
(2015) 08 DEL CK 0238
In the Delhi High Court
Case No : FAO (OS) 283 of 2015

Anil Timber Private Limited

APPELLANT

Vs

ING Vyasa Bank Limited and Others

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2015) 7 AD 569 : (2015) 179 PLR 31

Hon'ble Judges : Badar Durrez Ahmed, J; Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Ajit Dayal and Lohit Bimal, for the Appellant; Gurmeet Bindra, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.

CM No. 12426/2015, CM No. 9798/2015 & FAO (OS) 283/2015

1. CM 12426/2015 has been filed on behalf of the State Bank of India, Chicago Branch, USA for vacation of the stay order which was passed by this Court on 22.05.2015, whereby the operation of the order dated 14.05.2015 passed by the learned Single Judge of this Court in IA No. 7054/2015, was stayed. The earlier order dated 29.12.2012 passed by the learned Single Judge which had been in operation prior to the order dated 14.05.2015 was revived for the time being.

2. The appeal is directed against the order dated 14.05.2015 passed by the learned Single Judge in the said IA 7054/2015 which was an application under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure, 1908 ("CPC"). We had issued notice in the appeal on 22.05.2015 and the returnable date was to be 09.10.2015. However, in view of the fact that the respondent No. 6 has filed CM No. 12426/2015 for vacation of the stay, we have taken up the hearing of the stay application CM No. 9798/2015 filed by the appellant as also the appeal.

3. The facts of the case are that the appellant (an Indian Company) had entered into an agreement with the respondent No. 2 (based in USA) for the purchase of timber. The appellant had, therefore, opened a letter of credit (documentary credit No. 503 FLC002413/14). The said letter of credit was for an amount of US \$58950. The respondent No. 1 was the issuing bank and the respondent No. 6 was the advising and negotiating bank.

4. The said letter of credit, inter alia, stipulated the conditions with regard to the documents required. The documents required were as under:-

"46A: Documents Required

1. SIGNED COMMERCIAL INVOICES IN 1 ORIGINAL AND 1 COPY CERTIFYING THAT THE GOODS ARE AS PER SALES CONTRACT NOAT/2014-001 DATED 14-JUN-2014

2. CERTIFICATE OF ORIGIN IN DUPLICATE

3. FULL SET OF ORIGINAL CLEAN "ON BOARD" OCEAN BILLS OF LADING MADE OUT TO ORDER OF ING VYSYA BANK LTD, TRADE FINANCE UNIT, 23 BARAKHAMBHA ROAD, NARAINMANZIL, NEW DELHI- 110 001, INDIA MARKED "FREIGHT PREPAID" NOTIFY APPLICANT WITH APPLICANT'S FULL NAME AND ADDRESS. SHORT FORM BILL OF LADING NOT ACCEPTABLE. BL TO MENTION."

5. The case of the appellant is that the respondent No. 2 has committed a fraud upon the appellant by (a) not shipping the full quantity of the goods; and (b) by shipping sub-standard goods. For this reason, the appellant had sought an injunction restraining the respondent No. 1 from releasing any payment under the said letter of credit to the respondent No. 6 (the negotiating bank). It may be pointed out that the documents were presented by the respondent No. 2 (beneficiary) to the respondent No. 6 (negotiating bank), in the first instance, on 18.07.2014, in respect of one shipment for an amount of US \$38,502.77. The documents which were presented to the respondent No. 6 on 18.07.2014 were verified against the conditions stipulated in the letter of credit and were found to be in order by the respondent No. 6 and the beneficiary (respondent No. 2) was paid the said amount by the respondent No. 6 on 21.07.2014. The documents in respect of the second shipment for the value of US \$18941 were presented to the respondent No. 6 on 30.07.2014 and after the respondent No. 6 found the said documents to be in order, the payment was released on 31.07.2014.

6. The suit was filed by the appellant in December 2014 and, as pointed out above, an order was passed on 29.12.2014, whereby the respondent No. 1 was enjoined from making the payment under the letter of credit to the respondent No. 6. That order was vacated by the impugned order dated 14.05.2015, against which, the appellant is in appeal before us.

7. The law with regard to letters of credit is quite well settled. The bank negotiating the documents is not concerned with the underlying contract between the seller and the purchaser nor is it concerned with the goods. The

bank only has to see whether the documents presented to it are in terms of the letters of credit or not. Once the bank finds that the documents are not discrepant, it is bound to release the payment to the beneficiary.

8. The Supreme Court, in a recent decision in the case of National Bank Limited Vs. Ghanshyam Das Agarwal(2015) 2 AD 477 : (2015) 1 BC 493 : (2015) 1 SCALE 409 : (2015) 4 SCC 228 : (2015) 130 SCL 18 held as under:-

"7. As we see it, therefore, keeping in perspective that the Importer's Bank i.e. the appellant before us, should not have certified the documentation, reasonably anticipating or being aware of the possibility that this certification could be abused. Law assures the exporter and its Bank to repose in the expectation, nay, certainty, that the consignment, which is the subject-matter of the letter of credit, is not usurped by the importer/consignee or its agents, without remitting payment to the consignor's Bank. This is a strict liability cast on the bank which opens the letter of credit, since otherwise international trade and commerce will virtually and indubitably come to a standstill. It is only when irretrievable injury is bound to result and it is plainly evident that there is egregious fraud strictly ascribable to the beneficiary of the LC, that a reason to insulate a party before it against liability and that too, comes about only through the prompt intervention and interdiction of a Court of law. This Court has consistently adhered to this position of law even through the passage of several decades. The LC has the effect of creating a bargain between the banker and the vendor of goods, a deemed nexus between the seller and the issuing Bank, rendering the latter liable to the seller to pay the purchase price or to accept a bill of exchange upon tender of the documents envisaged and stipulated in the LC (See Tarapore and Co. Vs. V/O Tractoroexport and Another, AIR 1970 SC 891 : (1970) 40 CompCas 447 : (1969) 1 SCC 233 : (1969) 2 SCR 920 where Halsbury's Law of England have been relied upon). These observations have been repeated in United Commercial Bank Vs. Bank of India and Others, AIR 1981 SC 1426 : (1981) 1 SCALE 548 : (1981) 2 SCC 766 : (1981) 3 SCR 300 : (1981) 13 UJ 653 , U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., (1987) 2 ARBLR 279 : (1988) 1 CompLJ 39 : (1987) 4 JT 406 : (1987) 2 SCALE 1149 : (1988) 1 SCC 174 : (1988) 1 SCR 1124 , Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others, AIR 2000 SC 3166 : (2001) 106 CompCas 267 : (2000) 4 CTC 687 : (2000) 1 JT 317 Supp : (2000) 6 SCALE 654 : (2001) 1 SCC 663 : (2000) 3 SCR 542 Supp : (2000) AIRSCW 3639 : (2000) 6 Supreme 619 , Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, AIR 2007 SC 2798 : (2007) 3 ARBLR 139 : (2007) 139 CompCas 706 : (2007) 9 JT 631 : (2007) 9 SCALE 631 : (2007) 8 SCC 110 : (2007) 8 SCR 869 : (2007) AIRSCW 5080 . The opening bank must only look to assure itself that the invocation is in terms of the LC, and the completion of this exercise has consistently been circumscribed to a short period, which in the case in hand is one week as per Article 13-B of UCP, 500."

9. In Tarapore and Co. Vs. V/O Tractoroexport and Another, AIR 1970 SC 891 :

(1970) 40 CompCas 447 : (1969) 1 SCC 233 : (1969) 2 SCR 920 , the Supreme Court noted scope of an irrevocable letter of credit as explained in Halsbury's Laws of England and Chalmers on Bills of Exchange as follows:-

"12. The scope of an irrevocable letter of credit is explained thus in Halsbury's Laws of England (Vol. 34), para 319 at p.185) :

"It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to accept drafts drawn upon it for the price of the goods, against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued; and as between the seller and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract thus created between the seller and the bank 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. Thus the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefor; 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."

"13. Chalmers on "Bills of Exchange" explains the legal position in these words:

"The modern commercial credit serves to interpose between a buyer and seller a third person of unquestioned solvency, almost invariably a banker of international repute; the banker on the instructions of the buyer issues the letter of credit and thereby undertakes to act as paymaster upon the seller performing the conditions set out in it. A letter of credit may be in any one of a number of specified forms and contains the undertaking of the banker to honour all bills of exchange drawn thereunder. It can hardly be overemphasised that the banker is not bound or entitled to honour such bills of exchange unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutinised with meticulous care, the maxim *de minimis non curat lex* cannot be invoked where payment is made by letter of credit. If the seller has complied with the terms of the letter of credit, however, there is an absolute obligation upon the banker to pay irrespective of any disputes there may be between the buyer and the seller as to whether the goods are up to contract or not."

10. The Supreme Court in Tarapore & Co. (supra) further observed that:-

"There is this to be remembered, too. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, further more, to be observed that vendors are often reselling goods brought from third parties. When they are doing that, and when they are being paid by a confirmed letter of credit, their practice is - and I think it was followed by the defendants in this case - to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have effect of "freezing", if I may use that expression, the sum in respect of which the letter of credit was opened."

11. In *United Commercial Bank Vs. Bank of India and Others*, AIR 1981 SC 1426 : (1981) 1 SCALE 548 : (1981) 2 SCC 766 : (1981) 3 SCR 300 : (1981) 13 UJ 653 , the Supreme Court observed as under:-

"32. Banker's commercial credits are almost without exception everywhere made subject to the code entitled the "Uniform Customs and Practices for Documentary Credits", by which the General Provisions and Definitions and the Articles following are to "apply to all documentary credit and binding upon all parties thereto unless expressly agreed". A banker issuing or confirming an irrevocable credit usually undertakes to honour drafts negotiated, or to reimburse in respect of drafts paid, by the paying or negotiating intermediate banker and the credit is thus in the hands of the beneficiary binding against the banker. The credit contract is independent of the sales contract on which it is based, unless the sales contract is in some measure incorporated. Unless documents tendered under a credit are in accordance with those for which the credit calls and which are embodied in the terms of the paying or negotiating bank, the beneficiary cannot claim against the paying bank and it is the paying bank's duty to refuse payment."

12. In *United Commercial Bank (supra)*, it was also held as under:-

"34. The authorities are uniform to the effect that a letter of credit constitutes the sole contract with the banker, and the bank issuing the letter of credit has no concern with any question that may arise between the seller and the purchaser of the goods, for the purchase price of which the letter of credit was issued. There is also no lack of judicial authority which lay down the necessity of strict compliance both by the seller with the letter of credit and by the banker with his customer's instructions."

13. The Supreme Court, in the case of *Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others*, AIR 2000 SC 3166 : (2001) 106 CompCas 267 : (2000) 4 CTC 687 : (2000) 1 JT 317 Supp : (2000) 6 SCALE 654 : (2001) 1 SCC 663 : (2000) 3 SCR 542 Supp : (2000) AIRSCW 3639 : (2000) 6 Supreme 619 held that:-

"55. In several judgments of this Court, it has been held that courts ought not to

grant injunction to restrain encashment of bank guarantees or letters of credit. Two exceptions have been mentioned - (i) fraud and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39, Rule 1 CPC can be issued. It has also been held that the contract of the bank guarantee or the letter of credit is independent of the main contract between the seller and the buyer. This is also clear from Articles 3 and 4 of UCP (1983 Revision). In case of an irrevocable bank guarantee or letter of credit the buyer cannot obtain injunction against the banker on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller prima facie complies with the terms of the bank guarantee or letter of credit, namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit. If the bank is satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the bank guarantee or the letter of credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. While doing so it must take reasonable care. It is not permissible for the bank to refuse payment on the ground that the buyer is claiming that there is a breach of contract. Nor can the bank try to decide this question of breach at that stage and refuse payment to the seller. Its obligation under the document having nothing to do with any dispute as to breach of contract between the seller and the buyer....."

(underlining added)

14. Again in Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, AIR 2007 SC 2798 : (2007) 3 ARBLR 139 : (2007) 139 CompCas 706 : (2007) 9 JT 631 : (2007) 9 SCALE 631 : (2007) 8 SCC 110 : (2007) 8 SCR 869 : (2007) AIRSCW 5080 , the Supreme Court held as under:-

"14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit :

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the

parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

(underlining added)

15. In the present case, we find, prima facie, that the documents which were presented to the respondent No. 6 on both occasions were not discrepant and were in conformity with the letters of credit. Therefore, our prima facie view is that the respondent No. 6 was not wrong in releasing the payment to the beneficiary. That being the case, the appellant is not in a position, in law, to seek an order restraining the payment by the respondent No. 1 to the respondent No. 6 and thereby reimbursing the respondent No. 6 for the payment made under the letter of credit issued at the instance of the appellant by the respondent No. 1. The learned counsel for the respondent No. 1 also has no objection to the release of the payment to the respondent No. 6 and she states that the only reason why the payment has not been made is because of the injunction order. According to the respondent No. 1 Bank also the documents are in order. The banks have no concern with the disputes between the purchaser (the appellant) and the seller (respondent No. 2.). The alleged non-supply of the full quantity contracted or the alleged sub-standard quality of goods do not fall within the exception of fraud of an egregious nature and irretrievable injustice.

16. In these circumstances, we not only vacate the order dated 22.05.2015 passed by us in CM No. 9798/2015 but also dismiss the appeal preferred by the appellant. The result is that CM No. 12426/2015 is allowed, the order dated 22.05.2015 stands vacated and FAO(OS) 283/2015 and CM No. 9798/2015 are dismissed.

17. The next date (i.e., 09.10.2015), which was fixed in the appeal, stands cancelled. There shall be no order as to costs.