

(2008) 04 DEL CK 0042

In the Delhi High Court

Case No : IA No. 3867 of 2008 in CS (OS) 574 of 2008

Accord Alloys Limited

APPELLANT

Vs

Pee Ell Alloys and Another

RESPONDENT

Date of Decision : 10-04-2008

Acts Referred:

Citation : (2008) 3 BC 497 : (2008) 150 DLT 564

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Sandeep Sethi and Sachin Midha, for the Appellant; Arun Bhardwaj and Manish Sharma, for Defendant No. 1 and Rajiv Nanda, for Defendant No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—The plaintiff placed a purchase order on the defendant No. 1 for supply of High Carbon Ferro Chrome. The payment was to be made by the plaintiff through a letter of credit. It is stated by the learned Counsel for the plaintiff that the plaintiff placed an order for 300 Metric Tonnes of High Carbon Ferro Chrome upon the defendant No. 1. It is further submitted on the basis of the averments contained in the plaint that the defendant No. 1 has only supplied 195 Metric Tonnes out of the order of 300 Metric Tonnes. It is also submitted by the learned Counsel for the plaintiff that the original rate agreed upon by the parties was Rs 60,000/- per Metric Tonne. Subsequently the rate has been increased to Rs 63,000/- per Metric Tonne on account of increase in the chrome content in the said goods. The purchase order, according to the learned Counsel for the plaintiff, was placed on 03.01.2008 and the same was confirmed by the defendant No. 1 on the same day. The purchase order that was referred to by the learned Counsel for the plaintiff is the one that has been placed at page 7 of the plaintiff's documents and it refers to a quantity of 300 Metric Tonnes. The learned Counsel then submitted that a letter of credit was opened at the instance of the plaintiff by the defendant No. 2 (the issuing bank) on 08.01.2008 for a

sum of Rs 76 lacs. This was, however, amended on 09.01.2008 for a sum of Rs 1.59 crores. The increase in the value of the letter of credit was due to the increase in the price of the goods as also the increase in the quantity of goods. The earlier LC was in respect of 100 Metric Tonnes at the rate of Rs 60,000/- per Metric Tonne. The amended LC was in respect of 200 Metric Tonnes at the rate of Rs 63,000/- per Metric Tonne. Thereafter, supplies were made by the defendant No. 1 to the plaintiff on 10th and 12th of January, 2008. The total extent of the supplies that were made was of 195 Metric Tonnes.

2. On 12.01.2008 a bill of exchange was drawn on the basis of the said supply of 195 Metric Tonnes and on the basis of the goods having a chrome content of 65%. The bill of exchange was for the amount of Rs 1,58,88,330/-. It is the case of the plaintiff that the goods that were received by the plaintiff from the defendant No. 1 were dispatched to third parties by the plaintiff. It is also contended that those goods when received by the third parties disclosed that they did not have the requisite chrome content of 65%. It is further alleged that the defendant No. 1 did not supply the full quantity as agreed, that is, 300 Metric Tonnes as a result of which the plaintiff was constrained to purchase 100 Metric Tonnes from other sources at a much higher rate of Rs 76,000/- per Metric Tonne. The learned Counsel for the plaintiff drew my attention to a copy of the letter dated 18.01.2008 received from one of the third parties to whom the plaintiff supplied the goods, which indicates that there was variation in the chrome content. On the same day, that is, on 18.01.2008 the plaintiff apparently sent a letter to the defendant No. 1 requiring it to depute a chemist to carry out a joint inspection at the buyer's plant so that the matter with regard to the chrome content could be sorted out. He submitted that despite such a letter, the defendant No. 1 did not respond and no chemist was deputed. As a consequence of the shortfall in the quality of the goods, the third party to whom the plaintiff had supplied the goods, raised various debit notes totalling Rs 10,28,240/-.

3. Mr. Sandeep Sethi, the learned senior counsel appearing on behalf of the plaintiff, submitted that the documents presented to the bank for the purposes of encashment of the letter of credit did not conform to the terms of the letter of credit and, Therefore, the plaintiff was entitled to the injunction restraining the defendant No. 2 from paying under the letter of credit. The learned Counsel submitted that the analysis done by the plaintiff's purchaser clearly indicated that the chrome content was far less than what had been agreed upon between the parties and what had supposedly been dispatched by the defendant No. 1. The learned Counsel referred to the decision of the Supreme Court in the case of U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., . In particular, he referred to paragraph 34 wherein the Supreme Court observed that the opening of a confirmed letter of credit constituted a bargain between the banker and the seller of the goods which imposed on the banker an absolute obligation to pay. The banker was not bound or entitled to honour the bills of exchange drawn by the seller unless they and such accompanying documents, as might be required there under, were in exact compliance with the terms of the

credit. It was contended on the strength of these observations that the bill of exchange drawn by the defendant No. 1 in the present case as well as the documents accompanying the same were not in exact compliance of the terms of the credit and, Therefore, the plaintiff was entitled to the injunction that it was claiming.

4. Mr. Bhardwaj, the learned senior counsel appearing on behalf of the defendant No. 1, submitted that letters of credit, like bank guarantees, cannot be enjoined unless and until fraud is pleaded and a clear case of egregious fraud is established. He submitted that in the present case, admittedly, no fraud has been pleaded. On the contrary, he submitted that the negotiations between the parties started on 03.01.2008. At that point of time the quantity agreed upon by the parties was 300 Metric Tonnes. The packing was to be done in 50 kg double gunny bags and without any marking and the price was, at that point of time, settled at Rs 60,000/- per Metric Tonne on the basis of 60% chrome content pro rata. He also submitted that the condition at that point of time was that the price was ex plant. He submitted, with reference to the above, that the stipulation that the packing should be without any marking has a significance. The fact that the plaintiff has accepted delivery of such unmarked goods would, Therefore, not allow the plaintiff to later contend that the objections raised by the third party purchasers were in respect of the very goods which were supplied by the defendant No. 1. It was at the instance of the plaintiff that the goods were unmarked. Had the goods been marked, as was normally the case, then the same could be easily identified and the chrome content in those goods could also be ascertained.

5. Apart from this, the learned Counsel submitted that there was suppression of facts on the part of the plaintiff. He submitted that the plaintiff had not disclosed that consequent upon the initial agreement for supply of 300 Metric Tonnes of High Carbon Ferro Chrome, the entire contract was novated inasmuch as the quantity had been reduced to 200 Metric Tonnes and the price had also been altered from Rs 60,000/- per Metric Tonne to Rs 63,000/- per Metric Tonne. He submitted that this is clear from the letter dated 10.01.2008 (which wrongly mentions the year as 2007) at page 11 of the defendants' documents which speaks of the amendment from 300 to 200 Metric Tonnes. The amended purchase order is at page 14 of the defendants' documents and that also mentions 200 Metric Tonnes instead of the earlier figure of 300 Metric Tonnes. The learned Counsel then referred to paragraph 13 of the plaint to show that the amendment in the contract between the parties, bringing down the quantity from 300 to 200 Metric Tonnes, has not at all been mentioned. On the contrary, the plaint proceeds on the basis that the contract between the parties remained at 300 Metric Tonnes. He further submitted that the supplies that were made were of goods having a chrome content of 65% and certificates to that effect had been issued by the defendant No. 1. A sample certificate dated 10.01.2008 is at page 32 of the plaintiff's documents. Such certificates have also been submitted to the negotiating bank for the purposes of obtaining payment under the letter of

credit. Mr. Bhardwaj then referred to the document at page 22 of the plaintiff's documents which is a letter dated 11.01.2008 issued by the plaintiff to the defendant No. 2. The letter clearly stated that the plaintiff accepts all discrepancies in documents for payment under the letter of credit in question and that the plaintiff undertakes and indemnifies the bank for all losses and consequences. There is also a direction to the bank to do the needful and release the payment against the said letter of credit. It is the case of the plaintiff that this letter, though addressed to the bank, was never sent to the bank but was handed over to the defendant No. 1. On the other hand, the learned Counsel for the defendant No. 1 submits that the letter was sent to the bank and a copy only was handed over to the defendant No. 1. He also submitted that the copy which was handed over to the defendant No. 1 bore the stamp of the bank and a copy of such letter has been filed at page 12 of the defendants' documents. He submitted that the stamp was fraudulently obtained by the plaintiff inasmuch as the bank has refuted having received this letter from the plaintiff. Furthermore, Mr. Bhardwaj also pointed out the contents of paragraph 10 of the plaint which deal with this letter. The said paragraph clearly indicates that the letter dated 11.01.2008 was issued by the plaintiff and that the plaintiff had written to the defendant No. 2 whereby an undertaking had been given by the plaintiff that it would be responsible for the discrepancies in the documents. It was the plaintiff's case in the said paragraph that it was only on the basis of having written the said letter that the defendant No. 1 agreed to dispatch the goods.

6. After the supplies were completed, the attitude of the plaintiff altered completely and by a letter dated 19.01.2008 written to the defendant No. 2 the plaintiff requested the bank not to honour the letter of credit on account of various discrepancies. However, those discrepancies did not mention the variation in the chrome content which is now sought to be made a ground for seeking injunction. The learned Counsel for the plaintiff states that at that point of time the question of chrome content had not arisen inasmuch as the third party purchasers of the plaintiff had written to the plaintiff later. In response, Mr. Bhardwaj submits that paragraph 14 of the plaint itself records that the plaintiff came to know of the alleged shortcomings in the quality and description of the material on 18.01.2008 whereas the letter noting the alleged discrepancies was issued on 19.01.2008. Yet, despite the plaintiff's alleged knowledge of the shortcomings in the quality, there was no mention of the deficient chrome content in the letter of 19.01.2008 wherein other alleged discrepancies in the documents were pointed out. The learned Counsel concluded his arguments by submitting that since no case of fraud has been pleaded, there can be no question of any injunction being granted in favor of the plaintiff and against either the defendant No. 1 or the defendant No. 2 so as to prevent payment under an unconditional and confirmed letter of credit. The learned Counsel for the defendant No. 1 referred to various decisions of the Supreme Court, which are as under:

(1) United Commercial Bank Vs. Bank of India and Others, ;

- (2) U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., ;
- (3) Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, ;
- (4) National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, ;
- (5) Murarka Cables and Conductors Ltd. v. Zomet Trading Co. Ltd. and Ors. ;
- (6) Ansal Engineering Projects Ltd. Vs. Tehri Hydro Development Corporation Ltd. and Another, ;
- (7) Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others, ;
- (8) Fargo Freight Ltd. Vs. The Commodities Exchange Corporation and Others, ;
- (9) Ram Chandra Singh Vs. Savitri Devi and Others, .

7. Having considered the arguments advanced by the learned Counsel for the parties as well as the various decisions relied upon by them, it is apparent that a letter of credit just as a bank guarantee, is not concerned with the underlying contract. The contract between the plaintiff and the defendant No. 1 is independent of the contract evidenced by the letter of credit. The letter of credit constitutes a bargain between the banker and the seller of goods which imposes on the baker an absolute obligation to pay provided the documents are not discrepant. If the buyer has any grievance against the seller then the buyer has all opportunities to sue for damages etc. The disputes in the underlying contract cannot be made a ground for seeking an injunction of payment under a letter of credit. It is well settled that the bank cannot be prevented by a party at whose instance the letter of credit was issued, from honouring the guaranteed credit unless and until the said party is able to establish fraud at the instance of the seller / beneficiary. The fraud must not only be suspected fraud but established fraud and that too of an egregious nature. As noted in Federal Bank Ltd. (supra), irrevocable letters of credit are "the life blood of international commerce" and, if I may add, domestic commerce.

8. In the present case the plaintiff has raised a dispute with regard to the variation in the chrome content in the said goods. It is the case of the plaintiff that the chrome content in the goods is not what the defendant No. 1 purports it to be and, in fact, the chrome content of the goods is much lower than what the defendant No. 1 had represented. This is a dispute with regard to the quality of goods which the plaintiff has received from the defendant No. 1. It is, on the other hand, contended on the part of the defendant No. 1 that the chrome content was 65% as would be evidenced by the certificates issued by them and which would form part of the documents accompanying the bill of exchange. The dispute between the plaintiff and the defendant No. 1 with regard to the quality of goods is one concerning the underlying contract and is not the concern of the defendant No. 2. The defendant No. 2 is only concerned with the contract

evidenced by the letter of credit which is an absolute obligation to pay, provided the documents are not discrepant. It is for the bank to analyze the documents and to make the payment on the basis of the documents. Therefore, for this reason alone, the plaintiff would not be entitled to the injunction it seeks.

9. Apart from this, the plaintiff has admitted writing the letter dated 11.01.2008 where it has unequivocally accepted all the discrepancies in the documents and even requested the bank to pay taking upon itself all losses and consequences and indemnifying the bank. In view of the fact that the plaintiff has admitted writing such a letter, I do not see how the plaintiff could have approached this Court for an injunction against the bank from paying under the letter of credit. It is also noteworthy that the plaintiff has not disclosed the full nature of the transactions between the parties and in particular the fact that the contract was subsequently amended for a lesser quantity of 200 Metric Tonnes.

10. All these circumstances lead me to the conclusion that the plaintiff is not entitled to any injunction. Consequently, the order dated 31.03.2008 is vacated. This application is dismissed.

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