

(2009) 08 DEL CK 0130

In the Delhi High Court

Case No : I.A. No.13366 of 2008 in CS (OS) No.1368 of 2008

The Saraswati Industrial Syndicate Ltd.

APPELLANT

Vs

Overseas Infrastructure Alliance(I) Pvt. Ltd and Another

RESPONDENT

Date of Decision : 20-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A
Constitution of India, 1950 — Article 14, 19, 21
Specific Relief Act, 1963 — Section 41

Citation : (2009) 08 DEL CK 0130

Hon'ble Judges : Rekha Sharma, J

Bench : Single Bench

Advocate : P.V. Kapur, Anuradha Dutt, Ekta Kapil, Gaurav Chauhan and Chetna, for the Appellant; Arun Bhardwaj Manish Sharma, for D-1, Sunil Gupta Jatin Zaveri, for Proposed Defendant No. 3, Public Prosecutor Malhotra, ASG and Sudarsh Menon, for Proposed Defendant No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Rekha Sharma, J.—Three applications, one under Order 6 Rule 17 read with Order 1 Rule 10, another under Order 39 Rules 1 & 2 and the third under Order 39 Rule 4 of the CPC (hereinafter referred to as the Code) seemingly simple have been a witness to marathon sessions of arguments. Mercifully, arguments on the application under Order 6 Rule 17 read with Order 1 Rule 10 of the Code have concluded and though the other two applications are still to see conclusion of arguments, I am proceeding with the order on the application seeking amendment of the plaint and impleading of two new parties namely Walchandnagar Industries Ltd. and the Export-Import Bank of India (hereinafter referred to as the EXIM Bank). But first, the background.

2. The Government of Ethiopia proposes to set-up sugar factories at Addis Ababa. The project is being funded by the Government of India through EXIM Bank to the tune of US \$ 122,000,000 (Dollars one hundred twenty two million)

on certain terms and conditions which were reduced into writing by means of a Dollar Credit-line Agreement dated October 04, 2007 between the Government of the Federal Democratic Republic of Ethiopia and EXIM Bank. In order to give effect to the project, defendant No. 2, namely, Tendaho Sugar Factory Project which is a company incorporated under the laws of Ethiopia and is owned and controlled by the Government of the Federal Democratic Republic of Ethiopia, invited tenders for Juice Extraction Plant, Steam Generation Plant, Power Generation Plant, Process Home Plant and related modernization packages. The plaintiff and some other companies including defendant No. 1, namely, M/s. Overseas Infrastructure Alliance (India) Pvt. Ltd. responded to the invitation of tenders by submitting their respective bids. The bid of the plaintiff, after some negotiations, was accepted for Steam Generation Plant vide a communication from defendant No. 2, dated September 17, 2007. In so far as defendant No. 1 is concerned, it succeeded in procuring two contracts, namely, Juice Extraction Plant and Power Generation Plant. This acceptance of two bids of defendant No. 1 brought into play the "EXIM Bank Disbursement Schedule., under which it was necessary to proceed through a single Engineering, Projects Management and Construction (hereinafter called the EPC) Contract method. As per this method, any bidder who won two or more bid packages became eligible to act as a 'Single EPC Contractor". Since defendant No. 1 had won two bids, it was appointed to act as 'Single EPC Contractor.. The plaintiff was informed about this appointment of defendant No. 1 by defendant No. 2 through a communication dated December 07, 2007. The plaintiff was also informed that, "being a winning bidder of Steam Generation Plant, it will be retained as a sub-contractor to the main EPC Contractor without any alteration in the agreed technical and commercial aspects including the time schedule, as already negotiated and finalized." On the same date defendant No. 2 also sent a letter to defendant No. 1 intimating it about its appointment as "Single EPC Contractor., with the stipulation that the winning bidders of other packages were to be retained as sub-contractors without any alteration in the agreed technical and financial aspects as already finalized with individual bidders.

3. It is thus the case of the plaintiff that it was to act as a sub-contractor to the EPC contractor, that is, defendant No. 1 without any alterations in the agreed financial and technical aspects which, as per it, stood already finalized with defendant No. 2. It is also its. case that in order to finalize the type of contract agreement to be signed between the EPC contractor and the winning bidders of other packages, a joint meeting between the plaintiff, defendant No. 1 and defendant No. 2 was held on 19th & 20th December, 2007 at Addis Ababa in which it was categorically agreed that a contract would be entered into between defendant No. 1 and the sub-contractors which would be seamless and address all issues as per the original tender documents including General Conditions of Contract, Special Conditions of Contract and other financial conditions. Thereafter, as per the plaintiff, a "Contract Agreement" dated February 20, 2008 was executed between defendant No. 1 and defendant No. 2 and one of the

clauses of the said contract agreement was that the appendices listed in the attached list of appendices shall be deemed to form an integral part of the agreement. Referring to Appendix-5, it is pointed out that it contained a list of approved sub-contractors where the name of the plaintiff appeared at serial No. 2 against "Steam Generation Plant. and it was mentioned therein that, "the Contractor, to the extent possible, shall have seamless contracts with the sub-contractors."

4. It is alleged that notwithstanding the obligation cast upon defendant No. 1 to enter into an agreement with the plaintiff without effecting any changes in the financial and technical aspects of its bid which stood already accepted by defendant No. 2 and inspite of having agreed to abide by those terms and conditions in the joint meeting of 19th & 20th December, 2007 and in the contract agreement dated February 20, 2008, referred to above, defendant No. 1 insisted upon the plaintiff to reduce its price by 15%, on the pretext that it was required to be paid to it to discharge its obligation of a lead contractor. In other words, as per the plaintiff, defendant No. 1 attempted to re-negotiate the contract price which it legally could not do and that when it refused to give in to the alleged illegal demand of defendant No. 1, it threatened to introduce a new sub-contractor in its place. It is this threat which has given birth to this suit for perpetual and mandatory injunction wherein the plaintiff has pleaded that it has a concluded contract with defendant No. 2 and that defendant No. 1 is bound to and liable to give effect to the concluded contract. It is also pleaded that the status of defendant No. 1 is no better than that of the plaintiff, as the tenders of both the plaintiff and defendant No. 1 have been accepted by defendant No. 2 with the only difference that defendant No. 1 has been described as an EPC or a lead contractor, for the sole reason that it succeeded in securing two contracts. The plaintiff, thus, has alleged that defendant No. 1 by threatening to introduce another sub-contractor in its place is tortuously interfering in its contract with defendant No. 2. Accordingly, it has prayed for the following reliefs:

(a) grant a decree of perpetual injunction restraining defendant No. 1 from interfering in the contract/award of contract between plaintiff and defendant No. 2 as contained in letter dated September 17, 2007 including appointing any third party;

(b) grant perpetual injunction restraining defendant No. 1 from committing a breach of the negative covenant enumerated in para 18 of the plaint and restrain defendant No. 1 from modifying any technical and/or commercial terms including price agreed/finalized between the plaintiff and defendant No. 2;

(c) grant a decree of mandatory injunction directing defendant No. 1 to execute the obligation of signing a formal contract with the plaintiff in accordance with the terms and conditions agreed between the plaintiff and defendant No. 2 as contained in letter dated September 17, 2007;

(d) costs; and

(e) pass any further order/orders as this Court may deem fit and proper in the facts and circumstances of the case.

5. Along with the suit, the plaintiff also filed an application under Order 39 Rules 1 & 2 of the Code, on which a learned Single Judge of this Court passed an order dated July 23, 2008 restraining defendant No. 1 from taking any measures to introduce a third party in respect of the tender floated by defendant No. 2 for Steam Generation Plant for which the plaintiff has been accepted by defendant No. 2 as a successful bidder.

6. In response to the summons, defendant No. 1 has filed written statement while defendant No. 2 has chosen to remain absent despite service of summons upon it.

7. It is alleged by defendant No. 1 that there is no concluded contract between the plaintiff and defendant No. 2, as the detailed terms and conditions governing the construction of the plant were never settled and they never entered into any formal contract. It is further alleged that as the plaintiff was delaying the finalization of the terms of the sub-contract to be awarded in its favour this was brought to the notice of defendant No. 2 who authorized defendant No. 1 to write a letter to the sub-contractors giving them a last chance to finalize the contract agreement between the EPC contractor and the sub-contractors within a week and submit the document on June 28, 2008 failing which defendant No. 1 could approach defendant No. 2 with an alternative sub-contractor. The case of defendant No. 1 is that in furtherance of the said direction given by defendant No. 2, it addressed an e-mail dated June 21, 2008 to the plaintiff informing it that defendant No. 2 had given a dead line of June 27, 2008 as the date by which it was expected to resolve all the pending issues as well as signing of the contract. As per defendant No. 1, the plaintiff failed to meet the dead-line and settle the terms of the said contract and as a result defendant No. 1 entered into a "Memorandum of Understanding. dated July 08, 2008 with Walchandnagar Industries Ltd. for the construction of "Steam Generation Plant" followed by a sub-contract agreement dated July 12, 2008. It is also the case of defendant No. 1 that the plaintiff was fully aware of said sub-contract agreement and that it obtained the ex-parte ad-interim order dated July 23, 2008 by suppressing this fact from the court. It may not be out of place to mention here that defendant No. 1 has also challenged the territorial jurisdiction of this Court not only on the ground that the project is to be executed outside the territorial limits of this Court but also on the ground that no part of action has arisen at Delhi. Of-course, it is further alleged that as per clause-6 of the General Conditions of Contract contained in the EPC Contract document, any dispute of any kind whatsoever between the employer and the contractor in connection with or arising out of the contract shall be referred in writing by either party to an Arbitrator. It is further stated that the reliefs claimed are in the nature of enforcement of specific performance of a contract and cannot be granted in view of Sections 41(e) & 41(h) of Specific Relief Act, 1963.

8. Having provided with the necessary background, let me revert back to the application of the plaintiff under Order 6 Rule 17 and under Order 1 Rule 10 of the Code. The plaintiff alleges therein that the so-called "Memorandum of Understanding. dated July 08, 2008 between defendant No. 1 and Walchandnagar Industries Ltd. and pursuant thereto the alleged definite contract signed between them on July 12, 2008 are forged and fabricated documents which have been antedated to frustrate and over-reach the above-referred interim order passed by this Court on July 23, 2008 which was served on defendant No. 1 on July 24, 2008. It is further stated that the fabrication and forgery committed by defendant No. 1 in connivance with Walchandnagar Industries Limited can be seen through from the fact that though the alleged "Memorandum of Understanding. dated July 08, 2008 was to remain valid for a period of 30 days, yet, within just four days of the signing of the "Memorandum of Understanding., a purported definite contract was, allegedly, signed on July 12, 2008. As for the sub-contract dated July 12, 2008 allegedly entered into between defendant No. 1 and Walchandnagar Industries Limited, it is stated that it makes even those documents to be part of the contract which had not been finalized and were only proposed, such as, "Minutes of Package Negotiations meeting (proposed) to be held between the Employer and Sub-contractor (WIL) for the Package Facilities on technical aspects", showing thereby, that the sub-contract was prepared after receiving the ex-parte order passed by this Court. That the said documents are forged is further sought to be proved from the fact that as late as on August 05, 2008 in a meeting held between defendant No. 1 and defendant No. 2, there was no mention that a definite contract had been signed with Walchandnagar Industries Ltd. Reference in this regard has been made to the Minutes of the meeting dated August 05, 2008 which, it is alleged, go to show that defendant No. 1 merely informed defendant No. 2 that only negotiations were being conducted with Walchandnagar Industries Limited. Reference has also been made to a letter dated August 05, 2008 from defendant No. 1 to defendant No. 2, though its authenticity is being disputed. It is stated that as per this letter, assuming the same to be correct, it was on August 05, 2008 that defendant No. 1 had accepted the proposal of defendant No. 2 to substitute Walchandnagar Industries Limited, showing again, that the alleged "Memorandum of Understanding. dated July 08, 2008 and the purported definite contract dated July 12, 2008 are forged documents. In nut-shell, the case of the plaintiff is that defendant No. 1 in concert with defendant No. 2 and Walchandnagar Industries Limited is clandestinely introducing Walchandnagar Industries Ltd. as a sub-contractor in its place when the said proposed defendant had not even participated in the tender process. It is in these circumstances that the plaintiff is seeking to implead Walchandnagar Industries Ltd.

9. The impleadment of EXIM Bank as defendant No. 4 is sought on the ground that defendant No. 2 is proceeding with modernization essentially financed by credit line from the EXIM Bank of India and that the said Bank being State is bound to act fairly and not in violation of the order of this Court.

10. The aforementioned facts contained in the application for "amendment-cum-impleadment. are sought to be incorporated in the original plaint by adding paragraphs 18-A to 18-L after paragraph 18. The said paragraphs run as under:

18A. That this Hon.ble Court on 23.07.2008, passed an Order that, "having regard to the facts of the case and taking the consideration the documents placed on the record, till the next date of hearing, the defendant No. 1 shall not take any measures to introduce a third party in respect of the tender floated by defendant No. 2 for Steam Generating Plant for which the plaintiff has been accepted by the defendant No. 2 as the successful bidder". The said order was duly served on the defendant No. 1 on 24.07.2008 and has also been served on Defendant No. 2. The defendant No. 1 has filed its written statement on 04.08.2008 wherein it has alleged in paragraph 1 of the Preliminary objections that the defendant No. 1 has already signed a definite contract with defendant No. 3 for execution of the power project as a Sub contractor for construction of the steam generation plant for the Tendaho Sugar Factory Project (purportedly just about 11 days before the passing of the exparte injunction order). Therefore, in light of the said development, it has been alleged that the said suit filed by the plaintiff has become infructuous. A copy of the purported sub-Contract Agreement between defendant No. 1 and the said defendant No. 3 has been filed by the defendant No. 1.

18B. The said purported sub-Contract Agreement is clearly antedated and has been fabricated with a view to frustrate the injunction order dated 23.07.2008 and/or to overreach the Order dated 23.07.2008 passed by this Hon.ble Court.

18C. The first telltale sign is in the written statement itself where in Para 7, it has been alleged that a Memorandum of Understanding (MOU) was signed between Defendant No. 1 and defendant No. 3 on 8th July, 2008 and thereafter, a definite purported contract was signed on 12th July, 2008, i.e. within 4 days of the MOU despite the MOU being valid for a period of 30 days - seemingly, a tearing hurry indeed. However, the Defendant No. 1 proposed the name of defendant No. 3 to defendant No. 2 long after 12th July, 2008.

18D. It is also relevant to note that in the alleged sub- Contract Agreement dated 12th July, 2008 filed by the Defendant No. 1, defendant Nos. 1 and 3 have purported to create a definition of "contract documents" which includes documents that have not yet been finalized but are only "proposed.. One of the documents forming part of Contract document is "Minutes of package Negotiations meeting (proposed) to be held between Employer and Sub-contractor (WIL), for the Package Facilities on technical aspects". Firstly, there cannot be a meeting or minutes of a meeting which are qualified as "proposed". Secondly, there cannot be minutes of a meeting which is yet "to be held". It is obvious that the documents have been prepared in a hurry only to be produced before this Hon.ble Court with a view to mislead this Hon.ble Court and to frustrate and over-reach the orders of this Hon.ble Court.

18E. That even as late as on 5th August, 2008, in the meeting between the defendant No. 1 and defendant No. 2, there is no mention that a definite contract had been signed with defendant No. 3. In fact defendant No. 1 informed defendant No. 2 that only negotiations were being conducted with defendant No. 3.

18F. Further and in any event, the defendant No. 2 has not been shown to have ever authorized appointment of the said defendant No. 3 as a Sub-Contractor in substitution of the plaintiff. This is apparent from the letter dated 30.06.2008 written by defendant No. 2 to its Board of Management on 30.06.2008 along with the legal opinion and the opinion of the consultant which clearly reveal that the minutes dated 19.06.2008 and 20.06.2008 and the letter dated 12.06.2008 sought to be relied upon by the defendant No. 1 did not constitute any approval of substituting the plaintiff as alleged by the defendant No. 1. The defendant No. 1 is clearly suppressing all material facts as the aforesaid documents are within the knowledge of defendant No. 1 who has chosen to conceal the same from this Hon.ble Court. Neither the negotiations nor the minutes and/or any alleged MOU can be given effect to in teeth of the order dated 23.07.2008 passed by this Hon.ble Court and the defendant No. 1 ought not to be permitted to defeat the bonafide rights of the plaintiff and/or overreach this Hon.ble Court.

18G. It is relevant to note that in a similar contract, which relates to another Govt. of Ethiopia company known as Wonji Shoa Sugar Factory, the plaintiff had a bid for a Juice Extraction plant. The EPC Contractor in that case is one M/s. Uttam Sucrotech International Pvt. Ltd. The said M/s. Uttam Sucrotech International Pvt. Ltd. has signed a Sub- contract with the plaintiff without making any demand for 15% of contract price for discharge of its obligations as a lead EPC/Contractor. It has not come to the knowledge of the plaintiff that defendant No. 1 was not even entitled to become the EPC contractor and the defendant No. 1 and 2 have manipulated records to make defendant No. 1 become the EPC contractor who is demanding unreasonable and absolutely uncalled for 15% of the contract price from plaintiff and other similarly placed sub-contractors. That defendant Nos. 1,2 and the said Walchandnagar Industries Ltd. are acting in concert and are attempting to defeat the order of this Hon.ble Court and perpetrate a fraud which they cannot be permitted to do.

18H. In fact, defendant No. 1 has itself subsequently filed a letter dated 5th August, 2008 purportedly issued by defendant No. 2 permitting the defendant No. 2 to substitute the plaintiff (the authenticity of the said letter is denied). Clearly the said letter dated 5th August, 2008 shows that there could be no contract between defendant No. and the said defendant No. 3 prior thereto and further that defendant No. 1 and 2 were acting in concert and in teeth of the order dated 23rd July, 2008 passed by this Hon.ble Court which is in force even till date.

18I. The attempt of defendant No. 1 of clandestinely introducing the purported Sub-Contractor who did not even participate in the tender, is not only contrary to

the entire tender process but is also malafide and an attempt to over- reach this Hon.ble Court. Further, till date no termination of plaintiff.s sub-contract has even been communicated.

18J. The aforesaid facts clearly reveal that the purported sub-contract Agreement dated 12th July, 2008 which was allegedly entered into within four days of signing the Memorandum of understanding which was valid for 30 days is clearly ante dated with a view to defeat the injunction order passed by this Hon.ble Court. The said purported sub-contract Agreement cannot be permitted to be implemented and be proceeded with and being in teeth of the order dated 23rd July, 2009 is void ab initio. Even the purported permission dated 5th August, 2008 cannot be acted upon and is void ab initio as defendant No. 2 was also informed of the order dated 23rd July, 2008.

18K. As stated in the plaint, the defendant No. 2 is proceeding with modernization essentially financed by credit line from the EXIM Bank of India. The said EXIM Bank of India being State is bound to act fairly and not to act in violation of the order of Hon.ble Court. In any event, EXIM Bank of India being a banking institution has a duty of care and cannot allow fraud to be perpetrated by defendant No. 1 and/or 2 and cannot approve substitution of the plaintiff by the said defendant No. 3 contrary to the order of this Hon.ble Court.

18L. That defendant Nos. 1,2 and 3 are acting in concert and are attempting to defeat the order of this Hon"ble Court and perpetrate a fraud which they cannot be permitted to do.

11. The plaintiff is also seeking to amend paragraph 2 of the original plaint. It relates to defendant No. 2, i.e. Tendaho Sugar Factory Project. In the original plaint, it is stated that defendant No. 2 is a proper party and is being sued as such and that no relief whatsoever is being sought against it. This paragraph is now sought to be substituted by the following paragraph:

Defendant No. 2 is acting malafide and is acting in concert with other defendants to perpetrate a fraud on the plaintiff and defeat and disobey the orders of this Hon.ble Court.

12. The plaintiff is further seeking to add prayers (d), (e), (f), (g) & (h) after prayer (c) of the original plaint while prayers (d) & (e) of the original plaint are sought to be renumbered as (i) & (j). The proposed amended prayers run as under:

(d) grant a decree of declaration that the purported sub-contract Agreement dated July 12, 2008 between defendant No. 1 and defendant No. 3 is invalid and void ab initio,

(e) grant a decree of perpetual injunction restraining defendants No. 1, 2 & 3 from proceeding with and/or acting upon in any manner whatsoever on the purported sub- contract Agreement dated July 12, 2008 or on any subsequent date;

(f) grant a decree of declaration that the purported permission granted vide letter dated August 05, 2008 issued by defendant No. 1 to defendant No. 2 is invalid and/or void ab initio;

(g) grant a decree of permanent injunction restraining defendants No. 1, 2 & 3 from taking any action pursuant to the purported letter dated August 05, 2008;

(h) grant a decree of perpetual injunction restraining defendant No. 4 from granting any approval to substitute the plaintiff and/or proceed with any funding of the project of Steam Generation Plant floated by defendant No. 2 without the plaintiff.

13. It is time now to come straight to the application for "amendment and impleadment.. Should it be allowed? As far as the prayer for amendment is concerned, it need not detain me for long and the reason is that after the application had suffered lengthy arguments, for and against, the learned Counsel for defendant No. 1 conceded that the amendments sought could be allowed subject to liberty to it to raise such objections as may be available to it and to this, it may be noted, the learned Counsel for the plaintiff had no objection. Keeping this in view and keeping also in view the nature of the amendments and so also the fact that the amendments have their seed in subsequent developments, the amendments sought are allowed. Of-course, it would be open to defendant No. 1 to take in response to the amendments, the pleas legally open to it. With the question of amendment over, the next question which craves for an answer relates to the impleadment of Walchandnagar Industries Ltd. and the Exim Bank. Should not the impleadment follow the amendments?

14. Before I venture to answer it, let us have a look at the power of the Court to strike out or add a party in an ongoing proceeding. The power as we all know flows from Order 1 Rule 10(2) of the Code. It says that "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." This then is the fountain head of all the power. We also know that a necessary party is one without whom no order can be made effectively and, a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. See Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, . In a relatively recent judgment of the Apex Court in the case of Kasturi Vs. Iyyamperumal and Others, , two tests have been laid down to determine who is a necessary party. These tests are that (1) there must be a right to some relief against such party in respect of controversies involved in the proceedings, and (2) no effective decree can be passed in the absence of such party. Reference may also be made

to a judgment of this Court in the case of Madhupuri (Ms.) and Anr. v. Sh. Moti Lal Puri and Ors. reported in 2005 VIII AD (Delhi) 737. "It says that Order 1 Rule 10 of the Code has been expressly provided in the Code to meet with situations so as to implead all the parties which may be affected by any litigation so that the rendering of justice is not hampered. It further says that plaintiff is dominus-litus and he is bound to sue every possible adverse claimant to avoid multiplicity of suit and needless expenses."

15. The principle is thus clear and it is that while deciding whether a person ought to be made a party to the suit, what needs to be examined is, whether the controversy raised in the plaint can be effectively and finally set at rest in the absence of the person sought to be impleaded and if not, then that person must necessarily be impleaded as a party or else it will leave scope for further litigation and may also lead to multiplicity of proceedings.

16. The law of impleadment being what has been noticed above, are Walchandnagar Industries Ltd. and EXIM Bank necessary and proper parties in the suit? I shall first deal with Walchandnagar Industries Ltd. but before I do that, let me notice the objections raised by it to its impleadment. It says that it is a stranger to the proceedings. It has no privity of contract with the plaintiff and that it has entered into an independent contract with defendant No. 1 dated July 12, 2008 with which the plaintiff has no right to interfere. It further says that the foundation of the original suit is the alleged concluded contract between the plaintiff and defendant No. 2 and that the plaintiff by way of an application for "amendment-cum-impleadment. cannot be allowed to change the contours of the original plaint where it does not figure at all. As per it, it is not the relief sought against it which should form the basis for its impleadment but the averments made in the plaint. Those averments, it is stated, give rise to disputes, if any, between the plaintiff, defendant No. 1 and defendant No. 2. It has also taken an objection that assuming there is an agreement between the plaintiff and defendant No. 1, such an agreement is not capable of being specifically enforced and that the only remedy available to the plaintiff is to sue for the alleged breach of the contract. Hence, it is argued that it is neither a necessary or a proper party, and in support, reliance was placed on Anil Kumar Singh Vs. Shivnath Mishra alias Gadasa Guru, . The facts of that case were that one Daulat Singh, father of the petitioner filed a suit for specific performance of an agreement of sale of some land said to have been executed in his favour by one Shiv Nath Mishra. Pending decision in the suit, Daulat Singh died. The petitioner came on record as legal representative of Daulat Singh. He filed an application under Order 6 Rule 17 of the Code seeking leave to amend the plaint and seeking to implead the respondent also as a party- defendant in the suit. The contention of the petitioner was that Shivnath Mishra, the vendor, had colluded with his sons and wife and had obtained a collusive decree in a suit u/s 229-B of the U.P. Zamindari Abolition and Land Reforms Act and by operation of the said decree, they became co-sharers of the property to be conveyed under the "Agreement to Sell. and, therefore, the respondent was a necessary and proper party to

effectuate the ultimate decree of the specific performance that may be granted in favour of the petitioner. The Apex Court declined the relief on the ground that the suit of the plaintiff was based on the "Agreement to Sell. said to have been executed by the vendor and that the person who was sought to be impleaded as a respondent had acquired interest in the property by an independent decree which decree was not the subject matter of the suit and hence, without assailing the validity of the decree, those who acquired the right through the decree could not be dragged into the litigation.

17. Reliance was also placed on *Sarvinder Singh Vs. Dalip Singh and Others*, . In the said case Sarvinder Singh had already obtained a decree of declaration, that he was the owner of the suit property on the basis of a registered Will executed by his mother. In that suit the daughters of Hira Devi, were impleaded as defendants. One of the daughters was Rajinder Kaur. Subsequent to that decree which had become final, Sarvinder Singh filed another suit for declaration of his ownership on the basis of the same Will against the heirs of Rajinder Kaur. Since the said heirs of Rajinder Kaur alienated the self same lands to X and Y, the said X and Y moved an application under Order 1 Rule 10 of the Code for being impleaded as defendants. The Supreme Court observed that though it may be open to the heirs of the Rajinder Kaur to resist the suit on any legally available or tenable grounds, those grounds were not available to the applicants. It was further made clear that the earlier decree on the basis of the Will having become final and as the applicants were claiming title only through the heirs of Rajinder Kaur who was a party to that decree they could not legally challenge the legality and validity of the said Will. It was for these reasons that the applicants were held to be neither necessary nor proper parties to the suit.

18. As would be borne out from above both the judgments relied upon by learned Counsel for Walchandnagar Industries Ltd. bear no parallel to the facts of the present case.

19. Having regard to the facts of the present case as borne out from the plaint as well as from the amendments which, I have allowed, some of the issues which are likely to fall for consideration are, firstly, whether the plaintiff and defendant No. 2 had a concluded contract and if so, could defendant No. 1 renegotiate the price with the plaintiff in contravention of alleged express understanding arrived at between the plaintiff, defendant No. 1 and defendant No. 2 in the joint meeting held on 19th & 20th December, 2007 and in contravention of the alleged contract-agreement dated February 20, 2008 between defendant No. 1 and defendant No. 2; and secondly, was defendant No. 1 authorized by defendant No. 2 or even otherwise legally entitled to oust the plaintiff from the project and induct in its place another sub-contractor, namely, Walchandnagar Industries Ltd.? Not only this, the amendments sought to be introduced in the plaint challenge the existence, legality and validity of the so called binding contract with Walchandnagar Industries Ltd. vide "Memorandum of Understanding" dated July 08, 2008 and the sub-contract dated July 12, 2008. It may be recalled that

as per the application for amendment the said documents were forged and fabricated by defendant No. 1 in concert with defendant No. 2 and Walchandnagar Industries Ltd.

20. This certainly is not the stage to go into merits. That stage has not yet come. At this stage, what is to be seen is whether in view of what is pleaded, a person sought to be impleaded is a necessary or a proper party or not and whether the totality of the averments made against the person sought to be impleaded give rise to a cause of action against that person and if they do, should that person be not treated as a necessary or proper party? This being the position, should Walchandnagar Industries Ltd. be kept out of the proceedings? Should it be heard to say that it had entered into an independent contract with defendant No. 1 and that the plaintiff has no right to challenge its contract? The effect of the alleged contract with Walchandnagar Industries Ltd. on the alleged rights of the plaintiff is obvious. It has the effect of ousting the plaintiff from the project of setting-up Sugar Factory at Addis Ababa by Walchandnagar Industries Ltd. The plaintiff has challenged not only the very existence of that contract but its legality and validity too. Whether the plaintiff had a concluded contract with defendant No. 2 and if so, whether it was wrongly ousted by defendant No. 1 and rightly replaced by Walchandnagar Industries Ltd., who is a direct beneficiary from the ouster of the plaintiff are questions which have been raised and these questions will have to be determined. And, if so, and it being so, Walchandnagar Industries Ltd. becomes a necessary party. The loss of the plaintiff is the gain of Walchandnagar Industries Ltd. It has allegedly stepped into the shoes of the plaintiff. It cannot be allowed to watch the proceedings from the side-lines. It must enter the fray and justify its induction, more so, when it is being accused of making its way to the contract by forging and fabricating documents. More than the plaintiff, it will be in its own interest to do so, for in case, it remains out of the proceedings and assuming any adverse order is passed in its absence, it may cause irreparable loss to it and in all likelihood may lead to further litigation. Therefore, in my opinion, Walchandnagar Industries Ltd. is a necessary and proper party. I, therefore, allow the prayer for impleading it as a party.

21. This brings me to the prayer for impleadment of EXIM Bank. As already noticed above, the project for development of Sugar Factory at Addis Ababa is being funded by the said bank. It has entered into an agreement dated October 04, 2007 with the Government of Federal Democratic Republic of Ethiopia, called the "Dollar Credit-line Agreement. and it is under the terms of the said agreement that it has to release the funds to the Government of Ethiopia who has been described as the "Borrower".

22. It is the case of the EXIM Bank that the agreement dated October 04, 2007 has been entered into between two sovereign countries and the Bank is under legal obligation to remit the amount to defendant No. 2 by opening the line of credit. As per the Bank, it is not at all concerned with the contract entered into between defendant No. 1 and defendant No. 2 or any alleged sub-contract having

been entered into between defendant No. 1 and Walchandnagar Industries Ltd. or any dispute arising between the parties to the said contracts. It says that its obligation to release funds to defendant No. 2 is independent of all these transactions and that the plaintiff who is a complete stranger to the Dollar Credit Line Agreement dated October 04, 2007 has no right to seek any injunction vis-à-vis the said agreement. According to the counsel for defendant No. 1 and the EXIM Bank, all that the bank is required to do before it remits the amount, is to ensure that it is done in terms of Clause 3 of the "Dollar Credit Line Agreement.. The Clause runs as under:- 3. Eligibility of contract to be financed out of the credit.

3.1 A contract shall not be eligible to be financed out of the Credit unless:

(a) it is for the import of the Eligible Goods into the Borrower's Country and in case of any contract which includes rendering of consultancy services, it provides for sourcing consultancy services from India;

(b) the contract price is specified in Dollars and is not less than \$50,000/- (Dollars fifty thousand only) or such amount as may from time to time be agreed upon between the Borrower and EXIM Bank;

(c) the contract requires the Buyer to make payment to the Seller of 100% (one hundred per cent) of FOB/CFR/CIF contract price of the Eligible Goods (other than services), pro-rata against shipments, to be covered under an irrevocable and non-transferable letter of credit in favour of the Seller;

(d) in the case of Services to be rendered by a Seller in the Borrowers Country, or where the contract requires advance payment to be made by the Buyer to Seller which needs to be financed out of the Credit, the contract provides for the Buyer to cause the Borrower to issue a Payment Authorisation to EXIM Bank to enable the Seller to claim payment from EXIM Bank of the Eligible Value apportionable to the amount of invoice for such services or, as the case may be, the amount of advance payment;

(e) the contract contains a provision that the Eligible Goods shall be inspected before shipment on behalf of the Buyer and the documents to be furnished by the Seller to the Negotiating Bank under the letter of credit arrangement referred to in sub-clause(c) herein shall include an inspection certificate;

(f) the contract also contains a provision to the effect that EXIM Bank shall not be liable to the Buyer or the Seller for not being able to finance purchase of the Eligible Goods or any portion thereof by reason of suspension or cancellation of any undrawn amount of the Credit in terms of this Agreement;

(g) the Borrower has sent to EXIM Bank for its approval brief details of the contract in the format at Annexure-I and such other documents and information as EXIM Bank may require in this behalf, and EXIM Bank has, in writing, approved of the contract as being eligible indicating the Eligible Value thereof.

23. Reference was also made to the definition of Eligible Goods as given in Clause 1 of the agreement which says "Eligible Goods" in respect of an Eligible Contract means "any goods and services (including consultancy services from India) relating to projects for the development of sugar industry in the Borrower's Country, agreed to be financed by EXIM Bank under this Agreement, out of which goods and services of the value of at least 85% of the contract price shall be supplied by the Seller from India, and the remaining goods and services (other than consultancy services) may be procured by the Seller for the purpose of the Eligible Contract from outside India."

24. In view of these clauses, it was contended by the counsels that the bank is not concerned as to who is the Contractor and will release the funds to the Contractor whoever he may be on the instructions of the borrower, provided the conditions laid down in the Dollar Credit Line Agreement are found to have been fulfilled.

25. The plaintiff, on the other hand, has sought impleadment of EXIM Bank as defendant No. 4 on the ground that defendant No. 2, i.e. Tendaho Sugar Factory Project is proceeding with modernization essentially financed by credit line from the EXIM Bank of India and the said Bank being a State is bound to act fairly and not in violation of the order of this Court. On the basis of the averments so made, the prayer clause is also sought to be amended seeking a decree of perpetual injunction restraining EXIM Bank from granting any approval to substitution of the plaintiff and/or proceeding with any funding of the project of Steam Generation Plant floated by defendant No. 2 without the plaintiff.

26. What needs to be noticed at this stage is that after the plaintiff had filed the application for "amendment-cum-impleadment. of which notice was issued by this Court on November 04, 2008, it also filed an application being I.A. No. 14363 of 2008 under Order 39 Rules 1 & 2 of the Code seeking an ad-interim ex-parte order restraining EXIM Bank from taking any steps including approving the substitution of Walchandnagar Industries Ltd. or any other party in place of the plaintiff and/or opening the line of credit and/or disbursing any moneys to defendant No. 1 and/or 2 or Walchandnagar Industries Ltd. for completion of "Steam Generation Plant. . Since no interim order was passed on this application, the plaintiff preferred an appeal before a Division Bench of this Court which was registered as FAO(OS) No. 472 of 2008 and was disposed of on December 17, 2008. The Division Bench declined the relief basing itself on the submissions of the learned Counsel for the EXIM Bank which have already been noticed above. The Division Bench also relied upon a judgment of Bombay High Court dated October 07, 2008 in the case of Uttam Sucrotech International Pvt. Ltd. v. EXIM Bank Writ Petition Lodging No. 2002/2008 where a similar prayer in relation to EXIM Bank was made.

27. The relevant paragraphs of the judgment of the Division Bench run as under:
We may also note at this stage that the appellant has also filed Civil Contempt

under Order 39 Rule 2 A of the CPC alleging violation of orders dated 23.07.2008. It is the submission of the appellant in the said application that in spite of injunction granted by the aforesaid order, the respondent No. 1 had gone ahead and had taken measures to introduce the respondent No. 3 to the respondent No. 2 in place of the appellant. The submission of the learned Counsel for the appellant is that when there was an injunction passed on 23.07.2008 whereby the respondent No. 1 was restrained from taking any measures to introduce a third party in place of the appellant, any action taken by the respondent No. 1 after 23.07.2008 and introducing respondent No. 3 to the respondent No. 2 and substituting it in place of the appellant is contemptuous as it constitutes violation of order dated 23.07.2008. In these circumstances, submits the counsel, the learned Single Judge, should have granted injunction as prayed for in I.A. 14363/2008.

Mr. P.P. Malhotra, Additional Solicitor General of India has appeared on behalf of the EXIM Bank. He has pointed out that an agreement has been entered into between the Government of Federal Democratic Republic of Ethiopia and the EXIM Bank, which is dated 04.10.2007. Copy of that agreement is placed before us. He submitted that in pursuance to the said agreement between the two sovereign countries, the EXIM Bank is under a legal obligation to remit the amount to the respondent No. 2 by opening Letter of Credit. It was further submitted that the EXIM Bank is not at all concerned with the contract entered into by the respondent No. 2 with respondent No. 1 or for that matter, any disputes which arose out of those contracts. It is not even a part to the said contracts. The obligation of the EXIM Bank qua respondent No. 2 is independent of all these transactions. We find merit in this submission of Mr. Malhotra.

We may note that a similar issue had arisen in the Bombay High Court in the case of Uttam Sucrotech International Pvt. Ltd. v. EXIM Bank Writ Petition Lodging No. 2002/2008 and vide judgment dated 07.10.2008 rendered by a Division Bench of that court, similar prayer to restrain the EXIM Bank, though in different factual context, was turned down in the following manner:

10. In our opinion, it is not necessary to refer the other contentions except the limited contention of respondent No. 3, that the project in question is a sovereign understanding between two countries. The petitioners by the present petition, it is contended are seeking to challenge the tender process of another sovereign country or its nominee without invoking the judicial process of that country or without first seeking remedy through the procedure given in the bid document issued by that country. The bid document and the main contract dated 10th January, 2008 and the contract dated 20th February 2008 clearly provides for all disputes to be covered by the laws of Ethiopia. The petition also it is submitted does not disclose any violation of Articles 14, 19 and 21 of the Constitution of India. The issues raised are not in public interest but are purely beneficial to the petitioner and only in its self interest.

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The clause which requires EXIM Bank to approve the contract requires that EXIM Bank must consider whether the approved contract has become eligible and indicating the eligible value thereof. For the purpose of considering the eligibility what respondent No. 1 must consider as set out in their affidavit in reply and the contract terms is to examine, whether the terms of the contract conform to the terms of the LOC agreement. In this exercise it only satisfied itself that the terms of the contract viz. such as Eligible Goods, Seller, Eligible Value, Terminal Date for Opening Letters of Credit and Terminal Date for Disbursement conforms to the terms of the LOC Agreement entered into between respondent No. 1 and the Government of Ethiopia. The stand of respondent No. 1 that it does not involve itself in the process of selecting the exporter, neither does it sanction the bidding process which will be conducted in our opinion is right. This is as it should be. The contracts are invited by the Government of Ethiopia and/or its agency, in the present case respondent No. 2. Neither the respondent No. 1 nor the respondent No. 3 has any control over the said bidding process.

28. After noticing the aforementioned paragraphs from the judgment of the Bombay High Court, the Division Bench further held as under:

The SLP against the said judgment has also been dismissed by the Supreme Court on December 15, 2008. Therefore, in so far as restrain order sought against EXIM Bank is concerned, this relief cannot be granted to the appellant.

29. It was argued by learned Counsel for the plaintiff that the issue before the Bombay High Court was different and that reliance placed on the said judgment by the Division Bench was misplaced.

30. A copy of the writ petition filed in the Bombay High Court resulting in the order dated October 07, 2008 has been placed on record. A perusal of the same goes to show that the petitioner therein was aggrieved by the appointment of Overseas Infrastructure Alliance (India) Pvt. Ltd. as single EPC Contractor by virtue of its having secured two contracts, namely, Power Generation Plant and Juice Extraction Plant and was further aggrieved by the approval granted by the EXIM Bank to the appointment of Overseas Infrastructure Alliance (India) Pvt. Ltd. as single EPC Contractor. The prayers made before the Bombay High Court were as under:

(a) this Hon.ble Court may graciously be pleased to call for the records of the case from respondent No. 1 and after examining the same issue a writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, order or direction quashing or setting-aside the approval dated 21.4.2008 granted by respondent No. 1 to contract dated 28.2.2008 entered into between respondent No. 2 and respondent No. 3.

(b) this Hon.ble Court may further be pleased to issue a Writ of Mandamus or

any other appropriate Writ, order or direction, directing respondent No. 1 to take all the necessary steps and actions to ensure that (i) the contract for Power Generation Package be awarded to petitioner No. 1 being the lowest eligible bidder and (ii) respondent No. 3 is removed as the Single EPC Contractor.

(c) pending the hearing and final disposal of the petition, respondent No. 1 be restrained from approving/signing of letter of credit, and/or disbursing any funds in any manner towards the said line of credit in favour of the respondent No. 3 as Single EPC Contractor for Tendaho Sugar Factory Project or as a successful bidder for the Juice Extraction and Power Generation Packages.

(d) pending the hearing and final disposal of the petition, respondent No. 3 be restrained from acting as Single EPC Contractor.

(e) cost of the petition be provided for.

(f) any other and further orders as this Hon.ble Court deems fit in the nature and circumstances of the case be passed.

31. It will be seen from the aforementioned prayers that so far as prayer (c) before the Bombay High Court was concerned, it was no different from the relief which is being sought by way of present application for impleadment. Therefore, learned Counsel for the plaintiff is not right in saying that the issue before the Bombay High Court was different.

32. What after-all is the purpose of the plaintiff in seeking to implead EXIM Bank as a party to the suit? It is to restrain the Bank from granting approval to substitute the plaintiff by Walchandnagar Industries Ltd. or to proceed with funding of the Steam Generation Plant. I feel that the judgment of the Bombay High Court provides the answer. It appears that the EXIM Bank has no role to play in the process of selecting a sub-contractor. In fact it has nothing to do with even the selection, approval or appointment of sub-contractors. It has also no role to play in the substitution or retention of sub-contractors. Its role is confined only to disbursement of the fund. This is how I look at it and in support I have not only the judgment of the Bombay High Court but also the judgment of the Division Bench of this Court.

33. For the fore-going reasons, the application for amendment is allowed and the prayer for impleadment of Walchandnagar Industries Ltd. with consequential reliefs sought against it is also allowed. However, application, in so far as it relates to the EXIM Bank is dismissed.