

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

% **Date of Decision 29th November, 2021**

+ **CM(M) 1081/2021**

ANSAL LANDMARK TOWNSHIP PVT. LTD Petitioner
Through: Mr. Parveen Semwal, Advocate.

versus

BIG BROTHERS PROJECTS PVT. LTD Respondent
Through: Mr. Rajesh Mahendru, Advocate.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J. (Oral)

CM No.42517/2021(for exemption)

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

CM(M) 1081/2021 & CM No.42516/2021(for stay)

3. The present petition under Article 227 of the Constitution of India impugns the order dated 6th October, 2021 passed by the District Judge (Commercial Court)-02, Patiala House Courts, New Delhi (Commercial Court) in a commercial suit bearing CS (COMM) No.165/2019, dismissing the application filed on behalf of the petitioner (defendant no.2 in the suit) under Order I Rule 10 of the Code of Civil Procedure, 1908 (CPC).
4. Brief facts as set out in the impugned order are set out below:

4.1 The respondent herein, was awarded the contract for plumbing and sanitary works by the petitioner and the defendant no.1 with respect to work orders starting from 14th November, 2011 to 26th November, 2015.

4.2 Alleging default in payments as well as breach of terms of the contract by the petitioner and the defendant no.1, the respondent filed the commercial suit for recovery in 2019.

4.3 Upon the written statement in the suit being filed beyond a period of 120 days, the defence of the petitioner and defendant no.1 was struck off by the Commercial Court vide order dated 29th January, 2021.

4.4 The application under Order I Rule 10 of the CPC filed by the petitioner for deletion of its name from the array of parties in the suit, was dismissed by the Commercial Court vide the impugned order.

5. Counsel appearing on behalf of the petitioner has submitted that; (i) there are no allegations in the plaint against the petitioner except in paragraph 20 of the plaint; (ii) there is no privity of contract between the petitioner and the defendant no.1; (iii) the suit is not based on torts but is based on an agreement entered into between the respondent and defendant no.1; (iv) the petitioner and defendant no.1 are separate legal entities; (v) corporate veil can only be lifted in public interest or in the case of tax fraud; (vi) there are no specific averments made in the plaint in terms as required under Order VI Rule 4 of the CPC with regard to the petitioner; and, (vii) where no particulars are pleaded in the plaint, corporate veil may not be pierced. Reliance is placed on the judgment dated 16th May, 2017 of the Single Judge of this Court in OMP (COMM) No.22/2016 titled as *Sudhir*

Gopi Vs. Indira Gandhi National Open University and Anr. in this regard. Reliance has also been placed on the judgment dated 2nd July, 2014 while deciding IA No.6063/2010 and IA No.2737/2014 in CS(OS) No.76/2010 titled as ***Kohli One Housing & Development Pvt. Ltd. Vs. C.S. Agarwal and Ors.*** to contend that in case there is no privity of contract, then a party may not be impleaded in a suit for recovery and unless there are specific pleadings in this regard, the doctrine of lifting of corporate veil is not applicable.

6. Counsel appearing on advance notice on behalf of the respondent has contended that (i) in the present case the defence of both the defendants has already been struck off; (ii) in terms of the proviso to Order VIII Rule 5 of the CPC as applicable to commercial suits, every allegation or fact in the plaint if not denied shall be taken to be admitted; (iii) since, the defence of the petitioner has been struck off, all the averments made in the plaint including paragraph 20 shall be deemed to be admitted; and (iv) after the passing of the impugned order, an application under Order VII Rule 11 of the CPC has also been filed by the defendants which is pending adjudication before the Commercial Court.

7. Counsel appearing on behalf of the respondent has further submitted that in the present case, the averments in the suit are not just premised on the defendant no.1 being a subsidiary of the petitioner, but also on the ground that the defendant no.1 has been acting as an agent of the petitioner. In this regard reliance has been placed on the judgment of the Division Bench of this Court in ***Bharat Starch Industries Ltd. Vs. Prudent International Shipping and Trading Co. Ltd.*** 1995 (4) AD 343.

8. Next, it is contended on behalf of the counsel for the respondent that there are well recognized exceptions to the Rule of Privity of Contract and said exceptions are fully applicable in the facts and circumstances of the present case. It has been specifically pleaded in the plaint that the petitioner is the actual owner of the township that is being developed and defendant no.1 is only acting at the behest of the petitioner. Reliance in this regard is placed on the judgment of this Court in *Utair Aviation Vs. Jagson Airlines Limited and Anr.* 2012 (129) DRJ 630. It is contended that unless the petitioner is impleaded as a party in the suit, the respondent would be left with a paper decree which would be impossible to execute against the defendant no.1.

9. I have heard the rival contentions. It is clear from the reading of the proviso to Order VIII Rule 5 of the CPC as applicable to commercial suits that in the absence of a specific denial to the allegation made in the plaint, the same has to be accepted. In this regard, reference may be made to paragraph 20 of the plaint which has been relied upon by both parties and is set out below:

*“20. That the defendant No.1 and defendant No.2 both are jointly and severally liable to make the payment of the suit amount as the defendant No.1 is subsidiary of defendant No.2. The entire equity of the defendant No.1 is owned/controlled by the defendant no.2. The actual working control of the working of defendant No.1 is with defendant No.2 and in fact the corporate veil of defendant no.1 and No.2 are liable to be lifted as the defendant No.2 is actually using name the defendant No.1 to trade with other and even would make the defendant no.1 defunct and usurp all assets of defendant No.1 to deny the recovery of dues/claims of plaintiff. **It is submitted that the defendant No.2***

company is the actual owner of the project where the plaintiff was awarded the contract as the defendant No.2 is the actual owner of the land and building of the housing project and selling the flats after their completions, the name of defendant No.1 is only being used to defraud public at large as such in lay they are actually liable to make the payment of the suit amount to the plaintiff. The defendant No.2 used to give all the instruction and has entered into negotiations with plaintiff and all the part payment made to the plaintiff have originated from defendant No.2 only, the defendant no.1 of its own has no source of funds or income or any ownership over the project. Thus under these circumstances the corporate veil of the defendant No.1 and defendant No.2 are required to be lifter as in fact the defendant No.1 was worked simply as agent of the defendant No.2 all the work orders were issued depicting the defendant No.1 as subsidiary of defendant No.1 and using the trade Mark/logo of 'ANSAL API'. The defendant No.1 & 2 both are the group companies of 'ANSAL API' therefore being the owner of the land and building of the entire project for which work was awarded to the plaintiff, the defendant No.2 alongwith defendant No.1 be held jointly and severally liable for the monetary dues/claims/losses of the plaintiff in the present suit."

10. A reading of the aforesaid paragraph makes it abundantly clear that the suit is not just premised on the defendant no.1 being a subsidiary of the petitioner or on the doctrine of lifting of corporate veil. It has specifically been pleaded that the petitioner is the actual owner of the project, in respect of which the respondent was awarded the contract. It has further been pleaded that the petitioner has entered into negotiations with the respondent and even the payments have originated from the petitioner. The doctrine of agency has specifically been pleaded in the aforesaid paragraph by stating

that the defendant no.1 was simply acting as an agent of the petitioner. In light of the aforesaid averments made in paragraph 20, which are deemed to be admitted on account of the petitioner having failed to file a written statement, the petitioner cannot be deleted from array of parties by invoking provisions of Order I Rule 10 of the CPC.

11. Counsel for the respondent has correctly placed reliance on the judgment in ***Bharat Starch Industries*** supra. Paragraph 11 of the said judgment is set out below:

*“11. Before analysing the evidence, we shall briefly refer to certain basic legal principles. The test of agency for the purpose of Section 182 of the Contract Act is whether a person is purporting to enter into a transaction on behalf of the principal or not. In order to constitute an agency, it is not necessary to have a formal agreement, (Babulal Swarupchand Shah vs. S. S. (Fixed Delivery) Merchants, Assam (AIR 1960 Bombay 548)). Under Sections 101 to 104 of the Evidence Act, if a person claims to be agent of another, the burden of proof is on the person so claiming. But at the same time under Section 109 of the Evidence Act when the question is whether the persons are in the relationship of principal and agent, and it had been shown that they had been acting as such, the burden of proving that they do not stand or have ceased to stand to each other in that relationship, is on the person, who affirms it. Further where a person allows another to hold himself out as agent of the former, he will be bound by whatever agreement was entered into by such an agent. (*Walsh v. Griffith Jones* (1978) 2 All E.R. 1002 (1007). Under Section 186 of the Contract Act the authority of an agent may be expressed or implied. Section 187 of the Contract Act states that an authority is said to be express when it is given by words spoken or written. **An authority is said to be implied when it is to be inferred from the circumstances of the case.***

Things spoken or words written or the ordinary course of dealing, and circumstances of the case could be taken into account for deciding whether there was agency. Further if a person by words or conduct holds out another as having authority to act on his behalf, he is bound as regards third parties by the acts of such other as if he were his agent. (Union of India v. Motilal (AIR 1962 A.P. 384). Shearson Iehama Bros. Inc. v. Machine Watson and Co. Ltd. (No. 2) (1988) 1 W.L.R. 16 (28)(H.L.).”

12. The reference to the judgment in *Utair Aviation* supra by the respondent is also apposite. Relevant paragraphs, 17, 19 and 21 are set out below:

“17. It is well established principle of law that a party who is not privy to the contract, cannot sue for enforcement of the said contract and the said principle has been laid down by the English courts from time to time which has been appreciated by the Indian Courts with the well recognized exceptions. **There are number of exceptions which have been carved out by the courts to the principle of privity to the contract ever since the said principle was evolved by the English Courts. This is due to the reason that the definition of consideration under Section 2(d) of the Indian Contract Act, 1872 is wide enough to encompass a situation wherein contract is entered into between the two parties and the consideration may or may not pass from them and can pass from the third party.**

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19. It is clear from the aforementioned observations of Division Bench of Calcutta High Court that the doctrine of privity of contract although is applicable even in India but, the same has been applied with well recognized exceptions and the court of

equity like in India may not be strictly guided by the said dictum of *Twaddle v. Atkinson* (supra) in order to defeat the claims of the parties. This was the era to carve out the exceptions to the principle of privity of contract which is that a stranger to a contract cannot sue. From time to time, number of exceptions has been evolved against the rule of privity of contract and more than often quoted exceptions are that a person for whose benefit the contract is entered into, can certainly sue as he is beneficiary in the contract. Similarly, a person who is a trustee of the third party can also sue likewise, even if he is a stranger to a contract. These are not exhaustive exceptions and as seen above from the observations of Division Bench that in a given facts and circumstances.

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21. There are other exceptions also which are equally recognized to the said principle of privity to the contract and reference is invited to the case of *Jnan Chandra Mukherjee vs Manoranjan Mitra And Ors.*, decided on 27 June, 1941 reported as AIR 1942 Cal 251 wherein the Division Bench of Calcutta High Court after analyzing the authorities on the aspect of privity to the contract has observed:-

"3. So far as the first point is concerned, the law seems to be fairly well settled. A stranger to a contract which reserves a benefit for him cannot sue upon it either in English or in Indian law even though in India the consideration need not move from the promisee. There are two well-recognised exceptions to this doctrine. The first is 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 privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party.**" (Emphasis Supplied) ”

13. The position in law that emerges from the reading of the aforesaid judgment in **Utair Aviation** supra is that there are number of exceptions carved out by the Court to the principle of Privity of Contract and one of the said exceptions is that where there is no privity of contract, the stranger to the contract creates his privity by constituting himself as an agent of the third party. Whether the defendant no.1 was an agent of the petitioner or not can only be established in the trial. At this stage, there are no valid grounds for deletion of the name of the petitioner from the array of parties.

14. The judgment cited by the petitioner in **Sudhir Gopi** supra is not applicable in the present case as the same was the judgment in a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 after the Award had been rendered by the Arbitrator and not in the context of Order I Rule 10 of the CPC. Further, there is no discussion in the said judgment on the question of agency as well as exceptions to privity of contract, which has been pleaded in the present case. Similarly, judgment in **Kohli One Housing** supra is not applicable to the facts of the present case as the said judgment was passed while deciding an application under Order VII Rule 11 of the CPC and also did not deal with the issue of agency as well as exceptions to privity of contract.

15. The impugned order passed by the Commercial Court is a detailed and well-reasoned order. Paragraph 17 of the said order which contains the reasoning is set out below:

“17. Fact of the matter is suit for recovery of money was filed on 22/07/2019 with respect to alleged performed works with respect to work orders starting from 14/11/2011 to 26/11/2015. It has already been held by this Court on 29/01/2021 that it would be one of the facet for plaintiff to prove that the claims were within the limitation. It is also fact of the matter that the defence of defendants was struck off for non filing of written statement within permissible time period. The question relating to privity having been created by virtue of conduct, acknowledgment and admission becomes a mixed question of fact and law as it requires a fact finding as well as due application of law. Elicited averments of the plaint incorporate the allegations of defendant no.1 to be subsidiary of defendant no.2; entire equity of defendant no.1 is owned and controlled by defendant no.2; the actual working control of the working of defendant no.1 is with defendant no.2; defendant no.2 is actually using name of defendant no.1 to trade with others to deny recovery of dues/claims of plaintiff after usurping all assets of defendant no.1 in the backdrop of defendant no.2 company being the actual owner of the project where plaintiff was awarded the contract since defendant no.2 was actual owner of the land and building of the housing project and selling the flats after their completions. It is also the allegation of plaintiff that defendant no.2 used to give all the instructions and entered into negotiations with plaintiff and all the part payment made to plaintiff have originated from defendant no.2 only, defendant no.1 of its own having no source of funds or income or nay ownership over the project. In this fact of the matter, no case is made out by applicant/defendant no.2 that Court strikes out its name as defendant being improperly joined, considering the averments and allegations of plaintiff relating to privity having been created by virtue of conduct, acknowledgement and admission becoming a mixed question of fact and law that

requires a fact finding as well as due application of law and it cannot be said that the presence of defendant no.2 is not necessary to effectually and completely adjudicate upon and settle the questions involved in the suit.”

16. There is no infirmity in the impugned order that warrants interference of this Court in exercise of its jurisdiction under Article 227 of the Constitution of India. It has been held by the Division Bench of this Court (of which I was a member) in ***Black Diamond Trackparts Pvt. Ltd. and Ors. Vs. Black Diamond Motors Pvt. Ltd.*** 2021 SCC OnLine Del 3946 that jurisdiction under Article 227 of the Constitution of India has to be very sparingly exercised in orders that are not appealable under the provisions of Commercial Courts Act, 2015.

17. No grounds for interference are made out. Dismissed.

NOVEMBER 29, 2021

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AMIT BANSAL, J

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