
(1988) 09 MAD CK 0056
In the Madras High Court

Gnanasigamani Nadar, represented by M.G. Jayapandian
Tuticorin and Others

APPELLANT

Vs

Canara Bank and Another

RESPONDENT

Date of Decision : 30-09-1988

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 30, 35

Citation : (1990) 1 MLJ 401

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—This case raises a question, which according to learned Counsel has not come up for consideration so far in any Court. In short, the question is whether an intermediary Bank which has merely communicated to the beneficiary the letters of credit opened by a Foreign Bank is entitled to get a refund of the amount paid by it to a person who discounted the bill drawn by the beneficiary after it is found that the foreign Bank never existed.

2. The relevant facts are these: The 9th defendant in the suit, hereinafter referred to as the "seller" purported to enter into a contract for supply of sun glasses with M/s. Olerewagu Loadipupo, Esq.6, Dabira Street, Shomulu, Lagos in Nigeria hereinafter referred to as the "buyer". The plaintiff received a communication dated 25.9.1971 from

British Trust and Saving Corporation Ltd., Lagos, Nigeria, hereinafter referred to as the "Foreign Bank" requesting for a notification to the seller of an irrevocable letter of credit opened by the Foreign Bank with the plaintiff by order of the buyer along with the communication an irrevocable letter of credit for an amount of ...3845 was sent to the plaintiff. It was expressly stated in the letter of credit that it was to be notified by the plaintiff without adding its confirmation. The Letter of credit was valid upto 15th December, 1971 in India. The plaintiff wrote on 6.10.1971 a letter to the seller enclosing therewith the letter of credit opened by the Foreign Bank. The plaintiff requested the seller to remit a sum of Rs. 5

towards advising commission. The period of validity of the letter of credit was extended by subsequent letters from the Foreign Bank. At first it was extended upto 15th January, 1972 and later upto 15th April, 1972. In the first extension letter it was stated to have been made on the advice of the buyer and in the second extension letter it was stated to have been made on the instructions of the seller. The related consignment was air-freighted by the seller from Bombay to Lagos. The corresponding bill No. 22/72 was discounted by the seller with the first defendant who is a customer of the plaintiff bank. The first defendant sent the bill to the plaintiff and got money thereon. The plaintiff sent it to its corresponding bank in Nigeria viz., Bareilly Bank of Nigeria Limited for collection. The corresponding bank informed the plaintiff that neither the buyer nor the foreign bank could be traced? On getting such information the plaintiff intimated the same to the first defendant as well as the seller who would also appear to have made some attempts through their agents to find out the buyer and the foreign bank but in vain. The consignment was ultimately re-booked to Bombay and the plaintiff on receipt of the said information communicated it to the first defendant and the seller. The plaintiff requested the first defendant to reimburse it as no collection was possible under the bill. The first defendant and the seller refused to take any action regarding the re-booked cargo or to pay the amount to the plaintiff. After adjusting certain amounts of the first defendant available with it, the plaintiff found that a sum of Rs. 14,298.05 was due. After issuing notice the plaintiff filed the suit for recovery of the said amount. The first defendant is the firm M/s. Gnanasigamani Nadar represented by one of its partners. Defendants 2 to 4 are the partners of the firm and they are the sons of Gnanasigamani Nadar. Defendants 6 to 8 are the personal heirs of Gnanasigamani Nadar and the 9th defendant is the seller. As Gnanasigamani Nadar died before suit, the suit was filed against the firm, the partners thereof and his personal heirs.

3. In the written statement filed by defendants 1 and 2 it was stated that the first defendant was only helping the seller by acting on his behalf to collect the money. It was stated that the plaintiff was acting as the agent of the foreign bank and if the money was not realised the plaintiff can only look upto the foreign bank and not the defendant. It was further stated that the plaintiff volunteered to discount the bill, on the strength of the implied guarantee and dependence on the foreign bank. It was also stated that the plaintiff did not exercise its mind over the matter and was merely acting as a post-office forwarding letters all the time depending on the foreign bank and seller and the plaintiff should suffer for its negligence if there had been any loss.

4. The fourth defendant filed a separate written statement to the following effect. The confirmed and irrevocable letter of credit opened by the foreign bank with the plaintiff mentioned that the plaintiff should reimburse itself by drawing on the accounts of the foreign bank. The plaintiff could have its remedy only against the buyer and the foreign bank and not against the defendants. The written statement of the fourth defendant was expressly a defence on behalf of the other

defendant also including the seller. Defendants 3 and 5 to 8 adopted the written statement filed by the fourth defendant. Though the seller engaged a separate advocate he did not file any separate written statement. The plaintiff filed a reply statement reiterating the claims made in the plaint.

5. The trial Court held that the plaintiff acted only as an agent for collection and did not open any letter of credit. Consequently, the trial Court held that the plaintiff is entitled to get back the money paid to the first defendant and that all the defendants were liable therefor. The trial Court passed a decree against defendants 1 to 4 and 9 personally and defendants 5 to 8 out of the assets of the late Gnanasigamani Nadar and their heirs for a sum of Rs. 14,293.05 with the interest at 6% per annum from the date of plaint till date of realisation. It is that decree which is challenged in this appeal by defendants 1 to 8. The 9th defendant seller has not preferred any appeal.

6. In order to appreciate the position, in law it is necessary to refer to the principles governing a letter of credit. The law on the subject is succinctly stated in Halsbury's Laws of England Fourth Edition Volume 3 at pages 99, Et seq. The relevant passages are as follows:

131. Types of credit:

A letter of credit is in principle an undertaking by a banker to meet drafts drawn under the credit by the beneficiary of the credit in accordance with the conditions laid down therein. A letter of credit may be addressed, (1). as in a traveller, letter of credit," to all the issuing banker's correspondents throughout the world, or (2). where the credit is designed to facilitate trade (generally, but not always, foreign trade); to another specified banker (called the intermediary banker) or to the beneficiary.

Where in case (2) previously mentioned the credit is addressed to the intermediary banker, it may contain an instruction to that banker either merely, to advise the beneficiary of the credit without any commitment or to add his confirmatory undertaking to it, in which case the beneficiary has the promise of both bankers, except where the confirming banker issues his own credit to the beneficiary. Where a credit is intended to facilitate trade it is called a commercial letter of credit.

132. Nature of commercial letters of credit: Commercial letters of credit may be issued at the instance of a buyer in favour of a seller in the same or another country in which latter case they are called import credits, or they may be issued at the instance of a seller, when they are called export credits and take the form of an acceptance credit the seller drawing on his own banker or at any /ate a banker in his own country. Where buyer and seller are in different countries the banker issuing the credit at the instance of a buyer docs so usually through a banker in the other country, the authorisation of the issuing banker is addressed to the other banker and instructs him to advise the credits to the beneficiary with or without committing himself by adding his confirmation. The banker issuing

credit is called the issuing or opening banker, the second banker, who advises the beneficiary is an advising, negotiating confirming or paying banker according to the role he plays.

Commercial letters of credit may be of two types namely revocable credits and irrevocable credits. Irrevocable credits may be confirmed or unconfirmed.

133. Commercial Letters of credit relationship. The contractual relationship between the issuing banker and the buyer is defined by the terms of agreement between them under which the letter opening the credit is issued, and as between the seller and the banker, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the banker directly liable to the settlor to pay the purchase price or to accept the bill of exchange upon tender of the documents.

The issue of an irrevocable credit is not conclusive payment as regards the buyer and the seller for if the issuing banker should fail the seller still has a right to sue the buyer for the price. The contract thus created between the seller and the banker to rely upon terms of the contract between is separate from, although ancillary to, the original contract between the buyer and the seller by reason of the banker's undertaking to the seller which is absolute. Thus, the banker 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 the payment for them, 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.

Bankers commercial credits are almost without exception every where, made subject to the code entitled. The Uniform Customs and Practice for Documentary Credits. The code applies where the credit is not specific or is lacking insofar as it is relevant and to the extent of such application, it forms part of the credit contract.

134. Negotiability, transfer and assignment: Letters of credit are not negotiable and unless they are transferable, are available, to the grantee only if a person on the faith of the letter of credit, pays or advances money to a person other than the grantee the banker who granted the letter of credit will not be liable to the person who advanced or paid the money.

135. Issuing and paying bankers: The contract between the issuing or opening banker and the (paying or negotiating (intermediary) banker partakes in a dual nature. The relationship is partly that of principal and principal, partly of principal and agent, mandator and mandatory, it depends too, in some measure, on the nature of the credit, whether it be revocable or irrevocable. In order that he may claim to be reimbursed for any payment he makes under the credit the banker paying must obey strictly the instructions he receives, for by acting on them he accepts them and thus enters into contractual relations with the opening or issuing banker. Most of the difficulties which arise in practice are due to the fact that often instructions are not clear or are intended to mean something different

from what they actually convey. The instructions may take the form of an authority to (1). pay against documents or against drafts accompanied by documents and (2) negotiate drafts drawn either on the opening banker or on the buyer the instructions may or may not be accompanied by instructions to confirm the credit that is for the intermediary banker to place himself in binding contractual relationship with the beneficiary.

7. The uniform customs and practice for Documentary credits referred to in Halsbury's Laws of England has been published by the International Chamber of Commerce. Some of the provisions therein are relevant:

Article 3:

An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or as the case may be to the beneficiary and bona fide holders of drafts drawn end or documents presented thereunder, that the provisions for payment acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.

An irrevocable credit may be advised to a beneficiary through another bank without agreement on the part of that other bank (the advising bank), but when an issuing bank authorises another bank to confirm its irrevocable credit and the latter does so such confirmation constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will be duly fulfilled or, in the case of a credit available by negotiation of drafts that the confirming bank will negotiate drafts without recourse to draw. Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

Article 7:

Banks must examine all documents with responsible care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit.

Article 9:

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon, nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing delivery, value of existence of the goods represented thereby, or for the good faith or act and or omissions, solvency, performance or standing of the consignor the carriers or the insurers of the goods, or any other person whomsoever.

8. In *United Bank of India Ltd. Vs. Nederlandsche Standard Bank*, it is laid down that each case must be examined and determined on the exact terms and

conditions of the letter of credit in a particular case and that they alone can determine whether the correspondent was merely acting as an advisor or doing something more.

9. The Supreme Court of India had occasion to deal with the scope of a letter of credit and the principles on which a Court could interfere with the operation of the same in *Tarapore and Co. Vs. V/O Tractoroexport and Another*, . After quoting from Halsbury's Laws of England and Chalmers on "Bills of Exchange" the Supreme Court observed thus:

An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade: Any interference with that mechanism is bound to have serious repercussions on the international trade of this country. Except under very exceptional circumstances, the Courts should not interfere with that mechanism.

Again it was observed that the letter of credit is independent of and unqualified by the contract of sale or underlying transaction and the autonomy of an irrevocable letter of credit is entitled to protection. The Supreme Court held that as a rule Courts refrain from interfering with that autonomy.

10. In *State Bank of India Vs. The Economic Trading Co. S.A.A. and Others*, , the distinction between a letter of credit and a bank guarantee was pointed out by a Bench of the Calcutta high Court in *United Commercial Bank Vs. Bank of India and Others*, the Supreme Court reiterated the rule that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller and the duties of a bank under a letter of credit are created by the document itself. The Court went on to point out that a letter of credit sometimes resembles and is analogous to a contract of guarantee. The following passage from the judgment of Lord Denning M.R. in *Elia v. Marsas* (1966) 2 L.I.L.R.495 was quoted:

a Bank guarantee is very much like a letter of credit. The Courts will do their utmost to enforce it according to its terms. They will not in the ordinary course of things interfere by way for injunction to prevent its due implementation. Thus they refused in *Malus v. British Inex Industries Ltd.*, But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction.

11. In *N.O. & Company Industries v. Punjab & Sind Bank* A.I.R.1989 Delhi.9, it was held that the principle relating to letter of credit is not to be extended to protect an unscrupulous seller when there is a fraudulent transaction.

12. Bearing the above general principles in mind, if the facts of the case are looked into, it is seen that the plaintiff was expressly asked by the foreign Bank not to add its confirmation to the letter of credit. Exhibit A.20 is the irrevocable letter of credit sent by the foreign Bank. The relevant portion thereof reads as follows:

We beg to inform you that by order of Olarewaju Oladipupo Esquire 6 Dbira Str/

Sh Omolu/Lagos and for account of M/s. Olarewaju Oladipupo Esquire 6 Dabria Street/Saomolu Lagos we open with you your Irrevocable Letter of Credit in favour of M/s. P.S. Ponnudoorai Pandian 124 North Cotton Road, Tuticorin-1 to be notified without adding your confirmation upto the aggregate amount of (...3,845.00) Three thousand Eight Hundred and Forty Five Pounds only.

In the covering letter sent by the foreign Bank, the plaintiff was only requested to notify the beneficiary about the letter of credit. Pursuant to that, the plaintiff sent a letter on 6.10.1971 marked as Exhibit A.21 to the seller enclosing the letter of credit opened by the foreign Bank. There is no assurance or confirmation by the plaintiff of the letter of credit opened by the foreign Bank. Learned Counsel for the appellant strenuously contended that there is an implied guarantee by the plaintiff that the foreign Bank is creditworthy and that there will be no difficulty to collecting the amount from the buyer through the foreign Bank. I do not agree with the contention. By a reading of Exhibits A.20 and A.2.1 together it is clear that the plaintiff did not venture to give any such express or implied assurance. There was no guarantee whatever on the part of the plaintiff to the seller. It is stated by learned Counsel that there was no collusion between the first defendant and the seller and that the plaintiff was guilty of negligence in not ascertaining whether the foreign Bank existed or not. According to learned Counsel the plaintiff could have easily verified whether the foreign Bank did in fact exist.

13. As regards the absence of collusion between the first defendant and the seller, it is significant that there was no evidence on the side of the defendants either documentary or oral. The evidence in this case consists of 41 documents filed only by the plaintiff. The defendants did not choose to examine any witness or file any document. As stated already, the written statement of the fourth defendant is not only on behalf of the seller, the 9th defendant. There is no reason why the fourth defendant should try to protect the seller, the 9th defendant in the written statement. In spite of the fact that the 9th defendant had engaged a separate counsel he did not file any written statement on his own. This conduct on the part of the fourth defendant raises suspicion that the first defendant and the 9th defendant are going hand in glove with each other.

14. It is a fact that the first defendant had discounted the bills of the seller. The bills are drawn by the seller and are marked as Exhibit A.5. The first defendant had chosen to endorse the same in favour of Canara Bank, the plaintiff. The plaintiff has accepted the endorsement and paid the amount to the first defendant as the first defendant is admittedly a customer of the bank. Hence, the payment made by the plaintiff cannot be said to be on strength of the letter of credit opened by the foreign Bank, but it was on the basis of the discount of the bills made by a customer of the Bank. Unless there is specific evidence on record to show that the plaintiff acted only on the basis of the letter of credit and not on the discounted bills it cannot be contended that the plaintiff is not entitled to claim a refund of the amount paid to the first defendant.

15. As rightly contended by learned Counsel for the plaintiff a bill of exchange has been discounted and presented to the Bank and in the normal course of business the bank has chosen to honour the same and make payment. u/s 30 of the Negotiable Instruments Act, the drawer of a bill of exchange or cheque is bound in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer. u/s 35 of the said Act, in the absence of a contract to the contrary whoever indorses and delivers a negotiable instrument before maturity without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonour provided due notice of dishonour has given to, or received by, such indorser.

16. There is no dispute that due notice of the dishonour has been given to the first defendant as well as the 9th defendant. The plaintiff is the holder of the bill of exchange and the 9th defendant is the drawer. The first defendant is the indorser. Hence the requirements of Sections 30 and 35 of the Negotiable Instruments Act are satisfied. In the circumstances, there is no difficulty in holding that the plaintiff is entitled to claim back the amount paid to the first defendant when it is found that the bill of exchange was dishonoured by the drawee viz., the buyer.

17. In the result, the judgment and decree passed by the trial Court are upheld and the appeal is dismissed with costs.