

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Mar-07-2014

Judge : Nadira Patherya

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER

SHEET CP No.254 of 2013 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction POWER MAX (INDIA) PVT.LTD.AND M/S MCNALLY SAYAJ.ENGINEERING LTD.BEFORE: The Hon'ble JUSTICE PATHERYA Date : 7th March, 2014.

Mr.D.N.

Sharma, Mr.Anirudh Poddar for the petitioning creditor.

Mr.Chayan Gupta, Mr.S.Prosad for the company.

The Court : This application has been filed under Sections 433 and 434 of the Companies Act, 1956 on account of price of goods sold and delivered.

The case of the petitioning creditor is that it had supplied goods as per the specification given by the company.

The goods were to be supplied within six months from the date of approval of the drawings.

The drawings were approved in January, 2011 and supplies have been made prior to June, 2011.

Therefore, the issue of delay raised in the reply to the 434 notice is nothing but imaginary.

The plea of defective goods also taken in the reply to the 434 notice is illusory as the motors to be supplied had to be of Kirloskar make.

This was a specific requirement of the company.

In case there was any defect in the supply of motors the petitioning creditor cannot be held liable in respect thereof.

Therefore, for the goods supplied by the petitioning creditor it will be entitled to payment.

For the supplies made invoice has been raised and it is only for non-payment that the statutory notice was issued.

As the defence sought to be raised is illusory and not bona fide, the Company Petition be admitted.

Counsel for the company submits that the petitioning creditor was to supply primary and secondary screens.

The said screens were not delivered within the due date and the goods supplied were also defective in nature.

At the time of commission also none on behalf of the petitioning creditor was present.

In fact, such service was refused by the petitioning creditor and the defective materials supplied had to be replaced by the company at its own cost.

Therefore, the company is entitled to recover such cost of the materials replaced from the petitioning creditor.

In fact, the said was brought to the notice of the petitioning creditor in 2011 that is much before the statutory notice issued on 3rd January, 2013.

Therefore, this application merits no order.

Having considered the submissions of the parties it is true that primary and secondary screens were supplied by the petitioning creditor to the company and the motors supplied were according to the petitioning creditor as per the specification of the company i.e. of Kirloskar make.

Supply of defective motor ORS, if any, cannot be attributed to the petitioning creditor as the motors were of Kirloskar company, a company preferred by the company.

The primary screen and the secondary screen were definitely supplied by the petitioning creditor for which it has to take responsibility and in the letter of December, 2011 there is a complaint with regard to the non-functioning of the primary and secondary screens and the rollers attached therewith.

The alignment was done at the workshop of the petitioning creditor and a solution was also sought by the said letter.

Admittedly there is no reply to the said letter.

This letter of 2011 was followed by a letter of 2012 wherein again the non-functioning of the screens has been mentioned but no reply thereto has been disclosed by the petitioning creditor.

Although the defence of delay in supply of goods by the petitioning creditor to the company may not come to the assistance of the company, as admittedly the drawings were approved in January, 2011 and the goods were supplied by May, 2011 i.e. within six months from the date of approval of drawings but the defective materials supplied and taken as a defence gives rise to a bona fide dispute which cannot be adjudicated in proceedings filed under Section 433 and 434 of the Companies Act, 1956.

Accordingly, this application merits no order and is accordingly dismissed.

This, however, will not prevent the petitioning creditor from taking recourse to proceedings in the appropriate forum in accordance with law.

Any observation made in this order will not in any way influence the forum where proceedings may be undertaken.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(PATHERYA, J.) pa

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