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**(2007) 02 CAL CK 0033**

**Calcutta High Court**

**Case No:** C.P. No. 503 of 2005

Bapi Construction

APPELLANT

Vs

Pronob and Co. (P.) Ltd.

RESPONDENT

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**Date of Decision:** Feb. 8, 2007

**Citation:** (2008) 82 SCL 13

**Hon'ble Judges:** Sanjib Banerjee, J

**Bench:** Single Bench

**Advocate:** Ranjana Guha, for the Appellant; Mukti Chandra Ghosh, for the Respondent

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### **Judgement**

Sanjib Banerjee, J.

The petitioner has sought winding up of the company upon the company's refusal to refund the advance made in pursuance of a purchase order which the company failed to execute.

Three purchase orders were issued on 12-12-2003, by the petitioner on the company for supply of counter weight plates of divers specifications. According to the petitioner, a sum of Rs. 15,50,000 was paid by way of advance by the petitioner to the company in respect of the three purchase orders. The company supplied materials against two of the purchase orders. After adjusting the company's bills of Rs. 11,35,650 against the supplies made, the balance of the advance made remained refundable. A sum of Rs. 86,341 was thereafter paid by a cheque dated 13-1-2004. The petitioner has claimed the balance amount after giving credit to the company for the part payment of Rs. 86,341. The balance principal sum claimed is Rs. 3,28,044, though the figures Rs. 11,35,650, Rs. 3,28,044 and Rs. 86,341 do not add up to Rs. 15,50,000.

2. The petitioner's first demand, relied upon in these proceedings, was by a letter issued by its advocate on 22-3-2005. In reply, it was contended on behalf of the company by its letter of 24-4-2005, that by letters dated 31-7-2004, and 18-1-2005, the company had reminded the petitioner that due to the petitioner not lifting the

goods, the plates had to be "remelted". The company also claimed that in respect of transactions with the petitioner and its sister concern, U. K Construction, the company had allegedly suffered loss of Rs. 4,66,092 and that after giving credit of Rs. 3,28,044 to the petitioner, a sum of Rs. 1,38,048 remain due to the company. The petitioner responded by denying that any letter of 31 -7-2004, or 18-1 -2005, had been written by the company to the petitioner reminding the petitioner that on account of the goods not being lifted, the company had suffered any loss. The petitioner admitted receipt of two letters and claimed that by such letters the company had merely sought sales tax declaration forms.

3. The statutory notice of 1 -8-2005, reiterated the petitioner's claim and the company's reply of 16-8-2005, was a repetition of the stand earlier indicated.

4. The company has relied on the two letters allegedly dated 31 -7-2004, and 18-1-2005. The two letters relied upon are addressed to both U.K. Construction and Bapi Construction. It is necessary to notice the contents of the two letters. The first letter claims to be in response to the petitioner's letter of 5-4-2004. By the letter of 5-4-2004, appearing as annexure "D" to the affidavit-in-opposition, the petitioner had claimed that after adjusting a sum of Rs. 11,35,615 against supplies effected, a sum of Rs. 4,14,385 still remained with the company. The petitioner complained of the company's failure to supply the goods in terms of the third purchase order.

5. It is of some significance that the company's alleged response was issued after more than three months. This is more surprising in view of the first sentence contained in the alleged letter of 31-7-2004. If, indeed, the company was shocked to receive the letter of 5-4-2004, it should have reacted immediately and not waited for nearly four months to express its shock.

6. The alleged letter of 31-7-2004, runs as follows:

Dear Sir,

We are in receipt of your letter dated 5-4-2004, and were shocked to read the contents.

Firstly, we say that out of Rs. 4,14,385 we have already refunded you Rs. 86,341 on account of Bapi Construction.

Secondly, please note that the balance C.I. counter weights ordered by you weighing 49.440 M.T. on account of U.K. Construction and Bapi Construction are lying ready with us and we request you to lift the same after making payment of Rs. 4,40,810 on account of U.K. Construction.

Failure on your part in lifting the C.I. counter weights will result in melting of the entire quantity of C.I. counter weights and for which you will be solely liable for all costs arising therefrom.

Thanking you.

There was no immediate reminder issued by the company thereafter. By the second alleged letter of 18-1-2005, the company claims to have asserted thus:

Dear Sir,

Sub.: Your letter dated 5-4-2004,

Our letter dated 31-7-2004,

Many Telephone Calls and Personal Visits.

As you are not interested in lifting the C.I. counter weights in spite of our above referred letter and numerous personal calls and visits, we did not have any choice but to melt the total quantity of C.I. counter weights that is 49.440 M.T. and we have suffered a loss of huge amount, amounting to Rs. 4,66,092 only due to your own fault and negligence.

In this situation, you are liable to pay us Rs. 1,38,048 being the sum duly adjusted after taking into consideration the credit balance of Rs. 3,28,044 on account of Bapi Construction.

Please send us the said amount of Rs. 1,38,048 immediately. We are enclosing herewith a schedule to substantiate our claim.

Thanking you.

8. As if the contents in the body of the letter were not enough, the petitioner was emphatically reminded of the "many telephone calls and personal visits" claimed to have been made on behalf of the company.

9. The dates of the two alleged letters are significant, just as the petitioner's immediate response upon such alleged letters being asserted, was. The petitioner claimed to have received two letters and, in a supplementary affidavit has disclosed the two letters it has received. The first of the two letters is dated 26-7-2004, and the second is dated 18-1 -2005. Both letters are bland demands for supply of sales tax declaration forms, made out in similar format?

10. It is submitted on behalf of the petitioner that the company has sought to take advantage of the two innocuous letters it sent to contend that letters of more serious nature were issued. The petitioner claims that it is an admitted position that supplies in respect of the third purchase order had not been made by the company. It is urged that the company was seeking to cover up for its failing to effect supply and thereafter in its inability to refund the balance amount.

11. On behalf of the company it has been argued that as to whether the two disputed letters had been issued or received were questions that required to be tried and, in proceedings of this nature, such questions cannot be conclusively answered.

12. If, as a proposition, it were to be that upon a document being set up and its existence being denied, a triable issue arose, every insolvent company would resort to such means to defer the liability. It is well known that suits are not concluded in a hurry and the relegation of a claim made in winding up proceedings to a suit sometimes effectively results in the claim being rejected.

13. According to the company, the first of the two disputed letters was sent by ordinary post and the second was issued by registered post with acknowledgement due. The petitioner, however, asserts that the second notice for sales tax declaration form was sent by the company to it by registered post and the postal acknowledgement card relied upon by the company in its affidavit as being the one evidencing service of the alleged letter of 18-1 -2005, was proof of service of the second reminder relating to the sales tax declaration form.

14. The two letters set up by the company in defence are not credible. It is difficult to believe that nearly four months after the letter of 5-4-2004, was received by the company, it woke up from its slumber to react with shock in end-July, 2004. There has been no subsequent assertion of the stand allegedly taken by the company in the purported letter of 31-7-2004, prior to the alleged letter of 18-1 -2005. It is inescapable that the date of the second letter relied upon by the company was chosen inasmuch as there was, in fact, a letter issued on the same day by the company to the petitioner. Since the company claimed that the alleged letter of 31 -7-2004, was issued by the ordinary post, it is not clear why the letter was not shown to be dated earlier than it is. The company was also not serious for pursuing its claim for damages for Rs. 1,38,048. It is also slightly bewildering that despite not supplying the material, but only on account of manufacturing the goods and subsequently "remelting" the same, a sum of Rs. 4,66,092 was expended by the company.

15. The company's defence is without any basis. The petitioner is entitled to the principal sum claimed. However, though the petitioner in its statutory notice and the petition had claimed that the company was entitled to Rs. 11,35,650 on account of goods supplied, there appears to be an obvious mistake as the original amount shown to be adjusted (in the letter of 5-4-2004) was Rs. 11,36,615. If such sum and the further payment of Rs. 56,341 are deducted from the sum of Rs. 15,50,000 paid by way of advance by the petitioner to the company, the petitioner's principal claim is Rs. 3,28,044.

16. The petition is admitted for such sum of Rs. 3,28,044 together with interest at the rate of eight per cent per annum thereon from the date of the statutory notice (1-8-2005). The petition shall be advertised once in "The Statesman" and once in "Aajkaal". Publication in the Official Gazette is dispensed with. The advertisements should indicate that the matter will be returnable on the next available court date four weeks after the date of publication.

17. In the event the entire payment of Rs. 3,28,044 together with interest thereon is cleared by the company within a period of three weeks from date, the petition will remain permanently stayed.