

and Vs. M/S. Multichem

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Court : Kolkata

Decided On : Jul-26-2017

Judge : I. P. Mukerji

Appellant : and

Respondent : M/S. Multichem

Judgement :

ORDER

SHEET C.P.No.522 of 2014 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction ORIGINAL SIDE IN THE MATTER OF: CAPRICORN OILS LIMITED - ANDVersus M/S.MULTICHEM BEFORE: The Hon'ble JUSTICE I.P.MUKERJ.Date : 26th July, 2017.

Appearance: Mr.Supratim Laha, Adv.Mr.Sounak Sengupta, Adv.Ms.Debanjana De, Adv.For the petitioning creditor Mr.Priyankar Saha, Adv.Mr.Amritam Mondal, Adv.For the respondent The Court : This is a winding up application, at the stage of admission.

The claim of the petitioning creditor is founded on goods, namely, activated carbon, activated bleaching earth sold by them to the respondent company between 7th April, 2012 and 5th May, 2012.

Their claim is for Rs.4,08,318/-.

The respondent company has raised only one defence.

Its previous management was guilty of very serious wrongdoing against the company.

The transaction in question was also part of this wrongdoing.

There was no real transaction between the petitioner and the company and a false claim has been raised by the petitioner.

The said goods were allegedly supplied by the petitioner between 7th April, 2012 and 5th May, 2012.

The present management took over the reigns of the company on 7th May, 2012.

Even if companys defence is true, letters were written by the petitioner on 22nd May, 2012 (annexure B at page 15 of the petition). 21st June, 2012 (page 16 of the petition) and 2nd July, 2016 (page 20 of the petition) claiming payment for the above supply.

The company did not reply to those letters. At least the defence now taken by the company ought to have been taken at that point of time.

Mr. Saha for the company says that his client did not receive these letters which is disbelieved by the Court.

The reason for disbelieving Mr. Saha is that admittedly the statutory notice dated 24th March, 2014 was received by the company.

In that statutory notice, the claim was made in detail.

Reference was made to the earlier reminders. In spite of this, the company did not reply to it.

Moreover, according to the petitioner, a cheque for Rs.50,000/- dated 11th February, 2014 was sought to be handed over by the company to them, in part payment of their dues which was dishonoured for insufficiency of funds.

Mr.Saha says that this cheque was not issued for the transactions in question.

If this is the defence of the company, why was not the leave of this Court taken to file a rejoinder to the affidavit in reply ?.

In normal circumstances, the above facts warranted an admission of the winding up application.

My attention is, however, drawn to the judgment and order passed by this Court in C.P.No.660 of 2013 In the matter of Capricorn Oils LTD.and Hooghly Agro Products PVT.LTD.on 23rd July, 2015, where this Court held following : Ordinarily, the change of guard at a company does not defeat the right of any creditor or the quality of any claim made by a creditor against the company.

However, in this jurisdiction, a claim has to be affirmatively established before it may be inferred that the failure on the part of the company is without any bona fide reason and the negligence to pay can be seen to be a consequence of the commercial insolvency of the company.

The high tests that have been laid down in this determination require a claim to be established to the hilt.

As a corollary, it can be said that when a defence to a claim in this jurisdiction is demurrable, in the sense that even if such defence is accepted the claim would remain unaffected, would the petitioner have succeeded in affirmatively establishing the same.

Since claims in this jurisdiction are generally decided on affidavit evidence, the Company Court cannot disregard a defence unless the defence appears to be, on the face of it, utterly unmeritorious and moonshine.

The defence in this case is that the transaction which has been asserted by the petitioner may not have been a genuine transaction and may have been set up by the erstwhile management of the company.

It is possible such defence may fail when evidence is led by the company in support thereof; but since it is not possible to gaze into the crystal ball and

anticipate what oral evidence may be led by the company in defence of this claim, the failure on the part of the company to discharge the debt apparently due cannot be inferred as negligence on the part of the company without any just cause leading to the presumption of the companys inability to pay.

The claim of the petitioning-creditor is relegated to a suit.

CP No.660 of 2013 is permanently stayed.

There will be no order as to costs.

Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities. In this case reminders were issued by the petitioner after the new management took control.

There is not a single denial of the petitioners claim, by the company, as I have said before.

Not even a reply to this statutory notice.

Therefore, at least in this case, the internal management dispute within the company is not believed by this Court.

However, in view of the said order dated 23rd July, 2015 and considering the ratio of the case of Mechalac reported in AIR 1977 SC577 a chance is given to the company to prove its unlikely defence, upon securing the entire claim of the petitioning creditor.

In those circumstances, I direct the respondent company to immediately secure the claimed amount of Rs.4,08,318/- together with interest at the rate of 8% per annum from the date of the statutory notice, i.e.24th March, 2014 till this date by furnishing cash security by way of pay order or demand draft in favour of the Registrar, Original Side by 16th August, 2017.

The Registrar, Original Side will invest the sum in a short term deposit with United Bank of India, High Court Branch.

The petitioner will have to file a proper suit by 31st August, 2017.

If the suit is filed within that date, the above security will be deemed to be security in the said suit and appropriate steps will be taken by the petitioner to transfer the secured amount from the registry of this Court to the Court where the suit is filed or to a receiver appointed by that Court.

If the suit is not filed by the said date, the company may apply to this Court to withdraw the secured amount.

In default of the company furnishing the above security, the petitioner shall make an application to this Court.

In that event, this winding up application will be admitted with a direction for publication of advertisement.

The case of the petitioner will be deemed to have been established by this order.

The period during which this company petition was pending in this Court from 5th June, 2014 till date will be excluded for the purpose of calculating the period of limitation for the suit to be instituted by the petitioner.

This winding up application is disposed of accordingly.

(I.P.MUKERJI, J.) A Dey AR(CR)

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