(2012) 08 DEL CK 0363

In the Delhi High Court

Case No : CO. Petition 475 of 2009

M/S Shyam Dri Power Ltd. APPELLANT

Vs

Bhav Shakti Steel Mines Private Limited RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 13, Order 11 Rule 5, Order 19 Rule 3
Companies Act, 1956 — Section 433, 434

Citation : (2013) 177 CompCas 248 : (2012) 132 DRJ 129 : (2012) 115 SCL 360

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Upamanyu Hazarika, with Mr. Raka Phookan and Mr. Paul Ray Paske, for the Appellant; Virender Ganda with Mr. Ashish Middha and Mr. S.K. Giri, for the Respondent

Final Decision : Disposed Off

Judgement

Indermeet Kaur, J.—M/s Shyam Dri Power Mines Limited (hereinafter referred to as the ''petitioner'') seeks winding up of Bhav Shakti Steel Mines Pvt. Limited (hereinafter referred to as the ''respondent company'') u/s 433 read with Section 434 of the Companies Act, 1956. Submission is that the respondent company had placed various purchase orders between the period from 17.04.2007 to 10.06.2007 upon the petitioner for the supply of 386.140 metric tons of sponge iron lumps at Sinnar, Nasik; the same were accordingly supplied by the petitioner to the respondent company from time to time. The total value of the aforenoted goods was Rs.62,22,401/-. The entire quantity of the aforenoted goods was supplied by the petitioner to the respondent which were received by the respondent pursuant to which a Form ''C'' dated 07.03.2009 was also issued by the Central Sales Tax Department, Government of Maharashtra.

2. Submission of the petitioner company is that it had raised 25 invoices upon the respondent company. Payment of Rs.22,23,647/- was alone made by the

respondent to the petitioner. Goods supplied by the petitioner to the respondent were valued at Rs.62,22,401/-. The balance sum of Rs.39,98,754/- was still due and payable by the respondent.

3. Inspite of the repeated visits and reminders to the respondent company, the said payment had not been liquidated.

4. On 07.09.2009, a legal notice had been sent by the petitioner to the respondent which was received by the respondent but no reply was filed and the amount was also not liquidated. Hence the present petition was filed.

5. Reply has been filed by the respondent. Submission is that this petition is not maintainable as the orders have been placed upon the petitioner by the respondent through the Commission Agent Mr. Pramod Avasthi the goods which were to be supplied by the petitioner to the respondent were to contain an iron ore content of 77.80% FE which after melting contained 87% iron. The goods supplied by the petitioner however contained only 50% FE which was like a waste to the respondent and the same could not be used. The respondent had immediately informed the petitioner as also the Commission Agent about this and the petitioner had also undertaken to lift the goods but the goods have not been lifted up to date; goods are lying at the factory premises of the respondent; they are a waste material for him; Form ''C'' issued by the respondent on 17.03.2009 was for the reason that the petitioner had not taken back the defective goods; the petitioner had assured the respondent that the defective goods will be removed but inspite of this assurance, the goods were not lifted; Form ''C'' was issued only because the goods were lying in the factory premises of the respondent; the petitioner is seeking to take benefit of this Form ''C''; he has wrongly relied upon this document to base the present petition.

6. Along with the reply the affidavit of the Commission Agent has also been filed. There are in fact two affidavits filed by the said Commission Agent. The first affidavit is dated 30.10.2010 and the second affidavit is dated 21.09.2011; submission being that in this affidavit also, the Commission Agent has disclosed that initially the goods supplied by the petitioner contained the iron ore content of 80% but thereafter the sponge iron contained only 50% FE; the respondent had informed the Commission Agent who in turn had informed the petitioner who had agreed to lift the aforenoted defective goods but the same have not taken back; the affidavit further discloses that Form ''C'' had been issued after two years only at the assurance of the petitioner that he would lift this defective material.

7. Rejoinder has also been filed to the reply of the respondent. It is not in dispute that the Commission Agent was the commissioning agent between the petitioner and the respondent; it has been reiterated that goods were supplied by the petitioner to the respondent which fact has been admitted; further submission being that the affidavit of the Commission Agent is a mere collusive device to harass the petitioner.

8. Arguments have been addressed at length.

9. On behalf of the petitioner it has been submitted that the liability of the petitioner is clear and unequivocal; admittedly the goods have been supplied; admittedly Form ''C'' dated 17.03.2009 has been issued by the Central Repository, Sales Tax Department, Government of Maharashtra which clearly states that the petitioner had supplied goods to the respondent worth Rs.62,22,401/-. Reliance has been placed upon Phool Chand Gupta Vs. State of Andhra Pradesh, as also Shree Digvijay Cement Co. Ltd. and Others Vs. State of Rajasthan and Others, to support a submission that the issuance of ''C'' form is a proof of the sale of the goods having being effected by the petitioner to the respondent and the goods have been accepted without a demur. Reliance has also been placed upon Paharpur 3P (A Division of Paharpur Cooling Towers Limited) Vs. Dalmia Consumer Care Private Limited, to support the submission that the defence set up by the respondent at this stage which was at the stage of filing of the reply to the winding up petition which defence is that the goods are defective and there admittedly being no written communication of this defect having been intimated by the respondent to the petitioner is clearly a moonshine and sham defence; it has been set up only to defeat the winding up petition which has been filed by the petitioner.

10. Arguments have been countered. At the outset, Learned Counsel for the respondent has pointed that the affidavit filed by the petitioner in support of his petition is defective; there are certain blanks which have not been filled in. Reliance has been placed upon a judgment of the Apex Court reported in W.P.(C) No. 39/2006 Amar Singh Vs. Union of India delivered on 11.05.2011 to support his submission that a perfunctory and slipshod affidavit which is not consistent either with the provisions of Order XIX Rule 3 of the CPC or with Order XI Rules 5 & 13 of the Supreme Court Rules should not be entertained by the Court.

11. This objection of the respondent does not have any force. The purported blanks are filled in the petition which is a part of the Court record. That apart, the judgment relied upon by the petitioner related to defects in the two affidavits where the said affidavits were clearly in contradiction to one another. As noted supra, there are no blanks in the affidavit which is a part of the record of this Court.

12. On merits, the Learned Counsel for the respondent submits that this is a civil liability which has arisen as there are disputed questions of fact and law which cannot be entertained in a winding up petition. He has placed reliance upon a judgment of this Court reported as 2007 (3) ARBLR 402 Delhi Taipack Limited and Others Vs. Ram Kishore Nagar Mal; submission being the ''C'' form heavily relied upon by the petitioner although admittedly has been issued by the company but can at best be treated only as an acknowledgment of the goods received under the contract of the supply of goods and the price fixed to be paid for them; submission of the respondent being that the goods were defective and coupled with the fact that the Commission Agent has filed his affidavit supporting

the stand of the respondent that the defective goods had been promised to be lifted by the petitioner clearly shows that a dispute has arisen on facts which cannot be answered in this petition.

13. Record has been perused.

14. The transaction between the parties is admitted. Admittedly goods had been supplied by the petitioner to the respondent. It has also come on record that the goods supplied by the petitioner to the respondent were valued at Rs.62,22,401/-. The Central Sales Tax Form (Form ''C'') issued by the State of Maharashtra clearly shows that the petitioner had raised invoices upon the respondent for the aforenoted sum of Rs. 62,22,401/-; this is an admitted document. The law is well settled. A ''C'' Form is a proof of sale made by one party to another; it is an acknowledgement by the respondent that the goods in the value of Rs.62,22,401 has been received by the respondent from the petitioner. The respondent has in fact admitted that ''C'' Form had been issued on 17.03.2009 as the goods up to the value of the aforenoted figure were supplied and were lying in his factory premises on that date. The defence set up by the respondent is that these goods were defective and the same had been intimated to the petitioner as also to the Commission Agent; the petitioner had agreed to lift these defective articles from his factory premises pursuant to which the ''C'' Form had been issued.

15. This defence of the respondent was taken by him for the first time after the winding up petition had been filed. Admittedly there is no communication on record to show that the defect which the respondent had allegedly noticed in the goods supplied by the petitioner had ever been communicated to the petitioner. The reply filed to this petition clearly and categorically states that this defect had been notified both to the petitioner as also to the Commission Agent but no such communication to the petitioner is on record.

16. There is no doubt that the affidavit of the Commission Agent has been placed on record. In fact there are two affidavits filed by the said Commission Agent. The first affidavit is dated 30.10.2010. In this affidavit it has been stated that Mr. Pramod Avasthi was acting as a commission agent for both the parties and the petitioner had initially supplied material till April, 2008 as per requirement containing an iron ore content of 80% but thereafter the material supplied contained a 50% FE which was a waste; assurance was given by the petitioner that he would lift his defective material and that is why ''C'' Form came to be issued two years later. In this affidavit, it has been stated that the material supplied by the petitioner was till September, 2008; as per the respondent it was a typographical error and in view of an application filed by him, a fresh affidavit of the Commission Agent was permitted to be taken on record. This second affidavit is dated 21.09.2011.

17. Learned Counsel for the petitioner points out that the Commission Agent was only acting as an agent between the parties for a transaction which had last

culminated in July, 2007; his knowledge about the defect in the goods supplied by the petitioner to the respondent and the promise of the petitioner to lift these goods is based on un-known information as admittedly he had no role to play between two parties after the transaction had been completed between them in July, 2007. The additional fact incorporated in the second affidavit has also been pointed out by the Learned Counsel for the petitioner which is to the effect that the petitioner had given an assurance to lift the defective goods in March, 2009 which date did not find mention in the first affidavit dated 30.10.2010; submission being that the affidavit of the Commission Agent is a collusive arrangement between the respondent and the Commission Agent; this submission also finds mention in the rejoinder affidavit filed by the petitioner.

18. It is also relevant to note that in the first affidavit the Commission Agent has not mentioned any date when the petitioner would lift the so called defective material but in the later affidavit, he has made a substantial improvement that the petitioner had agreed to lift the defective material in March, 2009 and that is how the ''C'' Form came to be issued on 17.03.2009. The defence of the respondent largely based on these affidavits clearly appears to be suspect.

19. The reply of the respondent also clearly and categorically states that he had sent a communication to the petitioner about the defect in the goods; no such communication is on record; this defect relates to a transaction which had taken place in July, 2007 even then the respondent issued ''C'' Form on 17.03.2009 i.e. two years later without a demur.

20. No mention of the defect in the goods supplied by the petitioner to the respondent had ever been pointed out to the petitioner right up to November, 2010 i.e. when the reply was filed by the respondent; on 08.09.2010, the Court had recorded this oral submission of the respondent but admittedly in this entire intervening period from July, 2007, the so called defects in the goods and the nature of such defects were never communicated to the petitioner; the defence of the respondent company does not appear to be either bonafide or probable. It is sham and moonshine; it appears to be illusory.

21. In Joti Prasad Bala Prasad Vs. ACT Developers Pvt. Ltd. (1990) 68 CC 601 (Delhi) in similar circumstance where the defence sought to be set up by the respondent company that the goods supplied were defective and not up to the mark; the Court had noted that this defence clearly appears to be an afterthought as the respondent has failed to prove that these defects were ever communicated to the petitioner; the so called defence was accordingly rejected as it was only to ward off the winding up petition.

22. Considering all the aforenoted aspects, this Court is satisfied that the respondent owes a debt to the petitioner; despite service of the statutory notice by the petitioner to the respondent, it has failed to liquidate the demand of the petitioner.

23. Petition is accordingly admitted. However, the order for publication of the

citation is deferred for a period of two weeks; the respondent is granted two weeks time to make the payment of Rs.39,98,754 along with interest @ 12% per annum (w.e.f. 20.12.2009 till payment) to the petitioner failing which citations of this petition shall be published in the ''Statesman'' (English edition) and ''Jansatta'' (Hindi edition); publication shall also be effected in the official gazette. The petitioner will take effective steps in this regard after a period of two weeks from today. Petition disposed of.

