Sonam

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 10 OF 2024
WITH
MISC. CIVIL APPLICATION NO. 41 OF 2026 (F)
WITH
MISC. CIVIL APPLICATION NO. 651 OF 2015
WITH
MISC. CIVIL APPLICATION NO. 699 OF 2019
WITH
MISC. CIVIL APPLICATION NO. 896 OF 2019

1. M/s O & M Services Company
Sole proprietorship concern of
Mr. Suresh Pathoor Rao,
62 years in age,
Having its office at 201,
Second Floor, Sai Chamber,
Sector 11, C. B. D. Belapur,
Navi Mumbai-400614.

2. Mr. Suresh Pathoor Rao,
Indian National, 62 years of age,
Businessman, resident of Mumbai,
Carrying on business under the name of
M/s O & M Services Company,
Having its office at 201,
Second Floor, Sai Chamber,
Sector 11, C. B. D. Belapur.
Navi Mumbai-400614.

… Appellants

Versus

1. M/s Surface Tech (India) Pvt. Ltd.
A company incorporated and
Registered under the
Provisions of Companies Act, 1956,
Having its registered office at,
25, Shreementa Market, A. T. Road,
Guwahati-781001, Assam
And local project office at
BRO camp, INS Hansa Airport Road,
Dabolim, Goa-403801.
Represented by its duly constituted attorney,
Mr. Deepak Srivastava, Indian National,
Major in age, employed,
Resident of Vasco da Gama, Goa. **…Respondent**

Mr. Shivan Desai with Ms. Riya Amonkar, Advocates for the Appellants/Applicants.

Mr. Bhargav Khandeparkar, Advocate for Respondent No. 1

CORAM : VALMIKI MENEZES, J.
RESERVED ON : 5TH MARCH, 2026.
PRONOUNCED ON: 17TH AUGUST, 2026.

JUDGMENT:

1. This Appeal impugns the Judgment and Decree dated 31.10.2013 passed by the Civil Judge Senior Division at Vasco in Special Civil Suit No. 39/2009/B and dismissed the Counter Claim filed by the Appellants.

2. The Appellants are the original Defendants and the Respondents are the Original Plaintiffs in Special Civil Suit No.39/2009/B; the parties shall hereinafter be referred to by their original nomenclature "Plaintiffs and Defendants". It was the case of the Plaintiffs in the plaint that it was a Company which executed civil contracts for the Military Engineering Service and other agencies of the Indian Defence Force, and for which it needed supply of Ready Mix Concrete (R.M.C). To that end, it accepted the offer of the Defendants vide their letter bearing No. O&M/STPL/Mgmt/001 dated 10.09.2007 and subsequently issued work order dated 12.09.2007 under which the Defendants were to set up a mobile batching (R.M.C) plant at the work site of the Plaintiffs, at Dabolim, and for production and supply of R.M.C; that the contract would be irrevocable and continuous for a period of 12 months for production and supply of 45000 cubic metres of concrete, extendable on same conditions as per requirement; the Defendants were to install their own infrastructure, have its own staff, workmen and technicians and supply concrete as per requirement and minimum requirement being 4000 cubic metres per month; the price was fixed at Rs.225 per cubic metre.

According to the Plaintiff, it was to pay Rs.5 lakhs as advance to install the batching plant, agreed to be recovered from the 4th Running Account Bill (R.A. Bill) in six months; the Defendants were to provide certified quality concrete and submit R.A. Bills. It was also agreed between the parties that payment would be made only on submissions of R.A. Bills to the Plaintiffs, along with Original Challans certified by the Site in Charge.

3. According to the Plaintiffs, the Defendants failed to provide R.A. Bills despite regular reminders, despite which the Plaintiffs released payments on demand, only with a view to keep the work at site running. According to the Plaintiffs some amounts were released to the Defendants without R.A. Bills at their request, as they claim they needed funds to repair the plant. The Work Order expired on 12.09.2008. The Parties mutually continued operating the contract; defendants supplied the concrete and the Plaintiff made payments whilst insisting on R.A. Bills. According to the Plaintiffs, a total payment amounting to Rs.85,00,000/- was made to the Defendants.

4. According to the Plaintiffs in June 2009 the Defendants requested for payment of Rs.5 Lakhs, to which Plaintiffs issued a cheque amounting to Rs.3 Lakhs on a

promise by the Defendants that R.A. Bills would be submitted by them; on a further demand for payment an amount of Rs.2 Lakhs being made by the Defendants, the Plaintiffs, believing the same to be a strategy to demand money, stopped the payment of the earlier cheque for Rs.3 Lakhs and agreed to pay the same only if the Defendants provided R.A .Bills. However, The Defendants sent a legal notice under section 138 of the Negotiable Instruments Act, in reply the Plaintiffs demanded R.A. Bills for payment to continue and gave a clarification that Defendants were entitled to Rs.65,25,000/- but the Plaintiffs paid Rs.85,00,000/- and demanded the excess of Rs.19,75,000/-.

It is the Plaintiffs' case that the defendants, pursuant to the said reply, began winding up the project, despite objection from the Plaintiffs, who sought assistance from the Police and took away the machinery and the plant on 19.07.2009. The Plaintiffs have sought the following reliefs:

That the Defendants are liable to refund the Plaintiffs the excess amount of Rs.16,02,006.25/- as they had been paid Rs.85,00,000/- for the supply of 30,657.75 cubic metre which payment is made in excess to the supply, at the rate of 18% p.a.

The Defendants also filed Criminal Case No.274/2009 (10732/2015 New) against the Plaintiffs in the Court of the Judicial Magistrate First Class at Navi Mumbai under section 138 of the Negotiable Instruments Act and subsequently process was issued against the Plaintiffs.

5. The Defendants vide their Written Statement and Counter Claim dated 17.12.2009, contended that the Plaintiffs themselves have not adhered to the Work Order and are themselves liable to pay the Defendants Rs.16,25,000/- along with interest @24% which amounts to Rs.5,31,156 until June 2009 and Rs.1,95,000/- from 01.07.2009 till the filing of the suit as balance payment of the said work; Rs.74,45,250/- along with interest @24% which amounts to Rs.10,42,335, towards maintenance and operation of the batching plant from 01.10.2008 to 31.05.2009, and the same was communicated to the Plaintiffs vide letter dated 23.06.2009 which was never replied to by the Plaintiffs, and to claim the said amount the Defendants have filed a Counter claim in the said suit claiming these amounts.

6. According to the Defendant, the Plaintiffs were bound to purchase the total quantity of 45000 cubic metres during the contract period and were to pay idle charges and total

contract value of Rs.1,01,25,000/-. It further the Defendants case that they had submitted R.A. Bills, however, they were not accepted by the Plaintiffs despite the same being sent via Registered Post A.D which returned as "refused R to sender". Further the defendants have denied the allegations on various grounds.

The plaintiffs on 12.01.2010 filed their Written Statement to the Counter Claim of the defendants denying the Defendants' claim.

This Appeal was admitted vide order dated 13.02.2014, pursuant to which the Defendants filed Miscellaneous Civil Application No.651 of 2015 for amending the Written Statement/ Counter Claim and for amendment of the Appeal memo. In the meantime, the Criminal case no.274/2009 (10732/2015 New) was compounded vide application dated 03.08.216 on payment being made by the Plaintiff and the said case was disposed of on 05.06.2018.

7. The Respondent filed yet another Miscellaneous Civil Application No.699 of 2019, on 02.02.2019, seeking amendment of the appeal to incorporate new grounds and events which occurred subsequently ; Miscellaneous Civil

Application NO.896 of 2019, on 11.09.2019 for production of Documents as additional evidence in terms of Order XLI Rule 28 CPC and Miscellaneous Civil Application No.41 of 2026 (F) for refund of the Bank Guarantee of Rs.12,81,429/- and Fixed Deposit of Rs.16,02,006/- deposited in this Court pursuant to stay being granted vide order dated 13.02.2014 in the present appeal.

SUBMISSIONS

8. The Appellant was appearing in person in this matter and was insisting on arguing the matter on his own. Since this Court was of the opinion that it required assistance of a Legal Counsel to put forth the case of the Appellant, in Appeal, by an order of 20.01.2026, learned Advocate Mr. Shivan Desai, was appointed to represent the Appellant and assist the Court; nevertheless, the Appellant, through its Proprietor Shri. Suresh P. Rao, presented written notes of arguments before this Court, whilst learned Advocate Shri. Shivan Desai advanced oral arguments and filed a written synopsis on behalf of the Appellant. The following submissions were advanced by the Appellant:

   a. The Defendants failed to prove how an excess amount of Rs.16,02,006.25/- was paid to Appellants, which was a relief sought in the suit.

b. Defendants have not proved that total quantity of 30,657.75 Cu.Mts. was produced except by providing a Statement of Accounts at Exhibit 68colly to 72 Colly as it was the only evidence which was maintained by them. According to the Appellant, mere production of the Statement of Accounts and the fact that it was exhibited is not proof of the content of the document.

c. Statements made by PW1 in Cross Examination state that PW1 has deposed on statements of accounts without having prima facie knowledge of the same whereas Deepak Srivastava who is the Project Manager should have been examined to prove the authenticity of the Evidence for it to be admissible and therefore the trial court could not have given weightage to the said documents to prove the quantity of concrete produced and supplied.

d. Accounts of the defendants do not tally thus reliance cannot be placed on the Statement of Accounts, Voucher and other ledger entries and the same is admitted by PW1.

e. The duration of the Work order is clearly stated to be 12 months or production of 45,000 Cu.Mts at the price of Rs.1,01,25,000/- or whichever is earlier therefore contract could end upon completion of 12 months or production of 45000 Cu.Mts of concrete; since 12 months period was over, irrespective of the quantity, the said amount was to be paid to the Defendants.

f. The Appellant claims that an amount towards Idle charges is due to him as the contract provides for such payment. It is submitted that PW-1 admits that no order for production was given from 29.05.2008 to 29.09.2008, which entitle him to idle charges according to the contract. Defendant is entitled for charges for production and supply of concrete from 01.10.2008 to 31.05.2009, beyond contract period and for maintenance of the batching plant during the said period as the same is admitted in evidence by PW-1. Reliance has been placed the following case law:

   i. Parimal v/s Veena[1]

[1] (2011) 3 SCC 545

ii. ***Rangammal v/s Kuppuswami and anr***[2]

iii. ***Narbada Devi Gupta v/s Birendra Kumar Jaiswal and Nar*** [3]

iv. ***Vishnu Vardhan v/s State of Uttar Pradesh and Ors***[4]**.**

The Appellant Mr. Suresh Rao, in person, has also filed written notes of arguments. In these, I have noted that the party in person has made serious personal allegations against the Judge of the Trial Court and against the learned Advocate appearing for the Plaintiff. On going through these allegations, I am of the opinion that, these border on being contemptuous and made to embarrass officers of the Court and I therefore choose, under these circumstances, not to refer to any of these arguments and allegations. The substance of the written submission however, are that the Plaintiff has committed fraud; the written submissions are also to the extent that the liability of the original Plaintiff, claimed in the counterclaim has been admitted during the course of hearing of the Criminal Case before the JMFC in Navi Mumbai, filed by the Defendant when a cheque issued by the Plaintiff claimed to be dishonoured. These arguments

[2] (2011) 12 SCC 220
[3] (2003) 8 SCC 745
[4] 2025 SCC OnLine SC 1501

are raised outside the record and could be dealt with in this Judgment at the time the MCA No. 41/2026(F) is dealt with. The second set of written submission filed by the party on 25.02.2026 also referred to alleged fraud committed by the Plaintiff and extensively refers to the evidence of PW1 on the electronic evidence produced under Exhibit 46 to 74. These submissions are dealt with by me whilst considering the evidence of PW1.

9. Learned Advocate Mr. Bhargav Khandeparkar for the Respondents has advanced the following submissions;

a. The learned Advocate has taken me through the pleadings of the parties and the various Clauses of the contract; his main submission was that the Defendant could not claim the contract amount of Rs.1,01,25,000/- in view of the Clauses of the contract and most specifically to the Clause which deals with delay charges and manner of paying the R.A. Bills. The learned Counsel has extensively referred to the evidence of the Defendant and the fact that the Defendant had in fact charged idle charges, which were subsequently merged and adjusted into subsequent Work Order after one year has expired, and within the contract value.

The learned Counsel has extensively referred the correspondences between the parties. He had argued that once the Defendant received receipt of 85 Lakhs and does not produce R. A. Bills or a record, counter signed by the Plaintiff's Site Incharge, to substantiate the quantum of R. M. C. Supplied, the burden of proof under Section101 of the Evidence Act, would be on the Defendant.

He submits that the Plaintiff cannot be expected to discharge negative burden of proving these facts.

b. It was then submitted that the Defendant has not proved any of the claims in the counterclaim based upon the contract and the claim is only based on the balance amount under the Work Order of Rs.16,02,006.25/- claimed by the Plaintiff as excess payment. It was also contended that there is no reason for substantiating an exorbitant rate of interest of 24% claimed in the counterclaim.

Reliance has been placed on the following judgements:

i. ***Vishnu Vardhan (supra)***

ii. *Bibhuti Bhusan Dutta v/s Samarendra Nath Misra*[5]

iii. *Ram Gopal v/s Vidya Devi*[6]

iv. *Gopal Krishnaji Ketkar v/s Mohamed Haji Latif*[7]

v. *Khushalbhai Mahijibhai Patel v/s A Firm of Mohamadhussain Rahimbux*[8]

vi. *Niranjan Kaur v/s New Delhi Hotels Ltd*[9]

vii. *Citibank N.A v/s Standard Chartered Bank & Ors*[10]

viii. *M/s Kailash Nath Associates v/s Delhi Development Authority 7 Anr*[11]

ix. *Placido Francisco Pinto v/s Jose Francisco Pinto*[12]

x. *Hemalatha & Ors v/s Tukaram & Ors*[13]

xi. *Annaya Kocha Shetty v/s Laxmibai Narayan Satose*[14]

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[5] 2002 SCC OnLine Cal 350
[6] 2024 0 supreme (HP) 275
[7] 1968 SCC OnLine SC 63
[8] 1980 Supp SCC 1
[9] 1987 SCC OnLine Del 313
[10] 2004 (1) SCC 12
[11] 2015 2 SCC (Civ) 502
[12] (2024) 14 SCC 569
[13] 2026 SCC OnLine SC 106
[14] 2025 SCC OnLine SC 758

xii. ***R.S Amarnath Mehra & Co v/s Union of India***[15]

CONSIDERATIONS

10. I have considered the pleadings of the parties, the evidence on record and their arguments; the following points for determination arise in this Appeal:

(a) Has the Plaintiffs proved with legally acceptable evidence whether it is entitled to the money claim of Rs. 16,02,006.25/- with interest at the rate of Rs. 18% per annum from the date of the suit till the effective payment.

(b) Has the Defendant proved it is entitled to the payments claimed in relief clause (a) to (f) of the counter claim.

(c) Does the Judgment and Decree impugned in this Appeal call for any interference.

11. The entire claim of the Plaintiff is based upon the Work Order dated 12.09.2007, which is produced at Exhibit-33 in the evidence of PW1-Siddharth Chaudhary. According to the pleadings in the plaint, the Work of supply

[15] 1993 SCC OnLine Del 436

of concrete was to be done by the Defendant in terms of the Work Order dated 12.09.2007. From the pleadings, the Plaintiff claim that the Work Order constituted the contract between the parties, pursuant to which the Defendant set up the RMC plant at the site appointed by the Plaintiff and commenced supply of concrete to the Plaintiff, though the contract stipulated the period to expire on 12.09.2008, it is the Plaintiff's pleading in para 11 of the plaint that the contract continued after that date and the Defendant continued to supply concrete. However, the Defendants neglected to submit any Running Account Bills along with Challans duly certified by the "Site In-charge" to substantiate payments towards supply of concrete. The Plaintiff also claimed that it maintains accurate accounts for the quantity of concrete supplied by the Defendants and payments made on that account. According to the Plaintiffs, it has made payment in excess of RMC actually supplied. The Plaintiff claims it has paid Defendants an amount of Rs. 85 Lakhs, when RMC supplied, according to its record was approximately the value of Rs.68,97,994.75/- and hence an excess payment of Rs.16,02,006.25/- was received by the Defendants which ought to have been refunded to the Plaintiff. The suit claims recovery of this amount with an interest @ 18% per annum from the date of the suit till payment, on the claim that the contract was a commercial one.

12. With these pleadings, the Plaintiff examined its Account Manager Shri. Siddharth as PW1 and closed its evidence. The two relevant considerations for deciding the Plaintiff's claim are, the terms contained in the contract (Work Order) at Exhibit-33 and the evidence lead by PW1 to prove that the payment made in excess of what was due to the Defendants amounted to Rs. 16,02,006.25/-.

13. Before proceeding to examine the oral evidence of PW1, it would be necessary to understand the terms of the contract between the parties, which in this case was the Work Order dated 12.09.2007.

14. The Work Order in Clause 1 lays down the scope of work required to be done and the quantity to be supplied by the Defendants; under clause 2 of the Contract the plaintiff was to provide for an area for installation, supply of raw materials for production of concrete and other facilities including transport; Clause 3 lays down the duration of competition of work being 12 months or production of 45,000 Cu.Mts. Sub Clauses (1) to (3) of Clause (3)

therefore provide for the duration of the contract and provide for its extension

15. The second part of Clause (3) of the contract deals with Quantities & Rates. Clause (1) thereof requires all Quantity and Quality of concrete to be certified by the **Site Incharge** on daily basis. It also requires R.A. Bills to be submitted, and these would be based upon the certification of the Site Incharge. Clause (1) of this part also requires R.A. Bills submitted according to the Certificate to be paid within four days of submission.

Clause (2) under "Quantities and Rates" requires a record to be maintained jointly with the Defendants' representatives and the Plaintiff's Site Incharge; this record, which is to be jointly maintained is for supply of concrete and for receipt of raw materials. The said clause is reproduced herein and is as follows:

> *"Quantities & rates:*
>
> 1. *All the quantity and quality of concrete shall be certified by the site In charge on daily basis and it is final for R.A.Bills submission. All the R.A. bills submitted by the Agency shall be paid within 4 days after submission.*
> 2. *Agency's representative has to jointly with Site in Charge of the Contractor maintain a record for the supply of concrete and receipt of the raw material and cement.*
> 3. *The Contractor rates are firm and fixed through out the period of contract and no escalation shall be paid to the*

Agency on any account till the completion of the scope of works.

4. *If any taxes, duties etc are applicable that will be paid by the Contractor.*
5. *Income tax as applicable shall be deducted at source from each of Employer's R.A. bills.*
6. *Agency's scope is labour work only.***"**

16. Claus (2) under "Quantities and rates" governs the relations between the Contractor (Plaintiff) and the Agency (Defendant) and is the key covenant which controls the working of the contract between the parties. From the reading of these clauses, the contract requires supply of raw materials by the Plaintiff to the Defendant at the R. M.C batching plant and after the R. M.C. is manufactured, the R. M. C. is delivered to the construction site, for use by the Contractor (Plaintiff) for construction work undertaken by the Plaintiff in relation to the Defence Ministry. According to this Clause, therefore the record of supply of raw material, which in this case would be cement, sand and other aggregates would have to be maintained in a record, countersigned by the representative of the Defendant and the Site Incharge of the Plaintiff. It is only if there was supply of raw material that the Defendant could produce the R. M. C.; the R. M. C. produced would then be supplied at the construction site with a Certificate maintained in a joint record signed by the Site Incharge. It is this joint record, to be maintained under Clause (2) of "Quantities and Rates"

that would be the main document which would evidence the exact supply of the raw material and the exact output of R. M.C. supplied to the construction site.

17. It is in the light of the aforementioned Clauses of the contract which governs the execution and working of the agreement between the parties that the evidence led by the parties would have to be examined. The pleadings of the Plaintiff do not claim maintenance of a record jointly between the Defendant's representative and the Site Incharge of the Plaintiff. The pleading in para 9 of the plaint is that after the Defendant set up the R. M. C. plant they did not submit R.A. Bills in accordance with the contract, which were certified by the Site Incharge of the Plaintiff and yet collected huge amounts from the Plaintiff. In para 10 of the plaint, it is pleaded that the Plaintiff maintained an accurate account of the quantity supplied by the Defendant and the payments were made on account. There is no statement made in the plaint as to the manner in which and whether at all the parties were maintaining a joint record countersigned by Plaintiff's Site Incharge and the Defendant's representative. In the absence of such specific pleading, one would have to read the evidence and examine whether there was any methodology adopted by the parties to comply with

the joint record required to be maintained by them under Clause (2) of the "Quantities and Rates".

18. PW1 in his Affidavit in Evidence has stated in para 12 thereof that the Plaintiff maintained an accurate account of the Quantity produced by the Defendant and the payments made by the Plaintiffs to the Defendants. He further states in para 17 of the affidavit that a total payment according to the Plaintiff's account of Rs. 85 Lakhs was made to the Defendant as verified from its record. According to the Plaintiff, its record disclose that the Defendant has supplied 30,657.75 Cu.Mts of concrete which if multiplied by the contractual rate of Rs. 225 per Cu.Mts worked out to Rs. 68,97,993.75/-, leaving an access amount of Rs. 16,02,006.25/- claimed to have been paid by the Plaintiff to the Defendant. This amount, is claimed by the Plaintiff to be the Defendant's unjust enrichment and is the relief sought in the suit.

19. In this background, two facts which assume relevance to decide the claim of the Plaintiff would have to be proved; the first being, the fact that the record jointly maintained by the representative of the Defendant and of the Plaintiff containing details of the receipt of the raw material and cement and details of supply of R. M. C. to the site were

certified by the Site Incharge of the Plaintiff. The second fact that required to be proved was the claim of excess payment made to the Defendant by the Plaintiff, which is the claim in the suit.

20. The first fact was attempted to be proved by production of Exhibits 68 to 72 Colly which are extracts of entries made in the statement of Account maintained by the Plaintiff at its Project Office at Dabolim. These were produced by PW1 and admitted in evidence accompanied by Certificate under Section 65 B of the Indian Evidence Act; these are five documents in all of which first four are statements printed from the computer of different grades of concrete recording Challan no. of the supply, while the fifth is the summary of the total concrete produced which is at Exhibit 72 Colly. These documents are stamped and countersigned by PW1, who is the Accounts Manager of the Plaintiff.

21. On perusal of the aforementioned documents, two things stand out. The documents are print outs from the original electronic record claimed to be maintained in a computer, under the power of the witness PW1. The Certificate under Section 65 B produced with them state that the documents are printout of the record in the computer

system of the Plaintiff, maintained in the regular course of business and the information stated therein is derived from the information regularly fed in the computer system.

22. Section 65B mandates that an electronic record would be admissible in evidence, only if the conditions stated in Sub Section 2 thereof and in compliance of Sub Section 4 thereof. In considering the requirements of compliance with these provisions, the Supreme Court in ***Anwar P.V V/S P.K Basheer and Ors***[16] has considered the details to be specified as to the machine in which the electronic evidence was stored and has made the following observations:

> *" 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, 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). Following are the specified conditions under Section 65-B(2) of the Evidence Act:*

[16] (2014) 10 SCC 473

(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 a 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 1 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.

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 b 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.

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.

24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with g reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence [under Section 62 of the Evidence Act] the same is admissible in evidence without compliance with the conditions in Section 65-B of the Evidence."

23. ***Anvar*** (supra) has been approved by the Supreme Court in a later Judgment rendered in ***Arjun Panditrao Khotkar v./s Kailash Kushanrao Gorantyal ad Ors***[17] ; the relevant portions of this Judgment are quoted below:

"*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*

[17] (2020) 7 SCC 1

65-B. which is a special provision in d 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, în sub-section (4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, à 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 para 24 of Anvar PV2 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.2 does not need to be revisited.

35. In fact, in Vikram Singh v. State of Punjab 16, a three-Judge Bench of this Court followed the law in Anvar P.V.2, clearly stating that where primary evidence in electronic form has been produced, no certificate under Section 65-B would be necessary.

This was so stated as follows: (SCC pp. 531-32, paras 25-26)

"25. The learned counsel contended that the tape-recorded conversation has been relied on without there being any certificate under Section 65-B of the Evidence Act, 1872. It was contended that audio tapes are recorded on magnetic media, the same could be established through a certificate under Section 65-B and in the absence of the certificate, the document which constitutes electronic record, cannot be deemed to be a valid evidence and has to be ignored from consideration. Reliance has been placed by the learned counsel on the judgment of this Court in Anvar P.V. v. P.K. Basheer. The conversation on the landline phone of the complainant situate in a shop was recorded by the complainant. The same cassette containing conversation by which ransom call was made on the landline phone was handed over by the complainant in original to the police. This Court in its judgment dated 25-1-2010 has referred to the aforesaid fact and has noted the said fact to the following effect (Vikram Singh case17, SCC p. 61. para 5)

The cassette on which the conversations had been recorded on the landline was handed over by Ravi Verma to $1 Jiwan Kumar and on a replay of the tape, the conversation was clearly audible and was heard by the police."

26. The tape-recorded conversation was not secondary evidence which required certificate under Section 65-B, since it was the original cassette by which ransom çall was tape-recorded, there cannot be any dispute that for admission of secondary evidence of electronic record a certificate as contemplated by Section 65-B is a mandatory condition. 18

36. Despite the law so declared in Anvar PV2, wherein this Court made it clear that the special provisions of Sections 65-A and 65-B of the Evidence Act are a complete code in themselves when it comes to admissibility of evidence of information contained in electronic records, and also that a written certificate under Section 65-

B(4) is a sine qua non for admissibility of such evidence, a discordant note was soon struck in Tomaso Bruno. In this judgment, another three-Judge Bench dealt with the admissibility of evidence in a criminal case in which CCTV footage was sought to be relied upon in evidence. The Court held: (Tomaso Bruno case, SCC pp. 191-92, paras 24-25)

"24. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents stricto sensu are admitted as material evidence. With the amendment to the Evidence Act in 2000, Sections 65-A and 65-B were introduced into Chapter V relating to documentary evidence. Section 65-A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65-B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65-B of the Evidence Act. Sub-section (1) of Section 65-B makes admissible as a document, paper printout of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65-B Secondary evidence of contents of document can also be led under Scion 65 of the Evidence Act. PW 13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

25. The production of scientific and electronic evidence in court as contemplated under Section 65-B of the Evidence Act is of great help to the investigating agency and also to the prosecution The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Amir Kasab v. State of Maharashtra wherein production of transcripts of internet transactions helped the *prosecution case a great deal in proving the guilt of the accused. Similarly, in State (NCT of Delhi) Navjot Sandhu 13, the links between the, slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers"*

37. What is clear from this judgment is that the judgment of Anvar PV2 was not referred to at all. In fact, the judgment in State (NCT of Delhi) v Navjot Sandhu 13 was adverted to, which was a judgment specifically overruled by Anvar P.V.2 It may also be stated that Section 65-B(4) was also not at all adverted to by this judgment. Hence, the declaration of law in Tomaso Bruno following Navjot Sandhu 13 that secondary evidence of the contents of a a document can also be led under Section 65 of the Evidence Act to make CCTV footage admissible would be in the teeth of Anvar PV2 and cannot be said to be a correct statement of the law. The said view is accordingly overruled

38. We now come to the decision in Shashi Mohammad. In this case, by an order dated 30-1-2018 made by two Judges of this Court, it was stated (SCC pp. 808-11, paras 21-30)
"21. We have been taken through certain decisions which may be referred to. In Ram Singh v. Ram Singh20, a three-Judge Bench Considered the said issue. English judgments in R. v. Maqsud Ali21 and Rav Robson22 and American Law as noted in American Jurisprudence 2d (Vol. 29) p. 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.

22. In Tukaram S. Dighole v Manikraa Shivaji Kokate 23, the same principle was reiterated. This Court observed that new techniques and devices are the order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

23. In Tomaso Bruno v. State of P7, a three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra19 and State (NCT of Delhi) v. Navjot Sandhu13,

24. We may, however, also refer to the judgment of this Court inn Anvar P.V. v. P.K. Basheer, 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 65-B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65-B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandhu13 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 65-B of the Evidence Act.

25. Though in view of the three-Judge Bench judgments in Tomaso Bruno and Ram Singh20, 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 faet 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 PV2, 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 document produced before the court and the expression "document" is defined in Section 3 of the Evidence Act to meet 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 28. The expression "data" is defined in Section 2(1)(0) of the Information Technology Act as follows:

2. (1)(o) "data" means a representation of information, knowledge facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed. is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

29. The applicability of procedural requirement under 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 whenever interest of justice so justifies."

39. It may be noted that the judgments referred to in para 21 of Shashi Mohammad are all judgments before the year 2000, when Amendment Act f 21 of 2000 first introduced Sections 65-A and 65-B 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 para 22, namely, Tukaram S. Dighole v. Manikrao Shivaji Kokate is also a judgment which does not deal with Section 65-B……….

40. Much succour was taken from the three-Judge Bench decision in Tomaso Bruno in para 23, which, as has been stated hereinabove, does not state the law on Section 65-B correctly. Anvar P.V.2 was referred to in para 24, but surprisingly, in para 26, the Court (in Shashi Mohammad case³) *held that Sections 65-A and 65-B cannot be held to be a complete code on the subject, directly contrary to what was stated by a three-Judge Bench in Anvar PV2 It was then "clarified" that the requirement of a certificate under Section 64-B(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*

41. Quite apart from the fact that the judgment in Shafi Mohammad³ states the law incorrectly and is in the teeth of the judgment in Anvar P.V.2, following the judgment in Tomaso Bruno which has been held to be per incuriam hereinabove the underlying reasoning of the difficulty of producing a certificate by a party who is not in possession of an electronic device is also wholly incorrect.

45. Thus, it is clear that the major premise of Shashi Mohammad³ that such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.

46. Resultantly, the judgment dated 3-4-2018 of a Division Bench of this Court reported as Shashi Mohd. v. State of H. P.8, in following the law incorrectly laid down in Shashi Mohammad³, must also be, and is hereby, overruled.

60. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a responsible official position" in relation to the operation of the relevant device, as also the person who may otherwise be in the management of relevant activities" spoken of in sub-section (4) of Section 65-B. Considering that such certificate may also be given long after the electronic record has actually been produced by the computer, Section 65-B(4) makes it clear that it is sufficient that such *person gives the requisite certificate to the "best of his knowledge and belief". [Obviously, the word "and" between knowledge and belief in Section 65-B(4) must be read as "or", as a person cannot testify to the best of his knowledge and belief at the same time.*

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.2, and incorrectly "clarified" in Shashi Mohammad³. 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 40, 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.

81. What is laid down in Section 65-B as a precondition for the admission of an electronic record, resembles what is provided in the second part of Section 136. For example, if a fact is sought to be proved through the contents of an electronic record (or information contained in an electronic record), the Judge is first required to see if it is relevant, if the first part of Section 136 is taken to be applicable.

82. But Section 65-B makes the admissibility of the information contained in the electronic record subject to certain conditions, including certification. The certification is for the purpose of proving that the information which constitutes the computer output was produced by a computer which was used regularly to store or process information and that the information so derived was regularly fed into the computer in the ordinary course of the said activities

24. Applying the ratio laid down in ***Anvar*** (supra) and ***Arjun*** (supra) to the evidence led by PW1 in attempting to prove the statements of Accounts produced under Exhibit 68 to 72 Colly, I am of the opinion that these Statement of Accounts and entries do not stand proved for the following reasons:

The requirements of Section 65B (4) of the Evidence Act, since PW1 desired to give a statement pertaining to an electronic evidence, requires that the Certificate identifies the electronic record containing the statement, the manner in which the record was produced, and such Certificate must furnish the particulars of the device involved in the production. The Certificate produced by PW1 does not specify the Serial Number of the device or the computer where the electronic record was stored, nor does it state the particulars of the device, which could be, the brand, model Number or such other details, to be able to identify the original device which contains the original of the electronic evidence. To that extent the Trial Court has committed an error of law in accepting Exhibit 68 to 72 colly and the Certificates produced thereof being in compliance with provisions of Section 65B of the Evidence Act. In fact, the five statements of Accounts ought not to have been admitted in evidence, much less be considered as proof of the fact of supply of R. M. C..

25. The same question can be also viewed from a different angle. The evidence had to be led by the parties in consonance and in proof of the compliance of Clause (1) and (2) of “Quantities & Rates” Agreement of the Work Order. What was required therefore, to be proved by the Plaintiff by way of electronic evidence or any other evidence in its possession was the joint record, counter signed by the representative of the Defendant and the Site Incharge of the Plaintiff. Under Clause (2) of “Quantities & Rates” of the Work Order, the joint record was to contain the details of raw material and cement supply by the Plaintiff to the Defendant at the R. M.C. plant and the details of the R. M. C. manufactured and supplied by the Defendants at the Plaintiff’s construction site. Neither the Plaintiff nor the Defendant has produced any record, which partakes of a joint record counter signed by the Defendant’s representative and the Site Incharge of the Plaintiff, to substantiate the quantity of R. M.C. supplied at the construction site. The sole document which forms the basis of the Plaintiff’s claim is not the joint record to be maintained under the contract, but a record in a form of a

statement of entries made into the electronic record of the Plaintiff, which the witness claims is the Ledger Account; in cross examination, at page 30 of his evidence, he states the following:

> *"…………I say that the entries are the same except that in voucher numbers are different. I also admit that the narration against each entry are also different and changed as the voucher numbers are different. The ledger entries at Exbt. 46 and Exbt. 74 were prepared by my accountant. I do not know which account had prepared the same and whether the said accountant who prepared the same had done so by referring to the voucher and then prepared the same or not. I have not checked the vouchers visa vis the ledger entries on Exbt 46 and 74. The witness is asked to disclose the name of the accountant who prepared the ledger account at Exbt (46) and Exbt 74 and the witness states that he does not want to disclose the name of the said accountant. The witness is asked to disclose the names of the accountant who were working with the plaintiff from 1.1.2006 to 4.2.2010 and thereafter till date. The witness states that he does not wish to disclose the names of the accountants. I have not checked the vouchers visa vis the ledger accounts at Exbt 46 and Exbt 74. say that Deepak Srivastava who has filed the present suit and was supposed to depose in the present case has verified the vouchers visa vis the ledger accounts at Exbt 46 and 74. On the basis of the vouchers and the ledger account entries at Exbt 46 & 74, the plaintiff has made on account payment of Rs.85,00,000/- to the defendants. It is not true to suggest that Exbt 46 & 74 have been falsely prepared and fabricated by the plaintiff."*

26. Reading this cross examination, one can draw certain inferences from the same. The Ledger Account entries in Exhibit 46 and Exhibit 74 are claimed to be based on Vouchers but it is admitted that there are discrepancies in the Voucher

number and the number actually entered in the Ledger. The witness also states that Ledger entries in these Exhibits were prepared by his Accountant, but he is not prepared to disclose the name of his Accountant. He also states that he has not checked the Vouchers Vis-a -Viz Ledger Accounts at Exhibits 46 and 74. It is clear from this evidence that entries made in Exhibit 46 and 74 are not to the knowledge or under the supervision and power exercised by PW1 as an Account Manager, and cannot be considered as proved. What is even more relevant, is that the statements made in the plaint on the claims based upon the Account entries have been verified by one Deepak Srivastava, who has signed the verification in affidavit, claiming the facts to be true to his knowledge. Deepak Srivastava was not examined to prove the entries in the electronic record.

27. However, when one reads the cross examination of PW1 at page 14, there is a clear admission on the part of PW1 that no joint record of supply of raw material and supply of R. M. C. at the construction site was maintained under signature of the Site Incharge of the Plaintiff. Exhibit 68 to 71 Colly, which are identified to have been partly signed by Srivastava (who has not been examined), are also, admittedly not reflective of all supplies of R. M. C. to the site during the period of the contract and during the extended period between 01.10.2008 and 31.05.2009. The relevant portion of the evidence of PW1, on the

basis of which the above findings are arrived me are quoted below:

> "*…..The Plaintiff has supplied material during the monsoon period from end of May to the end of September have not produced any documents on record showing supply of material during the monsoon period from end of May to end of September. I admit that joint records for supply of concrete and the receipt of raw material and Cements has not been jointly maintained as provided in clause 2 of Quantities and Rates on page 2 of the work order at Exbt 33. It is true that except for my statement that the plaintiff has supplied material during the monsoon period from end of May to the end of September there is no documents to produce on record to this effect. It is true that The certification at Exbt 68 colly to 71 golly have not been done jointly with the site in charge of the contractor as required under clause 2 of the Quantities and Rates on page 2 of the work order at Exbt 33 I am the accounts Manager of the plaintiff From12.9 2007 to 12.9 2008 Deepak Srivastava was the Project Manager. As Project Manager Deepak Srivastava was authorized to supervise the production of the defendant Exbt 68 colly to Exbt 71 colly are the details of the concrete productions on day to day basis on which the signature of Deepak Srivastava, Project Managers not found. Shown Exbt 72 colly particularly the signature on the same by Deepak Srivastava at points "B". I cannot say on which date Deepak Srivastava signed the same at point "B". I have signed on Exbt 72 colly at points "A" on 13.4.2011. To the suggestion that Deepak Srivastava must have signed on Exbt 72 colly at point "B" on 13.4.2011, I say it is not true. I have not produced the original annexure summary along with the certificate at Exbt 12 colly signed by Deepak Srivastava. Deepak Srivastava has been transferred to Assam from September, 2009 till date. On 13.4.2011 Deepak Srivastava did not come to Goa to sign at point "B" on Exbt 72 colly. It is true that no taxes or duties have been paid by the contractor.*"

28. In his further evidence, PW1 at page 37 of his evidence has categorically admitted that the actual production of cement as per the Work Oder/contract is certified by the Site Incharge on daily basis, along with the Defendant's representatives. He also admits that such joint record was neither maintained nor certified. The evidence to this effect is quoted below:

> "*It is true that the actual production of cement as per the work order at Exbt 33 will be certified by the site in charge on daily basis and the agencies representatives has to jointly with the site in charge of the contractor maintains the record for the supply of concrete. It is true that such joint certification by the site in charge of the defendant and the plaintiff representative bas not been done and not produced in the Court. I can produce the joint certification by the site in charge of the defendant and the representative of plaintiff on the next date.*"

On the same page, PW1 admits that on the sole Ledger maintained for the Defendant by the Plaintiff, several of the entries made in Exhibit 46, 47 to 67 and 74, which are Vouchers, do not tally with the Ledger entries. These statements in evidence are quoted below:

> "*Only one account of the defendant is maintained in the ledger of the plaintiff at exhibit 46 and at exhibit 74, there are number of ledger entries which are not related to the work order at exhibit 33. it is true that the ledger entries at exhibit 46, vouchers at exhibits 47 to 67 and the ledger account at exhibit 74 do not tally with each other. It is true that as per accounting procedure, all the said three exhibits exhibit 46, 47 to 67 and 74 should tally with each other. It is true that*

as the said 3 exhibits 46, 47 to 67 and exhibit 7 do not tally with each other, it cannot be said that the accounts have been tallied and can be accepted as true and genuine It is true that the accounts at exhibit 46, 47 to 67 and at exhibit 74 are required to be reflected in the balance sheet which has not been so reflected. It is not true to suggest that exhibit 46.47 0 67 and exhibit 74 are false documents which cannot be relied upon. It is true that the plaintiff has not furnished in writing the weekly and monthly programmes in advance for the concrete requirements with the grades as required under the special conditions at serial no. 5 of the work order at exhibit 33. it is true that in terms of clause 5(1) of the exhibit 33, if the plaintiff fails to furnish the weekly and monthly programmes in advance for concrete requirements with grades, the defendant shall not be responsible for the non availability of concrete and so cause delay."

29. The relief sought in the plaint is based upon the statement that from the statements of Accounts maintained by the Plaintiff, a total of Rs. 85 Lakhs was paid to the Defendant, but R. M. C., calculated at Rs. 225/- per Cu.Mts of the value of only Rs.68,97,993.75/- was supplied to the Plaintiff; the excess payment of Rs. 16,02,006.25/- is due to the Plaintiff as claimed in relief Clause (a) of the plaint. In cross examination, however, PW1 has admitted that the excess amount paid of Rs. 16,02,006.25/-, mentioned in Exhibit 46 has not been shown in the Ledger Account maintained for the Defendant, nor it has been mentioned or indicated in the Balance Sheet of the Plaintiff's company as excess amount paid. This statement assumes great significance, since according to the Plaintiff's own Ledge

Account and the Balance Sheet, the amounts claimed in the suit were not shown as outstanding and payable by the Defendant to the Plaintiff. The relevant portions of the cross examination of PW1 that reflect these findings are quoted below:

> *"….Shown Exbt 72 colly at page which gives total supply as 30,657.75. The witness admits that this figure was the total production of concrete cement supplied by the defendant. To the question whether the production given in the reply at Exbt 44 of 28,938 cubic meters is correct or the figure of 30657 75 is correct. The witness states that both the figures are correct. The witness further states that the figure of 28,938 was given by approximation It is true that the excess payment amount of Rs 19,75,000/- mentioned in para 5 of Exbt 44 and the excess amount of Rs. 19,75,000/ mentioned in para 14 of Exbt 44 has not been shown in the ledger account of the defendant. It is true that the excess amount of Rs. 19,75,000/- mentioned in the said reply at Exbt 44 as well as the same averment made in the plaint has not been shown or indicated in the balance 0 sheet of the plaintiff company. It is not true to suggest that the excess amount of Rs. 19,75,000/- mentioned in the reply at Exbt 44 as well as in the plaint are false."*

30. Considering all the aforementioned evidence and admissions by PW1, the burden of proving that excess payment has been made by the Plaintiff to the Defendant, based upon its record lay on the Plaintiff and the Plaintiff has certainly not discharged that burden; this is compounded by the fact that even where no joint record was maintained under the counter signature of the Site Incharge

of the Plaintiff, in pursuance of Clause (1) and (2) under the heading "Quantities & Rates" in the contract, the Plaintiff had ample opportunity of examining its Site Incharge or at least its Project Manager, Srivastava, who would have personal knowledge of the quantity of R.M.C actually supplied to the site. Neither of these were examined, nor was the Accountant, who made the entries into the Ledger/Statement of Account on the basis of the Vouchers produced, examined. The Plaintiff has therefore failed to discharge the burden of proving his claim.

31. In this context, I refer to Section 101 of the Indian Evidence Act which stipulates the burden of proof, and requires that whoever desires a Court to give Judgment as to a right or liability dependent on the existence of facts which he asserts, must prove those facts exists. Whilst dealing with this provision and Section 103 of the Indian Evidence Act, the Supreme Court in ***Parimal***(supra) has held as under:

> *"19. The provisions of Section 101 of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour Section 103 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any*

special law that the proof of that fact shall lie on any particular person. The provision of Section 103 amplifies the general rule of Section 101 that the burden of proof lies on the person who asserts the affirmative of the facts in issue.”

32. Again in ***Rangammal*** (supra), the Supreme Court has reiterated that until the burden is discharged by the party on whom the same lies, the other party is not required to prove his case. The relevant para 21 is quoted below:

21. Section 101 of the Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

"101. Burden of proof-Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.”

There is no doubt that the statements/Ledger have been produced and Exhibited, but merely because the same is admitted in evidence, it does not constitute to be proof of the contents of the document and such contents are required, in the present case, being electronic evidence, to be proved, both in terms of Section 65 B and by examining the person who was responsible to certify the receipt of the R. M.C. at site. In this context, the observations of the Supreme Court in ***Narbada Devi Gupta*** (supra) are relevant and are reproduced below:.

> "*16. Reliance is heavily placed on behalf of the appellant on the case of Ramit Dayawala & Sons (P) Ltd.3 The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue". The situation is, however, different where the documents are produced, they are admitted by the opposite party, signatures on them are also admitted and they are marked thereafter as exhibits by the court. We find no force in the argument advanced on behalf of the appellant that as the mark of exhibits has been put on the back portions of the rent receipts near the place where the admitted signatures of the plaintiff appear, the rent receipts as a whole cannot be treated to have been exhibited as admitted documents.*"

Applying the ratio of these Judgments to the evidence before me, the Plaintiff has failed to prove and discharge the burden of proving the content of the Statements of Accounts or the fact/claim that the Defendant had supplied R.M.C. worth only Rs.68,97,993.75/-, which is the relevant fact to be proved, in order to claim the excess payment made.

33. The Trial Court approached the entire manner with somewhat a reverse analogy. Without addressing itself to the specific Clauses of the Agreement and the requirement of

the parties to maintain a joint record (para 22 and 23 of the impugned Judgment) has in one single paragraph (i.e. para 24) has held that the Plaintiff has proved through Exhibit 68 Colly to 71 Colly that only 30,657.75 Cu Mt. of concrete was supplied worth Rs.68,97,993.75/-. There is no discussion at all on the provisions of the Evidence Act, considering this was an electronic evidence, nor on the burden of proof, nor on the cross examination of PW1. The findings arrived at in these paragraphs are without considering the evidence on record or the law applicable to the evidence of the Plaintiff, and are therefore perverse and contrary to the provision of Section 65 B and Section 101 of the Evidence Act.

34. The learned Advocate for the Plaintiff has submitted that the allegations made in the plaint as to the claim of the Plaintiff are in the negative form. He has submitted that the Defendant has admitted the receipt of Rs. 85 Lakhs and has also admitted supply of only 30,657.75 Cu.Mts of R. M. C. In that context, it was argued that having admitted the actual supply in Cubic meters, there could be no negative burden of proof of this fact placed on the Plaintiff. Reference was made to ***Bibhuti Bhusan Dutta*** (supra), ***Ram Gopal*** (supra) to support this proposition.

In the plaint, at para Nos. 10, 12 and 14 of the plaint, the Plaintiff has stated that the Defendant has supplied a total quantity of 30,657.75 Cu.Mts of R. M. C. In reply to these assertions, at para Nos. 20, 21 and 22, of the written statement, the Defendants have denied these assertions. The Defendants have specifically stated that the records allegedly maintained by the company are not genuine and they have denied that as per the records of the company, Defendants have supplied 30,657.75 Cu.Mts of R.M.C. They have further denied that they have collected excess amount of Rs. 16,02,006.25/- as alleged by the Plaintiff. It is in this background that the provisions of Section 101, under which the burden was fully on the Plaintiff to prove, by evidence, its assertion that the Defendant has supplied 30,657.75 Cu.Mts had to be discharged. The question of proving a negative burden did not arise in these facts. The Judgments cited would therefore not apply to these facts.

35. Insofar as the arguments of the Plaintiff that they having proven the quantum of supply of R. M. C., in the absence of the Defendants leading any evidence to contradict these figures an adverse inference ought to be drawn against the Defendants. There is no doubt that the four Judgments cited by the Plaintiff support this

proposition, however, having held that the Plaintiffs have not discharged the initial burden to prove the supply of R. M. C., the question of drawing adverse inference in the light of the provision of Section 101 does not arise.

36. I accordingly answer point (a) for determination in the negative. As a consequence, the claim of the Plaintiff of Rs. 16,02,006.25/- against the Defendant stands rejected.

37. The counterclaim of the Defendant seeks several reliefs, which have been all been rejected by the Trial Court in the impugned Judgment and Decree. These have been briefly listed below:

(a) For balance payment of Rs. 16,25,000/- in terms of the Work Order.

(b) For payment of Rs. 74,45,250/- towards operation and maintenance of the R. M. C. plant from 01.10.2008 to 31.05.2009.

(c) Interest payment calculated at 24% per annum on Rs. 16,25,000/- amounting to Rs. 7,26,156.10/- and further interest till payment.

(d) Interest payment calculated at 24% per annum amounting to Rs. 10,42,335/- on Rs. 74,45,250/- and further interest till payment.

(e) For a direction to issue Certificate under Section 194 (J) towards T. D. S.

(f) For a direction to pay Service Tax.

38. The foundation for the reliefs sought in the counterclaim are based on the following averments made therein:

(a) The Defendant is a SSI unit; according to the contract, the Work Order was irrevocable for 12 months or production of 45,000 Cu.Mts R. M. C. and the contract value of the Work Order was Rs. 1,01,25,000/- and therefor, the Plaintiff is bound to pay the contract value of Rs. 1,01,25,000/-. Since the Plaintiff has admittedly paid only Rs. 85 Lakhs to the Defendant, the balance amount of Rs. 16,25,000/- is due and payable with interest @ 24% per annum. These claims are in prayer Clauses (a) to (d) of the counterclaim.

(b) Since the Plaintiff was required to perform a contractual value of Rs. 1,01,25,000/-, it was liable to pay statutory charges/taxes, towards Service Tax and deduct taxes (T.D.S.) and make such payments to the Income Tax Department, which are now claimed in prayer Clause (e) and (f).

39. For determining whether the Defendant is entitled to the total contractual amount of Rs. 1,01,25,000/- under the contract, if no R.M.C. was manufactured and supplied during the contract period i.e. from 12.09.2007 to 11.09.2008, one would have to examine the contract i.e. the Work Order. As discussed earlier, the quantities and rates and the method of maintaining joint records is specified in the contract. According to Clause (1), the contract stipulates total quantity of production of R. M. C. by the Defendant to be 45,000 Cu.Mts. The rate per month of production is specified as approximately 4000 Cu.Mts. The Defendant was required to set up its own plant, maintain the same and procure testing of its batches of concrete, all at its own cost.

40. The scope of work by the Plaintiff is specified in Clause (2), which was, supply of raw material, supply of the site storage tanks, material storage area, restrooms for 15 workmen and other ancillary installations for running the batching plant. Clause (6) specifies that the scope of the contract that is its performance by the Defendant was only

towards labour work. In this scheme of the contract, one can conclude that the only cost to the Defendant in the contract was the cost of setting up of the batching plant, dismantling it after the contract was concluded and the cost of labour. All costs towards raw material, water supply for use of labour and for manufacture of R.M.C., the cost towards providing land and other storage facilities would be borne by the Plaintiff.

41. Clause (3) stipulates the duration of the contract and requires the Plaintiff to provide the land and all other facilities within a stipulated period, after which the work by the Defendant would commence; Sub Clause (2) of Clause (3) stipulates that the contract is irrevocable and continuous for the duration for the period of 12 months or on supply of 45000 Cu.Mts of R. M. C., or whichever is earlier. In the face of these conditions, various contingencies were possible, amongst them, the delay in supply of raw material or delay in specifying the requirement of concrete for any period of time on the part of the Plaintiff, is one such possibility. In this case, the delay could be attributable to the remise on the part of the Plaintiff. The Defendant may also indulge in a breach of delay of performance due to lack of labour or break down of the plant or slow production

below the rate of expected 4000 Cu.Mts. per month. The contract does not specify the consequence of these breaches by the Defendant, but it specifies in Sub Clause (9) of Clause (5) that if the production of the plant is hampered due to non-availability of work, site, material etc., idle charges would be applicable at Rs. 5 Lakhs per month, which would be adjusted or paid by the Plaintiff. Reading these Clauses in conjunction, the Defendant would be entitled to idle charges at this rate, though the contract remains silent as to the rates at which the Defendant would be paid if no production was made possible for a few hours in a day or such type of exigencies. Nevertheless, in my opinion, the only amount that the Defendant would be entitled to, would be the idle charges at the rates specified above, if set up in the pleadings of the plaint are proved in evidence.

42. It is the Defendant's case that he would be entitled to entire value of the contract i.e. Rs. 1,01,25,000/-, at the end of 12 months, if he has produced less than the targeted 45000 Cu.Mts., as according to him there were no delays on his part. On going through the entire evidence of DW1, there is absolutely no evidence produced by the DW1, either in the form of joint record, counter signed by the Defendant

and the Site Incharge or by any type of record to substantiate that he had produced the entire 45000 Cu.Mts of R. M. C. prior to one year, and within the term of the contract; the Defendant relies upon the statement made in the plaint that it had supplied 30,657.70 Cu.Mts. However, in the written statement the assertion that only 30,657.70 was supplied has been denied and there is no positive statement made anywhere in the Defendant's pleading either to the fact of the exact tonnage supplied by it or to the fact that there were delays attributable to the Plaintiff in supply of raw material or request for supply or non providing of facilities at site. There are no pleadings in the counterclaim to substantiate that the contract was breached by the Plaintiff, much less any evidence led by DW1.

43. The contract states its value, but this by itself does not entitle the Defendant to the contract value or balance claimed in relief Clause (a) for reasons stated above. In my opinion the stipulation in Clause 5 of the Work Order for payment of idle charges of Rs. 5 Lakhs per month is the only amount that the Defendant could claim, provided he pleads and proves that the plant was kept idle due to the Plaintiff's remise in supply of material and of placing orders, and this is not the Defendant's case in his written statement or

counterclaim. This clause, if put to work between the parties, in view of the fact that the R. M. C. plant was expected to run under Clause (5), 24 hours a day and 7 days a week, would entitle the Defendant to calculate even an hour of idle charges based on the rates specified. The fact that the value of the contract is stated to be Rs. 1,01,25,000/- is of no consequence, and no claim by the Defendants be based on this figure as it is not a covenant in the contract. Viewed from a different angle, had the Plaintiff complied with all supplies of raw material and its part of the contract, and if the Defendant had produced less than 45000 Cu.Mts. of R. M. C. within a period of the contract, it would be entitled to the payment calculated on Cubic metres produced at Rs. 225/- per Cu.Mts and not the contract amount of Rs. 1,01,25,000/-. In addition, if the contract was continued beyond one year, or completion of full production of 45000 Cu.Mts , the Defendant would claim payments only towards production supplied at Rs. 225/- per Cu.Mts, until termination of the extended period.

44. In his evidence, DW1 has filed an Affidavit mainly restricted to the contentions raised in the pleadings and to raising a claim to the contract value. The Affidavit in Evidence however, does not state anything to the effect that

there was any delay or shortage of work due to breach of supply by the Plaintiff. In fact, DW1 claims that an amount of Rs. 8,43,750/- was due to him every month irrespective of R. M. C. production. He also admits that there was no record of R. M. C. produced and states that the Plaintiffs maintained their own record, while the Defendant maintained a separate record, both for the period of the contract and the extended period of the contract. Most of the cross examination of DW1 is restricted to interpretation of the Clauses of the Agreement or pending cheque bouncing case, which are irrelevant for the purpose of deciding the claim. In my opinion therefore, the claim of the Defendant is not founded upon the covenants in the contract. The contract is also silent on rates of interest on either side and perusal of the cross examination of the Defendant does not disclose the basis on which he claims interest @ 24 % per annum. The claim in prayer Clause (a) and (b) is therefore rejected, and the point for determination (b) is answered in the negative.

45. The Defendant has filed Miscellaneous Civil Application No.651 of 2015 under Order 41 Rule 27 CPC seeking to amend the written statement and counterclaim and incorporate the fact that it was a registered Micro, Small and Medium Enterprises Development Act, 2006 (MSME),

as on the date of the contract and would therefore be entitled to interest on his claim at 24%. The rate of interest claimed is based upon the provisions of Section 16 of the MSME Act. An application under Order 41 Rule 27 CPC is required to be considered along with the evidence produced by the parties during the trial. The amendment is restricted only to incorporate the fact that the Defendant was a MSME unit, when the contract was entered into and therefore would be entitled to the interest rate specified in the said Act. On going through the application, there is not a single averment made therein to justify or establish that notwithstanding exercise of due diligence, the evidence relating to registration of the Defendant under said Act was not to his knowledge or could not be produced after exercise of such diligence or was prevented on producing it during the trial. The fact that it was registered under MSME Act was known to the Defendant at the stage of filing its pleadings and on this count alone, I am justified in rejecting the application. However, after having considered the evidence led by the parties, the covenant in the contract and on that basis rejecting the claims in the reliefs sought by the Defendant, there would be no purpose served in allowing the application, which is only to claim a higher rate of interest under the said Act, as the Defendant is not entitled to the principal claim under the said Act. For all these reasons therefore, the Miscellaneous Civil Application No.651 of 2015 stands rejected.

46. In view of what is held above, Miscellaneous Civil Application No. 699/2019 for amending the Memo of Appeal to incorporate details of Criminal Case under Section 138 between the parties would be redundant; the documents sought to be produced in Miscellaneous Civil Application No. 896/2019 from the aforementioned Criminal Case are also irrelevant for the decision of this matter. Both applications i.e. Miscellaneous Civil Application No. 699/2019 and Miscellaneous Civil Application No. 896/2019 are therefore dismissed. In view of the directions passed in the operative part of this Judgment, Miscellaneous Civil Application No. 41/2026(F) stands disposed of. Office objection in this application stands waived.

47. For the reasons recorded in answer to points for determination (a) and (b), the point for determination (c) is answered in the following terms:

(a) The Judgment and Decree passed by the Court of the Civil Judge Senior Division at Vasco in Special

Civil Suit No. 39/2009/B calls for an interference to the extent that it has decreed the Plaintiff's suit and directed the Defendant to pay Rs. 16,02,006.25/- with interest @ 18% per annum with effect from the date of the suit till payment is quashed and set aside and the suit stands dismissed; for reasons cited above, the Decree to the extent it dismisses the Defendant's counterclaim does not call for any interference.

48. In the light of the answers to the points for determination stated above, the Appeal is partly allowed. Special Civil Suit No.39/2009/B, before the Civil Judge Senior Division at Vasco stands dismissed; the Decree of the Civil Court dated 31.10.2013 to the extent that it dismisses the Defendant's counterclaim stands confirmed. All amounts which may have been deposited by the Appellants/original Defendants in this Court to secure the Decree of the Trial Court and to secure the stay of any Execution Proceedings shall be paid to the Appellant No. 1/ original Defendant No.1 with accrued Bank interest if any; if any Bank Guarantee was executed by the Appellants, the same shall stand discharged and the Guarantee returned to any person authorized by Appellant No.1/original

Defendant No. 1. In the circumstances of the case there shall be no costs. Decree shall be drawn accordingly.

49. In parting, I must record appreciation for the able assistance by Advocate Shri. Shivan Desai, who was appointed by this Court to assist this Court in arguing the matter on behalf of the Defendants/Appellants herein, considering that the Appellant was appearing in person. Without his assistance, this Court would not able to appreciate the voluminous evidence and the rival submissions made by the parties.

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JUDGMENT CONTINUED

50. At this stage, the learned Advocate appearing for the Respondent/original Plaintiff submits that the Plaintiff desires to file an Appeal to the Supreme Court against this Judgment and Decree. He further submits that if the amount deposited in this Court to secure the Decree as also if the Bank Guarantee, which has been deposited with this Court is released, it might render the Appeal infructuous.

51. The submission is vehemently opposed by the Appellant. It is submitted by the Appellant that the deposit of the part of the Decretal amount and the Bank Guarantee has itself caused great prejudice to the Appellant/original Defendant.

52. Considering that the amount deposited and the Bank Guarantee has been with this Court since 13.02.2014, considering the prejudice that may be caused to the Plaintiff, the operative part of the Judgment, which is in para 48 to the extent that it directs release of the deposit and the discharge of the Bank Guarantee shall stand stayed for a period of eight weeks from today.

VALMIKI MENEZES, J.