IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 28TH DAY OF APRIL 2017

THE HON'BLE MR. JUSTICE P.KALAIYARASAN

A.No. 2675 of 2017
in
C.S.No.979 of 2007

M/s.TVS Motor Company Limited,
Jayalakshmi Estates,
No.29, Haddows Road,
Chennai-600 006.
Rep. by its Authorized Signatory
Mr.Harne Vinay Chandrakant ... Plaintiff

-Versus-

M/s.Bajaj Auto Limited,
Akurdi, Pune-411 035
Maharashtra ... Defendant

A.No.2675 of 2017:

M/s.Bajaj Auto Limited,
Bombay-Pune Road,
Akurdi, Pune-411 035
State of Maharashtra,
rep. by Mr.S.Ravikumar
..Applicant/Defendant

vs

M/s.TVS Motor Company Limited,
Jayalakshmi Estates,
No.8, Haddows Road,
Chennai-600 006.
Rep. by its Authorized Signatory
Mr.Harne Vinay Chandrakant
..Respondent/Plaintiff

Application praying that this Hon'ble Court be pleased to set aside the commissioners' ruling dated April 11th 2017 declining to mark the CD in evidence and issue suitable directions to the Learned Judge

Commissioner to proceed to mark the same in evidence subject to the Respondents' objections in the that regard being decided at the time of final arguments.

This application coming on this day before this court for hearing the court made the following order:

This application has been filed to set aside Commissioner's ruling dated 11.04.2017 declining to mark the CD in evidence and issue suitable directions to the learned Judge Commissioner to proceed to mark the same in evidence, subject to the respondent's objection.

2. It is evident that when the applicant / defendant attempted to confront P.W.1 in cross-examination by showing a CD containing an interview of the respondent company's Managing Director, the respondent objected to such CD being put to P.W.1 on the grounds that there was no accompanying certificate under Section 65B of the Indian Evidence Act. The learned Judge commissioner, after hearing both sides declined to permit the application to either introduce CD in the cross-examination or to mark the same through P.W.1 and directed the applicant to comply with Section 65 B of the Indian Evidence Act, prior to introducing the said CD to the witness. The above order is now under challenge in this application.

3. The learned Senior counsel appearing for the

applicant contends that the learned Judge Commissioner's ruling is beyond the scope of the powers conferred under Order XVIII Rule 4 CPC and the learned Judge Commissioner should have allowed to introduce and mark the CD subject to objections and proof leaving to the decision of the Court after recording of evidence.

4. The respondent / plaintiff per contra contends that a mere CD without an accompanying certificate under Section 65B of the Indian Evidence Act is not a document under law and it becomes a document subject to the conditions of Section 65B being satisfied. It is further contended that the averments of the applicant relating to interpretation of Order XVIII Rule 4 CPC are baseless. The CD was sought to be marked without the certificate under Section 65B and therefore, the decision taken by the learned Judge Commissioner is correct.

5. In this case, the applicant / defendant attempted to confront P.W.1 in cross-examination by showing a CD containing an interview of the respondent Company's Managing Director as provided under Section 145 of the Indian Evidence Act, 1872.

6. As per Section 145 of the Indian Evidence Act, a witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him or being proved. If it is intended to

contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Therefore, as per the above provision, before proving the writings, i.e., the document, the witness can be contradicted by calling to those parts of previous statements.

7. Order XVIII Rule 4 CPC reads as follows :

> "Recording of evidence - (1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence :
>
> Provided that where documents are filled and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.
>
> (2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it.
>
> Provided that the Court may, while appointing a commission under this sub-rule consider taking into account such

relevant factors as it thinks fit.

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commissioner within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may be general or special order fix the amount to be paid as remuneration for the services of the

> Commissioner.
>
> (8) The provisions of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule."

8. The learned Senior counsel for the applicant has also brought to the notice of this Court the Judgment of the Full Bench of Mumbai High Court in **Hemendra v. Subodh** reported in **(2008) 6 Mh.L.J 886** and contended that as per Order XVIII Rule 4 CPC, the Commissioner has to record objections and give tentative exhibits to the document subject to the decision of the Court and proceed to the recording of evidence. In paragraph 88 of the Judgment, it has been held as follows :

> "The cases; wherein Court Commissioner is appointed to record cross-examination, the Court may decide the question of admissibility of document or proof of such document before the matter is sent for recording of evidence to the Commissioner in the form of cross-examination or re-examination or, in a given case, the Court may decide that question at a subsequent stage. The Court, obviously, has a discretion of recording cross-examination and re-examination itself. During the cross-examination, if the document is produced and the

question leading to its admissibility of the evidence. In such case, the Court Commissioner is expected to record objection and can give tentative exhibit to the document subject to the decision of the Court. The Court would then be obliged to decide the question before the judgment is delivered so that the party producing evidence could not be deprived of its right to tender evidence or an opportunity of producing fresh evidence or opportunity of making up defects which in many cases could be remedied, if he is told that the objection is allowed."

9. The learned Senior counsel appearing for the respondent mainly relies upon Section 65B of the Indian Evidence Act and contends that without the certificate, the CD intended to be marked is not a document and therefore, the order of Commissioner to obtain the order by filing application under Section 65B is correct.

10. Section 65B of Indian Evidence Act no doubt requires that electronic record should be accompanied with a certificate as mentioned in the Section. If Section 145 of the Indian Evidence Act, 1872 and Order XVIII Rule 4 CPC are read together, it is very clear that proving of the document does not come initially when the

witness is attempted to be contradicted with his previous statement and proving of the document comes only when the witness denies the same, then it is for the defendant to prove the document, as per law. Therefore, this Court is of the considered view that the Commissioner should have marked the document as Exhibit by recording objection made by the other side and proceeded with the recording of evidence. It is for the Judge to decide at the time of argument either to consider the evidence or reject it after analysing the objections and all attendant facts.

11. For the aforesaid reasons, this Court is of the view that the Commissioner's Ruling, dated 11.04.2017 declining to mark the CD in evidence is to be set aside. Accordingly, the above ruling of the Commissioner is set aside and the learned Judge Commissioner is directed to proceed to mark the same in evidence subject to the objections raised by the other side, leaving it open for the decision of the Court at the time of final argument.

With the above observation, this application is allowed.

sd/.P.K.J
28.04.2017

//Certified to be a true copy//

Dated this the day of 2017

R.s/05.05.2017 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.