

(2018) 05 CAL CK 0001

In the Calcutta High Court

Case No : APD No. 461 of 2014, GA No. 93 of 2015, GA No. 1126 of 2016, GA No. 91 of 2017, CS No. 351 of 2012

PARAS MARKETING COMPANY PVT.LTD.

APPELLANT

Vs

CATHAY PACIFIC AIRWAYS LTD. & ANR.

RESPONDENT

Date of Decision : 04-05-2018

Acts Referred:

Indian Evidence Act, 1872 — Section 102, 103, 106
Code of Civil Procedure, 1908 — Rule Order 41 Rule 27, Order 8 Rules 3, 5, Order 37 Rule 3

Citation : (2018) 05 CAL CK 0001

Hon'ble Judges : BISWANATH SOMADDER, MOUSHUMI BHATTACHARYA J

Bench : Single Bench

Advocate : Jishnu Saha, Jishnu Choudhury, Suvasis Sengupta, Aniruddh Poddar, Anurag Bagaria, Ratnanko Banerji, D.N. Sharma, Ankan Rai, Sachin Shukla

Final Decision : Dismissed

Judgement

Biswanath Somadder, J.

1. The appeal is at the instance of the first defendant in the suit who has suffered a decree dated 28th August, 2014 in a summary proceeding under the provisions of the Chapter XIII A of the Original Side Rules of this Honâ??ble Court and have challenged the same. The respondent nos. 1 and 2

are respectively the plaintiff and the proforma defendant in the suit.

2. The case of the respondent no.1/plaintiff as made out in the plaint and the application for summary judgment being G.A. No. 256 of 2013 is briefly as follows:-

i) The respondent no. 1/ plaintiff is an Airline Company of well-repute and is a member of respondent no.2/proforma defendant (IATA), an

international trade body. The appellant/defendant no. 1 is a travel agent and is also a member of respondent no. 2/ proforma defendant.

ii) The respondent no.1 /plaintiff as the member of the respondent no. 2/ proforma defendant has entered into an working arrangement whereby and

whereunder tickets of respondent no.1/plaintiff airlines can be booked by any travel agent/agency which is also a corresponding member of

respondent no.2/proforma defendant.

iii) The appellant/defendant No.1 through respondent no.2/proforma defendant places orders and /or books and/or blocks tickets/seats in respondent

no.1/plaintiff airlines.

iv) The payment of the price of tickets are made by the appellant/defendant no.1 as per Bill Settlement Plan (in short BSP) of respondent

no.2/proforma defendant which is a fortnightly cycle as per the rules of the said respondent. The respondent no.2/proforma defendant on realising

payments from the appellant/defendant no.1 pays the same to the respondent no.1/plaintiff.

v) The appellant/defendant no.1 allegedly made default for two cycles for the period between 16th March, 2011 and 31st March, 2011 and 1st April,

2011 and 15th April, 2011. vi) The respondent no.1/plaintiff in view of nonreceipt of the price of the tickets sold to the appellant/plaintiff took up the

matter with the respondent no.2/proforma defendant who ultimately declared the appellant/defendant no.1 as a defaulter.

vii) The respondent no.2/proforma defendant thereafter invoked the bank guarantee which had been provided by the appellant/ defendant no.1 to the

respondent no.2/proforma defendant and adjusted the sum realised therefrom. The respondent no.2/proforma defendant on prorata basis paid a sum of

Rs.2, 24, 825/- to the respondent no. 1/plaintiff out of the amount realized by it from the bank guarantee provided by the appellant/defendant no.1.

viii) The respondent no.1/plaintiff thereafter caused to be issued a notice dated 28th July, 2012 to the appellant/defendant no.1 claiming a principal

sum of Rs. 34, 09, 689/- with interest @ 18% per annum. The appellant/defendant no.1 replied to the advocate's notice issued by the respondent

no.1/plaintiff by an advocate's letter dated 28th July, 2012 wherein as alleged by the respondent no. 1/plaintiff the appellant/defendant no.1

admitted some contractual payments.

3. In support of its claim the Respondent no.1/plaintiff has relied upon several documents which includes the extract of BSP from Passenger Agency

Conference Resolution manual, BSP/billing analysis for the two defaulted cycles, correspondences primarily between itself and the respondent

no.2/proforma defendant, its advocates notice and the appellant's reply thereto through its advocate. The BSP appears to be a document prepared

by the respondent no.2/proforma defendant and supplied to the respondent no.1/plaintiff. It also appears from the BSP that the same pertains to

several travel agents, the appellant/defendant no.1 is one of them. From the correspondences annexed it appears that as per the BSP records of

respondent no.2/proforma defendant as on 4th August, 2011 a sum of INR 1, 71, 44, 913/- remained unrecoverable toward international from the

appellant/defendant no.1. In the reply to the notice of the respondent No.1/plaintiff, the appellant/defendant no.1 has alleged that there is no binding

privity of payment with respondent no.2/proforma defendant, which fact according to it has been admitted by the respondent no.1/plaintiff. It has also

alleged to have been carrying out contractual payment obligation with the said respondent no.2/proforma defendant. There is, however, no affidavit

from the respondent no.2/proforma defendant either supporting or controverting the allegation and counter allegation made by the respondent

no.1/plaintiff and the appellant/defendant no.1.

4. The respondent no.1/plaintiff for realising the unpaid price of the tickets from the appellant/defendant no. 1 with interest has instituted the suit.

Wherein it has impleaded the respondent no. 2 as proforma defendant without seeking any relief against it but only wanted the presence of such

proforma defendant for adjudication of the issues.

5. After service of the writ of summons pursuant to which the appellant/defendant no.1 entered appearance, the plaintiff took out the said application

for summary judgment under the provisions of Chapter XIII A of the Original Side rules of this Honâble Court.

6. The appellant/defendant no.1 filed an affidavit wherein it referred to a passenger sale agreement dated 13th August, 2002 between itself and the

respondent no. 2/proforma defendant and have alleged that there is no privity of contract between itself and the respondent no.1/plaintiff.

7. It is also the allegation of the appellant/defendant no.1 in its affidavit that it is

not a defaulter and have been making phase wise payment to the respondent no.2 /proforma defendant. The appellant/defendant no.1 have further alleged that there had been a previous dispute between the appellant/defendant no.1 and the respondent no.2/proforma defendant no.2 when it was declared defaulter in late 2007 with regard to both domestic and international BSP. This issue was referred to Travel Agency Commissioner (in short T.A.C.). The T.A.C. by his decision dated 9th January, 2009 had set aside the decision of the respondent no.2/proforma defendant declaring that the appellant/defendant no.1 as defaulter. The T.A.C. also reinstated the appellant/defendant no.1 to pre December 2007 level and further passed certain directions including directing the respondent no.2/proforma defendant to write to United India Assurance Company Ltd. withdrawing its letter dated 13th October, 2008 and request the said company to revoke the notice of removal coverage. By virtue of such order of the T.A.C, according to the appellant it should be deemed that B.S.P. billing of November, 2008 be the first in a twelve months period.

8. The appellant/defendant no.1 in its affidavit admitted receipt of the notice dated 12th April, 2011 from the respondent no.2/proforma defendant but denied the claim of Rs. 4, 74, 33, 314/- said to have been made therein. It is also the case of the appellant/defendant no.1 that due to cancellation of tickets the appellant/defendant no.1 had suffered loss and damages. The appellant/defendant no.1 has also alleged that there is no cause of action in favour of the respondent no.1/plaintiff in filing the suit and there is also no working agreement between itself and the respondent no.1/plaintiff. The claim of the respondent no.1/plaintiff is malicious and the termination made by the respondent no.2/proforma defendant is unlawful. It has further alleged that the notice of the respondent no. 1/plaintiff is bad in law, barred by statute and that the agency agreement having been terminated by the respondent no.2/proforma defendant, the agency conference resolution manual is not binding on the appellant/defendant no.1.

9. On these allegations and counter allegations the parties went before the Honâ??ble Single Judge where the main thrust of argument was whether there is any privity of contract between the appellant/defendant no.1 and the respondent no.1/plaintiff. The Honâ??ble Single Judge overruled the argument of the appellant/defendant no.1 as to no privity of contract between

itself and the respondent no.1/plaintiff and came to a finding that there is an implied contract between the respondent no.1/plaintiff and the appellant/defendant no.1. The respondent no.2/proforma defendant acted as a conduit between the said two parties and the appellant/defendant no.1 and the respondent no.1/plaintiff entered into the transactions of purchase and sale of the ticket through its mechanism being members of the said respondent no.2/proforma defendant. The Honâ??ble Single Judge also held that there is also no dispute as to such mechanism and the appellant/defendant no.1 cannot deny its liability toward the respondent no.1/plaintiff as to the price of tickets. The Honâ??ble Single Judge also held that there is no necessity of further oral evidence and accepted the claim of the respondent no.1/plaintiff made on the basis of the BSP statements issued by the respondent no.2/ proforma defendant to the respondent no.1/plaintiff and passed the decree under challenge.

10. We are conscious about the provisions of Chapter XIII A of the Original Side Rules of this Court. Under such provision on one hand we denude the defendant of its right to defend the suit in regular trial by holding that defence does not warrant any further scrutiny and on the other relieve the plaintiff from proving its case by adducing evidence as its case is a water tight one which need not to be scrutinised any further. In arriving at such finding there is no straight jacket formula. The judgments holding the field are only indicative, providing certain guidelines to be tested in certain particular set of facts of each case as required in case of following a precedent. In this regard, we may refer to the judgments reported in 2006(1) CLT 259 (Tata Iron & Steel Company Limited Vs. Prakash Sales Corporation) cited before the Honâ??ble Single Judge, APD NO. 510 of 2015 (W. Newman & Company Limited Vs. Appollo Zipper India Limited), APD No. 86 of 2017 (Economic Transport Organisation Limited Vs. Poddar Projects Limited & Anr.) cited by the appellant before us which in turn relies upon the judgments reported in AIR 1949 Calcutta 479 (Kiranmoyee Dassi & Another Vs. Dr. J. Chatterjee) and 30 CWN 228 (Radha Kissen Goenka Vs. Thakursidas Khemka).

11. In the instant case the respondent no.1/plaintiff has stated about a â??working arrangementâ? without even specifying between whom was such working arrangement and what were its terms. There is also no document on

record to show that the appellant/defendant no.1 had directly placed orders with the respondent no.1/plaintiff and that supply/sale of tickets were directly made by it to the appellant/defendant no.1 and the bills with regard thereto were raised on the appellant/defendant no.1 directly by the respondent no.1/plaintiff or that the appellant/defendant no.1 directly paid the price of the tickets to the respondent no.1/plaintiff. On the contrary it is the case of the respondent no.1/plaintiff that tickets were enroute through the respondent no.2/proforma defendant to the appellant/defendant no.1 and the payments were also realised by the respondent no.2/proforma defendant from the appellant/defendant no.1 as per its BSP and made over to the respondent no.1/plaintiff. The respondent no.1/plaintiff has also not spoken about any direct transaction between itself and the appellant/defendant no.1. Even if we subscribe the view taken by the Honâ??ble Single Judge as to a â??mechanismâ? in the form of respondent no.2/proforma defendant for procurement of tickets from the respondent no.1/plaintiff then also such mechanism remains incomplete unless we place the respondent no.2/proforma defendant in between the appellant/defendant no. 1 and respondent no.1/plaintiff, since there is no direct transaction between the said two parties as evident from records. The conclusiveness of such mechanism cannot be arrived at in a summary procedure as it is dependent on several factors required to be considered in the presence of the respondent no.2/proforma defendant particularly when we find that a previous incident of default declared by the respondent no.2/proforma defendant was found to be flawed by TAC. The correctness of the BSP prepared and supplied by the respondent no.2/proforma defendant cannot also be accepted in a summary proceeding at the instance of the respondent no.1/plaintiff in the absence of respondent no.2/proforma defendant. The deponent who has affirmed the affidavit in support of the summons cannot also swear positively as to the correctness of the amount claimed by the respondent no.1/plaintiff on the basis of the BSP.

12. It is not known whether the respondent no.2/proforma defendant had been served with the writ of summons or with the application for summary judgment by the respondent no.1/plaintiff as they remain unrepresented at each stage. No version of respondent no.2/proforma defendant as to the allegations and counter allegations made by the respondent no.1/plaintiff and the

appellant/defendant no.1 is also available. The content of the statement of accounts being the BSP which the respondent no.1/plaintiff has averred to be true and correct has originated from respondent no.2/proforma defendant. In the absence of the said respondent no.2/proforma defendant the correctness of the same cannot be judged in a summary proceeding. The respondent no.1/plaintiff in order to prove its claim and obtain a decree in a summary proceeding on the basis of such accounts had either to furnish an affidavit from the respondent no.2/proforma defendant verifying the correctness of the same which gives a right to the appellant/defendant no.1 to cross-examine the veracity thereof or the respondent no.1/plaintiff was required to ensure the presence of the respondent no.2/proforma defendant before the Honâ??ble Single Judge to state that the same were correct which again would give the appellant/defendant no.1 a right to cross-examine as to the correctness of such accounts.

Even before us no attempt was made by the respondent no.1/plaintiff to establish the correctness of such accounts supplied by the respondent no.2/proforma defendant to the respondent no.1/plaintiff in either of the two forms as aforesaid. In order to prove the entries in the statement of account (BSP) in absence of an admission as to its correctness being made by the other side i.e. the appellant/defendant no. 1 requires the same to be corroborated and proved. Had the accounts statement been that of the respondent no.1/plaintiff, the story would have been different. In the instant case, the respondent no.1/plaintiff relies upon the statement supplied to it by the respondent no.1/proforma defendant in support of its claim. There is as such no primary evidence from the plaintiffâ??s side in support of its claim at this stage to enable it to have a judgment signed in its favour. The appellant/defendant no.1 in such circumstances, has the right to cross-examine to dispel the authenticity and correctness of the BSP (settlement plan) as it has denied to be defaulter as also the money claimed by the respondent no.2/proforma defendant from the appellant. Moreover, the BSP is in respect of tickets the respondent no.1/plaintiff supplied to various travel agents through respondent no.2/proforma defendant. It is therefore not clear at this stage what were the tickets actually ordered for by the appellant/defendant no.1 and what were actually supplied and at what price and the conditions appended thereto. These in itself are triable issues [as held in the

judgment reported in 1991 Supp (1) SCC 191 (Raj Duggal Vs. Ramesh

Kumar Bansal)] and the appellant /defendant no.1 is entitled to leave to defend.

13. The respondent no.2/ proforma-defendant, it appears, has initiated no proceeding against the appellant/defendant no.1 to recover its dues as

reflected in the BSP. It has simply declared the appellant/defendant no.1 a defaulter and terminated its sales agency agreement, so that it cannot of

itself continue with the ticketing business. It is also apparent that the respondent no.1/ plaintiff have made no claim against the respondent no.

2/proforma defendant thereby exonerating the said respondent. It is also a fact that the appellant/defendant no.1 has not initiated any action as against

the respondent no.2/proforma defendant. But this in itself does not amount to an admission of liability by the appellant/defendant no.1 particularly when

it has denied to be a defaulter and denied the amount claimed by the respondent no.2/proforma defendant as also any direct transaction or privity of

contract between itself and the respondent no.1/plaintiff. In such a situation the respondent no.1/plaintiff therefore is not entitled to a judgment in

summary procedure on admission.

14. It appears from the record that the passenger sales agreement did not form part of the documents before the Honâ??ble Single Judge though the

same has been referred to in the pleading. The said agreement, however, has been incorporated in the paper book filed in the instant appeal, though

the order of the previous Division Bench was only to incorporate the papers before the Honâ??ble Single Judge. On a perusal of the said agreement

it appears that respondent no.2/proforma defendant has been represented in the following manner â??each IATA Member (hereinafter called carrier)

which appoints the Agent, represented by the Director General of IATA acting for and on behalf of such IATA Memberâ??.

Even if we look into the said agreement ignoring the provisions of Order 41 Rule 27 of the Code of Civil Procedure, 1908 still there is a scope for

scrutinizing the document as to its meaning or correctness to the extent whether the respondent no.2/proforma defendant represented the respondent

no.1/plaintiff in the said agreement, when the respondent no.1/plaintiff itself has not mentioned about such agreement in the plaint or of any authority

granted by it to the Director of IATA, the respondent no.2/profoma defendant to enter into such agreement on its behalf. It also gives rise to

ascertainment of the principal-agent relationship and role of an agent of a disclosed principal. [As held in the judgment reported in 2015(10) SCC 521

(State Bank of Hyderabad Vs. Rabo Bank)]. The scope of unveiling the meaning and correctness of such document in itself is also a triable issue

which entitles the appellant/defendant no.1 leave to defend.

15. If we accept the view of the Honâ??ble Single Judge that there was an implied contract between the appellant/defendant no.1 and the

respondent no.1/plaintiff such implied contract has to be established by way of evidence in the present facts of the case wherein the

appellant/defendant no.1 has a right to cross-examine which is also in itself a triable issue entitling the appellant/defendant no.1 leave to defend.

16. So, we are of the opinion that the respondent no.1/plaintiff has not been able to discharge its obligation by proving its entitlement to recover a debt

or liquidated demand in money in a summary procedure to entitle itself to have a judgment signed in its favour and there are triable issues in respect of

the entire claim.

17. So far as the defence of the appellant/defendant no.1 is concerned we feel in view of the criticism advanced on behalf of the respondent

no.1/plaintiff to the case of the appellant /defendant no.1 it may well be that weighing the probabilities, the chances of success are more in its favour

than in favour of the appellant/defendant no.1. But there are triable issues in respect of the entire claim and it is difficult to say at this stage that the

defence is wholly illusory or sham or is bound to fail or the respondent no. 1/ plaintiff is entitled to have a judgment passed in its favour forthwith. Even

after considering the judgments reported in 1993(4) SCC 6 (Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar) as cited by

the respondent no.1/plaintiff we are of the view that there is no admission as to the liability by the appellant/defendant no.1 under the provisions of

Order 8 Rules 3 and 5 of the Code of Civil Procedure, 1908 in its affidavit. We also do not feel that any examination as envisaged under Rule 5(c) of

Chapter XIII A of the Original Side Rules of our Court is necessary in the instant case.

18. We have also considered the judgment reported in 2017(1) SCC 568 (IDBI Trusteeship Services Limited Vs. Hubtown Limited) cited by the

appellant/defendant no.1 which is with regard to a case under Order 37 of the

Code of Civil Procedure, 1908. Since the provisions under Chapter XIII A of the Original Side Rules of our Court are not exactly identical with the provisions of Order 37 of the Code, we feel that principles applicable although similar under the two provisions are not the same. Even then, the view taken by the Honâ??ble Supreme Court supports our findings, as stated above.

19. In the circumstances as stated hereinbefore, we set aside the impugned decree dated 28th August, 2014, upon rejecting the application of the respondent no.1/plaintiff under summary procedure, being G.A. No. 256 of 2013 and grant the appellant/defendant no.1 unconditional leave to defend the suit. There will be, however, no order as to costs. Moushumi Bhattacharya, J. :

The appellant/defendant no. 1 in the First Court has challenged a Judgment dated 28th August, 2014 whereby the application for summary Judgment filed by the plaintiff/respondent No.1 under Chapter XIII A of the Original Side Rules of this Court has been allowed and the suit partly decreed in favour of the plaintiff. The plaintiff is an international airline. The defendant No.1 (the appellant in these proceedings) is an accredited agent of the respondent No.2/proforma defendant. The proforma defendant is an international trade body formed by a group of airlines. Both the plaintiff as well as the defendant No.1 are members of the proforma defendant. The working arrangement between the three protagonists is something like this; the booking for tickets in the plaintiffâ??s airline is done by the defendant No.1 through the proforma defendant. In this set up, a person interested in travelling on the plaintiffâ??s airline would go to the defendant No.1 as a travel agent: the defendant No.1 would then place orders for tickets/seats in the plaintiffâ??s airline through the proforma defendant. The defendant No.1 as the travel agent would then collect the money from the concerned traveller and pass the same on to the proforma defendant in settlement of dues. The proforma defendant would thereafter likewise settle with the plaintiff the price of the tickets sold. This is universally accepted mechanism for booking tickets in airlines operating in the international sector, and according to the plaintiff, the defendant used this method to purchase tickets in the plaintiffâ??s airline on a regular basis. The chain of money travelling from the passenger/end user to the plaintiff is undisputed and the

defendant No.1 has not put forward any other mechanism by which the plaintiff's tickets were sold by the defendant to the ultimate end user.

By the impugned Judgment, the learned Judge came to the following conclusions; the plaintiff has been successful in establishing that a contract exists for sale and purchase of its tickets under which the defendant No.1 is liable to reimburse the price of tickets sold and delivered to the plaintiff. Second, there is no denial on the part of the defendant that it has sold the tickets of the plaintiff's airline to the customers. Third, as opposed to disputing its liability under the contract for settling the dues of the plaintiff, the only defence put forward by the first defendant is that the conduct of the proforma defendant has been unlawful. Fourth, casting aspersions on the proforma defendant cannot absolve the liability of the defendant No.1 to pay for the price of tickets sold by the defendant No.1 in the plaintiff's airline. Fifth, the affidavit-in-opposition of the defendant No.1 does not show that the plaintiff is not entitled to the amount claimed in the plaint.

It is relevant to mention the respective contentions urged by the parties which persuaded the learned Judge to arrive at the aforesaid conclusions. The

only point argued by the defendant no. 1 before the first Court was that there is no privity of contract between the plaintiff and the first defendant

No.1. The only other point raised by the defendant No.1 was an allegedly illegal termination of the agency agreement by the proforma defendant for

which the latter is liable to pay damages to the first defendant. On the other hand, the plaintiff showed the Billing and Settlement Plan (BSPs)

furnished by the proforma defendant for the settlement period between 16th March, 2011 to 15th April, 2011, a sum of Rs.26,53,295/- was due and

payable from the defendant No.1 to the plaintiff. The aforesaid billing settlement plan or the amounts mentioned therein have not been disputed by the

first defendant.

We now look at the arguments put forth by the parties in the appeal and the documents relied upon in support of the arguments made. The appellant

(the defendant No.1) has disputed the BSP/account statements relied on by the plaintiff which shows that the defendant No.1 owes Rs.12,68,534/- to

the plaintiff for the billing period on 16th March, 2011 to 31st March, 2011. This would appear from Annexure C to the plaint. Annexure D to the

plaint is the BSP for the billing period 1st April, 2011 to 15th April, 2011 which

shows that the defendant No.1 owes Rs.26,53,295/- to the plaintiff. In these documents, certain facts are clearly revealed; First, the defendant No.1 has been mentioned specifically by name as the agent of the proforma defendant; both these documents have been furnished by the proforma defendant to the plaintiff. Besides the BSPs, some other documents were shown to us by the plaintiff which are of some interest to the issue at hand. The first is a communication issued by the proforma defendant to its members in relation to the "the terminated agent" Paras Marketing Company Private Limited (the defendant No.1 and the appellant before us).

This communication (Annexure E to the plaint) states inter-alia that the agent (defendant No.1) has defaulted in payment within the stipulated deadline and that as per BSP records, Rs.1,71,44,913/- towards international airlines remains unrecovered.

In the same Annexure we find that certain emails were exchanged between the proforma defendant and the plaintiff where details of outstanding dues from the first defendant appear to have been requested by the plaintiff. In answer to such request, the proforma defendant states that a ticket by ticket transaction of the defendant No.1 for the default in relation to the plaintiff can be provided at a cost of a certain sum of money. These emails appear to have been exchanged on 3rd April, 2012. The suit was filed on 9th October, 2012. It is evident therefore that the first defendant purchased tickets of the plaintiff's airline through the proforma defendant and did not clear the price of tickets purchased to the proforma defendant who in turn could not pay for such tickets to the plaintiff. Whether the defendant NO.1 sold these tickets to the ultimate end user is not the issue here. What is relevant is that the billing statement provided by the proforma defendant for the two billing cycles in March and April, 2011 and the amounts mentioned for the said two billing cycles, matches exactly with the claim made by the plaintiff in the plaint particularly in paragraph 17 thereof.

In the affidavit-in-opposition of the defendant No.1, the only statement made in its defence with regard to the BSPs (Annexures C and D to the plaint), is a bare denial of liability for the specific period mentioned in the said Annexures. It is pertinent to set out paragraph 5 for the affidavit-in-opposition of the appellant/defendant No.1 (in response to Para 16 of the application which specifically mentions the BSPs):-

5. With regard to the allegations made in paragraphs no. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the said petition, save and except the matters of record I deny and dispute all the allegations made therein. I say that the defendant no.1 had never been informed that the plaintiff being a member of the proforma defendant has enter into a working agreement as such the defendant no.1 was not bound by the said alleged working agreement. I say that the agency of the defendant no. 1 was terminated by the proforma defendant as such the passenger Agency conference Resolution Manual and its relevant extract of the BSP has no binding effect on the defendant No.1. I say that there was no contract, agreement and understanding ever had with the plaintiff relating to the business of the defendant no.1. I say that the defendant no. 1 is not concerned with the agreement and understanding contemplated by and between plaintiff and proforma defendant. I deny and disputed that the defendant No.1 did not make any remittance for sale of traffic documents for the fortnight billing period commencing from March 16, 2011 to March 31, 2011 and subsequently from April 1, 2011 to April 15, 2011. In contrary thereto I say that by a purported notice dated April 12, 2011 the proforma defendant No.2 had maliciously been claimed a sum of Rs.4,74,33,314/- from the defendant No.2 on account of BSP whereas on the other hand one of the member airlines of proforma defendant had maliciously claimed a sum of Rs. 7,04,21,506/- as such the claim of the plaintiff against the defendant no.1 in the instant suit is not at all tenable in the eye of law, as it is not exist as against the defendant no.1. i deny and dispute the validity and sanctity of the purported letters annexed with the said petition and marked with the letters D & E respectively and the contents thereof are all far from truth. I say that there was no sum remaining due and payable to the plaintiff by the defendant no. 1 whereas the defendant no. 1 is entitled the damage from the proforma defendant for unlawful termination of the agency of the defendant no. 1. I deny and dispute that a substantial amount remained due and payable by the defendant no. 1 to the plaintiff. I deny and dispute the sanctity and validity of the communication exchanged electronically between the plaintiff and proforma defendant which are annexed to the said petition being marked with the letter F&G thereof as the defendant no. 1 is not bound by those communication. I say that notice dated July 20, 2012 issued by the plaintiff to the defendant no. 1 is bad in law and not binding upon

the defendant no. 1 as there were neither any express or implied contract ever exist between the plaintiff and defendant no. 1 whereas there was an agreement with the defendant no. 1 and proforma defendant which was cancelled and/or terminated by the proforma defendant and pursuant to several notices the said proforma defendant and its member airlines demanded the contradictory sum in collusion with each other. I repeat and reiterate the statement made in paragraph no. 3 of this affidavit and any allegation contrary thereto and/or inconsistent therewith are denied and disputed by me.â??

The defendant No.1 makes an evasive attempt to address the specific amount outstanding as reflected in the BSPâ??s, let alone disputing that the defendant was liable for making any payment to either the proforma defendant or to the plaintiff. The only defence taken is against the termination of its agency by the proforma defendant and demands made by the proforma defendant which, according to the defendant, are malicious and baseless.

The defendant further refers to documents which are wholly unrelated to the claims of the plaintiff or of the billing cycles shown in the BSPâ??s.

The other defence taken by the first defendant is somewhat strange. The pleading in the affidavit-in-opposition affirmed by the first defendant on an undated day in February, 2012 is that the defendant No.1 had apparently never been informed that the plaintiff had entered into a working agreement with the proforma defendant and consequently the defendant No.1 was not bound by the said working agreement. The defence taken becomes further removed from the real issue at hand when the defendant No.1 pleads termination of the agency agreement by the proforma defendant which according to the defendant, leads to the necessary result, that the defendant No.1 is free from its obligations to the proforma defendant. The only figures mentioned in the defence is a sum of Rs.4,74,33,314/- which according to the defendant No.1 is the amount claimed by the proforma defendant from the defendant No.1 on account of the BSPs; and a sum of Rs.7,04,21,506/- being an amount claimed by â??one of the member airlines of the proforma defendantâ?. No explanation or particulars are forthcoming with regard to these figures and it is not even clear whether the defendant No.1 is referring to the plaintiff vis-a-vis the second amount. The first defendant concludes that by reason of the aforesaid, the claim made by the plaintiff

against the said defendant is not at all tenable in the eye of law, as it is not exist as against the defendant No.1.

In the Memorandum of Appeal, the finding of the First Court on the liability of the defendant No.1 for the sum of Rs.34,09,352/- has not been

challenged (the total principal dues claimed by the plaintiff at paragraph 17 to the plaint). More striking is the absence of a ground challenging the fact

of the tickets of the plaintiff having been sold by the defendant No.1. If that is the case, can the defendant No.1 at all deny a contractual obligation, or

in the least, a transactionbased arrangement between the plaintiff and the defendant No.1? Even though, the proforma defendant has not entered

appearance in the proceeding and has not presented its side of the story, the two BSPs furnished by the proforma defendant to the plaintiff and

the emails exchanged referred to above, leads to the inescapable conclusion that the plaintiff has the support of the proforma defendant, which the

defendant no.1 does not. This is important and the reason for such needs to be explained.

The picture of liabilities inter-se the three parties before us would have been more fuzzy had the proforma defendant simply lurked in the shadows and

not come up with the two BSPs matching exactly to the two periods claimed by the plaintiff. That the proforma defendant itself has been

deprived of its dues from the defendant No.1 would also appear from the communication dated 4th August, 2011 issued to its member airlines with

regard to the terminated agent

i.e. the defendant No.1; as well as the notice directed at the defendant No.1 dated 1st July, 2011 actually terminating the Passenger Sales Agency

Agreement due to defaults on the part of the first defendant. The obfuscation of the issue by the defendant No.1 with regard to its outstandings to

even the proforma defendant casts a shadow of dishonesty on the defence taken by the defendant No.1. Has the first defendant pleaded any of the

following by way of a defence?

i) It did not purchase tickets through the proforma defendant.

ii) The tickets bought through the proforma defendant were not of the plaintiff's airline? iii) It had paid off the proforma defendant for the tickets

bought in the plaintiff's airline?

iv) It was not liable for the claim made by the plaintiff in para 17 of the plaint,

namely, for the sum of Rs.40,23,036 or even Rs.34,09,352 being the total

principal due for value of ticket sold by the plaintiff to the first defendant from 16th March to 31st March, 2011 and 1st April to 15th April, 2011?

The answer is a clear NO. If this is the factual scenario before us, then the simple question would be, where did the money for the tickets purchased

by the defendant No.1 (and not returned either to the proforma defendant or the plaintiff), go? And if the money due and owing to the plaintiff has

indeed not been returned and there is no plausible explanation forthcoming from the defendant No.1 for such failure to return, can the defendant no.1

take the benefit of Rule 6 of Chapter XIII A of the Original Side Rules of this Court ?

Under Chapter XIII A, the defendant has to establish a good defence to the satisfaction of the Court under Rule 6. The "good defence" must be in

relation to the claim made by a plaintiff on its merits or on the disclosure of such facts which may be seen as a defence deemed sufficient to set up a

triable issue, fit to be adjudicated in a trial and not in a summary manner (as envisaged under Chapter XIII A). In this case, if the first defendant had

either dealt with the plaintiff's claim head-on or even disputed the BSP's or alternatively disclosed some facts resulting in a shadow of a doubt

over the plaintiff's statements, the learned Single Judge may not have made a summary Judgment under Chapter XIII A and have the suit decreed

in the plaintiff's favour. In the present case however, the defendant has been anything but direct in dealing with the issue at hand. It has turned

away and focussed on the acrimonious relationship with the proforma defendant, when the proforma defendant was not even present to contest such

allegations. Although the first defendant cannot be held responsible for the proforma defendant not making an appearance in the proceedings, it would

definitely have helped matters had the first defendant satisfied the Court below that it had been entirely absolved of its liability towards the plaintiff by

either having paid off the proforma defendant in whole or in part, or even better, that it had not purchased the plaintiff's tickets at all. We

searched for a semblance of a believable defence but unfortunately, did not find any.

The defence of the defendant as to whether a contract existed between the plaintiff and the first defendant for the application to come under Chapter

XIIIA and the findings of the First Court in relation to this is required to be dealt with. Under Chapter XIII A, a Court can resort to a summary

procedure in deciding a suit to recover debts or liquidated demands provided the requirements under Rule 1 are satisfied. For a Court to invoke such

procedure, there has to first exist a contract, express or implied.

Although the only argument put forward by the defendant No.1 before the learned Single Judge was an absence of privity of contract between the

plaintiff and the first defendant, the first Court held that contrary to the submission made, there was indeed an underlying contract between the

plaintiff and the defendant No.1, since the latter failed to explain how the tickets of the plaintiff's airline reached the hands of the first defendant.

The learned Single Judge clarified the arrangement between the three parties in these words:-

“It is not in dispute that the plaintiff and defendant No.1 are members of the proforma defendant. The proforma defendant No.2 in fact acted as a

conduit. On fortnightly settlement accounts by the proforma defendant No.2 the payments are made by the proforma defendant No.2 to the plaintiff

on behalf of the defendant No.1. The plaintiff and the defendant No.1 entered into the transaction of purchase and sale of the tickets through the

mechanism of proforma defendant No.2.”

The aforesaid arrangement appears to be perfectly credible and is in fact the accepted mode of purchase and sale of ticket for travel agents when

procuring tickets in any major airline. But more important is the question whether the defendant No.1, in its pleadings or elsewhere, denied such an

arrangement? The answer is in the negative. The learned Court below concludes that by reason of the aforesaid arrangement, there is an implied but

established contract between the plaintiff and the defendant No.1. The learned First Court was sufficiently convinced of the existence of such an

implied contract so as to hold that no oral evidence was necessary to prove the existence of such a contract. The statements made in paragraphs 5 to

10 of the plaint, clarifies the exact nature of the working arrangement between the plaintiff, the proforma defendant and the defendant No.1, relevant

portions of which are set out below:-

“5. The plaintiff states that the proforma defendant has a billing settlement plan (BSP). The plaintiff being a member of the proforma defendant

has entered into a working arrangement whereby and where under ticketing and booking of the same in the plaintiff's airlines can be booked by

any travel agent/agency which is also a corresponding member of the proforma defendant.

6. Both the defendant No.1 and the plaintiff are members of the proforma defendant and accordingly the passengers who are interested to book tickets in the plaintiff's airline, on approaching the defendant No.1 in its capacity as a travel agent, the said defendant No.1 through the proforma defendant places orders and/or books and/or block tickets/seats in the plaintiff's airlines, both manually and electronically.

7. According to the Rules of the proforma defendant, a fortnight period is given to a member travel agent for booking tickets on credit on a particular airline and on the immediate next fortnight period, the said travel agent is supposed to make payment and/or clear the dues for the tickets which have been booked/blocked for the earlier fortnightly period in a particular airline. The transaction forming the subject matter of the instant suit between the proforma defendant and the defendant No.1 was also on similar lines.

8. The plaintiff states that the Billing Settlement Plan (herein after referred as 'BSP') of the proforma defendant provides inter-alia as follows:

a) Reporting and remitting through BSP;

b) Reporting and remitting directly through members;

c) Consequences of defaults. The relevant extract of the BSP as set out in the Passenger Agency Conference Resolution Manual of the proforma defendant is annexed hereto and marked with the letter 'B'.

9. The plaintiff states that as per Rules of IATA the defendant No.1/travel agent has to keep a minimum level of bank guarantee with the proforma defendant for enabling the settlement of the billing in proportion to the volume of tickets booked by the defendant No.1 on various airlines through the instrumentality of the proforma defendant.

10. The plaintiff states that in the present case, the defendant No.1 used to book tickets on the plaintiff's airlines through the proforma defendant on regular basis. Normally, transaction of booking for the first fortnightly period of a month is settled on the subsequent fortnight period of the same month or the next corresponding month as the case may be. Thus, tickets which are normally booked by the defendant for the first 15 days is to be

paid and/or reimbursed by the defendant No.1 to the proforma defendant during the next immediate 15 days thereof. After such payment is released

by the defendant No.1, the proforma defendant credits the accounts of the plaintiff. In case of any default in making payment by the defendant No.1,

the proforma defendant normally takes up the matter with the defendant No.1 calling upon the defendant No.1 to release payment so that the same

can be disbursed to the various member airlines of the IATA.â? The defendant No.1â??s counter to the above implied contract/working

arrangement is extracted below:-

â??3. (a) The defendant No.1 was an accredited agent of the proforma defendant No.2. Pursuant to the passenger Sale Agency Agreement dated

August 13, 2002 the said Agency was created.

(e) By a letter dated March 17, 2009 the defendant No.1 had been threatened of being declared as defaulter pursuant to the alleged irregularity as

contemplated therein wherein the proforma defendant No.2 had made purported demand. The said demand was settled.

(f) By a letter dated April 12, 2011 the defendant No.1 had been declared as defaulter. By the said letter the proforma defendant No.2 had

purportedly been demanded a sum of Rs.4,74,33,314/- in respect of billing and settlement for the remittance period of 16th to 31st March, 2011. On

April 13, 2011 immediately thereafter the said purported demand notice of proforma defendant No.2, one of its member airlines claimed a sum of

Rs.7,04,21,506/- from the defendant No.1, whereby the proforma defendant No.2 for its all member airlines claimed a total sum of Rs.4,74,33,314/-.

However, the defendant No.1 had denied both the said purported claim/demand of the proforma defendant No.2 and the said member airlines.

(g) Several tickets were cancelled and blocked by the member airlines of the proforma defendant No.2. The defendant No.1 had been suffered huge

losses for such cancellation and block tickets. The defendant No.1 had assessed the amount of the damages and demanded the proforma defendant

No.2 and such damages was resulted effect of the illegal conducts of the proforma defendant No.2 and its member airlines.

5. I say that the defendant No.1 had never been informed that the plaintiff being a member of the proforma defendant has enter into a working

agreement as such the defendant No.1 was not bound by the said alleged

working agreement. I say that the agency of the defendant No.1 was terminated by the proforma defendant as such the passenger Agency conference Resolution Manual and its relevant extract of the BSP has no binding effect on the defendant No.1. I say that there was no contract, agreement and understanding ever had with the plaintiff relating to the business of the defendant No.1. I say that the defendant No.1 is not concerned with the agreement and understanding contemplated by and between plaintiff and proforma defendant. I say that by a purported notice dated April 12, 2011 the proforma defendant No.2 had maliciously been claimed a sum of Rs.4,74,33,314/- from the defendant No.2 on account of BSP whereas on the other hand one of the member airlines of proforma defendant had maliciously claimed a sum of Rs.7,04,21,506/- as such the claim of the plaintiff against the defendant No.1 in the instant suit is not at all tenable in the eye of law, as it is not exist as against the defendant No.1. I deny and dispute the validity and sanctity of the purported letters annexed with the said petition and marked with the letters D & E respectively and the contents thereof are all far from truth.

I say that there was no sum remaining due and payable to the plaintiff by the defendant No.1 whereas the defendant No.1 is entitled the damage from the proforma defendant for unlawful termination of the agency of the defendant No.1. I say that notice dated July 20, 2012 issued by the plaintiff to the defendant No.1 is bad in law and not binding upon the defendant No.1 as there were neither any express or implied contract ever exist between the plaintiff and defendant No.1 whereas there was an agreement with the defendant No.1 and proforma defendant which was cancelled and/or terminated by the proforma defendant and pursuant to several notices the said proforma defendant and its member airlines demanded the contradictory sum in collusion with each other. Nowhere in the pleadings has the defendant come out with a categorical denial of any arrangement existing between the three main players whereby the defendant No.1 either did not purchase tickets of the plaintiff's airline from the proforma defendant No.1, or that there was no contract at all between the proforma defendant and the first defendant. If the defendant No.1 is to be believed, (and it is presumed that the plaintiff has no existence in this chain of transactions), then what would be the basis for the defendant No.1 to have any

dealings with the proforma defendant when the proforma defendant is merely a "middle man" international trade body facilitating sale-purchase of tickets in major airlines to agents, for the ultimate end user? For these reasons there cannot be any doubt that there was an implied contract existing between the plaintiff and the first defendant on the date of the defaults on the part of the latter in settling the outstanding dues of the plaintiff for the ticket sold to the first defendant. For these reasons, we do not find any material to take a different view from that of the learned Court below of the arrangement existing between the three parties.

Now to the main issue. Was the learned Single Judge justified in holding that the plaintiff is entitled to a summary Judgment for the amount decreed?

Under Chapter XIII A, once a plaintiff makes an application under Rule 3 (and upon satisfying the criteria laid down in Rule 1), the defendant would be called upon to show cause against such application in terms of Rule 5. In this Rule, the defendant may show cause by way of an affidavit and is required to specifically deal with all matters of fact in relation to the plaintiff's claim. Under Rule 6, a Court is entitled to make an order refusing leave to the defendant to defend the plaintiff's claim and pronounce Judgment, unless the defendant by affidavit is able to satisfy the Court that he has a good defence to the claim on its merits or disclose such facts as may be seen to be sufficient to entitle him to defend. If the defendant is unable to succeed on either of the two conditions, the Court will make an order refusing leave to defend and forthwith pronounce Judgment in favour of the plaintiff.

In our view, the language of Rules 5 and 6 is sufficiently clear. Once the plaintiff satisfies the requirements under Rule 1 (and upon satisfying the procedural requirements of Rules 3 and 4), the onus shifts on the defendant to satisfy the Court that it has a good defence to the claim on merits or is in a position to disclose such facts as would entitle him to defend the claim. In the facts of this case, if we were to see the conduct of the plaintiff and the first defendant against the rationale of a summary procedure evolved by this Court, the defendant No.1 has failed to discharge its onus of satisfying the Court that it has any defence to the plaintiff's claim, let alone a good defence, which would stop the Court in its tracks in pronouncing Judgment in favour of the plaintiff.

Let us dwell for a bit on what exactly the onus would be on the defendant No.1. In our view, in order to escape summary Judgment, it would

necessarily have to show that it did not buy tickets (in the plaintiff's airline) from the proforma defendant; that it did not owe any money to the

proforma defendant for the tickets bought; or that it had paid off the proforma defendant for the tickets purchased. Instead of raising such a defence,

the defendant takes refuge on a termination of its contractual relationship with the proforma defendant. Is this a good defence? Certainly not. What is

most telling is that the first defendant has singularly failed to raise any dispute which can be considered to be a triable issue and could compel a Court

to pause before pronouncing final Judgment in favour of the plaintiff? In our view, IATA's non-appearance in the suit is not fatal to the

plaintiff's claim against the defendant No.1. The BSPs and the emails exchanged between IATA and the plaintiff is evidence enough that IATA

has also been deprived of its outstanding dues from the defendant No.1 for which it was compelled to terminate its contractual relationship with the

first defendant. The first defendant's seizing the absence of IATA as an escape-route to defend its obligations to the plaintiff is in the words of

several decisions, "a sham and a moonshine defence" and one which does not stand the test of Rules 5 and 6 of Chapter XIII A.

Mr. Jishnu Saha, learned Senior Counsel for the appellant/defendant No.1 assails the impugned Judgment on various grounds. The first of such

grounds is that the plaint and the application under Chapter XIII A do not disclose particulars of either the tickets sold to the defendant No.1 during the

relevant period, or the sector for which the tickets were sold, the value of the said tickets or the invoices raised for such tickets, any cancellation or

return of tickets sold by IATA to the defendant No.1. The main defence taken by counsel is that there is no clear admission by the defendant No.1 of

any part or portion of the claim of the plaintiff, either in its affidavit or in any document disclosed in the application under Chapter XIII A. For this, the

defendant No. 1 relies on specific paragraphs in his affidavit which are set out below:

"(Para 4)- I deny that there is no defence to the claim of plaintiff in the instant suit. I say that the claim maliciously contemplated in the

plaint is not due and payable by the defendant No.1. I repeat and reiterate the statements made in paragraph number 3 of this affidavit ...".

(Para 5)- I deny and dispute the validity and sanctity of the purported letters annexed with the said petition and marked with the letters D & E

respectively and the contents thereof are all far from truth. I say that there was no sum remaining due and payable to the plaintiff by the defendant

No.1 whereas the defendant No.1 is entitled to damage from the pro forma defendant for unlawful termination of the agency of the defendant no.

1.

(Para-5)- I deny and dispute the sanctity and validity of the communication exchanged electronically between the plaintiff and pro forma

defendant which are annexed to the said petition being marked with the letter F thereof as the defendant no. 1 is not bound by those

communication. I say that notice dated July 20, 2012 issued by the plaintiff to the defendant no.1 is bad in law and not binding upon the defendant no.1

as there were neither any express or implied contract ... between the plaintiff and defendant no.1 and pro forma defendant which was cancelled

and/or terminated by the pro forma defendant and pursuant to several notices the said pro forma defendant and its member airlines demanded

contradictory sum in collusion with each other.

(Para 6)- I say that in reply to the letter dated July 20, 2012 issued by the plaintiff, the defendant no.1 by its letter dated July 28, 2012 never

admitted that any contractual payment on the part of defendant no.1 had remained due and payable to the pro forma defendant. I say that the

defendant no.1 had categorically denied the unlawful claim of the plaintiff. I say that the pro forma defendant had maliciously and irresponsibly

demand that a sum of Rs.4,74,33,314/- from the defendant no.1 ... and the defendant no.1 had answered the said purported demand.

In short, the defendant No.1's challenge to the impugned order is this; the absence of any admission of any liability, the express denial by the

defendant No.1 of any liability and that IATA (the pro forma defendant) did not come forward to file any affidavit in support of the contents of the

BSPs, namely, to reinforce the plaintiff's claim. Mr. Saha relies on W. Newman & Company Limited Vs. Apollo Zipper India Limited & Anr.

reported in AIR 2017 Calcutta 182 and Economic Transport Organisation Limited Vs. Poddar Projects Limited & Anr. reported in (2015) 5 WBLR

(CAL) 362, for the discussion contained in the said decisions on the scope of Rule

6 of Chapter XIII A. Rule 6 mandates that the Court may make an order in favour of the plaintiff, unless the defendant by affidavit or otherwise is able to satisfy the Court that he has a good defence to the plaintiff's claim on merits or disclose additional facts which may be deemed sufficient to entitle him to defend.

Mr. Saha raises two further points against the impugned Judgment. He submits that since it is the plaintiff's case that tickets were sold by the

plaintiff to the defendant No.1 against which payments remained outstanding, the burden was on the plaintiff to prove the same. He relies on Sections

102 and 103 of the Indian Evidence Act, 1872 in this regard. Section 102 states inter-alia that the burden of proof in a suit lies on that person who

would fail if no evidence at all were given on either side.; Section 103 provides that the burden of proof as to any particular fact lies on that person

who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The

decision cited by Mr. Saha in *Abrath Vs. The North Eastern Railway Company* reported in (1883) XI 440, is on the requirements under the Evidence

Act. We however find that in the aforesaid case, an exception has been made out for those cases where the facts lie peculiarly within the knowledge

of the opposite party. In this context, it may be useful to refer to Section 106 of the Indian Evidence Act where the burden of proof of any fact

specially with the knowledge of any person, lies upon that person.

In the facts of the case before us, the transactions for the two specified fortnight periods were within the exclusive knowledge of the defendant No.1

and the defendant No.1 therefore should have come forward and disputed the statements in the BSPs. According to the defendant No.1, despite the

burden of proof being on the plaintiff, the plaintiff has not discharged such burden and consequently there can be no question of shifting of any onus on

the first defendant. We disagree with the aforesaid contention. The paragraphs from the plaint showing the underlying arrangement between the three

protagonists has already been set out above. Paragraph 8 of the plaint refers specifically to the Billing and Settlement Plan of the proforma defendant

and sets out the particulars which a typical BSP would contain. The relevant extract of the BSP on which the plaintiff seeks to rely is annexure B to

this paragraph. In this context, paragraph 13 of the plaint is required to be set

out:-

13. The plaintiff states that during the two fortnightly periods mentioned above, the defendant No. 1 had booked various tickets on the

plaintiff's airline through the proforma defendant no.2 as would be evident from the BSP/Billing analysis of the plaintiff for the period March 16 to

March 31, 2011 and April 1, 2011 to April 15, 2011. True copies of the said BSP/Billing analysis for the aforesaid two fortnight period are annexed

hereto and marked with the letters 'C' and 'D' respectively. The contents of such billing analysis are all true and correct.

Mr. Ratnanko Banerji, Learned Senior Counsel for the plaintiff/respondent submits in support of the impugned Judgment that the only defence urged

by the appellant before the First Court was that there was no privity of contract between the plaintiff and the defendant No.1 and therefore, an

application under Chapter XIII A was not maintainable. He submits that in the appeal, the defendant has given up the aforesaid defence and has

pitched its challenge much higher than in the Court below by disputing the amount in the BSPs, which according to him is contrary to the affidavit of

the appellant/defendant No.1. On the procedural efficacy of the plaintiff's application, he submits that once the suit satisfies the criteria under

Chapter XIII A, the onus shifts on the defendant to bring forth a good defence to the claim. In the facts of the instant case, the appellant has

significantly argued a defence only on the question of privity of contract which has conveniently been given up before in the appeal. On impleading the

proforma defendant IATA as a party to the proceedings Mr. Banerji submits that if the appellant had indeed any claim against IATA and since the

appellant has not done so, any allegations made in the affidavit with regard to its alleged claim against IATA is not relevant. The main thrust of the

plaintiff's/respondent's argument is that although the defendant No.1 was in a position to deny the particulars of the plaintiff's claims, it

has chosen not to deny such particulars (as specifically reflected in the two BSPs) or even the total amount of claims for tickets sold. Mr. Banerji

relies upon Lohia Properties Private Limited, Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar reported in (1993) 4 SCC 6 on the principle or Order 8

Rule 5 of the CPC, namely that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted

in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. In the case cited, the doctrine of nontraverse was applied and the Court held that there was an implied admission. This decision has been relied upon as it is a case of the plaintiff that the first defendant in the suit did not deny the amount claimed in the plaint and hence this would amount to an admission on behalf of the defendant to show that there is no defence to the claim of the plaintiff.

We have considered the submissions put forward by the parties and the authorities cited in support thereof. We are fully in agreement with the proposition of law laid down in Apollo Zipper and Economic Transport Organisation with regard to the jurisdictional basis of passing a summary

Judgment in suits which satisfy the mandate of Chapter XIII A of the Original Side Rules of this Court. In Apollo Zipper, a Judgment delivered by a

Division Bench consisting of one of us (Biswanath Somadder, J.), it was held inter-alia that under Rule 6, the matter of granting leave (or refusal) to

defend should be decided first and such decision should be supported with clear reasons, before the Court proceeds to pronounce Judgment on the

merits of the case in an application under Chapter XIII A. In that case, the Division Bench held that the Court below had discussed on the merits of

the case without first coming to any clear finding as to why the Court was satisfied that the defendant had no good defence to the plaintiff's claim

on merits. This was considered to be a vital omission on the part of the First Court. But more significantly, in the case of Apollo Zipper, the Division

Bench felt that there was a triable issue which required to be adjudicated at trial since the plaintiff and the defendant had raised contradictory factual

issues in relation to a vital piece of evidence, namely, whether the plaintiff is the sole owner of the suit premises.

Economic Transport Organisation relied upon by the appellant was a case arising out of a suit for eviction and the issue for adjudication was whether

the statutory notice issued before filing of the eviction suit was valid. In the facts urged by the parties therein, the Division Bench held that the issued

raised had to be decided at trial to find out whether the suit will be governed by the West Bengal Premises Tenancy Act or the Transfer of Property

Act. Further, in that case the defendant had been granted conditional leave to defend only upon imposition of stringent costs. The next case IDBI

Trusteeship Services Limited Vs. Hubtown Limited reported in (2017) 1 SCC 568 was a judgment passed in a matter governed under Order 37 of the

Code of Civil Procedure and not under Chapter XIII A of the Original Side Rules of this Court. This case lays down that the principles stated in M/s.

Mechelec Engineers & Manufacturers Vs. M/s. Basic equipment Corporation reported in (1976) 4 Supreme Court Cases 687 stand superseded in

view of the amendment to Order 37 Rule 3 of the CPC as to cases where the defendant should be given leave to defend in a suit filed under Order

37. All the cases cited by the appellant have laid down that a good defence has to be established by the defendant to the satisfaction of the learned

Judge in terms of Rule 6 of Chapter XIII A. When there are disputed questions of fact in the matter of establishing the defence then the Court will not

make a summary judgment under Chapter XIII A. In the present case however, there are no disputes with regard to the quantum of claim owed to the

plaintiff.

The copies of the BSP/Billing Analysis for the two periods mentioned in the above paragraph has been annexed as C and D respectively. Even if we

were to disregard the correspondence exchange between the plaintiff and the proforma defendant in respect of the BSPs, in the absence of any

specific rebuttal by the defendant to either the BSPs or the particulars given therein (including the name of the defendant No.1 and the exact amount

due and owing from the defendant No.1) or disputing the existence of the BSPs themselves, the burden of proof resting on the plaintiff has been

fully discharged and the plaintiff is not required to prove anything more. In fact, the defendant No.1 had every opportunity to contradict the essential

part of the plaintiff's claim, by disclosing additional facts which could have destroyed the plaintiff's case altogether or at least put the onus

back on the plaintiff's turf to prove the facts stated in the plaint. With the defendant No.1 clearly failing in that respect, the learned Single Judge

cannot be faulted in allowing the reliefs claimed in the Chapter XIII A application. The relevant parts of the impugned Judgment containing the reasons

given by the learned Single Judge in the context of the above is set out below:-

“The sheet anchor of the argument of Mr. Roy is that there exist of no privity of contract. However, the defendant has failed to explain how the

tickets ultimately reached the hands of defendant No.1 and such tickets were

sold.â?? â??Once the Court is of the view that the plaintiff has been able to establish that a contract exists by sale and purchase of the tickets, the question arises what would be the liability of the defendant under such contract. In the affidavit I tried to find out if the defendant is disputing the amount claimed by the plaintiff. The defendant never denies that the tickets of the plaintiff Airlines have been sold by the defendant No.1. The defendant No.1 complains about certain unlawful conduct of the proforma defendant which however does not absolve the liability of the defendant No.1 to pay the price of the tickets sold by the plaintiff. The supply of tickets to the defendant No.1 by the plaintiff is not in dispute. The affidavit in opposition does not show that the plaintiff is not entitled to the said amount. Once the defendant No.1 has received the tickets the defendant in its defence is at least required to show prima facie that such amount is not payable as has already been repaid to IATA.â??

We come to the other issue raised by Counsel appearing for the first defendant in that the deponent of the affidavit filed in support of the application under Chapter XIII A cannot positively swear to the facts verifying the cause of action and the amount claimed. In our view, the affidavit affirmed by Thomas Geoffrey Wright, General Manager as well as the constitute attorney and the principal officer of the plaintiff has described the entire cause of action which includes the arrangement between the parties, the obligations on the part of the defendant No.1 in respect of settling the amounts for the tickets purchased in the plaintiff's airlines and its failure to do so. The BSPs/ Billing Analysis for the two fortnight periods is only a part of the cause of action pleaded in the said affidavit. Even if we were to disregard the annexures D and E (the two BSPs) of Para 16 of this affidavit, the claim made out in the application under Chapter XIII A is complete and as the General Manager of the plaintiff, we have no doubt that the deponent has not fallen short of the mandate of Rule 3 of Chapter XIII A.

According to the first defendant, the Judgment cannot also be sustained since the learned First Court has not elaborated as to why, in its opinion, the defendant No.1 did not have a good defence to the plaintiff's claim on merits. This, in our view, is not correct. After clearly stating the reasons as to why the defendant has not disclosed a good defence to the plaintiff's claim, the learned

Judge has proceeded to hold, â??..... this Court is at a pain to find out if there is any defence on which the defendant could be allowed to go

to trial. The defence as to the lack of mutuality and privity of contract is an argument in despair.â??

For the reasons as stated above, we agree with the decision of the learned Single Judge and uphold the impugned Judgment. We find no merit in the

appeal filed by the defendant No.1 which is liable to be dismissed and is accordingly dismissed. There shall be no order as to costs. The Court :

Since we have not been able to reach a consensus as to whether the learned First Court could have decided the Suit summarily under Chapter XIII A

of the Original Side Rules, we deem it fit and proper to direct the Registry to place the matter before the Honâ??ble, the Chief Justice, for necessary

order. Urgent photostat certified copy of our judgements and this order, if applied for, be supplied to the parties on priority basis.