

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Apr-30-2014

Judge : Nadira Patherya

Appellant : Appellant

Respondent : Respondent

Judgement :

C.P.No.659 of 2013 C.A.No.485 of 2013 IN THE HIGH COURT AT CALCUTTA
Original Jurisdiction In the matter of: JAI BALAJ.INDUSTRIES LTD.AND
SOUTHERN ROAD CARRIERS LTD.BEFORE : The Honble Justice Nadira
Patherya Date : 30th April, 2014.

For the Petitioner : Mr.Ratnanko Banerjee, Mr.Shaunak Mitra.

For the Company : Mr.Abhrajit Mitra, Mr.J.Chowdhury, Ms.R.Kajaria.

To Court :- In this application a claim has been raised on account of transportation charges incurred by the petitioning creditor on behalf of the company.

The case of the petitioning creditor is that for the period July 2012 to 24th August, 2013 goods were transported by it on behalf of the company for which bills were raised.

As no payment was made on 28th June, 2013 the monthwise outstanding freight bills was forwarded with request for payment.

On 29th July, 2013 the company informed the petitioning creditor that the transportation job earlier carried on to be billed basis was since 2nd July, 2013 carried on to pay basis.

As no payment was made by the consignees this mode of transportation, i.e., to pay basis was discontinued and all the bills were to be paid on to be billed basis by the company.

For non-payment of the said bills a statutory notice under Section 433 of the 1956 Act was issued on 2nd September, 2013 which though received by the company no reply has been given.

In respect of some of the bills sums were withheld and by the letter dated 17th July, 2013 the petitioning creditor sought for payment of the sums withheld.

In spite of receipt of the said letter no reply has been given thereto.

The basis of the bills are rates approved by the representatives of the company.

This cannot be disputed in view of the electronic mails dated 23rd November 2013, 6th March 2013, 16th March 2013, 2nd May 2013 & 25th May 2013 in respect whereof payments have been made, which rates had also been approved by the representatives of the company.

Therefore, as payments have been made on the basis of the rates approved by the representatives of the company, for all the bills which have been raised and which remain unpaid there is no reason for non-payment as the rates have also been approved by the authorized representative of the company.

Therefore, the company petition be admitted for the sums mentioned in the statutory notice and payments be directed.

In opposing the said application, Counsel for the company submits that the petitioning creditor was aware that the rate will be fixed by one Mr.D.P.Jajodia.

This finds mention in the circular dated 23rd November 2009 relied on by the petitioning creditor.

Since 2nd July 2013, the goods were transported on to pay basis but the said mode of payment was altered according to the petitioning creditor as the consignee refused to make such payment.

There was no communication from the consignee refusing to make payment and the deviation in the mode of payment is oral.

The petitioning creditor in support of its case of the rates being approved by the authorized representatives of the company has pleaded in its reply that fixing of rate by Mr.D.P.Jajodia was not strictly insisted upon and that the same stood modified by the conduct of the parties.

Mr.D.P.Jajodia and his family members fixed the rates and, therefor, there has been substantial compliance.

This case varies from the case made in the petition.

In fact, in the 2nd reply of the company given to the affidavitin-reply filed by the petitioning creditor particulars have been sought with regard to the names of the companys authorized representative who approved the rate.

By letter dated 15th January, 2014 a reply has been given to the queries sought by stating that the particulars will be evident from the pleading and its annexures.

There is no dispute that the bills have been received but the amount payable is not admitted as the original transaction has not been proved and in view of inconsistencies, so also non-establishment of the approved rates this application merits no order.

Oral evidence will be required to prove signatures of the authorized signatories.

Triable issues have also been raised with regard to the rate approving authority, approval of rates, whether to pay could be treated as to be billed mode of payment and in the absence of segregation of the case with regard to to pay mode and to

be billed mode bona fide disputes have arisen.

The ledger account is also incomplete and is an account only in part.

It starts with an outstanding balance without specifying each and every amount.

Therefore, in the absence of proper account being disclosed from the ledger of the petitioning creditor in respect of the company there can be no admission and as bona fide disputes exists no order need be passed.

Reliance is placed on 2005 (7) SCC41 and 140 Company Cases 133 for the proposition that unless the exact amount is quantified no winding up order can be passed.

Reliance is placed on 71 CWN38 for the proposition that the case must be pleaded in the petition.

In the instant case the case of the petitioning creditor emerges in the affidavit-in-reply, therefore, no case has been made out by the petitioning creditor.

Reliance is also placed on 2004 (5) CHN343 In reply Counsel for the petitioning creditor submits that bills were raised is not disputed.

The bills were raised on rates approved, there is no doubt that the bills have also been received by the company.

Therefore, in the absence of any dispute raised, the company has become liable to pay such bills.

No bill could have been raised without the rates being approved.

In fact, since 2009 on the basis of the rates approved bills have been raised and that, there were persons besides Mr.D.P.Jajodia who approved the rates will be evident from the electronic mails.

The letter dated 26th August, 2013 evidences demand made by the company.

There is no denial of the bills raised.

In view of AIR 1971 SC2600 the creditor is not required to quantify the rate precisely and in the absence of such quantification, the Court will make a winding up order.

This, therefore, distinguishes 140 Company Cases 833.

71 CWN38 is not applicable to the facts of this case.

2005 (7) SCC42 has relied on AIR71SC2600 2005 (4) CHN343 is not applicable in the facts of this case as in the reported decision a counterclaim was made in the plaint filed earlier.

As there is no reply to the winding up notice or to the various letters issued by the petitioning creditor to the company, the company petition be admitted.

Having considered the submissions of the parties there is no doubt that transportation was undertaken by the petitioning creditor on behalf of the company.

Therefore, bills were raised.

It is for the bills which remained unpaid that a statutory notice was issued under Section 434 of the 1956 Act on 2nd September 2013 which though received by the company, no reply thereto has been given.

Therefore, it is necessary to examine the case set out by the petitioning creditor in its statutory notice and the case with which it has come to Court.

On a perusal of the statutory notice it appears that the dues arose for the period July 2012 to 24th August 2013 during which transportation was undertaken after the rate was confirmed by the company.

Such confirmation was made by the authorized representative of the company.

There were two modes of payment to be billed and to pay.

To be billed would warrant payment by the petitioning creditor.

To Pay would warrant payment by the consignees.

As the consignees refused to make payment it was the company which would be liable and responsible for the payment.

Upon non-payment by the consignee, the authorized representatives of the company were informed who requested the petitioner to raise bill on the company, therefore, the to pay bills were raised on the company.

In the case pleaded in the winding up petition as regards the rates fixed by the companys authorized representative is maintained.

But the case of authorized representative requesting the petitioning creditor to raise to pay bills on the company is at a variance.

In the winding up petition it has been stated that it was the company who assured payment of the to pay bills to the petitioning creditor.

No document of such assurance has been annexed.

It has also not been stated that the company through its authorized representative assured payment.

Therefore, the case made out with regard to payment of To pay bills by the company cannot be accepted.

The petitioning creditor has relied on the circular dated 23rd November 2009 wherein it was declared as the official transporter of the company.

But what needs to be noticed in the said circular is that it was specifically stated that the rates will be fixed by Mr.D.P.Jajodia.

A document has to be taken in its entirety or not at all, therefore, from this document itself it is apparent that the rate was to be fixed by Mr.D.P.Jajodia.

This finds no mention in the winding up petition filed and the case made in respect thereof is in the reply filed by the petitioning creditor for the fiRs.time.

While admitting that the fixing of rate by Mr.D.P.Jajodia was not strictly followed the explanation sought to be given by the petitioning creditor is that the said was modified by conduct of the parties and that the rates were fixed by Mr.D.P.Jajodia and his family members and, therefore, by conduct and several documents the agreement between the parties stood altered.

The case of the petitioning creditor, therefore, travels from Mr.D.P.Jajodia and his family members to the representative of the company who fixed the rates.

It will not be out of place to mention that it has also been pleaded in the affidavit-inreply that the concerned department also fixed the rates.

Therefore, raising of bills is not disputed but the rates at which the bills were raised and who approved the rates needs to be answered.

To the reply filed by the petitioning creditor, rate approval documents have been disclosed which bears the signature of persons alleged to be in the employment of the company.

That the said persons were employed by the company needs to be examined.

Some of the signatures are not even legible.

No rubber stamp of the company appears on the rate approval slips although on one of the rate approval slips the rubber stamp appears. It is only in the absence of inability to ascertain the persons who approved such slips that the defence of the company cannot be rejected.

In fact, the ledger account does not reflect an opening balance on and from July 2012 but is an incomplete ledger account starting from 1st April 2013 which is not the period for which transportation was effected.

The monthwise outstanding bills which have been disclosed in the application are independent documents with no forwarding letter to the company.

The fiRs.letter which if at all can be termed as document of demand is 28th June 2013.

Much stress has been laid on the letters dated 29th July, 2013 and 26th August, 2013 but all that can be culled out from the letter dated 29th July, 2013 is that the petitioning creditor was informing the company that on the date of issuance of such letter it was transporting goods on to pay basis and that payment would be made by the consignees and that the to be billed mode of payment had been discontinued.

Besides this the company was also informed that sum were due and payable.

In the letter of 26th August 2013, once again the petitioning creditor brought it to the notice of the company that the work undertaken from 2nd July, 2013 was on to pay basis and to be billed basis stood discontinued but to pay basis was also stopped, as the unit head or department head of the company had requested the company to raise bills directly on the company instead of making collection from the customer.

This also cannot be accepted as under the to pay mode of transportation it was the consignees who were to make payment and according to the pleadings it was the consignees who refused to pay.

This finds no mention in the said letter nor does this find any reflection in the statutory notice or in the pleadings.

In view of the inconsistencies in the petitioners case no order can be passed in favour of the petitioning creditor.

It will not be out of place to mention that two separate modes of payment is sought to be pursued by the petitioning creditor and a reason has also been given for treating the to pay bills as to be billed bills but the amounts claimed do not stand identified separately.

Accordingly, this application warrants no order as the defence raised by the company is bona fide, and in view of triable issues raised stands dismissed.

This, however, will not prevent the petitioning creditor from seeking remedies in accordance with law.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

(Patherya J.)

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