Appellant Vs. Respondent

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SooperKanoon Citation : sooperkanoon.com/1153881

Court : Kolkata

Decided On : Jul-02-2014

Judge : Nadira Patherya

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER
SHEET CP No.71 OF 2014 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction ORIGINAL SIDE IN THE MATTER OF : UNIT CONSTRUCTIONS Co.PVT.LTD.AND CHIYA TOURS AND TRAVELS PVT.LTD.BEFORE: The Hon'ble JUSTICE PATHERYA Date : 2nd July, 2014.

MR.SHAUNAK MITRA, MR.SANJEEB SENI, MR.SOUVIK KUNDU, ADVOCATES FOR PETITIONING CREDITOR MR.ANIRBAN ROY, MS.AIMAN ABDULLA, ADVOCATES FOR COMPANY The Court : This winding up application has been filed for a claim which arises on account of airline tickets booked by the petitioning creditor for the directors of the company.

The case of the petitioning creditor is that from time to time air tickets were booked and purchased by it for the directors of the company on instructions given.

The tickets were made over and invoice raised.

In respect of the said invoice part payments were made by the company.

For the outstandings requests were made.

As the same remained unpaid, a statutory notice was issued on 19th July, 2013, wherein it was specifically stated that on account of ticket cancellations credit note had been issued and after giving credit for the credit notes issued and part payments made a sum of Rs.12,12,814/- was due and outstanding which the petitioning creditor was entitled to claim from the company along with interest.

In spite of receipt of the statutory notice, the company gave no reply.

Therefore, the presumption contained in the statutory notice remained unrebutted.

An opposition has been filed to the winding up petition and the defence of excess payment or double payment has been taken by the company.

In fact, payments have been made without raising any objection in the past by the company and, therefore, the claim made be admitted and orders passed as sought.

Counsel for the company submits that the petitioning creditor has admitted that it is an agent of the principal airlines.

The principal being disclosed this application is barred by section 230 of the Contract Act.

In fact double payment has also been made and as the application is not maintainable this application warrants no order and be dismissed.

The subparagraphs of paragraph 3 of the opposition be read compositely and from a composite reading it will appear that the issue as regards maintainability has been raised.

Reliance has been placed on AIR1952 Cal 859 and AIR1951 Allahabad 596.

In reply counsel for the petitioning creditor submits that no issue of principal or agent has been raised in the affidavit filed by the company.

The petitioning creditor never acted as an agent.

Therefore, section 230 of the Contract Act will not apply.

There is no pleading with regard to the arguments made by the company and as held in AIR1976 Guahati 58 that the defence of maintainability must be raised in accordance with Order 6 Rule 2 of the Code of Civil Procedure specifically and not having done so the maintainability issue need not be considered.

Reliance has also been placed on AIR1984 Cal.

215. Having considered the submissions of the parties, defence of Section 230 of the Contract Act taken by the company cannot be accepted as conduct of the parties evidences payment made by the company to the petitioning creditor in the past.

It is not a case of a single transaction effected between the parties.

Air tickets were booked by the petitioning creditor for the personnel of the company for travel and when invoices were raised payments were made.

In fact, the company in sub-paragraph (e) of paragraph 3 has specifically stated as follows:It seems illogical that the company would not make payments of the airlines tickets purchased by it. It is an admitted position that payments were made by the company in respect of the air tickets purchased by the petitioning creditor.

Therefore, the plea of Section 230 of the Contract Act would not come to the assistance of the company.

In fact, the other defence taken by the company is that payments have been made in excess.

This excess payment arises on account of double payment.

It is unbelievable that for the financial year in which the double payments were made the accounts of that year would not be scrutinised by the Chartered Accountant of the company and the same would not have been brought to the notice of the company.

It is also unbelievable that when double payments have been made there would be no letter from the company informing the petitioning creditor of such double payments and seeking adjustment.

This becomes more pertinent as issuance of credit note by the petitioning creditor to the company has been admitted by it.

The petitioning creditor and the company are two independent and separate legal entities.

It is unbelievable that double payments would be made on the basis of goodwill.

In fact, there is a confusion in the mind of the company itself in respect of amounts which it is to receive from the petitioning creditor.

In sub paragraph (j) of paragraph 3 of the affidavit filed by the company the company has stated that it is entitled to receive Rs.6,10,472/- paid by it in excess from the petitioning creditor.

In spite thereof a sum of Rs.1,00,000/- has been paid by the company to the petitioning creditor.

Why such payment was made is beyond ones comprehension.

In another paragraph the company has pleaded that approximately Rs.8,00,000/- had been paid in excess to the petitioning creditor.

Therefore, the companys case as pleaded varies from the argument made in Court.

The company has also pleaded that it was agreed that payments would be made for the air tickets instantly by cheque or cash.

At the very fiRs.instant invoices would be raised by the petitioning creditor upon the company.

In the light of the aforesaid case pleaded by the company in its affidavit the defence taken, which defence does not even find mention in the affidavit filed cannot be accepted and accordingly, CP No.71 of 2014 is admitted for the sum of Rs.12,12,814/- along with interest at 8% per annum on and from the date of issuance of statutory notice till realisation.

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

The fiRs.of such instalment be paid by 30th July, 2014 and the 30th day of each succeeding month.

In default of payment of any one instalment, the petitioning creditor will be at liberty to advertise once in Sambad Pratidin and once in The Statesman.

Matter is made returnable eight weeks hence.

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

(PATHERYA, J.) sb/nm