
(2003) 03 DEL CK 0054

In the Delhi High Court

Case No : IA 11228 of 2002, 224, 569 and 1247/03 in S. No. 1948/02

Structural Waterproofing Company Pvt. Ltd.

APPELLANT

Vs

Continental Foundation Joint Venture and Others

RESPONDENT

Date of Decision : 07-03-2003

Acts Referred:

Citation : (2003) 2 AD 613 : AIR 2003 Delhi 356 : (2003) 103 DLT 552

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Sandeep Sethi and Manoj Kumar, for the Appellant; Rudra Kishan, for Defendants 1 and 3 and Shahid Azad, for Defendant No. 2, for the Respondent

Judgement

Vikramajit Sen, J.—This order shall dispose of all the above mentioned applications. I.A. 11228/2002 has been filed by the plaintiff under Order XXXIX Rules 1 and 2 of the CPC and accompanies the plaint. On 18.12.2002 the Defendants were restrained from selling, agreeing to sell, alienating or parting with possession of the property bearing Nos. Continental House, 28-29, Nehru Place, New Delhi-110019.

2. I.A. 224/2003 is for the issuance of Summons for Judgment. Since the question of whether to grant Leave to Defend to the Defendants shall be addressed in these Orders. This application stands disposed of.

3. I.A. 569/2003 has been filed by the Defendants under Order VII Rule 11 praying for the dismissal of the suit and also for the initiation of criminal contempt. Counsel for Defendants, however, has not argued or pressed the prayer for Contempt of Court.

4. I.A. 1247/2003 has been filed by Defendant Nos. 2 seeking Leave to Defend. Defendant Nos. 1 and 3 have filed an affidavit seeking Leave to Defend without a formal application. The affidavit filed by Defendants 1 and 3 be numbered as an interim application.

5. The plaintiff's case is that Defendants 2 and 3 had constituted a Joint Venture in the name and style of Defendant Nos. 1, all three of them doing business from the same premises i.e. Continental House, 28-29, Nehru Place, New Delhi-110019. It has been averred that Defendant Nos. 2 and 3 represented to the plaintiff that in case Defendant Nos. 1 failed to make payment, they would be liable for it. It has been further alleged that the Defendants placed oral orders from time to time for the supply of Resin Capsules and Cement Capsules etc. In the Purchase Orders it has been mentioned that interest at the rate of 25 per cent will be charged on the outstanding beyond thirty days of delivery. All the Invoices pertaining to the claim have been filed in original amounting to Rs.18,86,679.83. All the supplies were made by the plaintiff from B-29, Sector 4, District Goutam Budhnagar, Noida (U.P.). Neither the receipt of these Invoices nor supplies made against it have been denied.

6. The contention of Defendants 1 and 3 is that they had paid a sum of Rs.21,14,243 to M/s. Cico Technologies Limited on 13.2.2002. Although this was challenged by the plaintiffs earlier, it is no longer in dispute consequent upon the filing of an affidavit along with the Statement of Account of Citibank, New Delhi by Defendants 1 and 3. The contention of these Defendants, however, is that with the payment of the said sum to Cico Technologies Limited, all their liabilities against the sundry bills detailed in Annexure P-II stood fully and finally discharged. It has been contended by learned counsel for these Defendants that there has been material suppression of facts in that the plaint does not mention a formal settlement whereby the businesses of plaintiff family were divided. According to the Defendant, this division took place by virtue of Memorandum of Understanding (MoU) dated 1.2.2000 between Shri Sumit Gupta and Shri Amit Gupta, sons of late Shri Santosh Ranjan Gupta and Smt. Dipti Gupta, the widow of late Santosh Ranjan Gupta. The terms of the MoU were, inter alia, as follows:

"The assets & liabilities of SWC, New Delhi and Noida will be taken over by SG Group and Ag Group respectively as under:

a) The Factory at B-29, Sector-IV, Noida (U.P.) will go to SG Group. It is agreed between the parties that AG will shift the Lab which is presently at H-76, Sector-IX, Noida Factory and the ISCREW MIXTURE Machine, either to B-29 Factory or any other location as suggested by SG Group along with the existing facilities of ISI and ISO.

b) The Factory at 11-76/Sector-IX, Noida and H-78/Sector-IX, Noida will go to AG Group (Any liability during and after the aforesaid transfer will be borne by AG Group).

c) All the assets & liabilities attached to B-29/Sector-IX, Noida Factory will be taken over by SG Group. While all the assets and liabilities attached to H-76 and H-78 Factories will go to AG Group. The assessment of assets and liabilities attached to the factories will be determined by an independent person and should be accepted by both the SG and AG Groups.

d) All the assets and liabilities of SWC, New Delhi (Contract Divn.) and CES will taken over by SG Group.

e) The residential house at S-29 Greater Kailash-II, New Delhi-110048, which under the occupation of Sh. Amit Gupta and family will remain under their absolute possessions and out of the control of SG Group and the same will be transferred to Sri Amit Gupta or to the Company, fully owned and controlled by AG Group (The factory at 11-76/Sector-IX, Noida and 11-78/Sector-IX, Noida will go to AG Group. Any liability during and after the aforesaid transfer will be borne by AG Group).

f) The AG Group will sign a DEED OF DISCLAIMER that they will not use any of the product name as mentioned in the Annexure-I of the MOU."

7. It has been further disclosed in the application for Leave to Defend that family disputes came up before this Court in Suit Nos. 1118/2001. By the Order dated 11.7.2001 Hon"ble Justice J.D. Kapoor had observed, inter alia, that "without going into this aspect of the matter whether the Memorandum of Understanding was executed by way of playing fraud or coercion but in view of the fact that each and every term of Memorandum of Understanding has been acted upon and given effect to by both the parties, the plaintiff is not entitled to interim injunction against the terms of settlement." It has been jointly stated by counsel for the parties that this Order was unsuccessfully assailed before the Division Bench of this Court and thereafter by SLP before the Hon"ble Supreme Court. Keeping the MoU as well as the Orders in perspective, the Defendants 1 and 3 were advised to make the payment of the amounts outstanding against the nine bills to M/s. Cico Technologies Limited and they did so in February 2002. Failure to disclose these facts, according to counsel for Defendants 1 and 3, calls for the dismissal of the suit. It has also been contended that the plaint does not disclose cause of action inasmuch as all the facts leading up to the filing of the suit have not been disclosed. It has also been contended that Cico Technologies Limited was a necessary party and since it has not been impleaded the suit deserves to be dismissed. The claim as articulated in the plaint is directed only towards Defendants 1 and 3. I find no merit in this submission. Along with the plaint the plaintiff's letter dated 17.10.2000 has been filed, the contents of which are relevant and are reproduced below:-

"... We would also like to bring your kind attention that there has been restructuring in our company (SWC) and a company by the name of CTL (CICO Technologies Ltd) which has separated from SWC and has been writing to our esteem clients asking them to make the payment in the name of CTL. However, this is totally illegal and we would request you to kindly do not make any payment to them.

You may kindly note that they have also written letters to our esteem clients on the letter head of `THE STRUCTURAL WATERPROOFING COMPANY PVT LTD'(SWC) that payment/orders should be placed in the name of CTL. If they

have written a letter of such nature to you, kindly ignore the same as it is illegal. We are taking separate action to this effect. Kindly let us know if they have written such letter to your esteemed organisation.

We would once again request you to kindly release our payment and place your valuable order on us."

It was for this reason that I.A. 569/2003 under Order VII Rule 11 of the CPC has been filed. So far as this objection is concerned I find no merit in it. The suit is for recovery of money against bills and supplies made. Internecine disputes between the plaintiff and his brother are of little relevance whatsoever.

8. In reply to the contention of the Defendants that payment to Cico Technologies Limited could afford a valid discharge to the Defendants liability to the plaintiff, namely, M/s. Structural Waterproofing Company Private Limited, learned counsel for the plaintiff has relied heavily on the correspondence exchanged between the parties prior to the making of the payment. In its letters dated 11.12.2000 & 22.1.2001 a demand for release of Rs.18,86,679.83 was addressed to Defendant Nos. 1. In the letter dated 1.2.2001 the demand for payment had been made and it had been spelt out that the plaintiff had "neither engaged nor authorised anybody and not to speak of Cico Technologies Limited (CTL) to collect our dues from you. Once again we request to release the payment within 15 days". A request for payment is also evident from its letter dated 17.2.2001 addressed to Defendant Nos. 1. It is also relevant to mention that Annexure P-4 is Defendant Nos. 1's letter dated April 2, 2001 in which it has confirmed that a sum of Rs.18,86,679.83 is the balance standing in favor of the plaintiff in its Books. My attention has also been drawn to Annexure P-7 which is Defendant Nos. 1's letter dated March 28, 2002 under cover of which 'C Forms' dated 28.3.2002 in respect of purchases made against the nine bills were forwarded to the plaintiff. If the version of the Defendant is accepted, there would be no justification of sending the 'C Forms' to the plaintiff and not to Cico Technologies Limited.

9. The question is whether Defendants 1 and 3 are entitled to Leave to Defend. On the basis of the pleadings and the documents filed along with it, it is not possible to come to any conclusion other than that supplies were made by the plaintiffs and it was, Therefore, entitled to receive payment for the supplies. The Defendants argument that Cico Technologies Limited was entitled to the payment, on a perusal of MoU holds no water as it was not open to this party to adjudicate upon the rival claims in the plaintiffs family. If it was in any doubt as to the payment, keeping in view several letters addressed to it by the plaintiff challenging the propriety of the demand of Cico Technologies Limited, it could perhaps have withheld the payment awaiting a direction from the appropriate Court. If Defendants 1 and 3 were eager to make payment it could have done so by initiating an interpleader suit and could have deposited the same in the Court leaving it to the plaintiff and Cico Technologies Limited to prove their entitlement thereto. As I see it these Defendants have chosen to side with M/s. Cico

Technologies Limited. It has been contended by counsel for the plaintiff, and not denied by the Defendants, that the Advocates for the Defendants as well as for M/s. Cico Technologies Limited are the same, thus making out a foundation for the partiality. Even when the payment was being made to Cico Technologies Limited the Defendants, perhaps sensing a possible dispute in the future, had received an indemnity from Cico Technologies Limited against the claims in the suit.

10. Since it is not in dispute that the supplies were made by the plaintiff Company, and since the Defendant had confirmed the outstanding to the plaintiff as late as on April 2, 2001, and since the plaintiff had repeatedly demanded this amount and had also put the Defendants the notice and caution that Cico Technologies Limited was not entitled to payment against the supplies made, I find that no grounds have been shown for granting Leave to Defend to Defendants 1 and 3. The defense which has been put forward, so far as the sums against the nine bills is in the genre of 'moonshine'. The suit is for the recovery of Rs.33,01,689.03 which includes interest at the rate of 25 per cent per annum. So far as the interest is concerned, keeping in perspective the competing claims of the plaintiff and Cico Technologies Limited I am not inclined to pass a decree on this claim. In these circumstances Defendants 1 and 3 are directed to deposit the said sum of Rs.18,86,679.83 with the Registrar General of this Court within four weeks from today. Upon making this deposit these Defendants 1 and 3 shall be entitled to file their Written Statement within six weeks thereafter. Replication, if any, be filed within four weeks thereafter.

11. The defense of Defendant Nos. 2 is that no cause of action has been shown against him and that the Orders as well as supplies related to Defendants 1 and 3. However, since there is an averment that Defendant Nos. 2 had agreed to make payment in case Defendant Nos. 1 failed to clear the outstandings, this is a matter which can be substantiated only in the trial. It is also not in dispute that Defendant Nos. 2 along with Defendant Nos. 3 has constituted a Joint Venture. This has been so stated in all the correspondence addressed by Defendant Nos. 1. The liability of Defendant Nos. 2 is yet to be established. However, the plaintiff cannot be non-suited on these counts. Since there is no written document directly admitting the liability of the Defendant Nos. 2 I am of the opinion that Defendant Nos. 2 should be granted unconditional Leave to Defend. I order accordingly.

12. The question which remains is whether the interim orders passed by Hon'ble Mr. Justice S.K. Agarwal should be confirmed or modified or recalled. Admittedly Defendant Nos. 1, who is undoubtedly a principal debtor, is a Joint Venture of Defendants 1 and 3. All the Defendants share the same business address i.e. Continental House, 28-29, Nehru Place, New Delhi. Counsel for Defendants were unable to disclose whether Defendant Nos. 1 is a duly constituted company or a registered partnership firm. The result is that there is a serious doubt as to whether recoveries could be effected against Defendant Nos. 1, or for that matter Defendant Nos. 3. In my view the interim orders, Therefore, deserve to

be confirmed and I order accordingly.

13. All applications stand disposed of in the above terms.

Suit Nos. 1948/2002

14. List the matter for further consideration on 22.4.2003.