

(2011) 05 AHC CK 0173
In the Allahabad High Court
Case No : Civil Revision No. 46 of 2011

Picasso Digital Media Private Ltd. A Company Incorporated	APPELLANT
Vs	
Mr. Arun Srivastava, Chairman Vas Group and Another	RESPONDENT

Date of Decision : 20-05-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 2, 2(1), 34, 36
Civil Procedure Code Amendment Act, 1999 — Order 6 Rule 17, Order 6 Rule 18
Civil Procedure Code Amendment Act, 2002 — Order 1 Rule 10, Order 1 Rule 10(1),
Order 1 Rule 10(2), Order 6 Rule 17, Order 6 Rule 18
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(1), Order 1 Rule 10(2), Order 16
Rule 2, Order 23 Rule 3, Order 6 Rule 17
Partnership Act, 1932 — Section 69
Transfer of Property Act, 1882 — Section 130

Citation : (2011) 6 ADJ 575

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Judgement

Anil Kumar, J.—Heard Sri Ram Raj, learned Counsel for revisionist, Sri Ashok Nigam, Senior Advocate and Sri Rama Shankar Singh, learned Counsel on behalf of Respondents.

2. Revisionist has challenge order dated 25.04.2011 by means of present revision passed by District Judge, Lucknow in Regular Suit No. 19 of 2011, VAS Knowledge Growth Initiatives Private Limited v. Picasso Digital Media Private Limited.

FACTS OF THE PRESENT CASE

3. Picasso Digital Media Private Limited is the owner of certain trademarks and names unused in connection with a system developed by themselves for the teaching and training and production in Multi-Media including Animation.

4. Picasso has tied-ups with educational institutes in India and abroad and established rapport with corporate sector and has joint venture agreement in

offering training courses and, therefore has the know-how, expertise and experience in organizing the establishment of such training centres, in structuring the curriculum of such courses, developed a method of teaching the said course in the name and style of "Picasso Centennial Animation College", "Picasso Animation" and "Picasso Digital Media" and other Picasso brand extensions in accordance with the systems and method under the trademarks or trade name belonging to Picasso and uses the System and method and all materials developed or prepared by the "Picasso".

5. On 04.02.2008, a memorandum of Understanding (hereinafter referred to as the "agreement") entered between the following parties:

1. Picasso Digital Media Pvt. Ltd. a company incorporated in India and having its registered office at A. 14, MCIE, Mathura Road, New Delhi, (hereinafter referred to as "Picasso")

AND

2. Mr. Arun Srivastava, Chairman, VAS Group, USA, as an individual with the option to transfer the agreement to a new entry in next one (Hereinafter referred as the BP).

6. As per the terms of the said agreement, at the request of Mr. Arun Srivastava, Picasso grant a licence to establish one Picasso Animation College at Lucknow.

7. As per terms of the said agreement, if any, dispute and differences arises between the parties, arising out of the same, in order to resolve remedy by way of Arbitration as provided in Clause 9, quoted as under:

Clause 9-DISPUTE - In the event of there being any dispute or difference between the parties as to the interpretation of this agreement or any act omission in pursuance hereof or any matter touching these presents the same shall be referred to the sole arbitration of a single arbitrator acceptable to both the parties and resolved as per Indian arbitration act. All disputes shall be subject to the jurisdiction of courts of law in India.

8. Mr. Arun Srivastava, Chairman, VAS Group, USA as per agreement dated 04.02.2008 established one Picasso Animation College at Lucknow. Subsequently, thereafter some disputes and differences arises out of the agreement entered between parties in the matter in question. As a result of which, on 15.11.2009, Picasso Digital Media Private Limited (hereinafter referred to as the revisionist) terminated the agreement dated 15.11.2008. However, the said termination kept in abeyance till 20th December, 2010 thereafter by a notice (annexed as Annexure No. 7 to the affidavit) termination order passed earlier enforced by a notice dated 22.02.2011 (Annexure-8).

9. Accordingly, VAS Knowledge Growth Initiatives Private Limited through its Chairman Sri Arun Srivastava, filed a case u/s 9 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act, 1996") Registered as Regular Suit

No. 19 of 2011 in the Court of District Judge, Lucknow. Moreover, affidavit filed in support of application u/s 9 of Act, 1996 is verified in the following manner:

I, Arun Srivastava, aged about 59 years, son of Late Sri. Iqbal Narain Srivastava, resident of B-73, Nirala Nagar, City-Lucknow do hereby solemnly affirm and state oath as under.

10. Thereafter, objection filed by revisionist, on 26.03.2011, court below passed an interim order, relevant portion quoted as under:

Till then opposite party is restrained from terminating the Memorandum of Understanding dated 04.02.2008.

11. Aggrieved by order dated 26.03.2011, revisionist approached this Court for redressal of his grievances by filing FAFO No. 342 of 2011, Picasso Digital Media Private Limited v. VAS Knowledge Growth Initiatives Private Limited, disposed of vide order dated 07.04.2011, relevant portion is as under:

In view of above, we feel that District Judge should not have passed the impugned order in the manner as it has been done. In view of the facts and circumstances of the case, we modify the interim order and provide that right of the parties as well as any action taken by the Appellant or Respondent, shall be subject to final out come of application filed u/s 9 of the Arbitration? Act. While deciding the application, it shall be open to the District Judge, Lucknow, to take into account the subsequent developments and pass appropriate order. The District Judge, Lucknow is? further directed to decide the application filed u/s 9 of the Arbitration Act,? expeditiously,? may be on the next date or within a period of six weeks from the date of receipt of certified copy of the present order.

District Judge, Lucknow shall decide the application independently without being influenced by the observations made in the present order, in accordance with law and on the basis of evidence led by the parties.

12. Accordingly, the matter again came up for consideration before District Judge, Lucknow.

13. On 14.04.2011, on behalf of applicant (VAS Knowledge Growth Initiatives Private Limited) an application for amendment in the application u/s 9 of the Act filed. In paragraph No. 4 of the said application beside other plea sought to incorporated by way of amendment, it has been mentioned as under:

That to avoid any future controversy, it would be proper that impleadment of necessary party may be permitted by permitting the Plaintiff to incorporate amendments in the petition and the Signatory of Memo of Understanding, which is available on record, may be permitted to be impleaded as Plaintiff No. 1 (one) in the following manner:

(1) Mr. Arun Srivastava, Chairman, Vas Group, USA as an individual with the option to transfer the agreement to a new entity in the next one year (hereinafter referred to as the B.P.) presently residing at C-178 (One Hundred

Seventy-eight), Nirala Nagar, Lucknow, Pin Code-226020.

14. On behalf of the revisionist, objection filed, one of the objection taken against amendment as sought by Plaintiff that same cannot be granted as the Plaintiff/VAS Knowledge Growth Initiatives Private Limited who has filed application u/s 9 of Act, 1996, on the basis which Regular Suit No. 19 of 2011 registered before District Judge, Lucknow, is not a party to arbitration agreement dated 04.02.2008 in view of the definition of "party" as given u/s 2(1)(h) of the Act. Thus, the application for amendment/impleadment is not maintainable, liable to be rejected.

15. District Judge, Lucknow by order dated 25.04.2011, allowed amendment/impleadment application, relevant portion is quoted under:

In the present case the applicant wants to add Mr. Arun Srivastava, Chairman, Vas Group USA as individual with his address as Plaintiff No. 1 Memo of Understanding which is basis of the suit also shows that Mr. Arun Srivastava, Chariman Vas Group USA has individual with the option to transfer the agreement to a new entity in the next one year is second party to that Memo of Understanding and as such he is necessary party to this suit. His inclusion will also held the court in determining the real controversy in dispute.

As the applicant has moved this amendment application at subsequent stage through he was knowing this fact from the very beginning which has caused unnecessary inconvenience to the other side so proper compensation should be given to other side. In view of facts of this case I think that cost of Rs. 5000/- will be appropriate.

16. Hence, present revision filed, challenging order dated 25.4.2011.

SUBMISSION ON BEHALF OF PARTIES

17. Arguments as advanced by Sri Ram Raj, counsel for revisionist in nut shell are summarized as under:

(a) Agreement dated 04.02.2008 has been entered between revisionist and Mr. Arun Kumar Srivastava, Chairman, VAS Group USA. So, VAS Knowledge Growth Initiatives Private Limited (hereinafter referred to as Respondent No. 2) is not a party to the said agreement. Thus, had no locus to file an application u/s 9 of Act, 1996 because as per the definition of "party" given in Section 2(1)(h) only party to an agreement has right to file an application u/s 9 of Act, 1996 for interim protection. Because, as per the settled provisions, a person who is not a party to an arbitration agreement has got no right whatsoever to move in a court for an interim protection u/s 9 of the Act in view of the law as laid down by Apex Court in the case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.,

(b) Court below erred in allowing application for amendment/impleadment thereby impleading Mr. Arun Kumar Srivastava, Chairman, VAS Group USA, as

Plaintiff/applicant No. 2 in Regular Suit No. 19 of 2011 arising out of application moved u/s 9 of Act, 1996 by way of amendment as a result of which the defect which is incurable in nature has been cured by impugned order dated 25.04.2011 and thus the application u/s 9 which maintainable has been made maintainable by allowing amendment/impleadment which cannot be done in the grab of the impugned order.

18. In support of his argument Sri Ram Raj has relied on the following judgments:

- (i) N. Srinivasa Vs. Kuttukaran Machine Tools Ltd.,
- (ii) Lakshmi Suri Vs. Union of India (UOI) and Another,
- (iii) Indowind Energy Limited v. Wescare (India) Limited and Anr. (2010) 5 SCC 306.
- (iv) Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.,
- (v) I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd.,
- (vi) Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another,
- (vii) Rameshwar and Others Vs. Jot Ram and Another,

19. Accordingly, Sri Ram Raj, learned Counsel for revisionist request that order dated 25.04.2011 being without jurisdiction, illegal, arbitrary in nature, liable to be set aside.

20. Sri. Ashok Nigam, Senior Advocate and Sri Rama Shankar Singh learned Counsel appearing on behalf of Respondents submits that agreement dated 04.02.2008 although signed by Sri. Arun Kumar Srivastava in the capacity of Chairman, VAS Group, USA but in the recital of the parties it is mentioned as under:

1. Picasso Digital Media Pvt. Ltd. a company incorporated in India and having its registered office at A. 14, MCIE, Mathura Road, New Delhi, (hereinafter referred to as "Picasso")

AND

2. Mr. Arun Srivastava, Chairman, VAS Group, US, as an individual with the option to transfer the agreement to a new entry in next one year. (Hereinafter referred as the BP).

21. So, VAS Knowledge Growth Initiatives Private Limited is also a party to the said agreement dated 04.02.2008, thus got a right to move an application u/s 9 of Act, 1996 for get an interim protection, to protect its right arising out of agreement dated 04.02.2008.

22. It is further submitted on behalf of responders that even otherwise in view of

the provisions as provided under Order 1 Rule 10 CPC read with Order 6 Rule 17 CPC amendment/impleadment as claimed, rightly allowed by order dated 25.04.2011 by District Judge, Lucknow, further the said action is also in accordance with direction given by this Court in the judgment and order dated 07.04.2011 passed in FAFO No. 342 of 2011. Hence there is neither any illegality nor infirmity in the impugned order under challenge in the present revision, so liable to be dismissed. In support of their argument learned Counsel for Respondents placed reliance on the following judgments:

(i) Venture Global Engineering v. Satyam Computer Services Limited and Anr. (2010) 9 SCC 660.

(ii) I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd.,

(iii) R. McDill and Company Pvt. Ltd. Vs. Gouri Shankar Sarda and Others,

FINDING and CONCLUSION

23. I have heard counsel for parties and gone through the record.

24. So far the factual controversy of the present case is concerned, it is not disputed between the parties that initially an agreement dated 04.02.2008 entered between following parties:

1. Picasso Digital Media Pvt. Ltd. a company incorporated in India and having its registered office at A. 14, MCIE, Mathura Road, New Delhi, (hereinafter referred to as "Picasso")

AND

2. Mr. Arun Srivastava, Chairman, VAS Group, US, as an individual with the option to transfer the agreement to a new entry in next one year. (Hereinafter referred as the BP).

25. Thereafter, said agreement terminated on 15.11.2008/22.02.2011. Aggrieved by the said action, Respondent No. 2 (VAS Knowledge Growth Initiatives Private Limited) filed an application for interim protection u/s 9 of Act, 1996, registered as Regular Suit No. 19 of 2011 before learned District Judge, Lucknow in which an interim protection granted vide order dated 26.03.2011, thereafter matter came up before this Court by FAFO No. 342 of 2011, allowed by order dated 07.04.2011 a Division Bench of this Court.

26. In pursuance to the same matter again came up for consideration before District Judge, Lucknow in Regular Suit No. 19 of 2011. At this stage, an application for amendment/impleadment has been moved on behalf of Respondent No. 2, allowed by order dated 25.04.2011.

27. In view of the abovesaid facts, in order to adjudicate and decide the dispute involved in the instant case, relevant provisions as provided under Arbitration and Conciliation Act, 1996 which is to be taken into consideration, quoted as under:

Section 2(1)(b) - "arbitration agreement" means an agreement referred to in Section 7;

Section 2(1)(h) - "party" means a party to an arbitration agreement.

Section 7 - Arbitration agreement

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Relevant portion of Section 9

28. Interim Measures, etc by court:

A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters,

29. From the bare perusal of Section 9 of the Act, "a party" may before or at any time after making of Arbitration Award etc. may move an application for interim measures as given therein.

30. Thus, only a party has a locus standi for invoking the jurisdiction u/s 9 of the Act. "A Party" as mentioned in this Section has been defined in Section 2(1)(h) of the Act to mean a party to an arbitration agreement. Unless the person approaching the Court is a party to an arbitration agreement, the powers under

this Section cannot be invoked.

31. The Arbitration and Conciliation Act, 1996 is a long leap in the direction of alternate dispute resolution systems. The Act is based on the UNCITRAL Model Law. An application u/s 9 under the scheme of the Act is not a suit. "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of Arbitration and Conciliation Act to mean "a party to an arbitration agreement".

32. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court u/s 9 can be; (I) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36.

33. The qualification which the person-invoking jurisdiction u/s 9 must possess is of being a "party" to an arbitration agreement. A person not a party to arbitration agreement cannot enter the Court for protection u/s 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought from the Court or the right which is sought to be canvassed in support of the relief. Filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the Arbitration and Conciliation Act. The right sought to be protected u/s 9 is a right by way of interim measure so as to protect the right under adjudication before the arbitral tribunal from being frustrated.

34. Further, Clause (h) of Section 2(1), defines the expression "party", to mean "a party to an arbitration agreement". This clause is also new one and did not exist in the old Act 1940. This expression is also not mentioned in UNICITRAL Model Law and is not available under English Arbitration Act, 1996. The definition makes it clear that a party, which is not a party to an arbitration agreement, is not covered within the definition of term "party" for the purpose of Arbitration and Conciliation Act, 1996.

35. A person who is not a party to an arbitration agreement cannot pray for the enforcement of the agreement or the appointment of an arbitrator. The term "party" in this clause has narrowed down the scope of the word "party" as commonly understood. It has made clear that non-parties to the contract have no rights under the Act for seeking arbitration and consequently an award.

36. In the case of *Heyman and Anr. v. Darwins Ltd.* (1942 1 All ER 337, it was stated:

The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute, and (b) what disputes the arbitration clause covers. To take (b) first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties "in respect of" the agreement or in respect of any provision

in the agreement or in respect of anything arising out of it. If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have hampered - e.g. as to whether the agreement has been broken by either of them; or as to the damage resulting from such breach; or as to whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance; or as to whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further - in all such cases it seems to me that the difference is within such an arbitration clause as this. In view, however, of phrases to be found in the report of some earlier decisions, the availability of the arbitration clause when "frustration" is alleged to have occurred will require closer consideration.

37. Hon^{ble} the Apex Court in the case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., (relevant portion) quoted held as under:

Para 13-A and C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application u/s 9 under the scheme of A and C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application u/s 9 of the Act is enforcing a right arising from a contract? "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of A and C Act to mean a party to an arbitration agreement". So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court u/s 9 can be (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application u/s 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court u/s 9 must possess is of being a "party" to an arbitration agreement, A person not party to an arbitration agreement cannot enter the Court for protection u/s 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under Clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The Court is conferred with the same power for making the

specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power u/s 9 is sought to be exercised is the arbitral tribunal. Under the scheme of A and C Act, the arbitration clause is separable from other clauses of the Partnership Deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A and C Act. The relief sought for in an application u/s 9 of A and C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the arbitral tribunal; the Court u/s 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application u/s 9 of A and C Act. (See. N. Srinivasa Vs. Kuttukaran Machine Tools Ltd.,

38. In the case of Indowind Energy Limited v. Wescare (India) Limited and Anr. (2010) 5 SCC 306., Hon'ble Supreme Court held as under:

Para No. 8 - Wescare filed a petition u/s 11(6) of the Act against Subuthi and Indowind for appointment of a sole arbitrator to arbitrate upon the disputes between them in respect of agreement dated 24.2.2006. Subuthi resisted the said petition alleging that as the agreement dated 24.2.2006 did not contemplate any transaction between Wescare and itself (Subuthi) and as no transaction took place between Wescare and Subuthi under the agreement dated 24.2.2006, there was no cause of action nor any arbitrable dispute between them. Indowind resisted the petition on the ground that it was not a party to the agreement dated 24.2.2006 entered into between Wescare and Subuthi; that it had not ratified the agreement dated 24.2.2006 or acted upon it; that there was no arbitration agreement between Wescare and Indowind; that the transactions of purchase of 31 WEGs were neither covered by nor in pursuance of the agreement dated 24.2.2006 and therefore the petition was liable to be dismissed.

39. Para No. 10- On the contentions urged the following two questions arise for consideration:

(1) Whether an arbitration clause found in a document (agreement) between two parties, could be considered as a binding arbitration agreement on a person who is not a signatory to the agreement?

(ii) Whether a company could be said to be a party to a contract containing an arbitration agreement, even though it did not sign the agreement containing an arbitration clause, with reference to its subsequent conduct?

40. Para 11- Section 7 defines an arbitration agreement and it is extracted below:

7. Arbitration agreement.--(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties"

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other,

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

41. The term "party" is defined in Section 2(h) as referring to a party to an arbitration agreement. The term arbitration agreement is defined u/s 2(b) as an agreement referred to in Section 7.

42. Para-15-Relevant portion-In the absence of an arbitration agreement between Wescare and Indowind, no claim against Indowind or no dispute with Indowind can be the subject-matter of reference to an arbitrator. This is evident from a plain, simple and normal reading of Section 7 of the Act.

43. In the case of Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, Hon"ble Apex Court held as under:

Para No. 15 - We are of the opinion that in dealing with a prayer for amendment, Courts normally prefer substance to form and techniques and the interest of justice is one of most relevant considerations. Therefore, if a party is entitled to amend its pleadings, having regard to the justice of the case, the right of the party to amend cannot be defeated just because a wrong Section or a wrong provision has been quoted in the amendment petition. The approach of the High Court in this case, in rejecting the Appellant's prayer for amendment, inter alia, on the ground that a wrong provision has been quoted in the amendment petition, is obviously a very hyper technical one. Mr. Salve rightly did not even try to defend the impugned order on the aforesaid technical ground adopted by the High Court.(See also Andhra Pradesh Tourism Development Corpn. and Another Vs. Pampa Hotels Ltd.,

44. Recently, the Apex Court in the case of S.N. Prasad Vs. Monnet Finance Ltd. and Others, while considering the relevant provisions under the Arbitration Act,

1996 held that a person who is not a party to an arbitration agreement has got no right to invoke provisions as provided therein for redressal of his grievances.

45. In view of the abovesaid facts, the position which emerged out in order to invoke scope and applicability of Section 9 of Act, 1996, in nut shell is as under:

(i) There should be a dispute which had arisen with respect to the subject matter of the agreement and referable to an arbitral tribunal to which a person who moves an application u/s 9 of Act 1996 for interim protection as mentioned therein must be a party to the said agreement.

(ii) There has to be a manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application under this section. The issuance of a notice in a given case is sufficient to establish the manifest intention to have the dispute referred to an arbitral tribunal.

(iii) The application can be entertained under this section before the court only if in a given case the subject-matter of the arbitration comes within its original civil jurisdiction, both pecuniary and territorial. (See: Arita Finance Ltd. v. ATV Projects India Ltd. 2003 (2) Arb LR 376 (Mad) : M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd.,

46. Now reverting to the facts and circumstances of the present case, the agreement dated 04.02.2008 entered between Picasso Digital Media Pvt. Ltd. and Mr. Arun Srivastava, Chairman, VAS Group, USA as an individual. However, there is a recital in the title of the parties to the effect that "as an individual with the option to transfer the agreement to a new entry in next one year", the same cannot in any manner said to be an agreement entered by VAS Group as argued by learned Counsel for Respondent.

47. counsel for Respondents also made a submission to the effect that as Division Bench of this Court vide order dated 07.04.2011 passed in FAFO No. 342 of 2011, Picasso Digital Media Private Limited v. VAS Knowledge Growth Initiatives Private Limited, directed District Judge, Lucknow to decide the application filed u/s 9 of Arbitration Act, so District Judge, Lucknow has to decide the same. In spite of the facts that, Respondent No. 2 is not a party to the agreement dated 04.02.2008, accordingly to my opinion, has got no force as this Court while dealing with the matter in FAFO No. 342 of 2011, Picasso Digital Media Private Limited v. VAS Knowledge Growth Initiatives Private Limited, not considered the fact whether Respondent No. 2 is a party to an agreement or not and the application moved by him u/s 9 of Arbitration Act is maintainable or not and the said point as well as the matter relating to impleadment/amendment Order 1 Rule 10 CPC and Order 6 Rule 17 CPC are also not subject matter of consideration in the said case.

48. Accordingly, in view of the law as laid down by Apex Court as stated hereinabove, only a party to an agreement has right to move an application u/s 9 of Arbitration Act for interim protection and admittedly Respondent No. 2/VAS

Knowledge Growth Initiatives Private Limited is not a party to an agreement, so as per law and per inqurium, the Respondents cannot derive any benefit from the judgment dated 07.04.2011 given by a Division Bench of this Court in FAFO No. 342 of 2011, Picasso Digital Media Private Limited v. VAS Knowledge Growth Initiatives Private Limited.

49. In the light of the facts and law stated hereinabove as VAS Knowledge Growth Initiatives Private Limited/Respondent No. 2 has got no right or locus to move an application under 9 of Arbitration Act in the instant case.

50. Next point which is to be considered in the present case is whether the application moved on behalf of Plaintiff/Respondent for amendment/impleadment, in the application/petition u/s 9 of the Arbitration case to the effect that "Mr. Arun Srivastava, Chairman, VAS Group, USA as an individual with the option to transfer the agreement to a new entity in the next one year (hereinafter referred to as the B.P.) presently residing at C-178 (One Hundred Seventy-eight), Nirala Nagar, Lucknow, Pin Code-226020" is an exercise which is permissible under law or not.

51. Apex Court in the case of R. McDill and Company Pvt. Ltd. Vs. Gouri Shankar Sarda and Others, , in paragraph No. 7 held as under:

Apart from the above cases Section 41 of the Act itself provides that the provisions of the CPC shall apply to all proceedings before the Court. We do not find any provision in the Act so as to take away the provisions or Order XXIII Code of Civil Procedure. from being applied to applications filed u/s 34 of the Act, in a suit. That apart the case before us has started on a plaint filed by the Plaintiff and in such a suit if any application is filed under the Act, the same ought to be governed by the provisions of the Code of Civil Procedure.

52. The Hon''ble Supreme Court in the case of I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd., (relevant portion) held as under:

We do not agree with this submission of the learned Counsel. It is true in the present Act application of the Code is not specifically provided for but what is to be noted is: Is there an express prohibition against the application of the Code to a proceeding arising out of the Act before a civil court? We find no such specific exclusion of the Code in the present Act. When there is no express exclusion, we cannot by inference hold that the Code is not applicable.

53. So, it is late in a day to quarrel that provision of CPC are not applicable in arbitration proceeding filed under Act 1996.

54. Now, in order to resolve the present controversy involved in the instant case/ it is necessary to have a glance to the provision as provided under Order 1 Rule 10 Code of Civil Procedure, quoted as under:

Order 1 Rule 10 Suit in name of wrong Plaintiff.

(1) Where a suit has been instituted in the name of the wrong person as Plaintiff

or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties--The Court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

55. The aforesaid provision empowers the Court to substitute the Plaintiff in the suit which is instituted in the name of wrong person, by right Plaintiff and if the Court is satisfied that the suit has been instituted through a bona fide mistake and also that it is necessary for determination of real matter in controversy. Similarly the Court also has power to substitute a Plaintiff in the suit where it is doubtful that it has been instituted in the name of the right Plaintiff, if the Court is satisfied that the suit has been instituted through a bona fide mistake and it is necessary for determination of real controversy between the parties.

56. In *Hughes v. Pump House Hotel Company*, (1902) 2 KBD 485, the question was whether an action has been commenced in the name of wrong person as Plaintiff through a bona fide mistake and though the original Plaintiff has no cause of action, the Court has jurisdiction to order the substitution of another person as Plaintiff. The Court of appeal upon considering all relevant practice and procedure held that the jurisdiction of the Court is not taken away to order the substitution of Plaintiff by another person where the original Plaintiff though had no cause of action commenced the proceedings through a bona fide mistake. Collin M.R. in the said King's Bench Division held thus:

The Plaintiff commenced an action against the Defendants, and a question arose whether the Plaintiff had made an absolute assignment of his claim against the Defendants, or only an assignment of his claim against the Defendants, or only an assignment by way of charge only, and on the decision of that point depended the Plaintiffs right to bring an action. Wright, J. took one view of the case, and the Court of Appeal took another, and that in itself is evidence that the Plaintiff had made a bona fide mistake in commencing the action in his own name. That lets in the jurisdiction of the Court under Order 16, Rule 2, to order that another person should be substituted or added as Plaintiff upon such term as may be just. So long as the doubt as to who should bring the action was bona fide, there can be no question as to the jurisdiction of the Court, and on the facts it is plain that it was a genuine doubt. The two cases of *Duckett v. Cover*, and *Ayscough v. Bullar* are clear authorities on the point raised before us. In each case the right

asserted by the new Plaintiff excluded that of the original one. In those cases Plaintiffs were added, but there can be no difference in principle whether a Plaintiff is added or substituted, and both adding and substituting are specifically mentioned in the rule. I think, therefore, that the objection raised by the Defendants fails, and that the order was rightly made.

57. Cozens-Hardy L.C. in the very judgment observed thus:

This case seems to me to fall clearly within the words of Order. 16, Rule 2. There has been a bona fide mistake of law as to whether there had been an absolute assignment of the Plaintiffs claim, or an assignment by way of charge only. It is said that the rule does not apply where it is shown that the Plaintiff has no right to action; but there are abundant authorities to the contrary effect. In *Carswell v. Hyland* there was an addition of a Plaintiff in a case in which the original Plaintiff was heir-at-law of a deceased trustee, and had no right of action, the right being vested in the added Plaintiff as legal personal representative; and in others of the cases which have been cited the failure of the right of the original Plaintiff to bring the action was the reason for the addition of another person as Plaintiff. There is no difference, as was suggested, between the addition and the substitution of a Plaintiff. When once the case is shown to be within the rule, there is jurisdiction to add or to substitute. I think, therefore, the order appealed from was right.

58. In *Diayadaru Chandrasekaralingam Vs. Arigapudi Nagabhushanam and Another*, it has been held as under:

It seems to be that even if the assignment is valid the right of action originally residing in the assignor has not ceased. It is true Section 130, Transfer of Property Act says that where an actionable claim is transferred all the rights and remedies of the transferer are transferred. I do not deny this. All that I say is that the transferer may maintain the action and afterwards hand over the amount when collected to the transferee.

59. In *Laxmikumar Srinivas Das v. Krishnaram Baldev Bank*, Lashkar AIR 1954 MP 156 while construing the expression "Where a suit has been instituted in the wrong person as Plaintiff under Order 1, Rule 10(1)," it was held that the said expression must be construed to include those suits which are instituted by the person who had no right to do so. It was held thus:

(3) Shri Kanhyalal, learned Counsel for the Petitioners, contends that where the original Plaintiff had no right of suit, the suit must be deemed not to have been validly commenced and such a defect could not be cured by an amendment and so the plaint ought to be rejected and that a fresh suit must be filed. I do not think there is any substance in this argument; for, the words in Rule 10, Order 1 of CPC are in direct contrast with the argument addressed. The words "where a suit has been instituted in the name of the wrong person as Plaintiff" are quite clear and must be construed to include those suits which are instituted by persons who had no right to do so.

If it is laid down in any ruling that no amendment is possible or permissible in a case where the original Plaintiff had no right to sue, I should, with all respect, disagree with that interpretation as it would contravene the clear provisions embodied in Order 1, R. 10. I am fortified in this view by a ruling reported in Krishna Bai v. Collector and Govt. Agent, Tanjore (A) and Anr. reported in AIR 1934 159 (Nagpur)

60. The Privy Council in AIR 1939 170 (Privy Council) after considering the provisions of Order 1, Rule 10, CPC approved the proposition laid down by Kings Bench Division in Hughes v. Pump House Hotel Company Ltd. (Supra) and held as under:

It has long been recognised that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as Plaintiffs if they will consent or as co-Defendants if they will not. Such cases as and are examples of this principle. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action see. Once all the parties are before the Court, the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as Plaintiffs or Defendants. Prima facie therefore the trial Court in the present case should have given judgment in favour of the eight of the original partners who survived, though some of them had been made Defendants: see.

61. Accordingly, the Privy Council approved the law that when a right to sue of a party is challenged and if the case under Order 1, Rule 10, CPC is made out, it did not matter that a wrong person who had originally sued had no cause of action.

62. In the case of Razian Begum v. Sahebzadi Anwar Begum and Ors. AIR 1958 AP 195 in para No. 19 held as under:

Para No. 19 - In a recent decision of our Court in Sri ramamurty v. Venkatasubba Rao 1956 A LT 917 (F), Viswanatha Sastry J., Summarised the effect of Order 1 Rule 10 (2), as follows:

The expression questions involved in the suit" in Order 1 Rule 10(2), means not merely the questions which are involved in the suit as between the parties originally impleaded. The object of the provision is that the real dispute raised in the suit should be decided in the presence of all the parties interested in the dispute and for that purpose they should be brought before the Court. O.I.R. 10(2) was framed in order to ensure that the dispute might be finally determined at the same time in the presence of all the parties interested without the delay and expense of several actions and trials and inconclusive adjudications.

63. In the case of Razia Begum Vs. Sahebzadi Anwar Begum and Others, Hon"ble Apex Court in page No. 895 at para No. 13(1) held as under:

Para No. 13(1) - That the question of addition of parties under Rule 10 of Order 1

of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contra distinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in Section 115 of the Code;

64. In the case of Chief Conservator of Forests, Govt. of A.P. Vs. The Collector and Others, Apex court held as under:

Rule 10 of Order 1 CPC provides remedy when a suit is filed in the name of wrong Plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings.

65. In view of the facts stated hereinabove, Order 1 Rule 10 (1) CPC presupposes the filing of a suit by a person not competent to do it but file bona fide believing that he had such right, it contemplates substitution, addition by a party as Plaintiff if the court is satisfied about the bona fide mistake.

66. Thus in nut shell, the limitations of power on the part of the court in order to invoke the provisions of Order 1 Rule 10(1) CPC are summarized as under:

(a) Institution should have been made under a genuine and bona fide mistake.

(b) That valuable right occurred to the Defendant should not be defeated.

67. If the above two tests are applied in the present case, the answer to the same will be negative as from the pleadings as made by Respondents/Plaintiffs in application for amendment/impleadment, and also in affidavits filed in support thereof in order to incorporate the same in application/petition u/s 9 of the Act moved earlier by Respondent No. 2 who is nowhere pleaded by them that there is a bona fide and genuine mistake on their part by VAS Knowledge Growth Initiatives Private Limited who had filed an application u/s 9 of the Act or by Mr. Arun Kumar Srivastava, Chairman, VAS Group, USA who has entered into an agreement with Picasso Digital Media Private Limited.

68. Further in case if the said application is allowed, the same will also take away the valuable right which has occurred to the revisionist/Defendant in the instant case.

69. In view of the abovesaid facts, order dated 25.04.2011 passed by District Judge, Lucknow thereby allowing application for impleadment moved on behalf of Plaintiffs/Respondents is an action contrary to law and the same also cannot be done in the garb of exercise of the power as provided under Order 1 Rule 10(1) Code of Civil Procedure.

70. One of the next argument advanced by learned Counsel for Respondent that in view of the law as laid down by Apex Court in the case of Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another, the prayer for amendment as made by Plaintiffs/Respondents is rightly allowed by the court

below and in this regard, they placed reliance in paragraph No. 15, the relevant portion as under:

Para No. 15 - We are of the opinion that in dealing with a prayer for amendment, Courts normally prefer substance to form and techniques and the interest of justice is one of most relevant considerations. Therefore, if a party is entitled to amend its pleadings, having regard to the justice of the case, the right of the party to amend cannot be defeated just because a wrong Section or a wrong provision has been quoted in the amendment petition. The approach of the High Court in this case, in rejecting the Appellant's prayer for amendment, inter alia, on the ground that a wrong provision has been quoted in the amendment petition, is obviously a very hyper technical one. Mr. Salve rightly did not even try to defend the impugned order on the aforesaid technical ground adopted by the High Court. (See also Andhra Pradesh Tourism Development Corpn. and Another Vs. Pampa Hotels Ltd.,

71. In order to resolve the said controversy involved in the present case, it would be appropriate to state the facts regarding the change taken place in the provisions as provided under Order 6 Rule 17 of Code of Civil Procedure.

A.) The Order 6 Rule 17 CPC as exists before 1999 is quoted as under:

Order 6 Rule 17:

17. Amendment of pleadings- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

B.) The abovesaid provision was omitted by the CPC (Amendment) Act, 1999 and after amendment reads as follows:

16. Amendment of Order 6- in the First Schedule, in Order 6-

(iii) Rules 17 and 18 shall be omitted.

C.) The provision as it exists now after the CPC (Amendment) Act, 2002.

Order 6 Rule 17

17. Amendment of pleadings- The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due

diligence, the party could not have raised the matter before the commencement of trial.

72. Hon'ble Supreme Court in the case of Raj Kumar Gurwara (Dead) through LRS. v. S.K. Sarwagi and Co. Private Limited and Anr. (2008) 14 SCC 364 has considered the above changed in provision of Order 6 Rule 17 CPC held as under:

Para-12: In order to consider whether the Appellant Plaintiff has made out case for amendment of his plaint, it is useful to refer Order 6 Rule 17 CPC which reads as under:

17. Amendment of pleadings- The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

The first part of the rule makes it abundantly clear that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the purpose of determining the real questions in controversy. However, this Rule is subject to proviso appended therein. The said Rule with proviso again substituted by Act 22 of 2002 with effect from 1.7.2002 makes it clear that after the commencement of the trial, no application for amendment shall be allowed. However, if the parties to the proceedings are able to satisfy the court that in spite of due diligence they could not raise the issue before the commencement of trial and the court is satisfied with their explanation, amendment can be allowed even after commencement of the trial.

Para-13-To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso.

Para - 18-Further it is relevant to point out that in the original suit, the Plaintiff prayed for declaration of his exclusive right to do mining operations and to use

and sell the suit schedule property and in the petition filed during the course of the arguments, he prayed for recovery of possession and damages from the second Defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation. The Plaintiff not only failed to satisfy the conditions prescribed in proviso to Order 6 Rule 17 but even duly considered by the High Court and rightly set aside the order dated 10.03.2004 of the Additional District Judge.

73. In the case of Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, Hon''ble Supreme Court has held as under:

Para 59: The other important condition which should govern the discretion of the court is the potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs. then there is no injustice but in practice hardly any court grants actual costs to the opposite side. The courts have very wide discretion in the matter of amendment of pleadings but court''s powers must be exercised judiciously and with great care.

Para 63: On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- 1.) whether the amendment sought is imperative for proper and effective adjudication of the case;
- 2.) whether the application for amendment is bona fide or mala fide;
- 3.) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- 4.) refusing amendment would in fact lead to injustice or lead to multiple litigation;
- 5.) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case: and
- 6.) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

Para 64: The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.

74. In the light of the abovesaid facts, the argument advanced on behalf of

Respondents that in the garb of provisions as provided under Order 6 Rule 17, the amendment in the application/petition can be made, thus the order passed by court below is perfectly legal has got no fore, accordingly, rejected.

75. Needless to mention herein, after conclusion of the arguments, on 16.05.2011, an application moved on behalf of Respondents under Order 23 Rule 3 read with Section 151 CPC praying therein as follows:

WHEREON, it is most respect fully prayed that this Hon''ble Court may graciously be pleased to permit the applicants particularly Applicant No. 2 to withdraw the Suit No. 19 of 2011 from the Court of District Judge, Lucknow, in which now the Applicant No. 1 has also been impleaded by virtue of order dated 25.04.2011 and as such, the Applicant No. 1 may also be permitted to institute a fresh suit on the subject matter of the Suit No. 19 of 2011 along with the subsequent development in between the parties u/s 9 of the Arbitration and Conciliation Act, 1996, in the ends of justice, within time frame work the Hon''ble Court may deem proper.

76. Sri Ram Raj, counsel for revisionist, has no objection to the abovesaid prayer as made on behalf of Respondents.

77. For the foregoing reasons, present revision is allowed, order dated 25.04.2011 passed by District Judge, Lucknow is set aside and further of the Respondents/Plaintiffs, if so advised, for redressal of their grievances, may approach appropriate forum in respect to prayer as made by them in application dated 16.05.2011 moved under Order 23 Rule 3 read with Section 151 CPC in the instant matter.

78. No order as to costs.