*	**IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 07.10.2016
Pronounced on: 09.01.2017

\+	**FAO (OS) (COMM) 10/2016, C.M. APPL.26915 & 33445/2016**

ORGANIZING COMMITTEE COMMONWEALTH GAMES, 2010 ..... Appellant

Through: Sh. Maninder Singh, Sr. Advocate with Ms. Archana Lakhotia, Ms. Anushka Sharma, Sh. Rushil Chandra and Sh. Prabhas Bajaj, Advocates.

Versus

PICO DEEPALI OVERLAYS CONSORTIUM AND ANR. ..... Respondents

Through : Sh. Dharmendra Rautray with Ms. Tara Shahani, Advocates, for Respondent No.1.
Sh. Abhishek Gupta with Sh. Varun Sharma, Advocates, for Respondent No.2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This judgment will dispose of an appeal against an order by the Commercial court, rejecting a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (“the Act”), resulting in the confirmation of the award of an Arbitral Tribunal.

2. The brief facts of the case are that the appellant (hereafter “OCCG”) resorted to cluster-wise procurement on turnkey basis and invited an Expression of Interest ("EOI") on 5.12.2009. The Request for Proposal ("RFP") was issued to only four qualified bidders on 16.01.2010. The bids were invited for appointment of Overlays Providers ("Overlays" refers to

temporary structures such as marquees, tents, pre-fabricated office units, porta cabins/WC units, chairs, fences, barricades, temporary partitions etc.) on turnkey rental basis for supply, installation, testing, commissioning, operation, maintenance, de-commission and removal of Overlays for Cluster I to VII. The Respondent (hereafter "Pico") submitted its bid for all seven clusters (including cluster I and VI) on 26.02.2010. Its bid for providing overlays for clusters I and VI was the lowest and was accepted; bids for other clusters were not accepted. Later, Pico submitted a revised price after negotiation during the period 26.03.2010 to end April 2010 and bid was accepted only for Cluster I & VI on the basis of the revised price. OCCG issued a Letter of Intent (Lol) dated 05.05.2010 to Pico, accepting the revised price quoted by it. OCCG also issued a letter, dated 18.05.2010 to Pico proposing to sign a formal turnkey contract, on rental basis for Commonwealth Games Delhi 2010 for a total value of ₹ 1,239,597,128/- for Cluster I works and ₹ 852,455,662/- for Cluster VI works. The amounts were inclusive of all taxes and duties but excluded service tax (which was to be paid extra @10.3%). Thus, the total contract value for the said two Clusters was ₹2,092,052,790/-.

3. The contract listed payment terms in six stages described as follows:

(i) 10% of the contract value on signing of the contract against submission of bank guarantee of an equivalent amount (Stage 1)

(ii) 10% of the contract value after approval of the designs against submission of bank guarantee of an equivalent amount (Stage 2)

(iii) 10% of the value of goods to be supplied on proof of dispatch and on submission of bank guarantee of an equivalent amount (Stage 3)

(iv) 30% of the value of the goods supplied at site on certification by committee appointed by respondent. (Stage 4)

(v) 30% on successful installation, testing and commissioning of all overlays as per the contract and certification by committee appointed by the respondent (Stage 5)

(vi) Balance 10% after completion of de-commissioning and removal of rented overlays from site and certification by committee appointed by respondent (Stage 6)

The LOI required Pico to furnish a Performance Bank Guarantee (PBG) of 10% of the contract value towards performance security and Bank Guarantee for advance payment of 10% of the contract value. The PBG had to be furnished within one week of the signing of the agreement. The State Bank of India (SBI) issued the said guarantees on 15.06.2010 as Counter Guarantor to the guarantee letter issued by Pico's foreign banker HSBC since it was required to furnish an Indian bank's guarantee. The Guarantee No. 0999910PBG0000447 was for an amount not exceeding USD $ 1,786,600 and Guarantee No.099991OPBG0000448 was for an amount not exceeding USD$ 2,598,000, both valid up to 30th November, 2010.

4. After completion of the Games, disputes arose between the parties, which were referred to arbitration. A unanimous award was rendered on 03.12.2015 by a three-member Arbitral Tribunal, holding that Pico, the claimant had performed all its contractual obligations and that the PBGs had to be discharged forthwith. The Tribunal also ruled and awarded an additional amount of ₹ 79.24 crore to be paid to Pico, in accordance with the agreement between both the parties. OCCG was aggrieved and preferred a petition under Section 9 of the Act before this Court, (OMP (I) (COMM) No.

75 of 2015) seeking stay of discharge of the Performance Bank Guarantees (PBGs) till the conclusion of the proceedings under the Act. At the first hearing of the matter on 23rd December, 2015. This Court issued notice on the matter, which was accepted by respondent and re-notified the matter for final hearing before the Vacation Bench of this Court on 30th December, 2015. The court also directed that the challenge to the Arbitral Award under Section 34 be also filed and listed along with the Section 9 petition before the Vacation Bench with prayer for stay of the Arbitral Award and extension of the PBGs. OCCG then filed objections/application under section 34 of the Act. By the final order dated March 8, the learned Single Judge dismissed OCCG's petition under Section 34 and refused to interfere with the arbitral award.

5. The Tribunal adjudicated on 12 key issues; two were preliminary issues. These issues were dealt with seriatim again, by the learned Single Judge, in the impugned judgment. He ruled that *"It is evident on reading the award and pleadings that the Arbitral Tribunal has awarded the additional amount of the work of stage 5 and 6 in addition to the amount already paid by the petitioner for the work done on stage 1 to 4. Thus, the petitioner is now trying to create confusion by raising the pleas which were not taken before the Arbitral Tribunal who has given its correct findings on the basis of facts and evidence available…The present case is a classic example where the Arbitral Tribunal is so correct and reasonable, it is difficult to find out even an iota of any flaw in any part of the award. The said findings are in consonance with the contract between the parties."*

6. Mr. Maninder Singh, learned ASG, for the OCCG argues that the learned Single Judge failed to notice that the award was riddled with inconsistencies and contradictions. It is urged that the findings by the learned Single Judge that its contention regarding excess payments to the tune of ₹ 15.11 crores being devoid of merits and being raised for the first time before the court are without basis. Reliance is placed on the following averments

> *"31. The Respondent had categorically submitted in its affidavit of Evidence of RW-1 {See Para 13 at Page 7 of the Affidavit of Evidence of Mr. Nikesh Jain) that due certification for Stage 5 and Stage 6 has been submitted only for the amount of Rs. 79.24 Crore/- (this excludes the nil/Zero items as per the discussions between the parties on 08.08.2010 for amendment to the BOQ, which was confirmed in writing on 30.12.2010 and that form part of Volume 9, 10 and 11). This, as per the Respondent, is the entitlement of the Claimant for which due certification is on the record of this Arbitration. The tabulation showing the certification filed by the Claimant is annexed herewith and marked as Annexure WSR-1. The acceptance of Stage 5 and. Stage 6 certification of work for the above amount is without prejudice to the contention that the Claimant had failed to meet the milestones in time, which was the essence of the Contract.*
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> *32. The Respondent has admittedly paid Rs. 94.35 crore (inclusive of service tax) to the Claimant till date, which is Rs. 15.11 crore in excess of the certified value of the Overlays duly supplied, installed, tested, commissioned, operated, maintained, de-commissioned & removed that are on record as set out in Annexure WSR-1. The Respondent is, therefore, on the basis of the documents filed by the Claimant, entitled to the refund of the excess amount along with interest in addition to its Counter Claims.*
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> *33. The Claimant has not claimed any compensation on quantum meruit, but even such compensation can only amount*

to Rs. 79.24 crore on the basis of due certification as above and for which payment has already been made in excess to the tune of Rs. 15.11 Crore."

7. It is also argued that since the Pico had received the payment of ₹ 94.35 crores, it should have been directed to refund an amount of ₹15.11 crores, which was the remaining balance figure from the amount which has already been paid by OCCG for the first four stages of the Overlays contract. Since the value of the goods were not certified as having been successfully installed, commissioned, decommissioned and removed, the learned ASG argued that to the extent of such payment, which was not authorized by the contract, and which required appropriate clearance, the award was contrary to the contract and liable to be set aside.

8. OCCG argues that 100% payment was to be made only after due installation, testing, commissioning and thereafter decommissioning out of which 60% of the payment had already been made to Pico till stage 4. Both parties had no conflict till the first four stages; the conflict of payment arises at the fifth and sixth stages, i.e. relating to actual performance. OCCG argues that Pico was only certified for 50% of the overlay items at stage 5 for which it delivered the contracted items, thus, it was liable to 100% payment of those items in respect of which there was certification. OCCG states that the basis of its calculations of ₹ 79.24 crores was consideration towards the Respondent for all the works it was certified for, and not the balance payment of 40% for the 5^{th} and 6^{th} stages. Since OCCG has already paid ₹94.35 crore, for the first four stages, it claims entitlement to receive or be refunded the balance amount of ₹15.11 crore, instead of paying another ₹79.24 crore. Furthermore, OCCG claims that the Tribunal committed a

grave mathematical error in compounding the award and the learned Single Judge has overlooked that fact.

9. It is next argued that the learned Single Judge committed an error of law in not appreciating that the stage wise payment terms stipulated in the contract clearly showed that irrespective of the quantities delivered by Pico, 100% payment was only to be made after due installation, testing, commissioning and thereafter decommissioning. The stage wise payment ensured that even if extra quantities were delivered by the overlays provider at Stage 4, only proportionate payment for those items which complied with Stage 5 and Stage 6 certification requirement would be contractually and legitimately due to Pico. In ignoring this condition, and directing payment, the award was contrary to the express terms of the agreement.

10. OCCG also contends that the Arbitral Tribunal erred in directing that the Performance Bank Guarantees (PBGs) submitted by Pico be duly discharged by it. It was submitted that the Arbitral Tribunal failed to appreciate that in terms of the Contract, the completion certificate had to be furnished by Pico for release of the bank guarantee. However, no such certificate was obtained or submitted by Pico. Thus, the direction to release the bank guarantees was unreasonable and contrary to the intent of the parties, evidenced by the contract between them.

11. Ms. Meenakshi Arora, learned senior counsel appearing for Pico, argued that there is no dispute between the parties that ₹ 94.35 crore was paid to it, during the performance of the Contract to Pico. This amount corresponded to stages one to four of the contract. It was argued that payments for Stage 1 (10%), Stage 2 (10%) and for Stage 3 (10%) were to be

made on submission of Advance Bank Guarantees for equivalent amount. For Stage 4, the amount payable was 30%, on proof of deliveries of overlays items at the venues, which were certified by any one representative of the Petitioner at the venue. This amount was released after adjusting the payment made at Stage 1 to 3. It was submitted that these are evident from para (k),(pg. 22 of the Section 34 petition). She also urged that OCCG did not dispute that Pico completed the works for all stages and that the certificates for completion of work relating to Stage 6, i.e. de-commissioning and removal of the overlays materials from all the venues in Cluster I and VI were handed over to it. In these circumstances, there was no question of OCCG lawfully being able to withhold any sums due and payable to Pico, which had undertaken a great trouble and expense in leasing the goods and articles, for use during the Games.

12. Ms. Arora argued that OCCG never urged or pleaded anywhere that during the happening of the Commonwealth Games, or immediately after the Games were over or even during the arbitral proceedings that the sum of ₹ 94,35,74,430/- paid by it to Pico for works (completed up to Stage 4 which had been duly certified by its representative) were to be refunded by Pico since it had not completed the works and/or not commissioned the overlays materials for which they said payment was made. Thus, it was not entitled to claim any refund, or contend that the amounts paid were not due. Furthermore, it was argued that the only plea urged by OCCG before the Tribunal and in its pleadings in respect of ₹ 94,35,74,430/- payment made by it to Pico after deliveries made at Stage 4 was that it (OCCG)*"is entitled to recover a sum of Rs.94,35,74,434.33 or any other amount on the ground that the Contract is void ab initio due to fraud and conspiracy as prayed for*

under the Counter Claim". The only dispute, which was adjudicated by the Arbitral Tribunal in respect of additional payments to be paid under the contract, was in respect of Stages 5 and 6 certification of payments, which were over and above the payments already made by OCCG for 60% of works completed for an amount of ₹94,35,74,430/- to Pico and that under the award, there was no controversy between the parties for payments made to Pico up to Stage 4, i.e. 60% payment. The additional payments for completed works under Stages 5 and 6 of ₹ 79,24,21,449 crores as awarded by the Arbitral Tribunal was derived from Para 13 of RW-l's Affidavit. This was also admitted by RW-1 in its cross-examination held on 11.3.2014.

13. Learned counsel argued that in the absence of any pleading the award could not have rendered the finding that amounts to the tune of ₹15.11 crores were payable to OCCG. Ms. Arora also argued that OCCG was unable to establish in its claim under Section 34 that there was any finding that could be called patent illegality, that vitiated the award. Therefore, the impugned order, which analyzed the award in great detail and found no infirmity in it, should be left undisturbed.

Analysis and Findings

14. One of the principal disputes before the Arbitral Tribunal was as to whether the claimant, Pico, could be said to have a legitimate entitlement to say that amounts were due and payable. OCCG's argument was premised upon lack of certification of the equipment supplied to it. The findings of the Arbitral Tribunal, which led to the award *inter alia,* are as follows:

> *"9.22 Questions and answer numbers 54 to 70 of the evidence of Respondent's witness Mr. Nikesh Jain are relevant. According to him all the communications by the Respondent to the Claimant were not necessarily in writing; they could be*

verbal also. Similarly,even as to written communications it was not necessary that a formal procedure was followed and that an acknowledgement of every paper delivered to the-Claimant was obtained. This seems to be natural as there was a rush of events; officials of both the parties were meeting each other several times during the course of the day and in view of theirs having become thick to each other some formalities were not necessarily insisted upon. The Respondent's major reliance is on Exhibit RW-1/6 which is a letter dated 17.09.2010 dealing with constitution of certification committee. It does not mention any particular names though the designations/description of offices are available. It is difficult to comprehend that the Respondent would not have appointed some process for certification of payment and also would not have designated at-least by description the officials who would be competent to certify the works done. Similarly, it is also difficult to comprehend that the Claimant would expect being paid large sums without inquiring from the Respondent as to how certification was to be done so as to satisfy the Respondent for the payment being released. On a totality of the facts and circumstances of the case, in the light of the evidence adduced, we are inclined to hold, as we do, that there was a procedure of certification, that due certification was required to be done by three officials of the Respondent description whereof was known to the Claimant though particular holders of the office were not named. In short, we hold that such of the certifications as have been done by three officials of the Respondent answering particular descriptions are binding on the Respondent and have to be honored as being correct though they are not necessarily by particularly named officials. So also we hold that any certification by persons less than three would not bind the Respondent and would not entitle the Claimant to payment."

After discussing the relative facts and evidence, the Tribunal concluded that Pico was entitled to the sums that it finally awarded; in that it recorded its findings as follows:

"9.36 According to the [Respondent, the persons competent to certify were: (i) architect (ii)consultant (iii) functional area head or his representative, and (iv) venue operation head or his representative. If three out of four have certified then the certification would be treated as valid; certification by less than three would be invalid.

9.37 During the course of final hearing, compilations of the claims, supporting documents and certifications were exchanged between the two parties under copy to the Tribunal.It became clear that the quantum of amount for the works alleged by the Claimant to have been certified was Rs. 90,36.85,726/-. From out of the above, excluding such claims as were not certified by at-least three officials of the Respondent answering the description as per Exhibit RW-1/6, the net amount would come to Rs. 79,24,21,449/-. This figure is based on chart drawn by the Ld. Counsel for the Respondent and the correctness of the calculations of the figures entered in the chart was not disputed by the Ld. Counsel for the Claimant. Let it be noted that the compilations as above in support of the claims, were meticulously well done and while reserving the contentions already advanced, the learned counsel have been agreeable that so far as the quantification, i.e. the arithmetical part thereof is concerned, there is no dispute. In the opinion of the Tribunal, it would be just and fair to allow the claims of the Claimant to the extent of this amount. Accordingly, the Claimant is held entitled to the recovery of an amount of Rs. 79,24,21,449/-.

9.38 The chart so prepared and submitted before the Tribunal is reproduced hereunder:
(See Next Page for the Chart)
9.39 For the sake of clarity, let it be noted that upto Stage 4 all the claims on which there was no dispute, have been paid. So far as the above figure of Rs. 79,24,21,449/- is concerned this belongs to the disputed claims as against which the Claimant has not been paid anything."

15. The total contract value for Cluster I was ₹ 123 crore (approx.) and Cluster VI was ₹85 crore (approx.) amounting to a total value of ₹ 209 crores (approx.) out of which ₹94 crores had been paid to Pico prior to the Arbitration proceedings for Stages I to IV. The only contention debated in the arbitral proceedings was the certification of Stage V and Stage VI and non-payment thereof, which was calculated at ₹79.24 crores. Now, this amount of ₹79.24 crores was agreed upon as the balance amount which had to be paid for Stage V and Stage VI and since the Arbitral Tribunal and well as the learned Single Judge concurred on the fact that the performance of the contract with respect to Stages 5 & 6 had been met with by Pico, the question of withholding any amounts, or saying that excess amounts were paid, does not arise.

16. Apart from the question of refund being a new issue raised by OCCG, the foremost issue put forth by it is that, the Arbitral Tribunal accepted the submissions made by it that the payments were to be released to Pico only upon due certification by the committee so appointed by it. The Arbitral Tribunal also held that Pico has only obtained due certification for a sum of ₹ 79.35 crores (approx). OCCG's grievance is that despite upholding its submissions the Tribunal awarded the said amount to Pico, contrary to its own interpretation of the Contract. Its submission is that since Pico received ₹ 95.35 crores, it ought to have been directed to refund an amount of ₹15.11 crores, i.e. the remaining balance figure from the amount which has already been paid by OCCG for the first four stages of the Overlays Contract. 17.

A general view of the pleas taken by OCCG before the Tribunal show that it urged fraud and cartelization and collusion on the part of Pico, to deny its claims. The Tribunal noted that no substantial evidence was brought on record at the time of arbitral proceedings or otherwise which incriminated Pico of the allegation; rather OCCG based its allegations on inferences stating that undue preference was given to the respondent by some of its officials for shortlisting Pico for the award of the contract. It appears OCCG took this specific plea to avoid payment, making it seem as though it resorted to such allegations only after the work was completed by Pico and after having taken advantage of the contract performance and all that it entailed. This court is of the opinion that the findings recorded by the Tribunal are not only factual, but sound and reasonable and require no interference on any score.

18. OCCG, in its written submissions reiterated that under the contract it could vary the quantities of the overlays items as per its requirements and at any stage, claiming that the Tribunal failed to appreciate that Pico had been able to obtain Stage 5 & 6 certification only for a part of the overlays items comprising of the total bill of Quantities of Overlays items amounting to a value of only ₹ 79.24 crores. Along with this plea, OCCG contended, that to appreciate the express provisions of the Contract, the payment for Stage 6 would be reckoned against the complete de-commissioning and restoration of each venue that is certified by the committee comprising of (a) Overlays Architect, and (b) Venue Owner or its representative. It argues that 100% payment was only to be made after due installation, testing, commissioning and thereafter decommissioning. The stage-wise payment was only there to ensure that even if extra quantities were delivered by the overlays provider at Stage 4, only proportionate payment for those items which compiled with

Stage 5 and Stage 6 certification requirement would be contractually and legitimately due to Pico, even though under the contract, the payment terms are listed in six stages mentioned above in the facts. It is also argued that Pico was only certified for 50% of the Overlay items at stage 5 which it delivered, thus, it could rightfully claim payment of those items which was certified to the extent of 100%. OCCG states that the basis of its calculation of ₹79.24 crores was consideration towards Pico for all the works. Since OCCG paid ₹94.35 crore, for the first four stages, Pico claims that it rightfully deserves the balance amount of ₹15.11 crore, instead of ₹79.24 crore.

19. This court notices that Para 9.37 of the Arbitral Award reproduced above, which is the operative part, deals with the calculation of the amounts. It shows that the amount which was due to be paid for the 5th& 6th stages was calculated by the counsel for OCCG as opposed to the amount which was calculated by the Claimant, Pico. The counsel at that stage had agreed to calculations for the quantum of amount payable for the 5th and 6th stages. Since the only conflict regarding payment in the Tribunal was the amount payable for the last two stages, it cannot now contend that the calculation of ₹79.24 being the amount due to Pico in total, is erroneous. It never urged the issue regarding 100% payment only after the performance of all stages, neither did it argue that ₹ 79.24 was the total calculable amount for all the stages. After going through the issues raised by both sides during the Arbitral proceedings, it is clear that the quantification of compensation is only being disputed for the last two stages. Therefore, OCCG's current plea of the amount being wrongly calculated is meritless. As a matter of record OCCG,

by a letter dated 17.09.2010 to the Pico, indicated a changed process of certification for stages 5 & 6, in which designations and descriptions of offices were mentioned but it was silent on specific names of people comprising the committee. The respondent during the arbitral proceedings stated that the Pico was expected to know, who these people were, since they were thick with the people of the Organizing Committee working at the venues. The evidence on record also points to the fact that certification had to be by three officials; Pico established, however, that it had submitted certificates for payment, which were never countersigned by officials of OCCG. The award therefore, cannot be faulted as perverse or contrary to contract.

20. Significantly, during the course of hearing before the learned Single Judge a question was put to the OCCG as to whether it would have paid additional sum for Stages 5 & 6 (In addition to a sum of ₹4,35,74,430/- released for Stages 1 to 4) had Pico completed all the works under the contract and reached Stage 6. OCCG's answer was in the affirmative, i.e. it would have paid 40% of the balance payments in addition to the above 60% payment of ₹ 94,35,74,430/-. Indisputably, Pico duly completed all works and that payment had been made by the Appellant after the games had commenced and also after they were completed on 14th October, 2010. No objection was raised by OCCG that the work was incomplete or the deliveries were not made or were defective. In fact, no objections were ever raised in respect of the bill submitted to it by Pico for payment against work done at Stage 4 or Stages 5 & 6. During cross-examination, Mr. Nikesh Jain (RW-1) admitted that no complaint was ever made by the Functional Area

Head, Consultant or Architect about the Certificate of Work (COWs) for stage 5 & 6 submitted by Pico being either incorrect or deficient in any manner. As a matter of fact, OCCG did not place on record any document either during the arbitral proceedings or in Section 34 proceedings to show that the works executed by Pico entitling additional payments over and above ₹ 94,35,74,430/- was either incomplete or defective. The only counter-claim raised by the OCCG before the Arbitral Tribunal was for an amount of ₹1,27,71,673/- towards damage caused to the venue owners due to deficiency in service by Pico, again of which it was unable to show any credible evidence on record.

21. OCCG had contended that the Tribunal erred in directing that the PBGs submitted Pico be duly discharged stating that it failed to appreciate that under the terms of the Contract, the completion certificate was required to be furnished by Pico for release of the bank guarantee whereas no such certificate was obtained nor submitted by Pico. The order to release the bank guarantees was unreasonable and against the intent of the contract between the parties. It is an undisputed fact that there was substantial expenditure on behalf of Pico on keeping the PBGs alive. According to the contract, these PBGs should have been released to it on completion of the performance under the contract. However, in spite of it fulfilling its contractual obligations, OCCG issued several letters requesting for an extension of the PBG from the period of 31.12.2010 to 31.12.2012, renewing it six times in between this duration, incurring a total cost of ₹73,92,017/-. Therefore, Pico had to keep these guarantees alive, even during the pendency of the Arbitration proceedings, the last extension had extended the two PBGs upto

31.07.2015 and 30.06.2015 respectively. In fact, the documents filed on record during the arbitral proceedings show that Pico was called upon each time by OCCG, to renew the PBGs under threat of encashment. Bowing to these threats, Pico had no option but to renew them. Since Pico had performed the contract, it was entitled to recover the expenses incurred on behalf of it in keeping the PBGs alive for an unreasonably extended period of time.

22. This court is of opinion that on an overall analysis of the award, no patent illegality or facial unreasonableness in the factual findings is discernable, warranting interference under Section 34 of the Act. The learned Single Judge's findings are sound and do not call for interference. The appeal has to fail and is therefore, dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JANUARY 9, 2017