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Appellant Vs. Respondent

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Court : Kolkata

Decided On : May-07-2014

Judge : Nadira Patherya

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER
SHEET CP No.73 of 2014 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction ORIGINAL SIDE M/S.SHERA TUBE FORGE PVT.LTD.AND Sr.STEELS PVT.LTD.BEFORE: The Hon'ble JUSTICE PATHERYA Date : 7th May, 2014.

Mr.Jishnu Chowdhury, Mr.Satadeep Bhattacharyya, Mr.Sagnik Basu for petitioning creditor.

Mr.Amitave Das, Mr.Supratim Laha, Mr.Varun Garg for the company.

The Court : This winding up application has been filed on account of price of goods sold and delivered.

The case of the petitioning creditor is that in 2009 supplies were effected and bills raised.

A part payment of Rs.1 lakh was made in 2012 and as the balance sum was not paid statutory notice was issued.

Such statutory notice though received by the company, no reply has been given.

Hence this winding up application has been filed and orders be passed as sought.

Counsel for the company submits that supplies were effected in 2009 and an invoice raised in September, 2009.

For non-payment the instant company petition has been filed in 2013.

Therefore, the claim of the petitioning as in 2013 is barred by laws of limitation but to save limitation the plea of part payment has been taken.

To whom such part payment was made has not been disclosed.

The case of part payment has been pleaded only to overcome the bar of limitation and in absence of any corroboration, trial by evidence in a suit is necessary.

The company has paid the full amount to Sr.Udyog.

The management of both Udyog and Steel is the same.

The company is already out of pocket for the sums claimed and in view of Section 72 of the Contract Act the petitioning creditor is entitled to claim return of the said sum from Udyog.

The presence of Udyog is necessary as it is only Udyog who can prove payment to it and in its absence this winding up petition ought to fail.

In reply, Counsel for the petitioning creditor submits that there is no denial of the part payment made in 2012.

Publications were effected in respect of the demerger on 8th May, 2011 in the Financial Express and in Sangbad Pratidin.

Therefore, it was known to the public at large and the company that Udyog and Steel stood demerged.

Payment has been shown to have been made to Udyog which Udyog was not entitled to receive.

Therefore, the liability has not been satisfied by the company and necessary orders as sought be passed.

Having considered the submissions of the parties the claim in this winding up application raised is on account of price of goods sold and delivered.

An invoice raised is dated 8th September, 2009 and in 2013 the said claim would be barred by laws of limitation but while the petitioning creditor alleges part payment in 2012 the company has also disclosed document wherefrom it appears that payment has been made in 2012.

Therefore, payment has been made and limitation is saved.

The next question that arises for consideration is whether the payment which was made to Udyog was correctly made by the company or not.

In 2011 advertisements were published in the Financial Express and Sangbad Pratidin wherein it was informed to the public at large that an application under Section 391(2) and 394 of the 1956 Act had been filed and any person supporting or opposing the said application is to take steps within the time specified therein.

It may have escaped the knowledge of the company but such escape cannot be attributed to the petitioning creditor herein as it was the information given to the public at large of which the company is a part.

Therefore, one must proceed on the presumption that the company was aware of the demerger of Udyog and Steel.

Even after this public notice if the company has made payment to Udyog it has done so at its own risk and peril and it cannot absolve itself of its liability merely on the ground of Section 72 of the Contract Act.

Section 72 of the Contract Act is clear in terms and it speaks about repayment and return of sums received by mistake.

Therefore, Udyog may be liable to repay or return the money and it is only when a claim is made by someone, that someone cannot be the petitioning creditor, as the petitioning creditor knows that he is to receive the money from the company.

Therefore, it would be the company who would have to pursue its claim, if any, against Udyog.

The company has relied on a letter dated 04.5.2013.

But this letter has not been delivered to the petitioning creditor.

In fact, it has been received by Udyog and even after acquiring knowledge that the said letter may be through inadvertence was delivered to Udyog by the company but no step was taken to rectify the said mistake.

In the light of the aforesaid therefore the defence of the company cannot be termed as bona fide and this therefore entitles the petitioning creditor to admission of CP73of 2014 for the sum of Rs.4,10,910/-.

The part payment of Rs.1 lakh on which the petitioning creditor has relied cannot be accepted as the same is devoid of particulars but the company petition is admitted on the admission bank statement Rs.5,10,910/- annexed paid to by of the company itself which is evident from the it Udyog wherein in it August, has categorically shown a and the 2012 although sum of petitioning creditor would have been entitled to the sum of Rs.5,10,910/- but as the claim for a lesser amount has been made, the Court cannot enhance the sum and therefore, the company petition has been admitted for the amount mentioned above.

This amount will carry interest at 8% per annum to be paid on the reducing balance.

An opportunity is given to the company to make payment of the said sum in two equal instalments.

The fiRs.of such instalment be paid by 15th June, 2014 and the second instalment be paid by 15th July, 2014.

In default of payment of anyone instalment, the petitioning creditor will be at liberty to advertise once in Dainik Statesman and once in The Statesman, English Edition.

Matter is made returnable ten weeks hence.

Urgent certified photocopy of this order be supplied to the parties, if applied for, upon compliance of all requisite formalities.

(PATHERYA, J.) pa

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