IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

G.A. 2522 of 2016

C.S. 213 of 2016

J. K Engineering Pvt. Ltd.

Vs.

ANE Industries Pvt. Ltd.

For the Plaintiff	:	Mr. Ratnanko Banerjee, Sr. Adv. Mr. Reetobroto Mitra, Adv. Mr. Sukrit Mukherjee, Adv. Mr. S.R. Kakrania, Adv. Mr. Sanjib Seni, Adv. Mr. Ritika Shroff, Adv. Mr. Aviroop Mitra, Adv.
For the Defendant	:	Mr. Jishnu Chowdhury, Adv. Mr. Mayukh Maitra, Adv. Mr. Ratul Das, Adv.
Heard on	:	30.04.2018, 02.05.2018, 10.05.2018, 13.06.2018, 21.06.2018, 05.07.2018, 16.07.2018, 18.07.2018, 25.07.2018,

01.08.2018, 14.08.2018, 11.09.2018,
18.09.2018, 28.09.2018, 01.10.2018,
11.10.2018, 27.11.2018, 03.12.2018.

Delivered on : 07.02.2019.

Moushumi Bhattacharya, J.

This is an application for judgment on admissions made by the plaintiff in a suit claiming a decree for Rs. 16,51,85,702/- on account of outstanding payments due from the defendant to the plaintiff under a Memorandum of Understanding (MoU) entered into between the parties for removal of Hard Shale and Carbonaceous Shale at Tirap Colliery. The arrangement between the parties envisaged in the MoU is that the defendant would procure the contract for the work from North-Eastern Coalfields (NEC) and hand over the said work on sub-contract to the plaintiff for executing the work in accordance with the terms of the MoU dated 26th March, 2013. The work order contemplated a period of thirty six months and back-to-back arrangements for the defendant paying the plaintiff upon obtaining the payment from North-eastern Coalfields after keeping a margin of 12.50% of the actual rate of the letter of intent issued by NEC. In other words, the money received by the defendant from NEC would be paid by the defendant to the plaintiff after deducting the rate of margin mentioned in the MoU. The relevant clauses of the MoU are set out below.

"(f) That the party of the First part will keep 12.50% on account of its margin of actual rate as per LOI issued by North Eastern Coalfields Limited (NECL) and will pay the Balance amount to the party of the Second part.

(g) That the party of the first part will make to the party of the Second part, immediately after receiving the payment from North Eastern Coalfields Limited, after deduction of TDS as per Income Tax Act, 1961 and the Mutually agreed amount as per point no. (f) i.e. 12.50% of value of work done."

The petitioner/plaintiff is admittedly not privy to the contract between the defendant and NEC. The defendant has made substantial payments to the plaintiff till date amounting to approximately Rs. 79 crores. The decree claimed in the plaint relates to the balance amount allegedly due and owing to the plaintiff.

2. The dispute in the instant application under Order XII Rule 6 of The Code of Civil Procedure, 1908, is the rate agreed to be kept by the defendant before making the payments to the plaintiff of the amount received by the defendant from NEC. The defendant relies on the rate agreed by the parties in the MoU while the petitioner relies on the rate of 5% which the petitioner claims has been continuously followed in the transactions subsequent the MoU. The petitioner has prayed for final judgment and decree for a sum of Rs.13,64,26,682/- to be passed against the defendant on the basis of a rate of 5% margin to be kept by the defendant/respondent on the balance amount which remains due and owing to the petitioner.

3. Mr. Ratnanko Banerji, learned senior counsel and Mr. Reetobroto Mitra, learned counsel appearing for the plaintiff/petitioner relies on the

following documents to show that despite the rate mentioned in the MoU, the parties proceeded on the basis of 5% being the agreed rate to be kept by the defendant as margin before making the payment to the plaintiff. These documents are;

i) An E-mail dated 19th February, 2016 from the plaintiff to the defendant which states, inter alia, that the defendant has deducted an amount of Rs.1,02,07,373.43/- towards 5% commission for the R.A Bills after 11th September, 2015.

ii) The reply of the defendant on the same day i.e. 19th February, 2016 which requests the plaintiff to indicate whether an amount more than 5 crores is due to the defendant and further states that the defendant's share of commission is 6% (and not 5%).

iii) Working Notes prepared by the defendant giving the details of R.A Bills where 95% of the Bill amount has been shown to have been paid by the defendant to the plaintiff from the money received by the defendant from NEC. (This document is annexed of the affidavit-in-opposition of the defendant).

iv) Forms 26AS and/or the TDS Certificates of the petitioner for the relevant financial years which shows that the defendant had deposited TDS for the amounts reflected in the certificates. (The statement of such amount

would show that a rate of 5% had been kept by the defendant as commission).

4. According to Mr. Banerji, the amounts reflected in the Forms 26AS for the relevant years is an absolute admission on the part of the defendant that it received payment of the entire money from NEC and intended to make payment of the agreed amount to the plaintiff or has already made such payment to the plaintiff after retaining the commission of 5% as agreed between the parties. He submits that the fact of the TDS deposited reflected in the Form 26AS amounts to an acknowledgement of liability that a total sum of Rs.118,17,32,782/- is due and payable by the defendant to the plaintiff. Counsel relies on *Electro Flame Ltd., Hyderabad vs. Mittal Iron Foundry Pvt. Ltd* reported in *AIR 1998 AP 203* for the proposition that admission of a jural relationship of debtor and creditor can be found to exist from Sales Tax Declaration Forms relating to the transactions in question between the concerned parties. Counsel further relies on two Division Bench decisions of this court; *Arvind Metals Vs. Sonu & Soni Finvest Company Pvt. Ltd* and *Dolly Mazumder & Ors. Vs. Zee Telefilms Limited* on the point of TDS certificates being evidence of admission of liability.

5. Mr. Jishnu Chowdhury, learned counsel appearing for the defendant opposes this application on the ground that the alleged admission had been made by the defendant in the context of the huge amounts outstanding from the plaintiff and can be explained from the exchange of mails between the parties. Counsel stresses that the defendant is contemplating filing a

counter-claim against the plaintiff for breach of the terms of the MOU. Counsel denies that either the TDS Certificates or the email of 19th February 2016 can constitute admission on which the plaintiff can be entitled to a judgment.

6. I have heard the submission of learned counsel appearing for the parties. The decisions relied upon by Mr. Chowdhury for the defendant, particularly those where it has been held that there can be no judgment upon admission on the basis of TDS certificates have to be pitted against the decisions relied upon by Mr. Banerji and Mr. Mitra for the plaintiff which state the opposite. To clarify the grey area in the decisions, a brief reiteration is required. The plaintiff's decisions (*Electro Flame, Dolly Mazumder and Arvind Metals*) held that submission of Declaration Forms/TDS Certificates in respect of a transaction between the concerned parties is an admission of the existence of a jural relationship between the said parties as that of debtor and creditor. On the other hand, the decisions cited by Mr. Chowdhury for the defendant have unequivocally held that issuance of TDS Certificates does not amount to any acknowledgement of liability by one party to the other. It was further held that a TDS certificate is primarily to acknowledge the deduction of tax at source and does not refer to any amount of loan or even the interest is payable on the principal amount. The decision of the Delhi High Court in *Utility Powertech Limited Vs. Amit Traders* reported in *(2018) SCC Online Del 9096* that TDS can be deducted even on the expectation of estimated liability followed the decision of the Supreme Court in *Commissioner of Income Tax Vs. Gujarat Fluoro Chemicals* reported

in *(2012) 13 SCC 731*. The decision of the Bombay High Court *in S.P. Brothers Vs. Biren Ramesh Kadakia* reported in *(2009) 1 Bom CR 453* that TDS certificate does not refer to any amount of loan payable on the principal amount was followed in a later decision by the same court in *ACTAL Vs. India Infoline Limited* reported in *MANU/MH/1768/2012*, Having gone through the decisions, it appears that admission of an existence of a jural relationship is not the same as acknowledgment of liability of a specific amount outstanding to an alleged creditor, unless the books of accounts of the alleged debtor reflects the amount as a debt or money kept aside and liable to be paid to the creditor in question. It should be mentioned that the decision of the Delhi High Court in *Rahul Jain Vs. Vasant Raj Pandit* reported in *(2015) SCC Online Del 10900* was given in a case under Order XII Rule 6 of the CPC where it was held that TDS certificates would fall in the category of evidentiary admission as opposed to judicial admission of evidence which can form the basis of a decree for decree of a suit.

7. The three documents relied upon by the plaintiff which the plaintiff considers sufficient for a judgment on admission have to be seen in the context of the interpretation given to Order XII Rule 6 of the CPC by the courts.

i) <u>The TDS certificates:</u> Under Section 194C of The Income Tax Act, 1961, a person responsible for making any payment to a contractor for work done pursuant to a contract between the person and the contractor, will have to deduct an amount equal to the percentages specified under the section at the time of credit of such sum to the account of the contractor or

at the time of payment of the amount due to the contractor by the person concerned. The TDS certificates disclosed in the petition show the name of the plaintiff as the *"Assessee"* and the name of the defendant as the *"Deductor"* together with the TDS deposited by the defendant for the years 2012-2013 to 2015-2016. Learned senior counsel for the plaintiff has urged this court to hold that the TDS certificates prove that the defendant has deducted tax at source against the bills of the plaintiff at the rate of 2% per annum under Section 194C and that the gross bill amounts would add up to a total of Rs.2,34,17,960/- while the total of the figures shown as deduction of tax would amount to Rs. 2,36,34,656/-; this would amount to an acknowledgment of the sums covered by the bills raised by the plaintiff as being due and payable by the defendant. In both *S.P. Brothers (Bombay High Court)* and *Utility Powertech* (Delhi High Court), it was held that a TDS certificate is primarily to acknowledge the deduction of tax at source and does not refer to any amount of loan or even the rate of interest payable on the principal amount. It was further held that TDS does not constitute an admission of liability inasmuch as TDS can be deducted even on the expectation of estimated liability (Delhi High Court). The later decision referred to *Jyotsna K. Valia Vs. T.S. Parekh & Company,* a full bench decision of the Bombay High Court reported in *(2007) 4 M.H. L.J. 517*, where the expression *"acknowledgement"* was described as an unqualified recognition or an acceptance of responsibility to the extent that the statement of accounts (under which the entry had been made) were sufficient to furnish a cause of action to the plaintiffs for maintaining the suit (the decision relies on *AIR 1953 SC 225*). *Rahul Jain* placed the

evidentiary value of TDS certificates on a lower pedestal compared to judicial admissions of evidence which could form the basis of a decree. *ACTAL* (relying on *S.P. Brothers*) took a more straightforward view in that issuance of TDS certificate does not amount to any acknowledgement of liability. *Electro Flame* held that existence of a jural relationship can be inferred from Sales Tax Declaration Forms. In *Dolly Mazumder*, the respondent was directed to make payment of the amount deposited as TDS to the appellant after the Division Bench came to the conclusion that the TDS had not been mistakenly credited to the account of the appellant. In *Arvind Metals*, the TDS certificates were accepted as destructive of the defence set up by the appellant who was resisting winding up proceedings filed against it. None of the two decisions of this court explain the evidentiary value of TDS Certificates in the context of admission of specified liability.

Section 194C casts a mandatory obligation upon a person who has entered into an agreement with a contractor to deduct an amount prescribed under the Section and deposit the same with the Revenue. Form 26AS for the relevant year is only issued to the contractor (assessee) after the TDS has been deposited by the deductor (the person who has engaged the contractor). The percentage of the tax deducted will arise only after the person receives the bill from the contractor and the liability under the bill accrues, which is in consonance with the mercantile method of accounting where the liability has to be accounted for as soon as the bill is received from a contractor. Therefore, a TDS is evidence that a person is liable for the amounts raised by a contractor for work done and that a jural relationship

exists between the parties. One can even go to the extent of saying that based on the act of a person depositing tax at source, the existence of a debt is admitted to the contractor concerned. But the quantum of debt to a contractor can only be ascertained from a conjoint reading of the balance sheets of the respective parties. One would presume that the specified amount outstanding would be reflected as a liability in the balance sheet of the debtor (in this case the defendant) while the same amount would be reflected under the heading *"sundry debtors"* or *"amount receivable"*. The amount reflected in the respective balance sheets of the debtor and the creditor would be the amount after deduction of TDS. In the view of this court, TDS certificates alone, without the balance sheets of the respective parties showing the entries pertaining to the specified amount due and owing from the person to the contractor (from the defendant to the plaintiff in this case) cannot amount to an admission of a specified liability on which judgment can be pronounced under Order XII Rule 6 of the CPC. It should be mentioned that none of the parties before this court have disclosed or referred to their respective balance sheets or statements of accounts for the relevant years.

ii) <u>The E-mail dated 19th February 2016:</u> To understand the context in which the alleged admission was made of "6% not 5%" has made by the defendant both the plaintiff's mail sent on 19th February 2016 at 11.49 a.m. and the defendant's reply (containing the alleged admission) sent on the same day at 8.45 p.m. is required to be reproduced below:

"1) <u>Plaintiff</u>:

It is totally unjustified and unfair to adjust party payments with our service tax amounts. Please refer to the discussions held on 15.11.2015 with yourself, Balbir ji, Sunil ji.

You have assured to consider the following and accordingly duly signed Supplementary MOU was sent to you.

01. ANE has deducted an amount of Rs.1,02,07,373.43 towards their 5% commission for the RA Bills raised after 11.09.2015 from RA Bill 34 to RA Bill 39.

RA Bill 34= 9,14,834.28

RA Bill 35= 10,16,776.00

RA Bill 36= 16,35,143.29

RA Bill 37= 17,94,529.02

RA Bill 38= 25,03,150.00

RA Bill-39= 23,42,940.84

Total 5% Amount= 1,02,07,373.43.

As per the discussions held on 15.11.2015, you have assured us that you will utilize the total 100% received against the RA Bills for the payments against the project and will not deduct the 5% commission on RA Bills. ”

(2) <u>Defendant:</u>

We are surprise to read your email that you are calculating our commission, But please tell us if there is outstanding more than five crore against you then in which method you calculate our share. We are taking this share as per our agreement and at present we are

doing our best for Tirap site. I again want to inform you that our share is 6% not 5% and we will send this calculation to you in next bill. Ranga ji when you give us site operation at that time you well known the condition of your site. You was help less to supply diesel, spare parts and even tyres to Tirap site as per their requirement. We have no sufficient funds to pay your outstanding also. So if you want to clear your market immediately through us then ask your management to release our standing otherwise we will pay the party payment according to condition of project performance."

(The gaps in grammar are those of the parties.)

From the above exchange, it appears that the defendant had deducted commission at 5% for the RA bills raised after September 2015. The plaintiff's mail lists out six RA bills from 34 to 39 where 5% commission has been deducted by the defendant. It is the plaintiff's case that the admission contained in the defendant's reply mail of 6% (and not 5%) confirms the agreed modification from the 12.50% mentioned in Clause (f) of the MOU of 26th March 2013. One finds however that the email reflects only six RA bills from 34 to 39. Further, the defendant's reply shows that a further calculation at the rate of 6% was to be sent to the plaintiff (which is not part of the papers). The most significant point however is the last portion of the plaintiff's mail sent on 19th February 2016 which states:

"Please refer Point No.11, after the end of the project, ANE shall submit a final up to date report considering their commission, investments, etc, if there be any, and the final accounts shall be discussed. The amounts shall be paid by one to another to settle the final accounts".

iii) The working notes: Counsel for the plaintiff has relied on the working notes issued by the defendant to urge that even by the defendant's own calculation, an amount of 5% commission had been admitted. It is the

plaintiff's case that the documents at pages 119 (32nd RA bill), 121 (35th RA bill), 122 (36th RA bill), 124 (37th RA bill), 126 (38 RA bill) all show that the defendant is agreeable to a share of 5% from the transaction in question. These were issued by the defendant in respect of the RA Bills where 95% bill amount and TDS of 2% are reflected (disclosed in the affidavit-in-opposition of the defendant) in relation to the 32nd, 35th, 36th, 37th and 38th RA Bills. Although 33rd and 34th RA Bills have not been disclosed by either party, it may be assumed that there would not be a departure from the 95% Bill amount raised by the plaintiff on the defendant and accepted by the latter. In the absence of any other RA bills except the series from 32 to 38, it cannot be said that 5% commission was the rate admitted to be kept aside by the defendant for the entire transaction.

10. An admission on which a plaintiff proposes to have a suit decreed, partially or otherwise, must be clear, unambiguous and free from doubt. It must be of such an unequivocal nature that a defendant will not be in a position to explain the admission in a factual context. The principle enunciated by Justice Raveendran in *Himani Alloys Limited Vs. Tata Steel Limited reported in (2011) 15 Supreme Court Cases 273* should be reiterated and the relevant part is set out:

"It is true that a judgment can be given on an "admission" contained in the minutes of a meeting. But the admission should be categorical. It should be a conscious and deliberate act of the party making it, showing an intention to be bound by it. Order XII rule 6 being an enabling provision, it is neither mandatory nor peremptory but discretionary. The court, on examination of the facts and circumstances, has to exercise its judicial discretion, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any

remedy to the defendant, by way of an appeal on merits. Therefore unless the admission is clear, unambiguous and unconditional, the discretion of the court should not be exercised to deny the valuable right of a defendant to contest the claim. In short the discretion should be used only when there is a clear "admission" which can be acted upon."

Seen in the above light, a court would hesitate to pronounce judgment in a case where there is even a slightest doubt as to whether a defendant has been able to come up with an explanation as to the alleged admission, however specious the explanation might be. The decision of the Hon'ble Supreme Court in *IDBI Trusteeship Services Limited Vs. Hubtown Limited* reported in *(2017) 1 SCC 568*, which now governs the field of grant of interlocutory decree, lays down the parameters of exercise of judicial discretion in relation to a defence before pronouncing judgement. In paragraph 17 of the said decision (passed in proceedings under Order XXXVII of the CPC), it has been held that even if a defence is improbable, doubtful or below the mark of a positively good defence, the defendant will ordinarily be entitled to unconditional leave to defend subject to conditions which a court may impose on the defendant. It is only when the defence is deemed to be insubstantial, not genuine, frivolous or vexatious, that a plaintiff will be entitled to judgment and leave to defend the suit will be refused.

11. In the view of this court, an acknowledgement of a specified liability can only arise when there is an unqualified and unambiguous statement made by a party by way of a clear acceptance of responsibility towards an act which that party has made voluntarily and with an intention to have a binding effect on its future course of action. In this case, the complex

calculations put forth by the plaintiff and the consequent struggle to simplify arithmetics would itself caste a spanner in pronouncing judgment of an ascertained amount. Inviting the court to decipher the Forms 26AS and number-crunch on the amounts mentioned therein is itself a roadblock to pronouncing judgment of an ascertained sum of money.

12. In the present facts, having regard to the discussions under the individual heads of the documents relied upon by counsel for the plaintiff for a judgment on admissions, it cannot be said that either the TDS certificates or the e-mail dated 19th February, 2016 or even the working notes constitute admissions which are clear, unambiguous and free from giving any scope to the defendant to explain or account for the same. It cannot be said that the documents relied upon by counsel clearly and unequivocally demonstrate that the defendant had admitted (by such documents) that it was ready to agree on a commission of 5% for the entire transaction or had agreed to alter the 12.50% commission in clauses (f) and (g) of the MOU dated 26th March, 2013, in respect of the entire transaction between the plaintiff and the defendant. At this point in time, this court cannot place any weightage on the significance of a possible counter claim to be filed by the defendant or of the alleged breaches on the part of the plaintiff.

13. It must however be pointed out that since the e-mail dated 19th February, 2016 and the working notes show that the defendant had indeed agreed on 95% of the bill amount from the plaintiff and had therefore admitted to 5% commission in relation to the RA bills enumerated in the e-mail, the plaintiff would be entitled to claim 95% of the bill amount in

respect of the RA bills disclosed by the parties being series 32-39 and be entitled to a decree of the total amount of these RA bills keeping aside 5% of the amount raised in each of these bills as the defendant's commission.

14. There will accordingly be a decree in favour of the plaintiff to the extent of the total amount of the RA bills as indicated above less 5% on each of the bills.

15. GA No. 2522 of 2016 is partly allowed, as indicated above. There shall be no order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)

Later:

Stay as prayed for by learned counsel appearing on behalf of the defendant is considered and refused.

(MOUSHUMI BHATTACHARYA, J.)