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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 16 OF 2017
IN
COMMERCIAL SUIT NO. 397 OF 2016

K. Kishinchand & Airlines Agency ...Plaintiff
vs
Air France ...Defendant

.....

Mr Karl Tamboly a/w Mr P.A.Jani i/b VIGIL JURIS for the Plaintiff
Mr Aashish A. Agarwal i/b Anish Wadia for the Defendant.

.....

CORAM : **B.P.COLABAWALLA, J.**
DECEMBER 05, 2017.

ORAL JUDGMENT :

This Summons for Judgment has been filed on behalf of the Plaintiff seeking that a Judgment be entered against the Defendant in the sum of Rs.3,17,22,879/- being the principal sum together with interest at the rate of 18 % per annum. The claim in the present suit arises on the basis of the invoices raised by the Plaintiff on the Defendant which are annexed at Exhs C-1 to C-18 of the plaint.

2 The Plaintiff, being a partnership firm, carries on the business of custom clearing and forwarding as a Custom House Agent for foreign airlines. The Defendant is a limited liability company

incorporated under the Laws of France and is in the business of carrying passengers and cargo from one destination to the other worldwide in aircrafts owned and / or leased by it.

3 On 6th October, 1989 the Defendant appointed the Plaintiff as its Custom House Agent for clearing and forwarding the material imported by the Defendant into Mumbai as well as for export purposes. On 6th October, 1989, the Defendant addressed a letter to the Assistant Collector of Customs at Air Cargo Complex, Sahar, informing him that the Plaintiff has been appointed with immediate effect to clear various materials imported and exported by the Defendant until further notice. A copy of this letter was also forwarded to the Plaintiff.

4 It is the case of the Plaintiff that pursuant to the aforesaid appointment, the Plaintiff commenced working for the Defendant and from time to time, as and when required by the Defendant, materials imported / exported by the Defendant were cleared by the Plaintiff. How the Plaintiff and the Defendant used to interact with each other is more particularly set out in paragraph 4 of the plaint.

5 Some time in March 2013, due to failure of one engine of

the Defedant's aircraft, the same was grounded in Mumbai. Due to failure of this engine, a replacement was required and the Plaintiff was entrusted with the task of all custom clearance work relating to import of another aircraft engine to replace the failed engine. Along with this there were spare parts and tools etc. that were also required to be imported and for which again, the Plaintiff was to entrusted for the customs clearing work.

6 When the work of import was over, the Plaintiff was asked to give to the Defendant an estimate as to the amount that the Defendant was liable to pay for the import. On 19th March, 2013 the Plaintiff informed the Defendant that for the aforesaid import, approximately Rs.1.93 crores were estimated as amount for reimbursement and agency charges along with service tax.

7 Be that as it may, after completion of work, the Plaintiff addressed two letters both dated 17th April, 2013 to the Airport Manager, Traffic Department of the Defendant. By the first letter, the Plaintiff demanded a sum of Rs.2.59 Crores towards the agency charges and Rs.32 Lacs as service tax. By the second letter, the Plaintiff demanded Rs.58.21 Lacs towards reimbursement of various expenses incurred by the Plaintiff towards the Defendant and

Rs.4.47 Lacs towards service tax. With each of the letters dated 17th April, 2013 (Exhs B-1 and B-2) the Plaintiff also forwarded to the Defendant 18 bills bearing Nos. 1814 to 1831, one set out the agency charges payable by the Defendant to the Plaintiff for attending to the work relating to custom clearing and forwarding and another set of bills for reimbursement of the expenses incurred on behalf of the Defendant. According to the Plaintiff along with the aforesaid bills, the Plaintiff also forwarded all original documents supporting the claim of the Plaintiff for reimbursement as well as agency charges. The details of these bills and the amounts due therein have been set out in paragraph 6 of the plaint.

8 It is the case of the Plaintiff that the rates at which the Plaintiff was to be paid for providing the services of Custom House Agent and for doing the work for the Defendant from time to time, a rate sheet showing the rates applicable for different services was sent to the Defendant. The last change in the rates was made effective from 17th April, 2011 as communicated by the Plaintiff to the Defendant by forwarding a circular sent by the Plaintiff to all its clients who are foreign airlines. This included the Defendant. I must mention over here that the receipt of this rate sheet is not disputed by the Defendant.

9 On completion of the work and forwarding of the invoices / bills of the Plaintiff to the Defendant, on 10th May, 2013, the Plaintiff received an email from the Defendant raising certain queries. This email was responded to by the Plaintiff vide its email dated 14th May, 2013. Thereafter, on 21st May, 2013 the Plaintiff received from the Defendant an email informing the Plaintiff that the Defendant was going through the bills and would revert. In the meantime, with reference to the rates of the Plaintiff, the Defendant for the first time raised a query on the rates stating that they weren't realistic. What is important to note is that the attachment to this email sets out the amounts which according to Air France were payable to the Plaintiff. This email along with the attachment (the worksheet) can be found at Exh "G" (Pages 94 to 97 of the paper book).

10 By its email dated 21st May, 2013, the Plaintiff replied to the aforesaid email of the Defendant and informed the Defendant that the rates as informed by the Plaintiff to the Defendant are the rates applied by the Plaintiff in the past and the Defendant had till date not raised any question or query about the same being unrealistic.

11 It is the case of the Plaintiff that thereafter, on 21st June, 2013, for the first time they received from the Defendant an email communication alleging that the Plaintiff was attempting to claim an extremely inflated amount of Rs.3.5 Crores. It is, in these circumstances, that by the said email, the Defendant suggested a face to face without prejudice meeting to discuss the claim of the Plaintiff. Thereafter, several meetings took place in which no consensus was reached between the parties.

12 Be that as it may, on 11th October, 2013 (Exh "L") the Plaintiff received an email from the Defendant once again reiterating that the bills submitted by the Plaintiff were unreasonable. Despite this, the Defendant made an offer to close the issue by stating that the Plaintiff would be paid as per the agreement the Defendant had with its other Custom Clearing and Forwarding Agents at Delhi and Bangalore. Along with this email dated 11th October, 2013, the Defendant also forwarded a working of what according to the Defendant was now due and payable to the Plaintiff. This worksheet can be found at pages 105 to 107 of the paper book. In this worksheet, according to the Defendant, the amount of Rs.30,45,290/- was due and payable. Needless to state that the contents of this email were refuted by the Plaintiff vide its email dated 18th October, 2013.

13 Thereafter correspondence has taken place between the parties as more particularly set out in paragraphs 12 and 13 of the Plaint wherein again both the parties stuck to their respective stands. Since, according to the Plaintiff no payment was coming forth from the Defendant, they were constrained to file the present suit as a Summary Suit under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 (**"CPC"**).

14 After this suit was filed and the Writ of Summons was served upon the Defendant, the Defendant filed its appearance through an Advocate. Thereafter, the present Summons for Judgment was filed in which an affidavit-in-reply, an affidavit in rejoinder as well as an affidavit in sur-rejoinder were filed. In addition thereto, the Plaintiff has also filed a further affidavit dated 10th November, 2017 and in reply thereto, the Defendant has filed an affidavit dated 27th November, 2017. Under what circumstances these two affidavits came to be filed is stated later in this judgment. It is on the basis of these pleadings that I have heard both the parties.

15 Mr Tamboly, learned advocate appearing on behalf of the Plaintiff submitted that there was no real dispute to the claim made

by the Plaintiff in the present suit. He submitted that admittedly in March 2013, an aircraft engine in one of the aircrafts of the Defendant had failed to function. In order to replace that engine, another aircraft engine had to be imported into India. For the purpose of ensuring that this aircraft engine is imported into India, the services of the Plaintiff were engaged. This work was duly done by the Plaintiff, and according to Mr Tamboly, without any complaint from the Defendant. Once this work was done, the invoices were raised on the Defendant as per the rate sheet that was forwarded to the Defendant in the year 2011. He submitted that the defences raised, either in the correspondence or in the pleadings, are only with a view to avoid making payment of the legitimate dues of the Plaintiff.

16 In the alternative, Mr Tamboly submitted that in any event, at least to the extent of Rs.1.60 Crores the Defendant has admitted its liability to the Plaintiff. In this regard he placed heavy reliance on the email dated 21st May, 2013 (Exh "G") and the attached detailed worksheet. He submitted that this email clearly states that in the attached detailed worksheet the amounts indicated in red colour do not match with the schedule of rates or that the Defendant does not find them as correct. As a corollary, Mr Tamboly submitted that, therefore, the figures mentioned in the said

worksheet, which were not in red, were duly accepted by the Defendant. He brought to my attention the said worksheet which clearly sets out each bill number and the amounts as claimed by the Plaintiff in one column, and the amounts which according to the Defendant are payable in the next column. He submitted that even if one were to go by the worksheet attached to Exh "G", even according to the Defendant, an amount of Rs.1.60 Crores was due and payable by the Defendant to the Plaintiff. This being the case, Mr Tamboly submitted that there would be no question of granting unconditional leave to the Defendant to defend the present suit. At the very least, the Defendant ought to deposit the sum of Rs.1.60 Crores before any leave is granted for defending the Summary Suit. For all the aforesaid reasons, Mr Tamboly submitted that the Summons for Judgment be made absolute or at the very least the Defendant be put to terms of depositing the sum of Rs.1.60 Crores before any leave is granted to defend the suit. In addition to the amount of Rs.1.60 Crores, Mr Tamboly also submitted that the Plaintiff be directed to deposit the amount due under Bill Nos. 1827 to 1829 aggregating to approximately Rs.1.25 crores as clearly these amounts were also due and payable by the Defendant to the Plaintiff and which have wrongly been denied in the worksheet attached to Exh "G" to the plaint. For all the aforesaid reasons, Mr Tamboly submitted that at the very least, the Defendant be ordered to deposit an amount of Rs.2.85 Crores before any leave to defend is granted to the Defendant.

17 On the other hand, Mr Agarwal, learned advocate appearing on behalf of the Defendant, submitted that in the facts of the present case, the suit itself was not maintainable as a Summary Suit as there was no written contract between the parties. This being the case, there was no question of asking the Defendant to deposit any amount before granting leave to defend the present suit. The next contention raised by Mr Agarwal is that the reliance placed by Mr Tamboly on Exh "G" and the worksheet attached thereto is wholly misconceived. He submitted that on a plain reading of Exh "G" (which is the email dated 21st May, 2013), would clearly show that the Defendant was still going through the bills of the Plaintiff concerning import of the aircraft engine in March 2013 and which according to Mr Agarwal would never amount to an admission of liability. The worksheet that was annexed to Exh "G" were only a temporary working and was forwarded to the Plaintiff only for their information. According to Mr Agarwal this was made further clear when one looks at the email dated 11th October, 2013 (Exh "L") to the plaint along with the worksheet attached thereto. According to Mr Agarwal that is the final worksheet as to the amounts due and

payable by the Defendant to the Plaintiff. He submitted that the amounts mentioned in the invoices / bills raised by the Plaintiff have never been admitted by the Defendant. He stated that the vast difference that seems to appear between the worksheet annexed at Exh "**G**" (Rs.1.60 Crores) and Exh "**L**" (Rs.30.40 Lacs) is because the agency charges of the Plaintiff in the first worksheet was calculated at 1.5 % of the value of the goods imported whereas in Exh "L" the agency charges were calculated as per the market and industry standards and on the basis of certain caps as more particularly set out at pages 39 and 43 of the affidavit in reply. He, therefore, submitted that looking to these facts, there was no question of the Defendant being asked to deposit any sum higher than a sum of Rs.30.40 Lacs as that was the final amount, if at all, that was payable by the Defendant to the Plaintiff.

18 The next contention raised by Mr Agarwal and though not strenuously, was that the suit was barred under the provisions of Section 69 of the Partnership Act, 1932 in view of the fact that the Plaintiff was a partnership firm and nowhere in the plaint any proof of its registration was furnished. Lastly, Mr Agarwal submitted that the correspondence on record clearly goes to show that there are several disputed questions of fact inasmuch as the Plaintiff has itself

admitted that it had overcharged the Defendant as well as several other issues, and therefore, this is the fit case for granting unconditional leave to defend the suit to the Defendant. He consequently submitted that there is no merit in the Summons for Judgment and the same ought to be dismissed.

19 I have heard the learned advocates for parties at length and I have perused the papers and proceedings in the present suit. Most of the facts of the case seem to be undisputed. It is not in dispute that the Plaintiff was appointed as a Custom House Agent for the purposes of clearing and forwarding by the Defendant. It is also not in dispute that in March 2013 an aircraft engine in one of the aircrafts of the Defendant failed in Mumbai. To ensure that the failed aircraft engine is replaced by another engine, the services of the Plaintiff were engaged for the purposes of importing a new aircraft engine along with its spares and also the work of export of the failed engine. Lastly it is not in dispute that this work was duly carried out by the Plaintiff without any complaint from the Defendant. From the arguments that were canvassed before and on going through the record, the dispute really revolves around what are the amounts that would be payable by the Defendant to the Plaintiff. In this regard it would be apposite to refer to certain documents that have been

annexed to the plaint. As mentioned earlier, with effect from 17th April, 2011 the Plaintiff sent their rate sheet to all their foreign airlines for whom they used to supply their services as Clearing and Forwarding Agents. This rate sheet is dated 9th April, 2011. It is not in dispute that this rate sheet has been given or is in possession of the Defendant. This rate sheet (as is relevant for our purposes) reads as under:

> **"Revised Schdule of Customs Clearance Charges (Import/Export) for Foreign Airlines. To be effective from 17/04/2011,**
> **<u>This supercedes our last schedule of 24/05/2003.</u>**
>
> **Agency charges... Rs.1300 for first pkg**
> **Rs.0400 for addl**
> **Customs Examination.................................... Rs.0400 for first pkg**
> **Rs.0150 for addl.**
> **Bill of Entry/Shipping Bill............................. Rs.0500**
> **Repairs/Strapping/Scaling/Sealing............. Rs.0100 per pkg**
> **Loading/Uploading for forwarding and delivery.. Rs.0100 per kg**
> **Octroi Attendancy.. Rs.0200 per consignment**
> **V.D.Form.. Rs.300**
> **Sundry... Rs.0600 per consignment**
> **Conveyance charges for Catering Goods Rs.1200**
> **<u>Agency charges on all will be as above or 2.5 % ad vol and 1.5 % on A/C Spares as applicable.</u> Direct Delivery chgs. Rs.0500**
> **Service and conveyance charges for Delivery Order obtained from outside Sahar area.. Rs.0400**
> **Service charges for demand draft if applicable...Rs.0350"**

(emphasis supplied).

20 As can be seen from the above rate sheet (also known as the schedule of charges), the agency charges on all will be as

mentioned above or 2.5 % ad-vol and 1.5 % on A/C Spares as applicable. It is not in dispute that the word “A/C Spares” is with reference to an aircraft engine and its spare parts. To my mind, what this rate sheet clearly indicates is that when an aircraft engine or its spare parts are imported or exported, the charges that would be levied for the same by the Plaintiff would be 1.5 % of the value of the said engine and/or its spare parts. This is clear from a plain reading of the rate sheet annexed at Exh “D” (Page 90 of the paper book).

21 I am further fortified in taking this view when one peruses the work sheet prepared by the Defendant and forwarded to the Plaintiff as an attachment to their email dated 21st May, 2013 (Exh “G” to the plaint). On perusal of this work sheet it is clear that the Defendant itself calculated the attendance and agency charges at 1.5 % of the value of the aircraft engine and spare parts. Important to note also is that the figures that were disputed by the Defendant were shown in red colour and there was another column which showed the figures as to amounts according to the Defendant should have been the charges levied by the Plaintiff. Just as an example, the details with reference to the bill 1814 are set out hereunder:

		14045000 $ = INR 55.1500	
		7920 Kgs = 2 Pkg	

S. No.	Reimbursement Particulars	1814	As per AF 1814
1	Import Duty		
2	Octroi Duty	7,82,328	7,82,328
3	CMC Charges	0,00,022	0,00,022
4	Overtime Charges		
5	Loading Unloading charges (100 per pkg)	9500	200
6	Customs Examination charges (400+150)	3,50,550	550
7	Repairs(scaling) & Strapping(100 per pkg)	3500	200
8	Octroi Attendency Charges(200 per consign)	200	200
9	Xerox charges	40	40
10	IAAC	92670	92670
11	Customs B/Entry or Shipping Bill (Rs.500)	500	500
12	Conveyance charges		
13	Delivery Order Charges		
14	Attendance & Agency Charges		
15	Service Tax @ 12.36 %	94841	4735
16	Transport Charges (>300/rs4 perkg+2300)	38196	32780
17	Sundry Expenses (Rs.600 per consignment)	3,60,600	600
18	Bank Expenses	3440	2417
19	V/D Form Charges (Rs.300)	300	300
20	Direct Delivery Charges (Rs.500)	500	500
21	Stamp Duty	7,82,355	?
	Total	25,19,542	9,18,042
	Agency Charges Particulars		
	Attendance @ Agency Charges	**1,17,34,914**	**1,16,18,726**
	Service Tax @ 12.36 %	14,50,435	14,36,075
	Total	1,31,85,349	1,30,54,801
	Grand Total per Bill	**1,57,04,891**	**1,39,72,843**

22 On looking at the table above and which I have used as an example for every other bill in the said worksheet, it is clear that the Defendant has calculated the agency charges at 1.5 % of the value of aircraft engine and spare parts. This is also clear because at the top

of the table the value is shown as USD 14,045,000 and the exchange rate is mentioned as Rs.55.1500. If the USD figure is converted into INR and thereafter 1.5% is calculated by the said figure, it exactly comes to the figure mentioned in the table above. This would clearly go to show that the Defendant itself calculated the agency charges payable to the Plaintiff at the rate of 1.5% of the value of the aircraft engine and/or its spare parts.

23 Looking at the worksheet which is the attachment to Exh **"G"**, what becomes abundantly clear is that the figures mentioned in the bills raised by the Plaintiff and which have been indicated in red, were not accepted by the Defendant. In turn, what was payable according to the Defendant has been clearly set out in the next column titled as **"As per AF1814"**. To my mind this worksheet and especially when one looks at the figures mentioned therein, the same clearly establishes that at least as far as the agency charges are concerned, the Defendant has come to the aforesaid calculation in the worksheet on the basis of 1.5% of the value of the aircraft engine and/or its spare parts, as set out in the rate sheet dated 9th April, 2011 furnished by the Plaintiff to the Defendant, the receipt of which has never been denied by the Defendant. As per this worksheet, even according to the Defendant, the amount payable by it to the Plaintiff

comes to the figure of Rs.1,59,23,149/-.

24 To get over this, Mr Agarwal, learned Counsel appearing on behalf of the Defendant, submitted that this worksheet and which is annexed to the email dated 21st May, 2013, was only a temporary working and was forwarded to the Plaintiff only for their information. The final working was arrived at by the Defendant only in October 2013 and which was forwarded to the Plaintiff vide the Defendant's email dated 11th October, 2013 (Exh "**L**" to the plaint). According to Mr Agarwal this was the final worksheet as to what was the amount that was payable by the Defendant to the Plaintiff. I am unable to agree with this submission. It is true that Exh "**G**" to the plaint (email dated 21st May, 2013) states that the Defendant was going through the bills of the Plaintiff concerning the aircraft on ground in March, 2013. However, this very email also states that a detailed worksheet is attached showing the observations of the Defendant as per the bills submitted by the Plaintiff with their remarks. It is also specifically states that the amounts indicated in red on these bills do not match with the schedule or the Defendant does not find them to be correct. What is important to note is that what according to the Defendant was the correct figure is also mentioned in the said worksheet and as illustrated by me earlier. This being the position, I

am unable, at least at this stage, to accept this submission as a bona fide defence entitling the Defendant to unconditional leave to defend the suit.

25 There is yet another reason for taking this view. As mentioned earlier, the real dispute is with respect to the reduction in the amounts mentioned in the worksheet attached to Exh "G" in comparision to the amounts mentioned in the worksheet attached to Exh "L". Whilst in the worksheet attached to Exh "G" the Defendant has calculated the attendance and agency charges at the rate of 1.5%, as far as the worksheet attached to Exh "L" is concerned, the attendance and agency charges are calculated on the basis of keeping in mind the CAPS that would be applicable to clearing shipments of a very high value. This is clear from the email at Exh "L" dated 11th October, 2013. What is important to note is that when the work was done by the Plaintiff or any time prior thereto, the Defendant never once raised any issue regarding any CAP on import or export of high value shipments such as an aircraft engine. In fact the rate sheet annexed at **Exh "D"** (page 90) clearly indicates that the agency charges would be at 1.5% on A/C spares as applicable. The calculation done by the Defendant at Exh "L" is clearly an afterthought and contrary to the rate sheet (Ex "D") forwarded by

the Plaintiff to the Defedant. In fact, the calculations done by the Defendant in the worksheet attached to Exh "G" is in consonance with Exh "D" being the schedule of charges of the Plaintiff and which was admittedly received by the Defendant. This being the case, I am unable to accept the submissions of Mr Agarwal that the worksheet attached to Exh "**G**" was only a temporary calculation and the amounts due and payable by the Defendant are as reflected in the worksheet attached to the email dated 11th October, 2013 (Exh "**L**" to the plaint).

26 The next issue is with reference to bill No.1827. This bill relates to export of the unserviceable engine/ failed engine which was exported by the Plaintiff on the instructions of the Defendant. As far as this bill is concerned, the Defendant even at Exh "**G**" has not admitted any amount payable by the Defendant to the Plaintiff on account of attendance and agency charges. With reference to this bill, Mr Tamboly argued before me that the Defendant had themselves valued even the unserviceable engine at USD 14,045,000 as was clear from the first row of the worksheet attached at Exh "**G**". At the time when this matter was heard on 9th November, 2017, I was not inclined to accept this submission as there was nothing else on record to corroborate this fact. However, when I was in the midst

of dictating my order in the Court (on 9th November, 2017), at 3.00 p.m., Mr Tamboly produced across the bar *inter alia* a letter written by the Defendant, themselves valuing the unserviceable engine at USD 14,045,000. Since this document was tendered across the bar, I only thought it fit to allow the Plaintiff to bring the same on record and allow the Defendant to have an opportunity to deal with the same. Accordingly, the Plaintiff filed a further affidavit dated 10th November, 2017. In reply to this affidavit, the Defendant has also filed an affidavit 27th November, 2017. In this affidavit, it is for the first time stated that the schedule of charges (annexed at Exh "**D**" page 90 of the plaint) does not cover **"aircraft on ground".**

27 I must emphasise that this stand has never been taken by the Defendant in the affidavit-in-reply or even in the correspondence that was exchanged between the parties prior to filing of the suit. This argument comes up for the first time in the Affidavit dated 27th November, 2017. To my mind, not only is this argument an afterthought but is contrary to the Defendant's own email dated 21st May, 2013 (Ex "G" to the Plaint). The subject of this email states **"FW: RE AOG related bills"**. The abbreviation "AOG" is nothing but "Aircraft on Ground". Even in the body of this email it is stated that the Defendant is going through the bills of the Plaintiff

concerning AOG in March 2013. As stated earlier, in the worksheet attached to this very email the Defendant has stated what according to it is due and payable to the Plaintiff. This being the factual position, it is too late in the day for the Defendant to contend that schedule of charges (rate sheet) [annexed at Ex "D" to the Plaint] does not cover or take into consideration a situation of "Aircraft on Ground". This argument therefore stands rejected.

28 As far as the document showing the value of the unserviceable engine as USD 14,045,000 is concerned, it is not in dispute that the same is on the letterhead of the Defendant. With reference to this document, the only stand taken by the Defendant is that the Plaintiff has wrongly put the value of a new aircraft engine as the same value of the damaged aircraft engine in order to claim higher agency charges. This was the same stand that was reiterated by Mr Agarwal before me. I find this argument to be wholly ludicrous. This is a document annexed to the further affidavit filed by the Plaintiff and which can be found at Exh "D" thereof. This document is styled as an invoice and is executed by the Defendant on its own letterhead. It is ridiculous to suggest that the Defendant (who is a National Carrier of France), would put a value of an unserviceable engine purely on the basis of what the Plaintiff states.

This would be more so in the facts of the present case considering that the unserviceable aircraft engine was to be exported and did not have any customs duty implications. I must mention here that though the Defendant disputes that the value of the unserviceable aircraft engine is USD 14,045,000 the affidavit filed by the Defendant on 27th November, 2017, is conspicuously silent on what would be the value of this unserviceable aircraft engine. All that is stated in the affidavit of the Defendant dated 27th November, 2017 is that as a matter of routine protocol, the Defendant requires such an unserviceable / damaged engine to be transported back to its relevant team to carry out forensic analysis to determine why such an engine became damaged and unserviceable so as to ascertain whether there is a risk to other aircrafts with the same set / design of engines.

29 Faced with this situation, it was submitted before me by Mr Agarwal, that the value of this engine is "zero". However, this has not been stated anywhere in affidavit and in fact this affidavit does not even mention that this unserviceable engine has been subsequently scrapped or has been put in use once again by the Defendant after carrying out the forensic analysis mentioned in paragraph 8 of the affidavit dated 27th November, 2017. This being

the factual position before me, I find that even as far as bill Nos.1827 is concerned, the Defendant does not have any real defence with reference to the monies due by the Defendant to the Plaintiff which would have to be calculated at 1.5 % of the value of the unserviceable engine and spare parts and which has been valued at USD 14,045,000 by the Defendant themselves as is clear from Exh "D" to the further affidavit filed by the Plaintiff.

30 What is also interesting to note is that the worksheet attached to Exh "**L**" to the Plaint, the Defendant has agreed to pay Rs.1 Lac towards the export of this unserviceable engine. When I inquired with Mr Agarwal that on what basis the Defendant was willing to pay Rs.1 Lac for export of this unserviceable engine, (considering that the value of this engine was "zero"), Mr Agarwal stated before me that this was done on the basis of what other clearing and forwarding agents were charging the Defendant.

31 I find this argument to be wholly unmeritorious for more than one reason. Firstly, what the Defendant pays to other clearing and forwarding agencies is wholly irrelevant to the issue at hand. Secondly, in the facts of the present case, the schedule of charges was admittedly forwarded by the Plaintiff to the Defendant and

which is annexed at Exh **"D"** to the plaint. As per this schedule of charges, the Defendant was informed that the Plaintiff would charge for imports / exports of A/C spares at the rate 1.5 % of the value of the A/C spares. In fact as far as the import of the new engine is concerned, the calculation was done on this very basis by the Defendant in the worksheet attached to Exh "**G**" to the plaint. This story regarding the cap on charges for high value shipments comes up for the first time in the email dated 21st June, 2013 (Ex "I" to the plaint) and after all the work was already done by the Plaintiff. I, therefore, find this argument also wholly without any merit. In any event, it is not the case of the Defendant that the Plaintiff had agreed to any such expenses on the charges of high value shipments. This so called "cap" has been imposed unilaterally by the Defendant on the Plaintiff and that too contrary to the schedule of charges (rate sheet) annexed at Exh "D" to the plaint.

32 Even otherwise, even if I was of the view that the defence raised is plausible one, I find that the same is improbable and in such circumstances, as laid down by the Supreme Court in the case of **IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd.**[1] I would be justified to impose a condition for payment into the Court or furnishing the security by the Defendant before granting leave to

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defend the suit. This is clearly stated by the Supreme Court in paragraph 17.4 of its decision.

33 Looking to the totality of the facts of the present case, even if I was of the view that the defences raised by the Defendant were plausible, I find the same to be highly improbable, and in such circumstances, as laid down by the Supreme Court in the case of **IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd.**[2]**,** I would be justified to impose a condition for payment into the Court or furnishing security by the Defendant before granting leave to defend the suit. This is clearly stated by the Supreme Court in paragraph 17.4 of its decision. Hence, looking to the totality of the facts of the case, the following order is passed.

O R D E R

Leave is granted to the Defendant to contest the suit subject to-

(i) The Defendant depositing in this Court a sum of Rs.1.59 Crores + Rs.1.13 Crores aggregating to a total of Rs.2.72 Crores within a period of 12 weeks from today;

(ii) If the aforesaid deposit is made within the stipulated period, this suit shall be transferred to the list of Commercial Causes and the Defendant shall file its

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Written Statement within a period of eight weeks from the date of deposit;

(iii) If these amounts or any part thereof are deposited by the Defendant, the Plaintiff shall be entitled to withdraw a sum of Rs.1.59 Crores or any part thereof, on the Plaintiff furnishing a bank guarantee of the said amount. The Plaintiff shall also file an undertaking in this Court that in the event the Plaintiff fails in the suit, it shall bring back this amount together with interest at such rate as may be decided by the Court at the hearing of the suit;

(iv) If this conditional order of deposit is not complied with within the stipulated period as mentioned earlier, the Plaintiff shall be entitled to apply for an ex-parte decree against the Defendant after obtaining a non-deposit certificate from the Prothonotary and Senior Master of this Court.

34 The Summons for Judgment is disposed of in the aforesaid terms. However, in the facts and circumstances of the case there shall be no order as to costs.

(B. P. COLABAWALLA, J.)