
(2015) 09 CAL CK 0029

In the Calcutta High Court

Case No : GA 3326 of 2013 and CS 231 of 2013

Bengal India Global Infrastructure Ltd.

APPELLANT

Vs

Chaitainya Alloys Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 29-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13 (4)(d), 13(4), 34, 35

Citation : (2015) 09 CAL CK 0029

Hon'ble Judges : Arijit Banerjee, J

Bench : Single Bench

Advocate : Pramit Roy, Senior Advocate, for the Appellant

Final Decision : Allowed

Judgement

Arijit Banerjee, J—This application has been taken out by one of the defendant banks for deletion of its name from the array of the defendants impleaded in the suit.

2. The plaintiff and the defendant No. 1 are Limited Companies. The defendant Nos. 2 to 9 are all nationalized banks. The case pleaded in the plaint is that since 2012, the plaintiff from time to time sold and delivered diverse quantities of MS scraps, TMT bars, MS angles, MS channels etc. to the defendant No. 1 valued at Rs. 36,15,57,600/-. The defendant No. 1 received and accepted the said goods and the bills raised by the plaintiff without any objection or demur and consumed the said goods. In spite of requests and demands, the defendant No. 1 failed to pay to the plaintiff the price of the said goods being Rs. 36,15,57,600/- or any portion thereof. As such, the said sum along with interest at the rate of 24 per cent per annum is due and payable by the defendant No. 1 to the plaintiff.

As regards the reason given for impleading the defendant Nos. 2 to 9 in the suit, it is best to set out paragraphs 12 to 14 of the plaint:

"12. By virtue of the agreements entered into by and between the plaintiff and the defendant Nos. 2 to 9 in or about early 2013, the plaintiff unconditionally and unequivocally agreed and undertook that the monies due and owing from, inter alia, the defendant No. 1 to the plaintiff would stand as security for loans and advances made/to be made to the plaintiff by the defendant Nos. 2 to 9. The defendant No. 2 is the lead banker in the consortium of the defendants bankers.

13. In view of the defendant No. 1 having failed, neglected and refused to honour its obligation to make payment to the plaintiff in respect of the aforesaid dues, the plaintiff has been unable to make payment to the defendant Nos. 2 to 9.

14. In the circumstances, the monies due and owing to the plaintiff from the defendant No. 1 should be paid to the defendant Nos. 2 to 9 through the defendant No. 2 as the lead bank."

The primary prayer in the plaint is for a decree for Rs. 38,32,51,056/- against the defendant No. 1 in favour of the plaintiff with a direction to pay the decretal amount to the defendant No. 2 as the lead bank in discharge of the plaintiff's liability to the defendants bankers.

Contention of the defendant/applicant:--

3. The plaintiff has availed financial facilities from the defendant Nos. 2 to 9 and has executed financing documents wherein the plaintiff has admitted his liabilities and obligations. As security for the financial assistance given by the defendant Nos. 2 to 9 as a consortium of banks, the plaintiff has executed security documents and has created charge over its movable properties in favour of the defendant banks. The directors of the plaintiff along with other persons have executed personal guarantees in favour of the defendant banks. The plaintiff has failed to repay its loans and as on 31st July, 2013 its debts to the consortium of banks stood at Rs. 139,05,97,844.70 (approximately) along with unrealised interest to the tune of Rs. 9,79,82,994/- and unrealised penal interest to the tune of Rs. 18,66,327/-.

4. The account of the plaintiff with the applicant became a Non-Performing Asset as per the guidelines issued by the Reserve Bank of India and the plaintiff's account has been classified as NPA. The applicant has taken steps against the plaintiff under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act) as also under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short the DRT Act). The plaintiff has impleaded the defendant Nos. 2 to 9 in this suit in an attempt to thwart or put an embargo on the proceedings under the SARFAESI Act and the DRT Act.

5. The plaintiff has no cause of action against the defendant banks nor does the plaint disclose any such cause of action. The plaintiff has not made any allegation against the defendant banks. No relief has been claimed against the defendant

banks in the suit. The defendant banks are neither necessary nor proper parties to the suit. The presence of the defendant banks before this court is in no way necessary for effective and complete adjudication of the issues involved in the suit. The defendant banks have no role to play in the proceedings in the suit. In the guise of seeking a direction on the defendant No. 1 to pay to the defendant No. 2 as the lead consortium banker, its alleged dues to the plaintiff, the plaintiff is, in fact, attempting to block the defendant banks from taking independent recourse to the provisions of SERFAESI Act and DRT Act for recovery of their dues from the plaintiff. Moreover, the suit is a collusive one to protect the interest of the plaintiff and the defendant No. 1 and to play fraud upon the defendant banks. Unless the names of the defendant Nos. 2 to 9 are expunged from the array of defendants in the suit, their rights to take action under the SARFAESI Act and the DRT Act could be affected and/or curtailed. Hence, the name of the defendant Nos. 2 to 9 should be deleted from the cause title, body and prayer portion of the plaint and the plaint should be directed to be amended accordingly.

6. In support of its case, the defendant/applicant has relied on the following decisions:--

"(i) ANIIDCO Ltd. v. M/S. DYC Self-Help Group reported in 2013 (2) CLJ (Cal). In that case the Trial Court had allowed the application of the defendant No. 2 for deletion of its name from the array of defendants in the suit. The plaintiff's revisional application against the Trial Court's order was dismissed by a Ld. Judge of this Court. The Ld. Judge found that there was no specific pleading as to the cause of action against the defendant No. 2 nor was there any specific prayer against the said defendant and the defendant No. 2 had no role to play in the suit. Accordingly the Trial Court's order was upheld.

(ii) Arjan Singh and others Vs. Kartar Singh and others . In that case a Division Bench of the Punjab and Haryana High Court held that Order 1 Rule 10(2) of the Code of Civil Procedure gives wide discretion to the court to meet every case of defect of parties, but the power must be exercised on judicial principles and not arbitrarily. One of the well-known principles in this respect is that the presence of the persons added must be necessary to effectually and completely adjudicate upon and settle all the points involved in the suit and that a party should not be added merely to avoid multiplicity of suits.

(iii) Ashyana Construction Vs. Md. Omar and Another, (2012) 4 CALLT 138 : (2013) 1 CHN 343 . In that case a Ld. Judge of this Court held that under Order 1 Rule 10(2) of the CPC only two classes of persons may be added as parties to a suit. Firstly, a necessary party, that is a person who ought to have been joined as a party and in whose absence no decree or order can be passed. Secondly, a proper party that is a person whose presence is necessary for complete and effectual adjudication of the questions involved in the suit. If a person is neither a necessary nor a proper party, he cannot be impleaded in a suit. A person cannot be impleaded merely because he would be incidentally affected by the

judgment or is interested in the fruits of the litigation, or his presence may enable the court to come to a correct solution of the dispute before the court. What is to be seen in allowing or disallowing an application for addition of a party is whether such addition would be consistent with the scope of the inquiry necessitated in the pending suit and in the absence of such a party it would not be possible to completely and effectually adjudicate the controversy raised before the court.

(iv) International Air Transport Association Vs. Aziz Fatima Hasnain and Another, AIR 1985 Delhi 381 : (1985) 28 DLT 208 . In that case the Delhi High Court held that the power to strike off the name of any party improperly joined can be exercised at any stage of the proceeding and even before the filing of the written statement. Such an order can be passed suo motu or on the application of the party. The question for determination is whether the party was improperly joined as plaintiff or defendant. If the court concludes that the plaintiff or defendant has been improperly joined, the name of such party can be struck out. The party introduced to a litigation who has no connection with the relief claimed in the plaint is neither a necessary not a proper party.

(v) Smt. Durga Das and Others Vs. M/s Solace and Associates, (2012) 3 CHN 517 . In that case in a suit involving disputes between two groups, UCO Bank was sought to be added as a party. The Ld. Judge held that in considering an application under Order 1 Rule 10(2) of the CPC the Court can refuse to exercise discretion in the event it is found that a step has been taken under a statute which provides for a complete remedy and having regard to the fact that a financial institution has already initiated a proceeding under the SARFAESI Act, which is a complete code in itself, the court can refuse to exercise such discretion. The Ld. Judge referred to Section 34 of the SARFAESI Act which ousts the jurisdiction of the Civil Courts and also to Section 35 of the said Act which is a non obstante clause."

Contention of the Plaintiff/Respondent:--

7. Appearing on behalf of the plaintiff Mr. Roy, Ld. Senior Counsel submitted that the suit has been instituted by the plaintiff bona fide for recovery of money from the defendant No. 1 with a direction upon the defendant No. 1 to make payment of the decretal sum to the defendant No. 2 as the lead bank of the consortium. If the plaintiff did not implead the defendant banks as parties to the suit, the same would have amounted to suppression of material facts since the plaintiff has assigned its book debts as security to the defendant banks which includes the plaintiff's dues from the defendant No. 1.

8. It was submitted that the defendant banks have been made parties to ensure transparency and disclosure. The defendant banks are proper parties if not necessary parties to the suit.

9. The defendant No. 2 as the lead bank and in exercise of its power under Section 13(4) of the SARFAESI Act by a letter dated 19th April, 2014 called upon

the defendant No. 1 to make payment of the dues of the defendant No. 1 to the plaintiff directly to the authorised officer of the defendant No. 2. Hence, the suit is in the nature of a proceeding initiated by the plaintiff in accordance with the provisions of Section 13 (4)(d) of the SARFAESI Act and the same cannot be prejudicial to the interest of the defendant banks.

10. It was further submitted that the intention of the defendant No. 2 as expressed in the letter dated 19th April, 2014 and the prayer of the plaintiff in the suit are one and the same and the defendant cannot have any reason for resisting the same especially since the plaintiff has not sought any relief against the defendant banks. There is a jural relationship between the plaintiff, the defendant No. 1 and the defendant banks and the suit has been instituted by the plaintiff bona fide to facilitate the recovery of the money from the defendant No. 1 in favour of the defendant banks. Mr. Roy further submitted that not only is the presence of the defendant banks necessary for passing of an effective decree but also to facilitate the adjudication of all questions involved in the suit. Their presence is necessary for a complete and final decision on the questions involved in the suit. In support of his submission Ld. Counsel relied on a decision of the Hon"ble Supreme Court in the case of Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar, AIR 1963 SC 786 : (1963) 1 SCR 676 Supp . In that case it was observed a proper party is one whose presence is not necessary for making an effective order but whose presence may facilitate the settling of all the questions that may be involved in the controversy. Mr. Roy also relied on a decision of the Hon"ble Supreme Court in the case of Jugraj Singh and Another Vs. Jaswant Singh and Others, AIR 1971 SC 761 : (1970) 2 SCC 386 : (1971) 1 SCR 38 : (1971) 3 UJ 379 which is also to the same effect.

11. The next decision relied upon by Mr. Roy is in the case of Anil Kumar Singh Vs. Shivnath Mishra alias Gadasa Guru, (1995) 1 JT 273 : (1994) 4 SCALE 953 : (1995) 3 SCC 147 : (1994) 5 SCR 135 Supp . In that case the Hon"ble Supreme Court observed that a person may be added as a party defendant to the suit though no relief may be claimed against him/her provided his/her presence is necessary for a complete and final decision on the question involved in the suit. Such a person is only a proper party as distinguished from a necessary party. Mr. Roy also relied on a decision of the Hon"ble Supreme Court in the case of U.P. Awasthi Vs. Vikas Parishad Vs. Gyan Devi (Dead) by L.Rs. and another, etc. etc., AIR 1995 SC 724 : (1994) 4 SCALE 755(1) : (1995) 2 SCC 326 : (1994) 4 SCR 646 Supp . In that case the Hon"ble Supreme Court reiterated the test of necessary and proper party that it had laid down in the case of Udit Narain Singh Malpaharia (supra).

12. Mr. Roy further submitted that the present suit does not stand in the way of the defendant banks taking action under the SARFAESI Act or the DRT Act. The defendant banks are at liberty to approach the DRT for recovery of their dues or may take any steps that may be entitled to in law under the SARFAESI Act and this court can clarify the same. The plaintiff has filed the suit to facilitate

recovery of the dues of the defendant banks and the banks can have no legitimate grievance for being impleaded as defendants in the suit. Further, if according to the defendant banks the suit is a collusive one between the plaintiff and the defendant No. 1, then there is all the more reason for the defendant banks not to walk away from the suit as that would give the plaintiff a free hand.

13. Mr. Roy finally submitted that Section 34 of the DRT Act has no manner of application to the present suit since the subject matter of the suit is not triable by the DRT.

14. I have considered the rival contentions of the parties.

15. The only question that arises for determination in the present application is whether or not the applicant bank has been improperly added as a party defendant in the suit. Order 1 Rule 10(2) of the CPC vests the court with wide discretion to strike out the name of a party, whether a plaintiff or a defendant, from the records of the suit if that party has been improperly impleaded in the suit. Similarly, the court is given the power to add a party as a plaintiff or defendant to a suit if the court feels that the presence of that party before the court is required. The provision of the Code is reproduced hereunder:--

"10.(2) Court may strike out or add parties.- 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."

16. The question then arises as to whom a plaintiff should implead as a defendant while instituting a suit. The answer has been settled by several judicial decisions some of which have been discussed above. From the judicial precedents, it is clear that only necessary and proper parties should be impleaded as defendants in the suit. A necessary party is one without whose presence no effective decree/order can be passed by the court. All parties against whom reliefs are claimed and whose legal rights are liable to be curtailed and/or adversely affected by a decree/order passed in the suit are necessary parties to the suit. Since the decree/order passed in the suit is executable against such parties, they must have the opportunity of contesting the suit. The proper parties, on the other hand, are those in whose absence an effective order may be passed but whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In other words, a proper party is one whose participation in the suit, according to the court, would facilitate adjudication of all the issues involved. It follows that all necessary parties are proper parties but not vice-versa. The addition of parties is generally not a question of initial

jurisdiction of the court but of a judicial discretion which has to be exercised in the light of the facts and circumstances of a particular case.

17. As observed by Sen, J. in the case of *Durga Das v. Solace And Associates* (supra) a proper party is one who has a defined, subsisting, direct and substantive interest in the issues arising in the litigation, an interest which will be cognizable in the court of law and which the court will enforce. A person who is only indirectly or commercially interested in the proceedings, is not entitled to nor liable to be added as a party. If he is a person who is not interested in the questions which arise between the parties to the litigation, that is, a question with regard to the rights set up and the relief claimed by the plaintiff and withheld by the defendant, he cannot be impleaded as a party. The reason is that the scope of a suit will be enlarged, trial of the suit will be embarrassed, and considerable prejudice will be caused to the contesting parties, if irrelevant matters are allowed to be agitated, by adding a party whose interest in the litigation has no nexus to the subject matter of the suit.

18. A person cannot be impleaded merely because he would be interested in the fruits of the litigation. The main object of the rule is not to prevent multiplicity of actions or avoid fresh litigation but to consider whether the person is interested directly or legally in the action.

19. In the case of *Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others*, (1992) 2 JT 116 : (1992) 1 SCALE 530 : (1992) 2 SCC 524 : (1992) 2 SCR 1 : (1992) 2 UJ 181 of the judgment the Hon'ble Supreme Court observed as follows:--

"14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in *Amon v. Raphael Tuck & Sons Ltd.*, (1956) 1 All E.R. 273, wherein after quoting the observations of Wynn-Parry, J. in *Dollfus Mieg et Compagnie S.A v. Bank of*

England, (1950) 2 All E.R. 611, that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated:-- "The test is "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights."

20. The question that, therefore, arises in the facts of the present case is as to whether or not the applicant bank is a necessary and/or proper party to the instant suit. If the answer to this question is in the affirmative, then the present application must fail and the applicant bank cannot be allowed to exit the arena of the suit. If, however, the question is in the negative, it must be held that the applicant bank has been improperly impleaded as a party defendant and in that event the application will succeed.

21. The scope of the suit is extremely narrow. The plaintiff claims to have supplied goods to the defendant No. 1 and alleges that the defendant No. 1 has not paid the price of such goods. The suit is for recovery of price of goods already sold and delivered by the plaintiff to the defendant No. 1. The only issue involved in the suit is whether or not the plaintiff has supplied the goods to the defendant No. 1 and whether having accepted such goods the defendant No. 1 is liable to pay the price therefor to the plaintiff. The decree claimed is also solely against the defendant No. 1. There is no allegation against the applicant bank in the plaint. In the prayer portion while claiming the money decree against the defendant No. 1 the plaintiff has also prayed for a direction on the defendant No. 1 to pay the decretal amount to the defendant No. 2 in its capacity as the leader of the consortium of defendant banks. Only on this basis the defendant banks have been dragged into the suit and have been impleaded as parties.

22. The plaintiff contends that moneys are due from it to the defendant bank and if the plaintiff sought to recover its dues from the defendant No. 1 without making the defendant banks parties to the suit, the banks would complain of suppression of material fact and of dishonest motive on the part of the plaintiff to recover its dues from the defendant No. 1 behind the back of the defendant banks. That is the reason why, according to the plaintiff, the banks have been added as party defendants in the suit.

23. I do not find the reason advanced by the plaintiff convincing at all. I do not see how the defendant banks can be interested in what action the plaintiff takes against the defendant No. 1 to recover its alleged dues from the defendant No. 1. To my mind, the presence of the defendant banks in the suit is not essential for the court to be able to pass an effective decree against the defendant No. 1 and in favour of the plaintiff. Further, in my opinion, the presence of the defendant banks before the court is in no way necessary for effectual and complete adjudication of the issues involved in the suit. Hence, the defendant banks including the applicant are neither necessary nor proper parties to the suit. The defendant banks are strangers to the alleged cause of action of the

plaintiff against the defendant No. 1.

24. The plaintiff has contended that since no reliefs are claimed against the defendant banks in the suit, the defendants cannot be prejudiced in any manner by reason of them having been impleaded in the suit. In my opinion, it is not a question of prejudice that is relevant. If the defendant banks are not necessary or proper parties to the suit, plaintiff has no right to implead them as party defendants. There is no reason why the suit should hang over the heads of the defendant banks like a Damocles' Sword. There can be no justification as to why the defendant banks should be forced to participate in a proceeding with which it has no connection by spending valuable time and money.

25. The plaintiff has also contended that it has impleaded the defendant banks to facilitate recovery of their dues from the plaintiff by direct payment by the defendant No. 1 to the defendant No. 2 under decree of the court. I am not sure that the plaintiff, in fact, has such an altruistic motives in impleading the defendant banks in the suit. Rather, I am more inclined to believe that the defendant banks have been impleaded as parties so that the plaintiff can try and use the suit as a shield to actions taken by the defendant banks against the plaintiff for recovery of the dues of the banks from the plaintiff under the DRT Act and/or SARFAESI Act. One can take judicial notice of the fact that a court or a tribunal inferior to this court feels inhibited in proceeding with an action if another action, even if remotely connected, is pending before this court. The defendant banks should not be embroiled in the dispute between the plaintiff and the defendant No. 1 and they should be free to take steps in accordance with law for recovery of their dues from the plaintiff before the appropriate forum. After all, the defendant banks deal with public money and there should be no impediment in the way of the defendant banks recovering their dues from the plaintiff.

26. There should be no reason as to why the recovery of the dues of the defendant banks from the plaintiff should be contingent upon the plaintiff succeeding in obtaining a decree in the suit against the defendant No. 1. The defendant banks have no connection with the defendant No. 1. Their debtor is the plaintiff and they wish to proceed against the plaintiff in their own way to recover their dues. They apprehended, which apprehension in my opinion is not without basis, that unless they are disassociated from the present suit and their names are removed from the records of the suit, pendency of the suit will pose undue and unwarranted hurdles in the way of recovering their dues from the plaintiff by instituting appropriate proceedings before the appropriate forum or otherwise in accordance with law.

27. I am of the considered view that the plaintiff has not impleaded the defendant banks as parties bona fide or out of any altruistic motive. Rather, the plaintiff has done so, with the oblique motive of deflecting the actions taken or likely to be taken by the defendant banks against it for recovery of the bank's dues from it.

28. Looking at the matter from another angle, if on a meaningful reading of the plaint, it discloses no cause of action against some of the defendants, the suit should not be allowed to continue against such defendants. This can be achieved either by dismissing the suit against those defendants or by taking the plaint off the file as against those defendants or by deleting the names of those defendants from the array of defendants in the suit. As V.R. Krishna Iyer, J. observed in his celebrated dicta in the case of T. Arivandandam Vs. T.V. Satyapal and Another, AIR 1977 SC 2421 : (1977) 4 SCC 467 : (1978) 1 SCR 742 : (1977) 9 UJ 697 , if on a meaningful reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, and if deft drafting has created only an illusion of a cause of action, the suit should be nipped in the bud. Courts should insist imperatively on examining the plaint at the first opportunity so that bogus litigation can be shot down at the earliest stage. In my opinion, the aforesaid principle applies squarely to the facts of the instant case in so far as the defendant Nos. 2 to 9 are concerned. As stated above, I am of the view that the defendant Nos. 2 to 9 have not been impleaded in the suit for any legitimate cause but with ulterior motive.

29. For the reasons aforestated, this application succeeds. The name of the applicant bank is directed to be struck off from the cause title, body and prayer of the plaint. The department shall carry out the necessary amendment to the plaint within a fortnight from date. There will, however, be no order as to costs.

30. Urgent certified Photostat copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Later:

After the judgment is delivered, Mr. Roy, Ld. Counsel for the plaintiff, prays for stay of operation of the judgment. The same is opposed by Ms. Doshi appearing on behalf of the defendant Nos. 2 to 9. However, considering the facts and circumstances of the case, I am inclined to grant a limited stay so that the plaintiff may, if it wishes, approach the Hon"ble Appeal Court to test the correctness of this judgment and order. There shall be stay of operation of this judgment and order for a period of two weeks from date.