REPORTABLE

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

I.A. No.1938/2009 in CS(OS) No.1447/2008

Date of Decision: August 20, 2009

UTTAM SUCROTECH INTERNATIONAL PVT. LTD.
..... Plaintiff
Through Mr. A.S. Chandhiok, Senior Advocate with Ms. Pragyan Sharma, Ms. Shweta Kakkad and Mr. Arjun Pratap, Advocates

versus

M/S OVERSEAS INFRASTRUCTURE ALLIANCE(I) PVT. LTD & ANR
..... Defendants
Through Mr. Arun Bhardwaj, Sr. Advocate with Mr. Manish Sharma, Advocate for D-1.
Mr. Sunil Gupta, Sr. Advocate with Mr. Jatin Zaveri, Advocate for proposed defendant No.3.
Mr. P.P.Malhotra, ASG with Mr. Sudarsh Menon, Advocate for proposed defendant No.4.

CORAM:
HON'BLE MISS JUSTICE REKHA SHARMA

1. Whether the reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be reported in the 'Digest'? Yes

REKHA SHARMA, J.

Three applications, one under Order 6 Rule 17 read with Order 1 Rule 10, another under Order 39 Rules 1 & 2 and the third under Order 39 Rule 4 of the Code of Civil Procedure (hereinafter referred to as the Code) seemingly simple have been a witness to marathon sessions of arguments. Mercifully, arguments on the application under Order 6 Rule 17 read with Order 1 Rule 10 of the Code have

concluded and though the other two applications are still to see conclusion of arguments, I am proceeding with the order on the application seeking amendment of the plaint and impleading of two new parties namely Walchandnagar Industries Ltd. and the Export-Import Bank of India (hereinafter referred to as the EXIM Bank). But first, the background.

The Government of Ethiopia decided to establish at Addis Ababa new Sugar factories and expansion of existing Sugar factories for three Sugar Projects, namely, Tendaho Sugar Factory, Finchaa Sugar Factory and Wonj/Shoa Sugar Factory. Each factory project was sub-divided into major packages of plant and machinery like Juice Extraction Plant, Steam Generation Plant, Power Generation Plant, Process House Equipments, Plant Water Systems, Civil Work, Effluent Treatment Plants and other utilities etc. The project is being funded by the Government of India through EXIM Bank to the tune of US $ 122,000,000 (Dollars one hundred twenty two million) on certain terms and conditions which were reduced into writing by means of a Dollar Credit-line Agreement dated October 04, 2007 between the Government of the Federal Democratic Republic of Ethiopia and EXIM Bank. In order to give effect to the project, defendant No.2, namely, Tendaho Sugar Factory Project which is a company incorporated under the laws of Ethiopia and is owned and controlled by the Government of the Federal Democratic Republic of Ethiopia, invited tenders for Juice Extraction Plant, Steam Generation Plant, Power Generation Plant, Process Home Plant and related modernization packages. The plaintiff and some other companies including defendant No.1, namely, M/s. Overseas Infrastructure Alliance (India)

Pvt. Ltd. responded to the invitation of tenders by submitting their respective bids. The bid of the plaintiff was accepted for Process House vide a communication from defendant No.2, dated December 7, 2007. In so far as defendant No.1 is concerned, it succeeded in procuring two contracts, namely, Juice Extraction Plant and Power Generation Plant. This acceptance of two bids of defendant No.1 brought into play the 'EXIM Bank Disbursement Schedule', under which it was necessary to proceed through a single Engineering, Projects Management and Construction (hereinafter called the EPC) Contract method. As per this method, any bidder who won two or more bid packages became eligible to act as a `Single EPC Contractor". Since defendant No.1 had won two bids, it was appointed to act as `Single EPC Contractor'. The plaintiff was informed about this appointment of defendant No.1 by defendant No.2 through a communication dated December 07, 2007. The plaintiff was also informed that, "being a winning bidder of Process House, it will be retained as a sub-contractor to the main EPC Contractor without any alteration in the agreed technical and commercial aspects including the time schedule, as already negotiated and finalized." On the same date defendant No.2 also sent a letter to defendant No.1 intimating it about its appointment as 'Single EPC Contractor', with the stipulation that the winning bidders of other packages were to be retained as sub-contractors without any alteration in the agreed technical and financial aspects as already finalized with individual bidders.

It is thus the case of the plaintiff that it was to act as a sub-contractor to the EPC contractor, that is, defendant No.1 without

any alterations in the agreed financial and technical aspects which, as per it, stood already finalized with defendant No.2. It is also its' case that in order to finalize the type of contract agreement to be signed between the EPC contractor and the winning bidders of other packages, a joint meeting between the plaintiff, defendant No.1 and defendant No.2 was held on 19th & 20th December, 2007 at Addis Ababa in which it was categorically agreed that a contract would be entered into between defendant No.1 and the sub-contractors which would be seamless and address all issues as per the original tender documents including General Conditions of Contract, Special Conditions of Contract and other financial conditions. Thereafter, as per the plaintiff, a 'Contract Agreement' dated February 20, 2008 was executed between defendant No.1 and defendant No.2 and one of the clauses of the said contract agreement was that the appendices listed in the attached list of appendices shall be deemed to form an integral part of the agreement. Referring to Appendix-5, it is pointed out that it contained a list of approved sub-contractors where the name of the plaintiff appeared at serial No.7 against 'Process House' and it was mentioned therein that, "the Contractor, to the extent possible, shall have seamless contracts with the sub-contractors."

It is alleged that notwithstanding the obligation cast upon defendant No.1 to enter into an agreement with the plaintiff without effecting any changes in the financial and technical aspects of its bid which stood already accepted by defendant No.2 and inspite of having agreed to abide by those terms and conditions in the joint meeting of 19th & 20th December, 2007 and in the contract agreement dated February 20, 2008, referred to above, defendant No.1 insisted upon

the plaintiff to reduce its price by 15%, on the pretext that it was required to be paid to it to discharge its obligation of a lead contractor. In other words, as per the plaintiff, defendant No.1 attempted to re-negotiate the contract price which it legally could not do and that when it refused to give in to the alleged illegal demand of defendant No.1, it threatened to introduce a new sub-contractor in its place. It is this threat which has given birth to this suit for mandatory injunction wherein the plaintiff has pleaded that it has a concluded contract with defendant No.2 and that defendant No.1 is bound to and liable to give effect to the concluded contract. It is also pleaded that the status of defendant No.1 is no better than that of the plaintiff, as the tenders of both the plaintiff and defendant No.1 have been accepted by defendant No.2 with the only difference that defendant No.1 has been described as an EPC or a lead contractor, for the sole reason that it succeeded in securing two contracts. The plaintiff, thus, has alleged that defendant No.1 by threatening to introduce another sub-contractor in its place is tortuously interfering in its contract with defendant No.2. Accordingly, it has prayed for the following reliefs:-

> "(a) grant a decree of perpetual injunction restraining defendant No.1 from interfering in the contract/award of contract between plaintiff and defendant No.2;
>
> (b) grant perpetual injunction restraining defendant No.1 from modifying any technical and/or commercial terms including price agreed/finalized between the plaintiff and defendant No.2;
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> (c) grant perpetual injunction restraining the defendant no.1 from engaging any third party in respect of the Process House Project.
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> (d) grant a decree of mandatory injunction directing defendant No.1 to execute the obligation of signing a formal contract with the plaintiff in accordance with

the terms and conditions agreed between the plaintiff and defendant No.2 as contained in letter dated December 7, 2007;

(e) costs; and

(f) pass such further order/ as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

Along with the suit, the plaintiff also filed an application under Order 39 Rules 1 & 2 of the Code, on which a learned Single Judge of this Court passed an order dated July 30, 2008 restraining defendant No.1 from taking any measures to introduce a third party in respect of the tender floated by defendant No.2 for Process House for which the plaintiff has been accepted by defendant No.2 as a successful bidder.

In response to the summons, defendant No.1 has filed written statement while defendant No.2 has chosen to remain absent despite service of summons upon it.

It is alleged by defendant No.1 that there is no concluded contract between the plaintiff and defendant No.2, as the detailed terms and conditions governing the construction of the plant were never settled and they never entered into any formal contract. It is further alleged that as the plaintiff was delaying the finalization of the terms of the sub-contract to be awarded in its favour this was brought to the notice of defendant No.2 who authorized defendant No.1 to write a letter to the sub-contractors giving them a last chance to finalize the contract agreement between the EPC contractor and the sub-contractors within a week and submit the document on June 28, 2008 failing which defendant No.1 could approach defendant No.2 with an alternative sub-contractor. The case of defendant No.1 is that in furtherance of the said direction given by defendant No.2, it

addressed an e-mail dated June 21, 2008 to the plaintiff informing it that defendant No.2 had given a dead line of June 27, 2008 as the date by which it was expected to resolve all the pending issues as well as signing of the contract. As per defendant No.1, the plaintiff failed to meet the dead-line and settle the terms of the said contract and as a result defendant No.1 entered into a 'Memorandum of Understanding' dated July 08, 2008 with Walchandnagar Industries Ltd. for the construction of ' Process House' followed by a sub-contract agreement dated July 12, 2008. It is also the case of defendant No.1 that the plaintiff was fully aware of said sub-contract agreement and yet it chose to suppress this fact and obtained an order dated July 30, 2008. It may not be out of place to mention here that defendant No.1 has also challenged the territorial jurisdiction of this court not only on the ground that the project is to be executed outside the territorial limit of this court but also on the ground that no part of action has arisen at Delhi. Of-course, it is further alleged that as per clause-6 of the General Conditions of Contract contained in the EPC Contract document, any dispute of any kind whatsoever between the employer and the contractor in connection with or arising out of the contract shall be referred in writing by either party to an Arbitrator. It is further stated that the reliefs claimed are in the nature of enforcement of specific performance of a contract and cannot be granted in view of Sections 41(e) & 41(h) of Specific Relief Act, 1963.

Having provided with the necessary background, let me revert back to the application of the plaintiff under Order 6 Rule 17 and under Order 1 Rule 10 of the Code. The plaintiff alleges therein that

the so-called 'Memorandum of Understanding' dated July 08, 2008 between defendant No.1 and Walchandnagar Industries Ltd. and pursuant thereto the alleged definite contract signed between them on July 12, 2008 are forged and fabricated documents which have been antedated to frustrate and over-reach the above-referred interim order passed by this Court on July 30, 2008 which was duly served on defendant No.1. It is further stated that the fabrication and forgery committed by defendant No.1 in connivance with Walchandnagar Industries Limited can be seen through from the fact that though the alleged 'Memorandum of Understanding' dated July 08, 2008 was to remain valid for a period of 30 days, yet, within just four days of the signing of the 'Memorandum of Understanding', a purported definite contract was, allegedly, signed on July 12, 2008. As for the sub-contract dated July 12, 2008 allegedly entered into between defendant No.1 and Walchandnagar Industries Limited, it is stated that it makes even those documents to be part of the contract which had not been finalized and were only proposed, such as, "Minutes of Package Negotiations meeting (proposed) to be held between the Employer and Sub-contractor (WIL) for the Package Facilities on technical aspects", showing thereby, that the sub-contract was prepared after receiving the ex-parte order passed by this Court. That the said documents are forged is further sought to be proved from the fact that as late as on August 05, 2008 in a meeting held between defendant No.1 and defendant No.2, there was no mention that a definite contract had been signed with Walchandnagar Industries Ltd. Reference in this regard has been made to the Minutes of the meeting dated August 05, 2008 which, it is alleged, go

to show that defendant No.1 merely informed defendant No.2 that only negotiations were being conducted with Walchandnagar Industries Limited. Reference has also been made to a letter dated August 05, 2008 from defendant No.1 to defendant No.2, though its authenticity is being disputed. It is stated that as per this letter, assuming the same to be correct, it was on August 05, 2008 that defendant No.1 had accepted the proposal of defendant No.2 to substitute Walchandnagar Industries Limited, showing again that the alleged 'Memorandum of Understanding' dated July 08, 2008 and the purported definite contract dated July 12, 2008 are forged documents. In a nutshell, the case of the plaintiff is that defendant no.1 in concert with and Walchandnagar Industries Ltd., is clandestinely introducing Walchandnagar Industries Ltd. as a sub-contractor in its place. Since Walchandnagar Industries Ltd. will be effected by the present proceedings, it is also being sought to be impleaded as one of the defendant.

The impleadment of EXIM Bank as defendant No.4 is sought on the ground that since the approval and disbursal of funds would be done through EXIM bank, it is important that the same be also impleaded as a party in the suit.

The facts contained in the application for 'amendment-cum-impleadment' are sought to be incorporated in the original plaint by adding paragraph 7 A after paragraph 7, 16 A after paragraph 16 and paragraphs 20 (A) to 20 (W) after paragraph 20. The said paragraphs run as under:-

> Para 7 A:- As is evident from the internal letter dated 03.12.2007 issued by TSFT to TSFP Management Board Addis Abava, defendant no.1 have been trying to defeat the rights of the plaintiff at very stage so as to oust the plaintiff

from the subject project completely. The said letter clearly reveals that apart from the process house package which was allotted to the plaintiff, vide defendant no. 2's letter dated 07.12.2007, the plaintiff was also the lowest bidder in the power generation plant which was also ought to have been awarded to the plaintiff. So plaintiff was awarded both the process house and power generation plant bid and was eligible to be appointed as a EPC contractor. However, strangely, just about four days later i.e. on 7.12.2007, facts and records were illegally pruned to a large extent and the plaintiff was declared winning bidder only in the process house package and not in the power generation package.

Para 16A:-
The defendant no.2 is also acting malafide and is acting in concert with other defendants to perpetrate a fraud on the plaintiff and defeat and disobey the orders of this Hon'ble Court.

Para 20 A:-
In the agreement between defendant no.1 and defendant no.2 and/or the plaintiff, there exist a positive covenant coupled with an implied negative covenant which the defendant no.1 is threatening to breach. The Hon'ble Court ought to grant injunction to perform the negative covenant. The implied negative covenant is contained in letter dated 07.12.2007 from defendant no.2, which is the same letter, by which the defendant no.1 takes on its responsibilities as a single EPC contractor. It is further submitted that these responsibilities and conditions were integral to the defendant no.1 being appointed the EPC contractor by the defendant no.2. The relevant portion has been extracted hereunder:-
"The winning bidders of other packages are to be retained as sub-contractors without any alteration in the agreed technical and financial aspects as already finalized with individual bidders."

Further in letter dated 07.12.2007 from defendant no. 2 to plaintiff it is stated:-

"You as winning bidder of process house bid, Tender No.TSFP-F/007/07/PH, will be retained as sub-contractor to be main EPC contractor without any alteration in the agreed technical and commercial process including the time schedule, as per a bid document and subsequent clarifications given by our consultant, JPMA."

Further it is evident from the joint meeting, inter-alia, plaintiff, defendant no.1 and defendant no. 2:-
"All winning bidders were informed that as per the directive from Government of Ethopia, the Management of TSFP and FSF intend to appoint one single EPC contractor and all other winner bidders shall work as sub-contractor to the proposed single EPC contractor."

"Contract agreement between EPC contractor and winner bidder shall be seamless and address all

issues as per original tender documents including GCC, SCC and other financial conditions."

The aforesaid clauses clearly stipulates that the defendant no.1 by way of an implied negative covenant was not permitted to modify and/or attempt to modify any agreed technical, commercial including price aspects already finalized between the plaintiff and defendant no.2.

20B. that the purported MOU dated 8th July, 2008 and sub-contract agreement of 12th July, 2008 between defendant no.1 and Walchandnagar Industries Ltd. are clearly antedated and have been fabricated with a view to frustrate and/or to overreach the injunction order dated 30.07.2008 passed by this Hon'ble Court.

20C. That in the written statement filed by the defendant no.1 it has been alleged that a Memorandum of Understanding was signed between defendant no.1 and Walchandnagar Industries Ltd. on 8th July, 2008, and thereafter, a definite purported contract was signed on 12th July, 2008, that is within four days of the MOU despite the MOU being valid for a period of 30 days, and not withstanding that the defendant no.1 proposed the name of defendant no.3 to defendant no.2 long after 12th July, 2008.

20D. The alleged sub-Contract Agreement dated 12th July, 2008 filed by defendant no.1, defendant nos.1 and 3 have purported to create a definition of "Contract documents" which includes documents that have not yet been finalized but are only 'proposed'. One of the documents forming part of contract documents is "minutes of package negotiations meeting (proposed) to be held between employer and sub-contractor (WIL), for the package facilities on technical aspects". Firstly, there cannot be a meeting or minutes of a meeting which are qualified as "proposed". Secondly, there cannot be minutes of a meeting which is yet "to be held". It is obvious that documents have been prepared in a hurry only to be produced before this Hon'ble Court, with a view to mislead this Hon'ble Court and to frustrate and overreach the orders of this Hon'ble Court.

20E. In fact, defendant no.1 as itself subsequently filed a letter dated 5th August, 2009 purportedly issued by defendant no.2 permitting the defendant no. 2 to substitute the plaintiff (though the authenticity of the said letter is denied). The said letter clearly reveals that even as late as on 5th August, 2008, in the meeting between defendant no.1 and defendant no.2, there is no mention that a definite contract has been signed with Walchandnagar Industries Ltd. in fact defendant no.1 informed defendant no.2 that only negotiations were being conducted with Walchandnagar Industries Ltd.

20F. That the contents and tenor of the letter dated 5.08.2008 issued by defendant no.2 to

defendant no.1 clearly substantiates the fact that the alleged MOU dated 8.07.2008 and also the alleged sub-contract agreement dated 12.07.2008 have been fabricated and anti dated with malafide intention. The letter dated 05.08.2008 specifically states that it was only in a joint meeting dated 10.7.2008 held under the Chairmanship of the Minister of Trade, that it was decided to consider substitute sub-contractor proposed by OIA. The letter clearly states thus:

"We refer to the joint meeting dated July 10, 2008, held under the Chairmanship of his Excellency the Minister of Trade and Industry, whereby it was decided to consider substitute sub-contractors/consortium partners proposed by OIA and conduct technical evaluation of substitute offers for the subject packages."

However, as stated by defendant no.1 themselves in their written statement they had entered into an MOU on 8.07.2008 (which is even two days prior to the proposed decision to substitute, which was only taken on 10.07.2008). It is submitted that the decision to consider substitute sub-contractors/consortium partners was taken only on 10.07.2008 and thus there could have been no MOU on 8.07.2008 between defendant no.1 and WIL in as much as the defendant no.1 had no authority to enter into any agreement with WIL prior to the alleged approval of defendant no. 2 for changing the sub-contractor. Therefore this clearly reveals that the alleged MOU was illegal and void ab-initio.

20G. That, the letter dated 5.08.2008 states as under:

"In line with the above, TSFP has given original bid documents and invited OIA to submit substitute technical offers for subject packages on July 11, 2008. Substitute offers were opened in the presence of Tender Committee of TSFP, consultant's and bidder's representatives on July, 18, 2008."

Strangely defendant no.2 gave the original bid documents and invited/directed the defendant no. 1 to submit substitute technical offers for packages on 11.07.2008 i.e. just one day after defendant no. 2 decided to consider sub-contractors.

20H. The letter further states thus,

"TSFP is pleased to inform you that Art of management is hereby accepted your substitute technical offer dated 18th July, 2008 for above packages with Walchandnagar Industries Ltd. (WIL) as sub-contractor abiding to technical specification given in our bid documents and minutes of technical negotiation meeting held on August 4 and 5 2008, for turnkey supply, erection and commissioning with manpower training for both phase I and II of the project".

As stated above the sub-contractor agreement was allegedly executed on 12.07.2008. The technical offer allegedly accepted only on 05.08.2008. Glaring infirmities and illegalities in the alleged agreement dated 12.7.2008 and further highlighted by the fact that offers of WIL bidding as OIA's sub-contractor was opened and accepted by the defendant no.2 only on 5.8.2008, so how could a contract between defendant no.1 and WIL (defendant no.3) as contractor and sub contractor can claimed to have been entered into on 12.07.2008 which is completely arbitrary and devoid of any merits. This clearly demonstrates that the defendant no. 1 has filed a false affidavit and has committed an act of perjury. This further reveals the glaring infirmities and illegalities in the alleged sub-contractor agreement dated 12.7.2008.

20L. Furthermore, the contract dated 12.07.2008 is only antedated, it is void inasmuch as it fraught with false and misleading contents, which is clearly evident from Clause 4 of the said agreement, which provides as under:-

"Article 4 Technical Conditions
The technical aspects of the project as already agreed between the Employer and the Sub-contractor shall not be altered and shall be adhered to by the sub-contractor".

The said clause portrays as if the technical aspects had already been agreed upon prior to 12.7.2008, whereas allegedly the technical aspects of the project was agreed only allegedly vide the Letter dated 5.8.2008. This fact clearly demonstrates that the said sub-contract was antedated in as much as on 12.7.2008, the technical aspects of the project between the Employer and the sub-contractor qua the project in question was never accepted.

20J. That even as late as on 4th or the 5th August, 2008, in the meeting between the defendant no.1 and defendant no.2, there is no mention that a definite agreement had been signed with Walchandnagar Industries ltd. In fact the letter dated 5.8.2008 clearly states that the technical negotiation meetings were held on August 4 and 5, 2008 with OIA-WIL experts. It is further revealed from the minutes of tender committee meeting dated 5.08.2008, that on 5.08.2008, the evaluation report submitted by the consultants was forwarded to the General Manager for approval of substitute offers of defendant no.1 – defendant no.3. Therefore, there is no way in which a definite contract could have been entered into with WIL And even if assuming but not admitting that a contract was entered into between OIA and WIL such a contract prior to 5.8.2008, would be illegal, null and void in the eyes of law.

20K. The minutes of the tender committee meeting dated 5.8.2008 further record as follows:

"e) Detailed technical & commercial negotiations were held thoroughly between OIA-WIL, TSFP technical committee members and consultants team regarding the deviations specified in the tender documents by OIA.

Therefore, this clearly reveals that the defendant no.1 has been deliberately violating the stay order dated 30.07.2008 passed by this Hon'ble Court and in complete violation of the same has been taking active measures to substitute defendant no.3 instead of the plaintiff. It is further pertinent to mention herein that the defendants actively participated in the technical negotiations meeting held on 4.08.2008 and the minutes of the said meeting clearly bears the signatures of the representatives of the defendant no.1 and the stamp of the defendant no.1.

20L. That assuming but not conceding the alleged sub-contract agreement dated 12.7.2008, as per its own terms and conditions could not become effective without approval from the employer, which was allegedly granted only on 5.8.2008. The said approval on the face of it is Nullis juris and in the teeth of the injunction operating.

20M. That Article 3 of the alleged agreement dated 12.7.2008 clearly demonstrates that the same has been ante-dated. In fact, the said agreement has not become effective even today and hence has no legal validity. Article 3 has been extracted hereunder to illustrate the point further:

"Article 3 Effective Date

The subcontract agreement shall become effective when all of the following conditions are fulfilled to the satisfaction of the EPC contractor:

a) This Contract Agreement has been duly and validly executed by both parties and a duly authorized counter copy is exchanged between the parties hereto.
b) The subcontractor has submitted to the Employer (through the EPC Contractor) the Performance Security and the Advance Payment Guarantee as specified in Appendix 9-10 attached herein for the value defined in SCC and GCC;

c) The EPC contractor has paid 10% of the Contract value to the sub-contractor as the advance payment.

d) Technical and commercial approval of WIL by the Employer"

It is submitted that Sub-Clause (b), (c) and (d) of the said Article 3 is yet to be fulfilled till date in as much as inter-alia the performance security and the advance payment as stipulated under the Agreement has not been made and neither have the technical and commercial approvals as required been granted. It is submitted that the alleged technical approval was as required under

the clause was granted if at all, only on 5.8.2008 and not before and the same was in blatant disregard and violation of the order dated 30.7.2008 passed by this Hon'ble Court. No commercial approval of the appropriate value was granted. No payment has been made by the Defendant no. 2 to WIL.

20N. Furthermore, despite being specifically restrained by this Hon'ble Court, the defendant no.1, in furtherance of its malafide intentions of appointing M/s Walchandnagar Industries ltd. deliberately violated the said Order and attended the technical negotiation meetings on 4th and 5th August, 2008. The Minutes of the meeting dt. 4.8.2008 bears the signatures of representatives of the defendant no.1 and the Delhi office stamp of the Defendant no.1. Therefore, the alleged technical approval dated 5.8.2008 being in clear disregard to the Order passed by this Hon'ble Court is illegal and bad in law, which consequently also implies that another essential criteria stipulated under Article 3 (d) of the agreement dated 12.7.2008 also has not been fulfilled.

20O. That further, assuming but not conceding that the alleged contract dated 12.7.2008 had been entered into, and the approval was granted on 5.8.2008, yet the said contract is invalid and null and void in the eyes of law. It is submitted that the alleged approval dated 5.8.2008 clearly states that the prices for the substitute packages shall be as per the main contract dated 10th January 2008 executed between defendant no.2 and defendant no.1, which is admittedly US $ 65 million, however under the said agreement dated 12.7.2008 it has been specifically provided under Clause 2.1 as only 2.1 Million. Therefore, there are huge discrepancies and contradictions between the terms of the approval and the contract dated 12.07.2008 and it is not known as to where would these monies which are actually public Indian funds be used for is not known.

20P. That clearly the said letter dated 5th August, issued by defendant no.2 permitting the defendant no.2 to substitute the plaintiff shows that there could be no contract between defendant no.1 and the said Walchandnagar Industries Ltd. prior thereto and further that defendant no.1 and 2 were acting in concert and were completely aware of the order dated 20th July, 2009 passed by this Hon'ble Court which is in force even till date.

20Q. Further, and in any event, the defendant no.2 has not been shown to have ever authorized till end June/July 2008, appointment of the said Walchandnagar Industries Ltd. as a sub-contractor in substitution of the plaintiff. This is also apparent form the letter dated 30.6.2008 written by defendant no.2 to its board of Management on 30.6.2008 which clearly reveal that the minutes dated 19.6.2008 and 20.6.2008 and the letter dated 16.6.2008 sought to be relied upon by the defendant no.1 did not constitute any approval of

substituting the plaintiff as alleged by the defendant no.1. The defendant no.1 is clearly suppressing all material facts as the aforesaid documents are within the knowledge of defendant no.1 who has chosen to conceal the same from this Hon'ble Court. Assuming without conceding, neither the negotiations nor the minutes and/or any alleged MOU could have been entered into or be given effect to in view of clear restraint imposed by the order dated 30.7.2008 passed by this Hon'ble Court and the defendant no.1 ought not to be permitted to defeat the bonafide rights of the plaintiff and/or overreach this Hon'ble Court.

20R The petitioner recently discovered that a consortium Agreement dated 16.7.2008 was entered into between the defendant no.1 and defendant no.3, wherein it was agreed that the parties would enter into a definitive transaction agreement subsequently. The relevant clause of the said Consortium Agreement has been extracted hereunder;

"3) The parties shall enter into a "definitive transaction agreement" on being qualified by the Employer. The "definitive transaction agreement" shall include all terms and conditions to implement the packages including the payment mechanisms".

Therefore, a bare perusal of the said Consortium agreement clearly reveals that prior to 16.7.2008 no agreement had come into existence and in fact a subsequent agreement had to be entered into, which never happened. In fact, the agreement dated 16.7.2008 has actually been notarized on 28.7.2008, which is the date on which it becomes effective. The consortium agreement further reveals that till 28.7.2008 no price had been agreed to between the parties, whereas in the alleged contract dated 12.7.2008, the price has been specified under clause 2.1 and 2.2 therein.

20S. That in furtherance of their illegal designs and malafide intentions defendant no. 1 and 2 on 15.9.2008 made amendment in the contract agreement dated 10.1.2008 allegedly entered into inter-se in an attempt to oust the plaintiff from the entire project. The name of the plaintiff has been allegedly substituted by joint names of defendant no.1 and defendant no.3. in the garb of defendant no.3, it is defendant no.1 who has attempted to substitute the plaintiff.

20T. It is relevant to note that in a similar contract, which relates to another Govt. of Ethiopia company known as Wonji Shoa Sugar Factory, where the plaintiff has been appointed as the EPC Contractor, it has entered into contracts with the sub-contractors without making any demand for 15% of contract price for discharge of its obligations as a lead EPC/Contractor.

It has subsequently, now come to the knowledge of the plaintiff that defendant no.1 was not even

entitled to become the EPC contractor and the defendant no.1 and 2 have manipulated records to make defendant no.1 become the EPC contractor who is demanding unreasonable and absolutely uncalled for 15% of the contract price from plaintiff and other similarly placed sub-contractors. It is further submitted that defendant nos.1,2 and the said Walchandnagar Industries Ltd. are acting in concert and are attempting to defeat the order of this Hon'ble Court and perpetrate a fraud which they cannot be permitted to do.

20U. The attempt of defendant no.1 of clandestinely introducing the purported sub-contractor who did not even participate in the tender, is not only contrary to the entire tender process but is also mala fide and an attempt to over-reach the orders passed by this Hon'ble Court. Further, till date no termination of plaintiff's sub-contract has ever been communicated.

20V. The aforesaid facts clearly reveal that the purported sub-contract agreement dated 12th July, 2008, which was allegedly entered into within four days of signing the Memorandum of Understanding which were valid for 30 days is clearly ante-dated with a view to defeat the injunction order passed by this Hon'ble Court. The said purported sub-contract agreement cannot be permitted to be implemented and be proceeded with and being in complete violation of the order dated 30th July, 2008 is void ab-initio. Even the purported permission dated 5th August, 2008 cannot be acted upon and is void ab-initio as defendant no.2 was also informed of the order dated 30th July, 2008.

20W. That defendant nos.1, 2 and 3 are acting in concert and are attempting to over-reach the issues pending before this Hon'ble Court and perpetrate a fraud which they cannot be permitted to do.

The plaintiff is also seeking to amend paragraphs 2, 10, 11, 12, 15, 17 and 20. Those paragraphs run as under:

Para 2:-

That the defendant no.1 is a company incorporated under the Companies Act 1956 having its registered office at 1205, Surya Kiran Building, 19, Kasturba Gandhi Marg, New Delhi-110001. The defendant no.2 incorporated under the laws of Ethopia having its principle office at Addis Ababa and/or controlled by Government of Federal Democratic Republic of Ethopia. The defendant no.3 is a company incorporated under the Company Act, and having its registered office at 3 Walchand Terracescopp Air Conditioned Market, Tardeo, Mumbai, Maharashtra-40034 and branch

office at 201, Milap Niketan (2nd Floor), 8-A, Bahadur Shah Zafar Marg, New Delhi: 110002. That the defendant no.4 is the EXIM bank having its registered office at Centre One Building, Floor 21, World Trade Centre Complex, Cuffe Parade, Mumbai.

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Para 10:-

That therefore the defendant no.1 clearly agreed to the unanimous decision taken in the aforementioned meetings dated 19th and 20th of December to the effect that the contract shall be seamless and that the rights of the winning bidders and their bid award prices shall be adequately protected in the sub-contractor agreement. In view thereof, the defendant no.1, was under a legal obligation to finalize the modus of implementing all the various packages (sub-contracts) of the project along with his own award of work/contract. The defendant no.1 was further required to do so at the earliest and one the same terms and conditions as agreed to between the parties to the said meetings inter alia the plaintiff, defendant no.1 and the defendant no.2 in the aforementioned meetings. Further an agreement dated 10.1.2008 was entered into between the defendant no.1 and defendant no.2, wherein the name of the plaintiff was clearly mentioned as a sub contractor albeit only for Process House Package. The said contract contains Technical Bid Commitments and Tender Bid Prices, which have been clearly conducted between the plaintiff and the defendant no.2, and which form an integral par of the said contract between the defendant no.1 and defendant no.2. In fact, in the Process House Packages Technical and commercial annexures, it is clerly stated that these are as submitted by USIPL (short for Utta Sucrotech International Private Limited) and form an integral part of the contract. In the said contract it had been specifically agreed that there shall be a contract between the contractor and the sub contractor and that the agreement shall be entered into without any alteration in the agreed technical and commercial aspects of the original tender documents including the price of the bids. It has been alleged that the terms of the sid Agreement dated 10.01.2008, were changed without the consent of the plaintiff vide an Addendum No.1 dated 21.2.2008. Therefore, without prejudice, the mother contract of 10.1.2008 could not have been altered vide any addendum as alleged without involving the plaintiff and obtaining its consent, and any such addendum subsequently altering the terms and conditions of the said agreement is illegal, null and void.

Para 11:-

"That subsequently it was also revealed that on 20th February, 2008 a contract was executed between the defendant no.2, Ethiopia on behalf of Government of Federal Democratic Republic of Ethiopia and the defendant no.1. In the said agreement also it has been agreed that there shall be a contract between the contractor and the sub contractor and that the agreement shall be entered into without any alternation in the agreed technical and commercial aspects of the original tender documents including the price of the bids.

Para 12:-

That therefore in accordance with the procedure agreed and settled on 19th December and 20th December, 2007 and also in view of the directions of the defendant no.2, a formal seamless contract was required to be entered into between the plaintiff and defendant no.1 at the earliest, on the same terms and conditions as those of the original tender documents. It is further pertinent to mention herein that a binding contract had already come into existence between the defendant no.2 and the plaintiff vide the letter dated 712.2007 which was preceded by detailed technical and commercial meetings between defendant no.2 and plaintiff and also the contract dated 10.1.2008 on the same terms and conditions as per the original bid documents on the basis of which the plaintiff had prepared and pt in its bid. Therefore, no alternations whatsoever could have been made in the same.

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Para 15:-

"That the plaintiff, vide their letter dated 26.3.2008 replied to the aforesaid letter dated 6.3.2008 issued by the defendant no.1 specifically stating that the demand of the defendant no.1 directing the plaintiff to discount its offer price at least by 15% , is absolutely illegal and contrary to the terms agreed between the parties including the defendant no.1,2 and the plaintiff in the meetings dated 19th December and 20th December, 2007 and also vide the letter dated 7.12.2007, which created a formal concluded and binding contract between the plaintiff and the defendant no.2 in terms of the instruction to Bidders issued along with the tender documents.

Para 17:-

"That even, the draft of agreement received from the defendant no.1 by the plaintiff on 16.4.2008, failed to consider the submissions made by the plaintiff. The said draft was contrary to the agreement arrived at the joint Session Meeting held on 19th and 20th December, 2007, and the

same was pointed out to the defendant no.1 by the plaintiff. The defendant no. 1 most significantly, attempted to renegotiate the contract price to be able to receive a part thereof for discharging its obligation of a lead contractor. Not only the renegotiation of price was contrary to the mandate of defendant no.2 and the agreement between the plaintiff and the Sugar Factor Project as well as the minutes of 19th and 20th December, 2007, and also the letter dated 7.12.2007 but also the defendant no.1 is stopped from claiming any moneys from the plaintiff to discharge his own obligations to the defendant no.2 as a lead contractor after having accepted the said contract/duty without recourse to additional consideration from the plaintiff expressly and/or by conduct."

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Para 20:-

That plaintiff submits that there is already a concluded contract between the defendant no.2 and the plaintiff and the defendant no.1 cannot renegotiate the terms thereof. In any event, the defendant no.1's consideration for managing the entire project as a lead contractor must necessarily be included entire project as a lead contractor must necessarily be included in his consideration of the contract with the defendant no.2 and defendant no.1 cannot insist on consideration from the plaintiff as execution of a contract between the plaintiff and the defendant no.1 is a mere formality for due implementation of a project and/or a condition imposed by the defendant no.2 which has been accepted by the defendant no.1 without any protest or demur. Further and/or in any event the consideration received by defendant no.1 from defendant no.2 includes the discharge of obligation by defendant no.1 as a lead contractor. Without prejudice, it is further submitted that the same is a matter between the defendant no.1 and the defendant no.2 and the plaintiff is neither involved nor concerned with it, however, the same cannot be allowed to prejudicially affect the plaintiff. The defendant no.1 is stopped from claiming to the contrary. The defendant no.1 is attempting to jeopardize the agreement between the plaintiff and the said defendant no.2 and cause irreparable loss including loss of reputation of the plaintiff. The defendant no.1 tortuously by attempting to deliberately induce a third party instead, which the defendant no.1 is not entitled to do. The defendant no.1 is bound and liable to give effect to the concluded contract between the plaintiff and defendant no.2 and sign the formal contract between the plaintiff and defendant no.1. in regard thereto. The plaintiff has spent huge amount of monies and man-power time in preparation of discharge of its obligations including more than 25 man-visits by Senior Officers to Ethiopia at

exorbitant cost. The defendant no.1 cannot jeopardize the interest of the plaintiff. It is further submitted that the if the defendant no.1 is allowed to proceed in its malafide intention it would not only be illegal, it would also render the plaintiff without any remedy whatsoever for the colossal losses that would be caused to it.

The plaintiff is further seeking to substitute paragraph 24 by the following paragraphs:-

24. The defendant no.1 is having its corporate office in New Delhi and is described to carry its business with the local limits of the jurisdiction of this Hon'ble Court. The defendant no.3 and the defendant no.4 has its office within the local limits of jurisdiction of this Hon'ble Court. It is further submitted that several meetings between the parties have been held within the jurisdiction of this Hon'ble Court. Several pertinent documents including the letter dated. 7.12.2007 have been issued and received by the defendant no.1 from its Delhi Office and several agreements including the agreement dated 20.2.2008 and 10.1.2008 have been entered into between the defendants within the jurisdiction of this Hon'ble Court. The alleged minutes of meeting dated 4.8.2008 also bear the Delhi Stamp of the defendant no.1 and is thus within the jurisdiction of this Hon'ble Court. The alleged amendment dated 15.09.2008 to the 10.1.2008 contract has also been entered into within the jurisdiction of this Hon'ble Court and therefore the cause of action cannot be split inasmuch as the acts have been taken place within the jurisdiction of this Hon'ble Court. The defendants therefore reside and work for gain in Delhi. It is further submitted that without prejudice and in any event, if this Hon'ble Court holds otherwise, in best interest of justice, leave may be granted under Section 20 of the Code of Civil Procedure.

The value of the suit for the purpose of jurisdiction and court fees is as follows:-

(a) For grant of a decree of mandatory injunction direction defendant no.1 to execute the obligation of signing a formal contract with the plaintiff in accordance with the terms and conditions agreed between the plaintiff and defendant no.2 as contained in letter dated 7th December, 2007, at Rs.20,05,000/- and the court fee of Rs.21,915/- is affixed thereon.

(b) For grant of a decree of perpetual injunction restraining the defendant no.1 and defendant no.3 from interfering in the contract/award of contract between plaintiff and defendant no.2 as contained in letter dated 7th December, 2007, including appointing/engaging any third party in respect of the Process House Project; the relief is valued for the purpose of court fee

and jurisdiction is at Rs.200/- and a court fee of Rs.20/- is affixed thereon

(c) For grant of perpetual injunction restraining the defendant no.1 from committing a breach of the negative covenant enumerated in para 20 A above and restrain the defendant no.1 from modifying and technical and/or commercial terms including price agreed/finanlized between the plaintiff and the defendant no.2, the relief is valued for the purpose of court fee and jurisdiction is at Rs.200/- and a court fee of Rs.20/- is affixed thereon.

(d) For grant of decree of mandatory injunction, directing the defendants to undo the contemptuous and illegal acts and restore status quo ante as on 30.7.2008; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and a court fee of Rs.20/- is affixed thereon.

(e) For the grant of decree of perpetual injunction restraining defendant no.4, EXIM Bank from disbursing the funds for the Tendaho Sugar Factory Project in the Line of Credit opened by it from the Government of Ethopia; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(f) For grant of decree of perpetual injunction restraining the defendant no.1 from modifying and technical and/or commercial terms including price agreed/finalized between the plaintiff and the defendant no.2; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(g) For grant of a decree of perpetual injunction restraining the defendant no.1, 2 and 3 from proceeding with and/or acting upon in any manner whatsoever on the purported sub-contract Agreement dated 12th July, 2008; or on any subsequent date; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(h) For that the purported sub-contract Agreement dated 12th July, 2008 between defendant no.1 and defendant no.3 is invalid and void ab initio; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(i) For declaration that the consortium agreement dated 16.7.2008 entered into between the defendant no.1 and the defendant no.3 is illegal and void; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(j) For declaration that the purported permission granted vide letter dated 5.8.2008 issued by the defendant no.2 to defendant no.1 is invalid and/or void ab initio; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(k) For declaration that the addemdum no.1 dated 21.2.2008 the agreement dated 10.1.2008 is illegal and void ab-initio; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(l) For declaration that the alleged amendment dated 15.09.2008 toe the Agreement dated 10.1.2008 is illegal and void ab-initio; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(m) Grant of decree of perpetual injunction restraining the defendant no.1 and 2 from taking any steps in furtherance of the amendment dated 15.09.2008 illegally made to the contract agreement dated 10.1.2008 allegedly entered into between defendant no.1 and defendant no.2 or creating any rights in favour of defendant no.3; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

(n) Grant of decree of permanent injunction restraining the defendant nos.1, 2 and 3 from taking any action pursuant to the purported letter dated 5.8.2008; the relief is valued for the purpose of court fee and jurisdiction at Rs.200/- and court fee of Rs.20/- is affixed thereon.

Thus, the suit is valued for the purpose of court fee and jurisdiction at Rs.20,05,400/- and a court fee of Rs.21,995/- has already affixed thereon. Additional court fee of Rs.200/- is being paid herein. The plaintiff craves leave to affix any additional court fee if so required by this Hon'ble Court or otherwise.

The plaintiff is also seeking to amend the prayer clause. The proposed amended prayers read as under: -

Prayer clause:-

(a) Grant of decree of perpetual injunction restraining the defendant no.1 and defendant no.3 from interfering in the contract/award of contract between plaintiff and defendant no.2 as contained in letter dated 7th December, 2007 including appointing/engaging any third party in respect of the Process House Project.

(b) Grant perpetual injunction restraining the defendant no.1 from committing a breach of the negative covenant enumerated in Para 20A above and restrain the defendant no.1 from modifying any technical and/or commercial terms including price agreed/finanlized between the plaintiff and defendant no.2.

(c) Grant a decree of mandatory injunction directing defendant no.1 to execute the obligation of signing a formal contract with the plaintiff in accordance with the terms and conditions agreed between the plaintiff and defendant no.2 contained in letter dated 7th December, 2007.

(d) Grant perpetual injunction restraining the defendant no.1 from modifying and technical and/or commercial terms including price agreed/finanlized between the plaintiff and defendant no.2.

(e) Grant a decree of declaration that the purported sub-contract Agreement dated 12th July, 2008 between defendant no.1 and defendant no.3 is invalid and void ab initio; and cancel the said contract Agreement dated 12th July, 2008.

(f) Declare that the alleged consortium agreement dated 16.7.2008 entered into between the defendant no.1 and the defendant no.3 is illegal and void ab-initio and cancel the said Consortium Agreement dated 16.7.2008.

(g) Declare that the addendum no.1 dated 21.2.2008 to the agreement dated 10.1.2008 is illegal void ab initio and cancel the said Addendum No.1 dated 21.2.2008 to the agreement dated 10.1.2008.

(h) Declare that the Amendment dated 15.9.2008 to the agreement dated 10.1.008 is illegal and void ab-initio and cancel the said Amendment dated 15.09.2008 to the agreement dated 10.01.2008.

(i) Grant a decree of perpetual injunction restraining the defendant no.1 and 2 from taking any steps in furtherance of the amendment dated 15.09.2008 illegally made to the contract agreement dated 10.01.2008 allegedly entered into between defendant no.1 and defendant no.2 or creating any rights in favour of defendant no.3.

(j) Grant a decree of perpetual injunction restraining defendant no.1, 2 and 3 from proceeding with and/or acting upon in any manner whatsoever on the purported sub-contract Agreement dated 12th July, 2008; or on any subsequent date.

(k) Grant a decree of declaration that the purported permission granted vide letter dated 5.8.2008 issued by the defendant no.2 to defendant no.1 is invalid and/or void ab initio and cancel the said permission dated 5.8.2008.

(l) Grant a decree of permanent injunction restraining the defendant nos.1, 2 and 3 from taking any action pursuant to the purported letter dated 5.8.2008.

(m) Grant of decree of mandatory injunction, directing the defendant no.1 and 2 to undo the contemptuous and illegal acts done and status quo ante as on 30.7.2008 be restored;

(n) Grant a decree of perpetual injunction restraining defendant no.4 from disbursing any funds in the line of credit opened by it from the Government of Ethiopia.

(o) Costs; and

(p) Pass such further order/as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

The plaintiff also seeks to change the title of this suit as Uttam Sucrotech International Pvt. Ltd Versus The Overseas Infrastructure Alliance (I) Pvt. Ltd and Ors and the nature of the Suit from a “Suit for Mandatory Injunction” to a “Suit for Mandatory Injunction and Declaration”.

It is time now to come straight to the application for ‘amendment and impleadment’. Should it be allowed? As far as the prayer for amendment is concerned, it need not detain me for long and the reason is that after the application had suffered lengthy arguments, for and against, the learned counsel for defendant No.1 conceded that the amendments sought could be allowed subject to liberty to it to raise such objections as may be available to it and to this, it may be noted, the learned counsel for the plaintiff had no objection. Keeping this in view and keeping also in view the nature of the amendments and so also the fact that the amendments have their

seed in subsequent developments, the amendments sought are allowed. Of-course, it would be open to defendant No.1 to take in response to the amendments, the pleas legally open to it. With the question of amendment over, the next question which craves for an answer relates to the impleadment of Walchandnagar Industries Ltd. and the EXIM Bank. Should not the impleadment follow the amendments?

Before I venture to answer it, let us have a look at the power of the Court to strike out or add a party in an ongoing proceeding. The power as we all know flows from Order 1 Rule 10(2) of the Code. It says that *"the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."* This then is the foundation head of all the power. We also know that a necessary party is one without whom no order can be made effectively and**,** a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. [See *Udit Narain Singh Malpaharia Versus Additional Member Board of Revenue, Bihar and another* reported in AIR 1963 Supreme Court 786]. In a relatively recent judgment of the Apex Court in the case of *Kasturi Versus Iyyamperumal and others*, 2005(6) Supreme Court Cases 733, two tests have been laid down to determine who is a necessary party. These tests are that (1) there must be a right to

some relief against such party in respect of controversies involved in the proceedings, and (2) no effective decree can be passed in the absence of such party. Reference may also be made to a judgment of this court in the case of *Madhupuri (Ms.) and another v. Sh. Moti Lal Puri and others reported in 2005 VIII AD (Delhi) 737.* *"It says that Order 1 Rule 10 of the Code has been expressly provided in the Code to meet with situations so as to implead all the parties which may be affected by any litigation so that the rendering of justice is not hampered. It further says that plaintiff is dominus-litus and he is bound to sue every possible adverse claimant to avoid multiplicity of suit and needless expenses."*

The principle is thus clear and it is that while deciding whether a person ought to be made a party to the suit, what needs to be examined is, whether the controversy raised in the plaint can be effectively and finally set at rest in the absence of the person sought to be impleaded and if not, then that person must necessarily be impleaded as a party or else it will leave scope for further litigation and may also lead to multiplicity of proceedings.

The law of impleadment being what has been noticed above, are Walchandnagar Industries Ltd. and EXIM Bank necessary and proper parties in the suit? I shall first deal with Walchandnagar Industries Ltd. but before I do that, let me notice the objections raised by it to its impleadment. It says that it is a stranger to the proceedings. It has no privity of contract with the plaintiff and that it has entered into an independent contract with defendant No.1 dated July 12, 2008 with which the plaintiff has no right to interfere. It further says that the foundation of the original suit is the alleged concluded contract between the plaintiff and defendant No.2 and that the plaintiff by way of an application for 'amendment-cum-impleadment' cannot be

allowed to change the contours of the original plaint where it does not figure at all. As per it, it is not the relief sought against it which should form the basis for its impleadment but the averments made in the plaint. Those averments, it is stated, give rise to disputes, if any, between the plaintiff, defendant No.1 and defendant No.2. It has also taken an objection that assuming there is an agreement between the plaintiff and defendant No.1, such an agreement is not capable of being specifically enforced and that the only remedy available to the plaintiff is to sue for the alleged breach of the contract. Hence, it is argued that it is neither a necessary or a proper party, and in support, reliance was placed on *Anil Kumar Singh Vs. Shivnath Mishra alias Gadasa Guru reported in (1995) 3 Supreme Court Cases 147*. The facts of that case were that one Daulat Singh, father of the petitioner filed a suit for specific performance of an agreement of sale of some land said to have been executed in his favour by one Shiv Nath Mishra. Pending decision in the suit, Daulat Singh died. The petitioner came on record as legal representative of Daulat Singh. He filed an application under Order 6 Rule 17 of the Code seeking leave to amend the plaint and seeking to implead the respondent also as a party-defendant in the suit. The contention of the petitioner was that Shivnath Mishra, the vendor, had colluded with his sons and wife and had obtained a collusive decree in a suit under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act and by operation of the said decree, they became co-sharers of the property to be conveyed under the 'Agreement to Sell' and, therefore, the respondent was a necessary and proper party to effectuate the ultimate decree of the specific performance that may be granted in favour of the petitioner.

The Apex Court declined the relief on the ground that the suit of the plaintiff was based on the 'Agreement to Sell' said to have been executed by the vendor and that the person who was sought to be impleaded as a respondent had acquired interest in the property by an independent decree which decree was not the subject matter of the suit and hence**,** without assailing the validity of the decree**,** those who acquired the right through the decree could not be dragged into the litigation.

Reliance was also placed on *Sarvinder Singh Vs. Dalip Singh and others reported in (1996) 5 Supreme Court Cases 539***.** In the said case Sarvinder Singh had already obtained a decree of declaration, that he was the owner of the suit property on the basis of a registered Will executed by his mother. In that suit the daughters of Hira Devi, were impleaded as defendants. One of the daughters was Rajinder Kaur. Subsequent to that decree which had became final, Sarvinder Singh filed another suit for declaration of his ownership on the basis of the same Will against the heirs of Rajinder Kaur. Since the said heirs of Rajinder Kaur alienated the self same lands to X and Y, the said X and Y moved an application under Order 1 Rule 10 of the Code for being impleaded as defendants. The Supreme Court observed that though it may be open to the heirs of the Rajinder Kaur to resist the suit on any legally available or tenable grounds, those grounds were not available to the applicants. It was further made clear that the earlier decree on the basis of the Will having become final and as the applicants were claiming title only through the heirs of Rajinder Kaur who was a party to that decree they could not legally challenge the legality and validity

of the said Will. It was for these reasons that the applicants were held to be neither necessary nor proper parties to the suit.

As would be borne out from above both the judgments relied upon by learned counsel for Walchandnagar Industries Ltd. bear no parallel to the facts of the present case.

Having regard to the facts of the present case as borne out from the plaint as well as from the amendments which, I have allowed, some of the issues which are likely to fall for consideration are**,** firstly, whether the plaintiff and defendant No.2 had a concluded contract and if so**,** could defendant No.1 renegotiate the price with the plaintiff in contravention of alleged express understanding arrived at between the plaintiff**,** defendant No.1 and defendant No.2 in the joint meeting held on 19th & 20th December**,** 2007 and in contravention of the alleged contract-agreement dated February 20**,** 2008 between defendant No.1 and defendant No.2**;** and secondly, was defendant No.1 authorized by defendant No.2 or even otherwise legally entitled to oust the plaintiff from the project and induct in its place another sub-contractor**,** namely**,** Walchandnagar Industries Ltd.? Not only this, the amendments sought to be introduced in the plaint challenge the existence, legality and validity of the so called binding contract with Walchandnagar Industries Ltd. vide "Memorandum of Understanding" dated July 08**,** 2008 and the sub-contract dated July 12**,** 2008. It may be recalled that as per the application for amendment the said documents were forged and fabricated by defendant No.1 in concert with defendant No.2 and Walchandnagar Industries Ltd.

This certainly is not the stage to go into merits. That stage has not yet come. At this stage, what is to be seen is whether in view of

what is pleaded, a person sought to be impleaded is a necessary or a proper party or not and whether the totality of the averments made against the person sought to be impleaded give rise to a cause of action against that person and if they do, should that person be not treated as a necessary or proper party? This being the position, should Walchandnagar Industries Ltd. be kept out of the proceedings? Should it be heard to say that it had entered into an independent contract with defendant No.1 and that the plaintiff has no right to challenge its contract? The effect of the alleged contract with Walchandnagar Industries Ltd. on the alleged rights of the plaintiff is obvious. It has the effect of ousting the plaintiff from the project of setting-up Sugar Factory at Addis Ababa by Walchandnagar Industries Ltd. The plaintiff has challenged not only the very existence of that contract but its legality and validity too. Whether the plaintiff had a concluded contract with defendant No.2 and if so, whether it was wrongly ousted by defendant No.1 and rightly replaced by Walchandnagar Industries Ltd., who is a direct beneficiary from the ouster of the plaintiff are questions which have been raised and these questions will have to be determined. And, if so, and it being so, Walchandnagar Industries Ltd. becomes a necessary party. The loss of the plaintiff is the gain of Walchandnagar Industries Ltd. It has allegedly stepped into the shoes of the plaintiff. It cannot be allowed to watch the proceedings from the side-lines. It must enter the fray and justify its induction, more so, when it is being accused of making its way to the contract by forging and fabricating documents. More than the plaintiff, it will be in its own interest to do so, for in case, it remains out of the proceedings and assuming any adverse order is passed in its absence, it may cause

irreparable loss to it and in all likelihood may lead to further litigation. Therefore, in my opinion, Walchandnagar Industries Ltd. is a necessary and proper party. I, therefore, allow the prayer for impleading it as a party.

This brings me to the prayer for impleadment of EXIM Bank. As already noticed above, the project for development of Sugar Factory at Addis Ababa is being funded by the said bank. It has entered into an agreement dated October 04, 2007 with the Government of Federal Democratic Republic of Ethiopia, called the 'Dollar Credit-line Agreement' and it is under the terms of the said agreement that it has to release the funds to the Government of Ethiopia who has been described as the "borrower".

It is the case of the EXIM Bank that the agreement dated October 04, 2007 has been entered into between two sovereign countries and the Bank is under legal obligation to remit the amount to defendant No.2 by opening the line of credit. As per the Bank, it is not at all concerned with the contract entered into between defendant No.1 and defendant No.2 or any alleged sub-contract having been entered into between defendant No.1 and Walchandnagar Industries Ltd. or any dispute arising between the parties to the said contracts. It says that its obligation to release funds to defendant No.2 is independent of all these transactions and that the plaintiff who is a complete stranger to the Dollar Credit Line Agreement dated October 04, 2007 has no right to seek any injunction vis-à-vis the said agreement. According to the counsel for defendant No.1 and the EXIM Bank, all that the bank is required to do before it remits the

amount, is to ensure that it is done in terms of Clause 3 of the 'Dollar Credit Line Agreement'. The Clause runs as under:-

> **3. Eligibility of contract to be financed out of the credit**.
>
> 3.1 A contract shall not be eligible to be financed out of the Credit unless:-
>
> (a) it is for the import of the Eligible Goods into the Borrower's Country and in case of any contract which includes rendering of consultancy services, it provides for sourcing consultancy services from India;
>
> (b) the contract price is specified in Dollars and is not less than $50,000/- (Dollars fifty thousand only) or such amount as may from time to time be agreed upon between the Borrower and EXIM Bank;
> (c) the contract requires the Buyer to make payment to the Seller of 100% (one hundred per cent) of FOB/CFR/CIF contract price of the Eligible Goods (other than services), pro-rata against shipments, to be covered under an irrevocable and non-transferable letter of credit in favour of the Seller;
>
> (d) in the case of Services to be rendered by a Seller in the Borrowers Country, or where the contract requires advance payment to be made by the Buyer to Seller which needs to be financed out of the Credit, the contract provides for the Buyer to cause the Borrower to issue a Payment Authorisation to EXIM Bank to enable the Seller to claim payment from EXIM Bank of the Eligible Value apportionable to the amount of invoice for such services or, as the case may be, the amount of advance payment;
>
> (e) the contract contains a provision that the Eligible Goods shall be inspected before shipment on behalf of the Buyer and the documents to be furnished by the Seller to the Negotiating Bank under the letter of credit arrangement referred to in sub-clause(c) herein shall include an inspection certificate;
>
> (f) the contract also contains a provision to the effect that EXIM Bank shall not be liable to the Buyer or the Seller for not being able to finance purchase of the Eligible Goods or any portion thereof by reason of suspension or cancellation of any undrawn amount of the Credit in terms of this Agreement;
>
> (g) the Borrower has sent to EXIM Bank for its approval brief details of the contract in the format at Annexure-I and such other documents and information as EXIM Bank may require in this behalf, and EXIM Bank has, in writing, approved of the contract as being eligible indicating the Eligible Value thereof.

Reference was also made to the definition of Eligible Goods as given in Clause 1 of the agreement which says "*Eligible Goods" in respect of an Eligible Contract means "any goods and services (including consultancy*

services from India) relating to projects for the development of sugar industry in the Borrower's Country, agreed to be financed by EXIM Bank under this Agreement, out of which goods and services of the value of at least 85% of the contract price shall be supplied by the Seller from India, and the remaining goods and services (other than consultancy services) may be procured by the Seller for the purpose of the Eligible Contract from outside India."

In view of these clauses, it was contended by the learned counsel for the EXIM Bank that the bank is not concerned as to who is the Contractor and will release the funds to the Contractor whoever he may be on the instructions of the borrower, provided the conditions laid down in the Dollar Credit Line Agreement are found to have been fulfilled.

The plaintiff, on the other hand, has sought impleadment of EXIM Bank as defendant No.4 on the ground that defendant No.2, i.e. Tendaho Sugar Factory Project is proceeding with modernization essentially financed by credit line from the EXIM Bank of India and the said Bank being a State is bound to act fairly and not in violation of the order of this Court. On the basis of the averments so made, the prayer clause is also sought to be amended seeking a decree of perpetual injunction restraining EXIM Bank from disbursing any funds in the line of credit opened by it from the Government of Ethiopia.

What needs to be noticed at this stage is that the plaintiff herein had filed a Writ Petition No.2002 of 2008 in the Bombay High Court feeling aggrieved by the appointment of M/s. Overseas Infrastructure Alliance (India) Pvt. Ltd. as Single EPC Contractor by virtue of its having secured two contracts, namely, Power Generation Plant and Juice Extraction Plant and further feeling aggrieved by the approval granted by the EXIM Bank to the appointment of M/s Overseas

Infrastructure Alliance (India) Pvt. Ltd. as Single EPC Contractor. In the said Writ Petition, it prayed for the following reliefs:-

> (a) this Hon'ble Court may graciously be pleased to call for the records of the case from respondent No.1 and after examining the same issue a writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, order or direction quashing or setting-aside the approval dated 21.4.2008 granted by respondent No.1 to contract dated 28.2.2008 entered into between respondent no.2 and respondent No.3.
>
> (b) this Hon'ble Court may further be pleased to issue a Writ of Mandamus or any other appropriate Writ, order or direction, directing respondent No.1 to take all the necessary steps and actions to ensure that (i) the contract for Power Generation Package be awarded to petitioner No.1 being the lowest eligible bidder and (ii) respondent No.3 is removed as the Single EPC Contractor.
>
> (c) pending the hearing and final disposal of the petition, respondent No.1 be restrained from approving/signing of letter of credit, and/or disbursing any funds in any manner towards the said line of credit in favour of the respondent No.3 as Single EPC Contractor for Tendaho Sugar Factory Project or as a successful bidder for the Juice Extraction and Power Generation Packages.
>
> (d) pending the hearing and final disposal of the petition, respondent No.3 be restrained from acting as Single EPC Contractor.
>
> (e) cost of the petition be provided for.
>
> (f) any other and further orders as this Hon'ble Court deems fit in the nature and circumstances of the case be passed.

The Bombay High Court vide judgment dated October 07, 2008 dismissed the Writ Petition. In the present application for impleadment, the relief that is being sought against the EXIM Bank is in effect the same as was claimed before the Bombay High Court by way of prayer (c) noticed hereinabove. In this view of the matter, it will be appropriate to reproduce what Bombay High Court has said in relation to prayer (c). It has held as under:-

> "The clause which requires EXIM Bank to approve the contract requires that EXIM Bank must consider whether the approved contract has become eligible and indicating the eligible value thereof. For the purpose of considering the eligibility what respondent No.1 must consider as set out in their affidavit in reply and the contract terms is to examine, whether the terms of the contract conform to the

> terms of the LOC agreement. In this exercise it only satisfied itself that the terms of the contract viz. such as Eligible Goods, Seller, Eligible Value, Terminal Date for Opening Letters of Credit and Terminal Date for Disbursement conforms to the terms of the LOC Agreement entered into between respondent No.1 and the Government of Ethiopia. The stand of respondent No.1 that it does not involve itself in the process of selecting the exporter, neither does it sanction the bidding process which will be conducted in our opinion is right. This is as it should be. The contracts are invited by the Government of Ethiopia and/or its agency, in the present case respondent No.2. Neither the respondent No.1 nor the respondent No.3 has any control over the said bidding process."

What also needs to be noticed is that another company namely, Saraswati Industrial Syndicate Ltd. had also responded to the invitation of tenders floated by Tendaho Sugar Factory Project and in response thereto, it was awarded the contract for Steam Generation Plant. And what further needs to be noticed, is that like the plaintiff, Saraswati Industrial Syndicate Ltd. has also filed a suit in this Court being CS(OS) No.1368 of 2008 for perpetual and mandatory injunction, alleging therein that it has been wrongly ousted from the project by awarding the contract of Steam Generation Plant to Walchandnagar Industries Ltd. Along with the suit, it had filed an application under Order 39 Rules 1 & 2 of the Code on which similar interim order as was passed in this case was passed restraining M/s Overseas Infrastructure Alliance (India) Pvt. Ltd. from introducing a third party in respect of the tender floated for Steam Generation Plant. M/s. Saraswati Industrial Syndicate Ltd. also filed an application for 'amendment-cum-impleadment' and another application under Order 39 Rules 1 & 2 of the Code seeking ad-interim ex parte order restraining EXIM Bank from taking any steps including approving the substitution of Walchandnagar Industries Ltd. or any other party in its place and/or opening the line of credit and/or disbursing any moneys to M/s Overseas Infrastructure

Alliance (India) Pvt. Ltd. and Tendaho Sugar Factory Project. The learned Single Judge passed no interim order on the said application whereupon Saraswati Industrial Syndicate Ltd. preferred an appeal before a Division Bench of this Court which was registered as FAO(OS) No.472 of 2008 and was disposed of on December 17, 2008. The Division Bench declined the relief basing itself on the submissions of learned counsel for the EXIM Bank and also relied upon the aforesaid judgment of the Bombay High Court dated October 07, 2008.

The relevant paragraphs of the judgment of the Division Bench run as under:-

> We may also note at this stage that the appellant has also filed Civil Contempt under Order 39 Rule 2 A of the CPC alleging violation of orders dated 23.07.2008. It is the submission of the appellant in the said application that in spite of injunction granted by the aforesaid order, the respondent no.1 had gone ahead and had taken measures to introduce the respondent no.3 to the respondent no.2 in place of the appellant. The submission of the learned counsel for the appellant is that when there was an injunction passed on 23.07.2008 whereby the respondent no. 1 was restrained from taking any measures to introduce a third party in place of the appellant, any action taken by the respondent no.1 after 23.07.2008 and introducing respondent no.3 to the respondent no.2 and substituting it in place of the appellant is contemptuous as it constitutes violation of order dated 23.07.2008. In these circumstances, submits the counsel, the learned Single Judge, should have granted injunction as prayed for in I.A. 14363/2008.
>
> Mr. P.P. Malhotra, Additional Solicitor General of India has appeared on behalf of the EXIM Bank. He has pointed out that an agreement has been entered into between the Government of Federal Domestic Republic of Ethiopia and the EXIM Bank, which is dated 04.10.2007. Copy of that agreement is placed before us. He submitted that in pursuance to the said agreement between the two sovereign countries, the EXIM Bank is under a legal obligation to remit the amount to the respondent no.2 by opening Letter of Credit. It was further submitted that the EXIM Bank is not at all concerned with the contract entered into by the respondent no.2 with respondent no. 1 or for that matter, any disputes which arose out of those contracts. It is not even a part to the said contracts. The obligation of the EXIM Bank qua respondent no.2 is independent of all these transactions. We find merit in this submission of Mr. Malhotra.

We may note that a similar issue had arisen in the Bombay High Court in the case of **M/s. Uttam Sucrotech International Pvt. Ltd. v. EXIM Bank (Writ Petition Lodging No. 2002/2008)** and vide judgment dated 07.10.2008 rendered by a Division Bench of that court, similar prayer to restrain the EXIM Bank, though in different factual context, was turned down in the following manner:-

"10. In our opinion, it is not necessary to refer the other contentions except the limited contention of respondent no.3, that the project in question is a sovereign understanding between two countries. The petitioners by the present petition, it is contended are seeking to challenge the tender process of another sovereign country or its nominee without invoking the judicial process of that country or without first seeking remedy through the procedure given in the bid document issued by that country. The bid document and the main contract dated 10th January, 2008 and the contract dated 20th February 2008 clearly provides for all disputes to be covered by the laws of Ethiopia. The petition also it is submitted does not disclose any violation of Articles 14, 19 and 21 of the Constitution of India. The issues raised are not in public interest but are purely beneficial to the petitioner and only in its self interest.

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The clause which requires EXIM Bank to approve the contract requires that EXIM Bank must consider whether the approved contract has become eligible and indicating the eligible value thereof. For the purpose of considering the eligibility what respondent No.1 must consider as set out in their affidavit in reply and the contract terms is to examine, whether the terms of the contract conform to the terms of the LOC agreement. In this exercise it only satisfied itself that the terms of the contract viz. such as Eligible Goods, Seller, Eligible Value, Terminal Date for Opening Letters of Credit and Terminal Date for Disbursement conforms to the terms of the LOC Agreement entered into between respondent No.1 and the Government of Ethiopia. The stand of respondent No.1 that it does not involve itself in the process of selecting the exporter, neither does it sanction the bidding process which will be conducted in our opinion is right. This is as it should be. The contracts are invited by the Government of Ethiopia and/or its agency, in the present case respondent No.2. Neither the respondent No.1 nor the respondent No.3 has any control over the said bidding process.

After noticing the aforementioned paragraphs from the judgment of the Bombay High Court, the Division Bench further held as under:-

> "The Special Leave Petition against the said judgment has also been dismissed by the Supreme Court on December 15, 2008. Therefore, in so far as restrain order sought against EXIM Bank is concerned, this relief cannot be granted to the appellant."

The learned counsel appearing for EXIM Bank and learned counsel for defendant No.1 have heavily relied upon the judgment of the Bombay High Court as well as on the judgment of the Division Bench. On the other hand, it was argued by learned counsel for the plaintiff that the issue before the Bombay High Court was different and reliance upon the same by the Division Bench was misplaced. In support of his submission, reliance was placed upon a judgment of the Apex Court in *Workmen of Cochin Port Trust Vs. Board of Trustees of the Cochin Port Trust and another, reported in (1978) 3 Supreme Court Cases 119,* which is to the effect that a non-speaking order of dismissal without indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided only that it was not a fit case where special leave should be granted but that may be due to various reasons.

I fail to see how the above judgment of the Supreme Court comes to the rescue of the plaintiff.

What after-all is the purpose of the plaintiff in seeking to implead EXIM Bank as a party to the suit? It is to restrain the Bank from granting approval to substitute the plaintiff by Walchandnagar Industries Ltd. or to proceed with funding of the Steam Generation Plant. I feel that the judgment of the Bombay High Court provides the

answer. It appears that the EXIM Bank has no role to play in the process of selecting a sub-contractor. In fact it has nothing to do with even the selection, approval or appointment of sub-contractors. It has also no role to play in the substitution or retention of sub-contractors. Its role is confined only to disbursement of the fund. This is how I look at it and in support I have not only the judgment of the Bombay High Court but also the judgment of the Division Bench of this Court.

For the fore-going reasons**,** the application for amendment is allowed and the prayer for impleadment of Walchandnagar Industries Ltd. with consequential reliefs sought against it is also allowed. However, application, in so far as it relates to the EXIM Bank is dismissed.

REKHA SHARMA, J.

AUGUST 20, 2009
Ka/g