

(1999) 03 DEL CK 0048

In the Delhi High Court

Case No : I.A. No. 7427 and 3388 of 1998 in Suit No. 781 of 1998

Amira Foods (India) Ltd.

APPELLANT

Vs

Patriot and Others

RESPONDENT

Date of Decision : 10-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 4, 151

Citation : (1999) 2 AD 679 : (1999) 78 DLT 700 : (1999) 49 DRJ 322

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Dr. A.M. Singhvi and Mr. P. Mukhopadhyay, for the Appellant; Mr. P.P. Malhotra, Mr. Vineet Malhotra and Mr. Shailendra Sharma Advs., for the Respondent

Judgement

Dr. M.K. Sharma, J.—By this order I propose to dispose of the application (I.A.No.7427/1998) filed by the applicant, The Bank for Foreign Economic Affairs of USSR u/s 151 of the CPC for vacation of the interim injunction passed by this court on 22.4.1998 and 23.4.1998 on I.A.No.3388/1998 in Suit No.781/1998.

2. The plaintiff instituted a suit against three defendants seeking for a decree for declaration that the date of shipment under the contract agreement dated 30.1.1998 between the plaintiff and defendant No.1 is deemed to be extended for a period of 30 days from the date on which the permission is granted by defendant No.1 or deemed to be granted by this court for loading to Cargo of 7000 MT of rice as specified under the contract. The plaintiff also sought for a declaration that the validity of the letter of credit dated 5.2.1998 issued by the Canara Bank in favor of the plaintiff deemed to be extended, and also sought for a restraint order restraining defendant No.3, the Reserve Bank of India from remitting back or transferring the amount of Rs.8,92,50,000/- only to the Bank for Foreign Economic Affairs of USSR lying with defendant No.3 under the Rupee Rouble Trade for payment under the Letter of Credit dated 5.2.1998 issued by the Canara Bank. On 22.2.1998 an order was passed by this court directing the

Reserve Bank of India to maintain status quo regarding repatriation of the amount of the letter of credit dated 5.2.1998. On 23.4.1998 while issuing notice on the application seeking for injunction this court ordered that the defendant No.3 would not repatriate the amount held by them against the Letter of Credit dated 5.2.1998.

3. The plaintiff entered into an agreement with defendant No.1 to supply 7000 MT of rice to defendant No.1. The plaintiff executed a performance guarantee in the sum of 40,000 Dollars with the buyer's Bank in Russia whereas the applicant transferred by a Letter of Credit dated 5.2.1998 a sum of INR 2,23,12,500/- which is to the extent of 25% of the contract value. It is stated by the plaintiff that the plaintiff in compliance of the terms and conditions of the contract sent the goods to Kandla Port for shipment which were duly inspected by the agents of defendant No.1 but the same could not be shipped because instructions for shipment were not given by the defendants No.1 & 2 inspire of letter of the plaintiff dated 13.4.1998. It is stated that the plaintiff has fulfilled its part of the agreement and the said defendants 1 & 2 have committed breach of the contract and Therefore, the plaintiff has sought for an order of injunction restraining the Reserve Bank of India, the defendant No.3 from remitting back or transferring the amount held by them against the letter of credit dated 5.2.1998.

4. Subsequent to the passing of the aforesaid order an application was filed by the Bank for Foreign Economic Affairs of USSR , the applicant herein seeking for vacation of the aforesaid order contending inter alias that the said bank was not a party to the contractual disputes between the plaintiff and defendants No.1 & 2, if there be any, and that the applicant had merely issued the Letter of Credit under instructions of defendant No.1 through its banker which however, was not utilised during the period of its validity and Therefore, the applicant had returned this amount under the Letter of Credit to defendant No.1 and consequently the applicant does not hold any money of defendant No.1 with it. It is further contended that by the aforesaid order the funds of the applicant with the RBI have been held over and are restrained from being remitted to it. Being prejudicially affected thus, the applicant filed the aforesaid application.

5. On the aforesaid application I heard Dr. A. M .Singhvi appearing for the plaintiff as also Mr. P.P. Malhotra appearing on behalf of the applicant.

6. Admittedly the applicant bank is not a party to the original contract entered into between the plaintiff and defendant No.1. The applicant however, issued the Letter of Credit dated 5.2.1998 under instructions of defendant No.1 through its bankers to the plaintiff. The money of the applicant is lying with the Reserve Bank of India which according to the applicant is the money of the Russian Federation which are payable by the Indian Government to the Russian Federation in repayment of State Credits granted by the erstwhile USSR. It further appears that the Russian Federation utilises the said money for payments towards the goods exported from India and imported to the Russian Federation, and such payments are made in the form of Letters of Credit to be opened by the

applicant under instructions/orders of the Russian Importers. The applicant was not made a party to the suit which is instituted by the plaintiff against the defendants. The plaintiff in its pleadings has categorically asserted that the applicant bank is neither a necessary nor a proper party to the suit. The Letter of Credit was issued by the applicant bank on instructions from defendant No.1, the validity of which was to expire on 22.4.1998. The plaintiff in the suit has sought for a restraint order restraining the Reserve Bank of India from remitting back and/or from transferring the amount under the Letter of Credit.

7. Counsel for the plaintiff submitted that the applicant could have sought for vacation of the injunction order only after it gets impleaded in the suit. The aforesaid submission of the learned counsel for the plaintiff was refuted by Mr. Malhotra contending inter alia that when the plaintiff itself did not choose to implead the applicant in the suit on the ground that the applicant is neither a necessary nor a proper party it is not required for the applicant to get itself impleaded in the suit and thereafter seek for vacation of the injunction order. According to him since the order of injunction issued by this court directly affects the applicant and its assets the applicant can maintain the present application seeking for vacation of the injunction order passed by this court. In support of his contention the learned counsel appearing for the applicant relied upon the ratio of the decisions in *Narayan Chandra Garai and Others Vs. Matri Bhandar Pvt. Ltd. and Another*, and *Indian Express Vs. T.M. Nagarajan*, 1988 RLR (Vol.18) page 194 and also in *L.D. Meston School Society Vs. Kashi Nath Misra*, .

8. Dr. Singhvi, on the other hand relied upon the decisions in *Ramkarandas Radhavallabh Vs. Bhagwandas Dwarkadas*, and also *MCD Vs. Sunni Majlis Aukaf* AIR 1968 Delhi 215.

9. The plaintiff in the present suit has also sought for a decree for extension of the Letter of Credit and also a restraint order in respect of the said Letter of Credit. But in the pleadings the plaintiff has categorically stated that the applicant is neither a necessary nor a proper party. The plaintiff obtained an injunction order wherein it was ordered that the Reserve Bank of India would not transfer and/or repatriate the amount equivalent to the amount of the Letter of Credit. By the aforesaid order the interest and assets of the applicant definitely got prejudicially affected and under such circumstances the applicant has to necessarily come up before this court seeking for vacation of the order which has amounted to touching the assets of the applicant. Such an application could be held to be maintainable even though the applicant has not chosen to get himself impleaded in the present suit. The applicant cannot be said to be a stranger to the suit for the applicant is vitally and closely connected with the letter of credit which is also made a subject matter of the present suit. In *N.C. Garai's* case (supra) the Calcutta High Court granted relief to a stranger by dissolving the order of injunction holding that while normally the court does not grant any relief at the instance of a stranger to the suit, the court may however, in an appropriate case give relief to a stranger. This court in an appropriate case, if it is

found to be necessary for ends of justice, pass an order exercising the inherent power in absence of any express or implied prohibition thereto and such powers are required to be exercised by the court exercising inherent powers when such action is called for in the interest of justice. Thus I hold that the present is a case of the nature as envisaged in the Calcutta decision and accordingly hold that the application cannot be thrown out on the ground of being not maintainable and could be considered on its merits.

10. The dispute in the present case revolves around the Letter of Credit issued by the applicant on behalf of the defendant No.1. The said Letter of Credit is an independent contract though may be ancillary to the main contract entered into between the plaintiff and the defendant No.1 for sale and purchase of 7000 MT of rice. There is a clause of arbitration in the main contract between the plaintiff and the defendant No.1. As disputes have arisen between the parties in respect of the aforesaid contract for supply of rice, I am informed that the same were referred for arbitration and those arbitration proceedings are continuing in Moscow in respect of such disputes. The present contract of the Letter of Credit admittedly does not contain any arbitration clause. The contract on Letter of Credit is governed by ICC Uniform Customs and Practice for Documentary Credits (in short ICC uniform) , a copy of which was placed before me. Article 9 thereof lays down the liability of Issuing and Confirming Banks in respect of an irrevocable Credit when it states that an irrevocable credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with. Article 42 provides for fixing an expiry date and place for presentation of such documents, when it states that all credits must stipulate an expiry date and a place for presentation of documents for payment, acceptance, or with the exception of freely negotiable Credits, a place for presentation of documents for negotiation. It also provides that an expiry date stipulated for payment, acceptance or negotiation will be construed to express an expiry date for presentation of documents. In addition to stipulating an expiry date for presentation of documents, every Credit which calls for a transport document(s) should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the Credit. The said provision is laid down under Article 43 thereof. It further provides that if no such period of time is stipulated banks will not accept such documents presented to them later than 21 days after the date of shipment, and that in any event the documents must be presented not later than the expiry date of the credit.

11. The applicant issued a Letter of Credit to the plaintiff on instructions from defendant No.1 which is governed by the aforesaid ICC Uniform Customs and Practice for Documentary Letter of Credit. The said Letter of Credit was due to expire on 22.4.1998. It is an admitted position that the goods have not been dispatched and no documents have been furnished and presented prior to the date of expiry of the validity of the said Letter of Credit. In this connection

reference may be made to the letter of credit issued by the applicant in favor of the plaintiff which is on record. The date of issue of the said letter of credit is 5.2.1998 and the date and place of expiry is shown to be 22.4.1998 at New Delhi. It is also provided therein that payment is to be made as and when documents are presented in strict conformity with LC terms and reimbursement is to be made through Canara Bank, Bombay on the applicant's central account with the Reserve Bank of India, Mumbai. It was also stipulated therein - to advise the applicant by SWIFT/TELEX subject Bank's confirmation that the documents are presented in full compliance with the L/C terms. The applicant bank admittedly has no concern with the main contract between the plaintiff and defendant No.1. It was only concerned to pay the amount as stated in the Letter of Credit only when documents are presented in strict conformity with the Letter of Credit terms which was to expire on 22.4.1998. No shipment was made by the plaintiff to the defendant No.1 and Therefore, no document could be presented by the plaintiff in conformity with the terms of Letter of Credit within 22.4.1998. The applicant has also placed on record the letters received by it from defendant No.1 on different dates intimating the applicant that the shipment date under the Letter of Credit had already been frustrated by the beneficiary and further intimating not to accept for payment the documents with the overdue date of shipment without their consent. The applicant bank by its SWIFT message dated 30.4.1998 sent to the Reserve Bank of India sought reimbursement authorisation for amounts of unused balances under letter of credit in view of expiration of the terms of validity of the Letter of Credit. The Reserve Bank of India in its turn by a swift message dated 6.5.1998 informed the applicant bank confirming unused balance as against the said letter of credit. On receipt of the aforesaid swift message from the Reserve Bank of India the applicant believed, and rightly so, that the applicant bank could and is authorised to return and refund the money to defendant No.1 and accordingly, it is stated that the cover fund received by it from ING Bank on behalf of defendant No.1, was returned on 7.5.1998. In support of the aforesaid contention documentary evidence has been placed on record.

12. Reference in this connection may be made to various decisions cited at the bar in respect of invocation and/or enforcement of Letters of Credit. The law relating to such invocation and/or enforcement is by now well settled. In *Tarapore & Co. Madras Vs. M/s. V.O. Tractors Export, Moscow* and another; reported in 1996 (2) SCR 920, the Supreme Court quoted with approval the observations of Halsbury's Laws of England. It was observed that the Contract of a Letter of Credit creates between the seller and the bank a contract which is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the bank's undertaking to the seller, which is absolute. It was also noted that the bank is not entitled to rely upon the terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefore; and conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of

credit if the goods are defective. It was held by the Supreme Court in the said decision that the Letter of Credit is independent of and unqualified by the contract of sale or underlying transaction and that the autonomy of an irrevocable letter of credit is entitled to protection and that as a rule courts refrain from interfering with that autonomy.

In *U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd.*, the Supreme Court held that an irrevocable commitment either in the form of confirmed bank guarantee or irrevocable Letter of Credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice is made out, which is a well settled principle of law in England and also a well settled principle of law in India. The aforesaid principle has been reiterated again and again by the Supreme Court in subsequent various decisions.

13. Thus the law is well settled that an irrevocable Letter of Credit as of the nature of the present one cannot be interfered with except in case of a fraud or apprehension of irretrievable injustice. Irretrievable injury, on the other hand, which is the second exception against the rule for grant of injunction i.e. an irrevocable Letter of Credit are sought to be released must be of the kind which is the subject matter of decision in the *Itek Corporation Vs. First National Bank of Boston* as was held by the Supreme Court in the case of AIR 1997 1644 (SC) .

14. Learned counsel for the plaintiff vehemently submitted that the present is a case where the ratio of the decision in *Sunmac International Ltd.* (supra) and *Itek Corporation* (supra) could be applied, for neither the defendant No.1 nor defendant No.2 has any asset in India and Therefore, the plaintiff shall not be able to recover the amount, if any, found due and payable by defendant No.1 to the plaintiff in India. It is no doubt true that disputes have arisen between the parties in respect of the original contract for which arbitration proceedings are pending in Moscow. If an award is passed in favor of the plaintiff, it would be possible for the plaintiff to get the same executed in Moscow itself. But the plaintiff is not entitled to state that the validity of the Letter of Credit should be extended so as to enable it to get the award executed in India without making the applicant a party and although validity of the said bank guarantee had expired for non-submission of the documents within the validity period of the said Letter of Credit. According to the plaintiff the plaintiff is not responsible for its inability to get the shipment of the rice and the fault lies entirely with the defendant No.1, for although it inspected the goods there was delay in doing so and even after that they did not allow the shipment of the said goods. The said disputes are purely disputes between the plaintiff and defendant No.1 for which arbitration proceedings are pending which would adjudicate and decide the said dispute as to who is at fault for non-shipment of the goods. But for that matter could the applicant be held responsible and for that matter should the letter of credit issued by the applicant be extended and/or invoked and/or enforced although documents in terms of the Letter of Credit and as envisaged under ICC

uniform were not furnished within validity of the same and in the meantime validity of the same has expired. In my considered opinion the same is not permissible under the law. The applicant has specifically stated that the validity of the Letter of Credit has expired as unused for non-submission of documents for shipment of the goods within the stipulated date. The amount under the Letter of Credit has already been returned to defendant No.1 and Therefore, the applicant has no further liability and is not answerable for any of the lapses or loss and/or omission or commission on the part of defendant No.1 in execution of the aforesaid contract. plaintiff has to directly take up the issue as against defendant No.1.

15. The plaintiff has strongly urged that there is a definite collusion between the defendant and the applicant which would be borne from the fact that the defendants No.1 & 2 although served have not appeared in the suit and Therefore, the plaintiff has become entitled to a decree straightaway. It is true that defendant No.1 and the applicant belong to Russia but the applicant has not been made a party by the plaintiff itself on the ground that the applicant is not a necessary and a proper party. Defendant No.1 admittedly is contesting the arbitration proceedings as against the plaintiff at Moscow. The applicant has returned the money to defendant No.1 after it was informed by the Reserve Bank of India that there was unused balance under Letter of Credit No.0267. Thus neither any grievance could be raised as against the applicant nor any malafide could be attributed to the applicant under the Letter of Credit. In my considered opinion there could be no such collusion and/or malafide intention on the part of the applicant. The effect of non-appearance of defendant No.1 in the suit would be considered during the trial of the suit. But in my considered opinion the said factor of non-appearance of defendant No.1 in the suit cannot be taken into consideration for denying relief to the applicant and/or to prejudicially affect the interest and assets of the applicant.

16. The validity of the Letter of Credit has admittedly expired and no shipment was made and the goods have not been dispatched and no documents furnished for invocation of the Letter of Credit prior to expiry of the validity period of the same. The said letter of credit lapsed by efflux of time and the same cannot be invoked and/or enforced beyond the period of validity and without fulfilling the conditions as mentioned therein. Although the counsel for the plaintiff submitted that the plaintiff approached this court prior to the expiry of the validity of the Letter of Credit, that in my considered opinion, does not help the plaintiff in any manner, for the court also cannot direct for invocation and/or enforcement of Letter of Credit without fulfilling the conditions mentioned therein for its invocation and/or enforcement. Besides the applicant who had issued the letter of credit was not made a party to the present proceeding and, Therefore, the order passed in this case could not bind the applicant. Even otherwise, the applicant has returned the amount to the defendant No.1 after obtaining confirmation from the Reserve Bank of India that the letter of credit is unused. The amount under the letter of credit also stands returned/ refunded to

defendant No.1 and thus the applicant has no further obligation and/or liability under the Letter of Credit and/or under the main contract to which it was not a party at all, and Therefore, by issuance of an injunction by this court the interest and assets of the applicant cannot be prejudicially affected and/or impeded. While giving effect to the order of injunction passed by this court directing the Reserve Bank of India not to refund or transmit the amount under the Letter of Credit, the other amounts of the applicant with the Reserve Bank of India have been blocked as the applicant had already returned the amount under the Letter of Credit to the defendant No.1. No document has been placed on record to indicate and show that the applicant had any knowledge about the pendency of the case in this court or the interim order passed by this court prior to making payment of the aforesaid amount to defendant No.1 on 7.5.1998. On consideration of the entire facts and circumstances of the case, I am of the considered opinion that the application filed by the applicant is required to be allowed, which I hereby do. The orders passed by this court on 22.4.1998 and 23.4.1998 stand vacated.