

**HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT
JABALPUR**

Case No.	M.P. No.2861/2020
Parties Name	<i>BEYOND MALLS LLP</i> vs. <i>LIFESTYLE INTERNATIONSL PRIVATE LIMITED AND ANOTHER.</i>
Date of order	04/11/2020
Bench Constituted	Division Bench, comprising of Shri Sujoy Paul & Shri B.K.Shrivastava J.J.
Order passed by	Justice Sujoy Paul
Whether approved for reporting	YES
Name of counsel for parties	For Petitioner: Shri Priyankush Jain, Adv. For Respondent No.1 : Shri Deepesh Joshi, Advocate. For Respondent No.2 : None
Law laid down	<p>(i) The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015- Section 8 - Article 226/227 of the Constitution of India – The bar created to the interlocutory order cannot take away the jurisdiction of High court under Article 226/227 of the Constitution.</p> <p>(ii) Section 9- Arbitration and Conciliation Act, 1996- proceeding against a person not party to the agreement, in certain circumstances is permissible/maintainable. Third party or a non signatory to arbitration agreement is normally excluded from the proceedings under the Arbitration Act. However, a third party is bound by the agreement being an assignee or representative in that case it, may become a party.</p> <p>Clauses of Agreement/Lease deed- If a clause of the agreement assigned, the non party and said clause has a relation with relief claimed, a non signatory to the agreement can be treated as “necessary party”.</p> <p>(iii) Article 227 of the Constitution of India – Scope of judicial review- The scope of interference under this provision is limited to examine whether the order suffers from any jurisdictional error, palpable procedural impropriety or manifest perversity. Another view is possible is not a ground for interference. The court is not required to act as a <i>Bull in China Shop</i> or to correct mere errors of law or facts merely because another view than one which is taken by the court below, is possible.</p>
Significant paragraph numbers	8,9,10,11,12 and 13

(O R D E R)
04 .11.2020

As per: Sujoy Paul, J.

This petition filed under Article 227 of the Constitution of India takes exception to the order dated 11.09.2020 whereby application filed by

present petitioner/ non-applicant No.2 under Order 1 Rule 10(2) of CPC was dismissed by the court below.

2. Draped in brevity, the relevant facts for adjudication of this matter are that respondent No.1 filed an application under section 9 of the Arbitration And Conciliation Act, 1996 (Arbitration Act) before the court below. Since petitioner/ non-applicant No.2 was impleaded as a party, he preferred an application under Order 1 rule 10(2) CPC for deletion of his name. The bone of contention before the court below was that section 9 proceedings are founded upon an agreement and petitioner/ non-applicant No.2 was not a party to the said agreement. The court below after hearing the parties, passed a detailed order dated 11.09.2020 and rejected the aforesaid application filed under Order 1 rule 10(2) of CPC.

3. Shri Priyankush Jain, learned counsel for the petitioner submits that initially a lease agreement dated 21.02.2012 (Annx.M/1) was entered into between the parties. This was followed by yet another agreement between petitioner and respondent No.2 entered in the year 2017. Section 9 proceedings are arising out of this agreement of 2017 in which admittedly present petitioner was not a privy. Hence, section 9 proceedings are not maintainable. The court below has committed error of law in disallowing the application preferred under Order 1 rule 10(2) of CPC.

By placing reliance on **(2011) 1 SCC 320 (S.N.Prasad, Hitek Industries (Bihar) Ltd. Vs. Monnet Finance Limited and others)**, Shri Jain urged that the applicant could have impleaded the present petitioner/ non-applicant No.2 only when he was a party to the agreement. Reliance is placed on the definition of "party" defined under Section 2(h) and definition of "agreement" defined under section 7 of the Arbitration Act. To bolster the aforesaid submission, reliance is placed on **AIR 2006 Delhi-134 (National Highways Authority of India (NHAI) Vs. M/s**

China Coal Construction Group Corpn.) wherein it was held that a party who was not signatory to arbitration agreement cannot be sued. Since intervenor before the Delhi Court was not privy to contract, he was not permitted to participate in the proceedings filed under section 9 of the Arbitration Act. Lastly, he placed reliance on **2007(3) MPHT 206 (DB) (M/s B.D.Bhanot and Sons Vs. Shri Narmada Enterprises and others)** for drawing analogy that a person who was not a party in arbitration proceedings before the court below was precluded to file an appeal under section 37 before the court below. It is urged that court below has erred in disallowing the said application.

4. Sounding a *contra* note, Shri Deepesh Joshi submits that as per section 8 of the The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Commercial Courts Act), the intention of law makers is clear that at interlocutory stage and against interlocutory orders, no revision etc. is maintainable. Although, said statutory provision may not curtail or deprive the constitutional courts to exercise the extraordinary jurisdiction under Article 226/227 of the Constitution, the fact remains that intention of law makers was to ensure minimal interference at interlocutory stage. Clause-M of the agreement dated 27.09.2017 (Annx.M-3) makes it clear that the lessee (present petitioner) shall honour all the lease agreement/ lease Deeds signed by the lessor previously with various retailers until such time any breach of agreement/ Deed is committed by those retailers. He submits that the court below has taken note of the relevant clauses of agreement dated 27.9.2017 and rightly came to hold that in view of judgment of Supreme Court in **Ambica Prasad Vs. Mohd. Alam and another (2015)13 SCC-13**, it is well settled that transferee of landlord's rights steps into the shoes of landlord's with all rights and liabilities of the transferor landlord in respect of the subsisting. He also supported the order of court below on the basis of judgment of Bombay High Court reported in **(2009) 2 BCR-247 (Narayan Manik Patil Vs. Jayawant**

Patil). Shri Deepesh Joshi has taken pains to take us to clause-(e) of the application preferred under Section 9 of the Act (Annx.M-5). He submits that for the purpose of adjudication of applicant's rights in relation to aforesaid clause, the present petitioner is certainly a necessary party.

5. During the course of argument reliance is also placed by Shri Joshi on *AIR 1975 Calcutta page-8 (M/s Hindustan Steel Works Construction Ltd. Vs. M/s Bharat Spun Pipe Co., (2013) 1 SCC-641 (Chloro Controls India Private Ltd. Vs. Severn Trent Water Purification Inc. and Others and (2018) 16 SCC-413 (Cheran Properties Ltd. Vs. Kasturi and Sons Limited and others.* It is contended that the law relating to arbitration is clear and it can very well bind the non-applicant No.2/ petitioner when applicant is in a position to demonstrate that his rights are going to be affected and provisions of section 109 of Transfer of Property Act,1882 are attracted. Lastly, *(2005) 6 SCC 733 (Kasturi Vs. Iyyamperumal and Others)* is relied upon to submit that as per *dicta* of this judgment, relief can be claimed against a party and if it is shown that relief is related to that party, the said party becomes a "necessary party".

6. No other point is pressed by learned counsel for the parties.

7. We have heard the parties at length and perused the record.

8. At the outset, we may record that Section 8 of the Commercial Courts Act cannot be read to mean that supervisory jurisdiction of this court under Article 227 of the Constitution is taken away in any manner. A Constitution Bench of Supreme Court in *L.Chandra Kumar Vs. Union of India* has taken this view. The same view is taken by the Apex Court in *Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil- (2010) 8 SCC-329.*

The court below has reproduced the relevant clauses in the impugned order. Clause-M of Annexure M/3 dated 27.09.2017 reads as under :-

"Clause-M- The Lessee¹ shall honour all the lease agreement/ Lease Deeds signed by the Lessor² previously with various retailers³ until such time any breach of agreement/ Deeds is committed by those retailers."

(1.-Petitioner, 2.- Respondent No.2, 3.-Applicant) (Added by us to clarify the role of parties)

9. No doubt in the peculiar facts situation, the Delhi High Court in the case of ***National Highway Authority of India (supra)*** opined that in arbitration proceedings impleadment of a party is in relation to subject matter and intervenor having no privity of contract with petitioner therein, prayer for its impleadment is liable to be rejected. A careful reading of this judgment shows that it was delivered keeping in view the relevant clauses of agreement prevailing in that case. As a rule of thumb or straight jacket formula it is not laid down that in no case/ situation a party not signatory to agreement can be impleaded in a proceeding under section 9 of Arbitration Act.

10. However, the principle regarding impleadment in arbitration proceedings is no more *res integra*. It is apt to consider the principle enunciated by *Russell* in "*Russell on Arbitration*". Relevant portion reproduced in **(2018) 16 SCC 434 (Cheran Properties Ltd Vs. Kasturi and Sons Ltd.** reads as under :-

"Arbitration is usually limited to parties who have consented to the process, either by agreeing in their contract to refer any disputes arising in the future between them to arbitration or by submitting to arbitration when a dispute arises. A party who has not so consented, often referred to as a third party or a non-signatory to the arbitration agreement, is usually excluded from the arbitration. There are however some occasions when such a third party may be bound by the agreement to arbitrate. For

example, ..., assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that they are successors to that party's interest and claim "through or under" the original party. The third party can then be compelled to arbitrate any dispute that arises."

(Emphasis supplied)

This principle was followed by the Calcutta High Court in the case of *M/s Hindustan Steel Works Construction (supra)*. The same principle is followed by the Supreme Court in the case of *Chloro Controls India Private Ltd. (supra)*. After reproducing the aforementioned paragraph from the book of *Russell*, the Apex Court considered this aspect in great detail in the case of *Cheran Properties (supra)*. The relevant paragraphs reads as under :-

21. Explaining the legal basis that may be applied to bind a non-signatory to an arbitration agreement, this Court held in *Chloro Controls case held thus (SCCp.694, paras 103.1, 103.1, 103.2 & 105)*

"103.1 The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

105. We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

25. Does the requirement, as in [Section 7](#), that an arbitration agreement be in writing exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities? The evolving body of academic literature as

well as adjudicatory trends indicate that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Redfern and Hunter explain the theoretical foundation of this principle:

“..The requirement of a signed agreement in writing, however, does not altogether exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. Third parties to an arbitration agreement have been held to be bound by (or entitled to rely on) such an agreement in a variety of ways: first, by operation of the ‘group of companies’ doctrine pursuant to which the benefits and duties arising from an arbitration agreement may in certain circumstances be extended to other members of the same group of companies; and, secondly, by operation of general rules of private law, principally on assignment, agency, and succession..”

(Emphasis supplied)

11. A plain reading of these paragraphs makes it clear that if as per the agreement it can be shown that the relief can be claimed against a particular party, whether or not he is signatory to the said agreement, he can be treated to be a "necessary party". As noticed above, Clause-M of Annexure M/3 dated 27.09.2017 in no uncertain terms binds the present petitioner being a lessee and respondent No.2 as lessor and retailer. In this backdrop, if relief claimed in the application filed under section 9 of Arbitration Act is perused, it cannot be said that present petitioner is not a "necessary party". In the case of ***S.N.Prasad (Supra)*** as per relevant clauses of agreement, one guarantor was not covered and hence Apex Court ruled against original applicant. In the instant case, clauses of agreement are differently worded and hence said judgment is of no assistance to petitioner. The Bombay High Court in ***Narayan Prasad (supra)*** opined that interim measure application can be filed against such third party despite the fact that he is not signatory to the agreement. We respectfully agree with the principle laid down by Bombay High Court.

12. In view of relevant clauses of the agreement/ lease deeds (which were reproduced in the order impugned) we are of the opinion that court below has taken a plausible view and has not committed any illegality.

13. Interference under Article 227 of the Constitution can be made on limited grounds. If order suffers from any jurisdictional error, palpable procedural impropriety or manifest perversity, interference can be made. Another view is possible, is not a ground for interference. This court is not required to act as a *Bull in China Shop* or to correct mere errors of law or fact merely because another view than one is taken by the court below, is possible (*See : Shalini Shyam Shetty (supra)*). In absence of any ingredient on which interference can be made, interference is declined. Petition is **dismissed**.

(Sujoy Paul)
Judge

(B.K.Shrivastava)
Judge