

**(2001) 02 BOM CK 0101**

**Bombay High Court**

**Case No:** Summons for Judgement No. 78 of 1999 in Summary Suit No. 3997 of 1998

M/s. Asia Today Ltd. and Others

APPELLANT

Vs

M/s. Mudra Communication Ltd.  
and Another

RESPONDENT

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**Date of Decision:** Feb. 13, 2001

**Acts Referred:**

- Contract Act, 1872 - Section 126, 230
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 22

**Citation:** (2001) 4 ALLMR 111 : (2001) 3 BOMLR 273

**Hon'ble Judges:** D.Y. Chandrachud, J

**Bench:** Single Bench

**Advocate:** Mr. V.R. Dhond and Mr. J.B. Sen, instructed by M/s M. Dhruva and Co, for the Appellant; Mr. J.P. Cama, Ms. Shubhakher and Mr. N. Engineer, instructed by . K.P. Anil Kumar, for the Respondent

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**Judgement**

Dr. D. T. Chandrachud, J.

In these proceedings under Order 37 of the Code of Civil Procedure, 1908 the First Plaintiff is engaged in the business of conducting Satellite based Broadcasting of Programmes in the Asian region in 40 countries including India. The Second Plaintiff has acted as a Canvassing and Collecting Agent in India of the First Plaintiff. The Second Plaintiff has procured advertisements for the First Plaintiff through Advertising Agencies such as the First Defendant. In the present case, the First Defendant procured advertisements for the First Plaintiff from the Second Defendant which is a Company carrying on business in acrylic and synthetic yarn.

2. The Second Plaintiff was approached by the First Defendant on behalf of the Second Defendant for advertising the products of the Second Defendant. The General Terms and Conditions governing the broadcast of advertisements in the TV channels of the First Plaintiff have been laid down by the First Plaintiff and were duly

accepted by the Defendants. The First Defendant issued what are known as Traffic/Release Orders from time to time on behalf of the Second Defendant, who was a client of the First Defendant. These Traffic Release Orders were issued in 1994-95. A copy of one of the said release orders is annexed at Exh. B to the Plaint. By the said Traffic Release Order, the First Defendant has authorised the Plaintiff to release certain advertisements which were listed therein on behalf of the Second Defendant whose name was specified as the client. The First Defendant stated that it has read the General Terms and Conditions and Sales Policy of the First Plaintiff and confirmed its acceptance.

3. Pursuant to these Traffic Release Orders advertisements were broadcast on ZEE T.V. and invoices were raised by the First Plaintiff which were forwarded by the Second Plaintiff under its covering letter to the First Defendant together with debit notes which were raised by the Second Plaintiff. In Exh. C to the Plaint there are details of the debit notes which were raised by the Second Plaintiff upon the Second Defendant from time to time. A copy of a debit note is annexed at Exh. D. The First Defendant by a letter dated 20th April, 1995 forwarded a cheque in the amount of Rs. 4,61,463/- towards part payment of the amounts payable to the Second Plaintiff. Insofar as the Second Defendant is concerned, by a letter dated 7th November, 1996, it sought to inform the Second Plaintiff of its financial difficulties as reason for the delayed payment of its outstandings. A cheque dated 31st July, 1996 issued by the Second Defendant towards the partial payment of the dues came to be dishonoured. An Advocate's notice was issued to the Second Defendant on behalf of the Plaintiffs on 7th July, 1997 and once again to both the Defendants on 15th May, 1998. A statement of account of the dues outstanding as against different bills/ invoices of the Plaintiffs were annexed to the said notice. The statement appended to the said letter dated 15th May. 1998 provided the break up of the dues, which were payable to the First Plaintiff and to the Second Plaintiff separately. The statement also displayed the payments which were received on behalf of each one of the two Defendants.

4. At the present stage. It is material to note that payments were made by the Second Defendant between 2nd March, 1996 and 31st August, 1996, comprising of a total of 7 payments in all. The First Defendant is stated to have issued cheques in January and February, 1995 towards payments of the outstandings. An affidavit has been filed on behalf of the Second Plaintiff stating that even after the filing of the suit, the First Defendant has paid an amount of Rs. 2,57,145/- to the Second Plaintiff under a cheque dated 19th March, 1999. Copies of the said cheque and the payment vouchers are annexed to the said affidavit.

5. The Summary Suit in the present case has been instituted on the basis of the release/traffic orders which were issued by the First Defendant from time to lime and the invoices and debit notes that came to be raised by the Plaintiffs upon the Defendants. The claim in the suit insofar as the First Plaintiff is concerned, is for the

recovery of an amount of Rs. 40,94,439/- (equivalent to US \$ 97,486) together with future interest and insofar as the Second Plaintiff is concerned, for an amount of Rs. 3,42,784/- with future interest.

6. In reply to the Summons for Judgment, an affidavit has been filed for and on behalf of the Second Defendant in which it has been stated that a Reference has been registered under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 against the Second Defendant on 7th August, 2000. The proceedings against the Second Defendant are stated to be pending before the B.I.F.R. Having regard to the provisions of Section 22 of the Act. hearing of the Summons for Judgment as against the Second Defendant shall have to be adjourned sine die. The learned Counsel appearing on behalf of the Second Defendant, however, states that the Second Defendant undertakes to inform this Court as well as the Plaintiffs and the Registry of this Court as soon as the proceedings before the B.I.F.R. are concluded, so that necessary proceedings can be adopted against the Second Defendant.

7. Insofar as the First Defendant is concerned, an affidavit dated 18th July, 2000 has been filed on its behalf in which it has been sought to be contended that by a tripartite agreement dated 8th December, 1994, the First Plaintiff has attempted to make First Defendant directly liable to the First Plaintiff, and the Second Defendant in the alternative (para 3). It is sought to be submitted that the First Plaintiff by virtue of the said agreement "has deviated from the law of agency" and that there was a clear Intent of the First Plaintiff to treat the First Defendant "as other than an agent". It was sought to be submitted that the First Plaintiff has exercised an election and sought to recover its alleged dues wholly from the Second Defendant. Apart from this, it has been stated that the agency of the First Defendant was restricted wholly and solely to getting orders from the Second Defendant for advertising its products and issuing release orders to the Second Plaintiff. It is sought to be alleged that there was no privity of contract between the First Defendant and the Second Plaintiff.

8. In assessing the tenability of the defence urged on behalf of the First Defendant, it is necessary to note at the outset that it was the First Defendant who had issued the release orders a sample of which is annexed at Exh. B to the Plaint. By the release orders issued by the First Defendant the First Defendant called upon the Plaintiffs to release advertisements listed out therein on behalf of the Second Defendant, which was stated to be the client of the First Defendant. The First Defendant expressly stated therein that it had perused the general terms and conditions and sales policy in the First Plaintiffs rate card and confirmed its acceptance. Insofar as the Terms and Conditions governing the issuance of such release orders are concerned, it would be necessary to note that clause 2 of the General Terms and Conditions of contract provided that an agency commission of 15% will be paid to the Agency on the rate specified in the Rate Card. Clauses of

these Terms and Conditions provides that "by entering into the Contract, the Advertiser and/or the Advertising Agency, jointly and severally, accepts and agrees to be bound by the terms stated in Contract"". Amongst the other contractual terms, clause 9 which is entitled "Accounts", provided as follows :

"A. The Client or Agency shall promptly pay to the channel the sums specified in the then current Rate Card for the services to be provided hereunder.

B. The Channel shall render monthly invoices to the Client or Agency for all sums due to the Channel pursuant to this Agreement.

C. All invoices shall be settled by the Client or Agency as the case may be not later than forty five (45) days from date of Invoice or as specifically agreed between the Channel and the Client. In default of payment by the Due Date the Channel shall without prejudice to its other rights be entitled to refuse to transmit the advertisement."

9. Apart from the General Terms and Conditions, the parties have entered into a tripartite agreement dated 9th December, 1994 which is annexed at Exh. 1 to the affidavit in reply. The agreement to which both the First and the Second Defendants are admittedly parties, provides that the Defendants agree that the advertisements as advised by the nominated advertising agency be telecast on ZEE TV from time to time. The agreement stipulates that the advertisement tariff and terms and conditions will be as per the applicable Rate Card in force on the date of telecast and the payment will be on the 45th day from the date of invoice. The payment procedure which was envisaged between the parties was that 15% of the amount of the invoice shall be paid each to the advertising agency (the First Defendant) and to the canvassing agents (Second Plaintiff) separately in Indian Rupees. 70% of the invoice price was to be paid directly to the First Plaintiff in foreign exchange from an EEFC account. The agreement provided that in default of payment to be made in foreign exchange by the Second Defendant as advertiser, the First Defendant as advertising agency as well as the Second Defendant, its client, will be immediately responsible to pay the First Plaintiff in Indian Rupees as per the applicable INR Rate Card through the Second Plaintiff. The period of the said contract was from 11th December, 1994 to 4th June, 1995.

10. The claim of the Plaintiffs, in these proceedings arises out of advertisements broadcast by the First Plaintiff acting upon the release orders which were issued by the First Defendant for broadcast of advertisements of the Second Defendant. The claim in the suit is founded upon the General Terms and Conditions which were agreed upon by the parties which found reflection in both, the release orders as well as the tripartite agreement of 8th December, 1994.

11. Three submissions have been urged in defence to the claim in the Summons for Judgment:

(i) The first defence is that under the tripartite agreement dated 8th December, 1994, the First Defendant assumed the character of a guarantor to the obligation of the Second Defendant and since the Second Defendant cannot be proceeded with in view of the pendency of the proceedings before the B.I.F.R., the bar u/s 22 of the Act will equally apply to the proceedings against the First Defendant. Now, in view of the recent Judgment of the Supreme Court in *Patheja Bros. Forgings & Stamping v. ICICI Ltd.*, the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, would equally apply to a guarantor, who has furnished a guarantee in order to secure the dues and outstandings of a company in respect of which a reference u/s 16 of the Act has been registered or in respect of which any of the proceedings referred to in Section 22 are pending. However, having regard to the contract between the parties, it would be clear that the role of the First Defendant was not that of a guarantor to secure the dues of the Second Defendant. The First Defendant is an Advertising Agency, which has secured for the First Plaintiff, orders of the Second Defendant for broadcasting advertisements on various satellite TV channels. It was the First Defendant which had issued the traffic release orders such as the one dated 20th February, 1995. By issuing the release order, the First Defendant accepted in express terms, the General Terms and Conditions prescribed by the Plaintiffs under which both the First Defendant as the Advertising Agency as well as the Second Defendant as its client were responsible for making payment. This position is not modified or altered by the tripartite agreement dated 8th December, 1994. What the tripartite agreement provided is that a part of the payment representing 70% of the invoice value which has to be paid to the First Plaintiff would have to be remitted by the Second Defendant in foreign exchange to the First Plaintiff and that in the event of Second Defendant falling to do so, both the First and the Second Defendants would have to make payment through the Second Plaintiff in Indian Rupees. The First Defendant had an underlying obligation under the General Terms and Conditions prescribed by the Plaintiffs and which were accepted by the First Defendant to pay for the advertisements which were released by the First Defendant for being broadcast by the First Plaintiff. The underlying obligation of the First Defendant is continued under the terms of the tripartite agreement which merely postulate that in the first instance the component of 70% which was due to the First Plaintiff was payable in foreign exchange. The First Defendant is, therefore, not a guarantor in respect of the dues of the Second Defendant, but is jointly and severally liable together with Second Defendant for meeting the dues of the First Plaintiff. u/s 126 of the Contract Act, 1872 a contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default. The First Defendant has not assumed the obligation of a third person viz., the Second Defendant but the First Defendant has assumed an obligation on its own part which is joint and several with the obligation of the Second Defendant to meet the dues of the Plaintiff. In these circumstances, Section 22 of the Act has clearly no application to the First Defendant.

(ii) The second defence which is sought to be urged was that the First Defendant was acting as an agent of a disclosed principal and, therefore, is not liable by virtue of the provisions of Section 230 of the Contract Act. There is no substance in the said defence. An obligation was expressly assumed by the First Defendant under which it accepted the General Terms and Conditions of the First Plaintiff under which the liability was that both of the First Defendant as an Advertising Agency and of the Second Defendant as the client.

(iii) The third defence that has been urged is that the suit is barred by limitation. The suit in the present case was instituted on 31st July, 1998. Various payments were made from time to time both by the First as well as by the Second Defendants. So far as the payments by the First Defendant are concerned, these were made in January, 1995 and in February, 1995. Payments have been made by the First Defendant to the Second Plaintiff as late as on 19th March, 1999. Insofar as the Second Defendant is concerned, a list of the 7 payments which have been made between 2nd March, 1996 and 31st August, 1996 has been annexed to the letter dated 15th May, 1998 at Exh. I to the Plaint, having regard to the diverse payments which have been made the suit filed on 31st July 1998 is clearly within limitation. A reference may here be made to a judgment of a Division Bench of the Calcutta High Court in *Azizur Rahaman v. Upendra Nath*, in which it was held, while construing the provisions of Section 20 of the Limitation Act, 1908. that unlike the more restrictive provisions of Section 19 of the old Act under which an acknowledgment only affects the person giving it, payment u/s 20 affects not only the person making the payment but also other persons who are liable. The reason for this, it was held, was that an acknowledgment is a mere admission of a right whereas a payment is more than a mere admission of right and it operates for the benefit of all the persons who are liable.

12. Having regard to the aforesaid situation, I am of the view that there is no substance in the defence which is sought to be urged and in any event, no triable issue arises. However, in the facts and circumstances of the case, in the interests of justice, it is appropriate to grant conditional leave to the First Defendant to defend the suit on the following terms :

(i) The First Defendant is granted conditional leave to defend the suit subject to deposit of an amount of Rs. 20 lakhs within a period of 12 weeks from today.

(ii) On such deposit, the suit be transferred to the list of Commercial Causes. The First Defendant shall file its Written Statement within 8 weeks thereafter. Inspection and Discovery will be completed within 8 weeks thereafter.

(iii) In the event the amounts are deposited as aforesaid, the Prothonotary and Sr. Master to Initially deposit the said amount in a Nationalised Bank, for a period of one year and thereafter, for equal successive periods, till the disposal of the suit.

(iv) On failure to deposit the aforesaid amount, liberty to the plaintiffs to apply for further orders.

Summons for Judgment is disposed of in the aforesaid terms. No costs.