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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM SUMMARY SUIT NO. 319 OF 2018**

Aegis Logistics Ltd	...Plaintiff
<i>Versus</i>	
A Mohammed Altaf	...Defendant

**Ms Neeta Jain, with Sunil Gangan & Akshat Shah, i/b RMG Law
Associates, for the Plaintiff.**

**CORAM: G.S. PATEL, J
DATED: 14th March 2019**

PC:-

1. The Plaintiff filed this suit on 20th December 2018 after obtaining leave under Clause XII of the Letters Patent in the Commercial Division of this Court seeking a decree in the amount of Rs. 4,08,25,047/- with interest at 18%. The suit was filed specifically under the provisions of Order XXXVII of the Code of Civil Procedure 1908 as a summary suit.

2. The Plaintiff got a writ of summons issued and served it. There is an Affidavit of Service dated 5th May 2010 of one Rajkumar Tiwari, a bailiff and clerk in the office of the Sheriff, Mumbai. The provisions of Order XXXVII Rule 3(1) of the Code of

Civil Procedure 1908 require the writ of summons to be accompanied by a copy of the plaint with all its annexures. The Affidavit of Service specifically states that the packet that was delivered by registered post contain duplicate of the writ of summons along with true copy of the plaint. Service was effected by registered post and the acknowledgement card was duly returned evidencing service.

3. The Defendant did not enter appearance. Under Order XXXVII Rule 3(1) the Defendant had ten days from the date of service within which to enter appearance. There is no vakalatnama entered at all. The consequence of the Defendant not entering appearance at all is that the Plaintiff is not required to file and serve a summons for judgment as set out in Order XXXVII Rule 3(4). Consequently the provisions of sub-rule (5) will also not apply. This takes us back to the provisions of Order XXXVII Rule 2 and specifically sub-rule (3). The whole of Order XXXVII Rule 2 reads thus:

"2. Institution of summary suits.— (1) A suit, to which this Order applies, may, if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,—

- (a) specific averment to the effect that the suit is filed under this Order;
- (b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and
- (c) the following inscription, immediately below the number of the suit in the title of the suit, namely:—

“(Under Order XXXVII of the Code of Civil Procedure,
1908)”

(2) The summons of the suit shall be in Form No. 4 in Appendix B or in such other Form as may, from time to time, be prescribed.

(3) The defendant **shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons**, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.”

(Emphasis added)

4. The consequence of a failure to enter appearance is clearly provided. The allegations in the plaint are, by law, deemed to be admitted. The Plaintiff is, and these are the words of the statute’ “entitled to a decree for any sum, not exceeding the sum mentioned in the summons.” The amount mentioned in the summons is exactly the amount in the prayer of the suit.

5. I have heard Ms Jain for the Plaintiff. She has tendered an Affidavit in lieu of examination-in-chief of one Vikas R Hukumani, a compilation of documents and an Affidavit of Documents. There is also a second Affidavit in lieu of examination-in-chief of Milind Walavalkar and another compilation of documents produced through him. The documents in the two compilations filed through

Hukumani and Walavalkar are, respectively, taken on record and marked Exhibit “P1” (collectively) and Exhibit “P2” (collectively), in evidence. In addition, both the deponents are personally present in Court.

6. A brief narrative of the facts is thus: The Plaintiff sells and supplies Liquefied Petroleum Gas or LPG. It sets up auto LPG dispensing stations on lands that it takes on lease. It appoints various dealers to sell auto LPG to public consumers on a retail basis. The Defendant owned a plot of land at Bannerghatta Road, Bangalore 560 029.

7. The plaint goes on to say that the Defendant approached the Plaintiff asking that a dispensing station be set up on his plot and he be given a dealership in the name of M/s Classic Auto Gas, his proprietorship firm. On 17th April 2009, the Plaintiff agreed to do so and issued a Letter of Intent. A Dealership Agreement was signed by the parties on that date. Every such Dealer Auto LPG Dispensing Station requires a license from the Office of Chief Controller of Explosives of the Department of Petroleum Explosives and Safety Organization. The parties signed a Deed of Confirmation on 4th June 2009, and registered a Lease Deed dated 21st July 2009. The Plaintiff thus took leasehold rights to this land for 15-year terms at a monthly rent of Rs. 101/- free of all deductions.

8. The plaint goes on to say that the Defendant asked the Plaintiff to set up this dispensing station at its own cost. The Plaintiff adopted the Company-Owned-And-Dealer-Operated

model, a method by which all the hard investment, including dispensers, generators and so on were put in place by the Plaintiff at its cost. The Defendant had agreed to repay these costs by 1st June 2014 and till then agreed that he would get a commission of Rs. 1.80 per litre. After this entire cost was recouped, the commission would rise to Rs. 2.40 per litre. The plaint goes on to say that the Defendant has not made these equipment payments to the Plaintiff at all.

9. The Plaintiff supplied the Defendant LPG from its terminal at Mahul in Mumbai. This involved inter-State billing and there was the question of Central Sales Tax (at that time). There was also the question of collection of the balance differential amounts on account of Sales Tax Department. The Defendant had to submit the necessary sales tax C-forms. Since he did not do so, the Plaintiff made local arrangements in Bangalore for direct invoices from Bangalore so as not to have a carry-forward condition of pending C-forms. By December 2013, there was a total 169 invoices issued for a total of Rs. 13,54,86,818/- and for none of these had the Defendant submitted C-forms.

10. It seems that the parties then entered into an Addendum dated 20th November 2014 to the Dealership Agreement. The Defendant agreed to submit all pending C-forms failing which the Plaintiff would be entitled to its remedies. The Defendant then pursuant to the Addendum issued six cheques drawn on ICICI Bank in the amount of Rs. 33 lakhs. All six cheques were dishonoured on 16h February 2015 for insufficiency of funds. The Plaintiff then sent notice to the Defendant through its Advocates.

11. There is then a complaint that the Defendant sold LPG illegally from other sources at the Plaintiff's dispensing station and for which the Plaintiff took separate criminal proceedings. Ultimately, on 10th February 2016 a Joint Memo was filed in the criminal proceedings before the Hon'ble Karnataka High Court. A certified copy is tendered. Ms Jain tenders an annexure to the certified copy. I am willing to accept it since the statement bears the signature of the Defendant. The Joint Memo provided that the Defendant would pay Rs. 23.68 lakhs to the Plaintiff to clear out outstanding dues and that if he did not submit the necessary C-forms then all statutory dues would be to his accounts. This Joint Memo was filed in the Hon'ble Karnataka High Court.

12. The Plaintiff sent reminders to the Defendant. There was no response and the Defendant did not comply. The Plaintiff, therefore, raised a debit note and the claim thus arises from the failure of the Defendant to submit the C-forms. But that is not the cause of action in the summary suit. The cause of action is the Joint Memo constituting an Agreement in writing. This Joint Memo of 10th February 2016 is to be found in the compilation, Exhibit "P1" (collectively) at Serial No. 12 at pages 45-28.

13. Ms Jain is correct in pointing out that clauses 3 and 13 contain the necessary undertakings and provisions. Clause 13 states that if there is a default in furnishing the pending C-forms, the Defendant would be liable to pay all statutory dues, penalties, and interest as applicable, and the Plaintiff would be free to take suitable action to recover these dues. Hence, this suit. Now these two clauses must be read with Exhibit "L" to the plaint which is the particulars of claim

at pages 74 and 75. In paragraph 32 of his Affidavit Mr Vikas Hukumani has attested to the correctness of the claim made.

14. I have, unusually in such cases, set out some of these details because the provisions of Order XXXVII Rule 2(3) set out above put it beyond dispute that everything that is narrated is admitted and is deemed to be admitted.

15. Consequently, there will be a decree in the amount of Rs. 4,08,25,047/- in favour of the Plaintiff and against the Defendant with further interest thereon at the rate of 18% per annum from the date of the suit till payment or realization.

16. The suit having been filed in the Commercial Division of this Court, the Plaintiff is also entitled to a decree in costs under Section 35 of the Code of Civil Procedure 1908 as amended by the Commercial Courts Act.

17. Having regard to the nature of the suit, the number of transactions and the conduct of the Defendant and huge expenses that have been undoubtedly incurred by the Plaintiff, I am satisfied that an award of costs in the amount of at least Rs. 6 lakhs ought to be made as being reasonable legal expenses and costs. This decree for costs will not carry interest.

18. In addition, the Plaintiff will be entitled to the refund of court fee in accordance with the rules. The decree for costs is not to be reduced by the amount of the refund.

19. Decree to be drawn in these terms.
20. The Plaintiff is at liberty to move in execution without awaiting sealing of the decree.
21. The original documents will be returned to the Plaintiff upon these being substituted with authenticated photocopies.
22. The suit is disposed of in these terms.

(G. S. PATEL, J)