Appellant Vs. Respondent

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SooperKanoon Citation : sooperkanoon.com/1154136

Court : Kolkata

Decided On : Jul-03-2014

Judge : Nadira Patherya

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER
SHEET CP NO.438 OF 2014 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction ORIGINAL SIDE IN THE MATTER OF : ARNAB SENGUPTA COLLECTIONS PVT.LTD.AND FASHION KRAFT BEFORE: The Hon'ble JUSTICE PATHERYA Date : 3rd July, 2014.

MR.SWATARUP BANERJEE, MR SOURAV SENGUPTA, ADVOCATES FOR PETITIONING CREDITOR MR.SUSANTA DUTTA, MR.AMIT KR.BARMAN,ADVOCATE FOR COMPANY The Court : In this winding up application the claim arises on account of price of goods sold and delivered to the company by the petitioning creditor.

The case of the petitioning creditor is that goods were supplied to the company and three several cheques were issued to the petitioning creditor by the company.

Bills raised have also been received but on presentation of two cheques, the said cheques were dishonoured for insufficient funds.

Thereafter as no payment was made by the company to the petitioning creditor in spite of notice on 18th March, 2014 a statutory notice was issued.

The said though received by the company, no reply thereto has been given.

It is only by filing an affidavit to the winding up petition that the company has sought to rebut the statutory presumption of its inability to pay its debts.

The defence taken in the affidavit filed by the company is far from bona fide.

As defective goods has been alleged which defective goods the petitioning creditor has taken back and given credit to the company.

The second with regard to advance sums paid for future supplies and two several cheques returned.

From the written advice issued by Axis Bank Limited so also the letter dated 12th February, 2014 dishonour of two cheques is evidently clear.

Therefore, the case made out by the company with regard to the return of the two cheques is not correct.

Except for the goods taken back by the petitioning creditor no other goods were defective.

Therefore, the company petition ought to be admitted for sums after giving credit for the defective goods taken back by the petitioning creditor.

Counsel for the company submits that the issuance of a purchase order was a condition precedent to supply being made by the petitioning creditor to the company.

On supplies made all goods were found to be defective.

The fiRs.set of supply was made till August 2013 and therefore it is in September 2013 that the goods had been returned.

Three cheques issued are in November 2013 and December 2013 in anticipation of worthy goods to be supplied in future.

Therefore, as the defective goods supplied under the fiRs.set of supply is still lying at the factory premises of the company, the same be taken back by the petitioning creditor, and as a bona fide dispute has been raised this application merits no order.

Having considered the submissions of the parties that supply was effected by the petitioning creditor to the company is an admitted fact as this has also been accepted by the company in its pleadings.

Therefore, the dispute raised with regard to non-issuance of purchase order by the company to the petitioning creditor cannot be accepted.

In June 2013 it has been pleaded by the company that the goods were found to be defective.

Supplies have been made even thereafter i.e.in July 2013 and August 2013.

There is no reason why the company would continue to receive goods which initially were found to be defective.

No letter of rejection of defective goods has been issued by the company.

Although an oral assurance has been pleaded so also a talk over the phone and sending of messages but when such oral conversation took place between the parties or when the messages were sent is not known.

The text messages have also not been retrieved by the companys personnel from the service providers nor annexed to the opposition filed.

In fact it is unbelievable that when the fiRs.set of supply was defective and not lifted in its entirety, the company would issue cheques for future supply in advance.

According to the company two out of the three cheques had been returned to it but from the documents issued by the Bank and the letter of the advocate of the petitioning creditor issued under section 138 of the 1881 Act it appears that only one cheque was returned to the company while two cheques had been encashed, which cheques were dishonoured for insufficient funds.

There is no doubt that some of the goods had been returned aggregating to approximately Rs.98,000/-.

In the absence of any letter of rejection or any proof of the goods being defective beyond the defective goods returned aggregating to Rs.98,000/-, the defence of the company cannot be termed as bona fide.

Accordingly, C.P.No.438 of 2014 is admitted for the sum of Rs.6,15,208/along with interest payable 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 in four equal monthly instalments.

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

In default, the petitioning creditor will be at liberty to advertise once in Sambad Pratidin and 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.