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

Reserved on: 5th September, 2019
Pronounced on: 21st October, 2019

\+ **CS(OS) 3148/2015**

OXBRIDGE ASSOCIATES LIMITED ..... Plaintiff
Through: Mr.Jayant Mehta, Mr.Sumeet Lall, Mr.Nikhil Lal & Mr.Sajal Jain, Advocates.

versus

MR ATUL KUMRA ..... Defendant
Through: Mr.Amit Singh, Mr.Rajan Singh & Mr.Atul Kumra in Person.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

IA 1385/2017 in CS(OS) 3148/2015 *(under Order XIII-A r/w Order XII Rule 6 of the CPC)*

1. The plaintiff has filed the abovementioned suit for a decree against the defendant in the sum of ₹1,55,46,586.62 alongwith *pendente lite* and future interest. By the present application, the plaintiff seeks summary judgment under Order XIII-A Rule 3 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC")

in the sum claimed or alternatively, a decree upon admission for a lesser amount, allegedly admitted by the defendant.

2. During the course of this suit, the plaintiff filed an application for attachment before judgment which was initially allowed by a judgment dated 21.12.2016 in IA No. 487/2016. That judgment however was set aside by the Division Bench on the defendant's appeal (judgment dated 20.01.2017 in FAO (OS) 19/2017), and the application was remitted for fresh consideration of this Court. Although that application remains pending, counsel for the parties agree that the present application filed in the meanwhile be taken up for hearing first.

A. *Facts*

3. The plaintiff is a company incorporated in England which specialises in the marketing and sourcing of pharmaceutical products. The defendant, as proprietor of a concern known "Medicine House", is engaged in the business of supplying such products. The present suit arises out of two purchase orders placed by the plaintiff upon the defendant. Purchase Order No. 205 dated 18.10.2014 (hereinafter referred to as "PO 205") was for supply of specified quantities of Letairis capsules of stipulated dosages. Purchase Order No. 213 dated 05.01.2015 (hereinafter referred to as "PO 213") was in respect of a drug known as Kuvan Powder. The case of the plaintiff is that, pursuant to the aforesaid purchase orders, the defendant issued proforma invoices stipulating *inter alia* that payment was required to be made in advance and that the delivery time in respect of invoices were three weeks and four weeks respectively. The plaintiff remitted

the amounts due under the invoices. However, it is undisputed that no supply was in fact made under the invoices in question, although the defendant claims this was due to incomplete information being supplied by the plaintiff. The purchase orders were ultimately cancelled by the plaintiff and the plaintiff sought refund of the amounts remitted by way of advance payment. The defendant refunded a part of the amounts, but his failure to comply with this request in full has led to the institution of the present suit.

4. The detailed facts leading to the institution of this suit, and required for adjudication of the present application, are as follows:-

a. The defendant was in correspondence with one Mr. John James (hereinafter "JJ") of an American concern called M/s Daelmann Health Limited, with regard to a potential transaction for supply of medicines.

b. Under the cover of an email dated 02.08.2014, the defendant sent to JJ a proforma invoice for two medicines, Letairis and Revlimid. It was further stated as follows: -

> "*Once your orders are finalised, we will reconfirm on the availability status and suppliability for both these products and confirm you to make the payments. Please do not initiate any payments prior to our final confirmation.*"

With regard to Kuvan powder also, the defendant corresponded with JJ, including *inter alia* by way of an email dated 25.10.2014.

c. PO 205 was sent by JJ to the defendant by email dated 18.10.2014, on which a representative of plaintiff was also copied. The purchase order was issued by the plaintiff for specified quantities and dosages of Letairis. It was dated 18.10.2014 and was for the sum of USD 2,81,753.92.

d. In response thereto, the defendant raised Proforma Invoice No. 10123R dated 30.10.2014 for the same amount. The terms provided therein were inter alia as follows:

> " *Payments Terms: Prepayment required*
>
> *Delivery Time: 3 Weeks from order confirmation and payment*
>
> *Validity: Upto 30 Nov 2014*
>
> *Incoterms: CIF, New Delhi*
>
> *Please note:*
>
> > *1. Customs & regulatory clearance at destination port is consignee's responsibility.*
> >
> > *2. Patient details must be provided. Offered for male patients only.*"

Bank details were also provided for the purposes of payment.

e. Payment of the said amount was made by the plaintiff on 05.11.2014 and credited to the defendant's account on 07.11.2014.

f. The defendant addressed an email dated 15.11.2014 to JJ stating as follows:-

> "*We confirm receipt of the payment in our bank as a surprise as we were not informed in advance and that it*

was clearly mentioned by us not to initiate any payments until we confirm based on acceptance of the order by the speciality distributor.
Furthermore as discussed with you over the phone we are doing our utmost to fulfil your requirements but per our commitment to you.
As informed to you we are not even able to recover our costs as we pay twice to our forwarding agent as all Marken is only providing the documentation and our agents claims from us charges <u>but</u> we have never complained to you and with little margin available to us for our services we have again never complained to you and will continue to assist you as a friend in your business.
Hope you will appreciate the stress we undergo."

(I have been informed that 'Marken' is a marketing agency engaged for the purpose of the present transaction).

g. PO 213 dated 05.01.2015 for Kuvan powder was issued by the plaintiff in the sum of USD 84,275.60.

h. The defendant's Proforma Invoice No. 10178 for the same sum was issued on 06.01.2015 and carried the following terms:-

"*Payment Terms: Prepayment required*

Delivery Time: 4 Weeks from order confirmation and payment

Validity: 30 days

Incoterms: CIF, New Delhi

Please note:

1. Customs & regulatory clearance at destination port is consignee's responsibility.

2. Patient treatment details must be provided."

i. Payment under this invoice was remitted by the plaintiff on 15.01.2015 and credited to defendant's account on the same day.

j. By a further communication dated 19.02.2015 addressed by the defendant to JJ, the defendant reiterated his contention that the payments for the said purchase orders were to be sent only after the defendant's confirmation, and also stated as under:-

> "*We would like put on record here that in view of these circumstances it was clearly discussed, understood and agreed after the detailed discussion on the subject between us that a 25% service fee will be deductible in case the order is not processed by the dispensing pharmacy for unacceptable or incomplete patient details as provided by you time to time or is cancelled by your client to whom the medicines are to be shipped directly under your specific instructions in the U.K.*
>
> *Only after your clear acceptance of this you had again asked us to pursue the Letairis order again with another pharmacy after the same was not accepted by the first. We specifically advised you that this will unnecessary cause an additional expense for the fee twice for the same product. Despite this you forcefully asked us to follow your instructions and pursue your requirements.*
>
> *As per your advise and specific guidance on each step we have pursued these unaccepted orders under protest but the documentation provided by you for each of these three orders have not been accepted by the pharmacy and are on hold. Please advise.*
>
> *We have told you a number of times that this is not our line of business and we only agreed to help you in your business in view of our old association with you on your insistence and forceful convincing in hours spent on phone with you.*

Please send us a credit note for our service fee due on the above mentioned at the earliest for our accounts."

k. PO 205 (for Letairis) was cancelled by the plaintiff on 24.04.2015, and a full refund of the advance payments was sought.

l. The defendant issued Debit Notes 16 and 17 dated 28.04.2015 to the plaintiff in respect of difference in price amounts to be debited with reference to revised purchase orders placed by the plaintiff. The said Debit Notes were in the sum of USD 14,904 and USD 10,880.53 respectively and referred to the purchase order for Kuvan (PO 213) and Xenazine (PO 215- which is not the subject matter of the present suit).

m. On 08.05.2015 at 11.54 AM, the plaintiff addressed the following email to the defendant: -

"*We need the funds returned in full for your pro forma invoice relating to Letairis, paid in October 2014. These goods where not supplied and as such, prompt return of the funds is required by Tuesday 12th May 2015.*

My understanding is that you have been charged a handling fee by your supplier; this was under no circumstances agreed by me or Oxbridge Associates and is not our responsibility and such the full amount needs to be returned.

The other 2 pending orders relating to Kuvan and Xenazine have not come into our control, and are not relevant to the refund of Letairis.

I would like to set up a call with you in to make sure the above is in order and the full amount of funds are sent back to us. Whilst I hope there will not be an issue with this, I must advise you that if the funds are not on Tuesday in full we will instruct out lawyers with offices in

India to pursue you for this settlement along with any legal fees incurred."

n. The defendant's response dated 13.05.2015 to the above email, stated as follows:-

"*We were awaiting for the today's official exchange rate which is reflected at the start of the working day on the bank's website to finalise the statement of account for Letairis.*

Please find attached our statement of account in respect to Letairis dated 13 May 2015 as per our records.

Please feel free to ask for any clarification if you may require."

Alongwith the email dated 13.05.2015 was attached the following statement of account:-

"MEDICINE HOUSE
105 Padma Tower II
22 Rajendra Place
New Delhi 110008

STATEMENT OF ACCOUNT AS ON 13 MAY 2015 (REF: LETAIRIS)
(A/c Oxbridge Associates, UK)

Amount received for Letairis	*$281,753.92*	
	Processing & Handling charges @ 25%	*70438.48*
	Debit note # 16 dated 28 Apr 2015	*14904.00*
	Debit note # 17 Dated 25 Apr 2015	*10880.53*
	Exchange rate difference	*5493.61*
	Total	*101716.62*

Conversion rate at time of receipt of payment : 1 USD = INR 63.25

Conversion rate as on 13 May 2015 is 1 USD = INR 65.18

Total Amount due Medicine House $180,037.30"

o. On the same day, the defendant also addressed an email to JJ contending that his transaction was with JJ (and not the plaintiff), and expressing the desire to deal with JJ alone. With respect to the cancellation of the Letairis order, the defendant stated as follows: -

> "*In respect to the Letairis order cancellation and the refund requirement we have had a very clear understanding and communication with you on the subject. We are also surprised that there is no mention of the difference in the cost of the revised PO for Xenazine, Kuvan and the handling fee payable for Letairis and related charges payable in your amount reflected for refund, and hence this amount reflected by you is incorrect.*
>
> *Despite our advise and numerous discussions over the phone with you not to pursue the Letairis requirement as the same was incorrect you forced us to pursue the same with second distributor even after we informed you that it was rejected by the first distributor. As discussed and agreed with a clear understanding on the applicable Letairis processing and handling charges you forced us to pursue the order with other specialty distributors for both second and the third time even when we warned you that the processing and handling costs will be two times for pursuing the order the second time again. Later you also suggested possible ways to pay the 25% charge during our discussions and then also proposed that the 25% applicable handling charges be covered in the forthcoming Gilotrif order to settle the account which we informed you was not acceptable per Indian banking laws.*

We are sending you the correct account statement per our records. To resolve we will require a formal letter of Letairis order cancellation and confirmation of account. We will make the refund through our bank after deduction of the 25% processing and handling fee, difference on account of the two revised POs and the difference in the exchange rate from the time we received the payment and the present when we remit the refund."

[It was stated by learned counsel for the defendant that the statement of account attached with the said email was the same statement which was sent to the plaintiff on the same day and has been reproduced above.]

p. In response to the aforesaid emails, the defendant received a further email dated 13.05.2015 from the plaintiff, also copied to JJ. This communication was expressly headed "Without Prejudice". As far as PO 213 is concerned, the plaintiff agreed to the terms of Debit Note No. 16 subject to receipt of the goods and a final invoice being raised. As far as PO 205 is concerned, it sought copies of communication proposing, agreeing or confirming the 25% handling charge and foreign exchange charges upon cancellation of the order. The plaintiff also requested confirmation that the handling charges would not be applied to freight and insurance charges, and asserted that the legal and contractual relationship was between the plaintiff and defendant, with which M/s Daelmann Health was not involved. The plaintiff expressly rejected any proposed settlement until mutual agreement was reached between the parties and sought an immediate refund of USD 1,50,000.

q. The defendant issued Credit Notes bearing number 23 and 24 dated 18.05.2015, by which he reversed the Debit Notes Nos. 16 and 17 partially, to the extent of the freight and insurance components.

r. The defendant responded to the plaintiff's email on 20.05.2015 referring to the aforesaid Credit Notes and to his above email of 19.02.2015 in support of his claim for service charges.

s. The plaintiff addressed a further email dated 20.05.2015 to the defendant also entitled "Without Prejudice" in which, with regard to the two Purchase Orders in question, it stated as follows:-

> *"KUVAN PO 213*
>
> *Nothing can be done regarding this order until we know whether it is to go ahead or be cancelled, as per my email today. The additional debit note number #16 is agreed in value by us, but please treat as pending until we know if these goods will be supplied or not.*
>
> *LETAIRIS PO 205*
>
> *We have today sent you a copy of the signed and stamped cancellation letter relating to this invoice. I still dispute the legality of the proposed withholding of 25% of the order and also the proposed currency charges; we are taking advise on this and will come back to you. Please take it that these two amounts are officially in marked as in commercial dispute with our accountants, and are therefore ring-fenced until we have received our advice.*
>
> *Given the above, we see no legal reason why a proportion of UNDISPUTED funds should be returned to us immediately. Please see below breakdown of our perceived figures relating to this transaction.*
>
> *PAID 5th November 2014-$281,752.92*
>
> *AMOUNT CLAIMED BY MEDICINES HOUSE*
>
> *25% Processing Fee - $70438.48*

Exchange Rate Difference - $5493.61

Credit proposed against 25% of Freight Charges - $1538.93

This leaves an UNDISPUTED amount of $207,359.76 of our funds being held by Medicines House.

I formally request as per the attached signed and stamped letter to return $180,000.00 of our funds immediately; there is no legal reason not to do so. The attached letter clearly outlines that there are some matter in dispute, and can be used to release the funds along with the cancellation letter you have (also attached). I do hope you appreciate this is a large amount of money we have exposed, and without this partial return of funds we simply cannot operate fully as a business. I believe this is more than fair whilst we continue to resolve the issue, leaves you in control of the disputed funds, and well within our legal rights.

Please let me know your thoughts on the above, and provide confirmation that $180,000 can be transferred immediately. "

t. By another "Without Prejudice" email of the same day, the plaintiff addressed the defendant as follows:-

"*Further to our telephone call at 16.36 GMY Today.*

1. *You have agreed to send $150,000 on Monday, I want to see evidence of this payment made on Monday.*
2. *Kuvan debit note will not be agreed until we know the status of the order; please continue to secure this stock before Friday 4pm GMT.*
3. *We will under NO CIRCUMSTANCES agree to a 25% canellation fee should you fail to product the Kuvan by Friday at 4pm GMT. This has never been previously discussed; nor was it with the T+Cs of you pro-forma invoice. Should the order be*

cancelled, we expect the full funds to be returned immediately.

4. *I will take into the consideration agreeing to the 5 added margin on Xenzine, subject to the above being put into place.*

I have be more than reasonable through this process to find a mutually amicable and fair solution to these outstanding issues; however you continue to move the goal posts. You have our money, and I am requesting the undisputed element be returned, this is a legal requirement on your part.

There is a future business between us, but there needs to a two way respectful relationship, please prove this by honouring the above."

u. PO 213 (for Kuvan) was cancelled by the plaintiff on 22.05.2015 and a full refund was sought.

v. On 02.06.2015, the defendant remitted a sum of USD 1,50,000 to the plaintiff.

w. By an email dated 26.06.2015, the defendant addressed the plaintiff as follows:-

"*Please find attached the Statement of account in respect to Kuvan.*
We have also submitted our application to our bank for remittance of the refund amount of USD 57,790.00 after debiting the amount of US$ 23664 on account of the applicable service fee as per the understanding and agreement with Oxbridge Associates towards professional processing and handling charges and/or in the event of cancellation.
We will send you the SWIFT copy upon receipt of the same from our bank.
In respect to Xenazine, please advise on the difference in the price amount to corrected.

Please feel free to ask us if you require any further clarification."

The following statement of account was attached with this email:-

"MEDICINE HOUSE
105 Padma Tower II
22 Rajendra Place
New Delhi 110008

STATEMENT OF ACCOUNT AS ON 15 Jun 2015 (REF: KUVAN)
(A/c Oxbridge Associates, UK)

Amount received for Kuvan	*$84,275.60*	
	Processing & Handling charges @ 25%	*23664*
	Exchange rate difference	*2820.67*
	Total	*26484.67*
	Refund Amount (26 Jun 2015)	*$57,790.93*

Conversion rate at time of receipt of payment : 1 USD = INR 61.67

Conversion rate as on 12 Jun 2015 is 1 USD = INR 64.68

Total Amount due Medicine House $ 0.00"

x. On 26.06.2015, after cancellation of the Kuvan transaction, the plaintiff (again "Without Prejudice") denied any agreement or understanding regarding handling charge or exchange rate charges and claimed an amount of USD 2,16,029.52, after adjustment of the amount already received.

y. This was followed by a legal notice dated 09.07.2015 addressed by counsel for the plaintiff to the defendant and a further letter dated

12.08.2015. These communications did not elicit any response from the defendant.

B. Submissions

5. In support of the present application, Mr. Jayant Mehta, learned counsel for the plaintiff relied upon the correspondence exchanged between the parties, and particularly the undisputed nature of the main elements of the transaction viz., the purchase orders, proforma invoices, remittance of advance payments and non-supply of the drugs in question. It is his submission that the defences sought to be raised by the defendant are moonshine and do not disclose any likelihood of success. He therefore submitted that the defendant is liable to suffer a decree for the entire amount of the claim under Order XIII-A of the CPC. Mr. Mehta has drawn my attention particularly to statements of account dated 13.05.2015 and 15.06.2015, regarding the Letairis and Kuvan transactions respectively wherein, according to him, the defendant has unequivocally admitted dues to the plaintiff in the sum of USD 1,80,037.30 and USD 57,790.93 respectively.

6. Mr. Amit Singh, learned counsel for the defendant also drew my attention to various communications between the parties to contend that the transactions between the plaintiff and the defendant were in fact the result of protracted negotiations between the defendant and JJ. The defendant has denied any privity of contract with the plaintiff, which was introduced to the defendant by JJ as an affiliate of Daelmann Health Limited, the American company. According to him, the terms and conditions of the transaction were

agreed between the defendant and JJ, including the stipulation that the purchaser would be required to supply full details of the patients for whom the drugs were being procured in order to enable the defendant to place orders upon its suppliers. Mr. Singh further submitted that the plaintiff was requested not to make any payment under the subject invoices until being specifically requested by the defendant to do so. According to the defendant, it was also agreed that the purchaser would pay service charges to the defendant in respect of cancelled orders. Such service charges were payable at the rate of 25% of the invoice amount for each pharmacy with which the defendant was required to pursue the supply of the drugs in question. Mr. Singh therefore urged that the defences raised required trial, and could not be decided at this stage.

C. Analysis

7. In view of the fact that the plaintiff's larger claim is for summary judgment under Order XIII-A of the CPC, I propose to consider the plaintiff's entitlement thereunder first.

(I) <u>*Analysis under Order XIII-A of the CPC*</u>

8. The provisions of Order XIII-A of the CPC have been inserted by the Commercial Courts Act, 2015. The purpose of Order XIII-A has been explained in the judgment of this Court in *Jindal Saw Limited* vs. *Aperam Stainless Services and Solutions Precision Sas and Ors.* 2019 SCC OnLine Del 9163 (IA No. 6194/2018 in CS(COMM) 1314/2016 and CS(COMM) 45/2017, decided on 16.07.2019) in the following terms:-

"*24. Order XIIIA of the CPC, as made applicable to commercial suits within the meaning of Commercial Courts Act, is titled "Summary Judgment". Rule 2 thereof provides, that an application for summary judgment may be made at any time after summons have been served on the defendant, till the framing of issues. Rule 3 is as under:*

> *"3. Grounds for summary judgment……..*
>
> *(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."*

25. Rule 4 thereof providing the procedure for applying for a summary judgment inter alia requires the applicant to state the reason why there are no real prospects of succeeding on the claim or defending the claim and requires notice of the said application to be given to the opposite party of 30 days, and the reply to such application to precisely identify the points of law if any and the reasons why the relief of summary judgment should not be granted and why there are real prospects of succeeding on the claim or defending the claim and to state the issues to be framed for trial and what evidence is to be lead thereon and permits additional documentary evidence to be filed with such reply.

26. The Delhi High Court (Original Side) Rules, 2018, in Chapter XA thereof, also provides for summary judgment and do not provide for any application to be moved therefor. I have in K.R. Impex v. Punj Lloyd Ltd., 2019 SCC OnLine Del 6667 and Mallcom (India) Limited v. Rakesh Kumar, (2019) 259 DLT 1 had occasion to deal with the said Rules and the need to reiterate the same here and burden this judgment therewith is not felt. Suffice it is to state that an

application is not essential to seek summary judgment and the Court, on its own or on the asking of either party, is entitled to see/adjudicate, whether a case for summary judgment is made out.

27. Thus while under the procedure prescribed in CPC, the Court had no option but to list the suit for trial, howsoever negligible, in the light of documents and circumstances, the weightage to be attributed to a factual plea taken in the pleadings be, the Commercial Courts Act, introduced with the object and reason of early resolution of commercial disputes to create a positive image to the investor world about the independent and responsive Indian legal system, has done away with that and entitled the Courts to weigh, on the basis of pleadings and materials on record, the real prospect of succeeding on the claim or defence, unless there is any other compelling reason why the claim should not be disposed of before recording of oral evidence.

28. It cannot be lost sight of that most commercial transactions today, considering the availability of electronic and instantaneous means of communication, are in black and white and with a track record, with no element whatsoever of verbal talks/conversations. Such verbal talks/conversations/discussions in the past were often pleaded to plead what was the intention of the parties to the contract. However, when all that has transpired between the parties to the contract, before signing a contract as well as after signing the contract is in black and white, there is no scope left for any witness to appear and depose what was spoken and discussed with another and what was the understanding arrived at with the other. The intention of the parties is thus to be gathered from a reading of the communication exchanged between the parties in black and white. Needless to state, there is little, if no scope left to explain the written word in black and white."

9. The question to be considered therefore is whether the defences raised by the defendant afford to him any real prospects of defending the claim, which would necessitate the framing of issues and a trial on those issues.

10. In the present case, the fact that the purchase orders were raised upon the defendant by the plaintiff, that payments were made by the plaintiff, that the goods were not in fact supplied and that the purchase orders were cancelled are all undisputed. The defendant resists refund of the sums admittedly received on the ground that it is entitled to deductions by way of "processing and handling charges", "exchange rates difference" and two debit notes raised by him.

11. The purchase orders placed by the plaintiff and proforma invoices raised by the defendant admittedly contain no stipulation to this effect. However, the defendant relies upon pre-contractual correspondence between him and JJ in which he claims these terms were agreed.

12. At the outset, it is significant the defendant has taken an unequivocal position that he has no privity of contract with the plaintiff. This is the consistent plea in the written statement, the reply to the present application, and in the written submissions filed on his behalf.

In paragraph 9 of the written statement, it is pleaded as follows:-

> *"9. At the outset it must be pointed out that there is no privity of contract between the Plaintiff and the Defendant. The defendant came to know of the Plaintiff as an affiliate partner of One Mr. John James, Managing Director of Daelmann Health limited of USA. It is*

pertinent to mention here that the Defendant used to get the information/electronic message though the email jjames@daelmann.com hereinafter referred to as daelmann email."

The reply to the application and the written submissions are substantially to the same effect.

13. In the face of this plea, the defendant's claim that he was entitled to make certain deductions against the advance payments received from the plaintiff becomes irrelevant. The defendant cannot, on the one hand, deny any contractual relationship with the plaintiff and, on the other hand, also refuse to refund the amount paid by the plaintiff by referring to the alleged contractual arrangements between himself and JJ. The defendant's denial of privity of contract with the plaintiff equally precludes him from claiming deductions under a contractual relationship. Absent a contract, there is no reason whatsoever for the defendant to withhold any amount which he has admittedly received from the plaintiff. If the defendant's contention in this regard is accepted, it leads to the conclusion that there was no occasion for the plaintiff to make payments to him at all, and any remittance received by the defendant from him is liable to be returned.

14. Additionally, on a consideration of the documents on record, I do not find any contractual basis for the position taken by the defendant. There is no correspondence or other document disclosed which entitles the defendant to deduct the processing and handling charges or differences on account of exchange rate. The correspondence discussed above shows that the plaintiff has

throughout contested any such agreement and the defendant has been unable to support his contention by reference to contemporaneous correspondence. In fact, the defendant has contended in correspondence, *inter alia* dated 02.08.2014 and 19.02.2015 that the plaintiff ought not to have made advance payments prior to reconfirmation by the defendant of the supplies. This implies that the defendant did not expect to be paid at all if the supplies did not materialize. His grievance was that payments ought to have been made only after the suppliers have approved the patient details and other requirements. This is directly contradictory to his claim that he was entitled to be compensated for the time and expense incurred in attempting to secure the supplies from his vendors.

15. The defendant has filed statement of account dated 30.06.2015 in these proceedings and claims that he is owed a sum of USD 597.15 from the plaintiff. In this statement of account, with regard to PO 205, the defendant has claimed processing and handling charges of USD 70,438.48 twice, in addition to two debit notes (USD 14,904.00 and USD 10,880.53) and exchange rate difference (USD 5,378.37). In contrast, the statement of account sent by the defendant to the plaintiff and JJ on 13.05.2015 claims deduction of process and handling charges only once. This inconsistency further demonstrates the nature of the defendant's claim. If the defendant had relied upon the contemporaneous statement of account dated 13.05.2015, there would still have been some amount due to the plaintiff. It appears that the defendant has augmented the deductions only in order to establish that he owes nothing further to the plaintiff.

16. With regard to defendant's claim under the debit notes, the plaintiff's acceptance of the same by its email dated 20.05.2015 was conditional upon supply of Kuvan. That supply, admittedly, was never made. The defendant therefore cannot be entitled to deduct those amounts.

17. The defendant's contention that JJ is a necessary party to the suit is also unmerited. The right of the defendant to recover any amount from JJ is not the subject matter of the present proceedings. The defendant has placed on record certain documents to show that the purchase orders and proforma invoices were generated as a result of correspondence with JJ. However, it is undisputed that the parties to these instruments were the plaintiff and the defendant alone, and money received by the defendant was paid by the plaintiff. JJ is neither a necessary nor a proper party to the suit.

(II) "Without Prejudice" Correspondence

18. In the present case, much of the correspondence relied upon by the defendant was addressed "Without Prejudice". Mr. Mehta has also dealt with those letters substantively. Therefore, while I do not propose to rest my decision on the fact that the defendant has relied upon "without prejudice" communications of the plaintiff, it is necessary to note that such communications do not in general bar the author from exercise of rights in accordance with law. In *Superintendent (Tech I) Central Excise, I.D.D. Jabalpur & Ors.* vs. *Pratap Rai* (1978) 3 SCC 113, the Supreme Court relied upon the following extracts from legal dictionaries:-

"6…The term "without prejudice" has been defined in Black's Law Dictionary as follows:

"Where an offer or admission is made 'without prejudice', or a motion is denied or a bill in equity dismissed 'without prejudice', it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided. See, also, Dismissal Without Prejudice."

Similarly, in Wharton's Law Lexicon the author while interpreting the term "without prejudice" observed as follows:

"The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, 'without prejudice', to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.

The rule is that nothing written or said 'without prejudice' can be considered at the trial without the consent of both parties—not even by a Judge in determining whether or not there is good cause for depriving a successful litigant of costs.... The word is also frequently used without the foregoing implications in statutes and inter partes to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean 'not affecting', 'saving' or excepting."

19. In *Chairman and MD, NTPC Ltd.* vs. *Reshmi Constructions, Builders & Contractors* (2004) 2 SCC 663, the Supreme Court held as follows:-

"32. Even correspondences marked as "without prejudice" may have to be interpreted differently in different situations.

33. What would be the effect of without-prejudice offer has been considered in Cutts v. Head [(1984) 2 WLR 349: (1984) 1 All ER 597 : 1984 Ch 290 (CA)] wherein Oliver, L.J. speaking for the Court of Appeal held: (All ER p. 613e-g)

"In the end, I think that the question of what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to usage in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after, bearing in mind that the precise question with which we are concerned in this case did not arise in Walker v. Wilsher [(1889) 23 QBD 335 (CA)] and the court did not deal with it. I think that the wide body of practice which undoubtedly exists must be treated as indicating that the meaning to be given to the words is altered if the offer contains the reservation relating to the use of the offer in relation to costs."

34. Yet again in Rush & Tompkins Ltd. v. Greater London Council [(1988) 1 All ER 549 : 1989 AC 1280 : (1988) 2 WLR 533 (CA)] it was held: (All ER pp. 551g-552b)

> *"The rule which gives the protection of privilege to 'without prejudice' correspondence 'depends partly on public policy, namely the need to facilitate compromise, and partly on implied agreement' as Parker, L.J. stated in South Shropshire DC v. Amos [(1987) 1 All ER 340 : (1986) 1 WLR 1271 (CA)] (All ER at p. 343, WLR at p. 1277). The nature of the implied agreement must depend on the meaning which is conventionally attached to the phrase 'without prejudice'.*

The classic definition of the phrase is contained in the judgment of Lindley, L.J. in Walker v. Wilsher [(1889) 23 QBD 335 (CA)] , QBD at p. 337:

> *"What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."*

Although this definition was not necessary for the facts of that particular case and was therefore strictly obiter, it was expressly approved by this Court in Tomlin v. Standard Telephones and Cables Ltd. [(1969) 3 All ER 201 : (1969) 1 WLR 1378 (CA)] , All ER at pp. 204, 205, WLR at pp. 1383, 1385, per Danckwerts, L.J. and Ormrod, J. (Although he dissented in the result, on this point Ormrod, J. agreed with the majority.) The definition was further cited with approval by both Oliver and Fox, L.JJ. in this Court in Cutts v. Head [(1984) 2 WLR 349 : (1984) 1 All ER 597 : 1984 Ch 290 (CA)] , All ER at pp. 603, 610, Ch at pp. 303, 313. In our judgment, it may be taken as an accurate statement of the meaning of 'without prejudice', if that phrase be used without more. It is open to the parties to the correspondence to give the phrase a somewhat different meaning e.g. where they reserve the right to bring an offer made 'without prejudice' to the attention of the court on the question of costs if the offer be not accepted (see Cutts v. Head [(1984) 2 WLR 349 : (1984) 1 All ER 597 : 1984 Ch 290 (CA)]) but subject to any such modification as may be agreed between the parties, that is the meaning of the phrase. In particular, subject to any such modification, the parties must be taken to have intended and agreed that the privilege will

cease if and when the negotiations 'without prejudice' come to fruition in a concluded agreement."

20. In the present case, there is no reason to depart from the general rule that "Without Prejudice" communication exchanged in an attempt to resolve contractual disputes ought not to be relied upon unless the terms have been accepted.

(III) *Decree under Order XIII-A of the CPC*

21. In these circumstances, the plaintiff has succeeded in demonstrating that the defendant has no real prospect of succeeding in the defences raised. The plaintiff is consequently to summary judgment in the suit. The claims in the plaint have been quantified thus:-

"43. That, an amount of USD 131,735.92 under the Purchase Order #205 and USD 84,725.60 under the Purchase Order #213 amounting to USD 216,461.52 is due and pending by the Defendant till date. Thus, the Plaintiff is entitled to the following sum to be paid by the Defendant:-

a) A sum of USD 131,735.92 (equivalent to INR 87,18,849.65@ the exchange rate of 1 USD = 66.1843 INR as on 29 September 2015) with interest @ 21% from the date of cancellation of the Purchase Order #205 i.e. 24th April, 2015 till 29 September 2015 (the date of the present suit), which interest comes to Rs. 7,97,595.59.

b) A sum of USD 84,725.60 (equivalent to INR 56,07,504.53 @ the exchange rate of 1 USD = 66.1843 INR as on 29 September 2015) with interest @ 21% from the date of cancellation of the Purchase Order #213 i.e. 22nd May, 2015 till 29 September 2015 (the date of the present suit), which interest comes to Rs. 4,22,636.85.

Thus, the total amount payable by the Defendant to the Plaintiff till the time of the filing of the present suit comes to Rs 1,55,46,586.62 (Rupees One Crore Fifty Five Lakhs Fourty Six Thousand Five Hundred Eighty Six and Sixty Two Paise only).

The Plaintiff further claims pendente lite interest on the said sum of Rs. Rs 1,55,46,586.62 (Rupees One Crore Fifty Five Lakhs Fourty Six Thousand Five Hundred Eighty Six and Sixty Two Paise only) @ 18% from the date of institution of the present suit, till the dated of decree being passed in the matter.

The plaintiff further claims 18% interest on the decretal amount from the date of decree till the date of actual payment."

22. In addition to the principal amounts paid by it, the plaintiff has claimed interest at the rate of 21% per annum. The rate claimed by the plaintiff is not a contractual rate and appears to be excessive. However, in a commercial contract, the plaintiff is entitled to reasonable interest upon the amounts wrongly withheld. The rate of 9% per annum upon the principal amounts due (from the date of cancellation of the respective purchase orders until the date of filing of the suit) would, in my view, be reasonable in the facts and circumstances of the case. The plaintiff is also entitled to *pendente lite* and future interest at the same rate until realization.

23. Consequently, the plaintiff is granted summary judgment under Order XIII-A of the CPC in the following sums:

a) ₹87,18,849.65/- alongwith interest @ 9% per annum from 24.04.2015 (date of cancellation of PO 205) until 29.09.2015 (date of filing of the suit).

b) ₹56,07,504.53/- alongwith interest @ 9% per annum from 22.05.2015 (date of cancellation of PO 213) to 29.09.2015 (date of filing of the suit).

c) *pendente lite* interest on the above amount @ 9% per annum.

d) Further interest @ 9% per annum from the date of decree until realization.

(IV) *Alternative Claim under Order XII Rule 6 of the CPC*

24. Although, in view of the above, it is unnecessary to deal with the plaintiff's case for decree upon admission under Order XII Rule 6 of the CPC, for the sake of completeness, I record that even under Order XII Rule 6 of the CPC, the plaintiff is entitled to a decree for the sums admitted by the defendant in the account statements dated 13.05.2015 and 15.06.2015, namely USD 1,80,037.30 and USD 57,790.93 respectively. The admissions in the said two statements of accounts, to the extent above, are unequivocal and unambiguous. The defendant's subsequent attempts to wriggle out of its admitted liability are unsupportable. A clear and unequivocal admission in *inter partes* correspondence entitles the plaintiff to a decree, in terms of the judgments of Supreme Court in *Uttam Singh Duggal & Co. Ltd.* vs. *United Bank of India* (2000) 7 SCC 120 (paragraph 12) and in *Karam Kapahi Lal Chand Public Charitable Trust* (2010) 4 SCC 753 (paragraph 37). The Supreme Court has emphasised the grant of judgment upon admission in order to expedite proceedings where factual issues are not in dispute.

25. I therefore hold that, insofar as decree upon admission is concerned, the plaintiff would be entitled to a decree in the rupee equivalent of the sum of USD 87,828.30 (after adjustment of sum of USD 1,50,000 paid by the defendant). Plaintiff will also be entitled to interest 9% per annum *pendente lite* until realisation.

D. Conclusions

26. In the facts and circumstances, the application is allowed. The plaintiff is entitled to a decree in terms of paragraph 23 hereinabove. Decree sheet be drawn up accordingly. The plaintiff is also entitled to costs, assessed at ₹2,00,000/- (including ₹1,55,465.87 paid as court fee).

CS (OS) 3148/2015

1. In view of the judgment in I.A. 1385/2017, CS(OS) 3148/2015 stands disposed of, alongwith all pending applications.

2. I have been informed that the defendant has made a counter claim although the same has not been separately registered.

3. List before the JR on 13.11.2019 for further proceedings with regard thereto.

PRATEEK JALAN, J.

OCTOBER 21, 2019
'pv'/s