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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 969/2022 & CM APPL.40658/2022, CM
APPL.40659/2022, CM APPL.40660/2022, CM
APPL.40661/2022

KAPIL SHARMA Petitioner

Through: Mr. R. K. Singla, Adv.

versus

M/S PROGRESSIVE CONSTRUCTIONS LTD & ORS.

..... Respondents

Through: Ms. Prity Kumari, Ms. Neha
Singh, Advs. for R-2 & R-4 (IRB).

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T (O R A L)

% **15.09.2022**

1. M/s IRB Infrastructure Developers Ltd. (“IIDL”) was impleaded as Defendant 2 in CS No. 1302/2017 (*Kapil Sharma v. Progressive Constructions Ltd.*), instituted by the petitioner before the learned Trial Court. Summons were issued in the suit. In the written statement filed by way of response to the Suit, IIDL pointed out, *inter alia*, that there was no privity of contract between the petitioner and IIDL. The petitioner, thereafter, moved an application under Order I Rule 10(2) of the Code of Civil Procedure, 1908 (CPC), seeking to delete IIDL from the array of parties in the suit and to implead M/s IRB Jaipur Deoli Tollway Pvt. Ltd. (IRB Jaipur hereinafter).



2. The application of the petitioner has been allowed in part by the learned ADJ *vide* the impugned order dated 11th October 2019. The learned ADJ has allowed the deletion of IIDL but has disallowed the prayer for impleading IRB Jaipur as a defendant in the suit.

3. The said order has been called into question in the present proceedings invoking Article 227 of the Constitution of India.

4. I have heard Mr. R.K. Singla, learned Counsel for the petitioner and Ms. Prity Kumari, learned Counsel for the respondent at some length.

The suit

The controversy, in precis

5. In CS No. 1302/2017, Respondent 1-Progressive Construction Ltd. (“Progressive” hereinafter) was Defendant 1 and IIDL was Defendant 2. In its application under Order I Rule 10 of the CPC, the petitioner sought to contend that IIDL had been erroneously impleaded in the plaint and that, instead, IRB Jaipur ought to have been impleaded. For this purpose, the petitioner had drawn attention to the Concession Agreement dated 30th March 2010, on which the petitioner had sought to place reliance which was executed between the National Highways Authority of India (Defendant 3 in the suit and Respondent 3 in the present petition) and, IRB Jaipur. The



petitioner's contention, in his application, was that, instead of impleading IRB Jaipur who was a party to the Concession Agreement with NHAI, the petitioner had, by mistake, impleaded IIDL.

6. The learned ADJ has held that, in fact, neither IIDL nor IRB Jaipur is a necessary party to the suit. In this connection, the learned ADJ has observed that there is no privity of contract between the petitioner and either IIDL or IRB Jaipur. The Concession Agreement dated 30th March 2010 between NHAI and IRB Jaipur, holds the learned ADJ, confers no right on the petitioner, especially in the background of the cause of action pleaded in the plaint. The learned ADJ, therefore, upheld the prayer for deletion of IIDL and rejected the prayer for impleadment of IRB Jaipur.

7. Having heard learned Counsel for the parties and perused the record, I am inclined to agree with the learned ADJ.

In greater detail

8. For this purpose, a brief glance at the plaint filed by the petitioner is appropriate.

9. NHAI (Respondent 3) entered into a Concession Agreement dated 30th March 2010 with IRB Jaipur, for management and maintenance of a stretch of NH-12 from Jaipur to Newai Road. Para 3 of the plaint filed by the plaintiff reads as under:

“3. That the defendant no. 2 being the principal contractor appointed by the National Highway Authority



of India i.e. defendant no.3, further entered into the sub-contract agreement dated 30.03.2010 with the defendant no.1 to carry out the construction work allotted to the defendant no. 2 by the defendant no.3 as stated hereinabove.”

10. To a query from the Court, learned Counsel for the petitioner confirms that the recital of facts in para 3 of the plaint is incorrect. In the said paragraph, Defendants 2 and 3 are IIDL and NHAI respectively. Even if the prayer of the petitioner for deletion of IIDL and impleadment of IRB Jaipur in its place as Defendant 2 were to be granted, Defendant 2 would be IRB Jaipur and Defendant 3 would be NHAI. If one were to go by the recitals in para 3 of the plaint, it would seem to appear that NHAI entered into a contract with IRB Jaipur and IRB Jaipur entered into a contract on 30th March 2010 with Progressive. That, however, Mr. Singla confirms, is not the position. What actually happened appears to be that NHAI entered into a Concession Agreement with IRB Jaipur on 30th March 2010, IRB Jaipur thereafter entered into a sub-contract with Modern Road Makers and Modern Road Makers entered into a further sub-contract with Progressive, who contracted with the petitioner for supply of goods.

11. Ms. Prity Kumari, learned Counsel for the respondents submits that the Modern Road Makers is a sister concern of IIDL and confirms that IRB Jaipur had entered into a Concession Agreement with NHAI. She submits that IIDL (the original Defendant 2) has two sister concerns, namely IRB Jaipur and Modern Road Makers. She confirms had IIDL authorized Modern Road Makers to enter into the sub-



contract with Progressive. She, however, discounts any knowledge of the petitioner or of the contractual relationship if any, between the petitioner and Progressive. She submits that the relationship between the petitioner and Progressive was completely bilateral between them and was not entered into with the consent, tacit or otherwise, of IIDL, IRB Jaipur or NHAI.

12. It may be noted, here, that the petitioner had moved an earlier application under Order I Rule 10 of the CPC to implead Modern Road Makers as an additional defendant in the suit, which was withdrawn as not pressed.

13. The only agreement which is on record and which was placed on record before the learned ADJ in CS 1302/2017 was the Concession Agreement dated 30th March 2010 executed between NHAI and IRB Jaipur. No agreement either between Modern Road Makers and Progressive or between Progressive and the present petitioner was on record before the learned ADJ; nor is any such agreement on record before this Court. The correctness of the view of the learned ADJ that, in these circumstances, neither IIDL nor IRB Jaipur could be regarded as a necessary party in the suit, has, therefore, to be tested in this background.

14. Mr. Singla has placed reliance on Clause 42.2 of the Concession Agreement dated 30th March 2010 between NHAI and IRB Jaipur which reads thus:

“42.2 Indemnity by the Concessionaire



42.2.1 Without limiting the generality of Clause 42.1, the Concessionaire shall fully indemnify, hold harmless and defend the Authority and the Authority Indemnified Persons from and against any and all loss and/or damages arising out of or with respect to:

- (a) failure of the Concessionaire to comply with Applicable Laws and Applicable Permits;
- (b) payment of taxes required to be made by the Concessionaire in respect of the income or other taxes of the Concessionaire's contractors, suppliers and representatives; or
- (c) non-payment of amounts due as a result of materials or services furnished to the Concessionaire or any of its contractors which are payable by the Concessionaire or any of its contractors."

He has placed special emphasis on Clause 42.2.1(c).

15. According to the recital of facts in the plaint , the petitioner had effected supplies to Progressive consequent on Progressive approaching the petitioner in that regard. Purchase orders, according to the plaint, were placed by Progressive on the petitioner, against which supplies were effected and an outstanding liability of ₹ 35,50,336/- remains to be paid by Progressive to the petitioner. The suit essentially seeks recovery of the said amount.

16. The prayer clause in the suit, however, reads as under:-

“PRAYER: -

It is, therefore, most respectfully prayed that this Hon'ble Court may kindly be pleased to:-



i). Pass a decree in favour of plaintiff and against the defendants jointly & severally for a sum of Rs. 66,74,632/- (Rupees Sixty Six Lacs Seventy Four Thousand Six Hundred Thirty Two only) as detailed in para 17 of the plaint;

ii). Award Pendente-lite and future interest in favour of the plaintiff and against the defendant being the contractual rate of 24% per annum;

iii). Pass a decree of mandatory injunction in favour of the plaintiff and against the defendant thereby directing the defendant to handover the Central Sale tax Forms as stated herein above in para 12 of the plaint or in the alternative pass a decree of recovery of tax of 18,74,383/- (Rupees Eighteen Lacs Seventy Four Thousand Three Hundred Eighty Three Only) along with statutory rate of interest @ 18% per annum from its due date till its realization, against the defendant;

iv). Award cost of the suit in favour of plaintiff and against the defendants;

v). Any other or further relief/order which this Hon'ble Court may deem fit, under the facts and circumstances of the case may also be passed in favour of



the plaintiff and against the defendants.”

17. To a query as to how prayer (i) in the suit seeks a decree “jointly and severally” against the defendants and as to how IRB Jaipur would be a necessary party in the suit, Mr. Singla has placed reliance on Clause 42.2.1(c) of the Concession Agreement dated 30th March 2010 between NHA and IRB Jaipur, reproduced *supra*.

Legal position regarding impleadment

18. In *Kasturi v. Iyyamperumal*¹, it was held that a “necessary party” to a lis was one (i) against whom there was a right to relief in respect of the controversies involved in the proceedings, or (ii) in the absence of whom no effective decree could be passed. The test was thus postulated in *Ramesh Hirachand Kundanmal v. Municipal Corpn of Greater Bombay*²:

“14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. *The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled*

¹ (2005) 6 SCC 733

² (1992) 2 SCC 524



unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. *It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights.* It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in **Amon v. Raphael Tuck & Sons Ltd.**³, wherein after quoting the observations of Wynn-Parry, J. in **Dollfus Mieg et Compagnie S.A. v. Bank of England**⁴, that their true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject matter of the action if those rights could be established, Devlin, J. has stated:

“The test is ‘May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights’.”

(Emphasis supplied)

19. In **Kanaklata Das v. Naba Kumar Das**⁵, the Supreme Court ruled thus, with respect to the right of a third party to seek to be impleaded as a defendant (in para 11.4 of the report):

“11.4 Fourth, the plaintiff being a dominus litis cannot be compelled to make any third person a party to the suit, be that a plaintiff or the defendant, against his wish unless such person is able to prove that he is a necessary party to the suit and without his presence, the suit cannot proceed and nor can be decided effectively. In other words, no person can compel the plaintiff to allow such person to become the co-plaintiff or defendant in the suit. It is more so when such person is unable to show as to how he is a necessary or proper party to the suit and how without his presence, the suit can neither proceed and nor it can be decided or how his presence is necessary for the effective decision of the suit. (See **Ruma**

³ (1956) 1 All ER 273, (1956) 1 QB 357

⁴ (1950) 2 All ER 605, 611

⁵ (2018) 2 SCC 352



***Chakraborty v. Sudha Rani Banerjee*⁶⁾**

20. While it is true that the plaintiff, as *dominus litis*, may at the first instance implead those parties whom she, or he, deems to be necessary and proper parties to the *lis*, and if a party not so impleaded seeks impleadment in the proceedings, the right of such party to be impleaded would have to be adjudged on the anvil of Order I Rule 10(2).

21. In para 15 of the report in ***Mumbai International Airport (P) Ltd. v. Regency Convention Centre and Hotels (P) Ltd***⁷, the Supreme Court has adverted to the concepts of “necessary party” and “proper party”. A “necessary party”, according to the Supreme Court, is a person who ought to have been joined as a party and in whose absence no effective decree could at all be passed by the Court. A “proper party”, on the other hand, would include parties whose presence, even if they are not necessary parties, is necessary, “would enable the Court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit” *though he need not be a person in favour of or against whom the decree is to be made*. If a person is neither a necessary nor a proper party, he cannot seek impleadment in the suit.

22. ***Vidur Impex and Traders (P) Ltd. v. Tosh Apartments (P) Ltd***⁸ delineated the principles governing impleadment of a third party as defendant thus:

⁶ (2005) 8 SCC 140

⁷ (2010) 7 SCC 417

⁸ (2012) 8 SCC 384



“41.1. The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.

41.2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.

41.3. A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

41.4. If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

41.5. In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

41.6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment.”

Applying the principles to the present facts

23. Clause 42.2 is in the nature of an indemnity clause. It is a clause in an agreement between NHAI and IRB Jaipur. If anything, IRB Jaipur has, by the said clause, indemnified NHAI and NHAI indemnified persons against any and all loss or damages arising out of



or with respect to the circumstances envisaged in sub-clauses a, b and c thereunder. “Authority Indemnified Person” stands defined in clause 42.1.1 of the Concession Agreement as “the Authority and its officers, servants, agents, Government Instrumentalities and Government owned and/or controlled entities/enterprises”.

24. The indemnity that is extended by clause 42.2.1 is only to the authority and to the authority indemnified persons. The petitioner is neither the authority nor an authority indemnified person. Further clause (c) grants indemnity with respect to non-payment of amounts due as a result of materials or services furnished to the concessionaire (i.e. IRB Jaipur) or to the contractors of the concessionaire, payable by the concessionaire or the contractors. The contractor of IRB Jaipur would, at the highest, only be Modern Road Makers. There is no contract between the petitioner and IRB Jaipur. The petitioner is, therefore, not a contractor of IRB Jaipur. The petitioner is merely a supplier to Progressive with whom, according to Mr. Singla, an agreement has been executed with Modern which, in turn, is a sister concern of IRB Jaipur. The petitioner cannot, therefore, be regarded either as the concessionaire or a contractor of the concessionaire within the meaning of Clause 42.2.1(c) of the Concession Agreement.

25. Even otherwise, the petitioner is a stranger to the Concession Agreement. If any amount is found to be payable as a result of materials and services furnished to IRB Jaipur or to any of its contractors, payable by IRB Jaipur or by such contractor, IRB Jaipur has, by clause 42.2.1, indemnified NHAI against said liability. The petitioner is neither IRB Jaipur nor its contractor.



26. Even if, arguendo, Progressive were to be treated as a contractor of IRB Jaipur and Progressive were to incur any liability relatable to the Concession Agreement, Clause 42.2.1 merely indemnifies NHAI against such liability incurred by Progressive. The claim of the petitioner, any which way, can only be against Progressive. No claim can lie, at the instance of the petitioner, under Clause 42.2.1 of the Concession Agreement or under any of its sub-clauses. The operation of Clause 42.2.1 would be a matter between NHAI, IRB Jaipur and the contractor of IRB Jaipur. The petitioner is a stranger to the said covenant.

27. Viewed in the light of the law enunciated in the above decisions, IRB Jaipur cannot be regarded as a necessary or proper party to adjudication of the controversy raised by the petitioner in CS 1302/2017. IIDL, of course, had been impleaded by mistake.

28. As such, the learned ADJ has correctly deleted IIDL from the memo of parties and rejected the prayer for impleading IRB Jaipur.

Conclusion

29. I, therefore, find no reason to differ with the view expressed by the learned ADJ, to the effect that IRB Jaipur is neither a necessary nor a proper party to the suit within the meaning of Order I Rule 10 of the CPC.

30. For the aforesaid reasons, no case is made out to interfere with



the impugned order under Article 227 of the Constitution of India.

31. The petition is accordingly dismissed *in limine*. Pending applications also stand disposed of.

C.HARI SHANKAR, J

SEPTEMBER 15, 2022/kr

