

In Re: Durgapur Projects Ltd.

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Court : Kolkata

Decided On : Jul-23-1979

Reported in : [1983]53CompCas320(Cal)

Judge : Salil K. Roy Chowdhury, J.

Acts : [Companies Act, 1956](#) - Section 434

Appeal No. : Company Petition No. 301 of 1979

Appellant : In Re: Durgapur Projects Ltd.

Advocate for Pet/Ap. : R.N. Ghosh, Adv.;U.B. Mukherjee, Adv.

Judgement :

Salil K. Roy Chowdhury, J.

1. This is a winding-up petition which was presented on 11th June, 1979, and direction was given for serving the notice along with a copy of the petition on the company. The company appeared and took direction for filing affidavit.

2. The petitioning creditor's claim is for price of goods sold and delivered. It appears that previous to the present purchase order being placed by the company with the petitioning creditor there were negotiations for supply of a settled quality of goods but the said contract was cancelled. Be that as it may, those are not relevant or admissible for the purpose of the present application. The letter dated

19th October, 1978, by which the company asked the petitioning creditor to deliver 200 mm. of Conveyor Belts which were urgently required by the company and the formal purchase order was to be handed over to the petitioning creditor on or about 21st October, 1978, is set out hereunder, copy of which is annexed to the petition and is at p. 11 of the petition :

' THEDURGAPUR PROJECTS LIMITED (A Government of West Bengal Undertaking, Office of the Controller of Stores & Purchase, P.O. Durgapur-2, Dist. Burdwan).

Calcutta Office

Registered Office

1, Shakespeare Sarani Calcutta-700016. Phone 440221.

New Administrative Building P. O. Durgapur-2 Dist. Burdwan Phone 5381 (10 lines)
Date 19.10.78.

Ref. DP/CS-2089 To M/s. Hilton Rubbers Pvt. Ltd., 13-D, Everest 58-C, Chowringhee Road, Calcutta-700071. Sub: 800 mm Conveyor Belt.

Dear Sir,

This has reference to our discussion had with your Mr. Day. Kindly arrange to deliver 200 mm. of the subject belt to our plant stores immediately.

The material is urgently required for over-hauling of 4th and 5th unit of our power station. Our formal purchase order will be handed over to you on 21-10-78.

Please treat this as letter of intent

Yours faithfully,

Sd/-P.K. Sinha

Controller of Stores & Purchase

3. On the same date, it appears, the petitioning creditor handed over a railway receipt No. 655909 dated 19th June, 1978, to the company for which a receipt was granted. It appears in the copy that instead of 19th June, 1978, it is wrongly written as 19th June, 1976. The same was duly acknowledged by the company on the 19th October, 1978, being the date of the letter which has been set out. Thereafter the company placed the formal order dated 7th December, 1978, for the supply of the said goods by the petitioning creditor to the company. There is no dispute that the company received the said goods and in fact by a goods receipt note duly issued by the company dated 21st December, 1978, the company certified that the above 200 mm. conveyor belts were 'certified that the above materials have been taken into custody of the stores department in good condition duly checking up, sound and weight in conformity with the purchase order dated 7th December, 1978'. A copy of the said goods receipt note with the said certificate is annexed to the petition and is at p. 18. Thereafter the petitioning creditor duly submitted its bill to the company for the price of the said goods together with sales tax and other charges amounting to Rs. 64,958.16. A copy of the said bill is annexed to the petition and is at p. 19. The company having failed to pay the price of the goods the petitioning creditor by several letters dated 29th January, 1979, 2nd February, 1979, 28th February, 1979, demanded payment of the said bill being the price of the said goods and the said letters were duly acknowledged being received by the company on 1st March, 1979, from its office at Calcutta, at No. 46-C, Chowringhee Road. The company never cared to give any reply and ultimately by a statutory notice dated 12th April, 1979, through its advocate on record the petitioning creditor caused a notice under Section 434 of the Companies Act served on the company for the price of the goods sold and delivered together with interest thereon. It is then for the first time in reply dated 10th May, 1979, to the said statutory notice that the company through the same officer, who entered into the contract with the petitioning creditor as evidenced by the said letter dated 17th October, 1978, raised a question that the goods were not acceptable to the company as the quality was very bad (according to) the alleged performance report submitted by the senior maintenance engineer, boiler, which is referred to in the said letter. Subsequently by another letter dated 12th May, 1979, the company

through the secretary replied to the advocate on record of the petitioning creditor that the goods were not according to the specification and have been rejected and referred to the clause in the contract regarding acceptance and rejection and that the decision of the management would be final and binding on the parties. Therefore, the only dispute in this case, as raised by the company, is that the goods are not according to the specification and have been rejected by the company and their decision was final in terms of Clause 12 of the purchase order.

4. Mrs. U.B. Mukherjee, appearing for the petitioning creditor, placed the petition and the annexures together with the correspondence and submitted that the company had accepted the goods and entered into the contract on the representation that the goods were urgently required for immediate consumption by the company and the railway receipt was also handed over to the company on the very same day, i.e., on the 19th October, 1978, when the Controller of Stores & Purchase of the defendant-company entered into the said contract and accepted the delivery of the railway receipt. Thereafter a formal purchase order dated 7th December, 1978, was issued to the petitioning creditor and the goods were duly receipted by the company in good condition and order by its certificate dated 21st December, 1978. It was only after the statutory notice was served through the advocate on record of the petitioning creditor that the company came out with the story for the first time that the goods were not according to the specification and have been rejected and the decision of the management was final. Mrs. Mukherjee was right in her submission that the goods having been accepted and not having been rejected within a reasonable time, and further there being no intimation as to the inspection being held or the rejection of the goods on any date whatsoever to the petitioning creditor ; the said alleged rejection cannot be said to be bona fide, factually true or correct. Mrs. Mukherjee also submitted that the company represented to the petitioning creditor to supply the goods as the goods were very urgently required by the company for its immediate use and the purchase order was, in fact, issued more than 1 1/2 months after the said railway receipt was handed over by the petitioning creditor to the company. Mrs. Mukherjee submitted that there was no reply to the demand notice sent by the petitioning creditor to the company and it was only after the statutory notice was served by the advocate on record, of the petitioning creditor, on the company that the company came out with

the false and frivolous story of the goods not being according to the specification and being rejected by the company and the decision of the management being final. Therefore, Mrs. Mukherjee submitted, at this stage, it cannot be said that the winding-up petition is an abuse of the process of the court and therefore, the winding-up petition should be admitted as there was no bona fide dispute, of the petitioning creditor's claim, raised by the company and there is no substance in the defence sought to be raised by the company either in law or in fact.

5. Mr. R.N. Ghose, appearing for the company, submitted that the goods were not according to the specification and the decision of the management as to the quality of the goods and the rejection of the same would be final and binding on the petitioning creditor. He referred to Clause 12 of the terms of the contract which is printed at the back of the purchase order. He cannot dispute that the goods were received, as the same were urgently required by the company, through its Controller of Stores & Purchase. It is further admitted that the certificate was duly issued on the 21st December, 1978, in respect of the said goods but what is now contended is that by the letter dated 5th May, 1979, the company intimated the petitioning creditor about the rejection of the goods, as, after test, it was found to be defective and not according to the specification. It is admitted by Mr. Ghose that the letter was somewhat delayed but under the terms of the contract the decision of the management was final and, therefore, the petitioning creditor was not in a position to dispute the same. He further submitted that in such circumstances it must be held that a bona fide dispute had been, raised as to the terms of the contract and also if the court thinks fit the company should be directed to deposit the entire amount with the advocate on record of the company and the petitioning creditor would be relegated to a suitor. I am unable to accept the contention raised on behalf of the company as it appears that the company is estopped from raising any dispute, as to the contract, which it sought to raise, as, on the definite and positive representation of the company through its authorised officer, the Controller of Stores & Purchase by his letter dated 19th October, 1978, represented to the petitioning creditor that the goods were urgently required for the plant of the company and a formal purchase order would be forwarded subsequently as would appear from the said letter dated 19th October, 1978. It is also admitted that the company received the railway receipt dated 19th June,

1978, representing the goods but no payment has been made to the petitioning creditor in terms of the contract, i.e., 90% against document and 10% subsequently. It is also admitted that the company duly issued the certificate in respect of the goods being in good condition and has been checked and counter-dated 21st December, 1978, which is at p. 18 of the petition. The company has duly received the bill of the petitioning creditor in respect of the price of the said goods being dated 8th December, 1978, which is at p. 19 of the petition. There is no dispute that the petitioning creditor had duly served a demand notice which was received by the company on the 1st March, 1979. The company never cared to send any reply to the petitioning creditor's demand for the price of the goods. After the petitioning creditor served the statutory notice dated 12th April, 1979, on the company on the expiry of 21 days, i.e., on or about 16th May, 1979, the company through the same officer, Controller of Stores & Purchase, for the first time raised the question of the goods not being according to the specification and having been rejected as per the report submitted by the engineer. The said letter seems to be engineered or brought into existence only to create a dispute, if possible. It is quite clear from the conduct of the company that the goods were accepted and it was not rejected within a reasonable time. Further the company has not paid 90% against delivery of document and is now trying to deny its liability altogether on the ground of the goods being rejected as the report of the engineer found it to be not according to specification.

6. The said rejection seems to be not tenable both in fact or in law. The goods have not been rejected within a reasonable time and it was only after the statutory notice was served on the company that the question has been raised. No document has been produced to show that the company at any time gave any notice to the petitioning creditor as to the test in respect of the said goods, and, as the property in the goods has passed to the company, in any event, if the company wants to deprive the petitioning creditor of the price and reject the goods, it should have given a notice to the petitioning creditor as to the date of test, nature of test and also the goods to be tested. There is no material whatsoever that the petitioning creditor's goods have been tested. If it is to be accepted, that the order of the officers of a public undertaking would become statute or an order of a court and as such binding on everybody concerned including the court, then the matter

is different, and, that appears to be the attitude of the officer of the company as if no law or commercial morality exists in this country. The petitioning creditor has supplied goods as far back as on 19th October, 1978, which was received and then accepted in good condition and checked by the company as per certificate dated 21st December, 1978, which is now sought to be rejected in May, 1979, after the statutory notice was served on the company, the said fact reveals the attitude of the officers and the executive of a public undertaking and how they dealt with a citizen of India in respect of commercial transactions. They made positive representation to the petitioning creditor for supply of the goods immediately as the same was required urgently by the company and the petitioner having parted with the goods sometime back, a formal order was subsequently issued, receipts of the goods were duly issued. The petitioner duly submitted its bill to the company which was accepted without any objection. In order to deprive a citizen of his property he must be given an opportunity or a chance to be present when his goods are alleged to be inspected, tested and rejected in terms of a contract. It is now well settled that nobody can commit a fundamental breach of contract and the company having received the goods, and it appears that it has used the same, cannot now turn round and reject the goods on the ground that it was found to be not according to the specification as per report of the engineer. In this state of affairs if the contention of the company is to be accepted by the court then I believe that no transaction with a public undertaking is possible by any citizen of India. Now, the company has the audacity to rely on the clause in the contract which empowers the management to reject any goods and it would be binding on the contractor or the supplier. In this case, the company has raised the dispute as to the terms of the contract or its liability to pay for the said goods after having (accepted) the goods as in good condition and checking the same. There is no evidence to show that the petitioner's goods were duly tested with notice to the petitioner and found to be not according to specification. This appears to be an afterthought and has been set up by the company on an illusory notion. It is also on the ground that the company is a government company and as such what it will submit or state will become law and must be held to be binding on the court. I am afraid that I cannot accept the position from the conduct of the respondent-company. It is clear that the said dispute has not been raised in good faith but only

on frivolous and untenable pleas, if possible, and it is an afterthought which has been set up after the company was served with a statutory notice. In that view of the matter, I cannot but hold that this present winding-up petition is not an abuse of the process of the court at this stage and the company is commercially insolvent as it is unable to pay its debt and it is trying to create a cloud by raising frivolous issues and weaving a cobweb, if possible. It is now well settled that the winding-up petition is a legitimate mode of equitable execution and the question is whether in the circumstances of a particular case it should be availed of or not. I cannot imagine a better case than the present one where the claim of the petitioning creditor cannot be disputed on any ground after clear and specific representation made by the company and acceptance of the goods in good condition after checking. The goods were not rejected with notice to the petitioning creditor, which the principle of natural justice requires, apart from the question of depriving one of his property without notice. It appears that the persons who are in control of the affairs of the company are not at all efficient, honest and competent. They have acted in a high handed, manner and tried to deprive citizens of India of their legitimatedues taking advantage of being an officer of a government undertaking. Therefore, I have no other alternative but to make the following orders :

The winding-up petition is admitted and to be advertised once in Statesman, once in Jugantar and once in Calcutta Gazette but the same not to be published before the 31st of July, 1979. If the company satisfies the claim of the petitioning creditor by paying the value of the said goods being Rs. 64,958.16, together with interest thereon at the rate of 9% per annum from 8th December, 1978, until repayment, and the assessed costs of 30 GMs. before 31st July, 1979, the winding-up petition would remain permanently stayed and compliance with Rule 28 of the Companies (Court) Rules, 1959, is dispensed with. In default, the winding-up petition would be advertised and the same will appear in the list on the 10th of September, 1979.