

(2002) 03 DEL CK 0010

In the Delhi High Court

Case No : IAs 8432 and 8939/95 in S. No. 1335/95

Hindustan Zinc Ltd.

APPELLANT

Vs

Punjab National Bank and Others

RESPONDENT

Date of Decision : 20-03-2002

Acts Referred:

Citation : (2002) 6 AD 256 : AIR 2002 Delhi 398 : (2002) 97 DLT 930 : (2002) 62 DRJ 845

Hon'ble Judges : Sharda Aggarwal, J

Bench : Single Bench

Advocate : R.K. Garg, for the Appellant; Y.P. Chandna and Ravi Verma, for the Respondent

Final Decision : Allowed

Judgement

Sharda Aggarwal, J.—The plaintiff M/s Hindustan Zinc Ltd., a Government of India Enterprise, has filed the present suit for recovery under Order xxxvII CPC on the basis of irrevocable letter of credit (in short ILC) issued by Punjab National Bank, Court Road, Muzaffarnagar Branch, defendant No. 2 in their favor. Defendant No. 4 M/s Mohindra Steel Tubes Limited placed an order on the plaintiffs for purchase of furnace zinc weighing about 20.146 metric tons at the unit price of Rs. 44,500/- per metric ton. The plaintiff agreed to supply furnace zinc and defendant No. 4 opened an ILC with defendant No. 1 bank in favor of the plaintiff and the proceeds thereof were payable at Delhi. Defendant No. 2 Muzaffarnagar Branch of Punjab National Bank opened an ILC bearing No. 3/93 on 20th August, 1993 for a sum of Rs. 10 lakhs. According to terms and conditions of the ILC, the sight draft for the recovery of the value of the material supplied to defendant No. 4 was to be accompanied by the documents like signed invoice in duplicate, copy of gross FOB/FOP/CIF/C & F/CIP ex-works value of the furnace zinc. The plaintiffs issued the delivery order on 24th August, 1993 in favor of defendant No. 4 on their depot at 4, Industrial Area, Sahibabad. For the delivery of the goods, the authorised representative of defendant No. 4 duly

signed the delivery challan and took the delivery. The plaintiffs have averred that the goods were taken by the representative in a truck under a gate pass dated 25th August, 1993. It was mentioned on the challan that the defendant was entitled to interest free credit for a period of 60 days as per the policy of the plaintiffs. Defendant No. 4 was liable to pay interest at the rate of 30% per annum beyond the period of 60 days. On 20th October, 1993, plaintiffs sent a sight draft of Rs. 8,96,497/- drawn on defendant No. 2 against ILC No. 3/93 for collection through their bankers, namely, State Bank of Bikaner & Jaipur, Nehru Place, New Delhi branch. The plaintiffs claim that Along with the sight draft requisite documents were also enclosed. The plaintiffs' bankers were to purchase the bill and credit the amount to plaintiffs' account. On 30th November, 1993, plaintiffs bankers forwarded the said bill Along with the documents to Punjab National Bank, Nehru Place Branch, New Delhi (advising bank) demanding payment of Rs. 8,96,477/- plus Rs. 7,427/- being their charges against the letter of credit. The defendant No. 2 refused to make the payment. The plaintiff bankers informed on 5th January, 1994 that they were unable to obtain the payment against the aforesaid bill as the defendant No. 2 refused to make the payment. The plaintiffs wrote to defendant No. 2 for expediting the payment as well as informed defendant No. 4 about the refusal of payment by the advising bank. The plaintiffs leveled allegations against defendant No. 3, the Senior Manager of the Muzaffarnagar Branch of the advising bank for unilaterally amending the terms of the ILC. After some correspondence with the defendants, plaintiffs served a legal notice dated 16th January, 1995 on the defendants, to which defendants 1 to 3 gave reply dated 10th February, 1995. The plaintiffs filed the present suit on the basis of ILC against the defendants for Rs. 13,19,879/- claiming interest at the rate of 30% per annum for 24th August, 1993 to 30th April, 1995 on Rs. 9,03,924/-. The defendant No. 3 is impleaded as Manager of defendant No. 2 who unilaterally amended the terms of the ILC on 13th October, 1993 and refused to accept the bill on that basis. Defendant No. 4 is impleaded as a proper and not a necessary party. A decree is, however, claimed against all the defendants jointly and individually with interest at the rate of 30% per annum pendente lite and future. Photocopies of the documents relied upon have been filed by the plaintiff.

2. Defendants on receipt of summons for appearance under Order 37 CPC filed appearance. After that the summons for judgment were taken out and served on the defendants. In response thereto, defendants 1 to 3 and defendant No. 4 filed two separate applications for leave to defend the suit unconditionally being IA. No. 8432/95 and IA. No. 8939/95 respectively. By this order, I propose to dispose of these two applications.

3. Defendants 1 to 3 have claimed unconditional leave to defend the suit inter alia on the following grounds:-

1. The suit is not maintainable against defendant No. 3, who is the Senior Manager and Principal Officer of the branch of the defendant bank and had acted

in his official capacity, there being no privity of contract between defendant No. 3 and the plaintiff.

2. The documents submitted by the plaintiff with the sight draft were not in conformity with the terms of the letter of credit and that the same was not accompanied by the transport documents like RR/MTR, which was required as per the amended letter of credit. Also the sight draft with the documents was not submitted within the stipulated period of 21 days as per the practice of UCPDC (Uniform Customs & Practices for Documentary Credits) within 21 days from the date of dispatch i.e. 24th August, 1993. Even otherwise, the sight draft with documents was presented after the date of expiry of the letter of credit and the goods were not delivered at Muzaffarnagar, which was a condition prescribed.

3. Leave to defend is also claimed on the ground that there was no privity of contract to pay interest between the parties and defendants 1 to 3 were not bound by the terms of the sale contract between the plaintiff and defendant No. 4.

4. Shri Y.P. Chandna contends that admittedly the present suit is based on irrevocable letter of credit dated 20th August, 1993 issued by the defendant bank in favor of the plaintiff. A letter of credit constitutes an independent contract with the banker and a bank issuing or confirming a letter of credit is not concerned with the underlined contract between the buyer and seller. The submission is that there was no privity of contract between defendant No. 3, who is Manager of the Muzaffarnagar Branch of the defendant bank and the plaintiff. He had been acting in his official capacity and as such the suit against defendant No. 3 is not maintainable and is liable to be dismissed. Admittedly, defendant No. 3 had been acting in the capacity of an officer of the bank and no liability arising out of the letter of credit between the defendant bank and the plaintiff can be attributed to defendant No. 3. Prima facie there is no case against defendant No. 3. He is entitled for leave to defend the suit on this ground itself.

5. Coming to the contention regarding non-conformity of the terms of letter of credit, Mr. Y.P. Chandna submits that the documents should have been presented within 21 days from the date of the dispatch i.e. 24th August, 1993, the date shown in the challan. The submission is that the bankers commercial credits are governed by the code entitled "Uniform Customs & Practice for Documentary Credits" (UCPDC). The relevant Article of UCPDC is reproduced as under:

"Limitation on the Expiry Date:

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. If no such period of time is stipulated, banks will not accept documents presented to them later than 21 days after the date of shipment. In any event, documents must be presented not later than the expiry date of the credit."

6. It is shown from the documents placed on record that the plaintiff presented the documents with the sight draft to defendant No. 1, the advising bank on 30th October, 1993. The sight draft was not honoured as there were discrepancies in the documents and was not presented within 21 days from the date of dispatch. At the request of the collecting bank i.e. State Bank of Bikaner and Jaipur, the documents were returned by the advising bank on 1st December, 1993. The sight draft with documents presented to defendant No. 2, Muzaffarnagar branch i.e. the issuing branch was receiving even after 19th December, 1993, the date of expiry of the letter of credit. In this regard, it is pointed out that the documents were sent by the collecting bank under memo/letter dated 30th October, 1993 which was received by defendant No. 2 on 28th December, 1993. Defendants have placed on record photocopy of envelope in which documents were dispatched showing that the dispatch by the collecting bank from Delhi was on 15th December, 1993 which was received at Muzaffarnagar on 28th December, 1993.

7. The plaintiff refutes these contentions. The point as to whether the sight draft Along with the documents was received by the Muzaffarnagar Branch of the bank after 19th December, 1993 is a question to be decided on trial. The defense on this point cannot be said to be sham or frivolous. As regards the presentation of the documents to the advising bank beyond 21 days from the date of dispatch, plaintiff's contention is that no such UCPDC governs the bankers commercial credits. The contention has no merits. It is the settled legal position that bank credits are governed by the code of UCPDC. With advantage reference is made to United Commercial Bank Vs. Bank of India and Others, , where the question of applicability of UCPDC came in question with regard to a dispute based on liability of a banker arising out of a contract of letter of credit. It was observed as under:

"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."

8. Learned counsel for the defendants further contends that the sight draft was otherwise not accompanied by requisite documents as per the terms of letter of

credit. It was not accompanied by the transport documents like RR/MTR showing movement of the goods from NOIDA/Sahibabad Depot to Muzaffarnagar. The letter of credit is "at sight" and for a maximum period of 4 months i.e. expiring on 18th December, 1993. The advising bank was Punjab National Bank, Nehru Place, New Delhi. The goods comprising of furnace grade Zinc were to move from Noida/Sahibabad Depot for transportation to Muzaffarnagar. It further required that the sight draft was to be accompanied by signed invoice in duplicate, copies for gross FOB/FOR/CIF/C&F/CIP ex-works value of furnace grade zinc, receipted challans duly accepted by the applicant company (defendant No. 4) or by its representative. On account of amendment of a condition of the letter of credit by defendant No. 2, RR/MTR showing the goods consigned to Muzaffarnagar was required to be attached to the sight draft. The transport documents were also required to indicate the name and address of the applicant i.e. the purchaser and the bank issuing the letter of credit. The contention is that the documents accompanied with sight draft were not in compliance with the terms and conditions of the letter of credit as the requisite RR/MTR was not enclosed therewith. The claim of the plaintiff is that the amendment was made unilaterally by the bank and as such it was not binding on the plaintiff. The defendant's case is that the amendment carried out by the Muzaffarnagar branch of the bank was duly communicated by registered post to their branch at Nehru Place, New Delhi i.e. the advising bank and also to the plaintiff company. As such the plaintiff was aware of the amendment. Admittedly, the RR/MTR was not submitted to the advising bank Along with the sight draft. The plaintiff denies the receipt of any such communication regarding the amendment in the terms of the letter of credit. This is a disputed fact which requires evidence.

9. The further contention is that even the original terms and conditions of the letter of credit are not complied with. According to the terms, the goods were to be dispatched from NOIDA/Sahibabad Depot for transportation to Muzaffarnagar. In the invoice issued by the plaintiff to defendant No. 4, place of delivery is mentioned as Ghaziabad. This is apparent from challan No. 54 dated 24th August, 1993 which was enclosed with the sight draft. This challan does not give any reference to the goods receipt or the number of the truck through which the goods were dispatched or transported. On the other hand, the delivery letter dated 24th August, 1993 issued by the plaintiff shows the place of destination as Muzaffarnagar, which is contrary to challan No. 54. This also indicates that the delivery was to be made to one Mr. Ajit Singh Ratra. No document was attached to show the movement of goods from NOIDA/Sahibabad Depot to Muzaffarnagar. Challan No. 54 on the contrary shows that the goods were delivered at CWC (Central Ware Housing Corporation), Ghaziabad. It is submitted that these documents show that the terms of letter of credit were not complied with. The submission is that the documents are required to be in conformity with the terms of the letter of credit, as the issuing bank deals with the documents and not with the actual delivery of the goods. It is settled law that opening of a confirmed letter of credit constitutes a bargain between the bank and the seller which

imposes on the banker an absolute obligation to pay. Similarly, in such a bargain, bank is not bound or entitled to honour the bills of exchange drawn by the seller unless the bills of exchange and the accompanying documents are in exact compliance with the terms of the credit. Reference in this respect is made to Tarapore and Co. Vs. V/O Tractoroexport and Another, Prima facie the defendants' contention that the documents submitted with the sight draft by the plaintiffs were not in compliance with the terms of the letter of credit, requires consideration. It is a dispute giving rise to a triable issue, and the defense raised by defendants 1 to 3 cannot be said to be moon shine or sham. The defendants 1 to 3 are entitled to grant of unconditional leave to defend the suit even on this score.

10. Defendants 1 to 3 claim leave to defend the suit on yet another ground. The contention is that as there was no stipulation/agreement for payment of interest in the letter of credit, the suit itself is not maintainable under Order xxxvII CPC. Admittedly it is based on irrevocable letter of credit issued by defendant No. 2 in favor of the plaintiff which does not stipulate payment of interest. In the suit, plaintiff has claimed interest at the rate of 30% per annum from 24th August, 1993 up to 30th April, 1995. This claim is not based on any written agreement. Though the plaintiff has made an averment in terms of Order xxxvII Rule 2 CPC that the suit is filed under Order xxxvII CPC and no relief, which does not fall within the ambit of this rule, has been claimed, but in the suit interest is claimed which is not based on the written agreement i.e. letter of credit. This prima facie is cannot be said that the claim of interest is covered under Order xxxvII CPC. Since the question of payment of interest is a dispute in itself, to my mind, it is also a triable issue.

11. Defendant No. 4, the purchaser in his application (IA. No. 8939/95) has claimed entitlement to leave to defend the suit, inter alia, on the ground that the plaintiff had supplied goods to them against an irrevocable letter of credit opened by defendant No. 2 in favor of the plaintiff and the present suit is based on letter of credit, which is an independent contract between defendant No. 2 and the plaintiff and as such, there is no cause of action against defendant No. 4. The contention is refuted by the plaintiff. It is nowhere stated in the plaint as to how a suit under Order xxxvII CPC lies against defendant No. 4, assuming that the said defendant would be liable for the price of the goods purchased and not paid for. A perusal of the plaint, however, shows that it is based on letter of credit issued by defendant No. 2 in favor of the plaintiff. The plaintiff in the suit itself states that defendant No. 4 is a proforma party and not a necessary party even though in the prayer clause a decree for recovery of Rs. 13,60,839/- with interest has been claimed against all the defendants including defendant No. 4. Whether the plaintiff can claim the sale amount of the goods from defendant No. 4 in a suit based on letter of credit between the banker and the plaintiff in itself is a dispute. Therefore, it is a triable issue. The defense raised cannot be called a sham defense.

12. For the reasons stated above, I am of the considered view that defendants 1 to 3 and defendant No. 4 are entitled to the grant of unconditional leave to defend.

13. Both the applications are accordingly allowed.