

473/2009

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Court : Kolkata

Decided On : Feb-13-2012

Judgement :

CP No.473 of 2009

IN THE HIGH COURT AT CALCUTTA

Original Jurisdiction

ORIGINAL SIDE

CONCAST BENGAL INDUSTRIES LTD.

-And-

TOPSIA ESTATES PVT. LTD.

Appearance:

Mr. Sudhir Mehta, Adv.

Mr. Anurag Bagaria, Adv.

Mr. Rudrajit Sarkar, Adv.

...For the petitioner.

Mr. Debangshu Basak, Adv.

Mr. Rajratna Sen, Adv.

Mr. Dipayan Chowdhury, Adv.

...For the company.

BEFORE:

The Hon'ble JUSTICE SANJIB BANERJEE

Date :February 13, 2012.

The Court : The claim of the petitioning creditor is on account of an unpaid amount relating to high-seas sales of heavy melting steel scrap under six several bills of lading. The entire value of the transaction was in excess of Rs.5.92 crore against which a payment of slightly over Rs.5.20 crore has been received and credit for a further amount of slightly over Rs.23.25 lakh has been given to arrive at an unpaid principal component of Rs.49,28,917/-. There is no dispute that the relevant agreements, copies whereof have been appended to the petition, provided for immediate payment and interest at the rate of 17% per annum in case of delay.

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veracity of the agreements is not in question. That the high-seas sales took place is also not questioned. The petitioner has relied on copies of the value added tax declaration or payment forms relating to the six lots of sales, the bills of entry relating thereto and the bills of lading covering the transactions.

The petitioner issued a statutory notice on September 26, 2009 claiming that after giving credit to the payment received, a principal sum of Rs.49,28,917/- remained due and owing from the company to the petitioner. The petitioner also claimed interest at the agreed rate of 17% per annum which was calculated to be Rs.7,74,170/- till September 15, 2009. Advocate representing the petitioner had appended a chart to the statutory notice containing three schedules. The first schedule indicated the details of the high-seas sale agreements, the bills of lading relating thereto and the invoices and particulars covering the same. The second schedule detailed the payments received by the petitioner from the company and

the credits given. The third schedule disclosed the basis for claiming interest in excess of Rs.7.74 lakh.

It is the petitioner's case that notwithstanding due receipt of the statutory notice, the company did not respond thereto. The petitioner says that the company had no grievance as to the quantity or quality of scrap that had been sold by the petitioner to it. The petitioner submits that the company has not paid without any justifiable cause and, in the circumstances, particularly in the company not having dealt with the 3

statutory notice, the company should be presumed to be unable to discharge its debt.

The company's affidavit discloses copies of two documents. A purported letter of December 8, 2008 has been relied upon by the company which, according to the company, was issued to the petitioner under certificate of posting. The second document is a copy of a letter dated October 5, 2009, again said to have been issued under certificate of posting and addressed to the petitioner rather than advocate representing the petitioner in purported response to the statutory notice issued by advocate representing the petitioner on September 26, 2009. The petitioner has altogether denied receipt of either of the letters referred to and relied upon in the company's affidavit. The petitioner says that the tell-tale sign of the letters not having been issued to the petitioner is in the company's insistence that the letters had been posted under certificate of posting.

It appears that neither letter may have been issued by the company to the petitioner and they may have been manufactured or brought into existence by the company - whether or not with the ill advice of any expert - for trying to hide the company's inability to discharge its debt. If the purported letter of December 8, 2008 is taken at face value, it is belied by the other admitted documents on record and is not corroborated by any other contemporaneous material. 4

It is the admitted position that by November, 2008 the company had received the material under the relevant agreements. The purported letter of December 8, 2008 claims that the "scraps supplied by (the petitioner) being of inferior quality are of

no use for us and the same are lying unused." The company would have one believe that by the letter dated December 8, 2008 it called upon the petitioner "to replace the material by a fresh lot of equivalent quantity as per our contracted quality within 15 days from the date of this notice." For good measure, the company claims to have referred to the production loss that it allegedly suffered and demanded storage charges of Rs.300/- per MT per month from the date of the purported letter of December 8, 2008. If, indeed, the company had rejected the goods and had held it to the order of the petitioner, normal conduct would have required the company to issue a subsequent notice to the petitioner, whether to allow it a final chance to remove the rejected goods or to inform the petitioner of the company's proposal to dispose of the goods. There was no such subsequent notice. Significantly, the value of the goods covered by the three agreements referred to in the purported letter of December 8, 2008 was in excess of Rs.3.5 crore. Since the petitioner's claim is only of about Rs.50 lakh, it is evident that a substantial part of the goods covered by the three agreements referred to in the purported letter of December 8, 2008 had been paid for by the company. It defies reason that a company would have paid over Rs.3 crore in respect of the three agreements, claimed that the 5

goods supplied were worthless and take no steps for recovery of the price paid save the issuance of a solitary letter complaining of the quality of the goods.

If the purported letter of December 8, 2008 never saw the light of the day and has been brought into existence for the purpose of the company seeking to establish a defence to the present petition, the subsequent purported letter of October 5, 2009 would also be a manufactured document. The subsequent purported letter refers to the previous purported letter of December 8, 2008 without so much as the company indicating how the company may have disposed of the "inferior and sub-standard scrap." In fact clause (ii) of the second purported letter of October 5, 2009, in the use of the words "you have neither taken back the sub-standard scrap nor settled the account," would tend to indicate that the goods had not been disposed of by October, 2009. Commercial prudence would have demanded that a buyer who had been supplied spurious goods against advance payment would be up and about, proactive and insistent on the refund of the payment. There are

intrinsic indications in the purported letters of December 8, 2008 and October 5, 2009 that they have been brought into existence for the purpose of the present proceedings, inter alia, as they do not reflect the expected sentiments or the natural reaction of a defrauded buyer. The purported letter of December 8, 2008 refers to three lots of goods being of inferior quality: those covered by bills of lading Nos. 6

BJHA1801127GM1, SAFM751117423 and SAFM751140631. According to the purported letter, the company had required heavy melting scrap but the petitioner had apparently sold the company "pure light melting wire scrap" which were "rusty and pitted and full of Dust." The relevant documents pertaining to the three bills of lading have been relied upon in the petition. The bill of entry relating to bill of lading No. BJHA1801127GM1 appears at page 38 of the petition and the related way bill for transport of consignment of goods upon payment of value added tax thereon appears at page 37 thereof. The goods are described as heavy melting scrap in both the bill of entry and the way bill under the rules relating to value added tax. These have not been filled up by the petitioner and have either been issued by the customs authorities or filled up by the company and deposited with the sales tax authorities. Similarly, the way bill for transport of consignment relating to bill of entry No.SAFM751117423 appears at page 47 of the petition and the declaration therein describes the commodity as heavy melting scrap and indicates bill of entry no.436196. The corresponding documents relating to bill of lading No. SAFM751140631 appear at pages 51 and 52 of the petition. The goods are described as heavy melting scrap and due value added tax has been paid thereon.

In the affidavit-in-reply, the petitioner has referred to information obtained from the customs authorities following a query under the Right to Information Act. The information covers reports following the 7

inspection of several lots of goods. The inspection and the reports were made in course of the company obtaining clearance of the goods by the customs authorities. At page 13 of the affidavit-in-reply, bill of entry No.434690 is referred to which covers bill of lading No. SAFM751140631 and the inspector's report finds

the goods to be in order as per the description and packaging. At page 14 of the petitioner's reply, the report against bill of entry No.443183 dated November 21, 2008 corresponds to bill of lading No. BJHA1801127GM1 and the goods appear to have been found as per the invoice and packaging. At page 15 of the petitioner's affidavit, the examination against bill of entry No.436196 dated October 13, 2008 is found correct and as per the invoice. This relates to bill of lading No. SAFM751117423.

The company has not questioned the authenticity of the information obtained by the petitioner which has been disclosed in the affidavit-in-reply. What is evident, therefore, is that the goods that were brought into this country were inspected at the port of entry by the customs authorities and found to answer to the description thereof as indicated in the relevant bills of lading and bills of entry. The inspection was not carried out by any agent of the petitioner. The inspection was conducted by the statutory authorities in accordance with the provisions of the applicable law. The customs authorities did not find "light melting wire scrap" or the goods imported by the company to be "rusty and pitted and full of dust" as the company claims to have subsequently discovered that 8

the goods had transformed into after having left the confines of the customs area.

There are fewer affidavits evidencing a more dishonest stand that have been filed in this Company Court than the one used by the company in the present proceedings. It is evident that the purported letter of December 8, 2008 is of no basis and stands discredited by the undisputed documents that preceded it. That the company cannot demonstrate that this letter was delivered to the petitioner and uses the age-old trick of relying on having posted the letter "under certificate of posting," compounds the matter. Added to this is the company's attempt to explain away its failure to respond to the statutory notice and rely on another purported letter said to have been issued "under certificate of posting," curiously not to Advocate who had addressed the statutory notice but directly to the petitioner. The two letters appear to have been manufactured by the company and the deponent of the affidavit filed on its behalf to mislead the Court.

Whatever other consequence may follow as a result of the palpably dishonest stand taken by the company, it is necessary to protect the judicial system from litigants as this company and their misguided advisors. To preserve the sanctity of the judicial process and to uphold the majesty of the Constitutional mandate discharged by Courts, it is necessary that documents such as those sought to be relied upon by the company are not disregarded by merely disbelieving the same, but by 9

taking recourse to Section 340 of the Criminal Procedure Code, 1973 to cause appropriate proceedings to be instituted in respect thereof against those responsible for having brought such patently improbable documents on record. It is expedient in the interests of justice to do so since the judicial system is clogged under the weight of false claims and frivolous defenses that keep the deserving litigants waiting inordinately. False statements and dishonest claims or defence undermine the authority of Courts, subvert the process and erode public confidence in the system. The Registrar, Original Side, will take custody of the affidavit-in- opposition filed on behalf of the company, keep it in a sealed cover and institute appropriate proceedings before the appropriate Magistrate for the company and the deponent of the affidavit having, prima facie, committed perjury. It is necessary in the interests of justice that such proceedings be commenced as expeditiously as possible. The original affidavit and the improbable documents referred to therein will be made over to the appropriate forum. The deponent of the company's affidavit will produce the best copies of the documents appended to such affidavit before the Criminal Court for such Court to proceed with the matter in accordance with law. The deponent of the affidavit, Deepak Jain, will remain obliged to give evidence before the appropriate Magistrate.

For the company's efforts in trying to establish a defence that cannot stand on the basis of the documents that preceded the issuance of the purported letters of December 8, 2008 and October 5, 2009, C.P. No. 10

473 of 2009 is admitted. If the company pays off the petitioner the sum of Rs.49,28,917/- together with interest at the rate of 17% per annum, as agreed between the parties, from the respective due dates as indicated in Schedule-"C" to

the statutory notice till the date of payment, within a period of a fortnight from date, the petition will remain permanently stayed. In default, the petition will be advertised. The advertisements will be issued in "The Statesman" and in "Bartaman" and should indicate that the matter will appear before Court on the first available working day after the expiry of four weeks from the date of the publication being made. Publication in the Official Gazette will stand dispensed with. There will be no order as to costs at this stage. Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities. (Sanjib Banerjee, J.)

A/s/sg.

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