

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 22ND DAY OF SEPTEMBER 2020

THE HON'BLE MR. JUSTICE C.V.KARTHIKEYAN

A. No.996 of 2020
in
C.S.No.607 of 2019

E.Shankar
Son of Ethiraj
No.21/73, Gangaianman Koil Street,
Vadapalani, Chennai 600 026.Applicant/Plaintiff

-Versus-

Mr.K.Natarajan
Son of Kanagasabai
Proprietor
M/s. London Talkies,
No.2/486, Singaravelan 7th Cross Street,
Chinna Neelangarai, Chennai 600 115. Respondent/Defendant

Application praying that this Hon'ble Court be pleased to Accept the documents appended to the Judges Summon as additional documents on behalf of the plaintiff in C.S.No.607 of 2019.

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

This application has been filed by the applicant / plaintiff seeking permission to produce additional documents.

2.The documents are in the nature of WhatsApp video messages and picture messages sent by the defendant to the plaintiff and also Bank statement dated 04.04.2016.

3.In the affidavit filed in support of the said application, it had been stated that the extracts of the WhatsApp video messages and the picture messages were collected from the old mobile, only after the filing of the present suit. It was further stated that, since there was an urgency in filing the suit, the suit documents were not filed along with the plaint. Having obtained printouts of the said documents from the mobile of the plaintiff himself, the documents are now being sought to be filed and permission is now sought for filing the said documents by way of this application.

4.In the counter affidavit filed by the defendant, an objection is raised that the reasons advanced for not producing the documents along with the plaint are not convincing and that the reasons should not be taken note of by this Court and as a matter of fact, they should be rejected by the Court. It is also stated that an affidavit should have been filed under the Order XI Rule 4 of the Code of Civil Procedure as amended by the Commercial Courts Act, 2015, even in the cases of urgent filing. The plaintiff has to obtain leave to rely on additional documents as part of declaration on oath and only subject to grant of such leave by the Court at the initial stage itself, further documents can be permitted to be produced as

documents by the plaintiff. It is also stated that under Order XI Rule 3 of the amended Code of Civil Procedure, the plaintiff should give a declaration of oath that he has disclosed all the documents in his possession.

5. Heard arguments advanced by Mr.M.Jayaprakash, learned counsel for the applicant / plaintiff and Mr.S.Rajendrakumar, learned counsel for the respondent / defendant.

6.Mr.M.Jayaprakash, learned counsel for the applicant / plaintiff has placed strong reliance on the judgment reported in **2020 SCC OnLine SC 571, Arjun Panditrao Khotkar V. Kailash Kushanrao Gorantyal and Others**, wherein the Hon'ble Supreme Court was called upon to examine the necessity regarding the production of the certificate under Section 65(B) of the Evidence Act, particularly with respect to electronic records. A reference had been made and a Larger Bench had been constituted for that purpose.

7.The Hon'ble Supreme Court in had to examine two earlier judgments reported in **(2014) 10 SCC 473, Anvar P.V. V. P.K.Basheer and Others** and **(2018) 2 SCC 801, Shafi Mohammed V. State of Himachal Pradesh**. There had also been earlier pronouncement by the Hon'ble Supreme Court in **State v. Navjot Sandhu, (2005) 11 SCC 600** dealing with the same issue.

8.After examining in detail the law on the subject, the Hon'ble

Supreme Court, in **2020 SCC OnLine SC 571, Arjun Panditrao Khotkar V. Kailash Kushanrao Gorantyal and Others**, had stated as follows in paragraph 80(b):

“80.

(a)

(b) *The clarification referred to above is that the required certificate under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with*

certificate under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as “...if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act...” is thus clarified; it is to be read without the words “under Section 62 of the Evidence Act...”, With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.”

9.It had been stated that the Certificate under 65B(4) of the Evidence Act, is not necessary, if the original document itself is produced and they have further explained that fact by stating that if the owner of the mobile, steps into the witness box and proves that the concerned device, in which the original information was first stored, is owned and/or operated by him, then a certificate under Section 65B(4) is not required.

10.This observation and dictum of the Hon'ble Supreme Court is to be read in conjunction with the statement in the affidavit in this case that the documents which are now produced namely, WhatsApp video messages have been recovered from the mobile of the applicant / plaintiff himself.

11.A further clarification had been issued by the Hon'ble Supreme

stated that even if such a certificate is required and if trial had not commenced, then at any stage they can be admitted and relied upon in evidence.

12.The issue whether the electronic documents now sought to be produced by the applicant / plaintiff had been recovered from his own mobile or not has to be decided during trial and that version of applicant / plaintiff is subject to passing the test of cross-examination.

13.The issue whether the said WhatsApp video messages have been recovered from the old mobile of the applicant / plaintiff is again a statement which has to be tested during cross-examination.

14.The issue that they were actually recovered from the mobile before or post institution of the suit is also a statement which has to be tested during cross-examination.

15.The issue whether these documents are actually relevant is also a matter to be tested only an analysis of the evidence adduced in that regard.

16. The reason given that owing to urgency of the filing of the suit, the documents were not extracted from the old mobile is a reason which also has to be tested during cross-examination.

17.Only on analysis of the evidence recorded on all these issues can it be decided whether the documents have been produced in manner known to

18.The issue regarding applicability or otherwise of the certificate under Section 65B(4) of the Evidence Act, is an issue of admissibility.

19.The learned counsel for the respondent / defendant also stated that at the time of inspection of the documents, when electronic records are produced, there are several conditions stipulated under the amended Code of Civil Procedure and disclosures have to be made regarding the parties to such electronic records and the manner in which the said electronic records are produced and the date and time of preparation of such electronic records. These are all issues which can be raised only when the documents are actually produced and sought to be marked during the course of trial.

20.It is to be mentioned that the trial has not been commenced.

21.Granted liberty to the respondent / defendant to raise all these issues during cross examination of the witness for the plaintiff, I hold that at this stage, preventing the applicant / plaintiff from even producing the documents would not be appropriate.

22.However, it is also seen from the affidavit that the applicant / plaintiff also seeks to produce a bank statement dated 04.04.2016. That is also an electronic record and it is subject to production of necessary certificates, since it is produced from a 3rd party stranger to the suit. The production of such bank statement will be subject to admissibility, relevancy and proof.

23. Granting liberty to the respondent / defendant to raise all these issues when the documents are sought to be marked, and directing the objections to be recorded, which objections should be addressed at the time of advancing final arguments in the suit, and also during cross-examination and also an opportunity to the applicant / plaintiff to explain the reasons for non – producing the same at the time of institution of the suit, I hold that the application has to be allowed.

24. Accordingly, the application is allowed. No order as to costs.

Sd/.C.V.K.J.

22.09.2020

//Certified to be a true copy//

Dated this the

day of

2020.

su.29.09.2020

COURT OFFICER(O.S.)

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

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