



C.R.P(PD)No.1319 & 1273 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P(PD)Nos.1319 & 1273 of 2020

M/s.Borg Warner Morse TEC India Pvt. Ltd.,
No.79, SIDCO Industrial Estate,
Kakkalur, Tiruvallur – 602 003.

..Petitioner

Vs.

M/s.Om Logistics Ltd.,
No.130, Punjab Bag, (T.C), Ring Road,
Delhi – 110 035.

..Respondent

Common Prayer: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the fair and decreetal orders dated 25.10.2019 in IA.Nos.1 & 2 of 2019 in OS.No.123 of 2014 on the file of the I-Additional District Court, Tiruvallur.

For Petitioner in both petition : Mr.Bhagavath Krishnan for
Mr.Srinath Sridevan

For Respondent in both petition : Mr.K.S.V.Prasad



C.R.P(PD)No.1319 & 1273 of 2020

COMMON ORDER

WEB COPY

Challenge in these two revisions is to the orders of the learned I-Additional District Judge, Tiruvallur made in IA.Nos.1 & 2 of 2019, applications by the plaintiff in the suit seeking to re-open the evidence of the plaintiff and re-call the plaintiff's witness, in order to enable the plaintiff to mark certificates under Section 65-B of the Evidence Act.

2.The suit was filed by the plaintiff seeking recovery of money against the carrier. The suit is being defended by the defendant on various contentions, including the one that there was no notice as required under Section 16 of the Carriage of Goods by Road Act and therefore, the suit is not maintainable. Certain documents, which are copies of the E-mail communications were produced by the plaintiff. However, certificates under Section 65-B were not produced along with those documents. The documents were however, marked, the learned counsel for the defendant had cross-examined the witness of the plaintiff on the need for the certificates under Section 65-B also. The plaintiff's witness was examined in chief on 08.01.2019 and cross-examination was done on 29.04.2019. Thereafter, the



C.R.P(PD)No.1319 & 1273 of 2020

evidence was closed and the plaintiff also addressed arguments on 03.09.2021 and the defendant's side arguments were heard on 19.09.2021.

Then on 23.09.2021, these instant applications seeking permission to produce certificates under Section 65-B were filed.

3.These applications were opposed on the ground that the applications were considerably delayed and the intention behind these applications is only to fill up the lacuna. It was further contended that Order 18 Rule 17 is not a tool for filling up lacuna in the evidence, it is only meant for the Court to seek clarifications. The main reason adduced for seeking to re-call and re-open the evidence to mark the certificates under Section 65-B is that the law was nebulous and there was considerable shifts in the judgments of the Hon'ble Supreme Court on the question of need for certificates under Section 65-B. Therefore, till 26.07.2019, when a reference to a larger bench was made by the Hon'ble Supreme Court in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Others** reported in (2020) 7 SCC, there was considerable uncertainty in the requirement of production of certificates under Section 65-B. Finally, it was



C.R.P(PD)No.1319 & 1273 of 2020

only on 14.07.2020, a larger Bench of the Hon'ble Supreme Court definitely laid down the law on the requirement of the certificates. The learned District Judge, who heard the applications however, dismissed them on the ground that after having been specifically questioned in cross-examination, the plaintiff ought to have produced the certificates earlier in point of time and the applications filed after arguments were advanced cannot be sustained.

4.Heard Mr.Bhagavath Krishnan, learned counsel appearing for the petitioner and Mr.K.S.V.Prasad, learned counsel appearing for the respondent.

5.Mr.Bhagavath Krishnan, learned counsel appearing for the petitioner would draw my attention to the various judgments and contend that at the time when the evidence was recorded in the suit, the law relating to production of certificates under Section 65-B was not too well settled. At least, till reference to the larger Bench in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Others**, which was on 26.07.2019,



there was considerable doubt on the requirement of the certificate under

Section 65-B. In **Shafi Mohammad Vs. State of Himachal Pradesh**

reported in **(2018) 2 SCC 801**, the Hon'ble Supreme Court had held that

production of a certificate under Section 65-B cannot be held to be

mandatory and it will depend on the facts and circumstances of the each

case. But, this preposition of law was doubted by the Hon'ble Supreme

Court in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal**

and Others and an order of reference was made on 26.07.2019 therefore, at

least till 26.07.2019, the law laid down by the Hon'ble Supreme Court in

Shafi Mohammed Vs. State of Himachal Pradesh was holding field. In

the case on hand, it could be seen that the evidence was recorded in July

2019 and arguments were advanced in September 2019. Soon after, the

reference was made, the petitioner has come up with these applications

seeking leave to produce certificates.

6.Mr.K.S.V.Prasad would however contend that the purport of

Order 18 Rule 17 is not for filling up the lacunae. He would also refer to

the judgment of the Hon'ble Supreme Court in **Vadiraj Naggappa**



Vernekar (D) through Lrs. & Others Vs. Sharad Chand Prabhakar

Gogate reported in **CDJ 2009 SC 975** wherein, the Hon'ble Supreme Court has held that the purport of Order 18 Rule 17 is not to enable a party to fill up the lacuna. Pointing out, he had put specific questions to the witness namely, PW1 regarding the non-production of certificates under Section 65-B. Mr.K.S.V.Prasad would contend that these applications are nothing but an attempt to fill up a lacuna, which has been held to be improper by the Hon'ble Supreme Court in **Vadiraj Naggappa Vernekar** cited supra. Mr.K.S.V.Prasad would also draw my attention to the Paragraph 59 of the judgment of the Hon'ble Supreme Court in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Others** wherein, the Hon'ble Supreme Court has held that so long as the Trial is not over, the Judge can at any time seek production of certificates under Section 65-B. I have considered the rival submissions.

7.No doubt, Order 18 Ruel 17 has been held to be a tool in the hands of the Court to seek clarifications. This Court as well as the Hon'ble Supreme Court have also stated that a party can also seek re-opening of the



C.R.P(PD)No.1319 & 1273 of 2020

evidence, invoking Order 18 Rule 17 and the power is not restricted to the Court alone. The attempt of the Court when such an application is made should be to decide the case on the bonafides of the parties and to see whether, the parties are attempting to fill up the lacuna or a genuine error is sought to be rectified. If the ultimate finding is that a genuine error is sought to be rectified then the application should be allowed. If the ultimate finding is that it is for filling up the lacuna, as rightly pointed by Mr.K.S.V.Prasad, the application has to be rejected.

8.In the case on hand, is already adverted, the law relating to production of certificates under Section 65-B was not very clear at least till 2019 and the first half of 2020. Till such time, the larger bench of the Hon'ble Supreme Court ruled in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Others** on 14.07.2020, one can safely conclude that the law was in nebulous state. In **Shafi Mohammad Vs. Stage of Himachal Pradesh**, the Hon'ble Supreme Court has stated that a certificate is not always mandatory. That view was doubted by the Hon'ble Supreme Court itself in July 2019 and a reference to a larger Bench was made. This



nebulous or uncertain situation could have led some of the parties to believe that an application for certificate under Section 65-B is not necessary. No doubt, in cross-examination of PW1, in the case on hand, specific questions have been put on the production of the certificates. But, whether they are necessary or whether non-production would be fatal are all facts, which should have examined on the realm of law and the party cannot be expected to know the consequences of non-production. I am of the considered opinion, that this is a fit case where, the party must be given an opportunity and the attempt made now to produce Section 65-B certificate, is in my opinion, not an attempt to fill up lacuna but to rectify the genuine error that had crept in .

9.Mr.KSV.Prasad would submit that because of the non-production of the certificates, the defendnat has not chosen to let in evidence. It will be open to the defendant to let in evidence, if it chooses to. I make it clear that no application is required for that purpose.



C.R.P(PD)No.1319 & 1273 of 2020

WEB COPY

10. In fine, these civil revision petitions are allowed, the order of the Additional District Judge is set aside, IA.Nos.1 & 2 of 2019 will stand allowed, the evidence of P.W.1 will be re-opened and is re-called only for the purpose of producing certificates under Section 65-B and he cannot let in any other evidence. Upon completion of the evidence of PW1, the defendant shall be given an opportunity to let in evidence, if the defendant wants to.

26.11.2021

kkn

Index: Yes
Internet: Yes
Speaking

To:-

1. The I-Additional District Court,
Tiruvallur.



WEB COPY



C.R.P(PD)No.1319 & 1273 of 2020

R.SUBRAMANIAN, J.

KKN

C.R.P(PD)Nos.1319 & 1273 of 2020

26.11.2021