

\$~

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

Reserved on: 07.03.2019

Pronounced on: 27.03.2019

+ **RFA(OS)(COMM) 22/2017 & CM Appl. 42543/2017 & 2903-2904/2019**

DEEPALI DESIGNS & EXHIBITS PVT LTD Appellant

versus

PICO DEEPALI OVERLAYS
CONSORTIUM & ORS. Respondents

+ **RFA(OS)(COMM) 3/2018 & CM Appl. 7562-7563/2018, 7618-7619/2018, 18773-18774/2018, 45489-45490/2018, 10570-10571/2019**

PICO DEEPALI OVERLAYS
CONSORTIUM & ORS. Appellants

versus

DEEPALI DESIGNS & EXHIBITS
PRIVATE LIMITED Respondent

Present:- Mr. Raghvendra Singh, Adv. for Deepali Designs & Exhibits.
Ms. Ginny J. Rautray & Ms. Anushka Ashok, Advs. for PICO.
Ms. Lakshmi Gurung & Ms. Easha Kadian, Advs. for ITD.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

MR.JUSTICE PRATEEK JALAN

%

1. These cross appeals are directed against a judgment dated 18.07.2017 passed by the learned Single Judge in C.S. (Comm.) 1590/2016. The appellant in RFA(OS) (Comm.) 22/2017, Deepali Designs and Exhibit Pvt. Ltd. (hereinafter, "Deepali" or "the plaintiff") is the plaintiff in the said suit, and the appellants in RFA (OS) (Comm.) 3/2018 are three of the six defendants in the said suit, viz., PICO Deepali Overlays Consortium (hereinafter, "PDOC" or "the Consortium"), PICO Hong Kong Ltd. (hereinafter, "PHKL"), and PICO Event Management India Pvt. Ltd. (hereinafter, "PEMI"). (These three defendants, being the contesting defendants in the suit, are also hereinafter collectively referred to as "the defendants"). By the impugned judgment, the learned Single Judge has granted a decree of the suit in part, upon a finding of an admission in favour of Deepali and against the defendants, in the sum of ₹4,19,05,956/-.

Relevant Facts and Contractual Clauses

2. By an agreement dated 09.12.2010 (hereinafter referred to as "the Consortium Agreement"), Deepali, PHKL and PEMI agreed to form a consortium to submit an Expression of Interest in response to a tender opened by the Organizing Committee Commonwealth Games, 2010 (hereinafter, "OC"). The proposed project was a turnkey project in respect of supply, erection, commissioning, maintenance and removal of Games overlays at various venues at the Commonwealth Games, and was divided into seven clusters. The Consortium

Agreement (Clause 7) contemplated participation of the parties to the extent of 60:20:20 for PHKL, PEMI and Deepali respectively. They contributed to the capital of the consortium in the same proportion. The consortium was to operate under the trade name “PICO Deepali Overlays Consortium”.

3. Of the various terms and condition for the operation and governance of the consortium set out in the Consortium Agreement, clauses 7.4 and 8.2 provided for the manner of distribution of the income received by PDOC from the OC. They read as follows:

“7.4 The Final settlement of fees and the final distribution of profit as well as any remaining assets of the JV will take place after the complete payment of the fees with respect to the project by Delhi 2010.

8.2 The assignment of the activities of the project shall be effected by means of specific purchase orders issued by the JV and forwarded to the JV member or members responsible for each such activity. Following five (5) days after full delivery of all goods and / or completion of all works/services mentioned in each purchase order, each JV member shall issue and deliver to the JV the relevant invoice. The invoiced amount shall be paid to the relevant JV member by the JV after each respective payment by Delhi 2010 and within thee (3) days after the aforementioned payment is effected by Delhi 2010. It is agreed that remuneration by Delhi 2010 shall be deemed to have been received by the JV only if it has been duly deposited with the bank accounts of the JV designated for this purpose. From the amounts received by the JV, following say legal deduction, 4% of it will remain in a reserve in order to be used in case of debts of the JV as a result of poor workmanships, penalty clauses, insurance coverage and the like. This reserve, if not disposed of as aforesaid will be distributed to the JV members pro rata

to their participation percentages in the JV, after final acceptance of the Project, according to the Contract and not later than March 31.2011.”

(Emphasis supplied)

4. An amendment of the Consortium Agreement was entered into on 01.06.2010 (hereinafter, “the Amendment Agreement”) which *inter alia* did away with the original intention of an incorporated consortium. Instead, it enumerated the division of work between Deepali, on the one hand, and PHKL/PEMI on the other, by way of Appendices 2 and 3 to the Amendment Agreement respectively. Significantly, the clause in respect of distribution of the parties’ share from the income of the consortium was also altered. By virtue of clauses 2.1(1) to 2.1(3) of the Amendment Agreement, Deepali's entitlements were redefined as follows:

“ 2.1 Scope of works

(1) After the assignment of the works to each member, if there are any profits and assets earned and retained in the JV, Deepali shall not be entitled to any share of such profits and assets.

(2) Each party shall participate in the works tendered to the CWGOC Delhi 2010. The scope of works are assigned to members as follow:

Deepali: Works confirmed by CWGOC Delhi 2010, listed in Appendix 2/PHK & PEMI: All other works confirmed by CWGOC Delhi 2010, listed in Appendix 3. Any changes to the scope of work assigned to Deepali per Appendix 2, except for any changes imposed by CWGOC on the Consortium, must be mutually agreed by all parties.

(3) Amounts received by the JV on contracts with the CWGOC Delhi 2010 in respect of work performed by

Deepali, within the scope of work described in Appendix 2 (including any variations), minus 23% shall be paid to Deepali and the remainder shall belong to PHK. The net amount after deduction of the 23% is inclusive of the 10.3% service tax but excludes any tax deducted at source. Deepali shall provide PHK on demand any tax certificates reasonably required by PHK (including but not limited to anything related to the 10.3% Service Tax).
(Emphasis supplied)

Clauses 7 and 8.2 were also amended to the following extent:

“3.2 Article 7: delete in its entirety and replace with “The risks and liabilities of each party shall be as per the scope of work to be undertaken and the participation of each party as contained in the Addendum. In the event the risks and liabilities that materialize are general in nature and cannot be determined to be attached to any individual scope of work by any party, such as a general deduction by CWGOC Delhi 2010 from the payments on the main contract with Consortium, such deduction shall be apportioned to PHK & PEMI 80%, and to Deepali 20%.

3.3 Article 8.2

(a) Amend: “The invoiced amount shall be paid to the relevant JV member by the JV after each respective payment by Delhi 2010 and within three (3) days after the aforementioned payment is effected by Delhi 2010. It is agreed that remuneration by Delhi 2010 shall be deemed to have been received by the JV only if it has been duly deposited with the bank account of the JV designated for this purpose” to:

*“The invoiced amount shall be paid to the relevant JV member by the JV after each respective payment by Delhi 2010 and within **ten (10) days** after the aforementioned payment is effected by Delhi 2010 and deposited into the JV bank account.”*

(b) Delete: "From the amounts received by the JV, following any legal deductions, 4% out of it will remain in a reserve in order to be used in case of debts of the JV as a result of poor workmanships, penalty clauses, insurance coverage and the like. This reserve, if not disposed of as aforesaid, will be distributed to the JV members pro rata to their participation percentages in the JV, after final acceptance of the Project, according to the Contract and not later than March 31,2010."

(Emphasis supplied)

5. In line with these amendments, Appendix 2 to the Amendment Agreement entitled "Scope of Work to Deepali based on OC's Price less 23%; Dated 8 May 2010" itemized various goods/services in Cluster 1 of the project and their "revised Unit Rate & Total". The last column of Appendix 2 bears the headings, "Price to Deepali", and "After Agreed 23% deduction inclusive 10.3% Service Tax not inclusive of TDS (INR)".

6. Pursuant to the establishment of the consortium, PDOC submitted an Expression of Interest to the OC on 29.12.2009, and a Request for Proposals on 15.02.2010. The OC declared PDOC the lowest bidder in two clusters. It is stated that the work awarded to PDOC was successfully completed between 15.06.2010 and 14.10.2010.

7. On 10.12.2010, Deepali filed the suit arraying PDOC, PHKL, PEMI, OC and the consortium's bankers as defendants. The suit contended that the defendants have not made over to it the sums received by PDOC on account of its scope of work. The suit was amended on 01.08.2011 and the defendants amended their written

statement. The suit has since been treated as a commercial suit and renumbered as CS (COMM) No. 1590/2016.

8. Deepali, the applied under Order XII Rule 6 of the Code of Civil Procedure (hereinafter “CPC”) on 16.12.2015, principally relying upon alleged admissions contained in the written statements, read into the Amendment Agreement, and an email dated 10.03.2011 from PHKL. The defendants resisted the application by filing a reply dated 11.03.2016.

9. The application was disposed of by the impugned judgment of the learned Single Judge dated 18.07.2017. She rejected the plaintiff's claim for judgment upon admission in the sum of ₹6,99,24,861/-, but held that the said email constituted a clear and unequivocal admission of liability to the extent of ₹4,19,05,956/-. Consequently, a decree was directed for the said amount with interest at the rate of 9% per annum which would accrue from 10 days after the receipt of the amount by PDOC until recovery.

Pleadings

10. Deepali contended in the suit that during the course of the Games, and after the conclusion thereof, the OC has paid substantial amounts to PDOC, but PDOC failed to make over Deepali's share to it in terms of the Amendment Agreement. Deepali's claims are summarized in paragraphs 24 and 25 of the plaint (as amended) in the following terms:-

“24. That as on date, to the information and knowledge of the plaintiff company the Consortium / Compendium / Partnership Firm / defendant no. 1 has received

approximately total of 94,35,74,431/- out of total payment of about 180 crore from the Commonwealth Games Organizing Committee. That out of the said amount of 94,35,74,431/- an approximately amount of 30,35,40,044/- has been paid by the Organizing Committee to the defendant no. 1 on account of the work falling within the scope and ambit of the plaintiff company, which was duly completed by it. It may be pertinent to mention here that in terms of the revised understanding reached between the parties as reflected in the Addendum, the payment has to be released to a partner of the Consortium on the basis of nature of payments received from the Organizing Committee – whether they pertain to the scope of work falling to the share of the partner concerned.

25. After deduction 23%, the total amount payable to the Plaintiff Company would be 23,37,25,833. Till date, the total payment received by the Plaintiff Company in respect of the Commonwealth Games project is 16,38,00,972. Therefore, as on date, the total amount due to the plaintiff company from the defendants is to the tune of 6,99,24,861. The Defendants are jointly and severally liable to pay the aforesaid amount to the Plaintiff Company. The plaintiff has filed the statement of account in support of its claim. The Plaintiff company is also entitled to pendent elite and future interest @ 18 per annum on the said sum till the realization of the said amount.”

11. On this basis, Deepali made the following claims in the suit:-

“(i) Pass a decree of recovery of money of 6,99,24,861/- in favour of the plaintiff company and against the defendant no. 1 to 3 along with pendentelite and future interest at 18% per annum on the said sum till realisation of the said amount;

(ii) Pass a decree of declaration that the defendant no. 1 was formed for the specific purposes and the

compendium / consortium/ Partnership Concern of the plaintiff, defendant no. 2 and 3 have come to an end from the date of filling of the present suit before this Hon'ble Court;

(iii) Pass a decree of dissolution thereby dissolving the defendant no. 1;

(iv) Pass a decree of mandatory injunction thereby directing the defendant No. 4 to provide the entire details of the bank account having no. 166189464001, with the Barakhamba Road Branch, H.S.B.C. Bank;

(v) Pass a decree of mandatory injunction thereby directing the defendant No. 5 to provide the details of total payments made by the defendant no. 5 in favour of the defendant no. 1 alongwith the bills/ details for respective payment;

(vi) Pass a decree of mandatory injunction thereby directing the defendant No. 3 to provide the details of payments received by defendant No. 3 from defendant No. 1;

(vii) Pass a decree for rendition of accounts in favour of the plaintiffs and against defendant no. 1;

(viii) Pass order awarding costs of the present suit in favour of the plaintiff company and against the defendants.

(viiia)pass a decree of declaration that since the joint venture contract has been terminated by the plaintiff vide letter dated 23.03.2011 all payments towards the scope of the work of the plaintiff (minus 23%) be remitted to the plaintiff forthwith.

(viiib)pass a decree of declaration that all future payments towards the scope of work of the plaintiff (minus 23%) be remitted directly to the account of the plaintiff on receipt from Defendant No. 5 or its successor.

(xi) Pass any such other and further orders as may be deemed just and proper in the facts and circumstances of the case.”

12. The contesting defendants filed a common amended written statement in the suit in which they contended *inter alia* that interim payments received from the OC by PDOC were to be apportioned in the ratio of 80% to PHKL/PEMI and 20% to Deepali. They claimed to have complied with (and, in fact, exceeded) this stipulation. This defence was summarized in the amended written statement in the following words:-

“13. ... It is, however, submitted that the parties agreed that all interim payments received from the OC would be apportioned into 80% and 20% share of the Defendants and the Plaintiff respectively and this apportionment is reflected in the Defendants and the Plaintiff’s course of action.”

xxxx

xxxx

xxxx

xxxx

“15. ...The parties had expressly agreed and had also acted upon the understanding that the payment received by the Defendant No. 1 would be apportioned as per their respective percentage wise participation in executing the works under the CWG Agreement. The Plaintiff has been paid its 20% share from the payments received from the OC and the same is duly accepted by it. Under the Consortium Agreement and the parties’ practice, until the final accounting the value of Plaintiff’s work was deemed to be 20% of the certified value, or Rs. 345,519,327, and the value of the Defendants’ work was deemed to be 80% of the certified value, or Rs. 1,382,077,308. The total of the 20% and 80% share of the certified value is Rs. 1,727,596,635, i.e., the billed amount. The amount received for the work executed by the Plaintiff (being 20% of the total payment received by

the Defendant No.1) was Rs. 188,714,886. After deduction of the management fee of 23% on the amount received from the OC, the amount payable to the Plaintiff was Rs. 145,310,462. The Plaintiff, however, has been paid Rs. 165,310,467. Thus, the Plaintiff has already been overpaid a sum of Rs. 2 crores. It is submitted that an amount of Rs. 784,022,206 is still due from the OC of which 80% falls within the Defendants' scope of work."

Paragraphs 24 and 25 of the Plaint were dealt with in the following manner:

24. The contents of para 24, save as are matters of record, are wrong and denied. It is denied that the sum of Rs.30,35,40,044 paid by the OC to the Defendant No. 1, minus the 23% management fee, should be paid to the Plaintiff pursuant to the parties' agreement. It is denied that the revised understanding of the parties was in the manner alleged by the Plaintiff, i.e., on the basis of nature of payments received from the OC – whether they pertain to the scope of work falling to the share of the partner concerned. This plea of the Plaintiff is an after thought and has been raised in view of the fact that the OC has withheld large sums of money due to the Defendant No. 1 and especially due to delay and bad workmanship of the Plaintiff including damages caused by the Plaintiff to third parties. The Plaintiff had not raised any such plea during the period it received the payments on an 80% and 20% basis from the Defendant No. 1, i.e., from 14.6.2010 to 18.10.2010. Even if, which is denied, the Plaintiff is entitled to further payments the same can be paid over to the Plaintiff only after the OC has adjusted its claims against the Consortium and the Plaintiff has cleared all its liabilities including payments for losses and damages caused to third parties.

25. *The contents of para 25 are wrong and denied. It is denied that the total amount payable to the Plaintiff would be Rs. 23,37,25,833. It is further submitted that the Defendant No. 1 has paid the Plaintiff an amount of Rs. 162,004,253 after deduction of TDS at 2% even though the Plaintiff was only entitled to a sum of Rs. 142,404,253. It is therefore denied that the total amount due to the Plaintiff is to the tune of Rs. 6,99,24,861/-. It is denied that the Defendants are jointly and severally liable to pay the aforesaid amount to the Plaintiff. The Statement of Account filed by the Plaintiff is also denied and incorrect. It is denied that the Plaintiff is entitled to interest as averred and/or at all.*”

13. The defendants have also contended *inter alia* that the OC has withheld various amounts from the payments due to PDOC on account of Deepali's unsatisfactory performance of the scope of work assigned to it. They stated that PDOC has raised claims against the OC which are being agitated in arbitration proceedings and that Deepali would be paid the remainder of its remuneration upon receipt of the amounts by PDOC. (Documents filed during the course of proceedings before the learned Single Judge show that the arbitration proceedings later culminated in an award in favour of PDOC. The award was sustained by the orders of the Single Judge and later, a Division Bench of this Court dated, through the orders dated 08.03.2016 and 09.01.2017 respectively, rejecting the OC's petition for setting aside under Section 34 of the Arbitration and Conciliation Act, 1996. The Supreme Court also dismissed the OC's special leave petition by its order dated 05.07.2017.)

14. Deepali's application under Order XII Rule 6 of the CPC was based upon the written statement and Amendment Agreement dated 01.06.2010, and an alleged admission contained in an e-mail dated 10.03.2011 from the representative of PHKL to Deepali. Deepali sought the following reliefs in the said application:

“(a) to pass a decree on the basis of the addendum and direct the Defendants to disclose the amounts received towards the scope of work of the Plaintiff and after deducting 23% remit the same to the Plaintiff without prejudice to the above and on the basis of the email dated 10.03.2011 direct the Defendants to pay the Plaintiff an amount of Rs. 4,19,05,956/- forthwith and to grant interest of 18% on the this amount till date of passing of the decree;

(b) Any other relief which this Hon'ble may deem fit and proper be also awarded in favour of the Plaintiff in the fact and circumstances of the case.”

15. The defendants resisted the judgment upon admission. In their reply to the application, they *inter alia* contended that the email dated 10.03.2011 had not been placed on the record of the suit at all and in any event, that the email did not constitute any admission of liability. The relevant averments of the defendant in their reply are as follows:-

“4. A perusal of the Application would reveal that the Plaintiff's entire case of judgment on admission is based on a purported email dated 10 March 2011. It is submitted that this document is not part of the documents that were filed by the Plaintiff in the present suit proceedings, including at the time when the Plaintiff had filed its Amended Plaint in July 2011. Replication to the amended Written Statement filed on 29 May 2013, documents in the present suit on 16 April 2012 and additional documents filed on 7 November 2013. Despite

having knowledge of the email since March 2011, the Plaintiff did not refer to this email or mention its existence in any of its earlier pleadings or in the list of documents.

5. At the threshold, the Defendants state and submit that since the document dated 10 March 2011 does not form part of the records of the case, it cannot be taken into consideration at all unless permitted to be filed in accordance with law, and if such permission is granted by this Hon'ble Court the Defendants must have the opportunity to produce such further and other documents and file an additional Written Statement in respect thereof. Such a document cannot even be looked into or be taken on record even for the purposes of Order XII Rule 6 of the CPC without the leave of this Hon'ble Court, which leave also cannot be now granted in absence of any explanation by the Plaintiff. The Plaintiff has selectively filed one email without giving any explanation or background in which the said email was received and also not produced the other connected emails.

6. Besides, the further contention that an official of Defendant No. 2 has made an admission in the email of 10 March 2011, which email has been filed by the Plaintiff in the present proceedings for the first time alongwith the application under reply, cannot be made the basis of an application under Order XII Rule 6 CPC to seek a judgment on admission. The admission, if any, has to be in the pleadings or otherwise, whether orally or in writing. This cannot be stretched to a purported admission in a document, which was not even on record of the present proceedings prior to filing of the Application. The Plaintiff has therefore waived its right to rely on the said document as an admission of any kind.

7. In fact, the present Application is an indirect manner to place the said document on record in evidence

at such a belated stage of the proceedings without taking recourse to the provisions under the CPC. Even in the present Application, the Plaintiff has not explained as to why this document has been filed at such a belated stage. There is no explanation given by the Plaintiff, in the absence of which it has to be assumed that there does not exist any explanation and the only conclusion that can be arrived at is that the Plaintiff being well aware and in possession of this document had chosen not to file the same at an earlier stage, knowing that it contained no admission or alternatively, assuming that were not the case, had retained it deliberately to create a surprise at a later stage of the proceedings, which course of action is not permissible under the CPC.

xxxx

xxxx

xxxx

xxxx

18. Without prejudice to the aforesaid and in the alternative, it is submitted that the Defendant not only disputes the email of 10 March 2011, but also its contents and the interpretation offered by the Plaintiff as to the contents of the said document. The said email does not contain any such admission that the Defendant No 2 owes an amount of Rs. 20.57 crores as per the scope of work of the Plaintiff. In the absence of any such admission as has been alleged, the Plaintiff cannot be entitled to the sum claimed by way of a judgment on admission. Besides, there is an apparent and substantial disconnect and variance between the claim of the Plaintiff and the contents of the email, which is being projected as an admission. Clearly, there is no admission of any of the claims of the Plaintiff.

19. Even if this Hon'ble Court is minded to take on record the aforesaid document, it is humbly submitted that there is no definite, clear or unequivocal admission of liability in the said email. The document, assuming it is taken on record, would obviously require an explanation and cannot be taken as an admission. It is

humbly submitted that the said email dated 10 March 2011 relied upon by the Plaintiff does not admit of any fact as to the liability of the Defendants or any one of them towards the Plaintiff. Therefore, the email of 10 March 2011 does not and cannot mean to suggest that the Defendants owe to the Plaintiff certain amounts calculated on the basis of the scope of work as untruly alleged by the Plaintiff.

20. In any event, the email is not from the Defendant No. 1 and does not contain any admission to this effect. Further, there is no clear, definite or substantive submission/statement made by the Defendants and no adverse inference can be drawn from the email.”

(Emphasis supplied)

Submissions

16. We have heard Mr. Raghvendra Singh for the plaintiff and Ms. Ginny Rautray for defendants. They have taken us through the documents mentioned above and cited authorities, particularly on the scope of Order XII Rule 6 of the CPC, to which we shall presently refer.

17. Mr. Raghavendra Singh contends that Deepali is entitled to judgment upon admission for the entire amount claimed based upon the pleadings of the parties and the terms of the Amendment Agreement dated 01.06.2010, which is an admitted document. He argued that the defendants' reliance upon the original arrangement between the parties, contained in the Consortium Agreement is misplaced, as that understanding was replaced by the Amendment Agreement. Mr. Singh emphasized that the email dated 10.03.2011 contained an unequivocal admission of liability on the part of the defendants, at least to the extent granted by the learned Single Judge.

18. Ms. Rautray drew our attention to the defence taken in the amended written statement to the suit, and reiterated in reply to Deepali's application for judgment upon admission, that interim payments were to be made to it only to the extent of 20% of the amounts received from the OC. With regard to the email dated 10.03.2011, she argued that the said email had been denied by the defendants in the course of admission/denial of documents, relying upon Section 23 of Indian Evidence Act, 1872 as it was addressed to Deepali in the course of settlement negotiations. She disputed that such correspondence could be taken in evidence in the suit or be used to disclose an admission on the part of the author. She submitted that the discretionary relief under Order XII Rule 6 of the CPC ought not to be exercised on an application made by the plaintiff more than four years after the alleged admission. In the alternative, Ms. Rautray urged that there was no unequivocal admission in the said email which entitled the plaintiff to a decree without trial. She contended that the document containing the alleged admission had to be read as a whole to ascertain whether it meets the requirements of the provision, and that no judgment can be entered upon admission where the defendant has sought to explain the context of the admission. She relied upon the provisions of the Consortium Agreement and the Amendment Agreement to argue that the scope of work attributable to Deepali had to be crystallized upon trial, after which it would be entitled to the settlement of its accounts.

Scope of Order XII Rule 6 of the CPC

19. The legal position regarding the circumstances in which decrees can be granted upon admission is quite well settled. Although an admission, whether contained in pleadings or in other documents, ought to be given effect in the interest of speedy resolution of disputes, the Court must be satisfied on an interpretation of the relevant document as a whole, that the defendant has unequivocally admitted its liability to the plaintiff. The judgment of the Supreme Court in *Uttam Singh Duggal & Company Ltd. Vs. United Bank of India* (2000) 7 SCC 120 has elaborated the objective of the provision as follows:

“12. As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that “where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled”. We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed.”

20. In *Karam Kaphi vs. Lal Chand Public Charitable Trust* (2010) 4 SCC 753, the Supreme Court followed *Uttam Singh Duggal* and approved the dictum of G.P. Singh, J. in *Shikharchand & Ors. vs. Mst.*

Bari Bai AIR 1974 MP 75, to the effect that admissions may be made in the pleadings or otherwise. The Court also reiterated that the provision is enabling, discretionary and permissive, rather than mandatory or peremptory.

21. A Division Bench judgment of this Court in *Vijaya Myne vs. Satya Bhushan Kaura* (2007) 142 DLT 483 cited *inter alia* the aforesaid judgments in *Shikharchand* and *Uttam Singh Duggal* and summarized the legal position thus:-

“12. It is not necessary to burden this judgment by extracting from the aforesaid authoritative pronouncement as the learned Single Judge has accomplished this exercise with prudence and dexterity. Purpose would be served by summarizing the legal position which is that the purpose and objective in enacting the provision like Order 12 Rule 6, CPC is to enable the Court to pronounce the judgment on admission when the admissions are sufficient to entitle the plaintiff to get the decree, inasmuch as such a provision is enacted to render speedy judgments and save the parties from going through the rigmarole of a protracted trial. The admissions can be constructive admission and need not be specific or expressive which can be inferred in the pleadings or otherwise, namely in documents, correspondence etc. These can be oral or in writing. The admissions can even be constructive admissions and need not be specific or expressive which can be inferred from the vague and evasive denial in the written statement while answering specific plea raised by the plaintiff. The admissions can even be inferred from the facts and circumstances of the case. No doubt, for this purpose, the Court has to scrutinize the pleadings in their detail and has to come to the conclusion that the admissions are unequivocal, unqualified and unambiguous. In the process, the Court

is also required to ignore vague, evasive and unspecific denials as well as inconsistent pleas taken in the written statement and replies. Even a contrary stand taken while arguing the matter would be required to be ignored.”

22. The Division Bench judgments of this Court in *Nageshwar Pandey v. Karan Madaan* (RFA (OS) 100/2014, decided on 29.01.2016), *Trans Asian Industries Expositions Pvt. Ltd. v. GS Berar* (2016) 158 DRJ 629 and *Deluxe Dentelles Pvt. Ltd. v. Ishpinder Kochhar* (2015) 218 DLT 645 are to similar effect. *Nageshwar Pandey* (to which one of us, S. Ravindra Bhat, J. was party) has emphasized the general rule that a litigant is entitled to lead evidence in a full-fledged trial. The provision for judgment upon admission is a well recognized exception to this general rule. This Court held as follows:-

“38... As a proposition of law there can be no dispute that the court’s power under Order XVI Rule 6 CPC is circumscribed. Firstly the power is discretionary and not compulsive. Secondly the power is to be exercised upon an overall assessment of the record-it is not confined to examination of the pleadings alone; the inquiry can extend to admissions arising from oral evidence or the documents placed in the record. The third and in the present context important. condition which qualifies the use of the power to decree a suit on admission-is that unless the admission is apparent, clear and unequivocal, courts should not invoke that discretion. This is based upon the principle that every litigant who approaches the court has a right to be heard and the right to lead evidence in a full-fledged trial.”

Discussion

23. Keeping in mind the submissions recorded above, the first question to be determined is whether the plaintiff is entitled to rely upon the said e-mail dated 10.03.2011 which was not part of the documents originally filed by it. The record discloses that the said document was in fact part of the additional documents that the plaintiff had filed on 30.04.2011, and had been specifically dealt with when the defendants filed their affidavit of admission/denial, affirmed by Mr. Chung Chee Keong on 21.02.2014. Faced with this situation, Ms. Rautray rightly did not press this objection. It is clear that the e-mail was in fact part of the suit record and its existence had not been denied by the defendants. Their plea in reply to the plaintiff's application under Order XII Rule 6 of the CPC (incidentally affirmed by the very same Mr. Chung Chee Keong on 08.03.2016) is startling, to say the least.

24. This brings us to the question of whether the said e-mail could be treated as an admission in the light of the Section 23 of the Indian Evidence Act, 1872 which provides as follows:-

“23. Admissions in civil cases, when relevant. - In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.-Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.”

25. In the annexure to that affidavit the said e-mail appears at Serial No.50 of the list and is marked "DENIED". This denial has been specifically explained in paragraph 3 of the affidavit as follows:-

“3. That I say that the documents filed by the Plaintiff at Serial No. 49, 50, 54 & 55 are denied as they are correspondences exchanged by the Parties during settlement and these documents are confidential and are expressly barred by Section 23 of the Indian Evidence Act, 1826.”

26. In this context, it was Ms. Rautray's submission that the e-mail dated 10.03.2011 was part of a chain of correspondence exchanged between the parties in pursuance a possible settlement of the matter. She drew our attention to e-mails exchanged between the parties between 11.02.2011 and 14.02.2011 as well as a draft "settlement agreement" dated 14.02.2011. According to her, although the said settlement agreement was never signed, the parties continued the process of negotiation which resumed with the defendant's email dated 10.03.2011, and continued *inter alia* by an email of another representative of the defendant dated 20.03.2011.

27. Ms. Rautray relied upon the judgment of the High Court of Punjab and Haryana in *Mohinder Singh v. Baljit Singh* (2014)176 PLR 535 which in turn cites the judgment of the Allahabad High Court in *Shibcharan Das v. (Firm) Gulabchand Chhotey Lal* AIR 1936 Allahabad 157. The Allahabad High Court had held that settlement negotiations must be regard as being conducted "without prejudice" and no evidence of admissions made in the course of such negotiations can be led by either party. The High Court had observed

that such a course would enable parties to make offers with a view to settlement.

28. In response to this argument, Mr. Raghavendra Singh has also submitted that the Section was inapplicable as the email dated 10.03.2011 was sent by the representative of the defendant after the settlement talks had in fact failed. He also cited the Division Bench Judgment of the Calcutta High Court in *Meajan Matbar v. Alimuddi Mia* ILR (1917) 44 Cal 130. In that judgment a conversation that took place prior to the institution of the suit but when it was anticipated was held to be admissible the Court did not regard the possibility of a suit as sufficient to prevent evidence being led as to the conversation and also recorded that this objection was not taken in the Court of first instance. In a concurring judgment Mookerjee, J. held as follows:-

“... In the absence, however, of any express or strongly implied restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability, although, as has been said, it may not be proper to enquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim.”

29. Having considered these submissions and gone through the suit record, we are unable to find a link between the settlement negotiation which rested with the draft settlement agreement of 14.02.2011 and the email sent more than three weeks thereafter, on 10.03.2011. Unlike the later email dated 20.03.2011, this email was not marked "without prejudice" nor was there any express stipulation as to its confidentiality or protection from disclosure in evidence, which

would bring it within the first limb of Section 23. There is also no evidence upon which the Court can infer that the parties agreed that evidence of the said email should not be given. The defendants did invoke Section 23 at the stage admission/denial of documents, but did not take this ground before the learned Single Judge in response to the plaintiff's application for judgment upon admission. We therefore hold that the said email is not covered by Section 23 of the Evidence Act and the contents thereof can be taken into consideration for the purposes of Order XII Rule 6 of the CPC.

30. We must now analyze the contents of the said email to determine whether they constitute an admission upon which judgment can be entered without trial. As the adjudication of these appeals will ultimately turn on the construction placed on the email dated 10.03.2011, its contents and the attachment thereto are reproduced in full:-

“From: Chung Chee Keong
<cheekeong.chung@sg.pico.com>
Date: Thursday, March 10, 2011 9:56 PM
To: vinay mittal <vinay.mittal@deedesigns.com>, ANIL BATRA <anilbatra4u@gmail.com>
Cc: ‘Ang SM SG <sweemeng.ang@sg.pico.com>, ‘Gillis Heller’ <gills.heller@hk.pico.com>
Subject: Stage 4 claim’
Vinay/Anil

These are extracted from my record for your info.

Regards
Chee Keong

xxxx

xxxx

xxxx

xxxx

Scope of Work delivered by Deepali at Stage 4**Summary**

S/no.	Rate	Value Approved by OC (A)		
		Qty	Unit	100% value
14.12	672	3,147	m	2,114,784.00
14.13	855	2,976	m	2,544,480.00
14.14	1,099	4,636	m	5,094,964.00
14.15	1,528	2,497	m	3,815,416.00
14.16	2,078	1,604	m	3,333,112.00
14.17	2,688	1,622	m	4,359,936.00
14.18	3,544	4,735	m	16,780,840.00
14.19	4,521	11,893	m	53,768,253.00
14.20	5,132	17,097	m	87,741,804.00
14.21	6,599	19,619	m	129,465,781.00
14.29	398,912	1	no.	398,912.00
14.30	465,397	2	no.	930,794.00
14.31	565,125	5	no.	2,825,625.00
14.32	698,096	1	no.	698,096.00
14.33	831,067	1	no.	831,067.00
14.34	1,063,765	1	no.	1,063,765.00
14.35	1,196,736	2	no.	2,393,472.00
14.36	1,509,125	2	no.	3,018,250.00
14.37	2,553,905	31	no.	79,171,055.00
14.39	39,891	19	no.	757,929.00
14.41	39,891	48	no.	1,914,768.00
14.42	6,648	98	no.	651,504.00
Total		403,674,607.00		

Stage 4 value paid 60%

242,204,764.20

Add Service Tax 10.3%

24,947,090.71

Total paid by OC

267,151,854.91

Less 23%

61,444,926.63

205,706,928.28

xxxx

xxxx

xxxx

xxxx

Scope of Work for Deepali				
3rd Payment Cheque No. 417513 (INR 2,60,53,838.00)				
Invoice No. 9B				
		Value Approved by OC (A)		
S/No.	Rate	Qty	Unit	100% value
Cert. Of Work : C108/1				
14.12	672	507	m	340,704.00
14.14	1,099	1,050	m	1,153,950.00
14.16	2,078	1,034	m	2,148,652.00
14.18	3,544	2,895	m	10,259,880.00
14.19	4,521	8,000	m	36,168,000.00
14.20	5,132	10,000	m	51,320,000.00
14.21	6,599	10,150	m	66,979,850.00
14.29	398,912	1	no.	398,912.00
14.30	465,397	2	no.	930,794.00
14.31	565,125	2	no.	1,130,250.00
14.32	698,096	1	no.	698,096.00
14.33	831,067	1	no.	831,067.00
14.34	1,068,765	1	no.	1,068,765.00
14.35	1,196,736	2	no.	2,393,472.00
14.36	1,509,125	2	no.	3,018,250.00
14.37	2,553,905	27	no.	68,955,435.00
Subtotal of C108/1				24,77,91,077.00
Cert. Of Work : C108/3				
14.39	39,891	19	no.	757,929.00
14.41	39,891	48	no.	1,914,768.00
14.42	6,648	98	no.	651,504.00
Subtotal of C108/3				33,24,201.00
Total				251,115,278.00
Value paid at 60%				150,669,166.80
7th Payment Cheque No. 417530 (INR 15,75,64,971.00)				
Invoice No. 21A				
		Value Approved by OC (A)		
S/No.	Rate	Qty	Unit	100% value
Cert. Of Work : C108/1				

14.12	672	-	m	-
14.14	1,099	459	m	504,441.00
14.16	2,078	-	m	-
14.18	3,544	-	m	-
14.19	4,521	2,247	m	10,158,687.00
14.20	5,132	5,082	m	26,080,824.00
14.21	6,599	7,982	m	52,673,218.00
14.29	398,912	-	no.	-
14.30	465,397	-	no.	-
14.31	565,125	3	no.	1,695,375.00
14.32	698,096	-	no.	-
14.33	831,067	-	no.	-
14.34	1,068,765	-	no.	-
14.35	1,196,736	-	no.	-
14.36	1,509,125	-	no.	-
14.37	2,553,905	4	no.	10,215,620.00
Subtotal of C108/3		101,328,165.00		
Value paid at 60%		60,796,899.00		
8 th Payment Cheque No. 417531 (INR 8,03,53,749.00)				
Invoice No. 30				
		Value Approved by OC (A)		
S/No.	Rate	Qty	Unit	100% value
Cert. Of Work : JN63/4P				
14.12	672	2,640	m	1,774,080.00
14.13	855	2,976	m	2,544,480.00
14.14	1,099	3,127	m	3,436,573.00
14.15	1,528	2,497	m	3,815,416.00
14.16	2,078	570	m	1,184,460.00
14.17	2,688	1,622	m	4,359,936.00
14.18	3,544	1,840	m	6,520,960.00
14.19	4,521	1,646	m	7,441,566.00
14.2	5,132	2,015	m	10,340,980.00
14.21	6,599	1,487	m	9,812,713.00
Subtotal of JN63/4P		51,231,164.00		

31. It may be noticed at the outset that the attachment to the said email refers to the "scope of work delivered by Deepali", and to its "value approved by OC (A)". After computing the some of the said values, three further adjustments have been made - first, 60% of the value has been calculated (as that is the amount which had been paid by the OC upto Stage 4); second, service tax of 10.3% has been added to arrive at the figure of "total paid by OC"; and third, 23% has been deducted from the figure so arrived at. These calculations are exactly in accord with the requirements of clause 2.1 (3) and Appendix 2 of the Amendment Agreement. They constitute a clear statement on the part of the defendants that Deepali had delivered work of the value of ₹40,36,74,607 at Stage 4, out of which the OC had paid ₹26,71,51,854.91 (inclusive of service tax). In accordance with the Amendment Agreement, 23% was deducted to arrive at the figure of ₹20,57,06,928.28.

32. We are not impressed with the defendants' submission that parties had agreed to interim payments being disbursed to Deepali only to the extent of 20% of amounts received from the OC, regardless of whether the task was within its scope of work or not. This defence is contrary to the Amendment Agreement and seeks to resuscitate the provisions of the original Consortium Agreement. The defendants' argument that the payments to be made to Deepali were required to be adjusted for claims of the OC is also unsupported by the provision of the Consortium Agreement and the Amendment Agreement. Clauses 2.1(7), 2.2 (3) and 3.2 of the Amendment Agreement make it clear that each party was alone responsible for any

liability emanating from the scope of work assigned to it. In view of the aforesaid discussion, the alleged explanations / defenses offered by the defendants are not substantial and insufficient to decline a judgment upon the admission contained in the said email.

33. The last question to be addressed is whether Deepali was entitled to a larger decree than that granted by the learned Single Judge. Mr. Raghavendra Singh has relied upon the contents of the pleadings and Amendment Agreement, and the finding of the learned Single Judge that the Consortium has not disputed the receipt of the sum of ₹30,35,40,044 from the OC. We do not however find any unequivocal admission on the part of the defendants in respect of the larger amount claimed by the plaintiff. The fact that the contractual arrangement between the parties is an admitted document does not in any manner obviate the necessity for a trial on evidence. The written statement, read as whole, also does not disclose an unambiguous or unqualified admission of the sort entitling the plaintiff to the larger sum. The learned Single Judge has, while recording the undisputed receipt of the amount in question by the consortium, also recorded that Deepali's claim for the said amount is disputed. We have not been shown to any other document or pleading which can be regarded as an admission on the part of defendants, other than the email dated 10.03.2011 discussed above. We therefore concur with the view of the learned Single Judge that Deepali was not entitled to judgment upon admission for the entire sum claimed.

Conclusion

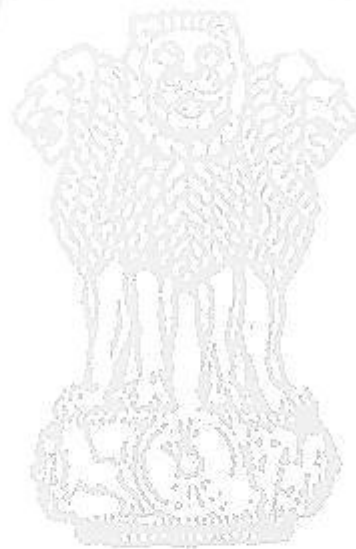
34. In view of the discussion above, the impugned judgment of the learned Single Judge dated 18.07.2017 is affirmed, and both the appeals are dismissed. No order as to costs.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

MARCH 27, 2019

'pv/j'



न्यायमेव जयते