by giving emphasis only on the conditions stipulated in Section 36-B(2) of the Central Excise Act, 1944 without considering other admitted relevant materials on record?"

3. The same three questions have been framed by this Court in OTAPL No.17 of 2016 by a separate order dated 11th December, 2017.

4. In OTAPL No.14 of 2016, by an order of the same date the following questions were framed for consideration:

"(1) Whether in the facts and circumstances of the case, the Tribunal is correct in deleting the penalty as imposed on the respondent U/r.26 of the Central Excise Rules, 2002, without considering the relevant facts and the materials on record?

(2) Whether in the present facts and circumstances of the case, the Tribunal is correct in deleting the penalty

as imposed under Rule 26 of the Central Excise Rules, 2002 without giving any reason or discussing anything in the impugned order?"

5. Identical questions have been urged in the other appeals i.e., OTAPL Nos. 15 and 16 of 2016 by the Department.

6. It must be noted at the outset that it has been the contention of Mr. Kartik Kurmy, learned counsel appearing for the Respondent-Assessee, that in each of the Department's appeals apart from OTAPL No 13 of 2016, i.e. OATPL Nos. 14, 15, 16 and 17 of 2016, the amount involved is below the monetary limit set by the instruction dated 22nd August, 2019 read with a Circular dated 26th December 2014 of the Central Board of Indirect taxes and Customs. However, Mr. Ch. Satyajit Mishra, learned Senior Standing Counsel appearing for the Appellant-Department maintains that all the appeals have to be considered together and not in isolation since they all involve connected questions of law.

7. Without entering to the issue concerning monetary limit, the Court has heard all the appeals on merits and accordingly proceeds to discuss the central question that is urged in OTAPL Nos.13 and 17 of 2016, viz., the seizure of a computer print-out of 'Sunderlal' ledger account from the residential premises of the accountant of Shivam Steel Corporation (SSC) which according to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) as held in its impugned order dated 29th April, 2016 is inadmissible in evidence

for not satisfying the conditions laid down under Section 36-B(2) of the Central Excise Act, 1944 (CE Act).

8. The factual background is that SSC is a partnership firm with Shri Ajay Bansal and Shri Rajinder Agarwal as partners. Both of them were also the Directors of another unit, viz., M/s. Bajarang Steel and Alloys (Private) Limited (BSAL) which was engaged in manufacture of M.S. Ingots and situated at a distance of 500 meters from the factory of SSC. According to the Department, since the partners of SSE were also the Directors of BSAL, both units are inter-connected units under the Monopolies and Restrictive Trade Practices Act.

9. On 11th August, 2006 the officers of the Directorate General, Central Excise Intelligence (DGCEI) simultaneously raided the factory and office premises of BSAL, the residence of one Shri Sanatan Maity, accountant of SSC and also the office premises of BSAL and recovered a number of incriminating documents each of which was seized under a *Panchanama*. During the course of the investigation, DGCEI also recorded the statements of Shri Bansal, Shri Agarwal and Shri Maity and the two partners of SSC.

10. In para 4 of the memorandum of appeal of the Department in OATPL No. 13 of 2016 this Court, it is averred that "comparison of the computer print out of the sales ledger of the Respondent recovered from the premises vis-à-vis the invoices issued to the Purchasing Dealer during the relevant period showed that goods

involving duties of Rs.28,17,957.00 was sold by the Respondent without payment of duty. Both the Partners of the Respondent in their statements confirmed the clandestine removal reflected in the ledger."

11. Since the questions of law framed revolve around the computer print out of the sales ledger of 'Sunderlal', it is necessary to dwell upon the legal implications of the said document. Admittedly, the said document, i.e., computer print-out is in the nature of 'electronic evidence' to which Section 65-B of the Indian Evidence Act, 1872 (EA) applies. For use of such electronic evidence in adjudication, the requirements of Section 36-B of the CE Act, which reads as "Admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence" have to be satisfied.

12. The title of Section 36-B of the CE Act itself refers to admissibility of 'computer print outs as documents and as evidence'. It is mandatory in terms of Section 36-B (1), for a computer print-out to be admissible without further proof of production of the original, to satisfy the conditions set out in Section 36-B(2) read with Section 36-B (4) of the CE Act. The said conditions are more or less similar to the conditions stipulated in Section 65-B (4) of the EA. The mandatory requirement of Section 65-B (4) was discussed by the Supreme Court of India in ***Anvar P.V. v. P.K. Basheer (2014) 10 SCC 473***. It was held as under in the said judgment:

"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."

13. The correctness of the above decision in ***Anvar P.V. v. P.K. Basheer*** (*supra*) was revisited by the Supreme Court in a subsequent decision in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (2020) 7 SCC 1***. The Supreme Court reiterated the mandatory nature of Section 65-B (4) of the EA and declined to revisit the decision in ***Anvar P.V. v. P.K. Basheer*** (*supra*). In ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*** (*supra*) the Supreme Court held as under:

> "32. Coming back to Section 65-B of the Indian Evidence Act, sub-section (1) needs to be analyzed. The sub-section begins with a non- obstante clause, and then goes on to mention information contained in an electronic record produced by a computer, which is, by a deeming fiction, then made a "document". This deeming fiction only takes effect if the further conditions mentioned in the Section are satisfied in relation to both the information and the computer in question; and if such conditions are met, the "document" shall then be admissible in any proceedings. The words "…*without further proof or production of the original*…" make it clear that once the deeming fiction is given effect by the fulfilment of the conditions mentioned in the Section, the "deemed document" now becomes admissible in evidence *without further proof or production of the original* as evidence of any contents of the original, or of any fact stated therein of which direct evidence would be admissible.

33. The non-obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65-B, which is a special provision in this behalf - Sections 62 to 65 being irrelevant for this purpose. However, Section 65-B(1) clearly differentiates between the "original" document - which would be the original "electronic record" contained in the "computer" in which the original information is first stored -and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65-B differentiates between the original information contained in the "computer" itself and copies made therefrom – the former being primary evidence, and the latter being secondary evidence.

34. Quite obviously, the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where "the computer", as defined, happens to be a part of a "computer system" or "computer network" (as defined in the Information Technology Act, 2000) and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). This being the case, it is necessary to clarify what is contained in the last sentence in paragraph 24 of *Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473* which reads as "…*if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act*…". This may more appropriately be read without the words "*under Section*

> *62 of the Evidence Act*,…". With this minor clarification, the law stated in para 24 of *Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473* does not need to be revisited."

14. The Supreme Court in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*** (*supra*) categorically held that the decisions of the Supreme Court of India in ***Tomaso Bruno v. State of U.P. (2015) 7 SCC 178*** as well as ***Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801*** had not stated the law on Section 65-B of the EA correctly and were in the teeth of the judgment in ***Anvar P.V. v. P.K. Basheer*** (*supra*). The Supreme Court in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*** (*supra*) further explained as under:

> "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. v. P.K. Basheer, (2014) 10 SCC 473*, 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 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."

15. Summing up the legal positions, it was held as under:

> "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. v. P.K. Basheer, (2014) 10 SCC 473*, and incorrectly "clarified" in *Shafhi Mohammed v. State of H.P., (2018) 2 SCC 801*. 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 (1875) LR 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 lead in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose."

16. As already noted, the wording of 36-B (2) read with Section 36-B (4) of the of the CE Act, is nearly identical to the wording of Section 65-B (4) of the EA and, therefore, the above decisions in ***Anvar P.V. v. P.K. Basheer*** (*supra*) and ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*** (*supra*) would squarely apply to the facts of the case on hand. Admittedly, in the present case, no certificate as required under Section 36-B(2) read with Section 36-B (4) of the CE Act was produced. Consequently, the CESTAT concluded that the computer print-outs taken from the residence of the accountant of SSC were inadmissible in evidence since they

were not accompanied by the requisite certificates as mandated under Section 36-B(2) read with Section 36-B(4) of the CE Act.

17. Mr. Choudhury Satyajit Mishra, learned Senior Standing Counsel for the Appellant-Department contended that since the Department had seized only the computer print-out and not the computer, it cannot be expected to comply with the requirements of Section 36-B(2) read with 36-B(4) of the CE Act.

18. The Court is unable to accept the above submission. Since it is the Department which is seeking to place reliance on the seized computer print-out, the burden is on the Department to ensure that the requirements of the law as regards its admissibility are fulfilled. Even if the Department did not seize the computer from where the print-out was taken, it would still not relieve the Department, if it seeks to rely on such computer print-out, from the burden of ensuring that the mandatory requirement of Section 36-B(2) read with Section 36-B(4) of the CE Act is fulfilled. If the Department is for any reason not in a position to furnish the certificate as envisaged under Section 36-B(4) of the CE Act, then the person who in charge of the computer and aware of its working would have to give such certificate. The long and short of this discussion is that without a certificate as mandated under Section 36-B (4) of the CE Act, accompanying the computer print-out, it cannot be relied upon by the Department in the adjudication proceedings.

19. Consequently, this Court concurs with the view expressed by the CESTAT in the impugned judgment dated 29th April, 2016. Question Nos. (1), (2) and (3) framed in OTAPL Nos. 13 and 17 of 2016 are accordingly answered in the affirmative, i.e., in favour of the Respondent-Assessee and against the Appellant-Department.

20. As a result of the above determination, the questions framed in the companion OTAPL Nos. 14, 15 and 16 of 2016 are answered again in the affirmative, i.e., in favour of the Respondent-Assessee and against the Appellant-Department.

21. The appeals are accordingly dismissed but, in the circumstances, with no order as to costs.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge

S. Behera