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

% ***Date of Reserve:*** *29th July, 2022*

Date of Decision: *10th October, 2022*

\+ **CS(COMM) 56/2020**

DEEPALI DESIGNS AND EXHIBITS PRIVATE LIMITED
having its Registered office at
1st and 2nd floor, Plot No. 17,
Central Market, Punjabi Bagh
(West), Delhi-110026

..... Plaintiff

Through: Mr. Raghvendra Singh, Mr. Abhishek Gupta and Mr. Varun Agarwal, Advocates.

versus

ENCOMPASS EVENTS PRIVATE LIMITED
having its registered office at Mez & Floor,
A-83 Okhla Industrial Area,
Okhla Ph-II, Delhi - 110020
(previously at Khasra No. 584
Main Extension Fatehpur Beri, Delhi - 110074)

..... Defendant

Through: Mr. Ashutosh Kumar, Mr. K.P. Jayaram and Mr. Pulkit Aggarwal, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

I.A.1529/2022

1. An application under Section XIIIA of Code of Civil Procedure, 1908 (*hereinafter referred to as* "CPC") has been filed on behalf of the plaintiff for Summary Judgment.

2. The facts in brief are that in October, 2018 the defendant approached the plaintiff in Delhi for supply of infrastructure and services for "Pravasi Bhartiya Divas-2019" to be held from 21st January, 2019 to 23rd January, 2019 at Varanasi, Uttar Pradesh. Various correspondences were exchanged for negotiations between October, 2018 to December, 2018 which resulted into an Agreement dated 27th December, 2018 through e-mail which recorded the scope of infrastructure and services to be supplied by the plaintiff and the consideration to be paid by the defendant was decided as ₹12,98,00,000/- inclusive of Goods and Service Tax (GST). The payment schedule was agreed as under:

> *"50% advance with work order latest by tomorrow*
>
> *25% part-payment on or before 15th January.*
>
> *Balance within 30 days of completion of event"*

3. On 29th December, 2018 the Billing Department of the defendant prepared a draft written Agreement describing the agreed scope of infrastructure and services, but proposed the different timing of payment viz:

> *"50% of service fee at start of work without GST*
>
> *25% of service fee with our GST after deliverables are confirmed by related government authorities (encompass client (UP Financial corp.)*
>
> *Balance payment after completion of complete project amount to encompass from UPFC."*

4. The plaintiff protested to the unilateral variation in the timing of payment by the Billing Department of the defendant as the contract between the parties already stood concluded. Discussions were again held between the plaintiff and the Authorized Representative of the defendant over the telephone on 01stJanuary, 2019 and the payment schedule as agreed on 27th December, 2018 was reaffirmed and reiterated. The defendant consequently withdrew the draft Agreement, and the parties did not sign the said Agreement.

5. The Purchase Order No. DOPO18120145 dated 31st December, 2018 was sent by the Billing Department of the defendant to the plaintiff on 3rd January, 2019 for the purpose of preparing the invoice and payment of GST. Since, this Purchase Order was prepared on 31st December, 2018 i.e. prior to the telephonic conversation between the parties on 01st January, 2019, it contained the payment term as was proposed in the draft Agreement. At this stage it was agreed and understood between the parties that the payment terms as agreed in the e-mail annexed dated 27th December, 2018 and as reiterated and agreed by the parties on 01st January, 2019 shall be binding on the parties. The plaintiff successfully executed his contract and "Pravasi Bhartiya Divas-2019" was successfully held from 21st January, 2019 to 23rd January, 2019 at Varanasi, Uttar Pradesh. The plaintiff on the request of defendant supplied additional infrastructure and services at the agreed cost of ₹57,23,000/- inclusive of GST. The services were duly accepted and utilized by the defendant without any complaint about any deficiency in service or defective goods. However, the defendant has failed to make complete payment and the plaintiff has received only ₹7,50,00,000/- till 19th

February, 2019. The plaintiff thus, filed a suit for recovery of ₹7,11,99,507/- and claimed *pendent lite* and future interest @ 24% per annum.

6. The plaintiff in its application has asserted that the defendant does not have any real prospect of successfully defending the claim of the plaintiff. It is asserted that whatever may have been the Contract between the defendant and the NRI Department, State of U.P, the same is not binding on the plaintiff, as he was not a party to the same.

7. The plaintiff has filed a communication dated 11th November, 2019 from State of Uttar Pradesh informing that defendant has been paid ₹19,32,37,231/-. The claim of the plaintiff is only for ₹12,98,00,000/- and ₹57,23,000/- (for the additional work). The defendant has already received the amount from the Department and cannot even otherwise deny the payment to the plaintiff.

8. It is thus, submitted that there is no prospect of defendant successfully defending its case and, therefore, a Summary Judgement may be made and the suit of the plaintiff may be allowed. Furthermore, the defendant has made no averment about any agreed deductions and penalties. Moreover, the defendant have refuted the burden of pre suit interest of ₹10,67,629/- which is a question to be determined by the Court.

9. The defendant in its **Written Statement** had taken a preliminary objection that the "Pravasi Bhartiya Divas-2019" was an event hosted by NRI Department of U.P. Government and the cost thereto were to be borne by the Department itself. The plaintiff Company was admittedly awarded the Contract for the event management for the amount of ₹21,25,00,000/-. It is

asserted that the Terms and Conditions agreed between the parties were as per the General Terms and Conditions of the Purchase Order dated 31st December, 2018 which was raised by the defendant to the plaintiff and was duly signed by both the parties. The relationship between them was to be governed according to the terms and conditions stated in the Purchase Order issued by the answering defendant which bears the seal of the plaintiff Company, and therefore the Plaintiff is bound by the law of *estoppel.*

10. The entire suit of the plaintiff is based on fictitious terms of payment alleged by the plaintiff on an alleged telephonic conversation dated 01st January, 2019 which actually never took place. The Terms agreed upon between the parties are only as stated in the Purchase Order which is duly signed by both the parties and the plaintiff is now bound by the terms and is estopped from claiming any subsequent modifications on the basis of alleged telephonic conversation.

11. It is further asserted that Clause 3 and Clause 6 of the General Terms and Conditions of the Purchase Order dated 31st December, 2018 clearly stated that *"the payments of client's supplier is subject our respective clients deductions from the source client of our client"*. The defendant has made payment to the plaintiff before and after conclusion of the Contract and no question arise *qua* the *bonafide* of the defendant. The plaintiff was always aware that the work was being done for the client of defendant i.e. NRI Department, Govt. of U.P. at the "Pravasi Bhartiya Divas-2019". He was also aware that the NRI Department would be making the payment to the defendant who in turn would pay to the plaintiff. The plaintiff was also aware that the NRI Department may deduct an amount to be paid to the

defendant if the deliverables were not satisfactory. The plaintiff had filed various RTI applications which leaves no doubt that NRI Department, Govt. of U.P. is a necessary and proper party to the present suit despite which it has not been impleaded as a party.

12. The defendant has also claimed that the plaintiff provided poor-quality material and deliverables at the event which were not at all acceptable as it not only damaged the reputation of the defendant before its regular clients, but also the relations between the defendant and its client. The defendant apprehends that there will certainly be a loss of further business to the defendant which is solely attributable to the plaintiff. It is claimed that the suit is merely a pressure tactic to harass the defendant and is also a well thought strategy to cover up the follies of the plaintiff in the garb of present suit. It is asserted that the plaintiff at the time of the event in January was shown that the deliverables were below the expected standard and was made aware that the payment deductions were inevitable for the poor quality of work to which the plaintiff never objected. The true copy of the summary Report of the event as prepared by the NRI Department reflects numerous deficiencies and sub-standard services provided by the plaintiff.

13. The defendant had further claimed that approximately ₹21,25,00,000/- plus GST (which is approx. ₹25,00,00,000/-) was the total value receivable by the defendant for the project as per the Letter of Intent given by the NRI Department, Govt. of U.P. for the "Pravasti Bhartiya Divas-2019". Till now the defendant had received only 75% of the total billing value done to the NRI Department as is also reflected in the RTI annexed by the plaintiff

along with the plaint. The amount so received by the defendant has been equitably distributed to all the vendors. There is still an outstanding amount of ₹14,32,00,000/- to be received from NRI Department, Govt. of U.P. and the defendant is trying its best to recover the amount, but the chances of recovery are slim, considering that the plaintiff had done many errors at site which ensure that there would be deductions from the NRI Department while making its final payment to the defendant. The defendant at this stage does not know the amount which would be released to it by the NRI Department considering the COVID-19 Pandemic, and also that the economic resources of NRI Department may be prioritized for the other centres like health and welfare. It is claimed that the plaintiff has failed to adhere to its commitments under the Agreement and is, therefore, not entitled to the recovery as claimed.

14. **No formal reply has been filed to the application on behalf of the defendant.** The defendant during the arguments has taken a sole defence that it would make the payments as and when it is received from the NRI Department.

15. **Submissions heard.**

16. In the Commercial Suit, while Order XII Rule 6 CPC has been made applicable, Order XIIIA CPC titled '*Summary Judgments*' has been incorporated. The legislative intent behind introducing summary judgment under Order XIIIA of CPC is to provide a remedy independent, separate and distinct from judgment on admissions and summary judgment under Order XXXVII of CPC. It empowers the Court to give Summary Judgment against the plaintiff or the defendant on a claim it considers that the plaintiff has no

real prospects of succeeding in the claim or the defendant has no real prospect of successfully defending the claim, as the case may be and there is no other compelling reason why the claim should not be disposed of before recording of oral evidence. Rule 4 prescribes the procedure for making Summary Judgments.

17. The relevant parts of Order XIIIA Rule 3 CPC read as under:

> *"3. Grounds for summary judgment.- The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that*
> *(a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and*
> *(b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence."*

18. In Swain vs. Hillman (2001) 1 AIR 91 Lord Woolf M.R. explained that the words *"no real prospect"* do not need any amplification as they speak for themselves. The Court needs to see whether there is a realistic as opposed to fanciful prospect of success. In Three Rivers District Council vs. Governor & Company of Bank of India (2003) 2 AC 1 the House of Lords while considering the word "*no real prospect*" held that Court should look what will happen at the trial and that if a case is so weak that it has no reasonable prospect of success, it should be stopped before great expenses are incurred.

19. These judgments were referred to by the Hon'ble Supreme Court in *Sukam Power Systems Limited vs. Kunwer Sachdev &Anr.* (2019) SCC

OnLine, Delhi 10764 and it was observed that the legislative intent behind introducing Summary Judgments under Order XIIIA of CPC is to provide a remedy independent, separate and distinct from the judgment on admission and summary judgment under Section XXXVII CPC. The Apex Court endorsed the test of real prospect of succeeding or no real prospect of defending the claim for determination of an application for Summary Judgment, as propounded in the aforementioned judgements. It was observed that:

> *"49. Consequently, this Court is of the view that when a summary judgment application allows the Court to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. It bears reiteration that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the Court the confidence that it can find the necessary facts and apply the relevant legal principles so as to resolve the dispute as held in Robert Hryniak (supra).*
>
> *....*
>
> *51. This Court clarifies that in its earlier judgment in Venezia Mobili (India) Pvt. Ltd. v. Ramprastha Promoters & Developers Pvt. Ltd., 2019 SCC OnLine Del 7761 while deciding two applications, both filed by the plaintiff in the said case (one under Order XII Rule 6 and other under Order XIIIA) it had applied the lowest common denominator test under both the provisions of the Code of Civil Procedure and held that the suit could be decreed by way of a summary judgment.*
>
> *52. Consequently, this Court is of the opinion that there will be 'no real prospect of successfully defending the claim' when the Court is able to reach a fair and just determination on the merits of the*

application for summary judgment. This will be the case when the process allows the court to make the necessary finding of fact, apply the law to the facts, and the same is a proportionate, more expeditious and less expensive means to achieve a fair and just result."

20. The twin test therefore, provided for a Summary Judgment is:

(i) that there is no real prospect of succeeding or of defending the claim, or

(ii) there are no other compelling reasons as to why the claim should not be disposed of before recording of oral evidence.

21. In the light of this twin test prescribed under Order XIII Rule 3A CPC the facts of the present case need to be considered.

22. It is an admitted case of the parties that the plaintiff was approached by the defendant in October, 2018 for supply of infrastructure and services "Pravasi Bhartiya Divas-2019" to be held from 21st January, 2019 to 23rd January, 2019 at Varanasi, Uttar Pradesh. Various correspondences were exchanged for negotiation from October, 2018 to December, 2018. The plaintiff and defendant negotiated for the rates through emails dated 26thDecember, 2018 and 27th December, 2018 when a final offer was accepted which was for ₹11,00,00,000/- plus ₹1,98,00,000/- towards the taxes. A draft Agreement was sent by the defendant through email dated 29th December, 2018 but the negotiations on the terms of payment continued even thereafter.

23. The defendant vide its **e-mail dated 29.12.2018** proposed the mode of appointment which was as under:

"***Service Payment Structure:***

50% of service fee at start of work without GST
25% of service fee with our GST after deliverables are confirmed by related Government authorities (encompass client (UP Financial corp.))
Balance payment after collection of Complete project amount to encompass from UPFC."

24. The plaintiff immediately expressed its objection to the defendant by email dated 30th December, 2018 which states as follows:

> *"Dear Ashish,*
>
> *1 have outlined my intent and terms in the agreement ....language may be row, can be corrected by lawyer*
>
> *Also Scope of work-for exhibit b, keep it the same as in the mail of vivek garg of dec 25th with rates and amounts,*
>
> *Regards*
>
> *Vinay Mittal"*

25. In this backdrop, the various defences raised by the defendant need consideration.

I. Agreement for back-to-back payment on receiving the amount from NRI Department of U.P Government.

26. An objection was taken by the plaintiff to the mode of payment proposed by the defendant vide email dated 01st January, 2019 asserting that there was no Agreement that the release of payment shall be subject to the payments being received by the defendant from NRI Department, Lucknow, dated 29th July, 2019.

27. The Office Memorandum dated 29th July, 2019 was in respect of having successfully organized functions for 15th Non-Resident Indian Day-2019 (15th PBD Convention) on 21st, 22nd & 23rd January, 2019 as a Joint Venture of the Foreign Ministry, Government of India and State Government at Sanskritik Nagari - Varanasi. Admittedly, a P.O dated 31st December, 2018 was issued by the defendant which was accepted by the plaintiff. It is further not in dispute that the programme was successfully concluded. The only dispute was in respect of the manner in which the payment was to be released. Admittedly, the defendant paid a sum of ₹7.5 crores till 19th February, 2012 leaving a balance of ₹6,05,23,212/-.

28. The defence taken by the defendant is that the payment was to be released to the plaintiff only on receiving the said amount from NRI Department of Uttar Pradesh Government. It is claimed that this function was organized by the defendant for and on behalf of NRI Department of Uttar Pradesh Government and, therefore, the payments were to be made to the plaintiff were subject to payments being received from NRI Department of Uttar Pradesh Government.

29. The defence for non-payment as taken by the defendant is totally fallacious as it is the defendant which had been awarded the work of organizing the programme by NRI Department of Uttar Pradesh Government. Once, having secured the work, it is the defendant who independently entered into the Agreement with the plaintiff for certain works to be carried out for the programme that was to be organized from 21st January, 2019 to 23rd January, 2019. It has been rightly contended on behalf of the plaintiff that whatever were the Terms agreed between the defendant and NRI Department, were in no way binding on the plaintiff since the contract between the plaintiff and defendant was an independent agreement. There was no privity of contract between the plaintiff and NRI Department. The claim of the defendant that it is liable to make the payment only on receiving the same from NRI Department, is totally not tenable.

30. Similar facts as in this case came up for consideration in the case of *Zonal Engineering Manager Ircon International Limited v. Vinay Heavy Equipment* (2015) 13 SCC 680. In the said case the appellant entered into a main Contract with the third party and thereafter into a sub-contract which were wholly in back-to-back nature. The appellant therein had claimed that the acceptability and tenability of any claim made by the respondent in the said case (sub-contract) against the appellant shall depend first upon the acceptability of the claim of the appellant by the third party with whom the appellant had entered into the main contract. The appellant therein declined to make the payments to the respondents on the ground of not having received the payments from the main contractor. It was held that the primary liability of the appellant towards the respondent was located in the sub-

contract and not in the main contract with the third party. The applicability of back-to-back principle as agitated by the appellant was repudiated affirming that the appellant was primarily liable to be respondent. It was explained that the question of primary liability under the law of sub-contract and employer is amply clear. In the absence of covenant in the main contract to the contrary, the rules in relation to privity of contract would mean that the jural relationship between the employer and the main contractor on the one hand and between the sub-contractor and the main contractor on the other hand, shall be distinct and separate. Unless there is a clause to the contrary existing in the contract between the appellant and the respondent, the presumption of distinct and sole liability of the appellant contractor viz-a-viz the respondent sub-contractor shall be imperative and cannot be deviated from. The accommodation or transference of liability needs to be pinpointed in the main contract for making the sub-contractor liable for it is only the acceptance of liability by the sub-contractor that the liability of the Contractor would arise. The back-to-back liability would not serve to novate the main contract and fasten the liability under the main contract on the sub-contractor. Once, there is a separate bilateral contract, the liabilities of the parties to the sub-contract shall be determined in accordance with its terms and clauses.

31. In the present case as well the defendant has tried to invoke back to back principle for payment which is clearly not tenable as it was not accepted by the plaintiff who at the time of negotiations itself, had repudiated this mode of payment. The defence taken by the defendant, is liable to be rejected outrightly.

II. Poor Deliverables by the Plaintiff:

32. The connected defence taken on behalf of the defendant is that NRI Department has not released the entire payment due to poor deliverables. However, at no point of time has the defendant has put the plaintiff to notice that the services rendered by the plaintiff in any way, were not satisfactory. The plaintiff has placed on record the communication dated 11th November, 2019 received from U.P. Financial Corporation in respect of the payments made. The Agenda Point No.5 pertains to the payment to the defendant. It has been clearly indicated that the approved amount for the Event was ₹19,32,37,231/- out of which ₹10,03,00,000/- was released as advance and the balance amount was ₹9,29,37,237/- for which the approval was granted for its release. It is further indicated that a consolidated amount of ₹46,07,11,781/- was recommended to be refunded.

33. From this document it is evident that the amount has been sanctioned by the NRI Department. The explanation given on behalf of the defendant is that though they had received ₹19,32,37,231/-, but it has been proportionately given to various vendors and consequently only a sum of ₹7.5 Crores has been released to the plaintiff. It is quite evident from the documents, the authenticity of which is admitted and not disputed, that the defendant has received the amount from NRI Department and there is no reason why the same has not been released to the plaintiff. The claim of the defendant that the payment was to be released on it being received from the NRI Department also stands satisfied and it is evident that the defendant himself has withheld the amount on the specious ground of releasing the

amounts proportionately to its various vendors who were engaged along with the plaintiff for execution of this event.

34. This finding is only in the alternate in so much as the primary liability under the Contract between the plaintiff and defendant to pay the entire amount rested solely on the defendant and was not dependent upon any payment been received from NRI Department. Moreover, the explanation now been given that there were poor deliverables, is clearly a vague plea which is not supported by any kind of details or Notice. Merely by claiming that there were poor deliverables without anything specific being pointed out, can only be a sham defence which cannot lead to any success even if the evidence is permitted to be taken on record.

<u>III. Apprehension of the Defendant that some deductions may be made by the U.P. Government:</u>

35. The third defence taken on behalf of the defendant is that U.P. Government may make some deductions or impose some penalties, but this again is purely speculative in nature. The event has happened in January, 2019 and till date the defendant has not been able to produce even a single letter or document showing any intention of any penalty or deductions being made by the NRI Department of U.P. Government. In any case, whatever may be the consequences, they are to be borne by the defendant under the Contract of the defendant with NRI Department of U.P. Government and the same cannot be transferred or transposed to the Contract between the plaintiff and defendant which is absolutely independent.

IV. NRI Department of U.P Government is a Necessary Party to the Suit:

36. An incidental argument raised on behalf of defendant is that NRI Department of U.P Government is a necessary party to the present suit. As already observed, the Contract between the plaintiff and defendant was independent of any Contract which the defendant may have entered into with NRI Department of U.P. Government. There was no privity of contract between the plaintiff and NRI Department of U.P Government and therefore, it is not a necessary party.

V. Payment of Interest:

37. The other defence raised by the defendant was that no interest is payable as the corresponding amount has not been received from NRI Department of U.P Government. Again, this argument is absolutely not tenable for the same reasons as discussed above. Once, it has been held that the liability to make payment is that of the defendant, the corresponding liability to pay the interest is also of the defendant.

38. The plaintiff has claimed interest @ 18% per annum. However, there is no basis on which this rate of interest has been claimed. There is no evidence per se required on this aspect as it is within the domain and discretion of the Court to determine the rate of interest payable on the due amount. The interest, therefore, is granted at the rate of 6% per annum from February, 2019 since when the amount became payable till the date of its realization.

VI. Whether the dispute is referrable to Arbitration:

39. The defendant has further claimed that there was an Arbitration Agreement between the parties and the matter is referable to Arbitration. First and foremost, the defendant has already participated in the proceedings and even the written statement has been filed. No objection by filing an application under S.8 of Arbitration & Conciliation Act, 1996 was ever filed taking this objection. Once the defendant has already participated and submitted itself to the jurisdiction of the Court, the subsistence of Arbitration Clause cannot be taken by the defendant.

40. Furthermore, it was only a proposed Agreement given by the defendant which included an Arbitration Clause, but the same never got finalized and there is no written Agreement between the parties in regard to reference of the disputes to arbitration. The Arbitration Clause appeared in the draft Contract which was neither accepted by the plaintiff nor signed by the plaintiff, and this was clearly conveyed in the subsequent emails. This line of defence is also not tenable.

Conclusion:

41. Applying the twin test of there being no prospect of succeeding in proving the defence and that there are no compelling circumstances to allow the defendant to lead evidence, it is evident that no plausible defence has been raised by the defendant about successfully defending the claim. Therefore, the facts of this case deserve a judgement to be summarily pronounced under Order XIIIA of CPC without recording of the evidence of the parties.

Relief:

42. In view of the discussion above, the application under Order XIIIA CPC is allowed. The suit of the plaintiff is decreed for a sum of ₹6,05,23,212/- along with interest @ 6% per annum from January, 2019 till its realization.

43. Parties to bear their own costs. Decree Sheet be prepared accordingly.

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44. In terms of the discussion above in I.A.1529/2022, the present suit is decreed as above.

45. Pending applications, if any, stands disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 10, 2022
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