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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUMMONS FOR JUDGMENT NO. 105 OF 2018
IN
COMM SUMMARY SUIT NO. 1206 OF 2018
WITH
NOTICE OF MOTION NO. 2374 OF 2018**

Air India Limited	...Plaintiff
<i>Versus</i>	
BKP Enterprises	...Defendant

Mr MPS Rao, *Senior Advocate, with Mr Arsh Misra, i/b MV Kini, for the Plaintiff.*

Mr Karl Tamboly, *with Mr Siddharth Mehta, Mr Mudit Gupta & Ms Sanjana Das, i/b Mehta & Padamsey, for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 29th November 2018

PC:-

1. The Plaintiff is Air India Limited. It seeks a decree against the sole Defendant for USD 10,505,208 (as on the date of the suit, equivalent to Rs.71.9 crores) with interest claimed at 18% per annum from the date of what is described as a Settlement Agreement dated 23rd March 2018. Prayer clause (b), unusual in a Summary Suit, seeks a judgment on admission under Order XII Rule 6 of the Code of Civil Procedure 1908 (“CPC”).

2. For the Summons for Judgment, I will, as I believe I must disregard the second prayer. The question is whether the Suit is one that can fairly be said to have been brought within the restricted ambit of Order XXXVII Rule 2 of the CPC. The contours of that Order are well established, and the recent decision of the Supreme Court in *IDBI Trusteeship Services Ltd v Hubtown Limited*¹ comprehensively sets out the law in this regard. It is only necessary to reproduce paragraph 18 of the decision in *Hubtown* :

"18. Accordingly, the principles stated in paragraph 8 of Mechelec's (AIR 1977 SC 577) case will now stand superseded, given the amendment of O. XXXVII R.3, and the binding decision of four Judges in Mikhiram's (AIR 1945 SC 1698) case, as follows:

- a. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit;
- b. if the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend;
- c. even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist

1 AIR 2016 SC 5321.

expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security;

d. if the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

e. if the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith;

f. if any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

3. Air India's case runs thus. It says first that the Defendant, a sole proprietorship of one Bharat Zaveri ("**Zaveri**") is the Indian representative of one Dynamic Airways ("**Dynamic**"), a US company. The Plaintiff then says that by virtue of clause 8(x) of a Charter Party Agreement dated 16th June 2014 to which Zaveri was a signatory, Dynamic agreed to provide Air India with various facilities (including aircraft) for pilgrimages to Haj in 2014. From paragraph 3 onwards there is a recitation of the circumstances in

which Air India floated a tender, received bids and which culminated in the Charter Party Agreement dated 16th June 2014 for the Haj pilgrimage, with the proposed flights originating at 11 different destinations in India to ferry pilgrims to Saudi Arabia and back. Paragraph 9 of the Complaint contains a statement that Zaveri signed the agreement “as a witness of Dynamic Airways”. Now whether this serves to bind the Defendant to any financial obligations alleged to have been incurred by Dynamic is undoubtedly a question that will arise; and it will arise not only on a reading of the document but is a matter that will, in my view, require evidence. It is not disputed that neither Zaveri nor his proprietorship firm was a directly contracting party, for the Agreement was with Dynamic.

4. Mr Rao for the Plaintiff submits that clause 8(x) of the Agreement, reproduced at page 69 of the Complaint, binds Zaveri and its proprietorship firm to the fullest extent and makes him liable for the financial obligations of Dynamic to Air India. The clause in question reads as follows:

“8(x) The Second Party has appointed M/s BKP Enterprise Ltd as authorised representative in India who will be signing this Charter Agreement on behalf of the operator **and who will be jointly and severally responsible for obligations under the contract of Haj 2014 operations.**”

(Emphasis added)

Mr Rao emphasises the phrase “jointly and severally responsible for obligations under the contract” to submit that this necessarily

extends to a joint and several liability of the Defendant with Dynamic for all financial obligations.

5. I will at this stage leave aside the various allegations made by Air India against Dynamic regarding aircraft being supplied of less than quoted capacity, cancellations of other agreements and so on for the simple reason that this narrative culminated in the appointment of an Arbitrator for a reconciliation of accounts in 2015. The relevant facts are set out in paragraph 24 of the Complaint.

6. Paragraph 26 says that Dynamic brought suit in the US Courts against Air India for USD 97.7 million. That District Court in New York directed the parties to proceed to arbitration.

7. There were Arbitration Proceedings including a separate arbitration between Dynamic and the present Defendant and a later award in favour of Air India which is dated 10th March 2017. In paragraph 31, Air India says that Dynamic entered into a Settlement Agreement dated 23rd March 2018 admitting its liability in the amount claimed in the present Suit. It is on this basis that Air India makes the second prayer for a Judgment on Admission under Order XII Rule 6 of the CPC and similarly claims that by virtue of clause 8(x) of the Charter Agreement, Dynamic's liability in this allegedly admitted amount is the joint and several responsibility of Zaveri and his proprietorship concern.

8. There are two paragraphs of note in the making of this claim. The first of these is paragraph 25 where the Plaintiff says that Zaveri

made some payment to a hotel in Jaipur, and because it did so on behalf of or as a representative of Dynamic, therefore it has accepted that its liability to Air India is coextensive with that of Dynamic. The second paragraph, material for the present purposes, is paragraph 34 at page 28 of the Complaint and this is how it reads:

"34. The Plaintiffs submits that as enumerated in clause 8(x) of the charter agreement dated 16th June 2014, Defendant firm is the authorized representative of Dynamic Airways. It is submitted that Defendant firm has its office in Mumbai. It is submitted that as per section 20 of the Code of Civil Procedure 1908 a suit can be instituted at a place where the Defendant or one of the Defendants reside or carry their business for personal gain. **It is submitted that since the Defendant firm acting as an authorized representative of Dynamic Airways** carries its business in Mumbai, therefore this court has jurisdiction to entertain the present Suit. It is submitted that the principle enumerated in the legal maxim *Debitum et contractus sunt nullius loci* which means that Debt and contract are of no particular place is clearly applicable to the present case."

(Emphasis added)

9. It appears to me that it is difficult to sustain Air India's claim against Zaveri. At the very least, it is an indirect claim founded on a solitary clause in an agreement with Dynamic, to which the Defendant was only a witness. Whether this can ever be said to be an agreement within the meaning of Order XXXVII is a question that arises, and evidence will be necessary as to the intention of the parties. In its Affidavit in Reply the Defendant avers that there is no privity of contract between the Plaintiff and the Defendant; the Defendant was not 'a party to' the Charter Party Agreement; even

according to Air India, Zaveri only ‘witnessed’ Dynamic’s execution of the Agreement; and neither Dynamic nor Air India could bind Zaveri or his firm to any financial liability arising from that Charter Party Agreement in this fashion. These are not questions that lend themselves to a summary assessment. Further, whether Clause 8(x) was intended to extend only to the performance of the Haj flight operations or was intended to continue thereafter and extended to later financial obligations, especially those arising from an Arbitral Award between Air India and Dynamic, is another question that lends itself to no immediate answer. It is unclear whether Air India makes this claim against Zaveri and its proprietorship firm as a guarantor or as the provider of a full-envelope indemnity or in some other fashion. There is no matter of doubt that even as between Dynamic and Zaveri there were separate arbitral proceedings and separate disputes.

10. The claim itself is founded on a statement of claim or particulars of claim set out in Exhibit “U” to the Plaint. I note at this stage that the original Court record does not have Exhibit “U” at page 799 although it is described in the index. I will grant the Advocates for Air India liberty to insert that page without need of re-verification. This is to be done on or before 17th December 2018. I have proceeded on a copy of Exhibit “U” provided by both sides and which I am reproducing below.

"EXHIBIT - U**STATEMENT OF CLAIM**

Particulars	Amount (Rs.)
Amount outstanding as on date as per the ledger maintained by the plaintiff in the regular course of their business in the Ledger report dated 23rd November 2015 and Settlement Agreement dated 23rd March 2018	U.S. \$ 10,505,208
Total	U.S. \$ 10,505,208

(United States Dollars One Crore and five lakhs five thousand and two hundred and eight only)

Further interest thereon on the aforesaid amount of U.S.\$ 10,505,208 @ 12 % p.a., from the date of filing the suit, till the full and final payment."

(Emphasis added)

11. We have already seen that there are several difficulties in Air India's way in reading the Charter Party Agreement in the manner it suggests. But the particulars of claim provided by Air India make it clear that the Suit claim is not in fact on the basis only of the Settlement Agreement, or only on an admission of liability or only on an arbitral award, but is a claim for an amount allegedly outstanding *as per Air India's ledger*, one that it says it has maintained in the regular course of its business. Zaveri is not a

signatory to the Settlement Agreement itself. Even if Air India's ledger is audited, that audit report cannot possibly bind Zaveri (or perhaps even Dynamic).

12. In these circumstances, I do not think it is possible to put the Defendant to terms let alone to grant Air India a decree and refuse leave to defend. I propose to direct the Defendant to file its Written Statement within an abbreviated time frame.

13. At this stage, Mr Tamboly points out that the Defendant has filed a Notice of Motion No. 2374 No. 2018 under Order VII Rule 11 of the CPC on the basis that the Plaintiff discloses no cause of action against the Defendant. The Defendant served this Notice of Motion on the Plaintiff's Advocate on 16th November 2018. Mr Rao states that an Affidavit in Reply will be filed and served on or before 11th January 2019. An Affidavit in Rejoinder, if any, to be filed and served on or before 25th January 2019. No further Affidavits are to be filed without leave of the Court. The Notice of Motion will be listed high on board on 31st January 2019 for hearing and final disposal.

14. Directions as to the filing of a Written Statement will, necessarily, depend on the outcome of that Notice of Motion.

15. The Summons for Judgment is dismissed in terms aforesaid. There will be no order as to costs.

(G. S. PATEL, J)