$~

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

Reserved on 23.12.2021
Pronounced on 17.11.2022

\+ CS (COMM) 303/2021, I.A. 7700/2021

NOKIA TECHNOLOGIES OY ..... Plaintiff
Through Mr. Gourab Banerjee, Sr. Adv. with Mr. Pravin Anand, Ms. Vaishali Mittal, Mr. Siddhant Chamola, Mr. Rohin Koolwal, Ms. Pallavi Bhatnagar and Ms. Shraddha Chauhan, Advs.

Versus

GUANGDONG OPPO MOBILE TELECOMMUNICATIONS CORP LTD & ORS... Defendants
Through Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra, Ms. Julien George, Ms. Anu Paarcha, Mr. Arjun Gadhoke, Mr. Vivek Ayyagari, Mr. Avijit Kumar, Mr. Aniruddh Bhatia and Mr. Skanda Shekhar, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **<u>J U D G M E N T</u>**
17 .11.2022

<u>I.A. 7700/2021 in CS (COMM) 303/2021</u>

[This judgement redacts all figures and details over which confidentiality has been claimed by the parties. They are, therefore shown by way of asterisks (*****)].

1. This judgement adjudicates I.A. 7700/2021, filed by the plaintiff Nokia Technologies ("Nokia", hereinafter) against the defendant Guangdong Oppo Mobile Telecommunications Corp Ltd ("Oppo", hereinafter) in CS (Comm) 303/2021.

2. Nokia is the holder of various patents, of which the present dispute primarily concerns itself with three. These are (i) Indian Patent No. 286352 (IN '352) titled "System and Method for Providing AMR-WB DTX Synchronization", (ii) Indian Patent No. 269929 (IN '929) titled "Method Providing Multiplexing for Data Non Associated Control Channel" and (iii) Indian Patent No. 300066 (IN '066) titled "Additional Modulation Information Signaling for High-Speed Downlink Packet Access". According to Nokia, the three suit patents are Standard Essential Patents (SEPs), which are necessary to work the technology for making cellular systems 2G, 3G, 4G and 5G compliant. Inasmuch as the defendant Oppo, in its cellular handsets, employs 2G, 3G, 4G and 5G technology, Nokia contends, in its plaint, that Oppo must necessarily be using the technology contained in the three SEPs forming subject matter of the present dispute. To support the contention that Oppo is indeed using the suit patents, held by the plaintiff, Nokia has filed, with the plaint, "Claim Mapping Charts", which purportedly maps each element of the claim to sections of the third generation partnership project (3GPP) technical specifications which form the basis of wireless telecommunications standards developed within the framework of the European Telecommunications Standard Institute (ETSI). As is well-known, a patent, to qualify as a SEP, has to map onto a standard set by the ETSI (or the relevant Standard Setting Organization/SSO). If the technology used by Oppo and the suit patents both map onto the same standard in the ETSI, it could lead to a legitimate inference that the defendants' technology infringes the plaintiff's patents.

3. SEPs form a category of patent *sui generis*, as has been noted by this Court in its judgment in ***Interdigital Technology Corporation v. Xiaomi Corporation***[1], though SEP litigation, at least in this country, is governed by the same fundamental substantive and procedural principles that govern any other litigation. Unlike normal patents, the use, by another of a patent held by one party, does not, *ipso facto*, entitle the party, as a right, to an injunction restraining the other party from using the patent. This is because SEPs, by their very nature, constitute standards for operation of technologies which are required worldwide and form an integral part of telecommunication across the globe. An inalienable element of public interest, therefore, is ingrained in allowing accessibility to such patents.

4. No SEP holder is, therefore, entitled to monopolise the SEPs held by him. He is entitled to hold the SEPs only if he offers the SEPs to others, who need to use the SEPs for working the concerned technology at rates, which must be Fair, Reasonable And Non Discriminatory (FRAND). If a person who desires to use the technology contained in a SEP held by another, he must be willing to obtain a licence from the latter on payment of FRAND royalty rates. Equally, the SEP holder must be willing to offer use of the SEPs held by him at FRAND rates to every willing licensee. A person, who is unwilling to pay licence fees at FRAND rates, is, therefore, condemned as an "unwilling licensee" and is not entitled to use the SEP.

---

[1] **(2021) 277 DLT 396**

5. It is necessary, before proceeding further, to understand the concept of SEP as well. In telecommunications, interoperability in instruments is essential. For this, the instruments must be compatible to one technology. The technical specifications of the technology used by these instruments must, therefore, conform to a common design. Industry groups, which set such common standards in different areas of technology, are known as Standard Setting Organizations (SSOs). A "standard" is defined by the IPR policy of the ETSI as meaning "any standard adopted by ETSI including options therein or amended versions and shall include European Standards (ENs), ETSI Standards (ESs), Common Technical Regulations (CTRs) which are taken from ENs and including drafts of any of the foregoing, and documents made under the previous nomenclature ... the technical specifications of which are available to all MEMBERS, but not including any standards, or parts thereof, not made by ETSI."

6. Certain standards are essential. In order for a standard, on the basis of which telecommunication technology can be implemented and operated to be treated as essential, the technology must be incapable of implementation without using that particular standard. In other words, a person who employs that technology must necessarily be using that standard. That standard must, in other words, be essential for using that particular technology. The IPR policy of ETSI defines "essential", with respect to a particular standard, as a standard without which "it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate Equipment or

Methods which comply with a Standard without infringing that IPR". This is further clarified by postulating that "in exceptional cases where a Standard can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered Essential". The plaint, in the present case, seeks to simplify this concept by explaining that "an essential patent in context of a given standard, or a standard essential patent implies that it is technically not possible to manufacture, sell, lease etc. equipment or technology which complies with such standard without making use of the patented technology in question" In other words, "it is not possible to comply with the given standard, without infringing upon the patents which are essential to that standard". This, in my considered opinion, is a reasonably accurate description of a SEP and, the defendant, too, in its written statement filed by way of response to the plaint as well as in its reply to the present application, does not seriously question it.

7. For the purposes of the present application, one need only bear in mind the following factors:

(i) A SEP is a patent without using which it is impossible to work a particular technology. For this purpose, the SEP must map onto the standard set by SSOs and adopted by the ETSI.

(ii) A holder of a SEP is not entitled to any absolute monopoly on the SEP, as is generally applicable to other holders of patents. He must necessarily be ready and willing to allow others to use the SEP on licence basis.

(iii) The license must be made available by the SEP holder on

FRAND terms.

(iv) No person who is unwilling to take a license from the holder of a SEP on FRAND terms is entitled to use the SEP. Such a person would be an unwilling licensee, and any such use of the technology contained in the SEP would amount to infringement within the meaning of Section 108 of the Patents Act, 1970. Such a licensee could be injuncted from the use of such patent.

8. Essentially, therefore, in any SEP litigation, such as the present, three primary issues arise for consideration, i.e., whether

(i) the suit patents are SEPs,

(ii) the defendants are using the plaintiff's suit patents and

(iii) the rate at which the plaintiff is willing to license the patents to willing licensees is FRAND.

The present application

9. With that background, one may come to the present application. The application has been moved under Order XXXIX Rule 10[2] of the Code of Civil Procedure, 1908 (CPC), by Nokia. It has been moved even while other interlocutory applications, including an application under Order XXXIX Rules 1 and 2 of the CPC are pending. The website of this Court indicates that, till date, the application under Order XXXIX Rules 1 and 2 of the CPC has not been finally decided, and I have not been informed, by either party, otherwise. Indeed, one

---

[2] **10**. **Deposit of money, etc., in Court**. – Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the

of the grounds on the basis of which Nokia has pressed the application under Order XXXIX Rule 10 of the CPC is that the decision on the interlocutory application of Nokia under Order XXXIX Rules1 and 2 of the CPC is likely to take time given the intricate technological issues involved and that Nokia is entitled to be secured in the interregnum.

10. What, essentially, Nokia seeks in the present application is a direction to Oppo to deposit, with the Court, an amount which, according to Nokia, would represent the royalty, at FRAND rates, on payment of which Oppo could be granted a license to use the suit patents and to which Nokia, consequently, claims to be entitled.

<u>Averments of Nokia in the Application</u>

11. In its application, Nokia has sought to contend that Oppo had, earlier, obtained a license from Nokia ("the first FRAND Licence Agreement") for utilizing Nokia's SEPs, by paying royalty at FRAND rates. That licence has expired in 2021. As Oppo has not renewed the license Agreement or taken any fresh license from Nokia, the application asserts that the continued use, by Oppo, of Nokia's SEPs, is infringing in nature. It is for this reason, asserts the application, that Nokia, with its suit, prayed, in its application under Order XXXIX Rules 1 and 2 of the CPC, that Oppo be restrained from continuing to infringe the suit patents of Nokia or, in the alternative, that an alternate interlocutory arrangement be put in place.

12. Adverting to the suit patents, the application avers that the suit patents protect technology necessary for 2G, 3G, 4G and 5G wireless telecom which was developed within the framework of the ETSI. The cellular handsets of Oppo, according to the application, are admittedly in compliance with the technical standards to which the suit patents conform. This, according to the application, indicates that Oppo is making use of Nokia's SEPs. By continuing manufacture, sale, offer for sale etc., of its cellular devices, which incorporate the standards contained in the suit SEPs without obtaining any license from Nokia, the application alleges that Oppo is infringing the plaintiff's SEPs.

13. The application further asserts that Nokia had offered a license to Oppo to use the suit patents at royalty rates which were FRAND, but that Oppo has failed to accept the offer. Rather, alleges Nokia, Oppo is following a policy of "holding out", by entering into extended and protracted negotiations with Nokia which do not evince any intent, on Oppo's part, to take licenses from Nokia, to utilize the SEPs at FRAND rates of royalty. As such, asserts the application, it is not disputed that

(i) Oppo is required to enter into a license for the use of the Plaintiff's SEPs pertaining to the 2G, 3G, 4G and 5G cellular standards, and

(ii) a fair and reasonable license fee would be required to be paid by Oppo to Nokia for grant of such a license.

14. Inasmuch as

(i) Oppo had earlier executed a license agreement, on FRAND terms, for utilising Nokia's cellular SEPs,

(ii) during negotiations in respect of the patents covered by the present suit, the sole dispute raised by Oppo was that the fee demanded by Nokia was not FRAND, and

(iii) Oppo, therefore, acknowledged the need to execute license agreement, on FRAND terms, with Nokia to manufacture/sell/import/export devices which used the technologies for the working of which the suit SEPs were essential,

the application asserts that Nokia has already established a strong *prima facie* case for injunction. In these circumstances, the continued use by Oppo, of the technology contained in the suit SEPs, asserts the application, tantamounts to infringement.

15. Adverting to the manner in which the amount claimed in the present application has been quantified, Oppo contends that the measure of damages, to which a patent holder would be entitled against an infringer is, it is well settled, to be computed on the basis of the loss of revenue that the patentee suffers. Nokia relies on an affidavit dated 1st July 2021 of Mr. Patrik Hammaren, Head of Licensing of Nokia which, according to Nokia, suggests the methodology for working out the sum to which Nokia would be entitled as security. The methodology, according to the application, is based on an analysis of Oppo's sale of 4G and 5G compatible devices, juxtaposed with the offer of Nokia for the second FRAND license agreement. The execution of the first FRAND license agreement, submits the application, tantamounts to acceptance, by Oppo, of its legal obligation to seek a license from Nokia to continue to use the suit SEPs. Oppo has, thereby, according to the application, admitted that Nokia would be entitled to compensation, in the form of license royalty, for use, by Oppo, of the suit SEPs.

16. In these circumstances, given the fact that the considerable time is likely to elapse even before any substantive order would be passed on the application filed by Nokia under Order XXXIX Rules 1 and 2 of the CPC and the necessity of ensuring that Nokia's commercial interests are protected in the interregnum, the application submits that a clear case for a direction, to Oppo, to make payment in accordance with Order XXXIX Rule 10 of the CPC is made out. It is sought to be contended, in the application, that such a direction would not result in any prejudice to Oppo, as any amount which this Court may direct Oppo to pay would be adjusted against the final damages to which Nokia would be found to be entitled in the suit. On the other hand, denial of the relief sought in this application, according to Nokia, would result in irreparable prejudice to it, as Nokia would then remain unsecured till an order is passed on the application filed by it under Order XXXIX Rules 1 and 2 of the CPC and, in the interregnum, there is every possibility of Oppo moving its resources and assets beyond the territorial jurisdiction of this Court, which may result in a *fait accompli*.

17. Predicated on the aforesaid factual assertions and allegations, the application seeks a direction to the Defendants for the payment of monies directly to the plaintiff, in terms of the amount as calculated in the confidential affidavit referenced in paragraph 21 of this application, or any other amount as considered appropriate by this Hon'ble Court in order to secure the rights and interests of the plaintiff during the pendency of the plaintiff's interim injunction application.

<u>Reply by defendant to the application</u>

18. The defendant has contested the maintainability, as well as the merits, of the plaintiff's application under Order XXXIX Rule 10, CPC, in its reply thereto. The reply has been filed under various heads, and it would be appropriate to digest the submissions contained in the reply, head-wise, as it has been filed.

19. The first submission of Oppo is that Nokia's application does not satisfy the requirement of Order XXXIX Rule 10 of the CPC. In this context, Oppo has highlighted the words "admits" and "that it belongs or is due to another party" employed in Order XXXIX Rule 10 of the CPC. Oppo further contends that the admission, as would justify an order under Order XXXIX Rule 10, has to be of a degree envisaged by Order XII Rule 6 of the CPC. The admission has, therefore, to be clear and unambiguous, and such as would relieve the plaintiff of the burden of proof which otherwise would be cast on it. Inasmuch as the suit instituted by Nokia claims infringement of three patents held by Nokia and alleged to be SEPs, Nokia, in order to claim itself to be entitled to an order of deposit under Order XXXIX Rule 10, would have to demonstrate that Oppo admitted not only to the validity and essentiality of the suit patents, but also that the rates at which deposit was being claimed by Nokia were FRAND compliant. Oppo contends that the pre-suit correspondence exchanged between Nokia and Oppo, and the reply filed by Oppo to IA 7699/2021, preferred by Nokia under Order XXXIX Rules 1 and 2 CPC, clearly indicate that Oppo was contesting the validity and essentiality of the suit patents as well as the assertion, by Nokia, that its assurances were FRAND.

20. Oppo further submits, in this context, that, in litigations involving SEPs, the plaintiff is required to demonstrate, assuming that it has been able to establish that the patents are indeed SEPs and that the defendant was using the said patents in its devices, that (i) the royalty rates at which license was being offered by the plaintiff was FRAND and (ii) the defendant was unwilling to take a license at such rates. Any examination of whether the rates at which licenses were offered by the plaintiff were FRAND would require the Court to examine third party licensing agreements. No such third party licensing agreement having been placed on record by Nokia, Oppo contends that the most basic parameters, which this Court would have to examine in order to assure itself that Nokia was offering the licence to Oppo to exploit the suit patents were in fact FRAND, are absent in the present case. Besides this, Oppo submits that FRAND rate determination is a complex exercise which requires consideration of third-party license agreements, expert evidence and a trial, among other factors.

21. Nokia, instead, was merely trying to rely on its own assessment of the possible damages due to it, for a direction to Oppo to make payment. While doing so, Oppo points out, Nokia had itself admitted that relief under Order XXXIX Rules 1 and 2 of the CPC could be granted only after an in-depth examination of the aspect of whether the suit patents are SEPs, whether Oppo has infringed the patents and whether the rates at which Nokia has offered licenses are FRAND. Nokia could not, therefore, seek to short circuit this exercise by seeking an interim deposit under Order XXXIX Rule 10. That, according to Oppo, would amount to placing the cart before the horse.

22. The second ground on which Oppo has opposed Nokia's application is that the reliance, by Nokia, on the first FRAND license agreement executed between Nokia and Oppo is completely misconceived. The said agreement, submits Oppo, cannot operate as an estoppel against the right of Oppo to question the essentiality and validity of the suit patents. Without prejudice to the said submission, Oppo further submits that, while Oppo has always been willing to take a FRAND license from Nokia representing the true value of its patent portfolio, that value has never been established by Nokia either during pre-suit communications or even during the currency of the present suit. Oppo reiterates the fact that, in its reply to the present application, it has contested the validity and essentiality of the suit patents.

23. The right of a licensee to challenge the validity and essentiality of a SEP, even after a license agreement with respect to SEP has been executed, submits Oppo, stands globally recognized in various jurisdictions. Reliance has been placed, for this purpose, on the judgment of the Supreme Court of the UK in ***Unwired Planet International Ltd. v. Huawei Technologies (UK) Company Ltd***[3]**.** which, in turn, placed reliance on the decision of the European Court of Justice in ***Huawei Technologies Co. Ltd. v. ZTE Corp.*** [4]

24. In fact, contends Oppo, any restraint against a licensee from challenging the validity of the licensed patent, if contained in the license agreement, would actually be illegal and void, in view of Section 140(1)(iii)(d) of the Patents Act. Taking of a license for permission to use a particular patent does not, therefore, estop the licensee from contesting the validity of the patent. Oppo further contends that, if the negotiations with Nokia, after the execution of the

---

[3] **2020 UK SC 37**

[4] **[2015] 5 CMLR 14**

first FRAND license agreement, did not fructify in any second agreement, that was because Nokia was unable to satisfy Oppo regarding the technical queries raised by it. Without prejudice to this submission, Oppo also seek to point out that, during the pre-suit negotiations, with Nokia, Nokia provided merely a few claim charts, which were insufficient to represent its entire portfolio. Inasmuch as, after corresponding with Oppo for this entire portfolio, Nokia had chosen to limit its claim, in the suit, to three patents, Oppo asserted its right to contest the validity of the said patents.

25. The third limb of the challenge, by Oppo, to Nokia's application, is with respect to the affidavit of Mr. Patrik Hammaren. Oppo emphasized that, in the affidavit, Mr. Hammaren himself acknowledges that his calculations were based on assumptions and presumptions and not on actual data. In any event, submits Oppo, no direction for deposit of money under Order XXXIX Rule 10 of the CPC can be made on the basis of such affidavit. No interim arrangement, submits Oppo, can be put in place under Order XXXIX Rule 10 , unless Nokia is able to *prima facie* establish its case.

26. Entertainment of such an application, submits Oppo, would be fraught with the danger of every patent holder, who files a suit alleging infringement of patents, seeking interim deposits for securing its possible claims of future infringement even prior to an interlocutory adjudication of the claims. This would amount to coercing the defendant to make payment, without even a *prima facie* determination.

27. Besides this, Oppo has also contested the claim of Nokia that, if interim deposit is not directed under Order XXXIX Rule 10 of the CPC, the plaintiff's rights may not be secured. Oppo has sought to emphasize its solvency by pointing out, *inter alia*, that it has recently opened a 5G innovation centre at Hyderabad and has multiple offices and manufacturing units across India which includes a 110 acre campus valued at approximately ₹ 190 crores, employing 10,000 Indians. India, emphasises Oppo, is the main market for it and there is, therefore, no chance of Oppo surrendering or placing its assets outside the jurisdiction of this Court.

28. Oppo has, to corroborate its submissions, relied on an affidavit dated August 2021 by Ming Li who is Senior IP Counsel of Oppo.

Rival Submissions

29. Detailed arguments were advanced by both sides over several dates. Mr. Gaurab Banerjee, learned Senior Counsel, argued on behalf of Nokia while Mr. Saikrishna Rajagopal, learned Counsel, argued on behalf of Oppo.

30. Comprehensive written submissions have also been placed on record by both sides, summarizing their contentions at the Bar.

31. It would be worthwhile, for the sake of precision, to enumerate the submissions advanced by both sides.

<u>Submissions of Nokia</u>

32. Nokia submits as under:

(i) For using Nokia's 2G, 3G and 4G SEPs during the period # #### #### to ## #### ####, Oppo has paid Nokia, under the first FRAND license agreement, approximately US$ *****, consequent to negotiations which spanned nearly ##### years.

(ii) Oppo was continuing to sell several of the same 2G, 3G, 4G and 5G enabled devices, which were being sold by them during the aforesaid licensed period. They have, thereafter, launched further devices which are also 3G and 4G, and in most cases, 5G enabled.

(iii) Nokia's offer, during its pre-suit negotiations with Oppo, for a second FRAND license agreement, also covered Nokia's portfolio of 5G SEPs.

(iv) Nokia had based its claim, in its prayer for deposit, in its application, by calculating the amount on the basis of assertions in the affidavit dated 1^{st} July 2021 of Mr. Patrik Hammaren. Applying the said calculation, for the period upto 31^{st} December 2022, Oppo would be required to secure Nokia by depositing € *****.

(v) Without prejudice to this submission, Nokia submits that Oppo must make a security payment commensurate with at least the license fee paid to Nokia for the first agreement, which is US$ *****.

(vi) Having said that, Nokia submits that the figure of US$ ***** could only be treated as a starting point since, compared with the first FRAND license agreement, the portfolio of Nokia has developed considerably thereafter, and the sales of 2G to

5G mobile devices of Oppo had also increased exponentially. As such, the figure of US$ *****, submits Nokia, is the bare minimum amount which should be directed to be paid at the outset in order to secure Nokia's interests.

(vii) According to Nokia, the pre-suit communications with Oppo clearly contained admissions, by Oppo, that they were liable to pay at least some amount to Nokia. For the use of Nokia's 2G, 3G, 4G and 5G SEPs, Nokia points out that Oppo voluntarily made three counter offers, in which they valued Nokia's portfolio at US$ *****, for which purpose Nokia relies on the assertions in Mr. Patrik Hammaren's affidavit.

(viii) Resultantly, Nokia and Oppo were *ad idem* on the following:

(a) Oppo was required to obtain a license from Nokia for its cellular SEPs.

(b) As on 11th June 2021, Oppo admitted the amount due to Nokia over 36 months between July 2021 to June 2024 to be US$ *****.

(c) For directing deposit under Order XXXIX Rule 10, the Court was entitled to take into account not only admissions contained in pleadings, but also admissions which could be inferred from the conduct and past relationship between the parties. For this purpose, Nokia relies on the judgment of the High Court Bombay in ***Chandrakant Shankarrao Deshmukh v. Haribhau***

***Tukaramji Kathane*[5].**

(ix) The existence of a past license relationship involving payment of license fee was a valid factor, for the purposes of Order XXXIX Rule 10 and, in such circumstances, the Court could, in exercise of the powers conferred by the said provision, require the defendant to deposit at least the license fee as per the said past agreement as an interim measure. For this purpose, Nokia relies on ***Sangeeta Prints v. Hemal Prints*[6]**, ***Sanjay Gupta v. Cottage Industries Exposition Ltd*[7]** and ***Green Band Apartments Ltd. v. Mint Matrix*[8].**

(x) Even after the expiry of the first FRAND license agreement, Oppo had, in its e-mail dated 22nd June 2021, addressed to Nokia, admitted the following:

(a) Oppo was willing make interim payments to Nokia w.e.f. 1st July 2021.

(b) The interim payments were not intended to be representative of an assessment of the FRAND rate of royalty. In fact, it was possible that there would be a difference between the interim payments and the negotiated FRAND license fee which could be resolved through additional payments by Oppo or refund by Nokia of the additional amount paid in the interim, as case would be.

---

[5] **1983 MhLJ 88**
[6] **AIR 1986 Bom 423**
[7] **102 DRJ 234**
[8] **2021 SCC OnLine Cal 428**

(c) In subsequent discussions between Mr. Adler Feng of Oppo and Mr. Tiande gong of Nokia, Oppo had agreed to make interim payments on the above lines and on the basis of the license fee of the first agreement, i.e. US$ *****.

(xi) The sole requirement of Order XXXIX Rule 10, for a direction for interim payment to be made thereunder, is an admission by the defendant, explicit or implicit, that money is owed to the plaintiff. Once such an admission exists, Order XXXIX Rule 10 does not envisage adjudication of any other issues, least of all issues involving complex assessments of the merits of the dispute, as may be relevant while dealing with an application for interlocutory relief under Order XXXIX Rules 1 and 2 CPC.

(xii) As such, all ingredients of Order XXXIX Rule 10 stand satisfied in the present case. The admissions of Oppo in the e-mail exchanged with Nokia, demolished Oppo's argument that interim security could be directed to be paid in the present case, under Order XXXIX Rule 10, only after FRAND rates were determined.

(xiii) Oppo was making transparent efforts to hold out, by entering into protracted negotiations with Nokia without entering into any firm commitment. Once again, via e-mail dated 22nd June 2021, Oppo proposed interim payment, to Nokia, of an amount which may, or may not, be commensurate with the ultimate agreed rate, for the period post expiry of the first FRAND licence agreement. This offer was reiterated in the e-mail dated 26th June 2021.

(xiv) The prayer of Nokia, predicated on these admissions by Oppo, was in tune with the well-established principle that determination of interim or *pro tem* security or financial arrangement, in such cases, did not involve determination of FRAND terms or review of comparable licenses of the SEP holder, by the person exploiting the patents.

(xv) It was important to note that, during the negotiations post the first FRAND license agreement, Oppo categorically refused to share its own comparable license agreement on multiple occasions, citing confidentiality concerns. This was an entirely unreasonable attitude, and estopped Oppo from raising any grievance regarding lack of transparency on the part of Nokia with respect to its own license agreements with third parties.

(xvi) Oppo had, therefore,

(a) executed and lived through a #####-#### long license agreement (the first FRAND license agreement) on payment of royalty of US$ *****,

(b) provided three specific counter offers for a second agreement and

(c) agreed to make interim deposits for the period for which they were unlicensed, without requiring Nokia to disclose any third party license agreement.

(xvii) This Court has, in several cases, directed such interim payments, even after itself seeing the comparable license agreement, without disclosing them to the defendant. By way of orders in which such *pro tem* payments had been directed, Nokia has cited order dated 20th September 2010 in ***Koninklijke Philips Electronics NV v. Bhagirathi Electronics***[9], order dated 16th December 2014 by the Division Bench in ***Xiaomi Technology v. Telefonaktiebolagetlm Ericsson(PUBL)***[10], order dated 27th November 2020 read with order dated 3rd June 2021 in ***Koninklijke Philips N.V. v. Xiaomi Inc*** [11] and order dated 17th November 2020 in ***Koninklijke Philips N.V v. Vivo Mobile Communication Co. Ltd***[12],

(xviii) "An order of payment of monies directly to the plaintiff or a deposit made in court under Order XXXIX Rule 10 does not require any admission from the defendant, express or implied, of validity, infringement or essentiality, the FRAND nature of the rates, or any determination of these or other issues on merits, save and except that the money is owed to the plaintiff".

(xix) Oppo, by offering to pay for use of the Nokia's SEP portfolio, admits that the said portfolio contains valid and essential patents.

(xx) Without prejudice, issues of *prima facie* validity, essentiality and FRAND nature of the rates may or may not be relevant for adjudication of an application under Order XXXIX

---

[9] **CS (Comm) 436/2017**
[10] **FAO(OS) 522/2014**
[11] **CS (Comm) 502/2020**

Rules 1 and 2 seeking interlocutory injunction, but are certainly not relevant for the present application, which is under Order XXXIX Rule 10 and is predicated on admission of liability by Oppo.

(xxi) The present application, therefore, is based on admissions by Oppo, and proposes an estimated security amount owed to Nokia. As per affidavit dated 1st July 2021 of Mr. Hammaren, the amount would be approximately € *****.

(xxii) This calculation was based on the rates offered by Nokia in November 2020, using sales data and forecast data supplied to Nokia by reliable, third party sources.

(xxiii) Nokia was, however, as an interim arrangement, willing to accept an interim security payment of a lower amount, pending filing of further evidence in the application under Order XXXIX Rules 1 and 2. It was well enshrined, in international jurisprudence (for which purpose reliance was placed on ***Huawei v. ZTE***[4]) that, even if the offer of the SEP holder was disputed by the defendant, the defendant was obligated to make a security deposit.

(xxiv) In the present case, the necessity of such deposit was underscored by the fact that (a) the current financial health of Oppo was questionable, (b) there were other cases of SEPs before this Court where Oppo had been found not to have the financial strength to meet the damages ultimately awarded, (c) the time required for adjudication of an interim injunction application would result in immense loss of licensing income for Nokia, (d) the absence of any such direction for deposit would encourage other competitors of Oppo and potential licensees of Nokia's SEPs to seek to reproduce Oppo's successful hold out behaviour and (e) in the long run, equities would tilt in favour of Oppo.

(xxv) The claim of Oppo that it had not made any admission of obligation to pay FRAND royalties to Nokia was falsified by the following facts:

(a) Oppo was an ex-licensee of Nokia, which had sold mobile devices compliant with 2G, 3G and 4G standards between # #### #### and ## #### ####, pursuant to the first FRAND license agreement with Nokia.

(b) Oppo had made clear and unequivocal admissions that it was required to take a license from Nokia for its several patents.

(c) Oppo had admitted that the license had a certain value by way of royalty payment.

(d) Oppo proposed to make interim payments while the parties continued discussion to arrive to a mutually agreeable FRAND royalty payment.

(e) Oppo had made at least four counter-offers to the offers of Nokia, of US$ ***** on 9th April 2021, US$ ***** on 24th May 2021, US$ ***** on 11th June 2021 and US$ ***** in November 2021.

(xxvi) The dispute could be analogised to one between a landlord and a tenant in which the tenant disputed the landlord's claim of rent, despite having paid the rent in the past. In such circumstances, the fact that there was no admission regarding the quantum of rent payable was irrelevant and could not impact the Court's jurisdiction to pass appropriate orders for deposit, *ex debito justitiae*, under Section 151, Order XXXIX Rules 1 and 2 or under Order XXXIX Rule 10 of the CPC.

(xxvii) The standard of admission, required for an order under Order XXXIX Rule 10, is less rigorous than that envisaged by Order XII Rule 6 of the CPC, for which purpose reliance has been placed on the judgment of this Court in ***Augmont Gold Pvt. Ltd. v. One97 Communication Ltd.***[13] and ***Rajul Manoj Shah v. Navin Umarshi Shah***[14] . Having admitted that, in order to use Nokia's SEPs, Oppo was required to take a license and that the licence was of considerable value, the value having been quantified by Oppo in its counter-offers, there was sufficient material for the Court to invoke Order XXXIX Rule 10 and direct Oppo to make a deposit.

(xxviii) The application was not restricted to three patents specifically mentioned in the plaint, which was cited merely by way of example. The plaint, rather, covered the entire SEPs portfolio of Nokia. The requirement of deposit, under Order XXXIX Rule 10 related to the subject matter of suit, and not the

[13] **2021 SCC OnLine Del 4484**
[14] **2018 SCC OnLine Bom 8206**

claim ventilated therein.

Submissions of Oppo

33. Oppo's submissions, *per contra*, as under:

(i) The first FRAND licensing agreement dealt only with patents relevant to 2G, 3G and 4G standards and did not cover patents applicable to 5G standards.

(ii) There was no consensus, *ad idem*, between the parties, with respect to the FRAND royalty rates chargeable by Nokia for the portfolio forming subject matter of the present suit, which included its 5G SEPs. That, in fact, was the reason why the present suit came to be instituted in the first place.

(iii) While the suit asserted only the three suit patents IN '352, IN '929 and IN '066, interim deposit was being sought, under the application, to cover the entire patent portfolio of Nokia.

(iv) "Admission", for the purpose of Order XXXIX Rule 10, of the CPC had to be of the nature envisaged by Order XII Rule 6 of the CPC. It had to be clear and unambiguous and such as relieve the opponent of the burden of proof of the fact said to be admitted. In the present case, there was no admission, whatsoever, by Oppo, of Nokia's claims in the suit. Oppo had, in its written statement, challenged the very essentiality and validity of the suit patents, apart from contesting the royalty rate claimed by Nokia as not being FRAND.

(v) By virtue of Section 140(1)(iii)(d) of the Patents Act, the first FRAND license could not estop Oppo from challenging the validity and essentiality of the suit patents, even if they were subject matter of the first FRAND licensing agreement. During the pre-suit communications between Nokia and Oppo, while Nokia shared the claim charts of some of its patents within its 2G-4G portfolio, including IN ’929, Nokia and Oppo agreed, *ad idem*, that some other designated patents including IN ’066 would not be discussed, as they were involved in other litigations.

(vi) Various other communications between Nokia and Oppo indicated that Oppo had concerns even about the essentiality and validity of Nokia’s 2G-4G patents. In this context, the following passages, from communications between the parties, were cited:

(a) ##### #### ## ##### ##### # ##### ####:

“#### ######,

######## ###### #### ##### ######## ### ######## ## ### #######.

#######,
#####”

(b) ##### #### ## ##### ##### ## ##### ####:

“#### ###### ,

#####, # #### ####### ## ### ##

- #### # #### #### # #### ##### (####### ####)/ #### ###### (###), ##### ##, ####

- **####: #####//####.####.###.##/#/ ###########**
  - ####### ##: ###########
  - ########: #####

#####'# ####### ### ######### ### ######### ######## #### ####. ######## ###### #### ### ####### ####### ## # ###### ## ######### ########### ## ### ########. ## ####### #### #### ## ####### ### ######-## ############## ####### ### ######### #####, ########## ########### #### ### ####### #### #### ### ### ##### #### ## ######## ####### ## ### ######### ######.

####### ####### ## ####### #### ###.

#######,
#####"

(c) ##### #### ## ##### ##### # ##### ####:

"#### ######,

######## ###### #### #####'# ######## ### ######## ## ### #####'# ############## #######.

#######,
#####"

(e) ##### #### ## ##### ##### ## ##### ####:

"#### ######,

#####. ###, ### ######## ### ##### ## # ######## ## ### ####### ### #### ## ### #### ######. ###### #### ##### ## # ###### #### ## ##### ###### ## ##########, ### #### ## ### #### # ########## ## ###### ### #####'# ### ####### ###

****

##, ####, ### #### ####### #### ## ######### ###### ### #, ####. ## ####### #### ### ####### #### ####### ### #######'# ##### ######### #### #### ######## #####. ########### #### #### ## ### ##### ###### ####### ####### ####### ### ####### ########## ## ### ######### #####, ##

#########, ### ####### ####### ### ############ ##### ####### #### ### #### # #### ### ##### ####.

#######,
#####"

(f) ##### #### ## ##### ##### # #### ####:

"#### ######,

#####.

######, ## ####### ######### # ##### ####### ####### #### ### ######## ######### ## ## ######## ## #####. ######## ##### ## #### ### ### #### ###### ### ###### ## ### #### #########, ####'# #### ##### ####### # #### ###### ## #### ## ########## ## #####'# ####### #######, ## ## ### ##### # ######## ## ######## ### #### #### #### ## ### #### ##### ######## ####### #### #### ##### ######## ## ### ##### #### #### ## ####### ## #### ### ########.

*****

######.

#######,
#####"

(vii) There were certain patents, such as IN '929, for which royalty at FRAND rate had already been paid by Oppo till ## #### #### based on the first FRAND license agreement. Nokia could not seek further payment for the said patent merely on the ground that it was also relevant to 5G standards. In other words, there was no justification for Nokia to seek additional royalty for exploitation of the same patent by Oppo, merely because the patent was also relevant to 5G standards. Oppo had, in its emails dated 17th June 2021, 18th June 2021 and 28th June 2021 to Nokia, clearly disputed the royalty rates claimed by Nokia as not being FRAND. Nokia had worked out the amount that it was claiming from Oppo, in the application, on the basis of the affidavit of Mr. Patrik Hammaren, which was predicated on the same rate that Oppo had opposed.

(viii) Despite acknowledging, in the following passage from its email dated 18th June 2021, that third party agreements were relevant for resolving the valuation dispute with Oppo, interim deposit was being sought without disclosing such third party agreements. Reference to third party agreements was indispensable for FRAND rate fixation.

(ix) As per the protocol which must be followed in all cases of SEP infringement, the Court is first required to examine whether the asserted patents are SEPs; secondly, whether the defendant is exploiting the said SEPs and, thereby, infringing them; thirdly, whether the plaintiff is willing to license the SEPs on royalty to willing licensees; and, fourthly, whether the royalty fee claimed by the plaintiff is FRAND. As such, the Court could not directly proceed to the issue of FRAND rate of royalty without, in the first instance, deciding the first three issues, which require a trial, especially where they were disputed by the defendant as in the present case.

(x) The pre-suit offers by Oppo were made in good faith, so as to avoid a litigative exercise. Once Nokia had chosen to initiate litigation with respect to the suit patents, these offers lost meaning. Oppo, consequent on the initiation of such litigation by Nokia, was entitled to challenge Nokia's suit on all grounds including validity and essentiality of the suit patents and the aspect of infringement, apart from whether the rate of royalty claimed by Nokia was FRAND.

(xi) Allowing the prayer of Nokia in the present case would set an extremely dangerous precedent by which, merely on filing a suit, a defendant could be mulcted with the liability to make interim payment even before the Court is able to arrive at a *prima facie* conclusion regarding validity and essentiality of the patent, the aspect of infringement and whether the royalty rate claimed by the plaintiff is, or is not, FRAND.

(xii) The financial state of health of Oppo was a consideration completely alien to Order XXXIX Rule 10 of the CPC. Despite this, Oppo asserted that it was solvent and was financially well placed.

(xiii) Decisions relating to tenancy and rates of rent were completely irrelevant, where the issue involved was royalty rates, which were required to be FRAND and on the basis of which an SEP holder could license its SEPs.

(xiv) Most of the cases cited by Nokia, in which *pro tem* orders were passed, directing interim deposit to be made, were consent orders. There is hardly any instance in which, on merits, the Court has directed *pro tem* payment even before ascertaining the basic aspects of essentiality, validity and infringement of the patent, even at a *prima facie* level.

Analysis

Certain preliminary observations

34. Though copious submissions, as noted above, were advanced at the Bar in the present application, I am of the opinion that it is not necessary, for the purposes to the present application, to enter in detail into the said submissions. With due respect to the eminence of learned Counsel who represented Nokia, I am unable to concur with the manner in which learned Counsel seek to interpret Order XXXIX Rule 10 of the CPC.

35. Before, however, adverting to Order XXXIX Rule 10 of the CPC and what, in my opinion, is the actual scope and effect, I deem it appropriate to deal with the reliance, by Nokia, on Section 151, as that is one of the provisions which has been invoked in the application under consideration.

Invocation of Section 151

36. It is a matter of standard practice that interlocutory applications, irrespective of the main provision of the CPC under which they are filed, invariably also invoke Section 151 of the CPC. In most such cases, Section 151 is invoked as a fall-back clause, to cater to a situation in which the relief sought cannot be granted under the main provision of the CPC that the application invokes. In my considered opinion, this is an erroneous practice, which should not be either encouraged or followed. Section 151 is not to be treated as an *akshaya patra*[15], into which one dips when there is no provision of the

[15] The inexhaustible vessel stated, in the *Mahabharata*, to have been given to Pandava King Yudhishtira by

CPC under which the relief sought can be obtained. It is a provision engrafted *ex debito justitiae*, which is meant to be used only where expedient orders are required in the interests of justice. It cannot trump the specific provisions of the CPC, or be used as an avenue to obtain relief which the other provisions of the CPC do not envisage. One of the most recent pronouncements of the Supreme Court, in this regard, is ***My Palace Mutually Aided Co-Operative Society v. B. Mahesh***[16]**,** from which the following passages may be usefully extracted:

> **"26.** Section 151 of the CPC provides for Civil Courts to invoke their inherent jurisdiction and utilize the same to meet the ends of justice or to prevent abuse of process. Although such a provision is worded broadly, *this Court has tempered the provision to limit its ambit to only those circumstances where certain procedural gaps exist, to ensure that substantive justice is not obliterated by hyper technicalities.* As far back as in 1961, this Court in ***Padam Sen* v. *State of U.P***[17], observed as under:
>
> > "8. …The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that *the inherent power is not to be exercised in a manner which will be <u>contrary to or different from</u> the procedure expressly provided in the Code."*
>
> (emphasis supplied)
>
> *****
>
> **28.** *Section 151 of the CPC can only be applicable if there is no alternate remedy available in accordance with the existing provisions of law. Such inherent power cannot override statutory prohibitions or create remedies which are not contemplated under the Code.* Section 151 cannot be invoked as an alternative to filing fresh suits, appeals, revisions, or reviews. A party cannot find

---

Lord Surya, which could provide a never-ending supply of food to the Pandavas.

[16] **2022 SCCOnLine 1063**

[17] **AIR 1961 SC 218**

solace in Section 151 to allege and rectify historic wrongs *and bypass procedural safeguards inbuilt in the CPC*".

(Italics and underscoring supplied)

37. To the same, or cognate, effect, are the following passages from other decisions on the point, which highlight the legal position that Section 151 cannot be used as a residuary clause, to seek reliefs which the CPC does not contemplate. In ***Nain Singh v. Koonwarjee***[18] and ***K.K. Velusamy v. N. Palanisamy***[19] the Supreme Court held thus under:

Nain Singh[18]

"4. The High Court, in our opinion, erred in holding that the correctness of the remand order was open to review by it. The order in question was made under rule 23, Order 41, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not appealed against, its correctness was no more open to examination in view of Section 105(2) of the Code which lays down that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness. The High Court has misconceived the scope of its inherent powers. *Under the inherent power of courts recognised by Section 151, Civil Procedure Code, a court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same.* Further the power under Section 151 of the Code cannot be exercised as an appellate power."

(Emphasis supplied)

K.K. Velusamy [19]

"12. The Respondent contended that Section 151 cannot be used for re-opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely

---

[18] **(1970) 1 SCC 732**

[19] **(2011) 11 SCC 275**

invoked for reopening evidence or recalling witnesses. The scope of Section 151 has been explained by this Court in several decisions (See: ***Padam Sen v. State of UP***[17]; ***Manoharlal Chopra v. Seth Hiralal***[20] ***Arjun Singh v. Mohindra Kumar***[21]; ***Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhay Lal***[22]; ***Nain Singh v. Koonwarjee***[18]; ***The Newabganj Sugar Mills Co. Ltd. v. Union of India***[23]; ***Jaipur Mineral Development Syndicate v. Commissioner of Income Tax, New Delhi***:[24]; ***National Institute of Mental Health and Neuro Sciences v. C Parameshwara***[25]; and ***Vinod Seth v. Devinder Bajaj*** [26] We may summarize them as follows:

> (a) *Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts*. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.
>
> (b) As the provisions of the Code are not exhaustive, Section 151 recognizes and confirms that *if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it*. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.
>
> (c) *A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.*
>
> (d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code *when the matter is not covered by*

---

[20] **AIR 1962 SC 527**
[21] **AIR 1964 SC 993**
[22] **AIR 1966 SC 1899**
[23] **AIR 1976 SC 1152**
[24] **AIR 1977 SC 1348**
[25] **2005 (2) SCC 256**
[26] **2010 (8) SCC 1**

any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) *While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.*

(f) *The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter*, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court."

(Emphasis supplied)

38. The amplitude and sweep of the CPC must not be forgotten while invoking Section 151. The CPC contains a wide variety of provisions which ensure that, where the interests of justice so require, a party secures not only final but also interlocutory remedies. The legislature must be deemed to have taken into consideration every possible circumstance in which relief would be required to be granted, while engrafting the provisions in the CPC, even if the CPC cannot be regarded as "exhaustive" in the classical sense. The Court must not lightly presume that there are exigencies which the CPC does not contemplate and which, therefore, would require invocation of Section 151 in order for complete justice to be done.

39. Even while, therefore, invoking Section 151for granting relief in a manner for which the CPC does not otherwise provide, the Court must remain acutely conscious of the scope of the provision. The Court cannot, therefore, first decide to grant relief and, thereafter, on finding no provision under which the CPC so permits, fall back on Section 151. The correct manner of invocation of Section 151 would, therefore, be for the Court to, in the first instance, decide whether the grant of the relief sought is *proscribed* by any provision of the CPC. If it is, Section 151 cannot be invoked. If, on the other hand, there is no such proscription, the Court may invoke Section 151, but, while doing so, the Court has to balance the considerations of the entitlement to the relief sought, keeping in mind the consideration of dispensation of substantive justice, vis-à-vis the power to grant such relief within the four corners of the CPC.

40. There may, of course, be exceptional cases where grant of relief is necessary *ex debito justitiae* and, in the absence of any other provision in the CPC, Section 151 has to be invoked. All that is required of the Court is, therefore, care and circumspection in that regard.

41. Insofar as interlocutory reliefs are concerned, the CPC contains various provisions, including Order XXXVIII Rule 5[27], Order XXXIX Rules 1 and 2[28] and Order XXXIX Rule 10.

---

[27] **5. Where defendant may be called upon to furnish security for production of property** –
(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him –
(a) is about to dispose of the whole or any part of his property, or
(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,
the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.
(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.
(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

[28] **1. Cases in which temporary injunction may be granted.** – Where in any suit it is proved by affidavit or otherwise –
(a) that any property in dispute in a suit is in danger of being wasted, damaged or

42. The present application invokes Order XXXIX Rule 10. The mere fact that the application states that it has been filed under Order XXXIX Rule 10 read with Section 151 of CPC, does not persuade me to examine this application on a canvass larger than that on which Order XXXIX Rule 10 operates.

43. I intend, therefore, to examine the present application on the basis of Order XXXIX Rule 10, and not outside the said provision. I may note, here, that though Section 151 CPC has been invoked in the heading of the application, arguments before me were essentially predicated on the basis of Order XXXIX Rule 10. The submissions of Mr. Gourab Banerjee, learned Senior Counsel for the plaintiff, were based on the premise that interim deposit, as sought by the plaintiff, could be directed by this Court Order XXXIX Rule 10 of the CPC.

Order XXXIX Rule 10 of the CPC

44. I may note, here, at the outset – and this is a common feature of most patent litigations especially involving telecommunication patents which have a worldwide impact – that a great deal of emphasis is placed, by the plaintiff-patent holder on the financial stakes involved.

---

alienated by any party to the suit, or wrongfully sold in execution of a decree, or
(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,
(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders.

2. **Injunction to restrain repetition or continuance of breach**. –
(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.
(2) The Court may by order grant such injunction, on such terms as to the duration of the

To my mind, the Court, while requiring to remain conscious of the stakes, cannot allow it to unduly impact its decision. A plaintiff who sues for a thousand rupees is entitled to the same courtesy, from the Court, as one who sues for a thousand million. The law does not differentiate between the two. More often than not, the plaintiff in the first case may be more impacted by the outcome of his suit than the latter.

45. That said, there is, as has been judicially recognized on multiple occasions, an element of urgency in intellectual property disputes. That element of urgency, however, arises from the very nature of the property in dispute, and its "intellectual" component, which requires the Court to ensure putting in place, if not final, at least interlocutory arrangements, with all due expedition, in order to ensure that continued infringement or passing off does not take place, and intellectual property is protected. Where, however, the CPC provides for such interim arrangements, and prescribes the conditions to be fulfilled for such an arrangement to be directed, satisfaction of the conditions is the *sine qua non* for any interim direction to be issued. The element of urgency that governs IP litigation cannot, therefore, extend to issuing directions to the defendant to make deposit in the Court, unless a clear case of possibility of any ultimate decree that may come to be passed being frustrated in the event no such direction for deposit is passed, exists; in which case the provision which would apply would be Order XXXVIII Rule 5, and not Order XXXIX Rule 10.

46. To cut a long story short, in the present case, if the plaintiff is

injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

able to make out a case for deposit within the four corners of Order XXXIX Rule 10, he would be entitled to relief as sought in the application; else, he would not.

47. For this, therefore, it is necessary, at the outset, to understand the scope and sweep of Order XXXIX Rule 10 of the CPC.

48. Order XXXIX Rule 10 of the CPC applies to a situation in which "the subject matter of a suit is money or some other thing capable of delivery". Where the subject matter of the suit conforms to this requirement, Order XXXIX Rule 10 further requires, for the provision to apply, *admission*, by one or the other party to the suit. The admission must be either that (i) such party holds the money or other thing as a trustee for the other party, or (ii) such money or other thing belongs to the other party or (iii) such money or other thing is due to the other party.

49. The averments in the present application by the Nokia do not plead the existence of either exigency (i) or exigency (ii). In other words, the application does not aver that Oppo admits holding money or another thing as a trustee for Nokia or that Oppo avers that the money or other thing held by it belongs to Nokia. The application is predicated on the basis of exigency (iii). What Nokia seeks to assert, therefore, is that the material on which it relies amounts to an admission, by Oppo, that it holds money which is due to Nokia.

50. Once the afore-noted two ingredients of Order XXXIX Rule 10 are satisfied, the provision proceeds to deal with the nature of the order that the Court may pass. It stipulates that, in such circumstances, the Court "*may* order *the same* to be deposited in the court", or to be delivered to the other party, with, or without security. The use of the word "the same" indicates that what may be directed to be deposited in Court or paid to the opposite party, is only the money or other thing which is held by one party and admitted to be due to the other party. In other words, if one of the party holds ₹ x and admits that ₹ x is due to the other party, the Court may, under Order XXXIX Rule 10, direct ₹ x to be deposited in Court or paid to the other party. The power of the Court Order XXXIX Rule 10 does not extend to directing payment either of ₹ x + y or ₹ x – y. The submission of Nokia that Order XXXIX Rule 10 merely requires admission of liability, and not of the quantum of liability, therefore, militates against the very wording of the provision.

51. Order XXXIX Rule 10 does, however, extend to the Court directing the other party to furnish security against the deposit or payment of such amount. The aspect of security, however, does not arise for consideration in the present case.

<u>Judicial decisions on Order XXXIX Rule 10</u>

52. There is no judgment of the Supreme Court which enlightens on the scope and ambit of Order XXXIX Rule 10 of the CPC. Mr. Banerjee cited ***Karan Kapoor v. Madhuri Kumar***[29]. Though the said decision refers to the appellant Karan Kapoor having filed applications, before the learned District Court under Order XII Rule 6 and Order XXXIX Rule 10 of the CPC, the Supreme Court has examined the matter only with respect to Order XII Rule 6. The

---

[29] **2022 SCC OnLine SC 791**

decision, therefore, does not throw any real light on Order XXXIX Rule 10, or its scope and effect.

53. The sole other decision which refers, to any extent, to Order XXXIX Rule 10 is ***S.D.S. Shipping (P) Ltd. v. Jay Containers Services Co. (P) Ltd.***[30], which, too, however, cannot, with great respect, said to be of much help. The proceedings in that case arose out of a suit instituted by the respondent Jay Container Services ("JCS" hereinafter) before the High Court of Bombay, in which the appellant SDS Shipping Pvt. Ltd. ("SDS" hereinafter) was Defendant 1. JCS had leased certain containers to SDS. Despite expiry of the lease period, the containers were not returned. JCS, therefore, sued SDS for a sum of ₹ 16113173.14, representing the claim for non-return of the containers as well as for outstanding rental. JCS also filed an application for a direction to SDS to deposit ₹ 81,77,632.50 representing arrears of rental along with a direction to deposit rent on a monthly basis. The application was rejected by a learned Single Judge of the High Court, who held that the case did not justify invocation of Order XII Rule 6 of the CPC. The Division Bench of the High Court, however, reversed the said decision and directed SDS to deposit ₹ 82,00,000/- within twelve weeks. Aggrieved, SDS appealed to the Supreme Court.

54. SDS contended, before the Supreme Court, that the Division Bench had impliedly affirmed the view of the learned Single Judge that Order XII Rule 6 of the CPC did not apply in the facts of the case. Nonetheless, the direction for deposit appeared to have been passed under Order XXXIX Rule 10. [This may be discerned from the submissions of learned Senior Counsel for SDS (as he then was), as cited in para 7 of the report]. SDS contended, before the Supreme Court, that, having ruled out the application of Order XII Rule 6, it was not open to the learned Division Bench to invoke Order XXXIX Rule 10, which operated in an entirely different background. The Supreme Court disposed of the matter thus (in paras 11 to 14 of the report):

> "**11.** A few facts of relevance need to be noted in view of the rival stands. Undisputedly, the order impugned is an interim order. The direction is for deposit and no liberty has been granted to the plaintiff for withdrawal after the deposit. As noted *supra*, there was no serious dispute relating to the claim for arrears of rentals. Admittedly, ninety-two containers were leased out by the plaintiff to Defendant 1 according to whom some of the containers were not traceable and were lost. We may add here that subsequent to the filing of the suit, it was contended that all the ninety-two vessels were lost.
>
> **12.** In view of the factual scenario unfolded above, it does not appear to be a case where interference under Article 136 of the Constitution is called for. That power is exercised only on showing substantial injustice, and not for merely technical flaws in a proceeding. (See ***Shahoodul Haque* v. *Registrar, Coop. Societies, Bihar*** [31]) The position was illuminatingly stated in ***Rashpal Malhotra v. Satya Rajput*** [32]. This Court in ***Heavy Engg. Corpn. Ltd.* v. *K. Singh and Co*.**[33] expressed the opinion that although the powers of this Court were wide under Article 136, it could not be urged that because leave had been granted the Court must always in every case deal with the merits, even though it was satisfied that the ends of justice did not justify its interference in a given case. It is not as if, in an appeal with leave under Article 136, this Court was bound to decide the question if on facts at the later hearing the Court felt that the ends of justice did not make it necessary to decide the point. Similarly in ***Baigana* v. *Dy. Collector of Consolidation***[34] it was held that this Court was more than a court of appeal. It exercises power only when there is supreme need. It is not the fifth court of appeal, but the final court of the nation. Therefore, even if legal flaws might be electronically detected, it may not interfere save manifest injustice or substantial question of public importance.
>
> **13.** In ***Taherakhatoon* v. *Salambin Mohammad***[35] it was noted

---

[30] **(2003) 9 SCC 439**
[31] **(1975) 3 SCC 108**
[32] **1987) 4 SCC 391**
[33] **AIR 1977 SC 2031**
[34] **(1978) 3 SCR 509**
[35] **(1999) 2 SCC 635**

that even in cases where leave has been granted, the Court might after declaring the correct legal position decline to interfere saying that it would not exercise discretion to decide the case on merits and that it would decide on the basis of the equitable considerations in the facts and circumstances of the case and mould the final order.

14. Even if it is accepted for the sake of arguments that there was some faulty conclusion in law, the impugned order being an interim one, we do not consider this to be a fit case for interference in exercise of jurisdiction under Article 136. But, taking note of the peculiar facts, the ends of justice would be best served if the appellant is directed to deposit rupees fifty lakhs instead of rupees eighty-two lakhs by the end of June 2003."

55. Thus, the decision of the Supreme Court was predicated on the premise that, being a challenge to an interim order, the case did not justify invocation of Article 136 of the Constitution of India. There was, thus, no discussion on merits, on the application of Order XXXIX Rule 10 or as to whether the judgment of the Division Bench of the High Court was in tandem with the said provision.

56. A learned Single Judge of the High Court of Madhya Pradesh has, in ***Balkrishna Agrawal v. Central Bank of India***[36]**,** observed that, while the admission envisaged by Order XXXIX Rule 10 of the CPC is "of the kind which should be akin to the admission of a claim entitling the Court to pronounce judgment in terms of Rule 6 of Order XII", Order XXXIX Rule 10 is, in its scope, admittedly narrower than Order XII Rule 6. I respectfully concur with this view.

57. There can, therefore, be no doubt about the fact that the scope of Order XXXIX Rule 10 is, in any case, not wider than that of Order XII Rule 6. One may, therefore, profitably refer to certain decisions which set out the principles governing Order XII Rule 6, and delineate

---

[36] **ILR 1984 MP 50**

its peripheries.

58. ***Karan Kapoor***[29], as already noted, does not throw much light on Order XXXIX Rule 10, but is instructive with respect to Order XII Rule 6. Paras 16 and 17 of the report in the said case read thus:

> "16. Thus, the scheme of Order XII Rule 1 prescribes that any party to a suit may give notice, by his pleading, or otherwise in writing that he admits the truth of whole or any part of the case to other party. As per Rule 2 of Order XII notice to admit the documents may be given by either party to the other party within the specified time for admission of a document and in case of refusal or admission of the document after the notice, the cost of proving such document shall be borne by the party who neglects or refuse, which shall be based on the discretion of the Court. Rule 2A enables the deemed admission if after notice the document has not been denied. The said notice is required to be given in Form No. 9 of Appendix 'C' of CPC. Rule 3A confers overriding powers to the Court, that even in absence of a notice to admit a document under Rule 2, the Court may record such admission on its own motion or by calling upon a party. The Court also have a power to record whether the party admits or refuses or neglect to admit such document. Rule 4 of Order XII relates to notice to admit the facts. Any party may by a notice in writing at any time not later than 9 days before the day fixed for the hearing, call upon any other party to admit for the purposes of suit only, any specific fact or facts, mentioned in such notice that is required to be answered within a specified time or within such further time as directed by the Court in case of refusal or neglect to admit the same, the cost of proving such fact or facts be paid by the parties as directed. By adding a proviso, it was made clear that the admission, if any, made in a proceeding would be relating to the same proceeding not for any other proceedings. The notice under Rule 4 is required to be given in Form No. 10 of Appendix 'C' of CPC as prescribed in Rule 5. Rule 6 confers discretionary power to a Court who 'may' at any stage of the suit or suits on the application of any party or in its own motion and without waiting for determination of any other question between the parties makes such order or gives such judgment as it may think fit having regard to such admission.
>
> 17. Thus, legislative intent is clear by using the word 'may' and 'as it may think fit' to the nature of admission. The said power is discretionary which should be only exercised when specific, clear and categorical admission of facts and documents are on record, otherwise the Court can refuse to invoke the power of Order XII Rule 6. The said provision has been brought with intent that if admission of facts raised by one side is admitted by other, and the

Court is satisfied to the nature of admission, then the parties are not compelled for full-fledged trial and the judgment and order can be directed without taking any evidence. Therefore, to save the time and money of the Court and respective parties, the said provision has been brought in the statute. As per above discussion, it is clear that to pass a judgment on admission, the Court if thinks fit may pass an order at any stage of the suit. In case the judgment is pronounced by the Court a decree be drawn accordingly and parties to the case is not required to go for trial."

59. The scope of Order XII Rule 6 has also been examined in the following passages from ***Hari Steel & General Industries Ltd. v. Daljit Singh***[37]:

> "**25.** In the judgment in ***Himani Alloys Ltd.* v. *Tata Steel Ltd***[38]**.** , nature and scope of Order 12 Rule 6 has been considered by this Court. In the aforesaid judgment this Court has held that the discretion conferred under Order 12 Rule 6 CPC is to be exercised judiciously, keeping in mind that a judgment on admission is a judgment without trial which permanently denies any remedy to the defendant. Para 11 of the judgment read as under : (SCC pp. 276-77)
>
>> "*11.* 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 12 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.* (See also ***Uttam Singh Duggal & Co. Ltd.* v. *United Bank of India***[39] , ***Karam Kapahi* v. *Lal Chand Public Charitable Trust***[40] and ***Jeevan Diesels & Electricals Ltd.* v. *Jasbir Singh Chadha***[41] . There is no such admission in this case."

---

[37] **(2019) 20 SCC 425**
[38] **(2011) 15 SCC 273**
[39] **(2000) 7 SCC 120**
[40] **(2010) 4 SCC 753**
[41] **(2010) 6 SCC 601**

26. In the judgment in ***S.M. Asif* v. *Virender Kumar Bajaj***[42], this Court has held that the power under Order 12 Rule 6 CPC is discretionary and cannot be claimed as a right. It is further held in the aforesaid case that *where the defendants have raised objections, which go to the root of the case, it would not be appropriate to exercise discretion under Order 12 Rule 6 CPC*. Para 8 of the judgment read as under : (SCC p. 291)

> "*8. The words in Order 12 Rule 6 CPC "may" and "make such order …" show that the power under Order 12 Rule 6 CPC is discretionary and cannot be claimed as a matter of right.* Judgment on admission is not a matter of right and rather is a matter of discretion of the court. *Where the defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion under Order 12 Rule 6 CPC. The said rule is an enabling provision which confers discretion on the court in delivering a quick judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim*."

27. In the judgment in ***Balraj Taneja* v. *Sunil Madan* [*Balraj Taneja* v. *Sunil Madan***[43] , while considering the scope of Order 8 Rule 10 and Order 12 Rule 6 CPC, this Court has held that the court is not to act blindly upon the admission of a fact made by the defendant in the written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court.

28. In the aforesaid judgment, while considering the scope of Order 12 Rule 6 CPC, post amendment by amending Act, 1976 this Court has held as under : (***Balraj Taneja***[43], SCC p. 408, paras 21-23)

> "*21*. There is yet another provision under which it is possible for the court to pronounce judgment on admission. This is contained in Rule 6 of Order 12 which provides as under:
>
>> '**6.** ***Judgment on admissions***.—(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or

[42] **(2015) 9 SCC 287**
[43] **(1999) 8 SCC 396**

> give such judgment as it may think fit, having regard to such admissions.
>
> (2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.'

22. This rule was substituted in place of the old rule by the Code of Civil Procedure (Amendment) Act, 1976. The Objects and Reasons for this amendment are given below:

> 'Under Rule 6, where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on the admitted claim. The object of the rule is to enable a party to obtain a speedy judgment at least to the extent of the relief to which, according to the admission of the defendant, the plaintiff is entitled. The rule is wide enough to cover oral admissions. The rule is being amended to clarify that oral admissions are also covered by the rule.'

23. Under this rule, the court can, at an interlocutory stage of the proceedings, pass a judgment on the basis of admissions made by the defendant. But *before the court can act upon the admission, it has to be shown that the admission is unequivocal, clear and positive*. This rule empowers the court to pass judgment and decree in respect of admitted claims pending adjudication of the disputed claims in the suit."

(Emphasis supplied)

60. The decision in ***Himani Alloys Ltd. v. Tata Steel Ltd***[38] advocates care and caution while passing a decree on admissions under Order XII Rule 6. The justification for the said note of caution is that the suit would be finally decided without a trial, if Order XII Rule 6 were to be invoked. The outcome of invocation of Order XII Rule 6 being, thus, drastic, the decision in ***Himani Alloys***[38] calls for circumspection while applying the provision.

61. That justification may not apply to Order XXXIX Rule 10, as a decision under Order XXXIX Rule 10 does not either decree the suit or bring the suit proceedings to an end. Even so, an "admission", which would justify a direction for deposit under Order XXXIX Rule 10, has to be an admission which would at least justify a decree on admission under Order XII Rule 6. The scope of "admission" in Order XII Rule 6 and Order XXXIX Rule 10 is, therefore, similar.

62. This would also flow from the basic principle that, where the legislature uses an expression in two provisions of the same statute, then, unless a contrary intent is apparent, the word has to be ascribed the same meaning at both places.[44]

63. No contrary intent being apparent from the CPC, the word "admission", as employed in Order XXXIX Rule 10 would have to be read analogously to the word "admission" as employed in Order XII Rule 6.

64. Both Order XXXIX Rule 10 and Order XII Rule 6 used the word "may". The use of the expression "may" in Order XII Rule 6 has been interpreted, by the Supreme Court, as indicating that the provision is merely enabling and discretionary in nature and cannot be claimed as a matter of right. The following passage from the judgment of the Supreme Court in ***S.M. Asif v. Virender Kumar Bajaij***[42]**,** elucidates this position:

> "9. The words in Order XII Rule 6 Code of Civil Procedure "may" and "make such order..." show that the power Under Order XII Rule 6 Code of Civil Procedure is discretionary and cannot be claimed as a matter of right. Judgment on admission is not a matter of right and rather is a matter of discretion of the Court. Where the Defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion Under Order XII Rule 6 Code of Civil Procedure. The said rule is an enabling

---

[44] Refer **Raghubans Narain Singh v. The Uttar Pradesh Government, AIR 1967 SC 465**

> provision which confers discretion on the Court in delivering a quick judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim. In the suit for eviction filed by the Respondent-landlord, Appellant-tenant has admitted the relationship of tenancy and the period of lease agreement; but resisted Respondent-Plaintiffs claim by setting up a defence plea of agreement to sale and that he paid an advance of Rs. 82.50 lakhs, which of course is stoutly denied by the Respondent-landlord. The Appellant-Defendant also filed the Suit for Specific Performance, which of course is contested by the Respondent-landlord. When such issues arising between the parties ought to be decided, mere admission of relationship of landlord and tenant cannot be said to be an unequivocal admission to decree the suit Under Order XII Rule 6 Code of Civil Procedure."

65. Where power conferred by a provision is discretionary, there have to be guidelines to guide the exercise of such discretion. If the statutory provision does not set out the guidelines, one has to search for such guidelines from precedents on the point, if any; else the Court would have to discern the guidelines on its own analysis of the provision. Quite obviously, exercise of discretion, whether under Order XII Rule 6 or under Order XXXIX Rule 10, cannot be uncanalised, as that would give rise to arbitrariness.

66. Certain principles which may said to be governing exercise of discretion under Order XII Rule 6 do emanate from judicial decisions on the point. Para 10 of the report in ***Razia Begum v. Sahebzadi Anwar Begum***[45] holds thus:

> "**10.** It is also clear on the words of the statute, quoted above, that the grant of a declaration such as is contemplated by Section 42, is entirely in the discretion of the court. At this stage, it is convenient to deal with the other contention raised on behalf of the appellant, namely, that in view of the unequivocal admission of the plaintiff's claim by the Prince, in his written statement, and repeated as aforesaid in his counter to the application for intervention by the Respondents 1 and 2, no serious controversy now survives. It is suggested that the declarations sought in this

[45] **AIR 1958 SC 886**

case, would be granted as a matter of course. In this connection, our attention was called to the provisions of Rule 6 of Order 12 of the Code of Civil Procedure, which lays down that, upon such admissions as have been made by the Prince in this case, the court would give judgment for the plaintiff. These provisions have got to be read along with Rule 5 of Order 8 of the Code, with particular reference to the *proviso* which is in these terms:—

> "Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

The proviso quoted above, is identical with the proviso to Section 58 of the Evidence Act, which lays down that facts admitted need not be proved. Reading all these provisions together, it is manifest that the court is not bound to grant the declarations prayed for, even though the facts alleged in the plaint, may have been admitted."

(Emphasis supplied)

67. ***Razia Begum***[45] also holds, in the following passages, that Order XII Rule 6 is to be read with the proviso to Order VIII Rule 5 which, in turn, is identical to the proviso to Section 58 of the Indian Evidence Act:

"10. It is also clear on the words of the statute, quoted above, that the grant of a declaration such as is contemplated by section 42, is entirely in the discretion of the court. At this stage it is convenient to deal with the other contention raised on behalf of the appellant, namely, that in view of the unequivocal admission of the plaintiff's claim by the Prince in his written statement and repeated as aforesaid in his counter to the application for intervention by respondents 1 and 2, no serious controversy now survives. It is suggested that the declarations sought in this case would be granted as a matter of course. In this connection, our attention was called to the provisions of r. 6 of O. 12 of the Code of Civil Procedure, which lays down that upon such admissions as have been made by the Prince in this case the court would give judgment for the plaintiff. These provisions have got to be read along with r. 5 of O. 8 of the Code with particular reference to the proviso which is in these terms:

> "Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

The proviso quoted above is identical with the proviso to section 58 of the Indian Evidence Act, which lays down that facts admitted need not be proved. Reading all these provisions together, it is manifest that the court is not bound to grant the declarations prayed for, even though the facts alleged in the plaint may have been admitted. In this connection, the following passage in Anderson's "Actions for Declaratory Judgments", Vol. 1, p. 340, under art. 177, is relevant :-

> "A claim of legal or equitable rights and denial thereof on behalf of an adverse interest or party constitutes a ripe cause for a proceeding, seeking declaratory relief. A declaration of rights is not proper where the defendant seeks to uphold the plaintiffs in such an action. The required element of adverse parties is absent."
>
> "In other words the controversy must be between the plaintiff and the respondent who asserts an interest adverse to the plaintiff. In the absence of such a situation there is no justiciable controversy and the case must be characterized as one asking for an advisory opinion, and as being academic rather than justiciable."..............
>
> "i.e., there must be an actual controversy of justiciable character between parties having adverse interest."

68. It is well settled that the admission, whether for the purposes of Order XII Rule 6 or Order XXXIX Rule 10, has to be clear, unequivocal and incapable of more than one interpretation, as held in ***Daljeet Singh Anand v. Harjinder Singh Anand***[46], *and* ***Vijendra Kumar v. Shailender Kapoor***[47] among others. Where there are disputed questions of fact or law involved, no decree on admission should be passed under Order XII Rule 6[48]. While exercising discretion on whether to pass a decree on admission under Order XII Rule 6, the Court is required to bear in mind interests of justice[49], as well as the legal effect of the admission[50]**.** If vexed questions of fact or law are involved[51]**,** or where the opposite party has raised issues

---

[46] **2008 SCC OnLine Del 301**
[47] **2013 SCC OnLine Del 3460**
[48] **Express Towers P.TD v. Mohan Singh , (2007) 7 DRJ 687 (DB)**
[49] **Manisha Commercial Ltd v. N.R. Dongre, AIR 2000 Delhi 176**
[50] **Makali Engg. Works Pvt. Ltd. v. Dalhousie Properties Ltd., 2006 1 CHN 419 (Calcutta)(DB)**
[51] **Manisha Commercial *ibid***

which go to the root of the matter[52], or where the questions cannot be decided without evidence[53], no decree on admissions can be passed under Order XII Rule 6. While examining whether there is any "admission" as would justify passing a decree on admissions under Order XII Rule 6, the Court is required to read the documents as a whole, and it is not permissible to tear out lines from any document, divorced from the rest of the document, to hold that there is an admission.[54]

69. Having said that, the admission may be oral or in writing, in the pleadings or in any other document including any cognate proceedings.[55]

70. Once the scope of Order XXXIX Rule 10 of the CPC has thus been understood, all that is required is for the Court to examine whether the material, to which the parties have drawn the attention of the Court, make out a case of unequivocal admission, by Oppo, of any particular amount as being payable to Nokia apropos the claims in the present suit.

<u>Material and pleadings relied upon by Nokia</u>

<u>Relevance of experts' affidavits at Order XXXIX stage</u>

71. Both sides relied upon affidavits of "experts", with Nokia relying on an affidavit of Mr. Patrik Hammaren and Oppo relying on an affidavit of Mr. Ming Li. Neither has Oppo admitted the affidavit of Patrik Hammaren, nor has Nokia admitted the affidavit of Ming Li.

---

[52] **S.M. Asif *ibid***
[53] **Parivar Seva Sansthan v. Dr. Veena Kalra, AIR 2000 Delhi 349**
[54] **Vijay Gupta v. Ashok Kumar Gupta, AIR 2007 Delhi 166**
[55] **Delhi Jal Board v. Surendra P. Malik, (104) 2003 DLT 151 (DB)**

For that matter, the competence and expertise of the deponents to the said affidavits have also not been admitted by either side.

72. I do not see how any order can be passed on the basis of such affidavits, which are not admitted by the opposite party. Expert evidence, though given a slightly exalted status under Section 45 of the Evidence Act, is otherwise relevant, only if it is tested in the manner envisaged by the CPC and the Evidence Act. At a pre-trial stage, therefore, I confess my hesitance in relying upon expert evidence, which is not admitted by either party. One may refer, in this context to the following passage from the judgment of the Division Bench of the High Court of Allahabad in ***Balkrishna Das Agarwal v. Radha Devi***[56], which sets out clearly the status of expert evidence:

> "27. In the words of Rogers, an expert in any science, art or trade is one who by practice and observation has become experienced therein. An expert, therefore, really means a person who by reason of his training or experience is qualified to express an opinion whereas an ordinary witness is not competent to do so. *His evidence is only an opinion evidence which is based on his special skill or experience. In view of the language of S. 45, it is necessary that before a person can be characterised as an expert, it is necessary that there must be some material on the record to show that he is one who is skilled in that particular science and is possessed of peculiar knowledge concerning the same. He must have made special study of the subject or acquired special experience therein. Thus before the testimony of a witness becomes admissible, his competency as an expert must be shown, may be, by showing that he was possessed of necessary qualification or that he has acquired special skill therein by experience.* Apart from the question that the report of a handwriting expert may be read in evidence, *what is necessary is that the expert should be subjected to cross-examination because an expert like any other witness is fallible and the real value of his evidence consists in the rightful inferences which he draws from what he has himself observed and not from what he merely surmises.*
>
> 28. Unfortunately in the present case after the report of the Handwriting Experts from either side had been submitted for admission in evidence, a statement was made that their reports may be read in evidence without formal proof. *The question arises*

---

[56] **1988 SCC OnLine All 868**

> *whether such a report can ipso facto become opinion evidence in the case.* It has been urged that even though the reports as a document can be read in evidence but in the absence of the expert appearing as a witness and being subjected to cross-examination, his report alone cannot be treated as evidence much less an opinion evidence. Apart from this even a reading of the report does not disclose that the person who has given the report was really an expert in this particular branch or that he had acquired necessary skill by experience. The letter head on which the report is typed alone will not prove that the person was an expert. There is thus no material on the record to show that the persons who have submitted their reports regarding, the disputed handwriting were qualified as experts within the meaning of Section 45 of the Evidence Act. *In a situation like this, the reports were not at all admissible in evidence and the learned trial Court was certainly in error in placing reliance thereon. The experts' evidence is only a piece of evidence and the weight to be given to it has to be judged along with other evidence as evidence of this nature is ordinarily not conclusive. Such evidence, therefore, cannot be taken as substantive piece of evidence but is there to corroborate the other evidence.*"
>
> (Emphasis supplied)

73. Neither Nokia, nor Oppo can, therefore, at this stage, seek to rely on the affidavits of their respective "experts", *to contest the case of the other side. The affidavit can, nonetheless, be relied upon, even at a prima facie stage, <u>against</u> the party who chooses to place it on record, as a party cannot dispute its own evidence.*

74. With that prefatory background, one may note, thus, the material on which the parties before me rely, in support of their respective stands on the present application:

<u>Material relied upon by Mr. Gourab Banerjee, on behalf of Nokia</u>

(i) Paras 10 and 36 of Oppo's reply to IA 7700/2021, which read thus:

> "10. It is most humbly submitted that the averments of the Plaintiff, in the application under reply, are completely false. The Plaintiff has chosen to misrepresent, what it terms to be the "*First FRAND License Agreement*", as an

admission of the Defendants' requirement to take a license from the Plaintiff for the suit patents.

However, this is not the case, as the Defendants are legally entitled to challenge the essentiality and validity of the suit patents and the said agreement cannot operate as a bar or estoppel against the Defendants in this regard. However, without prejudice to the Defendants' rights and contentions, it is clarified that the defendants are and have always been willing to take a FRAND license from the Plaintiff for the true value of its portfolio, however, the Plaintiff has not been able to substantiate the same, either during pre-suit communications or even after instituting the present action. The specific facts and relevant clauses pertaining to the aforementioned agreement (hereinafter referred to as "the 2018 Agreement") has been specified in the affidavit of Mr. Ming Li which will be filed under sealed cover, subject to the directions of this Hon'ble Court to maintain confidentiality of certain facts and information, which is in the interest of both parties. Further, the validity and essentiality of the suit patents have been disputed by the Defendants in their Reply to I.A. No 7699 of 2021, which is relied upon and not reproduced herein for the sake of brevity.

*****

36. In response to the averments contained in paragraph 12, it submitted that the Defendants are ready to take a license for the Plaintiff's SEPs on FRAND terms, for the true and correct value of the Plaintiff's portfolio. However, as explained to the Plaintiff even during the course of the pre-suit negotiations, the new licensing rate sought by the Plaintiff is unreasonably higher than what was previously agreed to, since it does not reflect the adjustments that are required to be made on account of the expired patents and since the Plaintiff has been unable to substantiate the value of the 5G portfolio included in the offer. Further, the Plaintiff's conduct throughout the course of the pre-suit negotiations has not been in compliance of its FRAND obligations, which is why both parties have been unable to conclude a license agreement. Also, since the Plaintiff has selected 3 suit patents from its portfolio to assert in the present suit, any interim deposits sought ought to be restricted to the said patents and since the suit patents are neither valid nor essential it brings to question the credibility of the Plaintiff's entire portfolio. Regardless, it is clarified that any averments made with respect to non-suit patents are completely irrelevant for the purposes of the present *lis*. Reliance in this regard is placed on the Preliminary Submissions & Objections of the present Reply as well as on the Defendants Reply to I.A. No. 7699 of

2021 the contents of which are not repeated herein for the sake of brevity.”

(ii) para 1 of email dated 22nd June 2021 from Nokia to Oppo, which reads as under:

“#### ### ######### ## ### ######### ############, ## #### #### ## #### ##### #### ## ### ####### ## ##### ### ####### ######### #### #####. ## #### ## ######### ## ##### ## #### ### ###### ####### ## ### #######. ####’# ######### ## ##### ### ###### ####### ##### #### ##### ## #########, ### ### ####### ####### ### ## ### ### ### ######## #### #####, ### ## #### # ### ######### #### ##### ## ####’# ######## ### ##### ######## ### ###, ## ### ####### ### # ##### ###.”

(iii) e-mail dated 27th June 2021 from Nokia to Oppo which reads as under:

“(#####)

######## ### ########### ##########

#####,

#######.

######.

-##### ### ### #### #########. #######, #### # #### ###### ## ### #### ## ####### ## # ##### ####### ####### ## ####### #### ####### ### ######### ### ########### ## ### ###### ## ######### ## ### #### ####### ### ########### #######.

########, # ######### #### #### ####### ##### ### ##### ### #### #### ### ### ######### #### ## ######### ### ########### ##### ## #### #### ######## #### ###### ######## ## ### ########### ########## ## ####### ## ######## ####### ## ### ##### #####’# ## ###### #########

#####. ####'# ### ###### # ########### ####### ##### ## ## #### ##### #### ##### ##### ###### #### ########### ## ### ######### ########### ####### ### #######. ##### ###### ##### #### #### ## ## ### ######### ########### ## #### ##### ### ####### ##### ####### ###### ######### #####.

###########. #### ###### ######## ### #####-####### ######### ## ### ########## ## ##### ## ######### ### # ###### ############# ## ##### #####'# ###### ######### ## ### ### ## #### ######### ## ########## #####. #### ###### ######## ######### ## ########## ########### ## ###### ##### ######### ### ## ###.

########.

-######### ### ##########, ## # #########, ## ## ## ######### ## ##### ## ##, ## ### ### ##### ##### ## ###### ### #####'# ###### #### ## ### ####. #### #### ### #### ## ## ##### ## #### ## #### ##### ######### ## ########### ###### ##########. #########, ####### ## ##### ### #### ########### ## ##### ### ###### ####### ####### ### #######, ########## ### ####.

-##### ## ######### ## #### ## ## ####, # #### #### ####### # ######## ## ######### ####### ######## ## ##### ## ### #### ## #######, ##### ############# ##### ####'# #### ##### ## #### ########## ### # #### ##### ### ####### ####, # #### ####### ####### ## ####### #### ####### ### ### ######## ####### ### ### ## ###. # ###### #### ### ### ########.

#############, # #### ### ####### #### #### ####### ### ### #######.

######"

Signature Not Verified
Digitally Signed By:SUNIL SINGH NEGI
Signing Date:22.11.2022 17:44:08

(iv) counter-offers for (a) US$ *****, made on 9th April 2021, (b) US$ ***** made on 24th May 2021 and (b) US$ ***** made on 11th June 2021.

(v) counter-offer of US$ ***** made vide email dated 5th December 2021, which reads as under:

> "Dear Sir,
>
> We wish to clarify that our client confirms to do the following:
>
> *****
>
> Our client however, wishes to clarify that the above undertaking is being given in the light of applicable German Laws and is in no manner to be construed as an admission of any of Nokia's claims made in any of the multiple jurisdictions that it has chosen to make a claim of infringement— i.e., UK, India, France and Spain.
>
> *****
>
> However, since our client is required to submit a bank guarantee before the German Court on the value of the counter offer given for the SEP holder's global portfolio, our client wished to inform this fact to the Delhi High Court, as it renders I.A. No. 7700/2021 infructuous and our client did not wish to waste the Hon'ble Court's precious time on this issue.
>
> Accordingly, it is clarified that our client is not willing to make any bank guarantees in India, in the light of legal position under Indian laws.
>
> Best Regards,
> Julien"

<u>Documents and pleadings relied upon by Mr. Saikrishna Rajagopal</u>

(i) Prayers (i) and (vii) in para 116 of the plaint filed by Nokia, which read thus:

> "(i) A decree of permanent injunction restraining the Defendants, their associate and group companies, their directors, employees, officers, servants, agents and all others acting for and on their behalf from using, making, selling, distributing, advertising, exporting, importing and offering for sale, or in any other manner, directly or indirectly, dealing in its Oppo A74 5G, Realme X50 Pro 5G, Oppo A53, OnePlus 9 Pro, OnePlus 9R, Realme Narzo 1 0A and Realme X7 Pro 5G or in any product that infringes the subject matter of Indian patents no. 286352, 269929 and 300066, or any of them, or any other patents as the Plaintiff may add in the present proceedings;
>
> *****
>
> (vii) A decree for damages, both compensatory and punitive, as may be ascertained in the present suit to be paid by the Defendants on account of infringement of the Indian patents no. 286352, 269929 and 300066, or any of them, or any other patents as the Plaintiff may add in the present proceedings, and their *mala fide* conduct, payable to the Plaintiff;"

(ii) Para 44 of the rejoinder filed by Nokia to Oppo's reply to the present application, which reads thus:

> "44. There is nothing in the present application which indicates that the Plaintiff seeks to pre-empt or estop the Defendants from challenging the validity, essentiality and infringement of the Plaintiff's suit patents, in the interim or the final stages. In fact, it is a matter of record that the Defendants in their reply to the Plaintiff's interim injunction application have already taken detailed grounds of invalidity, non-essentiality and non-infringement of the suit patents, which application would be adjudicated upon by this Hon'ble Court in due course. The present application has been filed only to avoid grave prejudice which may be caused to the Plaintiff should it remain unsecured for the pendency of the injunction application, while the Defendants continue reaping the rewards of its nonchalant misuse of the Plaintiff's intellectual property."

(iii) para 28 of the said rejoinder of Nokia to Oppo's reply to the present application, reads thus:

> "28. In fact, [redacted] and they are now looking to mislead this Hon'ble Court and to capitalize on the present litigation by using it as a route to get access to the Plaintiff's confidential third party licenses, many of which contain confidential commercial information of the direct competitors of the Defendants, which the Defendants

is likely to use to gain an unfair advantage."

(iv) notice of production dated 23rd August 2021, from Oppo to Nokia, requiring Nokia to provide its third party licence agreements.

(v) para 24 of affidavit dated 2nd September 2021 of Patrik Hammaren,

(vi) the first FRAND license agreement dated 1st July 2018 to the extent it covers thousands of patents, which have not been asserted in the present suit,

(vii) e-mail dated 26th June 2021 from Nokia to Oppo which reads thus:

"#### #####,

#####.

##########, ##### ## ######## ## ##### # #### ###### ## ####### # ######### ## ### ############ ## ### ########## ## ### #####-#### ###### ########. ## ######## ## ### ## ## ########:

- ### ######## ##### ## ######## # ##### ##### ######### ## ######## ### ######## ## ######### ########## ## ### ###### ########. ### #### ## ### ########## ## ## ######### ########### #### ### ######### ## ### #########, ##### ## ########## ##### ### ### ######## ## ### ###### ######## ##########, ### ## # ## ## # ###### ###### ##### #### ### ######## ########## ## ######## ## ## #### ####
- ### ########## ## #### ## #### ### ### ## ### ### ## #### #### ### ######.

- ## ## ######### ## ####### ## ### #########, ### ####### ##### ## #### ### ###### ## ########### ############# ########### ### ##########. ### ########### ######## ## ##### ### ##### ## #### ##### ### ####### ########. ### ########### ######## ##### ###### ## ### ###### ## ### ### ## #### #### ###### ######### ######. ### ########### ####### #### ## ####### ## #### #######. ###### ### ######## ## ### ########### #### #### #### ######### ####### ######## ## ### #### ##### ## ##### ### #### ######### ####### #### # #### ####.

- ####### ##### ## ##### ########## ## ### ###### ###### #########/########### ##### ### ####.

- #### ### ##### ########### #### (####### ### #######) ## ##### ## ####### ## ### ##### ### ##### ## ## ## ### ### ## ## #### #### ### ##### (### ####### ###### #### ## ### #########).

####, ##### ####### ### #### #### ###.

####. ##### #### ### ## ## # ######## ## ##### ########## ### ####### #### ####.

#####. # #### ####### ## #### ############ ####.

######,

#####”

(viii) e-mail dated 27th June 2021 from Oppo to Nokia already reproduced *supra*,

(ix) the following passage from e-mail dated 1st July 2021 from Oppo to Nokia, which suggested decision, by a suitable Court of the FRAND rate of royalty or a solution of interim payments as a professional way to resolve the dispute:

> “#######, # ##### #### ## ####### #### ## ### ###### #### ######## ## ## #####’# ###### ############ ######## ####### ########## ####### ########.
>
> - ##### #### ## # ########. ## ######### ##### #### ## # ######## ## ### ## ####### #### ## # ############ ## # ######### ###, ## ### #### ## ### #########, ### ## ##### ############ #### ###### #####. ##### ## ####### #### ### ########, ########## ## ######## ######### #### ####### ##### ### ## # ####### ## ###### #####’# ####### ## ###### #####’# #### ####### ## ###### # ####### ### ######## #######, ## #### ####### ## ######## #### ########### ## ########## #### ### ##### ########. ## ###### #### ##### ## ########### ## #### ### #### ### #### ### ##### ### #### ####### ## ##### #### ####### ## ### ######## ## #### ######. ####### ######### ##### ####, #### ### ### ######## ### ########### ######## ######### ##### ### ##### ## ########. ## ###### ## ### #### #### ### ##### #### ## ####### ### ######### ### ## ##### ### ## ### ## ### ### ####### ### ########### #### ## ###
>
> - ###########. ##### ######## ####### ########### ## ## ######## ### ### ######### ### ####### ## ### ######### ## ###### ## ### #########. ## ######## ########### ## ####, ##### ### ############ ### ####### ##### ####### ## ### ##### ### #### # ########## ## ######### ######## ######## ### ####### #######. ## ## ########### ### #### ### ######## #### ######## ####### ########## #########. ”

(x) paras 21 to 23 of the rejoinder filed by Nokia to the reply of Oppo to the present application, which read thus:

> "21-23. The contents of the present paragraph are denied as being incorrect and misleading. It is denied that the Plaintiff's request for payment of security is without any basis or that it is grossly disproportionate to its claim in the present suit. It is submitted that while the Plaintiff has asserted three of its SEPs in the present suit, they are representative of its portfolio, which practice is well recognized in such matters in many jurisdictions. It is also submitted that the use of even one patent of the Plaintiff requires the Defendants to take a license from the Plaintiff. The license offered by the Plaintiff to the Defendants is a portfolio license for all its SEPs, which industry practice even as per decisions cited by the Defendants themselves, has been recognized as being FRAND. Moreover, the deposit sought in the present application is to secure the Plaintiff during the time that the Defendants remain unlicensed as well as unrestrained by an order in the interim injunction application. In fact, the security sought in the present application is entirely proportionate to the potential harm to the interests of the Plaintiff, as the loss of licensing income of the Plaintiff is in respect of the entire license fee for its portfolio of SEPs in India and not with respect to a license for just the three suit patents. Accordingly, it is not correct to state that the security sought by the Plaintiff must also be limited to only the suit patents, just because the consequential relief of damages which has been sought in the Plaint has been limited to the suit patents. The use of representative patents cannot be objected to by the Plaintiff, since even the Defendants while executing the First FRAND License Agreement [redacted] It is denied that the Plaintiff is trying to coerce the Defendants in India to submit interim payment or deposits at unjustified or excessive rates. As explained above, the loss of licensing income which would be suffered by the Plaintiff is in respect of the entire license fee for its portfolio of SEPs and not with respect to a license for just the three suit patents. Accordingly, it is not correct to state that the security sought by the Plaintiff or the rates applied for the calculation thereof must be limited to only the suit patents. It should be noted that the Plaintiff is only seeking security with respect to its portfolio for the Defendants' sales in India. It is also not correct to state that the Plaintiff has tried to conceal from the Defendants the suits which were filed against the Defendants in multiple countries, insofar as the Plaintiff has been proactive in informing the Defendants of all related actions filed internationally. In fact, as a pure courtesy, [redacted], The Defendants' reliance on the decision of this Hon'ble Court dated 3rd May 2021 in

> *InterDigital Technology Corporation & Ors. Vs. Xiaomi Corporation & Ors.*, CS (COMM) No. 295/2020 is grossly misplaced insofar as in said case, this Hon'ble Court sought to distinguish the relief sought in the Indian suit versus the relief of global rate determination sought in China. Therefore, the context is extremely relevant to appreciate said decision, particularly in view of established precedent which permits the use of representative patents to seek security for the entire portfolio. Without prejudice to the above, it is submitted that the paragraphs cited and relied upon by the Defendants are merely *obiter dicta*, and not a finding, and thus cannot act as a precedent for this Hon'ble Court even when deciding a similar issue. Reliance is placed on the preliminary submissions."

75. Referring to the aforesaid pleadings and correspondences, and at the cost of some repetition, the submissions of Mr. Banerjee, learned Counsel for Nokia and of Mr. Saikrishna Rajagopal, learned Counsel for Oppo may be enumerated as under:

<u>Submissions of Mr. Gourab Banerjee, learned Senior Counsel on behalf of Nokia</u>

(i) Oppo, by entering into the first FRAND license agreement dated 1st July 2018, had acknowledged the fact that it was liable to pay royalty to Nokia for utilization of its SEPs conforming to 2G, 3G and 4G standards.

(ii) Paras 10 and 36 of Oppo's reply to the present application admitted the fact that Oppo had to take a licence from Nokia for use of its SEPs.

(iii) The e-mails dated 22nd June 2021 and 27th June 2021 from Oppo to Nokia proposed making of interim payments even while Nokia and Oppo continued discussions to arrive at mutually agreeable FRAND royalty payments.

(iv) Oppo had made counter offers on 9th April 2021 for US$ *****, 24th May2021 for US$ ***** and 11th June 2021 for US$ *****, for obtaining a licence to use Nokia's global portfolio of 2G, 3G, 4G and 5G SEPs.

(v) Oppo had, by its subsequent e-mail dated 5th December 2021, advanced a counter-offer of US$ *****, without any cross-licensing stipulation, for obtaining a licence to use Nokia's SEP portfolio.

(vi) The situation could be analogized to that in which a tenant disputed the landlord's claim for rent after having paid rent in the past. In such circumstances, the Court could, by invoking its jurisdiction under Order XXXIX Rule 10, Order XII Rule 6 and Section 151 of the CPC direct interim payment at all, by the tenant, of the rent paid in the past. For this purpose, Nokia relies on ***Chandrakant Shankarrao Deshmukh***[5], ***Sangeeta Prints***[6] and ***Sanjay Gupta***[7].

(vii) Admission of the need to execute a licence carries with it an implicit admission of the necessity to pay royalty.

(viii) The test for deposit of money under Order XXXIX Rule 10 of the CPC was less rigorous than the test for obtaining a judgment on admissions under Order XII Rule 6 of the CPC, for which purpose, reliance has been placed on para 22 of the report in ***Rajul Manoj Shah***[14] and the report in ***Augmont Gold***[13] (paras 68 to 71).

(ix) Directions for deposit under Order XXXIX Rule 10 could be issued even where the quantum payable by the defendant to the plaintiff was in dispute.

(x) There was no prior precedent in which, in a suit asserting SEPs, no *pro tem* payment had been directed by this Court. For this purpose, Nokia has referred to various interlocutory orders passed by this Court in which *pro tem* payment was directed.

(xi) The plaint was not restricted to the three suit patents, but covered the entire portfolio of 2G, 3G, 4G and 5G SEPs held by Nokia. Reference to (IN ’352), (IN ’929) and (IN ’066) was only by way of example. Even if the claim in the suit was to be read as restricted to the three patents mentioned therein, the subject matter of the suit covered infringement of Nokia’s entire SEP portfolio.

Submissions of Mr. Saikrishna Rajagopal, learned Counsel on behalf of Oppo

(i) The suit instituted by Nokia asserted only three patents, namely, IN ’352, IN ’929 and IN ’066. Nokia could not, therefore, under Order XXXIX Rule 10 of the CPC, seek interim deposit, by Oppo, for its entire SEP portfolio.

(ii) The counter offers made by Oppo to Nokia were only to facilitate good faith negotiations between the parties in accordance with FRAND principles.

(iii) Such counter offers could not be regarded as admission of any patent claims by Nokia, as they were always made without prejudice to Oppo's right to challenge the essentiality and validity of Nokia's SEPs.

(iv) Section 140(1)(iii)(d) of the Patents Act rendered terms and conditions of any license which prevented the licensee from challenging the validity of the patents, null and void. This would include the right to challenge their validity on the ground of essentiality, where the patents were allegedly SEPs.

(v) Para 24 of the affidavit dated 2nd September 2021 of Patrik Hammaren admitted that some of the patents covered by the first FRAND license agreement have expired.

(vi) The first FRAND license covered thousands of patents, which have not even been asserted in the present suit.

(vii) The interim payments offered by Oppo after the first FRAND license agreement had expired, was subject to Nokia avoiding litigation, as a good faith gesture.

(viii) Nokia's submission that, after the expiry of the first FRAND license agreement, Oppo had agreed to continue to make interim payments on the same level, was incorrect. In fact, Nokia had suggested, by its email dated 26th June 2021, that interim payments be continued to be made by Oppo on the same level, as envisaged by the first FRAND license agreement. Oppo, by its response dated 27th June 2021, did not agree to the suggestion and, rather, suggested discussing the quantum of interim deposit. After the expiry of the first FRAND license agreement interim payments were proposed to evidence good faith and in the interest of an amicable resolution of the dispute between the parties.

(ix) The financial state of health of Oppo was not a relevant consideration, under Order XXXIX Rule 10 of the CPC.

(x) The *pro tem* orders passed by this Court, on which Nokia relies, were all consent orders, in lieu of *ex parte ad interim* injunction.

Examination of rival contentions on merits

76. The decision of the UK Supreme Court of the United Kingdom in ***Unwired Planet International Ltd v Huawei Technologies (UK)***[3], which is arguably one of the most authoritative pronouncements, world over, on SEPs and infringement thereof and the FRAND licensing policy in that regard, explains the legal position thus:

> "5. Telecommunications SSOs have been established in China, Europe, India, Japan (two), South Korea and the United States. The first telecommunications SSO was the European Telecommunications Standards Institute ("ETSI"), which is a French association formed in 1988 and which has adopted an intellectual property rights ("IPR") policy and contractual framework governed by French law. ETSI is recognised as the SSO in the European Union telecommunications sector. It has over 800 members from 66 countries across five continents. Its purposes, as set out in article 2 of its Statutes (5 April 2017), include the production of "the technical standards which are necessary to achieve a large unified European market for telecommunications [etc]" and "to contribute to world-wide standardization" in that field. SSOs bring together industry participants to evaluate technologies for inclusion in a new standard. ETSI is the relevant SSO as the patents which are the

subject of these appeals are the UK designations of European patents ("UK patents") which have been declared to ETSI as essential. The relevant standards in these appeals are telecommunications standards for 2G (GSM), 3G (UMTS) and 4G (LTE) telecommunications equipment and devices. The seven SSOs have cooperated to form the 3rd Generation Platform Partnership (3GPP) to develop and oversee those standards. ETSI through its secretariat manages the process by which its members contribute to the development of international standards. Participants in SSOs have an incentive to put forward their technology as a component of a proposed standard as inclusion in the standard ensures a market for the technology. Alternative technologies which are not included in a standard may well disappear from the market. Participants also accept obligations to declare IPRs which might potentially have an effect on the implementation of standards developed by the SSOs.

6. Although it is necessary to examine the arrangements in more detail below, it may be useful to give an overview of how ETSI deals with "Essential IPRs", a term which we equate with SEPs, when it devises those standards. Owners of patented inventions which might be used in a telecommunications industry standard, which is under preparation, declare their patents to ETSI. When considering whether to include a technology in a standard, ETSI requires the patent owner to enter into an irrevocable undertaking or contract with it to allow implementers of the standard to obtain a licence to use the relevant patented technology on fair, reasonable and non-discriminatory ("FRAND") terms. If the declared patented invention is included in a standard and it is not possible to make, sell, use or operate etc equipment or methods which comply with the standard without infringing that IPR, it is treated as an "Essential IPR". The irrevocable undertaking to give a licence on FRAND terms to implementers applies to any such Essential IPRs. But ETSI is not under an obligation to check whether patents declared to be essential are in fact essential. Nor does ETSI make any binding judgment on the validity or status of any such patents (ETSI Guide on IPRs (19 September 2013) ("the Guidance") para 3.2.1). Those are matters for the relevant national courts. ETSI leaves it to the relevant parties, if they so wish, to resolve those questions by court proceedings or alternative dispute resolution: the Guidance para 4.3.

7. The purpose of the ETSI IPR Policy is, first, to reduce the risk that technology used in a standard is not available to implementers through a patent owner's assertion of its exclusive proprietary interest in the SEPs. It achieves this by requiring the SEP owner to give the undertaking to license the technology on FRAND terms. Secondly, its purpose is to enable SEP owners to be fairly rewarded for the use of their SEPs in the implementation of the standards. Achieving a fair balance between the interests of

implementers and owners of SEPs is a central aim of the ETSI contractual arrangements.

*****

10. The policy statements which provide the internal context include the objectives set out in clause 3 of the IPR Policy. They include the statement in clause 3.1 that the IPR Policy:

> "seeks to reduce the risk to ETSI, MEMBERS, and others applying ETSI STANDARDS and TECHNICAL SPECIFICATIONS, that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD or TECHNICAL SPECIFICATION being unavailable."

That statement clearly reveals a policy of preventing the owner of an Essential IPR from "holding up" the implementation of the standard. But that policy is to be balanced by the next sentence of clause 3.1 which speaks of seeking a balance, when achieving that objective, "between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs." The importance of protecting the rights of the owners of IPRs is declared in the second policy objective (clause 3.2) in these terms:

> "IPR holders whether members of ETSI and their AFFILIATES or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS."

This objective seeks to address the mischief of "holding out" by which implementers, in the period during which the IPR Policy requires SEP owners not to enforce their patent rights by seeking injunctive relief, in the expectation that license terms will be negotiated and agreed, might knowingly infringe the owner's Essential IPRs by using the inventions in products which meet the standard while failing to agree a license for their use on FRAND terms, including fair, reasonable and non-discriminatory royalties for their use. In circumstances where it may well be difficult for the SEP owner to enforce its rights after the event, implementers might use their economic strength to avoid paying anything to the owner. They may unduly drag out the process of licence negotiation and thereby put the owner to additional cost and effectively force the owner to accept a lower royalty rate than is fair.

11. Having looked at context, we turn to the operative clauses of the IPR Policy. A member of ETSI is obliged to use its

reasonable endeavours to inform ETSI in a timely manner of Essential IPRs during the development of a standard or technical specification. If a member submits a technical proposal for a standard or technical specification it is obliged to inform ETSI of its IPRs which might be essential (clause 4.1). Clause 4.3 confirms that this obligation of disclosure applies to all existing and future members of a "patent family" and deems the obligation in respect of them to be fulfilled if an ETSI member has provided details of just one member of the patent family in a timely manner, while also allowing it voluntarily to provide information to ETSI about other members of that family. A "patent family" is defined as "all the documents having at least one priority in common, including the priority document(s) themselves" and "documents" in this context means "patents, utility models, and applications therefor" (clause 15(13)). The patent family thus extends to patents relating to the same invention applied for and obtained in several jurisdictions. It shows an intention for the arrangement to apply internationally. This is important because the undertaking to grant a license under clause 6, to which we now turn, extends to all present and future Essential IPRs in that patent family.

*****

14. It appears from this brief review of the IPR Policy in its context that the following conclusions may be reached. First, the contractual modifications to the general law of patents are designed to achieve a fair balance between the interests of SEP owners and implementers, by giving implementers access to the technology protected by SEPs and by giving the SEP owners fair rewards through the license for the use of their monopoly rights. Secondly, the SEP owner's undertaking, which the implementer can enforce, to grant a license to an implementer on FRAND terms is a contractual derogation from a SEP owner's right under the general law to obtain an injunction to prevent infringement of its patent. Thirdly, the obtaining of undertakings from SEP owners will often occur at a time when the relevant standard is being devised and before anyone may know (a) whether the patent in question is in fact essential, or may become essential as the standard is developed, in the sense that it would be impossible to implement the standard without making use of the patent and (b) whether the patent itself is valid. Fourthly, the only way in which an implementer can avoid infringing a SEP when implementing a standard and thereby exposing itself to the legal remedies available to the SEP owner under the general law of the jurisdiction governing the relevant patent rights is to request a licence from the SEP owner, by enforcing that contractual obligation on the SEP owner. Fifthly, subject only to an express reservation entered pursuant to clause 6.2, the undertaking, which the SEP owner gives on its own behalf and for its affiliates, extends to patents in the same patent family as the declared SEP, giving the implementer the right to obtain a license for the technology covering several jurisdictions. Finally, the IPR Policy envisages that the SEP owner

and the implementer will negotiate a license on FRAND terms. It gives those parties the responsibility to resolve any disputes as to the validity of particular patents by agreement or by recourse to national courts for determination."

77. It becomes clear, from a reading of the aforesaid passages from the pronouncement in ***Unwired Planet***[3] that, before arriving at a decision that a defendant, accused of having infringed SEPs owned by the plaintiff, is required to take a license from the plaintiff on payment of royalty at a particular rate, the Court has to satisfy itself, in the first instance, that (i) the asserted suit patent is in fact a SEP, (ii) the technology used by the defendant infringes the SEP, (iii) the royalty rate at which the plaintiff is willing to license its SEP is FRAND, and (iv) the defendant is unwilling to take the license at the said FRAND rate. Unless all these four factors coalesce, the Court cannot call upon a defendant to pay any amount as royalty to the plaintiff for obtaining a license from the plaintiff for exploiting the suit patents.

78. There is, both jurisprudentially and etymologically, a clear distinction between an admission and an offer. Amounts offered during negotiations unequivocally cannot be treated as admitted unless, in the communications relating to such negotiations unequivocal admission of liability is found to exist.

79. I have already emphasized, hereinbefore, the necessity of any admission, on the basis of which an order for deposit under Order XXXIX Rule 10 of the CPC can be passed, having to be clear, unambiguous and unequivocal. It must not be hedged in by caveats or conditions. It must amount to a clear admission of liability of the defendant towards the plaintiff. Of course, the Court exercising jurisdiction under Order XXXIX Rule 10 or, for that matter, Order XII

Rule 6 of the CPC, would be within its authority in not allowing itself to be misdirected by adroit drafting. If, therefore, properly read, the communications or pleadings of the defendant on which the plaintiff relies, make out a case of admission of liability by the defendant, the Court can still proceed to pass an order under Order XXXIX Rule 10 of the CPC and Order XII Rule 6 of the CPC even if the defendant is not willing, in so many words, to admit liability. To that extent, the Court may be empowered to read between the lines of the assertions of the defendant as contained in the material on which the plaintiff relies. If, however, the defendant is clearly unwilling to admit the liability, and seeks to contest it, the plaintiff cannot seek, as a matter of right, an order for interim deposit under Order XXXIX Rule 10 of the CPC.

80. It must also be remembered that Order XXXIX Rule 10 of the CPC, unlike Order XXXVIII Rule 5 of the CPC, does not envisage any direction for furnishing security. Order XXXVIII Rule 5 of the CPC envisages a situation in which, where the defendant is likely to fritter away its assets or place itself in a position in which any decree that may finally be passed against it would become impossible to execute, the Court could, in order to safeguard the plaintiff's interest, direct furnishing, by the defendant, of an appropriate security. For that, however, as per the judgment of the Supreme Court in ***U.O.I. v. Raman Iron Foundry***[57], it is necessary for the plaintiff to establish not only the existence of liability on the part of the defendant, but also a concerted effort on the defendant's part to frustrate the execution of any decree which may come to be ultimately passed against it. Order XXXVIII Rule 5 of the CPC, therefore, does not deal so much with

---

[57] **(1974) 2 SCC 231**

admission of liability on the part of the defendant as with the unwholesome conduct of the defendant, in seeking to impede the due process of administration of justice.

81. Nokia has not invoked Order XXXVIII Rule 5 of the CPC. Nonetheless, it is necessary to refer to the said provision only because of the reliance, by Nokia, on the allegedly precarious financial condition of Oppo. Though Oppo has denied the allegation, of Nokia, that it is in financial doldrums, Mr. Rajagopal is correct in his contention that the financial status of Oppo is not a relevant consideration for Order XXXIX Rule 10 of the CPC. To reiterate yet again, Order XXXIX Rule 10 of the CPC does not envisage furnishing of security. The provision is essentially aimed at a speedy resolution of the dispute by directing a deposit of any amount which is admitted by the defendant to be *due* and payable, by it, to the plaintiff.

82. In the backdrop of the above legal position, I am of the considered opinion that Nokia has not been able to make out a case of any direction to Oppo to make a deposit in terms of Order XXXIX Rule 10 of the CPC for the following reasons:

(i) The first FRAND license agreement was on cross-licensing basis. In order words, Oppo was required, under the said agreement, to pay royalty, to Nokia, on the terms as set out in the agreement, subject to Nokia paying, reciprocally, royalty to Oppo for use of Oppo's SEPs. The agreement being, as Mr. Rajagopal correctly phrased it, not a one way street, it is not possible for this Court to rely on the said agreement as a basis to direct deposit by Oppo of any amount in terms of Order XXXIX Rule 10 of the CPC. I may note, in this context, that, in the present application, Nokia does not even visualize, much less suggest, any cross-licensing arrangement; it merely seeks a unilateral deposit by Oppo.

(ii) The e-mails exchanged between Oppo and Nokia, too, do not disclose any unequivocal admission, on Oppo's part, of any specific liability, for being permitted to exploit Nokia's SEP portfolio. The email dated 22nd June 2021 from Oppo to Nokia, even while conveying Oppo's willingness to renew the first FRAND license agreement with Nokia, clearly indicated that Oppo had its reservations regarding the rate of royalty sought by Nokia being FRAND. It is clearly stated, in the said communication, that, despite Oppo's willingness "the gap relating royalty fee now is too big". An agreement, at the end of the day, is an agreement, and no more. Unless the agreement spells out, in express terms, admission of liability, no such inference can flow from the mere fact that the agreement was executed. Where stakes are huge, parties often choose to arrive at agreed terms, which cannot be read as admission of liability. Para 3 of the communication dated 22nd June 2021, in fact, goes on to convey the willingness of Oppo to make interim payments to Nokia w.e.f. 1st July 2021, *subject to actual license fee payable being determined pursuant to further negotiations*. Para 3 of the communication which is of substantial significance and reads thus:

> "3. I have said that Oppo as a willing licensee, still will try its best to facilitate the conversation and would like to make a license deal with Nokia soon. In order to continue the partnership of two parties, Oppo is willing to pay a certain amount to Nokia annually as interim payment from July 1, 2021 (Vincent can discuss with Susana about specific payments). *However, the actual licensee fee shall be subject to the result of our further negotiation. Nokia*

> *need to refund the excessive payments to Oppo if the actual licensee fee is less than our interim payments, and vice versa."*

(iii) From para 3 of the communication dated 22nd June 2021, it becomes clear that (a) Oppo was only willing to pay a "certain amount" to Nokia annually as interim payment, (b) the amount that Oppo would thus pay to Nokia had to be determined after discussion between the representatives of Oppo and Nokia, (c) the actual license fee payable by Oppo to Nokia, if any, would be subject to further negotiations and (d) in the event that actual license fee was different from the amount of interim payment that Oppo would pay Nokia, the differential would have to be paid or refunded, as the case would be.

(iv) Even thereafter, the communication stated that, if the mechanics of the proposals as suggested therein were agreeable to Nokia, the global royalty rate could be fixed by referring the matter to the Chinese Courts.

(v) Referring, next, to the email dated 26th June 2021 from Nokia to Oppo, the email opens with the acknowledgement of the fact that there was a "disagreement on the valuation of Nokia-Oppo patent license", between Nokia and Oppo. To resolve this disagreement, Nokia suggested referring the dispute to a third party mediator, with whose support, the party may "agree on financial terms in the renewal of the patent license agreement". In the event that no agreement could be arrived at with the intervention of the mediator, the email envisaged referring the dispute to an international Arbitral Tribunal, whose outcome would be binding on both parties. During the pendency of such arbitral proceedings, Nokia suggested that Oppo continue to make quarterly interim payments, as were being made under the first FRAND agreement w.e.f. 1st July 2021. The email also suggested that the representatives of the parties meet to finalize the terms of the resolution. By following this protocol, the email expressed the hope that the parties would be able to reach at an amicable resolution of the disputes. Oppo's consent to the suggestion was, therefore, sought. Oppo's response to Nokia on the very next day, i.e. 27th June 2021, expressed misgivings regarding the possibility of the dispute being resolved by mediation or arbitration. Oppo expressed doubts as to whether a mediator or an arbitrator would be able to evaluate the reasonability of the royalty fee subject to payment of which Nokia was seeking to license its 5G patent portfolio. Rather, suggested the email, bilateral discussions between Nokia and Oppo would possibly be more productive. The email also conveyed Oppo's impression that the cross-license structure had to be followed, to arrive at a viable agreement, and that each party would have to offer a fee for exploiting the other parties' patents. Nokia was called upon, by the e-mail, to "recognize Oppo patent portfolio real value not ignoring Oppo patent portfolio directly".

(vi) Oppo again wrote to Nokia on 1st July 2021. The communication reveals that Oppo had given an offer for annual payment for exploitation of Nokia's SEP of less than US$ ***** which Nokia characterized as "unreasonable". Expressing dismay at this stand of Nokia, Oppo once again reiterated its suggestion, in the said email, that the FRAND rate at which Nokia could license its portfolio, or a solution for interim payments, could be decided by a Court. In this context, it is also relevant to refer to emails dated 17th June 2021, 18th June 2021 and 28th June 2021 cited in para 33 (*supra*), as they evince the refusal of Oppo to accept royalty rates proposed by Nokia as FRAND during pre-suit communications.

(vii) The emails dated 7th February 2021, 1st March 2021, 19th March 2021, 9th April 2021, 29th April 2021, 5th May 2021, 1st July 2021 and 20th February 2021, to which reference has been made in para 33 (*supra*) indicate that the confabulations between Nokia and Oppo did not even include all the patents forming subject matter of the present suit, inasmuch as certain designated patents including IN '066 were, by agreement, excluded from discussions.

(viii) These communications also indicate that Oppo was contesting, even in its correspondences with Nokia, the very essentiality and validity of 2G, 3G and 4G patent portfolio of Nokia.

(ix) These communications, therefore, clearly indicate that (a) the figures, which were being exchanged between Nokia and Oppo, were in the nature of offers and counter offers, (b) Oppo was not willing to agree to any interim payments, or even any royalty payments to Nokia, except on cross-licensing basis, (c) there was disagreement between Nokia and Oppo even regarding the scope of the first FRAND license agreement and

(d) any interim payment payable by Oppo to Nokia, even if a figure in that regard were ultimately to be arrived at, would be without prejudice to the royalty rate, if any, which would ultimately be found to be payable and subject to adjustment from such royalty, positively or negatively.

(x) Neither Nokia nor Oppo disputes the fact that the question of whether the royalty rate proposed by an SEP holder is, or is not, FRAND, would require examination of license agreements between the SEP holder and third party. No such license agreements have been placed on record. In any event, the decision of whether, on the basis of such license agreements, the proposed royalty rates are, or are not, FRAND, is an intricate and evolved exercise which cannot be done by the Court while exercising jurisdiction under Order XXXIX Rule 10 of the CPC.

(xi) The email dated 5th December 2021, on which Nokia places special reliance seems, in my opinion, to drive the final nail in the coffin of Nokia, insofar as the present application under Order XXXIX Rule 10 of the CPC is concerned. This e-mail indicates that

(a) Oppo suggested an amount, in the e-mail, merely by way of a counter-offer, which was rejected by Nokia,

(b) the undertaking by Nokia to deposit the said amount in the German court was in view of the laws applicable in Germany,

(c) offers made by Oppo were not to be construed, in any manner, as admissions of Nokia's claims in India,

(d) Oppo continued to assert that no deposit could be directed to be made by it in the present application, as

(i) there was no admission by Oppo of any liability towards Nokia and

(ii) Oppo retained the right to contest the essentiality and validity of the patents asserted by Nokia.

83. The issue of whether there exists, or does not exist, any "admission" of monies due to the plaintiff, by the defendant, so as to justify directing deposit of such amounts under Order XXXIX Rule 10, cannot be decided by isolated references to one document or the other. This is, in fact, a classic case to understand the working of the provision where there are protracted and high-level confabulations between the parties regarding the possibility at arriving at mutually acceptable terms. While applying Order XXXIX Rule 10 to such a case, the Court must bear, in mind two pristine considerations. The entire body of communications and correspondences is like an intricate painting, with a veritable chiaroscuro of light and dark. The communications and exchanges between the parties have to be seen as a whole. The Court cannot, therefore, pick out one communication, or another, from the entire body of communications, to hold that there is an admission of liability. What has to be seen is whether, seen as a whole, such an admission of liability, by either party to the other, exists. The second is that such admission of liability must be clear, unequivocal, and uncorseted by any caveats or conditions. It must divest the opposite party of the liability to prove the fact. For such admission to exist, ordinarily, in a case of SEP Frand infringement litigation, there must be *unequivocal admission* of (i) the essentiality and validity of the suit patents, i.e. that they are, in fact, SEPs (which would include, by its very nature, admission that, without utilizing the plaintiff's SEPs, the defendants' devices would not function as they should, i.e. the aspect of "essentiality"), (ii) the fact of utilization, of the said SEPs by the defendant, (iii) the fact that such utilization, absent any payment of royalty, would amount to infringement and (iv) that the royalty rate proposed by the plaintiff was FRAND.

84. By no stretch of imagination can it be said that these admissions are forthcoming from Oppo's communications to Nokia, or even from the first FRAND licence agreement. There cannot be said to emerge, from the entire slew of correspondence, any unconditional acknowledgment, by Oppo, that Nokia's patents were SEPs or that there was a legal liability on Oppo to pay royalty at any rate to Nokia. There is no *unequivocal admission*, as would meet the settled standards of Order XXXIX Rule 10, or even of Order XII Rule 6 of the CPC, as would justify grant of the prayers of Nokia in the instant application.

85. The entire application is, clearly, fundamentally misconceived. The first FRAND Agreement has admittedly expired by efflux of time. The Agreement was, moreover, on counter-licensing basis and did not, therefore, indicate any admission, by Oppo, of any liability towards Nokia, in the absence of a corresponding liability of Nokia towards Oppo. In any event, the amounts fixed under a reciprocal agreement can hardly constitute admission of any kind of liability by either party to the other. This is apparent even from the conduct of the parties, as they continued to remain in mutual negotiation for fixing the terms for entering into a fresh FRAND Agreement, which never crystallized. Patrick Hammaren, in para 24 of his affidavit dated 2nd September 2021 acknowledged that some of the patents covered by the first FRAND Licensing Agreement had expired. The patent portfolio of Nokia that Oppo now exploits – assuming the allegation of Nokia to that effect to be correct – is, therefore, not the same as the portfolio covered by the first FRAND Licensing Agreement. There is, in fact, absolutely nothing forthcoming, on record, on the basis of which this Court could, in exercise of the jurisdiction vested in it by Order XXXIX Rule 10 of the CPC, hold that any amount stood admitted by Oppo, as payable to Nokia, against the claim of Nokia in the present suit, the deposit of which could be directed under the said provision.

86. Amounts "offered" can never constitute the basis for an order under Order XXXIX Rule 10, unless, with the offer, there is an unequivocal admission of liability. Close to a century ago, the High Court of Allahabad had, in ***Shibcharan Das v. Gulabchand Chhotey Lal***[58], observed as under:

> "In our judgment the witness's evidence was not admissible Negotiations were being conducted with a view to settlement, and that being so we are bound to hold that these negotiations were being conducted "without prejudice." In such circumstances it is not open for one of the parties to give evidence of an admission made by an other. If negotiations are to result in a settlement each side must give away a certain amount. If one of the parties offers to take something less than what he later claims he is legally entitled, such must not be used against him; otherwise persons could not make offers during negotiations with a view to a settlement."

Dealing with the jurisprudential contours of an "offer", the Supreme

[58] **AIR 1936 All 157**

Court, in ***Consolidated Coffee Estate v. Workmen***[59], held thus:

> "**9.** In our view the entire reasoning on which these observations were made is erroneous and suffers from misapprehension about the true meaning of the observations made by this Court in the said decision. Those observations simply mean that workmen are not precluded from raising an industrial dispute by the mere fact of there being a binding contract between them and their employer. If the employees raise an industrial dispute, an Industrial Tribunal, dealing with such dispute, is equally not precluded, if it considers necessary in the interest of industrial harmony, to give an award which might be inconsistent with or have the effect of modifying the terms of such a contract. But that does not mean that if the employees themselves rely on a contract for their claim for bonus the Tribunal has the power to modify or discard the terms of contract on the ground that they are inconvenient. If the claim for bonus is rested on such a contract it is the contract which would govern the claim. If, on the other hand, a claim is made dehors the contract, the fact that the contract is binding on the parties would not preclude the raising of an industrial dispute or its adjudication which may not be in conformity with the terms of such contract. The Tribunal, therefore, was in error in observing that it could overlook or discard the condition attached to the Company's offer and treat that offer as an admission of liability. An offer made during negotiations is no more than an offer and unless it is accepted it cannot ripen into a completed contract binding on the company."

Offers and counter-offers, during negotiations aimed at arriving at a possible agreement or settlement, cannot, therefore, in the absence of any unequivocal evidence of consensus *ad idem*, constitute the basis for a direction for deposit under Order XXXIX Rule 10 of the CPC. Barring offers and counter-offers – in fact, counter-offers by Oppo to offers by Nokia – there is, really, no peg on which Nokia can seek to hang its case in the present application, as would bear its weight. The contention of Nokia that Oppo should "at least" be directed to deposit US$ *****, is alien to Order XXXIX Rule 10. The Court cannot, under the said provision, direct a party to at least deposit a particular

[59] **(1970) 2 LLJ 576 (SC)**

amount. If there is an admission, by either party, of its liability to the other, that amount can be directed to be deposited. In the absence of any such admission, the application must inexorably fail.

87. In the light of the above, I do not deem it necessary to burden this decision with any further discussion on the dynamics of the proposals and counter proposals between Nokia and Oppo for two reasons. The first is that the Court in the present case is seized only with the application under Order XXXIX Rule 10 of the CPC, which requires a clear, categorical and unequivocal admission that the defendant is holding monies of the plaintiff or that certain monies are due from the defendant to the plaintiff. For the reasons already elucidated hereinabove, no such unequivocal admission of liability can be said to exist in the present case. Though there may be substance even in the contention of Mr. Rajagopal that the present suit is essentially restricted to three patents, I do not deem it necessary to return any categorical finding in that regard, as it is not necessary, in my opinion, to do so. Suffice it to state, that even if the present plaint were to be considered as encompassing the entire SEP portfolio of Nokia, no case for directing interim payment under Order XXXIX Rule 10 of the CPC can be said to exist. The first FRAND license agreement has, admittedly, expired. There has been no consensus, *ad idem*, between Nokia and Oppo on the terms at which, the agreement is to be extended or continued further. Oppo has, in its communications, clearly stated that it had reservations regarding the reasonability of the terms at which Nokia was seeking to grant a license to Oppo to exploit its patent portfolio and as to whether they were actually FRAND. Oppo has, at all times, reserved its right to question the essentiality of the suit patents, as also the liability of

Oppo to pay royalty to Nokia for the exploitation thereof, at *any* rate.

88. Besides, and secondly, in the written statement, filed by way of response to the plaint instituted by Nokia, Oppo has contested Nokia's case at all levels. It has disputed Nokia's contention that the suit patents are SEPs, as also that it was exploiting the said suit patents and that the royalty rate at which Nokia was willing to permit such exploitation were FRAND.

89. These are all matters which require trial and on which, in the absence of a trial, it would be hazardous to venture even a *prima facie* opinion, as the present application would require this Court to return. I am unable to glean, from the material on which Nokia has sought to place reliance, any admission of liability of Oppo's part, as would be sufficient to justify an order under Order XXXIX Rule 10 of the CPC. The offers and counter offers between Nokia and Oppo are no more than what they purport to be, i.e. offers and counter offers. In its email dated 5th December 2021, Oppo has laid to rest any impression that Nokia may have had, to the effect, by extending such offers or counter offers, Oppo was admitting its liability to take a license from Nokia for operationalizing its devices.

Conclusion

90. For the aforesaid reasons, I am not convinced that Nokia has been able to make out a case for issuance of a direction to Oppo, under Order XXXIX Rule 10 of the CPC, to make any deposit, at this stage of the proceedings.

91. I.A. 7700/2021 filed by Nokia under Order XXXIX Rule 10 of the CPC is accordingly dismissed.

92. I hasten to clarify that the present order merely adjudicates on Nokia's application under Order XXXIX Rule 10 of the CPC and on the basis of the material available and forthcoming on record till this point of time. The observations and findings in this judgment are to be read as only intended for the said purpose, and are not to be read as an expression of opinion, even tentative regarding the rival claims of the parties before me for any other purpose.

93. The application accordingly stands dismissed with no order as to costs.

C.HARI SHANKAR, J

NOVEMBER 17, 2022
kr/rb/*dsn*