

(2014) 04 CAL CK 0024

In the Calcutta High Court

Case No : C.P. No. 659 of 2013 and C.A. No. 485 of 2013.

Southern Road Carriers Ltd.

APPELLANT

Vs

Jai Balaji Industries Ltd. (No. 1)

RESPONDENT

Date of Decision : 30-04-2014

Acts Referred:

Citation : (2015) 188 CompCas 342

Hon'ble Judges : N. Patherya, J

Bench : Single Bench

Advocate : Ratnanko Banerjee and Shaunak Mitra, Advocates for the Appellant; Abhrajit Mitra, J. Chowdhury and R. Kajaria, Advocates for the Respondent

Judgement

Nadira Patherya, J.—In this application a claim has been raised on account of transportation charges incurred by the petitioning-creditor on behalf of the company. The case of the petitioning-creditor is that for the period July 2012 to August 24, 2013, goods were transported by it on behalf of the company for which bills were raised. As no payment was made on June 28, 2013, the month-wise outstanding freight bills was forwarded with request for payment. On July 29, 2013, the company informed the petitioning-creditor that the transportation job earlier carried on "to be billed" basis was since July 2, 2013, carried on "to pay" basis. As no payment was made by the consignees this mode of transportation, i.e., "to pay" basis was discontinued and all the bills were to be paid on "to be billed" basis by the company. For non-payment of the said bills a statutory notice under section 433 of the 1956 Act was issued on September 2, 2013, which though received by the company no reply has been given. In respect of some of the bills sums were withheld and by the letter dated July 17, 2013, the petitioning-creditor sought payment of the sums withheld. In spite of receipt of the said letter no reply has been given thereto.

2. The basis of the bills are rates approved by the representatives of the company. This cannot be disputed in view of the electronic mails dated November 23, 2013, March 6, 2013, March 16, 2013, May 2, 2013 and May 25, 2013, in

respect whereof payments have been made, which rates had also been approved by the representatives of the company. Therefore, as payments have been made on the basis of the rates approved by the representatives of the company, for all the bills which have been raised and which remain unpaid there is no reason for non-payment as the rates have also been approved by the authorised representative of the company. Therefore, the company petition be admitted for the sums mentioned in the statutory notice and payments be directed.

3. In opposing the said application, counsel for the company submits that the petitioning-creditor was aware that the rate will be fixed by one Mr. D.P. Jajodia. This finds mention in the circular dated November 23, 2009, relied on by the petitioning-creditor. Since July 2, 2013, the goods were transported on "to pay" basis but the said mode of payment was altered according to the petitioning-creditor as the consignee refused to make such payment. There was no communication from the consignee refusing to make payment and the deviation in the mode of payment is oral. The petitioning-creditor in support of its case of the rates being approved by the authorised representatives of the company has pleaded in its reply that fixing of rate by Mr. D.P. Jajodia was not strictly insisted upon and that the same stood modified by the conduct of the parties. Mr. D.P. Jajodia and his family members fixed the rates and, therefor, there has been substantial compliance. This case varies from the case made in the petition. In fact, in the second reply of the company given to the affidavit-in-reply filed by the petitioning-creditor particulars have been sought with regard to the names of the company's authorised representative who approved the rate. By letter dated January 15, 2014, a reply has been given to the queries sought by stating that the particulars will be evident from the pleading and its annexures. There is no dispute that the bills have been received but the amount payable is not admitted as the original transaction has not been proved and in view of inconsistencies, so also non-establishment of the approved rates this application merits no order. Oral evidence will be required to prove signatures of the authorised signatories. Triable issues have also been raised with regard to the rate approving authority, approval of rates, whether "to pay" could be treated as "to be billed" mode of payment and in the absence of segregation of the case with regard to "to pay" mode and "to be billed" mode bona fide disputes have arisen. The ledger account is also incomplete and is an account only in part. It starts with an outstanding balance without specifying each and every amount. Therefore, in the absence of proper account being disclosed from the ledger of the petitioning-creditor in respect of the company there can be no admission and as bona fide disputes exists no order need be passed.

4. Reliance is placed on *Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH*, and *Juneja Chemical Industries (P) Ltd. Vs. Alam Tannery (P) Ltd.*, for the proposition that unless the exact amount is quantified no winding up order can be passed. Reliance is placed on *Bengal Plying Club Ltd., In re* [1967] 71 CWN 38 (Cal) for the proposition that the case must be pleaded in the petition. In the instant case the case of the petitioning-creditor emerges in the affidavit-in-reply,

therefore, no case has been made out by the petitioning-creditor. Reliance is also placed on SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., .

5. In reply counsel for the petitioning-creditor submits that bills were raised is not disputed. The bills were raised on rates approved, there is no doubt that the bills have also been received by the company. Therefore, in the absence of any dispute raised, the company has become liable to pay such bills. No bill could have been raised without the rates being approved. In fact, since 2009 on the basis of the rates approved bills have been raised and that, there were persons besides Mr. D.P. Jajodia who approved the rates will be evident from the electronic mails. The letter dated August 26, 2013, evidences demand made by the company. There is no denial of the bills raised. In view of Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., , the creditor is not required to quantify the rate precisely and in the absence of such quantification, the court will make a winding up order. This, therefore, distinguishes Juneja Chemical Industries (P) Ltd. Vs. Alam Tannery (P) Ltd., . Bengal Flying Club Ltd., In re [1967] 71 CWN 38 (Cal) is not applicable to the facts of this case. Mediquip Systems Pvt. Ltd. Vs. Proxima Medical System GMBH, has relied on Madhusudan Gordhandas and Co. Vs. Madhu Wollen Industries Pvt. Ltd., . SRC Steel (P) Ltd. Vs. Bharat Industrial Corporation Ltd., is not applicable in the facts of this case as in the reported decision a counterclaim was made in the plaint filed earlier. As there is no reply to the winding up notice or to the various letters issued by the petitioning-creditor to the company, the company petition be admitted.

6. Having considered the submissions of the parties there is no doubt that transportation was undertaken by the petitioning-creditor on behalf of the company. Therefore, bills were raised. It is for the bills which remained unpaid that a statutory notice was issued under section 434 of the 1956 Act on September 2, 2013, which though received by the company, no reply thereto has been given. Therefore, it is necessary to examine the case set out by the petitioning-creditor in its statutory notice and the case with which it has come to court.

7. On a perusal of the statutory notice it appears that the dues arose for the period July 2012 to August 24, 2013, during which transportation was undertaken after the rate was confirmed by the company. Such confirmation was made by the authorised representative of the company. There were two modes of payment "to be billed" and "to pay". "To be billed" would warrant payment by the petitioning-creditor. "To pay" would warrant payment by the consignees. As the consignees refused to make payment it was the company which would be liable and responsible for the payment. Upon non-payment by the consignee, the authorised representatives of the company were informed who requested the petitioner to raise bill on the company, therefore, the "to pay" bills were raised on the company. In the case pleaded in the winding up petition as regards the rates fixed by the company's authorised representative is maintained. But the

case of the authorised representative requesting the petitioning-creditor to raise "to pay" bills on the company is at a variance. In the winding up petition it has been stated that it was the company who assured payment of the "to pay" bills to the petitioning-creditor. No document of such assurance has been annexed. It has also not been stated that the company through its authorised representative assured payment. Therefore, the case made out with regard to payment of "to pay" bills by the company cannot be accepted.

8. The petitioning-creditor has relied on the circular dated November 23, 2009, wherein it was declared as the official transporter of the company. But what needs to be noticed in the said circular is that it was specifically stated that the rates will be fixed by Mr. D.P. Jajodia. A document has to be taken in its entirety or not at all, therefore, from this document itself it is apparent that the rate was to be fixed by Mr. D.P. Jajodia. This finds no mention in the winding up petition filed and the case made in respect thereof is in the reply filed by the petitioning-creditor for the first time. While admitting that the fixing of rate by Mr. D.P. Jajodia was not strictly followed the explanation sought to be given by the petitioning-creditor is that the said was modified by conduct of the parties and that the rates were fixed by Mr. D.P. Jajodia and his family members and, therefore, by conduct and several documents the agreement between the parties stood altered. The case of the petitioning-creditor, therefore; travels from Mr. D.P. Jajodia and his family members to the representative of the company who fixed the rates. It will not be out of place to mention that it has also been pleaded in the affidavit-in-reply that the concerned department also fixed the rates. Therefore, raising of bills is not disputed but the rates at which the bills were raised and who approved the rates needs to be answered. To the reply filed by the petitioning-creditor, rate approval documents have been disclosed which bears the signature of persons alleged to be in the employment of the company. That the said persons were employed by the company needs to be examined. Some of the signatures are not even legible. No rubber stamp of the company appears on the rate approval slips although on one of the rate approval slips the rubber stamp appears. It is only in the absence of inability to ascertain the persons who approved such slips that the defence of the company cannot be rejected. In fact, the ledger account does not reflect an opening balance on and from July 2012 but is an incomplete ledger account starting from April 1, 2013, which is not the period for which transportation was effected. The month-wise outstanding bills which have been disclosed in the application are independent documents with no forwarding letter to the company. The first letter which if at all can be termed as document of demand is June 28, 2013. Much stress has been laid on the letters dated July 29, 2013 and August 26, 2013, but all that can be culled out from the letter dated July 29, 2013, is that the petitioning-creditor was informing the company that on the date of issuance of such letter it was transporting goods on "to pay" basis and that payment would be made by the consignees and that the "to be billed" mode of payment had been discontinued. Besides this the company was also informed that sum were due

and payable. In the letter of August 26, 2013, once again the petitioning-creditor brought it to the notice of the company that the work undertaken from July 2, 2013, was on "to pay" basis and "to be billed" basis stood discontinued but "to pay" basis was also stopped, as the unit head or department head of the company had requested the company to raise bills directly on the company instead of making collection from the customer. This also cannot be accepted as under the "to pay" mode of transportation it was the consignees who were to make payment and according to the pleadings it was the consignees who refused to pay. This finds no mention in the said letter nor does this find any reflection in the statutory notice or in the pleadings. In view of the inconsistencies in the petitioner's case no order can be passed in favour of the petitioning-creditor.

9. It will not be out of place to mention that two separate modes of payment is sought to be pursued by the petitioning-creditor and a reason has also been given for treating the "to pay" bills as "to be billed" bills but the amounts claimed do not stand identified separately.

10. Accordingly, this application warrants no order as the defence raised by the company is bona fide, and in view of triable issues raised stands dismissed. This, however, will not prevent the petitioning-creditor from seeking remedies in accordance with law. Urgent xerox certified copy of this order, if applied for, be supplied to the learned advocates for the parties on their usual undertaking.