

(2007) 12 CAL CK 0048

Calcutta High Court

Case No: CP No. 148 of 2007

Durgapur Projects Ltd.

APPELLANT

Vs

Visa Steel Ltd.

RESPONDENT

Date of Decision: Dec. 12, 2007

Acts Referred:

- Contract Act, 1872 - Section 70

Citation: (2008) 1 CHN 848

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: S.B. Mukherjee, Sidhartha Mitra, Ratnanko Banerjee and Roopa Mitra, for the Appellant; Anindya Kumar Mitra and Ajoy Krishna Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.

The petitioner founders its claim for winding up the company on the company's failure to pay in respect of some 2000 MT of coal supplied to it. The petition is crisp and is based on a handful of documents leading up to the pithy statutory notice of May 3, 2005. The petitioner suggests that in the many pages expended by the company in response to the statutory notice, it has spun a web of confusion that should take little time for a Court to discern.

2. The petitioner asserts that the two other transactions that the company has copiously referred to in its reply to the statutory notice and the alleged fraud on the petitioner's part that makes up the better part of the verbose affidavit, are but part of a laboured shield to cloak its insolvency. According to the petitioner, the two other transactions are unconnected, have arbitration agreements covering the disputes relating thereto and should not be mixed up to permit dilution of the relevant claim of about Rs. 2 crore.

3. Of the three transactions entered into between the parties, there was the first for supply of about 66000 MT of coal of Australian origin by the petitioner to the company. The second transaction related to the handling of coal at the various ports of discharge and the transportation thereof to the company's sites. The third, and the one in which the present claim arises, relates to supply of coal effected by the petitioner to the company in the year 2004. The petitioner says that there is no doubt as to the quantity of coal supplied and relies on the three bills for 877 MT, 707 MT and 468 MT of coal. The petitioner suggests that the disputes sought to be raised in respect of other two transactions are irrelevant and the company cannot be heard to deny this claim on the basis of its fanciful demand for damages in respect of the other transactions.

4. It is submitted that the company's defence should be disbelieved as the payment against the supply of 66000 MT was made by way of letter of credit in the year 2004 without any complaint of any kind relating to the quality or quantity of goods being made prior to the institution of these proceedings. The petitioner claims that the company's counter-claim for Rs. 1.27 crore in respect of the second transaction, the port management and handling agreement, should not be permitted to be urged as the company made no claim in respect thereof before the petitioner sought an arbitration reference in respect of its unpaid dues of about Rs. 64 lakh in respect of such transaction. At the highest, the petitioner says, the company's counter-claim, is but a claim for an unliquidated sum for damages which the Company Court should completely disregard on the strength of the petitioner's unimpeachable case in respect of the subject transaction. A point has been made on behalf of the petitioner that if parties entered into three discrete transactions, the liquidated claim of a party in respect of one transaction cannot be resisted by putting up a claim on account of unliquidated damages in respect of another. Though no legal principle has been cited in respect of such contention, it has been submitted that the Company Court sifts through such unmeritorious defence on a regular basis and the proposition is so axiomatic that it needs no weight of authority to stand on.

5. On the simple case run in the petition, it would appear that it is such question on which hinges the solution to the matter. The company has joined issue on the proposition, but it is suggested that there are more immediate and mundane matters that would render the consideration of such finer legal question unnecessary. The company hints that in the simplicity of the claim in the petition, there is suppression. Such suppression was prompted, argues the company, in the petitioner's endeavour to seek a shortcut for its claim and to sidestep an investigation that the petitioner was aware of as to its fraudulent conduct. The company is controlled by the State Government and the supply of 66000 MT of coal effected to it by the petitioner came under the scanner of the Enforcement Directorate which has recently filed a report showing that a substantial part of such supply was of coal that the petitioner obtained at US \$ 45 a metric ton and sold to the company at US \$ 272 a metric ton. The company refers to the Enforcement

Directorate's report and refers to its affidavit where a claim in excess of Rs. 19 crore has been made against the petitioner following such report of July, 2007.

6. It is not necessary to address the question as to whether in a commercial transaction the price of acquisition of goods by a seller has to determine the contract price. Such matter can await the formal lodging of a claim by the company and would have been relevant if the petitioner's claim in the subject transaction was otherwise completely free from doubt.

7. The company admits that the petitioner is entitled to be paid for the 877 MT of coal it supplied under the subject transaction at Rs. 9728/- to each metric ton, but refers to the purchase order that it placed on the company being limited to the supply of 870 MT or of such amount that would complete the filling of a railway rake commandeered for the transportation of the coal from the Port of Paradip to the company's factory. The company demonstrates that there were no purchase orders for the balance of about 1150 MT supplied by the petitioner and the inspection report of the agreed agency in respect of such additional supply would reveal that the ash content thereof was higher than what the purchase order relating to the 870 MT required and the crucible swelling number (CSN) count was lower than what the company had specified. The higher the CSN count and the lower the ash content, it is the admitted position, the better is the grade of coal. The company submits that while it is true that the additional supply was not gratuitously made, in view of the admitted variance with the specifications, the company's obligation to pay u/s 70 of the Contract Act would be subject to the compensation being assessed; and these proceedings are scarcely the occasion to make such assessment. The company urges that in the petitioner's attempt to keep its claim short and sweet, it overlooked that its three bills were accompanied by inspection reports and the petitioner's failure to append the inspection reports to its second and third bills should discourage the Company Court from receiving the petition. The company points out to the petitioner's letter of April 29, 2004, the missing link between pages 10 and 11 of the petition and another at page 108 of the opposition to suggest that there was somewhat more to the petitioner's claim and its worthiness than what the petitioner brought to the fore.

8. Arguments of prejudice aside, there is a substantial defence raised as to the second and third bills. The company has offered to pay Rs. 3,500/- per metric ton for the additional supply and after giving credit to the petitioner for the 877 MT at the agreed price of Rs. 9,728/- per metric ton and the additional supply of about 1150 MT at Rs. 3,500/- per metric ton, the company has claimed that what is due to it from the petitioner in respect of the port management and handling transaction, would overwhelm the petitioner's claim. Against the petitioner's claim for about Rs. 64 lakh in respect of the port management and handling transaction, the company has indicated on counter-claim of about Rs. 1.27 crore for short supply of material. The company has referred to the affidavit-in-reply and the admission therein that

about 1200 metric ton (the company insists that it is 1300 MT) of coal could not be reached to the company from the Haldia Port, though the petitioner claims such short supply to be of the company's own doing.

9. Even though it may be shocking that a party to a commercial transaction had no inkling for a period of more than three years after the supply was effected that it had been sold inferior goods, and the company had to be apprised thereof by the Enforcement Directorate, the company need not rely on its belated claim for Rs. 19 crore to resist the admission of this petition. The second and third bills relied upon by the petitioner require adjudication in more protracted proceedings than the present one. To receive the petition for the admitted sum due to the petitioner in respect of the 877 MT of coal would amount to turning a Nelson's eye to the company's counter-claim as to the second transaction which, in the absence of any obvious legal embargo, would weigh in the matter of exercise of the discretion which is at large in proceedings of such nature. In the petitioner's failure to refer to some of the documents that the company has appended to its affidavit, it appears that there is more to the claim than meets the eye and robs even the claim in respect of the 877 MT of coal of its worthiness for the petition to progress to admission.

10. The petitioner has referred to the judgment reported at AIR 1962 Calcutta 613 and places paragraph 8 therefrom which has come to be accepted as the gospel by which creditors' winding up petitions are judged. The test is as to whether the defence put up by the company is merely to shroud the creditor's claim in suspicion, or indicate genuine grounds on which a more protracted action founded on such claim can be sought to be resisted. The Company Judge need not answer whether the defence is sound or is certain or even likely to succeed. What the company Judge seeks to ascertain is whether a plausible case can be run on the lines indicated by the company in its defence. What it implies is that if the claim is in clear white with the company failing to throw any doubt to sully its lustre, it qualifies the petition to be admitted; the area in black, and the gray in between, belong to the company. The clear white of a creditor's claim pales in its hue upon a plausible defence or counter-claim being shown. The Company Court will probe, but only a little, to check whether either the defence or the counter-claim can be run, but it will not carry its investigation any further to seek a definitive answer as to whether either would be likely to succeed.

Sub-paragraphs (k), (1) and (m) of the company's response to the statutory notice do not show up the company's case as a flight of its fancy. The company has not only admitted that it is liable for the 877 MT of coal that it ordered, it has also assessed the value of additional supply of 1150 MT. The company has claimed that the price of the 877 MT of coal is adjustable against the advance that it had made in respect of the port management and handling transaction. The company has sought a further adjustment of its assessed value for the 1150 MT of coal against the

company's claim for refund in respect of the short supply allegedly effected by the company under the port management and handling transaction to put forth its scaled down claim of about Rs. 86 lakh.

11. To find in favour of the petitioner and the unimpeachability of its claim, would be to label the company's counter-claim as absurd. And before such a conclusion is reached, one would have to believe the petitioner's case in respect of the port management and handling transaction and completely disbelieve the company's. On the facts that present themselves, an attempt to arrive at a definitive conclusion on such matter would be both foolhardy and harsh to the company.

12. Again, it is not as if the three transactions are completely distinct and any of them is totally detached from the others. It may have made no difference if the three transactions were disparate and unconnected, but the papers reveal a thread running through the three, or, at the very least, there is a link between the port management and handling transaction and the transaction that the petitioner has made the basis for this claim. The first document relied upon in the petition is the company's letter calling upon the petitioner to supply such quality of coal such that would ensure that the rake being despatched from Paradip Port carried the full load.

13. The petitioner's argument that the counter-claim raised in respect of the two other transactions should be disregarded would have been more weighty had the one transaction been, say, between the parties as buyer and seller and the other as landlord and tenant. Even then the adjustment sought by the company in respect of one transaction may not be easily brushed aside for a claim arising out of the other. But it is not necessary to delve into theory to answer the question in its absolute form once it is noticed that at least two of the transactions that the company insists is part of a trinity, are found to be not as far removed from each other as the petitioner would have one believe.

14. Company Petition No. 148 of 2007 is dismissed. The claims of the petitioner are relegated to a suit where the foregoing observations would have no impact on the rival contentions.

15. The petitioner will pay costs assessed at 500 GMs.

16. Urgent photostat certified copies of this judgment, if applied for, be issued to the parties upon compliance with requisite formalities.