

* HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.348/2002

% Date of Decision: 17th March, 2008

NATIONAL THERMAL POWER CORPORATION LTD APPELLANT

Through: Mr.Prashant Bhushan with
Mr.Rohit Kumar, Advocates

Versus

INDUSTRIAL DEVELOPMENT BANK OF INDIA & ORS

RESPONDENTS

Through Ms.Indu Malhotra, Sr.Advocate
with Mr.Kunal Tandon, Mr.Arjun
Suresh, Advocates for R-1
Mr.Tarun Johri, Advocate for R-2
Ms.Bina Gupta with Mr.Gaurav
Singh and Ms.Rashmi Rekha Devi,
Advocates for R-5

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers 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

DR. MUKUNDAKAM SHARMA, CJ

1.What is under challenge in this appeal is the order dated 13th September, 2002, passed by the learned Single Judge dismissing the application filed by the appellant-NTPC under Order VII Rule 11 of the Code of Civil Procedure, 1908.

2.The NTPC filed the said application praying for rejection of the plaint in

the suit, being Suit No.904/2002, instituted by the respondent No.1-IDBI against Spectrum Power Generation Co. Limited (SPGL for short), Jaya Food Industries Limited (JFIL for short), Mr.M.Krishna Rao(defendant No.3), National Thermal Power Corporation (for short NTPC) and Spectrum Technologies USA (STUSA for short). The aforesaid suit was filed by the IDBI in its capacity as lead institution representing a consortium of financial institutions, namely, IFCI, LIC, UTI, IIBI, GIC, NIC, NIA, OIC and UIL, collectively called as 'the Lenders'. In the said suit, challenge was made to the legality and validity of the compromise agreement dated 9th April, 2001 arrived at between SPGL and NTPC on the ground that terms and conditions of the said agreement are contrary to the conditions of the Loan Agreements amongst the financial institutions and SPGL and that SPGL had no power to make such payments through the compromise agreement or to enter into such a settlement. NTPC filed the aforesaid application under Order VII Rule 11 CPC in the said suit praying for rejection of the plaint on the ground that no cause of action was disclosed in the plaint and, therefore, the plaint was required to be rejected.

3.In order to appreciate the contentions raised by the counsel appearing for the parties before us, it would be necessary to deal with some background facts leading to the filing of the aforesaid suit.

4.The IDBI and other financial institutions as stated hereinbefore

collectively sanctioned financial assistance to SPGL to the tune of Rs.326.20 crores. The said loans are governed by the terms and conditions of the loan agreements dated 11th August, 1994 and 17th May, 1995. During the course of arguments, reference was made to the following provision of the aforesaid loan agreements entered into between the SPGL and the lenders, which provides as follows:

“Section 7.3 GENERAL COVENANTS
The Borrower shall,

(i)

(ii) LOANS AND DEBENTURES

Not issue any debentures, raise any loans, accept deposits from public, issue equity or preference capital, change its capital-structure or create any charge on its assets or give any guarantees without the prior approval of the Lead Institution. This provision shall not apply to normal trade guarantees or temporary loans and advances granted to staff or contractors or suppliers in the ordinary course of business or to raising of unsecured loans, overdrafts, cash credit or other facilities from banks in the ordinary course of business.

5.It is also necessary to mention at this stage that the promoters of the SPGL, namely, STUSA, Jaya Food Industries and NTPC, entered into a promoters agreement dated 29th June, 1993 to develop and set up a 208 MW combined cycle gas power project. However, in respect of the aforesaid agreement disputes arose amongst the parties and the said disputes culminated in the institution of suits, being Suit No.1256/1996 and Suit No.1905/1996 before this High Court. It is also necessary to

mention at this stage that the Lenders/Financial Institutions were not arrayed as parties in those proceedings. During the course of the aforesaid proceedings, Jaya Food Industries and Mr.M.Krishna Rao, who was the Managing Director of SPGL, entered into a compromise agreement dated 9th April, 2001 with NTPC, whereby SPGL was required to pay Rs.41.57 crores to NTPC with 9% interest from 1st January, 1999 in 12 monthly instalments commencing from 25th April, 2001. The same came to be noticed by the Asset Reconstruction Company (India) Limited (ARCIL), successor in interest of IDBI, so far rights of IDBI in the proceeding have been assigned in favour of ARCIL. The Supreme Court under order dated 9th April, 2001 recorded that taking of the compromise agreement on record would not preclude any other party affected by it from challenging the authority of SPGL to make such payment to NTPC or to enter into any such settlement or to take any objection available in law before an appropriate Court.

6.A bare perusal of the aforesaid order passed by the Supreme Court also indicates that the Supreme Court in that case held that if a challenge is raised before the competent court in respect of the power of SPGL to make such payment to NTPC and the competence of the NTPC to enter into such settlement without the consent of the Lenders/Financial Institutions, the same shall be decided on its own merits without being influenced by the fact that the terms of the

compromise agreement are taken on record and/or that undertakings are given to and accepted by the Supreme Court.

7. There was another suit filed by STUSA which was registered as Suit No.765/2001, for restraining SPGL from making any payment to NTPC pursuant to the compromise agreement, wherein the learned Single Judge passed an order dated 21st September, 2001 on the application filed by IDBI seeking to intervene, holding that IDBI has no right to intervene. The said order passed by the learned Single Judge was challenged by filing FAO(OS) No.518/2001. The Division Bench passed an order dated 22nd March, 2002 whereby the appeal filed by STUSA was partly allowed, reiterating the order passed by the learned Single judge holding that SPGL shall continue to make payment of instalments to NTPC. It was also held that the financial institutions can file a separate suit. Observations in that regard were also made in the following terms:

“Learned counsel for IDBI was duly heard on this application. Besides the maintainability of such an application in the appeal, in the absence of IDBI as a party to the suit, we find no merit in the application. At the instance of IDBI, directions as prayed for cannot be issued which are beyond the scope of the suit itself. Allowing such prayers would amount to even exceeding the prayers which STUSA has made in its suit. In case IDBI has any grievance, it was permissible for it to file a separate and independent suit or seek its impleadment in the pending suit rather than approaching the appellate court for such a relief.”

8. Consequent thereto, the aforesaid suit was filed by the IDBI on behalf of itself and the consortium of banks and financial institutions which is registered as Suit No.904/2002. In the said suit, a declaration was sought to the effect that the compromise agreement dated 9th April, 2001 was null and void and un-enforceable in law. A decree of perpetual injunction was also sought for directing SPGL and the NTPC to restore the amount paid by the SPGL to the tune of Rs.52 crores. In the said suit the aforesaid application under Order VII Rule 11 CPC was filed which was rejected by the learned Single Judge holding that there is cause of action for filing the suit. Accordingly the said application was dismissed as against which the present appeal is filed on which we have heard the learned counsel appearing for the parties and also looked into the records.

9. It was submitted by the counsel for the appellant that so far as the compromise agreement is concerned the Lenders/Financial Institutions have no connection and/or interest as that is a compromise agreement arrived at in a pending suit wherein the Financial Institutions were not even parties. It was also contended that the IDBI has no cause of action against the NTPC, as there is no privity of contract with NTPC and payment of money to NTPC by SPGL as loss of opportunity cost does not change the capital structure or the debt equity ratio of the company. Another contention that was raised was that the opting out of NTPC

from the project would not affect the paid up share capital of the company. Contention was also raised that NTPC had entered into the settlement at the insistence of IDBI and other parties.

10. On the other hand, counsel for the respondent No.1-IDBI, while refuting the aforesaid contentions, submitted that IDBI has made out a strong cause of action inasmuch as the Lenders/Financial Institutions are vitally concerned by payment of substantial money by SPGL to settle another promoter's dispute.

11. We have considered the aforesaid submissions in light of the records. On going through the records we find that whatever settlement was made through compromise agreement was made by the SPGL for loss of opportunity cost to NTPC. We also find from the records and as stated before us during the course of arguments, that the IDBI has claimed a substantial amount against SPGL and, therefore, any settlement arrived at by SPGL with any other party would be of vital interest and of utmost relevance to the Lenders/Financial Institutions. It was urged by the counsel for the IDBI that the aforesaid payment has seriously disturbed the debt equity ratio of the SPGL, which according to the institutional norms should be 70:30. It was sought to be shown in the pleadings of the parties that as a consequence of the aforesaid payment made by the SPGL to the NTPC, the debt equity ratio has reached 84:16 and, therefore, respondent no.1-IDBI has become vitally interested in the

activities of the SPGL in carrying on their financial activities. It cannot be denied that the respondent No.1-IDBI on behalf of the consortium of Banks/Financial Institutions now has a vital stake in the SPGL as on the date of the filing of the suit. Investment of different stake holders was in the vicinity of about 700 crores. The contention raised in the suit is also that the payment of the said amount by SPGL to NTPC for non-issuance of 77.7 lac equity shares to NTPC is barred in law as the payment of the said amount by SPGL would tantamount to purchase of its own shares by SPGL itself. In view of the pleadings of the parties in the suit, it cannot be said that there is no cause of action for the suit. The disputes which are raised in the pleadings of the parties as available on record would clearly indicate and also establish that the said disputes are required to be proved by leading evidence and are required to be adjudicated upon, for, it cannot be said that on the pleadings of the parties no cause of action is made out.

12.It has been held in a catena of judgments by the Supreme Court and also by this Court that whether or not the plaint discloses a cause of action is a question of fact, which has to be gathered on the basis of the averments made in the plaint in its entirety, taking those averments to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed.

13.A cause of action is a bundle of facts which are required to be

proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence, except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the like nature. So long as the plaint discloses some cause of action which requires determination by the Court, the mere fact that the plaintiff may not succeed cannot be a ground for rejection of plaint. [See: Mayar (H.K.) Limited v. Owners and Parties, Vessel M.V. Fortune Express reported in (2006) 3 SCC 100].

14. It was also held by the Supreme Court in the case of Liverpool and London S.P. & I.A.S.S.N. Ltd v. M.V. Sea Success I & Another reported in (2004) 9 SCC 512, that it may be true that order VII Rule 11(a) although authorises the court to reject a plaint on failure on the part of the plaintiff to disclose a cause of action, but the same would not mean that the averments made therein or a document upon which the reliance has been placed although discloses a cause of action, the plaint would be rejected on the ground that such averments are not sufficient to prove the facts stated therein for the purpose of obtaining relief claimed in the suit. By the statute the jurisdiction of the court is restricted to ascertain whether on the allegations a cause of action is shown and as long as the claim discloses some cause of action or raises some question fit to be decided by a Judge, the mere fact that the case is weak or not likely to succeed is no ground for rejecting it.

15. In this view of the matter, we are of the opinion that the learned Single Judge, who has given cogent reasons for coming to the conclusion that the application should be dismissed, was justified in holding that the suit has cause of action and that the averments made therein required trial. We find no merit in this appeal which is dismissed.

CHIEF JUSTICE

(REVA KHETRAPAL)
JUDGE

17th MARCH, 2008
“V”