

(2016) 09 MAD CK 0055

In the Madras High Court

Case No : O.S.A. No.156 of 2009 and M.P. No.1 of 2009

Indian Bank Rep. by its Branch Manager

APPELLANT

Vs

Tamil Nadu Small Industries Corporation Ltd.

RESPONDENT

Date of Decision : 01-09-2016

Acts Referred:

Citation : (2016) 3 MadWN(Civil) 577 : (2016) 7 MLJ 1

Hon'ble Judges : Mr. A. Selvam and Mr. P. Kalaiyarasan, JJ.

Bench : Division Bench

Advocate : Mr. Jayesh B. Dolia for M/s. Aiyar & Dolia, Advocates, for the Appellant; Mr. V. Selvaraj, Advocate, for the Respondents Nos. 1, 2 to 4

Final Decision : Dismissed

Judgement

P. Kalaiyarasan, J.—This Original Side Appeal is directed against Judgment and Decree, dated 12.12.2008 of the learned single Judge in C.S.No. 650 of 1999, decreeing the suit for recovery of money and also damages of Rs.1,00,000/-.

2. The plaint averments are as follows :

(i) The plaintiff is a company registered under the Companies Act, 1956 and is owned by the Government of Tamil Nadu. The plaintiff had placed orders with the third respondent, M/s. Paul Leibinger GmbH & Co., KG, Germany for supply of numbering machines for printing machinery and spare parts, for the value of DM 64053 about Indian currency value of Rs.16.00 lakhs. A Letter of Indent was placed on 30.04.1999 in accordance with the proforma invoice sent by the foreign supplier.

(ii) The plaintiff made an application to the first defendant/Bank for opening a Letter of Credit clearly indicating the nature of the goods and the last date of expiry for the purpose of shipment as 06.07.1999. The Letter of Credit was opened on 27.05.1999 and the same was made subject to UCPDC 1993 (Revision ICC No.500). The foreign supplier has not dispatched the goods as required by

the terms of the Letter of Credit. The plaintiff on the evening of 06.07.1999 cancelled the purchase order and communicated the same by fax to the foreign supplier and also to its Indian Office at Mumbai on 06.07.1999. On 12.07.1999, an intimation was received from the second defendant, M/s. MSAS Global Logistics (India) Pvt. Ltd., Egmore, Chennai, indicating the cargo arrival notice. Though it was indicated, the Master Airway Bill, MAWB 055-1909 8494 had not been sent.

(iii) The plaintiff after enquiry with the second defendant got the copy of the said bill and found that the Aircraft carrying the cargo had actually left on 10.07.1999. The date of dispatch so indicated on the Air Transport documents will be deemed to be the date of shipment, as per Articles under UCPDC and as per the document, the goods were dispatched only on 07.07.1999. Therefore, the plaintiff's action in cancelling the order is well within its rights.

(iv) The first defendant Bank insisted upon the plaintiff retiring the bill by making necessary payment as the plaintiff had already got its over draft facility with the first defendant Bank. The plaintiff had replied to the first defendant Bank, by its letters, dated 06.07.1999, 07.07.1999, 13.07.1999, 19.07.1999, 22.07.1999, 23.07.1999, 29.07.1999, 10.08.1999 and 12.08.1999 justifying its action in cancelling the order placed and also refusing to make the payment or allowing it to debit the above said sum for the goods. The first defendant Bank itself had in its letter, dated 21.07.1999 pointed out that the description of the goods differ from the Letter of Credit terms, as per the proforma invoice No.2407, dated 05.05.1999. Thus, the goods were not dispatched in conformity with the proforma invoice.

(v) The plaintiff moved this Court by filing an injunction application in this suit on 25.08.1999. Without mentioning the notice issued by the Advocate for the plaintiff, the first defendant served a notice on 26.08.1999 at 7.45 p.m on the plaintiff, stating that if orders are not obtained from this Court on or before 27.08.1999, the amount under the Letter of Credit will be paid. This Court ordered notice on the injunction application. The first defendant Bank had paid the amount under the Letter of Credit to the fourth defendant. Thus after filing of the suit, the first defendant had paid the amount to the fourth defendant and also charged interest on the said sum. Therefore, the plaintiff amended the plaint by filing application for recovery of money and also for damages. The suit is not barred by limitation.

3. The averments of the written statement are as follows :

(i) The first defendant as the Banker of the plaintiff opened irrevocable Letter of Credit, dated 27.05.1999 for DM 64,503/- favouring M/s. Paul Leibinger Numerierweke GmbH and Co., Germany for supply of numbering machines, as per the request made by the plaintiff. The plaintiff cancelled the purchase order for the numbering machines for printing machinery and spare parts for the alleged breach committed by the third defendant. The objections put forth by the

plaintiff was forwarded to the Overseas Bank and the objections was found to be untenable under the Uniform Practise for Documentary Credit, 1993 Revision No.500 (UCPDC). The Letter of Credit issued on behalf of the plaintiff is irrevocable and had to be honoured strictly based on merits and as per the set of document received under the Letter of Credit.

(ii) The first defendant on 25.08.1999 sent a letter to the plaintiff, explaining its position as a Banker and the payment was effected on 27.08.1999 even before the initiation of legal proceedings. The Bankers are concerned only with the Shippers Copy of Airway Bill, which is dated 06.07.1999. The first defendant is no way concerned with the dates mentioned in the consignee copy or in other related document, as per Article 27A of Uniform Practise for Documentary Credit 1993 Revision No.500 (UCPDC).

(iii) As long as there is no injunction against the first defendant, mere service of notice will not prevent it from discharging its obligation under the Letter of Credit. The circumstances under which payment was made are all subsequent to the filing of the suit. The plaintiff ought to have claimed the amount within three years from the date of payment and the claim regarding recovery of money through amendment of plaint belatedly is barred by limitation. Further, the first defendant is not a necessary party to the suit. The plaintiff has to seek its remedy only from the third defendant for the grievance if any as to defective performance of the contract or breach of any conditions of the contract by the third defendant. The plaintiff in order to cover its laches and lapses has come forward with the fresh case in the form of amendment to the plaint after the claim is barred by limitation. Therefore, the suit is to be dismissed.

4. The learned single Judge framed necessary issues and after analysing both oral and documentary evidence of both sides, decreed the suit. Aggrieved against the Judgment and Decree, the first defendant Bank has come forward with this appeal.

5. The learned counsel appearing for the appellant contends that as far as irrevocable Letter of Credit is concerned, the Bank is bound to honour the payment; that the objections raised by the plaintiff as to the breach of terms of contract are untenable under the Uniform Practise for Documentary Credit, 1993 Revision No.500 (UCPDC); that the proforma invoice was not integral part of the Letter of Credit, as per the uniform practise adopted in International transactions and that the suit itself is barred by limitation.

6. The learned counsel appearing for the first respondent per contra contends that the purchaser having deviated from the terms of contract not only in date of shipment of the goods by manipulating documents but also the nature of goods and therefore, the first respondent/plaintiff cancelled the purchase order and informed the appellant/first defendant Bank about the cancellation with instruction not to honour payment under Letter of Credit. It is further contended that even as per the terms of UCPDC 500, if the documents appears not to be in

compliance with the terms and conditions of the credit, the Bank may refuse to take up those documents. It is also contended that the learned single Judge, after elaborately analysing the evidence of both sides, has rightly decreed the suit and therefore, this appeal has to be dismissed.

7. There is no dispute that the plaintiff placed orders for the supply of numbering machines and spare parts with the foreign company, D3. The plaintiff made application for Letter of Credit with the first defendant Bank on 26.05.1999 indicating the nature of the goods as per proforma invoice. The last date of expiry for the purpose of shipment was also stipulated as 06.07.1999. Letter of Credit was opened on 27.05.1999 and the same was made subject to UCPDC, 1993 (Revision ICC No 500).

8. Before analysing the factual aspects, it would be useful to refer the citations pressed into service by both sides.

(i) On the side of the appellant, Vinitec Electronics Private Ltd., v. HCL Infosystems Ltd, reported in (2008) 1 SCC 544, had been brought to the notice of this Court for the proposition that the Bank Guarantee is an independent contract between the bank and the beneficiary. The Bank is always obliged to honour his guarantee as long as it is an unconditional and irrevocable one. In this Judgment, it had been further held as follows :

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an un-conditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In U.P. State Sugar Corpn. v. Sumac International Ltd. (1997) 1 SCC 568, this court observed that : (SCC p.574, para 12)

"12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encasement of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its

customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would over ride the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases."

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Ltd., v. Fenner India Ltd*, (2006) 2 SCC 728, this court held : (SCC pp. 733-34, para 10)

"10. There are, however, two exceptions to this Rule. The first is when there is a clear fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are special equities in favour of injunction, such as when irretrievable injury or irretrievable injustice would occur if such an injunction were not granted. The general rule and its exceptions had been reiterated in so many judgments of this court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.*, (1997) 1 SCC 568 (hereinafter *U.P. State Sugar Corpn*) this Court, correctly declare that the law was settled."

(ii) The second Judgment of the Hon"ble Supreme Court referred to was *Federal Bank Ltd., v. V.M.Jog Engineering Ltd.*, reported in (2001) 1 SCC 663, for the proposition that 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. In this Judgment, it had been further held as follows :

"55... 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 encasement if the seller prima facie complies with the terms of the bank guarantee or the 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 encasement. 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 buyer..."

(iii) The third citation referred to is *National Bank Ltd., v. Ghanshyam Das Agarwal*, reported in (2015) 4 SCC 228 is with respect to interdiction by Court of

law. In this Judgment, it had been held thus :

"7. As we see it, therefore, keeping in perspective that the Importer's Bank i.e., 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. v. V.O. Tractors Export*, AIR 1970 SC 891 where Halsbury's Law of England have been relied upon)."

(iv) The learned counsel appearing for the first respondent cited *BSES Ltd., (Now Reliance Energy Ltd.) v. Fener India Ltd.*, reported in (2006) 2 SCC 728, wherein, the Hon'ble Supreme Court has held as follows :

"9... In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition.

10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction..."

9. The learned counsel appearing for the first respondent/plaintiff also cited the Division Bench ruling of the Delhi High Court in *Roshan Lal Anand and another v. Mercantile Bank Limited (DB) (Delhi)*, reported in [1975] Vol.75 Company Cases 519, in which the Court has extracted the principle as found in "The Law of Bankers" Commercial Credits by Gutteridge, fourth edition, page 90, which is as follows:-

"Equally without foundation is the claim of the appellants that it was the responsibility of the bank to see whether the goods actually shipped by the shipper under the Letter of Credit correspond thereto or to the description of goods as contained in the import licence. In documentary credit operations, as in this case, all parties concerned deal in documents and not in goods. The banker owes a duty to his customer to refuse any documents which do not conform to

the terms of the instructions given for the opening of the letter of credit. The duty of the banker is only to examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Where the purchase is financed by an Irrevocable credit, the credit transaction would not be affected by a rejection of the goods after acceptance of the documents, if the latter were such as were called for by the credit. There is a difference between the position of a seller and buyer. The position of the seller and buyer under c.i.f. contract is that the seller has two distinct obligations: (a) to deliver the proper documents of title, and (b) to ship the proper goods; and that the buyer, in the event of the seller's failure, has two distinct rights: (i) to reject the documents, and (ii) to reject the goods, the former right arising when the documents are tendered and the latter when the goods are landed and, after examination, are found not to be in conformity with the contract. (See *The Law of Bankers' Commercial Credits* by Gutteridge, fourth edition, page 90).

One has, therefore, to examine the conditions which were agreed upon between the parties. The import licence is an integral part of the contract leading to the opening of the letter of credit. It is the duty of the banker to see that the documents are in respect of goods and to the extent authorised by the import licence. If the apparent tenor of the shipping documents clearly shows either that the goods are not goods the importation of which was authorised by the import licence or even if they are, the value thereof is in excess of the value as authorised by the import licence, the banker cannot claim indemnification."

10. From the above decisions, it is clear that so long as the documents accompanying the Letter of Credit are presented, the Letter of Credit must be honoured on its terms. The exception to this, of course is a fraud of an egregious nature and such fraud should be by the beneficiaries. The duty of the banker is only to examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit.

11. Bearing the above propositions in mind, the factual aspect as to whether the Bank was satisfied on the face of the documents, that they are in conformity with the list of documents mentioned in the Letter of Credit is to be looked into. If there is no discrepancy grave in nature, the Bank is bound to make payment as per the Letter of Credit.

12. The short point that is to be decided in this case is whether the appellant/ first defendant Bank made the payment under Letter of Credit, in spite of the documents received being not in conformity with the terms of the contract. For this, as already pointed out, the learned counsel appearing for the appellant contends that the proforma invoice does not form part of the Letter of Credit. Ex.P.7 is the Letter of Credit. Ex.P.4 is the proforma invoice. In Ex.P.7, the Letter of Credit, class 45A reads thus :

"45A : Description of goods and/or services :

Numbering machines for printing machinery and spare parts as detailed in the proforma invoice 2407 dated 05.05.1999"

13. The Manager of the first defendant Bank who was looking after the credit department was examined as D.W.1. He has deposed during cross-examination with respect to proforma invoice as follows :

"I am not aware as to why the terms and conditions of proforma invoice have been detailed in Ex.P.7. Normally, the proforma invoice is not an integral part of L/c. In this case, proforma invoice might have been made as a part of the terms and conditions of L/c."

14. Therefore, from Ex.P.7 and the evidence of D.W.1, it is clear that proforma invoice, Ex.P.4 forms integral part of the Letter of Credit. As per Ex.P.7, clause 72 reads thus :

"72 - Sender to receiver information :

This credit is subject to UCPDC 1993 (Revision ICC No.500)."

As already pointed out, there is no dispute that the Letter of Credit is subject to UCPDC 1993 (Revision ICC No.500).

15. Article 14 of UCPDC 1993 (Revision ICC No.500) is extracted below :

"Article 14: Discrepant documents and Notice

(a) When the Issuing Bank authorities another Bank to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate against documents which appear on their face to be in compliance with the terms and conditions of the Credit, the Issuing Bank and the Confirming Bank, if any, are bound --

(i) to reimburse the Nominated Bank which has paid, incurred a deferred payment undertaking, accepted Draft(s), or negotiated;

(ii) to take up documents.

(b) Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.

(c) If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the Credit, it may in its sole judgment approach the Applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in Sub-article 13(b).

(d) (i) If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank

acting on their behalf, decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but not later than the close of the seventh banking day following the day of receipt of the documents. Such notice shall be given to the Bank from which it received the documents, or to the Beneficiary, if it received the documents directly from him.

(ii) Such notice must state all discrepancies in respect of which the Bank refuses the documents and must also state whether it is holding the documents at the disposal of or is returning them to, the presenter.

(iii) The issuing Bank and/or Confirming Bank, if any, shall then be entitled to claim from the remitting Bank refund, with interest, of any reimbursement which had been made to that bank.

(e) If the Issuing Bank and/or Confirming Bank, if any, fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to, the presenter, the Issuing Bank and/or Confirming Bank, if any, shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit.

(f) If the remitting Bank draws the attention of the Issuing Bank and/or Confirming Bank, if any, to any discrepancy(ies) in the document(s) or advises such banks that it has paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated under reserve or against an indemnity in respect of such discrepancy(ies), the issuing Bank and/or Confirming Bank, if any, shall not be thereby relieved from any of their obligations under any provision of this Article. Such reserve or indemnity concerns only the relations between the remitting Bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained."

16. As already found, the proforma invoice, Ex.P.4 is part of the Letter of Credit, Ex.P.7. In the proforma invoice, in the description of goods, it had been specifically mentioned as "LEIBINGER - special rotary numbering machines, model 420 SF." Ex.P.23 is the letter written by the appellant/first defendant Bank to the plaintiff, dated 12.08.1999. In this, the discrepancy as to the description of the goods has not been denied and the appellant replied that proforma invoice was not an integral part of the Letter of Credit. Ex.P.16 is the letter of the appellant to the first respondent/plaintiff, dated 21.07.1999. The letter reads thus :

"We also observe the following discrepancies in the documents received by us:

1. Beneficiary's address differ from LC terms.
2. Description of goods differ from the LC terms as per proforma invoice No.2407 dated 05.05.1999.

as per proforma invoice

as per docs. received

a. 45mm keway compl

45mm keyway cpl

b. with direct drive on

direct drive to

c. 17.39" 17.39"

circ

d. cd 90.075mm

cd 90.075" 8mm slot

e. clamping lever

clamp lever

f. special rotary numbering machines

numbering machines

We request you to communicate to us your decision in accepting the above documents within 24 hours on receipt of this letter. Non receipt of the above communication from your end within the stipulated time will be construed as your willingness to accept the documents and payment will be made accordingly."

17. From the above documents, it is clear there are discrepancies as to the description of goods between the proforma invoice, which is integral part of Letter of Credit and the documents received. According to the first respondent/plaintiff, the above discrepancy in the description of goods is alone suffice to show that the documents received are not in conformity with the terms of the contract, which is egregious nature.

18. Another breach canvassed on the side of the first respondent/plaintiff is that the shipment was not made on or before 06.07.1999 as stipulated under the Letter of Credit and the documents received by the Bank are manipulated so as to project as if the shipment was made in time and even as per those documents, the shipment took place only on 07.07.1999, i.e., beyond the last date specified in the Letter of Credit. Ex.P.12, dated 12.07.1999 is the cargo arrival notice. This indicates that Master Airwal Bill and House Airwal Bill, dated 07.07.1999 and the shipment dated is 11.07.1999. Ex.P.13 is the Airway Bill issued by the ALITALIA flight. In this flight date is given as 10.07.1999 and further, airport departure is noted as Frankfurt where as in the LOC, departure airport is stated as Stuttgart.

19. D.W.1 during his cross-examination admits that Ex.D.6 MSAS Airway Bill does not contains the seal. He also admits that in Ex.P.12, cargo arrival notice, against

the column Master Airway Bill, the date mentioned is 07.07.1999 and against the column house Air Way Bill, the date mentioned as 07.07.1999. There is discrepancy even with respect to the weight of the goods between Airway Bill, Ex.P.13 and packing list, Ex.D.3. Cumulative perusal of the above facts will lead to infer that the purchaser made an attempt to project as if the shipment was made on 06.07.1999 itself, though the shipment was actually done at a latter date with many discrepancies even as to the description of goods. Therefore, the documents received are not in conformity with the terms of the Letter of Credit. Even as per the terms of "UCP 500", cursory perusal of the documents appear on their face to be not in compliance with the terms and conditions of the Letter of Credit. It is also pertinent to note that though appellant Bank mentioned that Negotiating Bank rejected the objections of the plaintiff as untenable as per the terms of UCP 500, no correspondence between the Appellant Bank and Negotiating Bank in this regard had been marked.

20. The first respondent/plaintiff communicated to the appellant Bank by several letters under Ex.P.10, Ex.P.14, Ex.P.15, Ex.P.18, Ex.P.19, Ex.P.21, Ex.P.22 about the deviations and informing not to pay under the Letter of Credit. In spite of the specific intimations and notice about the filing of the suit, the appellant Bank made the payment under the Letter of Credit, disregarding the alleged fraud committed by the beneficiary.

21. Another contention raised by the appellant is with respect to limitation. According to the appellant, the first respondent/plaintiff originally filed the suit for declaration and permanent injunction and subsequently amended the plaint seeking relief of recovery of money and damages and therefore, on the date of amendment, the claim for recovery of money is not sustainable, as time barred.

22. Admittedly, the appellant Bank had been debiting the interest regularly from the account of the first respondent/plaintiff and if such debit is taken into account, it cannot be said that the claim is time barred one. Further, once amendment is ordered, it relates back to the date of the plaint. Therefore, the contention of the learned counsel appearing for the appellant with respect to the limitation is not sustainable.

23. The learned single Judge having considered that the appellant Bank effected the payment by debiting the open cash credit account of the plaintiff, in spite of several communications of the plaintiff not to make the payment, has rightly awarded damages.

24. For the aforesaid reasons, this Court is of the considered view that the learned single Judge has rightly decreed the suit considering the entire facts and circumstances of the case and this Court do not see any reason to interfere with the findings of the learned single Judge.

25. In fine, this Original Side Appeal is dismissed with costs, confirming the Judgment and Decree of the learned single Judge, dated 12.12.2008 made in C.S.No.650 of 1999. Consequently, connected miscellaneous petition is also

dismissed.