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Divya Export Enterprises Vs. ProducIn Private Ltd.

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Court : Karnataka

Decided On : Mar-10-1990

Reported in : [1991]70CompCas760(Kar); ILR1990KAR1610

Judge : K. Shivashankar Bhat, J.

Acts : Indian Contract Act - Sections 230; Companies Act, 1956 - Sections 433

Appellant : Divya Export Enterprises

Respondent : ProducIn Private Ltd.

Advocate for Def. : K.S. Hanumantha Rao, Adv.

Advocate for Pet/Ap. : S.S. Naganand, Adv.

Judgement :

K. Shivashankar Bhat, J.

1. This is a petition under section 433(e) of the Companies Act, 1956 ('the Act', for short), seeking winding up of the respondent for its alleged inability to pay its debts.

2. The case of the petitioner as told in the petition is as follows:

The petitioner is engaged, inter alia, in imports raw cashewnuts from foreign countries and processes them in cashew factories owned by it. In the course of its

business, the proprietor of the petitioner got acquainted with one Romesh Kotecha. He claimed to be a representative of the respondent-company as a director and also of a company called Production Ltd., a company incorporated in the United Kingdom. Negotiations were held regarding the purchase of raw cashewnuts by the petitioner and, in July, 1987, it was agreed that 250 M. T. (plus or minus 10% at seller's options) of dry raw cashewnuts would be supplied to the petitioner. The salient terms and conditions of the contract were the following :

The goods were to be of Tanzanian origin and the shipment was to come from Mombasa port. The price negotiated and agreed was US dollars/1,300 per metric ton, C and F Cochin landed weight and quality. Ther was a tolerance limit prescribed as regards the quality of the goods, the moisture content and the foreign matter content. The payment of the price was to be by drawing against confirmed irrevocable letter of credit to be opened for 10% of the contract value. The price was to be paid at the rate of 90% on presentation of the documents at London and the balance of 10% after the cargo was discharged by the vessel at the port of destination, namely, Cochin, and after the goods were inspected and accepted by the petitioner. An L. C. was accordingly opened at the instance of the petitioner by the Bank of Baroda in accordance with these terms. The first consignment comprising 1,400 bags of 80 kg. each was shipped and documents in respect thereof were negotiated through bankers and 90% price was paid by the petitioner's bankers. The said 1,400 bags arrived at Cochin port on August 17, 1987, in the vessel, M. V. Black Falcon, and the cargo was discharged on August 30, 1987. The containers were destuffed on September 8, 1987. As the relative documents had not reached the petitioner, the petitioner followed up the matter by issuing telex messages and making telephone calls. This resulted in the good lying in the Cochins port for two months, with the petitioner being unable to clear the goods. One of the terms agreed upon in the contract was that the goods should be surveyed upon discharge by S. G. S India Pvt. Ltd., Surveyors, Cochin. After the goods were discharged, they were inspected on the 15th and 20th October, 1987. by S. G. S. India Pvt. Ltd. On a bare inspection of the goods, it appeared that the cashewnuts were sub-standard, rotten, spoiled, shriveled and immatured. Out of the 1,400 bags, 420 bags were in completely torn condition. Only the remaining 980 bags were intact. Though S. G. S India Pvt. Ltd. was required to survey the

entire goods discharged by the vessel, they, of their own volition, chose to survey only the goods in the bags found intact. The petitioner called upon them to take samples of the goods found in the remaining bags too. But the surveyors declined to do so. The petitioner then notified the consignor about this attitude of the surveyors and requested them to send necessary instructions for a proper survey. However, Ramesh Kotecha, director of the respondent- company, visited Cochin and there was a joint examination and inspection of the cargo. By October 16, 1987, the petitioner had taken delivery of 980 bags found intact and notified the consignor that the remaining 420 bags was lying in loose condition and again reiterated their request to conduct a proper survey. When no action was taken, the petitioner appointed J. B. Boda, marine surveyors, an internationally reputed concern to carry out a survey of the goods contained in the 420 torn bags. A report was received indicating that the percentage of goods found defective was of the order of 70%. In view of this finding, the letter of credit was amended after fresh negotiations to provide that, upon proof of shipment, 60% of the price would be paid instead of 90%. The second parcel of 1,800 bags arrived at Cochin port in vassel M. F. V. Khabeer Das on October 12, 1987. Out of this consignment, 1,126 bags were found to be in sound condition and 674 bags were in a torn and burst condition. The decayed and damaged nuts were in excess of the tolerance limits. Again, S. G. S. India Pvt. Ltd. was requested to survey the entire goods but they failed to do so. The petitioner, therefore, got the goods surveyed after bringing to the notice of the consignor the attitude of the designated surveyor. The survey was again conducted by J. B. Boda, marine surveyors. As in the previous instance, S. G. S India Pvt. Ltd. conducted a survey on November 18, 1987, in respect of the goods contained in the sound bags only. The report of J. B. Boda shows that the goods contained in the sound bags were damaged to the extent of 57.1% and the goods contained in teh torn bags were defective to the extent of 76%. The surveys conducted by S. G. S. India Pvt. Ltd. were defective, incorrect and incomplete. As the petitioner had already paid 90% and 60% of the invoice price of goods, when the extent of damaged goods received was so large, the petitioner became entitled to claim refund of the price paid in excess for the goods. Accordingly, it issued two debit notes one dated November 9,1987, indicating the excess amounts claimed from them as US dollars 43,762.38 and the second dated December 14, 1987,

indicating the excess amount claimed as US dollars 1,06,562.25. These debit notes were worked out on the basis of the invoice value. But, as the amounts paid by the petitioner were 90% and 60% respectively of the invoice value of each consignment, the following amounts are due from the respondents to the petitioner : US dollars(1) Total invoice value at US dollars 1,300/MT1,400 bags 1,43,1260.00do. 1,800 bags 1,84,080.00----------Total 3,27,340.00(2) Amount actually paid 1,400 bags (90% invoicevalue) 1,28,934.00do. (60% of invoice value) 1,800 bags 1,10,448.00----------Total 2,39,382.00Balance due to seller as per invoice 87,958.00(3) Total claim by buyers as covered by twodebit notes 1,50,424.65----------Balance due to the petitioner (buyer) US$ 62,366.63----------Total US$ 62,366.63Interest at 19.5% per annum from date ofdebit note till date 12,151.87----------Grand total US$ 74,518.50 ----------

3. The transaction between the petitioner and the respondent being a commercial one and as the respondent has realised excess price from the petitioner and as the respondent has realised excess price from the petitioner and has retained it unauthorisedly, the petitioner is entitled to interest on the excess payment at 19.5% per annum from the date of payment till the date of refund. Accordingly, the amount due from the respondent to the petitioner is Rs. 11,36,407.10 converting the amount due in US dollars into Indian rupees at the present prevailing rate of exchange, i.e., 1 US dollars = Rs.15.25. The amount actually payable to the petitioner shall be the rate prevailing on the date of payment. The petitioner called upon the respondent to refund the balance on more than one occasion by sending telex messages, letters, notices, etc., and by personal telephone calls. These demands have not evoked any response. As one of the conditions in the contract was that the provisions of the Combined Edible Nut Trade Association (CENTA), U.K., would be applicable to the contract, the petitioner raised a dispute before the CENTA and claimed refund of excess price and also sought arbitration of the dispute. The said association has erroneously and for ulterior purpose, not processed the reference and the claim of the petitioner, obviously due to the influence wielded by Romesh Kotecha with CENTA.

4. On September 29, 1988, the petitioner's counsel sent a notice to the respondent to pay a sum of US dollars 62,366.63 with interest. The notice was not compiled

with ; hence this petition. The petitioner asserts that the amounts claimed are quantified and are due. In response to the notice regarding admission, the respondent has filed its objections.

5. The substance of the respondent's pleas is:

There was not relationship of creditor and debtor between the parties. The respondent acted only as a broker between the petitioner and a company called Production Ltd., incorporated in the United Kingdom (referred in this order as 'the London seller'). There has been no contract of sale and purchase between the respondent and the petitioner. The petitioner has not even produced the relevant documents like the agreement, shipping documents, etc., Romesh Kotecha was not a director of the London seller. The petition does not even refer as to who agreed to sell the cashewnuts. The letter of credit was not opened in favour of teh respondent and it was actually opened by the petitioner in favour of the London seller; the petition does not even state that the respondent was the consignor.

6. Actually, the respondent's director acted as a broker. The petitioner had continuous correspondence and the contact with the London seller. There was no transaction between the petitioner and the respondent. The alleged debit notes raised against the respondent are illegal. The respondent repeatedly denied that it was acting on behalf of the London seller; it asserted that Romesh Kotecha was acting only as a broker and the London seller had paid brokerage of 1% to it. The registered notice issued by the petitioner was not served on the respondent as its registered office and hence the latter was not obliged to take note of it. Along with its additional statement of objections, the respondent produced copies of the arbitration reference made by the London seller against the petitioner for the failure of the petitioner to make full payments. The respondent also produced a copy of the letter written by the petitioner to the London seller, claiming payments from the London seller with debit notes; copy of the said letter and the debit note were sent to the respondent without any claim against it. Copies of other correspondence between the petitioner and the London seller were also produced indicating the direct dealing and mutual claims between them. Annexure R-12 which is a copy of the petitioner's letter to the London seller indicates that the

petitioner also sought arbitration of the dispute arising out of the petitioner's claim against the London seller. Annexure R-19 is the copy of the award dated August 18, 1988, made against the petitioner and in favour of the London seller.

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