

Appellant Vs. Respondent

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SooperKanoon Citation : sooperkanoon.com/1140209

Court : Kolkata

Decided On : May-13-2014

Judge : Nadira Patherya

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER

SHEET CP NO.552 OF 2013 CP NO.592 OF 2011 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction ORIGINAL SIDE IN THE MATTER OF : SSS LOHA MARKETING PVT.LTD.AND BIBBY FINANCIAL SERVICE INDIA PVT.LTD.BEFORE: The Hon'ble JUSTICE PATHERYA Date : 13th May, 2014.

MR.M.S.VINAIK, MR.S.BANERJEE, MR.D.BASHTA,ADVOCATES FOR THE PETITIONER MR.SAMIT TALUKDAR, MR.SUMAN DUTT, MS.H.CHAKRABORTY, MR.A.PODDAR, ADVOCATES FOR THE COMPANY
The Court : In this winding petition, the claim arises out of a factoring agreement entered into between the petitioning creditor and the borrower, Ramsarup Industries Limited.

The case of the petitioning creditor is that for goods supplied to the company herein by Ramsarup Industries, the borrower sums became due and payable.

As the supplier was in immediate need of funds an agreement was entered into between Ramsarup Industries and the petitioning creditor herein on the understanding that the petitioning creditor would make immediate payment to the borrower Ramsarup Industries on behalf of the buyer that is the company herein.

On the basis of such agreement the petitioning creditor paid sums due and payable by the company herein to Ramsarup Industries.

In the agreement between the Ramsarup Industries and the petitioning creditor SSS Loha Marketing PVT.Ltd., the company herein has been described as the debtor.

Pursuant to the said agreement between the petitioning creditor and Ramsarup Industries, Ramsarup Industries informed the company that all payment in respect of all outstanding invoices be made by the company to the petitioning creditor herein.

Alongwith the letters dated 19th November, 2009, the details of the invoice numbers were also attached thereto.

The said letters were also accepted by the company and in respect thereof letters were issued to the petitioning creditor on 19th November, 2009.

By the said letters the company accepted and confirmed supplies of material by Ramsarup Industries to itself and also acknowledged and agreed to make payment directly to the petitioning creditor.

Subsequently Ramsarup Industries transferred the receivables by letter dated 20th November, 2009 in favour of the petitioning creditor.

Therefore, as payments were made by the petitioning creditor to Ramsarup Industries on behalf of the company and in view of the company accepting and agreeing to make payment to the petitioning creditor, the company became indebted to make such payment to the petitioning creditor.

In fact a cheque drawn on Bank of Baroda replaced an earlier cheque issued by Allahabad Bank.

This was an act performed by the company on 22nd February, 2010.

A request was, however, made to deposit the said cheque drawn on Bank of Baroda on 13th March, 2010 due to financial stringency faced by the company.

The request was complied with but in spite thereof the cheque was dishonoured for insufficient funds.

As the liability of the company to make payment to the petitioning creditor exists and for non-payment a statutory notice was issued on 5th March, 2013.

On receipt of the said statutory notice, a reply was given on 25th March, 2013 by the company.

An earlier statutory notice was issued on 20th May, 2010 and proceedings initiated in respect thereof.

As such statutory notice was held not to be valid by the order dated 5th February, 2013, therefore, a statutory notice was once again issued on 5th March, 2013.

As sums remain due and payable this winding up application has been filed and reliefs sought.

Proceedings were initiated under section 138 of the 1881 Act for dishonour of cheque before the Judicial Magistrate 1st Class, Gurgaon, Haryana.

In the said proceedings, the director of the company surrendered in court and expressed his readiness and willingness to effect compromise of the matter.

After admitting the liability on behalf of the company a sum of Rs.30 lakhs was paid by demand draft as mentioned in the said order.

It was also recorded in the order of the Judicial Magistrate that the director was ready to make payment of the cheque amount within three months.

The said order was not challenged before any forum.

It was the order by which summons was issued which was challenged in criminal revision.

Such criminal revision has also been dismissed by the Punjab and Haryana High Court.

The claim though of 2009 finds acknowledgement in the letter of 19th February, 2010 so also on 27th September 2010 before the Judicial Magistrate, 1st Class, Gurgaon, Haryana.

This evidences that the company has no defence more so, in view of the cheques dishonoured for insufficient funds and acknowledgement of liability, the relief sought be granted.

Counsel for the company submits that the factoring agreement is nothing but a bill of exchange executed by the parties.

Clause 4.2 of the said agreement permits the borrower Ramsarup to realise monies directly from the debtor and on receipt of said sums the borrower is required to deposit the sum with the petitioning creditor.

In case no sums are deposit with the petitioning creditor the borrower shall hold such sums in trust for the petitioning creditor.

Clause 9.1(xvii) also contemplates the holding of sums received by Ramswaroop Industries, the borrower in trust for the petitioning creditor.

Clause 10.3 also entitles the borrower to re-purchase the receivables on request made to it by the petitioning creditor.

Clause 11.2 entitles the petitioning creditor to exercise recouRs.in respect of receivables.

In fact in March 2010 so also April 2010 sums have been paid by the company to Ramsarup, the borrower and the borrower, therefore, is holding such sums as a trustee for the petitioning creditor.

Claim, if any, should be made with the borrower in terms of Clause 4.2 of the agreement between the parties.

In fact, the petitioning creditor was entitled to re-purchase the receivables from the borrower which right has not been exercised by the petitioning creditor.

C.P.No.592 of 2011 has been filed against Ramsarup Industries, the borrower on the self-same cause of action by the petitioning creditor.

This finds no mention in the instant winding up petition.

Therefore, there is suppression of material facts.

Subsequent to the cheques issued on 23rd February, 2010 in favour of the company payments have been made by the company to the borrower Ramsarup on 18th March, 2010, 27th March, 2010, 10th April, 2010 and 26th April, 2010.

In view of such payments made it is for the petitioning creditor to proceed against the borrower Ramsarup.

In fact, by letter dated 2nd June, 2010 the company has informed Ramsarup of the 138 notice issued to it under the 1881 Act by the petitioning creditor.

In the said letter it was categorically recorded by the company that payments had been made to Ramsarup for the price of goods sold and delivered to the company.

In reply, the borrower Ramsarup Industries has also undertaken to make payments to the petitioning creditor and has accepted that the company is not liable to pay such sums to the petitioning creditor.

In fact, an instruction was also issued by the borrower Ramsarup to the petitioning creditor not to deposit the cheque handed to it.

Therefore, in view of the said correspondence the deposit of cheque by the petitioning creditor was uncalled for.

In 2013 Ramsarup Industries filed a reference before the Board for Industrial and Financial Reconstruction under the 1985 Act and proceedings in respect thereof

are at present lying before the Appellate Authority under the 1985 Act.

As the petitioning creditor was entitled to exercise recouRs.in respect of the receivables and in not doing so cannot maintain this winding up application.

In the order dated 5th February, 2013 it has been categorically recorded that the companys inability to pay its debt has not been borne out nor do the facts warrant consideration of the petition for winding up on just an equitable ground.

Therefore, the company petition was rejected.

Circumstance remains unchanged and as the companys inability to pay its debt is not borne out from this application too, the application be dismissed.

Having considered the submissions of the parties the company purchased goods from one Ramsarup Industries.

Ramsarup therefore became entitled to receive sums from the company on account of price of goods sold and delivered.

As Ramsarup was in urgent need of sums an agreement was entered into between Ramsarup and the petitioning creditor herein whereby the petitioning creditor agreed to purchase the invoices raised by Ramsarup on the company and for such purchase of invoice the petitioning creditor made payments to Ramsarup.

It was for this reason that an agreement was entered into between Ramsarup and the petitioning creditor.

In the said agreement Ramsarup has been described as the borrower and the company as a debtor because the company continued to remain a debtor whether to Ramsarup or to the petitioning creditor for it had purchased goods from Ramsarup but due to the agreement between Ramsarup, the borrower and the petitioning creditor the company now became liable to make payment to the petitioning creditor.

This agreement has been referred to by the petitioning creditor as a factoring agreement while the company describes this agreement as nothing but a bill of

exchange.

Be that as it may, but what is important to note is that under the agreement the petitioning creditor was to receive moneys from the company.

By the said agreement Ramsarup assigned its rights in favour of the petitioning creditor and it was on the basis of this understanding that certain documents were executed.

The fiRs.in the line of documents was the letter of assignment to which the list of invoices assigned was appended.

This was followed by a letter issued by the company accepting the agreement between the borrower and the petitioning creditor and also agreeing to act in terms thereof by making payment to the petitioning creditor for the invoices assigned.

A third document was also executed which is referred to as transfer of receivables dated 20th November, 2010.

In Clause 4 of the said document which has been issued by the borrower Ramsarup it has categorically stated as follows : The invoice/s offered for factoring to you have not been included in the statement of book debts submitted to our Bankers. From a reading of Clause 4 of the document by which the receivable has been transferred by Ramsarup Industries in favour of the petitioning creditor, the assigned invoices have been removed from the book debts submitted to the bankers of Ramsarup Industries.

There is no document to evidence inclusion of the said invoices in its book debts nor any intimation to its bank by Ramsarup Industries for realisation of such suMs. Therefore, by virtue of the aforesaid clause the invoices mentioned in the said letter stood excluded from the statement of book debts which document has been submitted to the bankers of Ramsarup.

The said agreement has also been acted upon by the company as by two several demand drafts payment of Rs.1 crore has been made by it on 5th March, 2010 and 31st March, 2010 to the petitioning creditor.

A confusion has been sought to be created by the company in respect of payment of Rs.25 lakhs.

According to the company the said sum of Rs.25 lakhs was paid by Ramsarup on 5th March, 2010 through Ramsarup Udyog which is a unit of Ramsarup Industries, the borrower but there can be no reason for a payment to be made twice over.

On the other hand a demand draft has also been issued for the sum of Rs.25 lacs by the company.

In fact, the said sums paid has been accepted as part payment against invoices assigned by the borrower in favour of the petitioning creditor.

This has not been disputed by the company.

The company has filed a supplementary affidavit wherein it has given details of the payments made to Ramsarup Industries.

The document which has been annexed is a bank statement, whose bank statement it is cannot be deciphered from the annexed document.

The amount which has also been shown as payment is an ad hoc payment.

No particulars of the invoice against which the payments have been made is given in the supplementary affidavit.

At the time of filing the supplementary affidavit the reply of the petitioning creditor was known to the company and the details of the invoice against which payment has been received was also known to it.

Therefore, it was a duty cast on the company to give details of the invoice in respect of which payment had been made by it to Ramsarup but no such detail has been given and rightly so as no payment against such invoice was made by the company to Ramsarup.

Therefore the case made by the company regarding payment of Rs.25 lacs by Ramsarup cannot be accepted in the light of the demand draft issued by the

company and its covering letter.

It is unbelievable that a businessman belonging to the commercial world will not scream foul play when payment is sought twice over.

In fact, payment to Ramsarup is belied by the recording in the order of the Judicial Magistrate, FiRs.Class, Gurgaon, Haryana dated 27th September, 2010.

It may be true that to escape proceedings under Section 138 of the 1881 Act an admission to make payment of the liability may have been made so also the readiness and willingness to make payment within three months but the said order could have been challenged or an application could also have been made by the Director of the company in the 138 proceedings stating therein that he had been coerced into admitting the liability so also expressing its readiness and willingness to make payment but neither has any application been filed nor the order challenged in any forum.

It is only the order by which summons was directed to be issued that was challenged before the Punjab and Haryana High Court which proceeding as on date stands dismissed.

Certain correspondence exchanged between the borrower and the company has been annexed to the affidavit-in-opposition filed by the company.

From a reading thereof it appears that a security was deposited by the company with Ramsarup on account of goods sold and delivered.

A cheque was also issued by the company in favour of the petitioning creditor and payment was also made by the company to Ramsarup for the goods supplied.

Therefore, three instruments had been executed by the company in respect of the goods sold and delivered to it.

Any prudent businessman on payment of sums would request nonencashment of the other instrument.

Admittedly, the instrument issued in favour of the petitioning creditor is in February, 2010 while payment made to Ramsarup, the borrower was in March and April, 2010.

The security undoubtedly was given prior to February, 2010 but the company even on making payment to Ram Swarup, the borrower did not address any letter to the petitioning creditor for non-encashment of the instrument given to it.

The instrument issued in favour of the petitioning creditor was deposited in May, 2010 and was returned on 19th May, 2010 by the Indusind Bank for insufficient funds and not for stop payment.

Therefore, the defence of the company in view of the aforesaid cannot be accepted.

The acknowledgement of liability is clear on replacement of the cheque issued by Allahabad Bank by the cheque drawn on Bank of Baroda.

Liability to make payment is also evident from the letter dated 19th February, 2010 which precedes the replacement of cheque.

The demand drafts dated 5th March, 2010 and 31st March, 2010 are proof in itself that payments were made by the company to the petitioning creditor and it is not known against which invoice the payment was made to Ramsarup.

As payment of a crore has been made and accepted against invoices 401554, 401557, 401561 and 401564 so also 401562 and 401563 let credit be given for the said sum to the company and C.P.552 of 2013 be admitted for the sum of Rs.3,00,06,655/-.

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

The fiRs.of such instalment be paid by 27th May, 2014 and the 27th day of each succeeding month.

Needless to mention that the said sum shall carry interest at 8% per annum on and from the date of issuance of the statutory notice till realisation.

An attempt was made by the company to take the plea of the agreement being nothing more than a bill of exchange which needs to be stamped under the Indian Stamp Act.

This plea was sought to be taken at the reply stage and although a point of law would have been allowed but for the submission of Counsel for the petitioning creditor who submits that the document has been stamped and the original can be produced in Court, if so required.

In fact, the company was entitled to take inspection of the document but no step in respect thereof either by letter or during the couRs.of hearing which has continued for several days was undertaken by calling upon the petitioning creditor to produce such document.

Therefore, the said plea seems nothing but a desperate one taken in defence.

C.P.592 of 2011 has been filed by the petitioning creditor against Ramsarup Industries and it is quite possible that the amount which has been admitted in this winding up petition also forms a part of its claim therein.

From a reading of the affidavit in opposition filed by the company the petitioning creditors claim in C.P.592 of 2011 is for the sum of Rs.10,35,000/-.

This is definitely an amount higher than the amount claimed in this winding up petition and in the event the said amount is included therein, the same be excluded therefrom.

This however will be subject to payment made by the company to the petitioning creditor.

In default of payment of any one instalment the petitioning creditor will be entitled to advertise once in Ei Samay and The Times of India, Kolkata edition.

Matter is made returnable eight weeks hence.

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

(PATHERYA, J.) sb/pa/TR

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