

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

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Reserved on: 31.01.2018
Pronounced on: 11.05.2018

+ **FAO(OS) (COMM) 125/2016 and CM APPL. 43232/2016 & 29572/2017**

EROS RESORTS & HOTELS LTD Appellant

Through: Mr. Akhil Sibal, Sr. Advocate with
Ms. Priya Deep and Ms. Tanvi,
Advocates.

versus

EXPLORER ASSOCIATES PVT LTD & ANR Respondents

Through: Mr. Gaurav Dua, Ms. Vrinda Agarwal
and Mr. Sumeet G.P. Singh,
Advocates for R-1. Mr. G.K. Mishra
and Mr. Raunaq Dutt, Advocates for
R-2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

FACTS:

1. The appellant, engaged in the hospitality business is aggrieved by the dismissal of its application for rejection of the plaint, in the suit (preferred by the first respondent—hereafter “the plaintiff”). The appellant entered into a contract with the second respondent (hereafter “the contractor”) whereby the

latter undertook to carry out interior works in two of its (i.e. the appellant's) hotels. The appellant sought rejection of the plaint in the suit preferred, for recovery of money against it and the contractor, by the plaintiff, alleging that there was no privity of contract between it and the plaintiff.

2. The facts necessary to decide the issue are that in November 2009, the appellant entered into a contract with the second respondent (hereafter "the contractor") for interior works of two of its hotels in Delhi. The contractor sub-contracted some of the work awarded to the plaintiff. The rates for the said work order and terms and conditions were finalized in terms of the communication between the two respondents by email dated 10.11.2009; work regarding the 40 and 100 rooms at the two sites began to be executed. By e-mail dated 20.03.2010 the contractor issued the work orders.

3. In respect of the transactions/work between the two respondents, an account, for dealings between the two was opened by the plaintiff, in its books of account in the name of the contractor. It is alleged by the plaintiff that the contractor, after seeing its active pace of works and its professionalism, sub-contracted the interior works and other related works to it (i.e. the plaintiff), as regards the Banquet Hall and Pre-Function area, restaurant at Holiday Inn Site, make up room, Holiday Inn retail area and corridors for both the Holiday Inn and the Intercontinental Hotel site, at the agreed rates, by various emails exchanged between them. It is stated that the plaintiff, accordingly generated pro forma invoices for the work/BOQ on the contractor, which were by it on site. It was further agreed that on confirmation of the BOQ at the sites and on its agreement, the plaintiff was to raise the final Tax Invoice for the said work and also that thereupon the accounts would be settled/reconciled amongst the parties and the final

payment whatever is found due and payable would be released by the contractor in terms of the tax invoices so raised by the Explorer within three months, barring 10% of the Tax Invoice which shall be made only after the completion of 12 months of defect liability period/workmanship. The plaintiff also claimed to have executed various additional/extra works under the specific instructions and at the behest of the contractor and the appellant in respect of restaurants, Banquet, pre-function area, 5th and 6th floor guest rooms, 5th and 6th floor corridor of Holiday Inn Site and 5th to 9th floor guest-rooms and corridor in respect of the Intercontinental Hotel, Mayur Vihar for which the rate quotations were provided and agreed from time to time for these items on an ongoing-basis.

4. The plaintiff claims to have finished the entire work (BOQ items as well as additional items) and handed over possession of said sites to the appellant's Housekeeping Team under the contractor's instructions in May 2011. Alleging that ever since it was following up telephonically and via email and even had meetings with the representatives of the contractor to clear the bills to the extent of 90% of the total work so carried out leaving the balance 10 % amount to be paid at the expiry of defect liability period of one year the plaintiff filed a suit before this court (CS(COMM) No. 82/ 2016) for recovery of ₹6,20,29,728/- (Rupees six crores twenty lakhs twenty-nine thousand seven hundred twenty-eight only) along with interest @18% per annum, against the Appellant and contractor, which is still pending.

5. The plaintiff alleged- in its suit- that out of the total tax invoice amount of ₹6,65,03,369/- (Rupees Six Crores Sixty Five Lacs Three Thousand Three Hundred Sixty Nine Only) the contractor only paid the sum of ₹4,99,13,998/-(Rupees Four Crores Ninety Nine Lakhs Thirteen Thousand

Nine Hundred and Ninety Eight Only) inclusive of the debit notes against tax invoices, TDS and WCT certificates and billable expenses issued, to it, and the balance amount of ₹1,65,89,371/- (Rupees One Crore Sixty Five Lakhs Eighty Nine Thousand Three Hundred Seventy One Only) of the verified BOQ quantities remained unpaid. According to Explorer (the sub-contractor) the contractor was also liable to approve and make the payment regarding the rest of the BOQ items worth ₹1,10,60,312/- (Rupees One crore Ten Lakhs Sixty Thousand Three Hundred Twelve Only) including taxes and also for the execution of Extra/Additional work for the sum of ₹2,94,03,233/- (Rupees two Crores Ninety Four Lakhs Three Thousand Thirty Three Only). It is alleged that the contractor and the appellant were also liable to pay interest @18% per annum as per customs and usage of the trade in which the parties are dealing. They are liable to pay the interest w.e.f. 01.06.2012 on the outstanding amount of ₹5,70,52,817/- (Rupees Five Crores Seventy Lakhs Fifty-Two Thousand Eight Hundred Seventeen Only) on account of the defect liability period which ended in May, 2012 as the site after completion was handed over in May, 2011. Further, the plaintiff is claiming interest 18% p.a. on the outstanding amount of the tax invoices; i.e. ₹1,65,89,371/- (Rupees One Crore Sixty Five Lakhs Eighty Nine Thousand Three Hundred Seventy One Only) which is the difference between the total of tax invoices duly received by the contractor and the payment of ₹4,99,13,998 (Rupees Four Crores Ninety Nine Lakhs Thirteen Thousand Nine Hundred ninety eight Only) made by the contractor to the plaintiff including all the debit notes, TDS, WCT and charges billable to Explorer.

6. The plaintiff's suit averments alleged that the contractor and the appellant were severally and/or jointly liable to pay the balance sum of

₹1,65,89,371/- (Rupees one crore sixty five lakhs eighty nine thousand three hundred Seventy One Only) out of the total tax invoice amount of ₹6,65,03,369/- (Six crores sixty five Lakhs Three thousand three Hundred Sixty Nine Only). Further, they were severally and/or jointly liable to make payment of ₹1,10,60,312/- (Rupees One Crore Ten lakh sixty Thousand Three Hundred and Twelve Only) including taxes for the rest of the BOQ items. Further, they were also severally and/or jointly liable to pay ₹2,94,03,233/- (Rupees Two crores ninety four lakhs three Thousand Two Hundred Thirty Three Only) for the Extra/Additional work executed by the plaintiff, under the instructions of the contractor and the appellant at the above stated two sites with their approval and consent. Thus, they were severally and/or jointly liable to pay the total amount of ₹5,70,52,917/- (Rupees five crores seventy lakhs fifty two thousand eight hundred seventeen only) towards the “Principal Outstanding Amount” and further ₹49,76,811/- (Rupees Forty Nine Lakhs Six Thousand Eight Hundred Eleven Rupees Only) towards the interest calculated @ 18% p.a. on the balance sum of ₹1,65,89,371/- (Rupees one crore sixty five lakhs eighty nine thousand three hundred seventy one only) out of the total tax invoice amount of ₹6,65,03,369/- (Rupee six crores sixty five lakhs three thousand three hundred sixty nine only) from 01.06.2012 to 31.01.2014.

7. In the above suit the appellant filed an application, IA No. 16870/2014, under Order VII Rule 11 of CPC, *inter alia* praying that the plaint be rejected qua the Appellant and it may be deleted from the array of parties. In brief the Appellant contended the following:

- a) The plaint does not disclose any cause of action against the Appellant and therefore the suit is liable to be rejected under Order VII Rule 11(a) of CPC.
- b) There was no privity of contract between the appellant and the plaintiff and thus the suit did not disclose any cause of action against the appellant.

8. A learned Single Judge of this court dismissed the application on the following findings:

- a) Perusal of the plaint indicates that although the plaint is based mainly on the contract between Explorer and the contractor, but there are averments in the plaint by Explorer that claim that the Appellant is liable for certain works executed by it.
- b) It is trite law that the defense of the defendants is not required to be looked into while considering the question whether the plaint discloses a cause of action; only the plaint and the documents furnished by the plaintiff are required to be examined for the aforesaid purpose. For the purposes of considering an application Order VII Rule 11 of CPC, it is not necessary to ascertain whether the plaintiff has a cause of action or not; all that is required to be seen is whether the plaint discloses a cause of action.

9. In this appeal, under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (“Commercial Courts Act”) and Section 10 of the Delhi High Court Act, the aggrieved defendant has approached this court.

Contentions:

10. Learned senior counsel, Mr.Akhil Sibal appearing for the appellants urged that the impugned order wrongly rejected the application under Order 7 Rule 11(a) of the CPC, 1908, on the ground, that the plaint and the documents filed has been able to disclose a cause of action against the appellant and that there are specific averments in the plaint that show that Explorer had executed certain works on the instructions of the officers of the Appellant. It was underlined that the plaintiff (Explorer) had admitted to entering into a sub-contract with the contractor. Furthermore, highlighting Para 9 of the plaint the appellant urges that Explorer raised all invoices for the said work on the contractor, its principal; the said defendant also stated that the final payment for the work done was to be released by the contractor who failed to do so. Therefore, the Appellant has no privity with the plaintiff and is not a necessary and a proper party in the suit. Counsel submitted that a whole and meaningful reading of the suit averments would disclose that in reality no cause of action worth the plea was urged against the appellant.

11. It is submitted that the Learned Single Judge has rightly held in the impugned order that the defendants' plea should not required to be looked into while considering the question of whether the plaint discloses a cause of action, only the plaint and the documents furnished by the Plaintiff have be examined. It is settled law that a cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. Despite these settled principles the impugned order erred in holding the court does not examine whether plaintiff has a cause of action or not, but if the plaint discloses a cause of action. It is

submitted that the plaintiff has significantly made vague and omnibus averments with respect to the appellant's liability, which do not measure up to the standard of pleadings. Contrasting the pleadings in the suit, with respect to the contractor, where the date of the agreement, reference to the invoices made etc. were made, the learned senior counsel submitted that no such particulars are disclosed and the suit contains bald averments, to somehow enmesh the appellant in protracted and frivolous litigation, which ought to have been seen through by the learned single judge.

12. It is submitted that this court should intervene and set aside this judgment, because the suit was instituted before the advent of the Commercial Courts Act, 2015; the available appellate remedies in such pending matters, including the appeal, to a Division Bench in matters of moment, which are likely to impact a party (such as an order refusing to reject a plaint) are preserved. Counsel submitted that the text of Section 13 of the said Act, to the extent it restricts appeals, against such orders, would not constitute a bar. It is also urged that the present appeal is maintainable, because the suit was instituted before the coming into force of the Commercial Courts Act; it cannot take away the vested right to appeal, which is preserved, notwithstanding what is enacted by Sections 13 and 16 which apply to suits filed after the enforcement of the Act. Reliance is placed on *Videocon International Ltd. Vs. Securities Exchange Board of India*, (2015) 4 SCC 33 and *Ardee Infrastructure Vs. Anuradha Bhatia & Ors*, 2017 SCC Online Del 6402.

13. Counsel for the plaintiff submitted that present appeal is not maintainable, since the order in question is one to which no appeal lies. The learned counsel argues that the impugned order has been passed by the

Commercial Division of this High Court, an appeal therefrom is governed by Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. It was pointed out that the proviso to Section 13(1) of the said Act limited appeals from orders to such orders which were specifically enumerated under Order XLIII CPC and Section 37 of the Arbitration and Conciliation Act, 1996. And in the matter in hand, the order in question too is one that is not enumerated under Order XLIII CPC. Reliance was also placed on Section 13(2) of the said Act which is a non-obstante provision specifying that notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of the said Act. In support of their contention above the counsel for the plaintiff placed reliance on *HPL(India) Limited Vs. QRG Enterprises*, 2017 SCC Online Del 6955.

14. It was argued that the suit, as against the appellant is competent and maintainable; the impugned judgment cannot be faulted. Counsel submitted that on an overall reading of the suit, the single judge correctly deduced that the averments constituted a cause of action. Reliance was placed on the judgments reported as *Wander v Antox* 1990 (Supp) SCC 727 and *Mohammed Mehtab Khan & Ors v Khushnuma Ibrahim Khan & Ors* 2013 (9) SCC 221. It was also submitted that the plaintiff's case against the appellant falls within a known exception that is, where it is shown that a party by conduct or action reveals existence of any obligation, a suit can be maintained, notwithstanding lack of privity of contract. In support, reliance

was placed on *Jnan Chandra Mukherji Vs. Manoranjan Mitra*, 1941 SCC Online Cal 267.

Analysis and Conclusions

15. The short question, which this court has to address, is, whether in the facts and circumstances of this case, it can be held that the plaintiff had made sufficient averments to allege a cause of action against the appellant.

16. Before this court proceeds to deal with the merits of this case, it would be necessary to deal with the question as to maintainability of the present appeal under the Commercial Courts Act. Section 16 of the said Act, reads as follows:

“13. Appeals from decrees of Commercial Courts and Commercial Divisions.

(1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996.

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.”

17. Before the coming into force of the above Act, the law declared by the Supreme Court in *Shah Babulal Khimji v Jayaben D. Kania* AIR 1981 SC 1781 held the field. Under the CPC, only a restricted category of orders passed during the trial of a suit are appealable, in terms of Order 43. Many

orders which are of some significance, however are not enumerated in that provision. The Supreme Court clarified that wherever Letters Patent or other such laws held the field, such orders could be appealed. It was held as follows:

Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-s. (2) of s.2 cannot be physically imported into the definition of the word 'judgment' as used in cl. 15 of the Letters Patent because the Letters Patent has advisedly not used the terms 'order' or 'decree' anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a Trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds :-

(1) A Final Judgment-a judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench

(2) *A preliminary judgment*-This kind of a judgment may take two forms-(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice under section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an R order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.

(3) *Intermediary or Interlocutory judgment*-Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by o. 43 R.1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge

in a suit under order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the Trial Judge would not amount to a judgment within the meaning of cl. 15 of the Letters Patent but will be purely an interlocutory order.

Similarly, suppose the Trial Judge passes an Order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of O. 43 R.1 though an order rejecting an application to set aside the decree passed ex parte falls within O. 43 R.1 cl. (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The fact, however, remains that the order setting aside the ex-parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

In the course of the trial, the Trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the Trial Judge.

Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.”

18. It is thus clear from the above passage that although only few categories of orders were enumerated in Order 43, the Supreme Court nevertheless pointed out certain orders which have the effect of impacting valuable rights, against which appeals could undoubtedly lie to the Division Bench. The clearest reference to this, is in the mention that “*shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to*

maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice under section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an R order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.”

19. Prior to the Commercial Courts Act, therefore, the *species* of order that is impugned herein was clearly appealable. However, Section 13 changed that. That provision was interpreted by a Division Bench in *HPL (India) Ltd* (supra), which held as follows:

“30. We now come to the meaning to be ascribed to the proviso in Section 13(1). It clearly stipulates that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the CPC, as amended by the said Act, and Section 37 of the Arbitration and Conciliation Act, 1996. We have seen that ‘orders’ as understood under the CPC are different and distinct from ‘decrees’. And, orders are nothing but the formal expression of any decision of a Civil Court not amounting to a decree. Therefore, the amplitude and width of the expression ‘order’ is very wide under the CPC itself but not all orders are appealable. The appealable orders are enumerated in Order XLIII of the CPC. We have already pointed out above, that there are only two kinds of appeals recognized under the CPC, namely, - ‘Appeals from decrees’ and ‘Appeals from orders’. Section 104, which has been

extracted earlier in this judgment, specifies the orders from which appeals lie. It clearly provides that an appeal shall lie from the orders enumerated in the said provision itself and, save as otherwise expressly provided in the body of the CPC or by any law for the time being in force, from no other orders. This means that appeals from orders are restricted to those orders, which are either specified in Section 104 itself or expressly provided in the body of the Code or by any law for the time being in force. Insofar as the impugned order is concerned, it is clear that it does not fall within the orders specified under Section 104. We now have to look at Order XLIII Rule 1 which stipulates that an appeal shall lie from the orders enumerated therein under the provisions of Section 104. In other words, only an order specified under Order XLIII Rule 1 would be appealable and, read with the provisions of Section 104, no other order would be an appealable order under the CPC. In this backdrop, the proviso to Section 13(1) makes it abundantly clear that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are 'specifically enumerated' under Order XLIII of the CPC, as amended by the said Act and Section 37 of the Arbitration and Conciliation Act, 1996. Clearly, in our view, this restricts the appealable orders to only those orders which are specifically enumerated in Order XLIII. In the present case, the impugned order is admittedly not one specified under Order XLIII.

31. We would also like to examine the scope and function of a 'proviso'

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33. From the above, it is evident that the natural presumption that can be raised while interpreting a proviso is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso. In sub-Section (1) of Section 13, the word 'order' would have a very wide amplitude and that could have included even orders which are not specifically enumerated in Order XLIII of the CPC. The proviso has taken out those orders and carved out an exception by

limiting the appeal from orders to those which are specifically enumerated under Order XLIII of the CPC (apart from an Order under Section 37 of the Arbitration and Conciliation Act, 1996).

34. The above analysis reveals that:- (a) the word 'judgment' appearing in Section 13(1) of the said Act actually relates or has a reference to a 'decree'; (b) the word 'order' in that provision would have to be construed in the light of Section 2(14) of the CPC as meaning 'a formal expression of a decision of a Civil Court which is not a decree; (c) the appealable orders would be only those which are specifically enumerated under Order XLIII, as provided in the proviso to Section 13(1) of the said Act.

35. Now, let us examine sub-section (2) of section 13 of the said Act. As noticed above, it begins with the non obstante expression "notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court ..". The words - "any other law for the time being in force" - would include the Delhi High Court Act, 1966. The portion after the non obstante expression specifically cautions that "no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act". In other words, whatever may be contained in, inter alia, the Delhi High Court Act, 1966, an appeal from any order or decree of a Commercial Division or Commercial Court "shall lie" only in accordance with the provisions of the said Act. To be clear, if an appeal from a particular kind of order or decree were to be provided under the Delhi High Court Act, 1966 but not under the said Act then, such an order or decree would not be appealable. Therefore, even if, by virtue of section 10 of the Delhi High Court Act, 1966, an appeal lay from a particular kind of an order, no appeal could be preferred thereagainst unless the said Act itself provided for such an appeal.

36. Reading the entire section 13 of the said Act the clear position is that an appeal lies from an order which is specifically enumerated under Order XLIII CPC. Furthermore, no appeal would lie from an order not specifically enumerated in Order XLIII CPC because of the incorporation of the expression “from no other orders” appearing in section 104 CPC (which is clearly applicable by virtue of section 16(2) of the said Act). And, Section 10 of the Delhi High Court Act, 1966 would not come to the rescue because of the non obstante provision contained in section 13(2) of the said Act.

37. Therefore, as the impugned order does not find place in the orders specifically enumerated in Order XLIII CPC, no appeal could lie against it and the present appeal is not maintainable. But, as the learned counsel for the appellants have made several submissions to the contrary we shall have to deal with them.”

20. The Appellant had refuted the plaintiff's contention that the appeal is liable to be dismissed as not maintainable. It is argued that the relevant date when the appellate remedy vests in the parties to the lis, is the date when the dispute is initiated; therefore since the present suit was already instituted before the enforcement of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, the amendment to the Provisions of the CPC with respect to the Commercial Courts Act, contained in Section 16 of the said act shall not apply in the present case and consequently the restrictive Section 13, does not apply. It is further argued that the right of appeal under Section 10 of the Delhi High Court Act, 1966, would subsist.

21. What is a “vested right” to appeal to a higher court, in the context of a judgment or appealable order was explained in *Videocon International Ltd.(supra)* as follows:

“ 39. As illustrated above, an appellate remedy is available in different packages. What falls within the parameters of the package at the initial stage of the lis or dispute, constitutes the vested substantive right, of the concerned litigant. An aggrieved party, is entitled to pursue such a vested substantive right, as and when, an adverse judgment or order is passed. Such a vested substantive right can be taken away by an amendment, only when the amended provision, expressly or by necessary intendment, so provides. Failing which, such a vested substantive right can be availed of, irrespective of the law which prevails, at the date when the order impugned is passed, or the date when the appeal is preferred. For, it has repeatedly been declared by this Court, that the legal pursuit of a remedy, suit, appeal and second appeal, are steps in a singular proceeding. All these steps, are connected by an intrinsic unity, and are regarded as one legal proceeding.

40. Where the appellate package, as in the present case, is expressed differently at the "pre" and "post" amendment stages, there could only be two eventualities. Firstly, the pre-amendment appellate package, could have been decreased by the amendment. Or alternatively, the post-amendment package, could have been increased by the amendment. In the former situation, all that was available earlier, is now not available. In other words, the right of an individual to the appellate remedy, stands reduced or curtailed. In the latter situation, the amendment enhances the appellate package. The appellate remedy available prior to the amendment, stands included in the amendment, and some further addition has been made thereto. In the latter stage, all that was available earlier continues to subsist. The two situations contemplated hereinabove, will obviously lead to different consequences,

because in the former position, the amendment would adversely affect the right, as was available earlier. In the latter position, the amendment would not affect the right of appeal, as was available earlier, because the earlier package is still included in the amended package.

41. In the facts and circumstances of this case, it is apparent that Section 15Z of the SEBI Act prior to the amendment, postulated that the appellate remedy would extend to "...any question of fact or law arising out of such order.". Whereas, the appellate remedy was curtailed consequent upon the amendment, whereunder the appellate right was limited to, "...any question of law arising out of such order.". Accordingly, by the amendment, the earlier appellate package stands reduced, because under the amended Section 15Z, it is not open to an appellant, to agitate an appeal on facts. That being the position, it is not possible for us to accept the contention advanced at the hands of the learned counsel for the appellant, that the amendment to Section 15Z of the SEBI Act, envisages only an amendment of the forum, where the second appeal would lie. In our considered view, the amendment to Section 15Z of the SEBI Act, having reduced the appellate package, adversely affected the appellate right vested of the concerned litigant. The right of appeal being a vested right, the appellate package, as was available at the commencement of the proceedings, would continue to vest in the parties engaged in a lis, till the eventual culmination of the proceedings. Obviously, that would be subject to an amendment expressly or impliedly, providing to the contrary. Section 32 of the Securities and Exchange Board of India (Amendment) Act, 2002, which has been extracted in paragraph 12 hereinabove reveals, that the 'repeal and saving' clause, neither expressly nor impliedly, so provides. Thus viewed, we are constrained to conclude, that the assertion advanced at the hands of the learned counsel for the appellant, that the instant amendment to Section 15Z of the SEBI Act, does not affect the second appellate remedy, but merely alters the forum where the second appellate remedy would lie, is not acceptable.

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43. Having recorded our conclusion, as has been noticed in the foregoing paragraph, it is apparent, that insofar as the vesting of the second appellate remedy is concerned, neither the date of filing of the second appeal, nor the date of hearing thereof, is of any relevance. Legal pursuit of a remedy, suit, appeal and second appeal, are steps in a singular proceeding. All these steps are seemingly connected by an intrinsic unity, which are treated as one singular proceeding. Therefore, the relevant date when the appellate remedy (including the second appellate remedy) becomes vested in the parties to the lis, is the date when the dispute/lis is initiated. Insofar as the present controversy is concerned, it is not a matter of dispute, that the Securities Appellate Tribunal had passed the impugned order (which was assailed by the Board), well before 29.10.2002. This singular fact itself, would lead to the conclusion, that the lis between the parties, out of which the second appellate remedy was availed of by the Board before the High Court, came to be initiated well before the amendment to Section 15Z by the Securities and Exchange Board of India (Amendment) Act, 2002. Undisputedly, the unamended Section 15Z of the SEBI Act, constituted the appellate package and the forum of appeal, for the parties herein. It is, therefore, not possible for us to accept, the contention advanced at the hands of the learned counsel for the appellant, premised on the date of filing or hearing of the appeal, preferred by the Board, before the High Court. We accordingly reiterate the position expressed above, that all the appeals preferred by the Board, before the High Court, were maintainable in law.”

22. Ardee Infrastructure adopted a similar position, explaining as follows:

“29. In such a situation, it would have to be considered, independent of Section 26 of the Amending Act, as to whether the amended provisions applied to the said second and third category of cases. In this regard, we may note the observations of the Supreme Court in Thyssen (supra) where, after, considering several earlier decisions, the Supreme Court

observed in paragraph 32 (which we have already extracted above) that the principles enunciated in the judgments show as to when a right accrues to a party under a repealed Act. The Supreme Court observed that it is not necessary that for the right to accrue, legal proceedings must be pending when the new Act comes into force. Furthermore, and more importantly, the Supreme Court observed that to have the award enforced when arbitral proceedings commenced under the old Act under that very Act was certainly an accrued right. In other words, all the aspects of enforceability of an award entail an accrued right both in the person in whose favour the award is made and against whom the award is pronounced. It will also be noticed that the Supreme Court made it clear that for the right to accrue, there is no necessity that legal proceedings must be pending when the new Act comes into force. This exactly covers the situation as obtaining in the second category of cases, where the arbitral proceedings were commenced prior to 23.10.2015 and the award was also made prior to 23.10.2015, but the petition under Section 34 had not yet been filed. This is the same situation as in the present case. Thus, the pendency of any legal proceedings or otherwise would not come in the way of determining as to whether the right had accrued under the unamended provisions or not. We have already noted that the Supreme Court in Thyssen (supra) observed that the right to have the award enforced (which also comprises of the negative right of the award debtor to not have it enforced till his objections under Section 34 of the said Act are heard and decided) is certainly an accrued right. Given the fact that the amended Section 36 takes away the right of an automatic stay of enforcement of an award, it is clear that the amendment introduced in Section 36 by virtue of the Amending Act would definitely impinge upon the accrued right of the party against whom the award is given after the arbitral proceedings have been held under the unamended provisions. Since an accrued right is affected, unless a contrary intention appears in the amending statute, the amendments would have to be treated as prospective in operation. Prospective from the standpoint of commencement of the arbitral proceedings.

30. Now, if the argument of the respondents is to be accepted that the first limb of Section 26 applies only to arbitral proceedings in the sense of proceedings before arbitral tribunals and not to court proceedings, then, it is obvious that Section 26 is silent with regard to the second and third categories of cases to which we have already referred above. In other words, in respect of these categories, no contrary intention of retrospectivity is evinced upon a reading of Section 26 of the Amending Act. Therefore, even if we take the argument of the respondents to be correct, the result would still be the same and, that is, that in respect of all the arbitral proceedings commenced prior to 23.10.2015, the unamended provisions of the said Act would continue to operate till the enforcement of the award.

31. We may also notice that in case the argument of the respondents is to be accepted that where arbitral proceedings commenced prior to 23.10.2015, the unamended provisions would be saved only in respect of the proceedings before the arbitral tribunal and would not extend to court proceedings, the same would result in serious anomalies. This is so because the Amending Act has sought to bring about amendments in Section 9 as well as Section 17 of the said Act. While Section 9 pertains to interim measures which may be directed by the court prior, during arbitral proceedings or after the making of the award, Section 17 deals with the interim measures which may be ordered by an arbitral tribunal. If the interpretation of the respondents is to be accepted, then, in respect of arbitral proceedings commenced prior to 23.10.2015, the amended provisions would apply to proceedings under Section 9 of the said Act, but not to Section 17 thereof. This would result in a serious anomaly.”

23. This court is of the opinion that the appellant’s argument is merited. Though no vested right to procedure exists, *Videocon* is a clear authority that the right to an appellate remedy is not extinguished by the enactment of a

new statute; a previously instituted litigant's right to appeal is preserved intact. It is therefore, held that the present appeal is maintainable.

24. The plaintiff had, on the merits urged this court not to interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely. If the discretion has been exercised in a reasonable and judicial manner the fact that the Appellate court would have taken a different view may not justify interference with the exercise of such discretion. Undoubtedly, *Wander* (supra) and the other decision in *Mohammed Mehtab Khan* (supra) supports such a view. Yet, the rule of non interference is fact dependent; each case is to be considered on the basis of the pleas and contentions.

25. The appellant's argument with regard to the merits is that a fair reading of the plaint averments shows that no specific allegations with respect to a contractual relationship between it and the plaintiff are discernible. It is urged that the appellant is a stranger and has no privity to the contract between the plaintiff and the contractor. The plaintiff, however submitted in response that the present case falls under a well-recognized exception of privity to contract. The exception is that in a case where no privity exists between the party to the contract and the stranger, then the privity gets created by conduct or acknowledgment of the stranger. The appellant is therefore, a necessary and proper party to the suit.

26. It would be necessary to notice the averments in the suit. The relevant extracts are as follows:

“That the Defendant No. 1 is a company incorporated under the provisions of the Indian Companies Act, 1955 having its

registered office at 46,34, Ajmeri Gate, New Delhi - HQ 005, The Defendant No. 1 is engaged in the business of Interior Designing and other related works. The Defendant No. 2 is a part of Eros Group and engaged in the business of hospitality.

3. That the Defendant No. 1 upon receipt of work Orders from the Defendant No. 2, sub-contract the interior and other incidental Works in respect of rooms of the following two (2) sites owned' and/or managed by the Defendant No- 2 to the Plaintiff after settling the rates as to Bill of Quantity Items (hereinafter referred to as the "BOQ Items") and terms and conditions thereof of 100 Rooms of the Hotel i.e. 'Intercontinental Hotel (which is now known as Hilton Hotel located at ISB, Mayur Vihar, District Centre, New Delhi) and 40 Rooms of the Hotel i.e. Holiday Inn (which is now known as Doubletree Hotel' located at 13A Mayur Vihar, District Centre, New Delhi, 110 091) in November, 2009. The rates for the aforesaid work order and terms and Conditions were finalized as per the communication between the plaintiff and Defendant No.1 via emails dated 10th of November 2009 The said emails dated 10th of November, 2009 along with the terms and conditions stipulated therein are annexed herewith. It is pertinent to mention herein that it was agreed that the payment had to be on the basis of the actual quantities at site after completion and not as per BOQ which may be higher or lower. That it was further agreed- that the payment to the extent of 90% of the work value would be released within a period of 03 months after verification of the actual quantities after adjustment of the payments made during the subsistence of the work and as per the invoices so raised and the balance payment of 10% would be made after the defect liability period i.e. 12 months from the completion of the work. .

4. That on being asked Shri Mayank Gupta, Director of the Defendant No.1 Company assured to issue the work orders soon and in the meanwhile, the Plaintiff should start carrying out work at the aforesaid two sites as per the terms and conditions settled as mentioned hereinabove. The Plaintiff Company in good faith started executing, the work in relation to the 40 rooms and 100 rooms at the two sites in November,

2009 and in view of the fact that Shri Mayank Gupta, Director of Defendant No. 1 and Shri Rajesh Khanduja, Director of Plaintiff had cordial relations since long.

5. That the Plaintiff started the aforesaid works; under the instructions of the Defendant No. 1 via emails as well as verbal communications between parties. It was after much persuasion, that the Defendant No. 1 issued the work orders vide e mails dated 20.03.2010 to the Plaintiff in respect of the rooms at the aforesaid two sites, which were not inconsonance with the terms and conditions as agreed between the parties barring some of them. However, the plaintiff on the assurance of the Defendant No.1 that the Plaintiff may continue with the work and that the terms and conditions as Originally agreed in November. 2009 would be adhered to. That so, in respect of transactions/works between the Plaintiff and the Defendant No.1, an account for dealings between the: Plaintiff and the Defendant No. 1 was opened by the Plaintiff in his books of accounts in the name of the Defendant No. 1 Company as mutually agreed between the Plaintiff and the Defendant No. 1. The nature of the account between the Plaintiff and the Defendant No. 1 was agreed to be as that of an open, mutual and current account, The entire dealings which took place between the Plaintiff and the Defendant No. 1 were based on the principle that such account of dealings between them would remain as an open, mutual and current account.

7. That it is further pertinent to mention herein that as a matter of practice in trade and as per the understanding of the Plaintiff and the Defendant No. 1, first the Pro Forma invoice (hereinafter referred to as the 'Bill for Approval') along with the measurements had to be issued for each work Qi details and upon the approval thereof,' the taxA invoice for the approved amount after verification at the site would be issued upon the Defendant would be made to the Plaintiff by the Defendant No.1,

8. That thereafter Defendant No. 1 by seeing, the active pace of the aforesaid works and the professionalism, of the Plaintiff the Defendant No.1 also subcontracted the- interior works and

other related works-to the Plaintiff as to the Banquet Hall and Pre-Function area, Restaurant-at Holiday Inn Site, mock up room. Holiday Inn retail area and C,,^dors for both the Holiday Inn and the Intercontinental Hotel Sitg, on the agreed rates vide various emails exchanged between them. Thus the-brief of total works sub-contracted to the Plaintiff are as follows...

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11. That the Plaintiff finished/completed the entire work (BOQ items as well as additional items) at Holiday INN – MAYUR VIHAR AND AT INTERCONTINENTAL HOTEL - MAYUR VIHAR and handed over the possession of the said sites to the Housekeeping Team of the Defendant No.2 under the instruction of the Defendant No.1 in May 2011 to their satisfaction. Since thereafter, the plaintiff has been following up telephonically and as well via emails and even had meeting with the representatives of the Defendants to clear the bills.....

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16..... In respect of this, discussions and meetings were held CS(COMM) 182/2016 Page 3 of 5 between the parties. The said invoices for approval by the defendants were raised by the plaintiff from time to time.....

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19. That however, the plaintiff was shocked to receive an email dated 18th July, 2011 from the defendant no.1 stating that the things are out of their control and the decision regarding the balance payment is with the Hotel management i.e. defendant no.2.....

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24.the Defendants failed to clear the Outstanding Amount and abruptly denied the same, thereby making its' mala fide intentions well evident. The efforts and requests of the Plaintiff have proved to be futile exercise as the Defendants failed to make due payment. The Defendants deliberately avoided to make the approvals thereof in order to avoid their liability towards the Plaintiff for the works carried out, though admitted

the execution of the works by the Plaintiff at the aforesaid sites to their satisfaction.

25. That the Defendants are also liable to pay interest @ 18% p.a. as per the custom and usage of the trade in which parties are dealing. The Defendants are liable to pay the interest w.e.f. 1st of June, 2012 on the outstanding amount of Rs.5,70,52,817/- (Rupees Five Crores Seventy Lakhs Fifty Two Thousand Eight Hundred Seventeen Only) on account of the defect liability period which ended in May, 2012 at the site after completion was handed over in May, 2011.....

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26. That accordingly, the Defendants are severally and/or jointly liable to pay the balance sum of Rs.1,65,89,371/- (Rupees One Crore Sixty Five Lakhs Eighty Nine Thousand Three Hundred Seventy One Only) Further, the Defendants are severally and/or jointly liable to make payment of CS(COMM) 182/2016 Page 4 of 5 Rs.1,10,60,312/- (Rupees One Crore Ten Lacs Sixty Thousand Three Hundred and Twelve Only) including taxes for the rest of the BOQ items. Further, the Defendants are also severally and/or jointly liable to make payment of Rs.2,94,03,233/- (Rupees Two Crores Ninety Four Lacs Three Thousand Two Hundred Thirty Three Only) for the Extra/Additional work executed by the Plaintiff under the instructions of the Defendants at the above stated two sites with their approval and consent. Thus the Defendants severally and/or jointly are liable to pay the total amount of Rs.5,70,52,917/- (Rupees Five Crores Seventy Lakhs Fifty Two Thousand Eight Hundred Seventeen Only).....”

27. It is quite evident from the above extracts that the predominant plea of the plaintiff is directed against the contractor, who – it is alleged, awarded it the contract. It is nowhere pleaded in the plaint that the work outsourced by the contractor to the plaintiff, was with the consent of the appellant, which was the service recipient. The contract to perform works for the appellant was between it and the contractor. In these circumstances, there ought to

have been some modicum of pleading, fixing responsibility upon the appellant, as liable, either through express terms of the arrangement, or through necessary implication. The mere advertence to an omnibus generic liability on its part, was therefore, insufficient to cast liability. In the absence of pleading, no amount of evidence can support the plaintiff's claim with respect to the appellant's liability.

28. During the hearing, the plaintiff had relied upon two e-mail communications addressed to the appellant, dated 26.05.2011 and 25.10.2011 and argued that this constituted awareness and background for a relationship between the plaintiff and the appellant. This court is of the opinion that the e-mail does not lead to any such possible inference; it merely forwards an e-mail as part of a chain mail. The correspondence is essentially between the plaintiff and its principal, i.e. the contractor. Even if one were to assume this communication to have been accepted by the appellant, it nowhere discloses that the latter and the plaintiff had any subsisting contractual relationship. At best, it constituted the appellant's awareness that the contract which was awarded to the second respondent, was subcontracted to a third party (i.e. the plaintiff). There was no privity of contract between the two. For these reasons, reliance on *Jnan Chandra Mukherji (supra)* is misplaced; the Calcutta High Court enunciated an exception to the principle that a stranger to a contract between two other parties cannot sue one of them, in the following terms:

“where a contract between two parties is so framed as to make one of them a trustee for a third; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract. The other exception covers those cases where the promisor, between

whom and the stranger no privity exists, creates the privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party. There are numerous authorities, both English and Indian, which have laid down these propositions of law...”

Clearly, the exception to a third party being held responsible for obligations of another, to an agreement, which it was not party to does not apply in the facts of this case. *Utair Aviation Vs. Jagson Airlines Limited &Anr*, 2012 SCC Online Del 2114 is a decision of this court, to say that where there are pleadings or material to conclude that *prima facie* a party is aware of its possible liability to a stranger, it would be unwise to reject a plaint. There is no pleading, or evidence suggestive of such awareness; furthermore, that the appellant is a stranger to the contract between the other two defendants was the premise for the application for rejection of plaint, in this case.

29. It was held in *T. Arivanandam v T. Satyapal* AIR 1977 SC 2421 that courts should give a meaningful and not formal reading of the pleadings, to filter out needless and vexatious litigation. This line of reasoning was adopted again in *Samar Singh v Kedar Nath* 1987 where it was held that:

“132. It is trite that a party should not be unnecessarily harassed in a suit. An order refusing to reject a plaint will finally determine high right in terms of Order 7 Rule 11 of the Code of Civil Procedure.

133. The idea underlying Order 7 Rule 11(a) is that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of a suit. Having regard to the changes in the legislative policy as adumbrated by the amendments carried out in the Code of Civil Procedure, the court would interpret the provisions in such a manner so as to save expenses, achieve expedition and avoid the court's resources being used up on cases which will serve no useful purpose. A litigation which is in the opinion of the court is doomed to fail would not further

be allowed to be used as a device of harass a litigant. See AzharHussain v. Rajiv Gandhi, 1986 Supp SCC 315 at pp. 324-325.

The same principles were re-iterated in *ITC Ltd v Debts Recovery Appellate Tribunal* AIR 1988 SC 634, in the following terms:

"Question is whether a real cause of action has been set out in the Complaint or something purely illusory has been stated with the view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions are not permitted in law and a clear right to sue should be shown in the complaint."

30. Upon analysis of the pleadings and documents on the record and after considering the relevant decisions, this court is satisfied that neither the complaint, nor the documents, disclose any evidence in support of the averments made in the complaint which shows that the plaintiff has a cause of action against the appellant, or that it (the appellant) has a nexus to the sub-contract between the plaintiff and the contractor. There does not exist even a single invoice for the work done against the appellant, neither any correspondence with the Appellant regarding the same. Therefore, reading the complaint in entirety along with the documents, we are of the view that Respondent No.1 has not been able to disclose a cause of action against the Appellant as per the provisions of Order VII Rule 11(a) CPC.

31. This court, therefore, is of the view that with respect to the present suit, the appellant is not a necessary party against whom any relief can be claimed. In the opinion of this court there exists a misjoinder with regard to the appellant. But, as per the provisions of Order I Rule 9 CPC, which states that, *"no suit shall be defeated by reason of the mis-joinder or non-joinder of*

parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: Provided that nothing in this rule shall apply to non-joinder of a necessary party.” Thus, under Order I Rule 10 the court may *suo moto* or on application by a party strike out a party at any stage of the proceedings, who in the court’s opinion may not be a necessary party for the purpose of effectively adjudicating upon and settling all the questions involved in the proceeding. This is evident from a ruling of the Supreme Court in *Prem Lala Nahata Vs. Chandi Prasad Sikaria*, (2007) 2 SCC 551:

“12. Thus, in a case where a plaint suffers from the defect of misjoinder of parties or misjoinder of causes of action either in terms of Order I Rule 1 and Order I Rule 3 on the one hand, or Order II Rule 3 on the other, the Code itself indicates that the perceived defect does not make the suit one barred by law or liable to rejection. This is clear from Rules 3A, 4 and 5 of Order I of the Code, and this is emphasised by Rule 9 of Order I of the Code which provides that no suit shall be defeated by reason of non-joinder or misjoinder of parties and the court may in either case deal with the matter in controversy so far as it regards the rights and interests of the parties actually before it. This is further emphasised by Rule 10 of Order I which enables the court in appropriate circumstances to substitute or add any person as a plaintiff in a suit....”

32. The appellant’s application under Order VII Rule 11 does not warrant a rejection of the plaint. On the other hand, this court, in terms of Order I Rule 10 CPC, directs that the Appellant be deleted from the array of parties in the present suit. As regards the restricted scope of interlocutory appellate jurisdiction (spelt out in *Wander(supra)*) the court is of the opinion that the appellant has established that on an overall reading of the suit and the

documents, it cannot be made liable for the contractor's omission to make payments in a contract to which the plaintiff and the contractor were parties. In view of the above reasoning the impugned order is set aside; the appellant, arrayed as second defendant in the suit is directed to be deleted from the array of parties. The amended memo of parties shall be filed by the plaintiff, in CS(COMM)-182/2016. The parties are directed to be present before the learned single judge, according to roster allocation, on 28 May 2018. The appeal is allowed in the above terms. Order dasti.

**S. RAVINDRA BHAT
(JUDGE)**

**A.K. CHAWLA
(JUDGE)**

MAY 11, 2018



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