

(2003) 04 DEL CK 0093

In the Delhi High Court

Case No : I.A. No. 1082 of 2001 in S. No. 1238 of 1996

Steel Authority of India Ltd.

APPELLANT

Vs

Dr. R.N. Jain and Others

RESPONDENT

Date of Decision : 02-04-2003

Acts Referred:

Citation : (2003) 3 AD 289 : (2003) 3 BC 246 : (2003) 105 DLT 81 : (2003) 70 DRJ 86 : (2003) 45 SCL 26

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : Dipak Bhattacharya and Seema Sharma, for the Appellant; A.P. Gupta, for defendant-2 and LR's of defendant-1, for the Respondent

Final Decision : Allowed

Judgement

Manmohan Sarin, J.—By this application under Order VI Rule 17CPC, plaintiff seeks impleadment of defendant No. 3 in the suit filed under xxxvII CPC. The amendment sought have been detailed in para 6 of the application. The amendments give the reasons for not seeking any relief against defendant No. 3 company, which was having a reference pending before the Board for Industrial and Financial Reconstruction (for short "BIFR) under Sections 16 and 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short "SICA").

Reply to the said application has also been filed. The application also sets out the consequential amendments required for disclosing the cause of action against defendant No. 3.

2. It is not necessary for me to go into the details and contents of the amendments sought since the defendants' objection as to amendment not being permitted, are on account of the plaintiff's alleged failure to seek and obtain permission for institution of the suit against defendant No. 3 u/s 22 of SICA, which contains a specific stipulation for the same. Accordingly, the facts essential for appreciation of the objections as raised by the defendants, are only being

noticed.

3. (i) plaintiff had instituted a suit under Order xxxvII CPC for recovery of a sum of Rs. 2,77,82,767/- (Rupees Two crores seventy seven lacs eighty two thousand seven hundred and sixty seven only) against defendant Nos. 1 and 2. Defendant No. 3 had also been arrayed as a party. However, in the prayer clause decree had been sought only against defendants 1 and 2, no relief had been sought against defendant No. 3.

(ii) Defendants 1 and 2 happened to be the Directors and guarantors, who as per the plaint had given the guarantee/surety in their personal capacity. plaintiff in paras 27 and 28 of the plaint had averred that no claim was being preferred against defendant No. 3 on account of the legal bar contained in Section 22 of the SICA and it reserved its right to claim the amount from defendant No. 3, as and when the legal bar was removed. In para 28, averment was made that the bar u/s 22 of the SICA would not ensure to the benefit of defendants 1 and 2. The claim in the suit being in respect of goods sold and supplied by plaintiff to defendant No. 3, payment of which was guaranteed by defendants No. 1 and 2.

(iii) plaintiff had also moved along with the plaint an application under Order II Rule 2 vide I.A. No. 4716/1996, wherein leave had been sought to sue defendant No. 3 for the relief claimed in suit as and when legal bar was removed. Notice of this application had been issued to the defendants, but no reply was filed.

(iv) Reference under Sections 16 and 17 of SICA in respect of defendant No. 3 was made on 22nd August, 1994. As such, the bar u/s 22 became applicable from the said date. plaintiff has handed over in Court the summary record of proceedings before BIFR held on 29.12.1999. The said proceedings record that despite hearings from July, 1995 to November, 1996, no viable and agreed rehabilitation proposal could emerge. There was also failure to make payment in terms of one time settlement propounded and also within the time as granted by AAIFR in appeal. Defendant No. 3 had also preferred a writ petition being CWP No. 4088/1997, which was dismissed on 22.9.1999, following which the proceedings were held on 29.12.1999, to consider the matter further. The proceedings record that defendant No. 3's promoters and Directors had failed to convince the Board about their seriousness and resourcefulness to revive the sick company, rather proceedings had been prolonged for nearly 5 years, thereby the company continued to remain under the protective umbrella of Section 22(1) of the Act. Consequently order was passed that company was not likely to become viable in future and it was just, equitable and in public interest that it be wound up u/s 20(1) of the Act.

4. It may be noted that the plaintiff on 19.1.1998 had preferred another application I.A. No. 548 /1998, for being permitted to proceed against defendant No. 3 in the present suit. plaintiff claims that it had moved the said application since it made enquiries from BIFR and was otherwise advised that the protection u/s 22 may not ensure to the benefit of defendant No. 3. Learned counsel Mr.

Bhattacharya points out that vide order dated 18.10.2001, my learned predecessor had observed that the plaintiff may in accordance with law seek amendment in the plaint so that suit against defendant No. 3 could proceed. It is pursuant to the said order and the bar u/s 22 having been lifted in view of order in the proceedings dated 29.12.1999, that the present application has been moved.

5. Mr. A.P. Gupta, learned counsel for the defendants submits that the suit having been instituted on 18.5.1996, initially included defendant No. 3, though no relief was sought against it. He submits that by an amendment defendant No. 3 cannot now be made liable as the period of limitation for claiming relief against defendant No. 3 stands expired. Secondly, Mr. Gupta submits that it was always open for the plaintiff to invoke the provision u/s 22 of the SICA, which could have enabled it to seek permission of BIFR for instituting a suit even though the proceedings were pending under Sections 16 and 17 of SICA. In other words, he submits that Section 22 of SICA itself has an enabling provision. plaintiff having failed to avail of the same and having waited for the bar to be lifted by itself, cannot claim that the suit against defendant No. 3 is within time. He also submits that filing of I.A. No. 548/1998 itself shows that as per the plaintiff, they could proceed with the suit. In case this was so, the amendment should have been sought at the same time as of moving the application I.A. No. 548/1998.

6. I have given my anxious consideration to the pleas, as raised by both the learned counsel. The factual position, which emerges, is that the suit was instituted in May, 1996, including the defendant No. 3, but not claiming any relief against the said defendant. Application under Order 2 Rule 2 CPC was also moved, notice of which was issued, but no formal orders allowing the same were passed. I.A. No. 548/1998 was also moved stating that informal enquiry revealed that the bar u/s 22 was not operative as the plaintiff had not been shown in the list of creditors filed by defendant No. 3 company. Notice of this application was also issued but no orders have till now been passed. The order passed on 18.10.2001, which allowed I.A. No. 548/1998 and observed that plaintiff may move formal application for amendment. From the foregoing, it would be seen that when the suit was instituted, there was a bar on institution and proceedings with the suit, against defendant No. 3, since proceedings under Sections 16 and 17 of SICA were pending. Even if the plaintiff had moved an application I.A. No. 548/98, by which leave to sue was sought, the fact remains that the bar u/s 22 got extinguished only with the order passed in the proceedings on 29.12.1999 when the Board finally put the nail in the coffin by holding that it was just and equitable that the company be wound up. That was the culmination and end of the protection u/s 22 of SICA. The plaintiff thereupon moved the application for amendment on 30.1.2002. Mr. Bhattacharya submits that as I.A. No. 548/1998 was allowed only on 18.10.2001, the plaintiff immediately followed it up with the amendment application.

7. I may, however, even notice that Section 15(1) of the Limitation Act, makes a

provision for exclusion of time taken where the institution has been stayed by an injunction or order of the Court. In the present case the pendency of the reference and the statutory bar u/s 22 are akin to an order contemplated u/s 15(1) of the Limitation Act, 1963. This period would be exigible for exclusion u/s 15(1) of the Limitation Act. Alternatively, even if the failure of the plaintiff to move an application for amendment immediately after 29.12.1999, as is being urged by learned counsel for defendants was to be considered, the defense would be that the plaintiff was bona fide pursuing the application I.A. No. 548/1998 and it was a mistake made in good faith that the amendment application was not preferred simultaneously, and thus the period was eligible for exclusion u/s 21 of the Limitation Act. I have noticed the submissions and provision, since bar of Limitation was sought to be urged. The observations are on a prima facie view of the matter. Although at the stage of allowing the amendments, the merits of the objections raised need not be considered. Be it may, the fact which stares on record is that plaintiff had instituted the suit initially with defendant No. 3 imp leaded as a party. It was only on account of the bar u/s 22 of the SICA that the relief had not been sought. This bar got lifted on 29.12.1999, whereupon plaintiff sought disposal of the application under Order 2 Rule 2CPC and seeking permission to proceed against defendant No. 3. Besides the amendment otherwise also deserves to be allowed as it would result in final adjudication of the matter in controversy and the presence of defendant No. 3 is necessary for the same. In view of the foregoing discussion the objections of the defendants to the application are rejected. I.A. No. 1082/2001 is allowed subject to payment of Rs. 2000/- as costs. Let the amended plaint as filed be taken on record.