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

+ **Date of Decision : 21.09.2010**

% **ARB. A. 6/2010**

NATIONAL HIGHWAYS AUTHORITY OF INDIA Appellant
Through: Mr. Ramji Srinivasan, Senior
Advocate with Mr. Sumit Gehlot,
Advocate

versus

M/S YOU ONE MAHARIA J.V. & ORS. Respondents
Through: Mr. Prashant Bhushan, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may : No
be allowed to see the judgment?
2. To be referred to Reporter or not? : Yes
3. Whether the judgment should be reported :
in the Digest? Yes

% **JUDGMENT (Oral)**

VIPIN SANGHI, J

1. By this appeal preferred under Section 37(2) of the Arbitration and Conciliation Act, 1996 (the Act), the appellant seeks the setting aside of the order dated 05.11.2009 passed by the arbitral tribunal whereby the arbitral tribunal allowed the application preferred by the respondent to intervene in the arbitral proceedings and also directed that the equipment and machinery detailed in para 7 of the application be released in favour of the respondent.

2. To understand the controversy before me, it is necessary to set out some of the facts. M/s You One Maharia (JV) (hereinafter referred to as 'the JV') entered into a contract dated 23.05.2001 with the appellant NHAI. Under this contract, the JV was awarded the work of 4/6 laning and upgrading of the existing 2 lanes road in the State of Andhra Pradesh from Km.49 (Champavati River) to Km.97 (Srikakulam) Section of NH-5 of Kolkata-Chennai Corridor. The said contract, inter alia, contained the following clauses:

“54.1 All contractors equipments, temporary works and materials provided by the contractor at the site of works shall be of the capacity quality approved by the Engineer and shall be deemed to be exclusively intended for the execution of the Works. All these shall be operated/used and maintained in a manner acceptable to the Engineer. The contractor shall not remove the same or any part thereof, except for the purpose of moving it from one part of the site to another, without the consent of the Engineer. Provided that consent shall not be required for vehicles engaged in transporting any staff, labour Contractors equipments, Temporary Works, Plant and materials to or from the site.

63.1(4) The Employer may, after giving fourteen days' notice to the Contractor, enter upon the Site and expel the Contractor therefrom without thereby voiding the Contract, or releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and powers conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other Contractor to complete the works. The employer or such other Contractor may use for such completion so much of the Contractor's Equipment, Plant, Temporary Works and materials which have been deemed to be reserved exclusively for the execution of the Works, under the provisions of the

Contract, as he or they may think proper, and the Employer may, at any time, sell any of the said Contractor's Equipment, Temporary Works and unused Plant and materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the Contractor under the Contract."

3. The general conditions of contract were contained in Part 1, which stated that "The general conditions of contract comprise *"Conditions of Contract for Works of Civil Engineering Construction – Part I, General Conditions, 4th edition, 1987 (Reprinted in 1988 with Editorial Amendments; Reprinted in 1992 with further amendments) published by the Federation Internationale Des Ingenieurs – Conseils (FIDIC), Lausanne, Switzerland."* The conditions of contract for works of civil engineering construction of FIDIC i.e. Federation Internationale Des Ingenieurs – Conseils contained the general conditions in Part I. In the definition clause contained in clause 1.1, sub clause (f)(v) the term "Contractor's Equipment" is defined to mean *"all appliances and things of whatsoever nature (other than Temporary Works) required for the execution and completion of the Works and the remedying of any defects therein, but does not include Plant, materials or other things intended to form or forming part of the Permanent Works."*

4. During the working of the aforesaid contract between the appellant and the JV it was found that the various bank guarantees furnished by the JV were forged and fabricated. Consequently, the appellant terminated its contract with the JV and sought to exercise the rights conferred by the aforesaid clauses to seize the equipments

brought to site by the JV. The appellant preferred OMP No.452/2005 under Section 9 of the Act, wherein it appears, that the Court passed orders of status quo on 07.12.2005 and 31.01.2006 with regard to possession of the equipment and machinery detailed in Annexure 'C' & 'C1' till the arbitration proceedings are disposed of by the arbitral tribunal. The aforesaid OMP was disposed of by the Court on 23.03.2006 with the direction that the orders dated 07.12.2005 and 31.01.2006 shall continue. However, the Court observed that it was open to the parties to seek modification of the interim order by an application before the arbitral tribunal.

5. The respondent then moved OMP No.555/2006 under Section 9 of the Act on the ground that various equipments belonging to it had been given by it to the JV on hire which had been seized by the appellant. The respondent sought to release of those equipments by filing the aforesaid OMP. The said OMP was disposed of by the Court on 04.07.2007. The Court held that in the absence of an arbitration agreement between the petitioner before it, i.e. the respondent herein and the appellant herein, the court could not come to the aid and rescue of the petitioner. The Court granted liberty to the respondent herein to approach the Court which heard OMP No.452/2005 to seek variation of the orders passed therein, as the orders had been passed in OMP No.452/2005 without hearing the respondent herein. The Court also observed that it would be open to the appellant herein i.e. NHAI to act fairly and in accordance with the law, and if they are convinced

that the machinery claimed by the respondent had not been purchased out of mobilization fund advanced to the JV, it was hoped that the same would be returned to the respondent herein.

6. Upon passing of the aforesaid order the respondent herein moved an application in OMP No.452/2005 being I.A. No.3806/2008. Upon hearing that application the Court held that the said application being I.A. No.3806/2008 was not maintainable. The Court also observed that while disposing of OMP No.452/2005 the Court had given liberty to the parties to seek modification of the orders passed in the said OMP. However, the respondent herein was not a party in OMP No.452/2005 and there was no agreement whatsoever between the respondent/applicant and the appellant NHAI. The Court held that the respondent may approach the arbitral tribunal *“for permission to be heard in the matter”*. The respondent was also not precluded from taking any other steps that may have already been taken to protect its interest. The right of the appellant herein to raise its objections before the arbitral tribunal were preserved.

7. In this background, the respondent moved an application before the arbitral tribunal dated 20.07.2009, firstly to seek permission to move the application for return of equipment/machinery claimed by it and for a direction to the appellant/claimant NHAI to return the equipment/machinery and, secondly to seek damages to the tune of Rs.5 crores on account of loss of income for four years. By the impugned order the learned arbitral tribunal has, as aforesaid, allowed

the application by permitting the respondent to move the said application and by directing the appellant to return the equipment stated to have been leased by the respondent to the JV.

8. Two issues were raised by the appellant before the arbitral tribunal which clearly find recorded in the impugned order. The first issue raised by the appellant was with regard to the right of the respondent to participate in the arbitral proceedings, and the jurisdiction of the arbitral tribunal to entertain the application of the respondent even for the purpose of seeking the release of the equipment claimed by it as its equipment and machinery. The second issue was with regard to the scope and effect of the contractual clauses in the contract between the appellant and the JV, which have been set out hereinabove on the rights of the respondent. While deciding the first issue the tribunal noted the decision of the learned Single Judge in the case of **NHAI v. M/s China Coal Construction Group Corpn.**, AIR 2006 Delhi 134. The tribunal also noted that in the said judgment the learned Single Judge of this Court had taken the view that a stranger to a contract could not move the Court under section 9 of the Act to seek any interim measures or variation of any interim measures. The tribunal then relied upon the judgment rendered by the Division Bench in an appeal arising out of the aforesaid judgment of the learned Single Judge, delivered in L.P.A. No.372/2006 titled **SREI Infrastructure Finance Ltd. v. NHAI** decided on 02.03.2006. The Division Bench allowed the appeal

without going into the issue as to whether **SREI Infrastructure Finance Ltd.** who was the financier in that particular case could have moved the petition under Section 9 of the Act.

9. Despite noticing that the Division Bench had not gone into the said issue of locus of the financier of the equipment to approach either the Court under section 9 of the Act, or the arbitral tribunal, the tribunal allowed the respondent to be heard in support of its application and by following the Judgment in **SREI Infrastructure Finance Ltd.** (supra) allowed the application preferred by the respondent.

10. Before me two submissions have been raised by learned senior counsel for the appellant. He firstly argues that it is well-settled that a party, who is not a party to an arbitration agreement cannot be heard by an arbitral tribunal. He submits that an arbitral tribunal is a forum which derives its authority from the arbitration agreement executed between the parties, and the said private forum cannot invest itself with the jurisdiction to entertain the claims and submissions of any third party. In this behalf he places reliance on the decision of the Supreme Court in **Firm Ashok Traders & Anr. v. Gurumukh Das Saluja & Ors.** (2004) 3 SCC 155 wherein the Supreme Court has held *"The qualification which the person invoking jurisdiction of the Court under Section 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 under*

Section 9.”. He also relies upon the decision of this Court in **Indusind Bank Ltd. v. NHAI** 166 (2010) DLT 354 which in turn notices various decisions on the subject. He submits that the same principal on which a petition under Section 9 of the Act has been held to be not maintainable by a stranger to an arbitration agreement, would be applicable even in respect of relief sought by a stranger to an arbitration agreement before the arbitral tribunal. He submits that the tribunal has, in fact, skirted the issue of the locus of the respondent to move the application before it, even though it took notice of the fact that the Division Bench in **SREI Infrastructure Finance Ltd.** (supra) did not deal with the said aspect, inspite of the fact that the learned Single Judge had specifically held that a stranger could not maintain a petition under Section 9 of the Act.

11. The second submission of Mr. Ramji Srinivasan, Sr. Advocate is that even on merits the order passed by the tribunal cannot be sustained. He submits that the expression “*all contractor’s equipment*” takes within its scope all equipments brought by the contractor to site of work and by virtue of clause 54.1 they are deemed to be exclusively intended for the execution of the work. He submits that the contract does not draw any distinction between the equipment brought by the contractor to site, on the basis of it being in the ownership of the contractor, or it having been taken on hire or under any other arrangement by the contractor. He submits that the contracts which are being got executed by the NHAI all over the country for

development of the national highways cannot be allowed to suffer in the event of the contracts being rescinded due to defaults of the contractors. It is, therefore, envisaged under the contracts executed by the appellant with the contractors, that upon termination of the contracts, the equipments brought to site by the contractor shall be available for being used for the completion of the contractual work. In this regard he relies on clause 63.1(4) which has been extracted hereinabove. Mr. Srinivasan further submits that the right of the appellant extends to even the sale of the contractor's equipment, temporary works and unused plant and materials and to apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due from the contractor under the contract.

12. Mr. Srinivasan places strong reliance on the decision of the Supreme Court in ***K.P.M Builders Pvt. Ltd. v. NHAI & Anr.*** in Civil Appeal Nos.3300-3301 of 2008 decided on 25.02.2010. In this case, the Supreme Court was confronted with a similar dispute. The relevant contractual term was contained in clause 61.1, which provided "*All materials on the Site, Plant, Equipment, Temporary Works and Works are deemed to be the property of the Employer, if the Contract is terminated because of a Contractor's default.*"

13. Mr. Srinivasan submits that the contractual terms in the present contract in spirit and intent are the same as that contained in clause 61.1 of the general conditions of the contract in the case of ***K.P.M Builders*** (supra). The Supreme Court in this decision dismissed

the appeal preferred by **K.P.M Builders** (supra), who had given on hire/finance the equipment to the contractor which incidentally, was M/s. You One Maharia (JV). While dismissing the appeal the Supreme Court held that there was no privity of contract between the NHAI and the hirer K.P.M Builders Pvt. Ltd. Before allegedly hiring the machineries/equipments to the contractor, the appellant did not inform NHAI that its machineries/equipments were being hired to the contractor for use by the contractor and that it was the owner of any particular machinery. The Court also noticed that the hirer was aware of the contract between the NHAI and the contractor and also its terms, in particular clause 61 of the general conditions. In spite of that being the position, it did not require the NHAI to exclude its machinery from clause 61 before termination of the contract. The Court also noticed that the hirer had not produced the alleged contract entered into by it with the contractor. The Court observed that the NHAI had not entered into any contract or arrangement with the hirer, nor given any assurance to it in regard to the machineries, nor owed any duty or obligation towards the hirer. The Supreme Court further held that if the hirer had entered into any contract with the contractor, and if it has any enforceable rights in that behalf, it is open to the hirer to enforce such rights against the contractor. So far as the NHAI is concerned, it was held that it owed no duty or obligation towards the hirer. The appellant hirer could not come in the way of NHAI enforcing its right as against the contractor. While dismissing the hirer's appeals, the Supreme Court held that the dismissal of the appeal

would not come in the way of the appellant hirer from taking action against the contractor, which may be available to it in law.

14. Mr. Srinivasan points out that, admittedly, the respondent had already initiated arbitration proceedings against the JV in terms of the arbitration agreement contained in its hiring agreement with the JV, which is also pending before Mr. Justice Jaspal Singh (Retd.), who is also the author of the impugned order.

15. Mr. Srinivasan submits that a perusal of the application preferred by the respondent before the arbitral tribunal shows that the respondent was aware of the factum that the JV had entered into a contract with the appellant for the work in question. This is evident from paragraphs 5 & 6 of the said application. It is recorded that the JV had been awarded the work of widening of 4/6 laning and upgrading of the existing 2 lane road in the State of Andhra Pradesh from Km.49 (Champavati River) to Km.97 (Srikakulam) Section of NH-5 of Kolkata-Chennai Corridor in the year 2001, and that the respondent had entered into two separate agreements dated 07.02.2004 and 20.06.2004 with the JV/contractor for taking certain constructions machinery/equipment with manpower on rent for use at the work site in relation to the aforesaid contract between the NHAI and JV. It is, therefore, argued that the respondent was aware of not only the scope of the work, but also the site at which the work was to be carried out. Mr. Srinivasan submits that the respondent should have acquainted itself with the contractual terms and conditions under which the JV was

awarded the contract by the NHAI. The respondent ought to have been aware of the rights of the NHAI under its contract with the JV. He, therefore, submits that the impugned order cannot be sustained.

16. On the other hand, Mr. Prashant Bhushan, learned counsel for the respondent, has defended the impugned order by submitting that this Court had repeatedly directed that the respondent may approach the arbitral tribunal to seek the release of its equipment and machinery. He submits that when the respondent had initially moved OMP No.555/2006, this Court vide order dated 04.07.2007 granted liberty to the respondent to approach the Court which passed the order in OMP No.452/2005, or the arbitrator for variation of the order passed in OMP No.452/2005. Accordingly, the respondent had moved an application in OMP No.452/2005. He submits that the application moved by the respondent being I.A. No.3806/2008 was also similarly disposed of on 01.07.2009 and the respondent herein was permitted to approach the arbitral tribunal for permission to be heard in matter. Mr. Bhushan submits that the Court after passing interim orders in OMP No.452/2005 had divested itself of the task of passing any further orders and had left the aspect of passing further interim orders, or variation of the orders passed by the Court, to the arbitral tribunal. He submits that a party against whose interest orders have been passed can always approach the forum which has passed the orders to seek a recall of the orders. He submits that it is a basic requirement of the principles of natural justice, that no party can be condemned unheard.

He submits that a third party who is affected by an interim measure/order cannot be left remediless by denying him the right to seek variation/vacation of the orders adversely affecting his rights. He, therefore, submits that the approach of the respondent to the arbitral tribunal by moving the aforesaid application cannot be faulted and it cannot be said that the tribunal did not have the jurisdiction to entertain the said application.

17. On the second aspect the submission of Mr. Bhushan is that the decision of the Division Bench in ***SREI Infrastructure*** (supra) sets out the rationale for not permitting the NHAI to seize the equipment and machinery which does not belong to the contractor and belongs to a third party. He submits that in the case of ***SREI Infrastructure*** (supra), the contractor China Coal had taken the equipment from ***SREI Infrastructure*** (supra) on hire purchase basis. However, the equipment did not vest with the contractor China Coal as the hire charges had not been paid in their entirety. The Division Bench did not agree with the view of the learned Single Judge that the NHAI was entitled to take possession of the equipment brought in by China Coal for utilization in its work. The Division Bench held that NHAI could take possession of the property belonging to China Coal, but surely not the property of a third party. Reliance placed by the learned Single Judge on clause 63.1 of the agreement, which is also relied upon by the appellant in this case, was negatived by the Division Bench. Mr. Bhushan further submits that the decision in ***SREI Infrastructure***

(supra) was challenged before the Supreme Court in Special Leave Petition No.5181/2006. The said petition was disposed of by the Supreme Court on 10.03.2006 and the judgment of the Division Bench was not interfered with, except that the receiver appointed by the Division Bench was replaced by the receiver appointed by the Calcutta High Court.

18. Mr. Bhushan also places reliance on another Single Judge decision of this Court in **NHAI v. M/s You One Maharia (JV) & Ors.** in OMP No.342/2004 decided on 04.04.2005. The contractual clauses considered by the Court in this decision were the same as the one with which we are concerned in the present case. This Court interpreted the contractual terms to mean that only equipments and machineries which were purchased by the contractor from out of the mobilization advance provided by the NHAI could be taken possession of and used by the NHAI in the eventuality of the contract being terminated. Mr. Bhushan submits that it is not even the appellant's case that the equipment in question was purchased from out of the mobilization advance that may have been provided by the appellant to the JV.

19. So far as the decision in the case of **K.P.M Builders** (supra) is concerned, the submission of Mr. Bhushan is that in that case the hirer had earlier (in the proceedings before the High Court), sought relief only in respect of those equipments which were beyond the work site. However, after obtaining relief in respect of equipments which were beyond the work site from the Division Bench of the High Court,

the hirer K.P.M Builders had approached the Supreme Court to contend that even those equipments which were brought to the work site, and which did not belong to the contractor and were taken on hire by it, could not be possessed or used by the NHAI. He submits that it was in that light that the Supreme Court held that the public law remedy would not be maintainable.

20. He submits that in **K.P.M Builders** (supra) the Court had, as a matter of fact, held that the hirer was aware of the contract between the NHAI and the contractor, whereas in the present case the respondent was not aware of the contractual terms on the basis of which the appellant sought to take possession of the machinery and equipment belonging to the respondent. Mr. Bhushan has also stressed on the difference in the language used in the contractual terms in the contract between the appellant and the JV on the one hand and clause 61.1 considered by the Supreme Court in the case of **K.P.M Builders** (supra) on the other hand. He submits that whereas under clause 61.1 of the contractual terms contained in the case of **K.P.M Builders** (supra), the equipment and machinery were deemed to be the property of the employer, i.e. NHAI (If the contractor was terminated for contractor's default), the contractual terms in the present case consciously do not provide for such an eventuality. He further submits that clause 63.1(4) uses the expression "*All contractor's equipment*" repeatedly and not "*All materials on the Site, Plant, Equipment, Temporary Works and Works*" as used in clause 61.1. He submits that

the contractual clauses in question are identical with those dealt with by the Division Bench in the case of **SREI Infrastructure** (supra). Mr. Bhushan submits that the meaning of the expression “contractors equipment” can only mean the equipment actually owned by and belonging to the contractor, and would not include equipment taken on hire by the contractor.

21. Having heard learned counsels for the parties, perused the impugned order, the various decision cited before me and the contractual clauses, I am of the view that the present appeal deserves to be allowed and the impugned order passed by the arbitral tribunal deserves to be set aside, both on the ground that the respondent had no locus standi to move the arbitral tribunal and that the arbitral tribunal had no jurisdiction or authority to entertain the application of the respondent, and also on the ground that under the contractual terms entered into between the appellant and the JV, the appellant was entitled to retain and use the equipment brought to site by the JV even though the same was taken on hire by the JV from the respondent, for the purpose of completing the contractual works and, therefore, the respondent in any event is not entitled to seek any direction for release of the same.

22. The arbitral tribunal has taken note of the decision of the learned Single judge in the case of **China Coal Construction Group Corpn** (supra), wherein it had been held that a third party could not maintain a petition under section 9 of the Act to seek any interim relief

in respect of the subject matter of arbitration. Even though the arbitral tribunal also noted the fact that the Division Bench while hearing the appeal from the said decision in the case ***SREI Infrastructure Finance Ltd.*** (supra) did not dwell upon the issue of locus standi of a third party to invoke section 9 of the Act, on the basis of the said decision, the tribunal proceeded to permit the respondent to participate in the arbitral proceedings for the purpose of release of the equipment given by it on hire to the JV. So far as the aspect of locus standi is concerned, the judgment of the learned Single Judge in ***China Coal Construction Group Corpn*** (supra) could not be said to have been overruled by the judgment of the Division Bench in ***SREI Infrastructure Finance Ltd.*** (supra). Therefore, the judgment of the Division Bench in ***SREI Infrastructure Finance Ltd.*** (supra) could not be relied upon to decide the issue of locus standi of the respondent to move the arbitral tribunal, or to decide the jurisdiction of the arbitral tribunal to adjudicate the claim of the respondent.

23. The arbitral tribunal has also relied upon the order passed by the learned Single Judge in OMP No.555/2006. The order passed in the aforesaid OMP was, in fact, in accord with the judgment in ***China Coal Construction Group Corpn*** (supra) inasmuch as the learned Single Judge held that it was not open to the respondent to maintain a petition under section 9 of the Act. The Court granted liberty to the respondent to approach the Court which heard OMP No.452/2005 to seek a variation of the order passed therein. The grant of the said

liberty could not vest locus standi in the respondent to approach the Court which passed orders in OMP No.452/2005, as while granting such liberty, the Court did not rule upon the objections that the appellant herein may have raised to the maintainability of application for variation of the orders passed in OMP No.452/2005.

24. When the respondent moved IA No.3806/2008 in OMP No.452/2005, this Court did not interfere with the orders passed in OMP No.452/2005. This Court was also conscious of the fact that the respondent may not have any right to move the arbitral tribunal to seek any interim measures. It is for this reason that while disposing of IA No.3806/2008, the Court observed that the respondent may approach the arbitral tribunal “*for permission to be heard in the matter*”, as there is no vested right in a third party to be heard by the arbitral tribunal. The Court also clearly reserved the right of the appellant herein to raise objections before the arbitral tribunal, in case the respondent did move the arbitral tribunal to seek variation of the interim order operating during the pendency of the arbitral proceedings.

25. The act of the arbitral tribunal in permitting the respondent to represent itself before the arbitral tribunal to seek variation of the interim orders operating during the pendency of the arbitral proceedings is clearly in the teeth of the judgments relied upon by the appellant in the case of ***Firm Ashok Traders & Anr.*** (supra), wherein the Supreme Court has clearly held that a person not party to an

arbitration agreement cannot enter the Court for protection under section 9. It is also contrary to the decision of this Court in **China Coal Construction Group Corpn** (supra), as also the decision of this Court in **IndusInd Bank Ltd.** (supra). In **IndusInd Bank Ltd.** (supra), this Court referred to various other decisions, wherein it has consistently been held that a third party has no right to be heard either in proceedings under section 9 of the Act or before the arbitral tribunal. I may quote paragraphs 17 to 23 of the said decision usefully herein below:

"17. It is further contended by the respondent that the appellant is not a party to the arbitration agreement between respondent Nos. 1 and 2 and therefore they could not have been impleaded by the arbitral tribunal which rightly dismissed its application under Order 1 Rule 10 CPC. A person who is not a party to the arbitration agreement cannot claim any right before the Arbitral Tribunal and cannot be impleaded as a party. In this regard reference is made to the case of First International Line S.A. Panama v. Chokhani International Ltd. 2003 (3) Arb. LR 225 (Mad) (DB) wherein it was observed that:

Once the first respondent comes out with the clearest possible stand that it had its claim only against the second respondent and once there is an agreement of arbitration between the first respondent and the second respondent, the appellant would be a total stranger to the affairs even if the appellant is the owner of the vessels.

18. He also referred to the case of National Highways Authority of India v. China Coal Construction Group Corporation MANU/DE/0488/2006 : AIR 2006 Delhi 134, whereby a similar issue was decided by this Court and it was held that:

...it becomes clear that the intervener has no privity of contract with NHAI. It is also clear that the intervener is not a party to the arbitration proceedings. Section 9 of the Act is with reference

to arbitral proceedings just as the intervener cannot be a party in the arbitral proceedings pending between NHAI and China Coal, it has no locus standi in the present proceedings. The interim orders that may be passed under Section 9 or Section 17 are with respect to the parties to the arbitration and in connection with the subject matter thereof. As such, the intervener's application under Order 1 Rule 10 cannot be allowed....

19. *In the case of Reliable Finance Corporation Pvt. Ltd. v. Ajoy Pal Singh MANU/DE/0181/1987 : ILR (1987) 1 Del 267, this Court dismissed an application for impleadment while holding that the applicant who is not a party to the agreement and who has not claimed any right under the agreement cannot be impleaded as a party.*

20. *Again in the case of Pawan Kumar Jain v. Parduman Jain ILR (2005) Delhi 397, it was held that a person who is not a party to arbitration agreement cannot be impleaded as necessary party to arbitration proceedings.*

21. *Recently, this Court in the case of J.L. Kapur v. Burmah Shell Co-operative Housing Society (DB) MANU/DE/2019/2008 : 2008 (103) DRJ 527 held that as the NDMC was not a party to an arbitration agreement, it cannot be made a party to arbitration proceeding between petitioner and respondent-society.*

22. *In the case of Sethi Construction Co. v. Chairman and Managing Director, NTPC and Anr. 2002 (65) DRJ 732, this Court refused to appoint an arbitrator vis-à-vis NTPC holding that there was no arbitration agreement between NTPC and Sethi Construction Co.*

23. *Again in the case of M.M. Aqua Technologies Limited v. Wig Brothers Builders and Engineers Ltd. and Anr. 2001(3) Arb.LR 301 (Delhi), this Court held in Para 10 as under:*

10. ...Arbitration is distinguishable from other clauses in the contract. The other clauses set out the obligations which the parties have undertaken towards each other binding them, but the arbitration clause does not impose on one of the parties an obligation towards the other. It embodies

an agreement of both the parties with consensus ad idem that if any dispute arises with regard to the obligations undertaken therein which one party has undertaken towards the other, such a dispute shall be settled by Tribunal of their own constitution. It must be construed according to its language and in the light of the circumstances in which it was made.”

26. Pertinently, while passing order in IA 3806/2008, the right of the respondent to take any other action available to it in law was preserved. The orders passed in OMP 452/2005 were directed against the JV. The said orders did not bind the respondent. If the respondent was desirous of removing its equipments from the work site of the appellant, and the same was being resisted by the appellant, it was open to the respondent to initiate appropriate civil action against the appellant. Since the orders passed in OMP 452/2005 were directed against the JV, the same could not have, in any event, come in the way of the respondent obtaining appropriate orders if it were so entitled. However, the respondent could not have intermeddled in the arbitration proceedings between the appellant and the JV, as the respondent was not a party to the arbitration agreement and the jurisdiction of the arbitral tribunal is derived only by the agreement of the parties.

27. For the aforesaid reasons, I am of the view that the impugned order passed at the instance of the respondent herein cannot be sustained.

28. Turning to the next issue raised by the appellant, I am of the

view that on a complete reading of the contract terms contained in the contract between the appellant and the JV, and comparing the same with the contractual term considered by the Supreme Court in **KPM Builders** (supra), there does not exist any material difference in the two set of contractual terms.

29. Clause 54.1 uses the expression “*all contractors equipments*”, temporary works and materials provided by the contractor at the site of the works. Clause 63.1(4) provides that the employer “... .. may use for such completion so much of the contractors equipment, plant, temporary works and materials which have been deemed to be reserved exclusively for the execution of the works and the employer may at any time sell any of the said contractors equipment, temporary works and unused plant and materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the contractor under the contract”.

30. The aforesaid two clauses did not use the expression “*equipments owned by the contractor or belonging to the contractor*”. From the standpoint of the employer, i.e. NHAI, all the equipment which the contractor provided at the site of works was “the contractors equipment”, in contradistinction with any equipment that may have been brought to site by NHAI. All such equipments brought to the work site by the contractor is deemed to be exclusively intended for execution of the works.

31. The General Conditions of Contract between the appellant and the JV comprises Conditions of Contract for Works of Civil Engineering Construction-Part I, General Conditions, 4th Edition, 1987 (Reprinted in 1988 with Editorial Amendments; Reprinted in 1992 with further amendments) published by the Federation Internationale Des Ingenieurs – Conseils (FIDIC), Lausanne, Switzerland). The Conditions of Contract for Works of Civil Engineering Construction of FIDIC defines the expression “contractors equipment” in clause 1.1(f)(v) to mean “*all appliances and things of whatsoever nature (other than Temporary Works) required for the execution and completion of the Works and the remedying of any defects therein, but does not include Plant, materials or other things intended to form or forming part of the Permanent Works*”.

32. Once again, it is seen that the aforesaid definition does not draw a distinction between equipments, equipments and machineries brought to site which is owned by and belonging to the contractor, and those brought to the work site by the contractor for the execution of the contract which were not owned by it. Consequently, it is clear that “*all contractors equipment*” would include all equipments brought to the site by the contractor for the execution of the contractual work, whether or not it is owned by or belonging to the contractor.

33. The purpose for providing such a condition in the contract has been explained by the appellant. The appellant is engaged in getting large scale works executed all over the country for

development of National Highways. The development of National Highways is considered of strategic importance to the economic development and growth of the country. The appellant has been created as a statutory body under the National Highway Authorities of India Act and the object and reasons of the said Act set out the main functions of the NHAI, which inter alia includes *“(f) the Authority will be responsible for the development, maintenance and management of the national highways which are vested in it by the Central Government”*.

34. To fulfill the aforesaid object, the Act vests varied powers and functions in the appellant as contained in section 16 of the NHAI Act. The construction and development of the Highways has to be achieved as planned in time bound manner with efficiency and without cost and time overruns. For this purpose, the contract provides that in the event of the contract being terminated for the fault of the contractor, NHAI would still be able to continue with the execution of the works through any other contractor by utilizing, inter alia, the equipments brought to site by the earlier contractor, as specialized and high value equipments are required for the execution of the works. Clause 63.1(4) authorizes the appellant to even sell the contractors equipment and to apply the proceeds of sale towards satisfaction of any amounts due or which may become due from the Contractor under the contract. This right given to the NHAI under the contract, in the event of the contract being terminated for fault of the contractor, is as good as deeming the NHAI to be the owner of the contractors equipment.

Ownership is a bundle of rights and the right to deal with the equipment, even to the extent of selling the same and appropriating the proceeds thereof, is the ultimate right that the owner of the equipment can exercise.

35. The Supreme Court in **KPM Builders** (supra) considered the right of the hirer, namely, KPM Builders to claim machineries which were lying at the work site of the NHAI, and which had been taken by the contractor on hire from KPM Builders for the execution of the contractual works. The Supreme Court while dismissing the appeal preferred by the hirer against the order of the Division Bench of this Court, whereby the Division Bench had denied the right of the hirer to remove the machineries and equipment lying at the work site, in paragraph 8, held as follows:-

“8. There is no privity of contract between NHAI and the appellant. Before allegedly hiring the machineries/equipments to the Contractor, the appellant did not notify NHAI that its machineries/equipments were being hired to the contractor or given to the use of the Contractor and that it was the owner of any particular machinery. The appellant was aware of the contract between NHAI and the contractor as also its terms, in particular clause 61 of the General Conditions. In spite of it, it did not require NHAI to exclude its machineries from the operation of Clause 61, before the termination of the contract. It also did not produce the alleged contract entered into by it with the Contractor, providing that at the end of each day's work, the machineries were to be returned to the appellant. In these circumstances, we are of the view that the writ petition against NHAI was misconceived. NHAI had not entered into any contract or arrangement with the appellant, nor given any assurance to it in regard to the machineries, nor owed any duty or obligation towards the appellant. Nor can NHAI's action in taking over the machineries at site in

pursuance of a specific contractual term with the contractor can give rise to any public law remedy to a third party against NHAI. If the appellant had entered into any contract with the Contractor and if it has any enforceable rights in that behalf, it is open to the appellant to enforce such rights against the Contractor. But that cannot obviously, be done in a writ proceedings. As noticed above, as far as NHAI is concerned, it owes no duty or obligation towards the appellant. Appellant cannot come in the way of NHAI enforcing its rights as against the contractor”.

36. From the above extract, it is evident that the hirer was not held entitled to seek recovery of the machineries and equipment which had been hired to the contractor for being used in its contract with the NHAI at the work site. Clause 61 of the General Conditions was relied upon by the Supreme Court which, in my view, is similar in its content and spirit with the contractual terms contained in the contract in question.

37. The question then arises, whether the respondent can take any advantage of its purported ignorance of the contractual terms of the contract between the appellant and the JV. Pertinently, the contract between the appellant and the JV was entered into in the year 2001 and the equipments were leased by the respondent to the JV only in the year 2004. The contract between the appellant and the JV had therefore run for a period of nearly three years before the equipments were hired by the respondent to the JV. Learned counsel for the respondent has, at the time of arguments, produced a copy of rental agreements dated 07.02.2004 and 29.03.2004 entered into by it with the JV. A perusal of the said agreement dated 07.02.2004 shows that

the respondent was well aware of the fact that the equipment was being taken on hire by the JV for use at the work site of the appellant in relation to the contract between the appellant and the JV. One of the representations made by the JV as recorded in the agreement dated 07.02.2004 reads *"that customer has taken permission from site owner or contractor to let equipment provider's personnel and officials have unrestricted entry to the site"*. The expression 'customer' refers to the JV in the said contract. Same is the position in the contract entered into between the respondent and the JV on 29.03.2004.

38. Even in its application moved before the arbitral tribunal, the respondent has disclosed that it was aware of the contract entered into between the appellant and the JV and it was for the purpose of the said contract, equipments in question were leased out by the respondent to the JV.

39. Reference in this regard may be made to paragraphs 5 and 6 of the respondent's application, which reads as follows:

"5. That the Petitioner/Claimant awarded a contract to Respondent for widening of 4-6 lane and upgrading of existing 2-lanes road in the State of Andhra Pradesh from KM-49 (Champawati River) to KM-97 (Srikakulam) Section of NH-5 of Kolkata-Chennai Corridor in the year 2001.

6. That the Respondent had entered into two separate Agreements dated February 7, 2004 and June 26, 2004 with the applicant herein for taking certain construction machineries/equipments, with manpower on rent from the applicant for use at above-said site. A copy of the said Agreements dated February 7, 2004 and June 26, 2004 is attached herewith and marked as Annexure P-3 (Colly)."

The expression 'applicant' refers to the respondent herein.

40. The respondent, therefore, cannot deny the knowledge of the existence of the contract between the appellant and the JV for the development of the National Highway at the work site in question. It was not the obligation of the appellant to go after any entity who may lease out machineries and equipments to the contractor/JV for carrying out the contractual work. The respondent ought to have carried out due diligence to make itself aware of the contractual terms between the appellant and the JV before hiring out its equipment and machinery to the JV. If it failed to do so, it must take the consequences.

41. Like in the case of **KPM Builders** (supra), the respondent did not notify the NHAI that its machineries and equipments were being hired to the JV or that they were being given for use by the contractor/JV. The respondent did not even put the appellant to notice about its ownership of any particular machinery/equipment. In spite of being aware of the existence of the contract between the NHAI and the JV, the respondent did not require the NHAI to exclude its machineries and equipments from the operation of the aforesaid clauses of the agreement between the appellant and the JV. Consequently, the respondent was not entitled to take any action against the appellant for return of the equipment and machinery.

42. The NHAI has not entered into any contract or arrangement with the respondent, nor did NHAI give any assurance to the

respondent in regard to the machineries and equipments. The NHAI owed no duty or obligation towards the respondent nor can NHAI's action in taking over the equipments and machinery at site in pursuance of a specific contractual term with the contractor/JV, give rise to any remedy to the respondent, who is a third party, against the NHAI. If the respondent has any enforceable right against the contractor/JV, the respondent can pursue its remedy which has already been invoked against the JV. So far as NHAI is concerned, as it owed no duty or obligation towards the respondent, the respondent cannot come in the way of NHAI in enforcing its rights against the contractor/JV.

43. In my view, the Supreme Court decision in **KPM Builders** (supra) squarely covers the field and therefore, reliance placed by the respondent on the decision in **SREI Infrastructure Finance Ltd.** (supra) and the decision in **NHAI v. M/s You One Maharia (JV) & Ors.** in OMP No.342/2004 decided on 04.04.2005 do not come in the way of the appellant. The mere dismissal of the Special Leave Petition [arising from the decision in **SREI Infrastructure Finance Ltd.** (supra)] by the Supreme Court *in limine* is also of no avail to the respondent, particularly in the face of a detailed and speaking judgment dealing with the same issues in **KPM Builders** (supra).

44. The endeavour of Mr. Bhushan to distinguish the case of **KPM Builders** (supra) on the ground that in that case the hirer had invoked the public law remedy by filing a Writ Petition under Article 226 of the

Constitution of India and not an application before the arbitral tribunal, as done by the respondent in the present case, is wholly fallacious. A perusal of the judgment in KPM Builders clearly shows that the Supreme Court observed that the public law remedy was not available to be invoked by the hirer, because in that case public law remedy had been invoked. However, the Supreme Court did not reject the appeal of hirer, KPM Builders only on that account and did not hold that the hirer, KPM Builders may initiate other available legal proceedings against the NHAI. The *inter se* rights and obligations of the NHAI and the hirer were clearly discussed in paragraph 8 of the judgment, which has been extracted hereinabove.

45. It is also evident that the Supreme Court did not reject the appeal of KPM Builders only on account of the fact that earlier before the High Court the hirer, KPM Builders had restricted its relief to those equipment which were lying beyond the work site, while before the Supreme Court the hirer, KPM Builders had sought relief even in respect of equipments which were lying at the work site.

46. For all the aforesaid reasons, I allow this appeal and set aside the impugned order dated 05.11.2009 passed by the arbitral tribunal. The appellant shall also be entitled to costs quantified at Rs.25,000/-. Application stands disposed of.

VIPIN SANGHI, J

SEPTEMBER 21, 2010

rsk/sr