

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Aug-27-2013

Judge : Harish Tandon

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER

SHEET C.P.No.381 of 2013 IN THE HIGH COURT AT CALCUTTA ORIGINAL JURISDICTION ORIGINAL SIDE RE: JESSOP & Co.LTD.And DHINGRA ISPAT UDYOG & ORS.BEFORE: The Hon'ble JUSTICE HARISH TANDON Date:

27. h August, 2013.

Appearance: Mr.Sakya Sen, Adv.Mr.Sukrit Mukherjee, Adv.Mr.S.R.Kakrania, Adv.Mr.Sanjeeb Seni, Adv. for the petitioner Mr.Kousik Chatterjee, Adv.Mr.Ruby Jaiswal, Adv. for the company The Court: The petitioning creditor is an unpaid seller.

The purchase order was issued by the company on 7th February, 2012 for supply of the material, description and specification whereof are indicated therein.

The aforesaid supply was to be made by 11th February, 2012.

The petitioning creditor avers that the goods were supplied to the company and the seal and signature appended on the challan would indicate that the goods were received by the company.

The purchase order was issued for a supply of 22,100 kgs of the materials whereas the supply is made to the extent of 20370.50 kgs.

It is also not in dispute that the invoice was raised in conformity with the rates which is also received by the company.

Admittedly, the company did not pay the value of the goods supplied by the petitioning creditor.

The statutory notice was issued on the company.

The documents annexed to the winding up petition would reveal that the same was served on 22nd of February, 2013.

There is no reply to the statutory notice by the company.

After the service of the winding up petition, the company appeared and sought for a direction to file affidavit.

The affidavit-in-opposition filed by the company would reveal three basic objections.

Firstly, the time was an essence of the contract; secondly, the supply was made to the materials of inferior quality and thirdly, there was a short supply of the materials.

It would be apt to record that there is no correspondence exchange between the parties after the supply was made depicting the aforementioned objections taken by the company in the affidavit-in-opposition.

The statutory notice was also not replied but for the fiRs.time the company took such a defence in the affidavit filed in its winding up petition.

Admittedly, the materials were supplied by the petitioning creditor on 15th February, 2012, four days beyond the delivery period, indicated in the purchase order.

The company did not take any plea that those materials could not be accepted having supplied beyond the period of the delivery recorded in the purchase order.

The company accepted the goods and did not protest for belated supply.

The purchase order does not indicate that in the event the supply is not made within the period the order shall stand cancelled.

The company by its conduct accepted the goods which were admittedly supplied beyond the period indicated in the purchase order.

The aforesaid objection, in my opinion, cannot be taken or be considered to be a bona fide defence; more particularly when there were no correspondence exchanges between the parties in this regard.

Although, the company says that there was a telephonic conversation between the petitioning creditor and the company but the same has been denied by the petitioning creditor.

The second objection put forth by the company is in respect of inferior quality of the goods supplied by the petitioning creditor.

The said plea is taken for the first time in the affidavit-in-opposition without being supported by any documentary evidence.

To my mind, such objection is taken for the purpose of avoiding the payments to be made and to wriggle out of all the provisions of the Companies Act relating to the winding up of the company.

If the company was aggrieved by inferior quality of the goods being supplied by the petitioning creditor, there would be one scrap of paper which would suggest such objection being raised and not for the first time in the affidavit-in-opposition.

The third objection which has been taken by the company is that the materials were supplied in short.

The purchase order would reflect that the petitioning creditor was to supply 22,100 kgs of the material.

Specification and description have also been sufficiently indicated therein.

Undisputedly there has been a short supply by the petitioning creditor which has been accepted by the company without any demur and objection.

Though, in the affidavit-in-opposition it is said that because of short supply the company has not been able to meet out its corresponding obligation but the aforesaid stray averments are not supported by any document.

The company has also not annexed any document evidencing that because of the short supply it has incurred losses and damages.

Although, in the affidavit-in-opposition the company says that short fall was meted out on an emergency basis resulting the company to spend a larger money for that purpose but there is no documentary evidence annexed to the said affidavit in relation thereto.

In my opinion, the so called dispute, sought to be raised by the company, is sham and bogus and is only with an intent to avoid the company to be liable for being wound up and, therefore, this Court finds that the company has not made out any bona fide defence warranting the court to relegate the parties to regular civil proceedings.

This Court, therefore, finds that the company has unreasonably and illegally withheld the legitimate dues of the petitioning creditor and has unable to pay its debt.

The winding up petition is, thus, admitted, for a principal sum of Rs.10,67,430/- together with interest @ 12% per annum with cost assessed at 800 GMs. The company is directed to pay the aforesaid sum within two months from date.

If the payments are made within time indicated, hereinabove, the winding up petition shall remain permanently stayed.

In default, the winding up petition shall be entitled to make advertisement once in the The Statesman.

and once in the Bartaman. The advertisement should indicate that the matter will appear before this Court after expiry of four weeks from the date of the publications being made.

Publication in the Official Gazette will stand dispensed with.

(HARISH TANDON, J.) sg2

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