

KABC170028152022



**IN THE COURT OF LXXXVI ADDL. CITY CIVIL & SESSIONS
JUDGE, COMMERCIAL COURT, BENGALURU (CCH-87)**

Present: Sri Jithendranath C.S., B.A., LL.M.,
LXXXVI Addl. City Civil & Sessions Judge,
Bengaluru.

COM. O.S. No.1490/2022

Dated on this the 10th day of July, 2024

BETWEEN:

M/s. BSR Infratech India Ltd. : PLAINTIFF/APPLICANT

AND

Indian Oil Corporation Ltd. : DEFENDANT/OPPONENT

ORDERS ON I.A. No.1 & 2

The plaintiff-BSR Infratech India Ltd. claiming to be reputed construction firm has filed the present suit against the defendant-Indian Oil Corporation seeking judgment and decree to direct the defendant to make payment of Rs.36,64,474/- along with interest at the rate of 18% per annum. Pleading of the plaintiff, which is necessary to decide I.A.No.1 & 2 is that, in the year 2012, the defendant allegedly issued a tender for construction of pre-engineered building

sheds and other related works at the LPG bottling plant in Mysore. The defendant allegedly agreed to pay a sum of Rs.9,08,22,617.25 to the plaintiff towards cost of construction. On 30.08.2013, the plaintiff completed the construction as per the terms of agreement. The plaintiff had deposited Rs.97,07,241/- with the defendants towards security. After completion of the construction work, the defendant ought to have return 50% of the same to the plaintiff. The plaintiff addressed letters dated 15.11.2014 and 29.11.2014 to the defendant and requested to release half of the security deposit. On 21.01.2015, the defendant released 50% of the security deposit. As per Clause 1.8 of the agreement the Bank Guarantee i.e., 50% of security deposit was to be valid for a period of 5 years. Since the construction was completed on 30.10.2013 warranty period of 5 years was expired on 30.10.2018. On 05.11.2018, the plaintiff addressed a letter to the defendant calling upon them to release remaining 50% of the security deposit. Copy of the letter has been produced vide Document No.8. On 06.12.2018, the defendant remitted Rs.11,89,196/- as

against Rs.48,53,670/-. According to the plaintiff, the defendant is still in due of Rs.36,64,474/-. On 19.12.2018, the plaintiff once again issued a letter to the defendant claiming its liability of Rs.36,64,474/- and called upon the defendant to release the same. On 19.12.2018, 22.10.2019, 20.01.2020 plaintiff addressed three reminders insisting the defendant to pay dues. The plaintiff produced copies of the documents at 11, 12 & 13. Since the defendant did not release the dues on 22.09.2020 plaintiff issued one more reminder through e-mail. The defendant allegedly issued a reply to the e-mail dated 08.10.2020 denying to release the dues by assigning reasons that ***“this matter is related to tax during the period 2012-13, 2013-14 are not payment related to works”***. Owing to the continued inaction of the defendant, the plaintiff issued a letter dated 21.01.2021 to Mr. Sagar Mudhole, General Manager(Finance) of defendant company calling upon him to release the balance amount of Rs.36,64,474/-. The General Manager (Finance) did not respond positively and therefore, the plaintiff was constrained to issue an arbitraion notice dated 22.04.2021 calling upon

the defendant to nominate an Arbitrator. The plaintiff pleaded several other aspects also in his plaint, but they are not relevant to decide the I.A. No.1 & 2.

2. In the back ground of the above facts and circumstances, the plaintiff filed I.A. No.1 under Order IX Rule 1 r/w Sec. 151 of CPC seeking permission to produce the Lawyer notice for arbitration dated 18.12.2023 along with attachment of arbitration notice dated 22.04.2021 and certificate under sec. 65B of the Evidence Act.

3. The plaintiff has filed I.A. No.2 under Section 65A, 65C and 66 of the Indian Evidence Act seeking permission to prove letters dated 15.11.2018 and 22.01.2021 as secondary evidence. The defendant filed a detailed objection to each applications and requested the court to reject the I.A.No.1 & 2.

4. Heard both sides.

5. The following points arise for court's consideration;

1. Whether the plaintiff has made out good cause for belated production of Lawyer notice for arbitration dated 18.12.2023 and arbitration notice dated 22.04.2021, certificate u/s 65B of Evidence Act?

2. Whether the plaintiff be permitted to produce letters dated 05.11.2018 and 22.01.2021 as secondary evidence?

3. What order ?

6. My answer to the above points are as under;

Point No.1 : In the affirmative,

Point No.2 : In the affirmative,

Point No.3 : As per the final order
for the following ;

REASONS

Point No.1:

7. The plaintiff has produced a copy of arbitration notice dated 22.04.2021 along with I.A. No.1 supported by certificate under Section 65B of the Indian Evidence Act. In his affidavit filed in support of I.A.No.1 Sri. M.V. Suryanarayana, the authorised representative of the plaintiff stated that due to

paucity of time, the plaintiff has not produced the notice dated 22.04.2021.

8. The learned counsel for the plaintiff cited decisions of ***VikramRoller Flour Mills Ltd. Vs. KRBL Ltd., (2018 SCC Online Del 13407 : (2019) 78 PTC 220), Md. Islamuddin Vs. S.S. Kapoor (2022 SCC Online Del 3608 : (2023) 241 AIC 296) and Hassad Food Company Vs. Bank of India and others (2019 SCC Online Del 10647)*** rendered by Hon'ble Delhi High Court in support of his application and submitted that even if the documents are produced at the belated stage and if the plaintiff has shown good cause, the same may be accepted.

9. Learned Senior Counsel Sri. Dhananjaya Joshi appearing for Sri. Viola Rodrigues submitted that the plaintiff beyond statutory period of 30 days has produced said documents and hence the same may be rejected. The learned Senior Counsel has relied upon the decisions of ***Societe DES Produits Nestle S.A. and another Vs. Essar Industries and others [(2016)158 DRJ (SN) 712], Nitin Gupta Vs.***

Texmaco Infrastructure and Holding Limited (2019 SCC Online Del 8367) and Sudhir Kumar @ Baliyan Vs. Vinay Kumar G.B. (2021 SCC Online 734).

10. As per order 11 of CPC as amended by the Commercial Courts Act, 2015, the plaintiff shall file all documents which are in its power, possession, control or custody pertaining to the suit along with plaint. If the plaintiff is unable to produce the documents along with the plaint, the additional documents may be produced within 30 days of filing of the suit when the suit was filed for some urgent relief.

11. In the present case, the plaintiff in fact has produced a copy of notice dated 22.04.2021 along with plaint which is numbered as Document No.20. The defendant, in his statement of admissions and denials has also denied the issuance of this document. Now the plaintiff came up with particulars of e-mail I.D. through which the notice was sent and also filed certificate under Section 65B of the Indian Evidence Act. Since the plaintiff has already produced copy of the notice dated 22.04.2021, the court do not find that he

shall be precluded from producing the e-mail particulars and the certificate under Section 65B of the Indian Evidence Act. Therefore, the I.A.No.1 is deserved to be allowed. The defendant however shall be at liberty to raise his objections with regard to relevancy, admissibility, mode of proof etc. of the notice dated 22.04.2021 at the time of tendering of the said document as evidence.

Point No.2 :

12. The plaintiff allegedly addressed letters dated 05.11.2018 and 22.01.2021 to the defendant calling upon them to release Rs.36,64,475/- in its favour. These documents have referred to in the plaint. According to the plaintiff these two notices delivered to the defendant by hand and since the originals are with the defendant, the plaintiff was unable to produce the same before this court. Advocate for plaintiff had issued two separate notices in Form No.7 of Appendix – C to the CPC, 1908 calling upon the defendant to produce the original letter dated 05.11.2018 and 22.01.2021.

For which the defendant issued reply stating that they have no record for having received the said letter under reference.

13. Learned counsel for the plaintiff submitted that the plaintiff has issued notice to the defendant to produce the documents which are in the possession of the defendant, since the defendant do not produce the same, the plaintiff may be given with an opportunity to prove the said documents through secondary evidence. In support of his arguments, the learned counsel relied upon a decision of the Hon'ble Supreme Court in the case of ***Rakesh Mohindra vs Anita Beri & Ors. Reported in (2016)16 SCC 483*** and the decision of Hon'ble High Court of Karnataka in the case of ***Vinay kumar C.H. V/s. Shivashankar B (Criminal Petition No.4184/2023)***.

14. Learned Senior Counsel Sri. Dhananjaya Joshi submitted that in the reply, the defendant specifically stated that no such notices were ever received, if the plaintiff is able to prove that the defendant is the custodian of the documents and deliberately not produced the same, the plaintiff may be

entitled to prove the same as secondary evidence. Learned Sr. Counsel submitted that, in the present case, the plaintiff failed to prove that the defendant is the custodian of those documents, the plaintiff may not be permitted to tender the photocopies as secondary evidence. The learned Sr. Counsel has relied upon a decision of Hon'ble Supreme Court in ***Jagmail Sigh and another Vs. Karamjit Singh and others reported in (2020)5 SCC 178.***

15. In the said decision, the Hon'ble Supreme Court at para-14 held that *where the original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not established it is not permissible for the court to allow a party to adduce secondary evidence.*

16. In Rakesh Mohindra's case (supra) the document was misplaced and therefore the Hon'ble Supreme Court permitted to lead secondary evidence under Section 65C of the Indian Evidence Act. By relying upon Rakesh Mohindra's case the Hon'ble High Court of Karnataka in Vinay Kumar C.H. (supra)

permitted the complainant to produce a photocopy of the loan agreement dated 09.10.2018 as as a secondary evidence.

17. In the present case, the plaintiff asserting that the plaintiff has issued letters dated 05.11.2018 and 22.01.2021 to the defendant calling upon to repay the outstanding dues. The burden is upon the plaintiff to prove the fact of issuance of letters and also the fact of due delivery of the same to the defendant. According to the plaintiff, the letters were hand-delivered to the defendant. Unless the person who actually delivered the letters to the defendant is examined no purpose would be served in production of these two letters, because the letters do not bear the acknowledgment for receipt of the same by the defendant.

18. Merely because the document tendered in the evidence and marked as an exhibit would not dispense with its proof; the party who tendered the document shall prove it. The court cannot direct the parties to prove a particular fact in a particular manner or in a particular fashion. The court, however, can call upon the parties to prove the facts which

are under dispute. At this stage, it is not possible to jump into the conclusion that the plaintiff has not at all issued such letters to the defendant. Further it is not even possible to presume that the defendant has received the letters. A fair opportunity shall be given to the parties to prove their respective assertions. The parties shall adduce best possible evidence and the court shall give its finding on the disputed facts on the basis of such evidence. In the present case, if the plaintiff is prohibited to adduce secondary evidence, it would amounts to curtailing his right to prove the fact of issuance of letters and their due service to the defendant. At this pre-trial stage it is not possible to conclude that the plaintiff has failed to prove the fact that the said two letters have duly served upon the defendant. With these observations, I answer point No.2 in the **Affirmative**.

19. **Point No.3** : For the foregoing reasons, I proceed to pass the following;

ORDER

I.A.No.1 filed Under Order XI Rule 1 r/w Sec. 151 of CPC and I.A.No.2 filed under Section 65(a), Section 65(c) and Section 66 of the Indian Evidence Act, 1872 r/w Sec. 151 of CPC by the plaintiff are hereby allowed.

(Dictated to the Stenographer, transcribed by him, corrected and then pronounced by me in the open court on **10th day of July 2024**).

(JITHENDRANATH C.S.)

LXXXVI Addl. City Civil & Sessions Judge,
Bengaluru