

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

**CHAMBER SUMMONS NO.36 OF 2016
IN
COMMERCIAL SUIT NO.119 OF 2015**

Wilfred Anthony Jose Pereira & Anr. ... Applicants.

In the matter between:-

Nipun Ishwardas Thakkar ... Plaintiff

Versus

Wilfred Anthony Jose Pereira & Anr. Defendants

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Mr. Girish Godbole, Piyush Raheja and Ms. Urvi Tanna I/b M/s. Pravin Mehta & Mithi & Co., for the Plaintiff.

Mr. Zubin Behramkamdin and Mrs. Shivani Khanna and Mr. Saahil Bijliwala I/b FZB & Associates, for the Defendants.

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CORAM : S.C.GUPTE, J.

DATE : 23 MARCH 2018

P.C. :

1. Heard learned Counsel for the parties.
2. Plaintiff is permitted to amend the plaint by incorporating the missing page of Exhibit A. Amendment to be carried out forthwith, re-verification dismissed.
3. This Chamber Summons seeks expungement of some of the portions of the affidavit of evidence tendered by the Plaintiff in lieu of examination-in-chief.

4. It is the case of the Applicants (Original Defendants) in the present Chamber Summons that these offending portions of the affidavit of evidence are beyond the pleadings and in any event are not relevant. Learned Counsel draws my attention to the skeletal averments in the plaint and submits that no portion of the narration in the affidavit of evidence has any basis in the Plaintiff's pleading.

5. The Suit is based on a sum of Rs.5.35 crores advanced by the Plaintiff to the Defendants. The Plaintiff has referred to correspondence exchanged between the Plaintiff and the Defendants in relation to advances made by the Plaintiff to the Defendants and then referred to a letter addressed by the Defendants to the Plaintiff on 12 April 2012. It is submitted that in this letter, the Defendants have admitted their liability to pay to the Plaintiff a sum of Rs.5.35 crores. It is submitted that this letter claims that the Defendants have sent cheque of Rs.5.35 crores under the cover of this letter, but that no cheque, in fact, was received by the Plaintiff with this letter. On the basis of these writings, the Plaintiff has filed the present Suit praying for a decree of the principal amount of Rs.5.35 crores and interest at the rate of 18% per annum thereon. If one has regard to the letter of 12 April 2012 annexed to the plaint, the amount of Rs.5.35 crores, which was admitted by the Defendants, was towards refund of the aggregate amount of Rs.5.35 crores paid by the Plaintiff "during the course of the proposed without prejudice settlement talks that took place" between the parties with respect to the captioned matter, the captioned matter being the letter of 22 March 2018 addressed by the Plaintiff to the Defendants in Writ Petition No.9449 of 2009. Besides this letter, there are two affidavits filed by the Defendants in this Court in miscellaneous

proceedings in the Writ Petition referred to above, which also refer to the without prejudice discussions between the parties. Besides these documents, which form part of the plaint itself, the Defendants have in their written statement extensively referred to the discussions between the parties, in the course of which payment was made by the Plaintiff to the Defendants. The Defendants have claimed that in view of the circumstances disclosed by them in the written statement, the amount is not refundable and the Defendants are entitled to forfeit this amount. In view of these pleadings between the parties, it is but necessary for the Plaintiff to set out extensively the settlement talks between the parties including the background litigation and events which necessitated the settlement talks, in the first place, and if the Plaintiff, with a view to disclose these circumstances, steps into the witness box and deposes to these circumstances, there is absolutely nothing wrong. The trial is in no way embarrassed by the deposition of the plaintiff; it does not take the Defendants by any surprise. In fact, the Defendants themselves have deposed to certain settlement talks in the course of which the amount of Rs.5.35 crores was received by them from the Plaintiff. It is but natural for the Defendants to expect the Plaintiff to step into the witness box and depose to the correct circumstances according to the Plaintiff, in which he paid this amount of Rs.5.35 to the Defendants.

6. There is, accordingly, no merit in the Chamber Summons. The Chamber Summons is dismissed. Cost to be costs in cause.

7. At the request of learned Court for the Plaintiff, the hearing of the Suit is expedited. The documents produced by the Plaintiff are admitted in

evidence. It is clarified that the marking of these documents does not dispense with the proof of their genuineness. These documents are marked subject to cross-examination and the proof of the truth of their contents. By consent Court Commissioner is appointed. The parties to write to the Commissioner and have a schedule of meetings fixed. Commissioner to number the Plaintiff's documents admitted in evidence today and record the evidence of PW-1 and submit a report within a period of five weeks from today. The Suit to come up for direction after six weeks.

(S.C.GUPTE, J.)