(2008) 11 CAL CK 0016

In the Calcutta High Court

Case No : C.A. No. 215 of 2008 in C.P. No. 349 of 2007

Jagdev Prasad Bajaj and Others — APPELLANT

Vs

Tirrihannah Co. Ltd. (No. 2) — RESPONDENT

Date of Decision : 05-11-2008

Acts Referred:
Companies Act, 1956 — Section 433, 434
Evidence Act, 1872 — Section 34

Citation : (2009) 148 CompCas 167

Hon'ble Judges : Patherya, J

Bench : Single Bench

Advocate : Sakya Sen, Ganesh Prasad Shaw and Anisha Surana, for the Appellant; D. Basak, S. Roy and Swatarup Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Patherya, J.—This is an application filed under Sections 433 and 434 of the Companies Act, 1956.

Petitioner''s case:

2. The case of the petitioner is that for price of goods sold and delivered to the company between April, 2005, to March 31, 2006, bills were raised. The same were received by the company without any objection. Part payments were made and after giving credit for such payments there remains a sum of Rs. 2,56,849 payable by the company to the petitioning creditor. The said amount is reflected in the ledger account of the company and a statutory notice u/s 433 of the Companies Act was sent to the company on August 13, 2007. The same though received has not been replied to by the company and the amounts outstanding in the ledger account evidence the inability of the company to pay its debts. Therefore, the winding up petition be admitted for the said sum and the company be directed to pay interest thereon.

3. Counsel for the company submits that the particulars of the bills though

mentioned have not been annexed. Bills for which payments have been made have once again been included in the sums claimed and the same has not been denied. The bills in respect of which there has been duplication are BDR/84, BDR/87, BDR/109 and BDR/114. Therefore, the entries in respect of these bills are fictitious and cannot be included in the claim of the petitioning creditor. Bills raised by the petitioner upon the company have not been annexed to the winding up petition and therefore the petitioner has failed to produce the primary documents in respect of his claim. The statement of accounts is unsigned and there is no acceptance of such statement of accounts by the company. In any event the same is disputed and cannot be looked into u/s 34 of the Evidence Act, 1872. There has been a change of management since November, 2007 and the records do not evidence delivery of the goods to the company. Reliance has been placed on a decision in Dadarao Vs. The State of Maharashtra, .

4. Counsel for the petitioner-in-reply submits that for the payments made credit has been given and the disputed bills have been dealt with in paragraphs 11,12 and 13 of the affidavit-in-reply, affirmed on March 27, 2008. In fact, no contemporaneous document has been produced to refute the disputed bills. It has never been pleaded that such bills were fictitious, or were not received by the company. The statutory notice was issued in August, 2007 and the same was received during the tenure of the old management. No reply has been given to such statutory notice and the pleas sought to be raised by the company after the new management took over in November, 2007, cannot be justified. The defence of the company is moonshine and orders be passed as sought for. Reliance has been placed on the decision in Bangasri Ice and Cold Storage Ltd. Vs. Kali Charan Banerjee, and Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, .

5. Having considered the submissions of the parties, the statutory notice dated August 13, 2007, was issued during the tenure of the old management and no reply was given thereto. The new management took charge in November, 2007. The dispute sought to be raised is neither genuine nor bona fide as payments have been made of the bills sought to be disputed. Only a part of one of the disputed bills has not been paid. The unpaid part of such bill was not disputed by the erstwhile management of the company at any point of time. For payments made credit has been given to the company. Therefore, the plea taken is unjustified. No contemporaneous document has been produced by the company disputing the said bills. It has not been disputed that the goods were not received or consumed by the company. The plea of change of management taken is intended to defer payments. The defence, therefore, of the company is not bona fide and no reason exists for recalling the order dated January 8, 2008 Jagdev Prasad Bajaj and Others Vs. Tirrihanah Co. Ltd. (No. 1),)). The payments directed will now take effect from November 15, 2008 and the balance instalment be paid on the 15th day of each succeeding month.

6. In view of the aforesaid C. A. No. 215 of 2008 is dismissed.

Later:

7. Stay prayed for is considered and refused.

8. Xerox certified copy of this judgment be made available to the parties, if applied for, upon compliance of all the requisite formalities.