

Arun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL SUIT NO. 137 OF 2015
WITH
CHAMBER SUMMONS NO. 330 OF 2017**

Agritrade India Services Pvt Ltd ...Plaintiff
Versus
Subhalabh Nirmaan Pvt Ltd ...Defendant

Mr Karl Tamboly, *with Bhavika Deora, i/b Jayakar & Partners, for the Plaintiff.*

Mr Rohaan Cama, *with Aditya Udeshi, i/b Sanjay Udeshi & Co., for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 25th March 2019

PC:-

1. On 30th July 2018, AK Menon J granted conditional leave to defend. He directed the Defendant to deposit an amount of Rs. 1 crores within six weeks as a condition precedent to the grant of leave. In default, the Plaintiff was entitled to seek an ex parte decree. The Defendant deposited nothing. Its appeal failed.
2. A document dated 26th December 2012 was impounded for stamp. This is an undertaking signed by the Defendant, which

contended at the time of the Summons for Judgment that the undertaking was insufficiently stamped. In my view, this undertaking is entirely irrelevant. The claim is in the amount of Rs. 1,94,09,755/-. It is true that this is the amount of the undertaking, but that is not the sole basis of the claim. There can be no doubt that the Defendant twice issued cheques in exactly this amount. Copies of these cheques are at pages 22 and 50 of the plaint. The second cheque was in replacement of the first. It was presented. It was dishonoured for insufficient funds. What is important is that the second cheque at page 50 is of 9th August 2013, i.e. several months after the so-called undertaking of 26th December 2012. Paragraph 20 of the plaint says that the cause of action arises in Mumbai. This averment is based on not only the undertaking but the cheques. The cause of action is set out in paragraph 16 and relates to Exhibit "J" at page 71. This in turn mentions the original invoices and computes the total amount payable exactly at Rs. 1,94,09,755/-, the precise amount of the second cheque dated 7th August 2013.

3. In this view of the matter, there is no purpose served by insisting on payment of the stamp duty on the undertaking. That stamp is required if the document is to be admitted into evidence or acted on. That would be necessary if it was the sole basis of the suit, or was such that without it being taken in evidence no decree could be passed. That is not the situation. The suit can be decreed with no reference whatever to that undertaking solely on the basis of the dishonoured cheque. The claim remains unchanged. It is open to Mr Tamboly for the Plaintiffs to say today, as he does, that he is basing no part of his claim on the undertaking at all, but only proceeding on the dishonoured cheque. This would make no

difference to the final result. It does not alter the basis of the suit. It does not alter the amount of the claim. The liability remains the same, in the same amount and it is on the basis of the dishonour of cheques. That dishonour, as Menon J noted, was for insufficiency of funds.

4. Mr Tamboly tenders an Affidavit of Evidence and a compilation of documents. These are taken on record. Copies are given to the Advocates for the Defendant.

5. The original documents will be returned to the Plaintiffs on these being substituted with authenticated photocopies.

6. In view of the Defendant's failure to comply with the condition of deposit, the Plaintiff is entitled to a decree under the provisions of Order XXXVII Rule 3(6)(b) of the Code of Civil Procedure 1908.

7. The suit is accordingly decreed in the full amount of Rs. 1,94,09,755/- with further interest on this amount at the rate of 18% per annum from the date of the suit until payment or realization.

8. This being a commercial suit, the Plaintiffs are also entitled to an award of costs in view of Section 35 of the Code of Civil Procedure 1908 as amended by the Commercial Courts Act 2015. No costs were awarded at the time of Summons for Judgment or at dismissal of the appeal. I believe a decree of Rs.7.5 lakhs is

reasonable towards legal expenses incurred throughout. This decree for costs will not carry interest.

9. The Plaintiff will be entitled to refund of court fee in accordance with the Rules. The refund of court fee is not to be deducted from the award of costs.

10. Drawn up decree expedited.

11. Liberty to the Plaintiffs to proceed in execution without awaiting sealing of the decree.

(G. S. PATEL, J)