
(1980) 08 DEL CK 0016

In the Delhi High Court

Case No : I.A. No. 3104 of 1979 and S. No. 1223 of 1979

Interads Advertising P. Ltd.

APPELLANT

Vs

Bentrex and Co. and others

RESPONDENT

Date of Decision : 05-08-1980

Acts Referred:

Citation : (1983) 53 CompCas 646 : (1981) ILR Delhi 681

Hon'ble Judges : J.D. Jain, J

Bench : Single Bench

Judgement

Jain, J.—This order of mine disposes of an application of the plaintiff under O. 39, rr. 1, 2 & 3 read with s. 151, CPC (hereinafter referred to as "the Code") for the grant of a temporary injunction.

2. The facts germane to the decision of this application succinctly are that in July, 1979, defendant No. 1, M/s. Bentrex & Company, which is a sole proprietary concern of Man Mohan Singh, defendant No. 2, entered into a contract for sale of first grade first quality cloves (Zanzibar quality) of the value of the Rs. 25,00,000 at the rate of US \$ 7,950 per M.T., C & F Bombay, to be shipped from Singapore on or before 30th September, 1979. Pursuant to the said contract of sale the buyer/plaintiff established an irrevocable commercial credit from the New Bank of India Limited (a banking Corporation), defendant No. 3 for a sum not exceeding a total of US \$ 60,050 on the basis of which the latter issued a letter of credit bearing No. JNP/FLC/677 dated 17th August, 1979, and the same was advised to defendant No. 1 through Chase Manhattan Bank (advising bank), Singapore. Accordingly, defendant No. 1 shipped a consignment of cloves (Zanzibar quality) contained in 153 bags, gross weight 7.803 M.T. (net weight 7.650 M.T.) on board the vessel "OH DAI" on 3rd September, 1979, and the documents of shipping, inter alia, comprising bill of lading, invoice and a draft for the price of the goods, viz., US \$ 60,800 odd, were duly sent to the issuing bank, viz., defendant No. 3. On 13th September, 1979, the plaintiff received non-negotiable copies of some of these documents and on inspecting the same they

found that the said documents suffered from serious discrepancies and were contrary to the express conditions embodied in the letter of credit opened by them in favor of defendant No. 1. So they requested defendant No. 3 through a letter of even date to intimate by means of a telex/cable to the negotiating bank at Singapore to withhold payment against the documents relating to the letter of credit covering the goods in question. Accordingly, defendant No. 3 pointed out the alleged discrepancies to the negotiating bank, namely, European Asian Bank, Singapore, through whom the said documents had been received and appraised them that the documents were not acceptable to the drawee (i.e., the plaintiff). The latter explained the correct position, vide their letter dated 20th September, 1979, and asked the issuing bank (defendant No. 3) to honour their commitment promptly. Accordingly, defendant No. 3, vide letter dated 22nd September, 1979, called upon the plaintiff to make payment of the bill immediately, inter alia, stating that the discrepancies observed by them in the documents received under the above letter of credit were not justifiable. The plaintiff, however, took exception to the same and eventually instituted this suit for a declaration that the bill of lading dated 3rd September, 1979, as also the quality certificate of even date were defective and was not in conformity with the agreement of sale between the parties. They have also prayed for a permanent injunction restraining defendant No. 3 and its servants/agents, etc., from in any manner making payment against the documents received under the letter of credit in question favoring defendant No. 3 and its servants/agents, etc., from in any manner having recourse to the margin money covered by the said letter of credit or to have recourse to any other moneys/deposits lying with defendant No. 3 in relation to the aforesaid letter of credit. The plaintiff has also sought an ad interim injunction on these very lines for safeguarding their interest.

3. The application is contested tooth and nail by defendants Nos. 1 & 2, who vehemently assert, that they have scrupulously complied with the terms and conditions incorporated in the letter of credit and as such they are entitled to payment of the price of the goods forthwith. Similar stance has been taken by defendant No. 3, according to whom the shipping documents and the draft received by them from defendants Nos. 1 & 2 are perfectly in order, being in conformity with the terms and conditions contained in the letter of credit. I shall elaborate the stand taken by them respectively in relation to each and every contention raised by the plaintiff while dealing with the same.

4. Before embarking upon a detailed discussion on the points in issue it would be pertinent to state here the salient terms and conditions and the special instructions which were contained in the letter of credit dated 17th August, 1979, issued by defendant No. 3 in favor of defendant No. 1 and was advised through Chase Manhattan Bank of Singapore (Chaman Bank).

1. The amount under the credit to be available against drafts of the beneficiary in duplicate payable at sight drawn on the buyer without recourse to the drawer for the full invoice value of cloves (Zanzibar quantity) as per indent No. BC/147/79

dated 20th July, 1979, at US \$ 7,950 per M.T.; the same were to be accompanied by the documents covering the merchandise as detailed in the letter of credit including full set of "clean on board" bills of lading evidencing current shipment signed by the shipping company marked "freight pre-paid" made out to the order of the New Bank of India or to shipper's order and endorsed in blank.

2. Special instructions, inter alia, envisage : (i) furnishing of weight and quality certificate from independent surveyors, and (ii) the cloves to be of first grade and first quality of Sri Lanka/Indonesia/African country.

3. The credit was subject to the Uniform Customs and Practice for Commercial Documentary Credits (1974 revision brochure No. 290) issued by the International Chamber of Commerce (hereinafter referred to as "UCP") except as otherwise stated therein, i.e., the letter of credit.

5. It is noteworthy that in the letter dated 13th September, 1979, the plaintiff pointed out only one discrepancy as per the non-negotiable set of documents received by them. It was : "while the L/C called for certificate of weight and quality issued by an independent surveyor, the certificate submitted by the beneficiary (i.e., defendant No. 1) is silent on the question of the checking of the quality which in other words means that no quality certificate has been submitted". Of course, it was further stated that there were other discrepancies as well. It would appear that subsequently another defect was pointed out by the plaintiff to defendant No. 3, namely, that the packing was in gunny bags only instead of polythene coated gunny bags as stipulated in indent No. BC/147/79 dated 20th July, 1979. Accordingly, both these discrepancies were communicated by defendant No. 3 to the negotiability bank (European Asian Bank, Singapore) vide cable 18th September, 1979, which was duly confirmed by a separate letter of date. So I take up these two objections first :

1. Certificate of quality and weight :

6. It is beyond the pale of controversy that defendants Nos. 1 & 2 were to supply first grade and first quality cloves of Zanzibar quality. It is also not disputed that as per the special instructions contained in the letter of credit they had to furnish weight and quality certificate from independent surveyor. Indeed, they did furnish the certificate dated 3rd September, 1979, purporting to be weight and quality certificate which had been issued by M/s. UNI-Q-MARINE SERVICES described as independent marine and merchandise surveyors and assessors, in this behalf. The negotiating bank, viz., European Asian Bank, Singapore, too asserted in its reply dated 20th September, 1979, that the weight and quality certificate had been issued by M/s. UNI-Q-MARINE SERVICES who were independent surveyors. Ex facie, Therefore, it can be safely assumed that the said certificate was issued by independent surveyors as desired. However, the learned counsel for the plaintiff has seriously questioned its being a quality certificate, as such. He has contended that it is only a weighment certificate as would be crystal clear from the opening paragraph and the over all tenor of the

same. Secondly, he has pointed out that this certificate does not disclose either the name or qualification of the expert who actually inspected or analysed the cloves in question for determining as to whether they were of first grade and first quality, i.e., Zanzibar quality. The opening paragraph of the said certificate runs as follows :

"This is to certify that we, the undersigned independent surveyors did on 20th August, 1979, onwards, at the request of the shippers, M/s. Bentrex and Company, Singapore, attend at their supplier's premises for the purpose of checking weighment of a consignment of cloves (Zanzibar quality) (of 1st Grade and 1st Quality)."

7. The surveyors then proceed on to state that after counting the gunny sacks containing cloves (Zanzibar quality) which were 153 in number they weighed the same on a tested platform scale. The bags were then emptied to ascertain the tare weight and the net weight. The empty bags were then filled with 50kg., net of the cloves (Zanzibar quality) and they were satisfied that the weight of the bags was as detailed in the certificate. They further state that the said consignment of cloves (Zanzibar quality) was consigned to the buyers, M/s. Interads Advertising Private Ltd., as they were given to understand. The certificate concludes with the words, "This certificate is issued to the best of our knowledge and belief."

8. The learned counsel for the plaintiff has fervently urged that this certificate apparently relates to the weighment of the bags containing cloves described as of Zanzibar quality, (i.e., of first grade and first quality) but by no stretch of reasoning it can be construed to be a certificate of quality of the goods contained in the gunny sacks weighed by them. In other words, the expression "Zanzibar quality" has been used by the surveyors in this certificate as merely descriptive of the goods filled in the gunny bags for consignment rather than as certifying the quality of the same. He has pointed out that the surveyors have not furnished any analytical data or particulars of any objective test carried out on the basis of which they can be said to have arrived at the conclusion that the goods packed in the gunny bags were, in fact, cloves of Zanzibar quality, i.e., of first grade and first quality. In this context, he has invited my attention to a booklet "specification for cloves (whole and ground)" issued by the Indian Standards Institution, New Delhi, which, inter alia, lays down the criteria for grading cloves (whole). It also specifies Chemical requirements for whole cloves. It further states that the appropriate methods for sampling and testing the cloves to ascertain whether the same conform to the requirements given in their brochure entitled "methods of sampling and test for spices and condiments (first revision)". Thus, the precise argument advanced by the counsel for the plaintiff is that the certificate of the surveyors should have indicated the method of sampling and testing adopted by them and the result of the Chemical analysis conducted by them, in the absence of which the certificate in question cannot be termed as a certificate of quality, even by taking the most charitable view of the

matter. A reference in this context has been made to the judgment of this court (Sultan Singh J.) in *Interads Advertising P. Ltd. v. Palmex Enterprises* in I.A. 3710/79 in Suit No. 1419/79 decided on 29th February, 1980 [1980] 53 Comp Case 550, in which a similar certificate was issued by the same surveyors in respect of the consignment of brass scrap and it was observed by his Lordship that "this certificate does not certify the quality of the goods. It does not disclose who conducted the survey and whether the person conducting the survey was a qualified person. The alleged surveyor's premises for surveying it nowhere certify that ..."

9. With respect I endorse some of the observations made by my learned brother as regards the nature of the certificate. For one thing, the certificate does not in express terms state the satisfaction of the surveyors about (Zanzibar quality) (i.e., of first grade quality). It is true that as pointed out by the learned counsel for the defendants, the certificate bears the caption "weight and quality certificate". It is also true that in the body of the certificate the surveyors have asserted that the empty bags were filled with 50 kg. net of the cloves (Zanzibar quality) and it may well be argued that this assertion connotes not only the factum of filling the bags with cloves (Zanzibar quality) but also certification of the quality of goods filled in the gunny bags. While there is considerable force in the submission of the learned counsel for the defendants that the heading of the certificate has a vital bearing, in that it tends to show that the surveyors were concerned not merely with the weight of the goods but also their quality, however, one cannot be oblivious to the contents of the document which constitute the pith and marrow of the same. Even though the certification of the quality of the goods may be implicit in the assertion of the surveyors that the empty bags were filled with cloves of Zanzibar quality, that is hardly enough. Surely the certificate falls much short of the purpose and the object of this requirement in the letter of credit. While the surveyors declared their satisfaction about the weight of the goods in categorical terms they have not done so regarding the quality of goods. It is not that they were not aware of their duty in this respect as experts. This is manifestly clear from another certificate dated 31st August, 1979, issued by the same surveyors in respect of the quality of refined, bleached and deodorised palm oil consignment which was shipped to Calcutta, vide photostat copy of the certificate placed by the plaintiff on the record. So looking from any angle the certificate of quality had to be clear, unequivocal and explicit in terms, based on analytical data and not on conjectures or surmises.

10. Faced with this predicament, the learned counsel for the defendants made a vain bid to lean against art 33 of the UCP which runs as follows :

"When other documents are required such as warehouse receipts, delivery orders, consular invoices, certificates of origin, of weight of quality or of analysis, etc., and when no further definition is given, banks will accept such document as tendered."

11. Under-scoring the words "as tendered" the learned counsel for defendants

Nos. 1 & 2 has canvassed rather vigorously that the issuing bank or for that matter the negotiating bank is bound to accept such a document as tendered especially when no further definition is given in the letter of credit as contemplated in the aforesaid article. It is no doubt true that a certificate of quality would fall in the category of other documents within the meaning of art. 33 (of the UCP) and the issuing banker is supposed to accept the same as tendered unless, of course, there is further definition in which case the requirement must be complied with. However, the words "as tendered" cannot be stretched to mean that whatever document is tendered by the seller/beneficiary styled as a certificate of quality has to be accepted by the issuing or the negotiating bank. The document has to be looked upon as a whole and it must satisfy the essential requirements contemplated in the letter of credit. It must be a certificate of quality in essence and not in name only. Mere ipse dixit of the independent surveyor will not be enough. Ex facie, Therefore, this document cannot be said to be a certificate of quality notwithstanding its nomenclature to that effect. So the argument of the learned counsel for the defendants that the issuing banker has to accept documents on their face and he cannot dissect or investigate into the same, in view of art. 8(a) of the UCP, does not hold water in the instant case.

12. The plaintiff has also assailed the validity and negotiability of some other documents in the suit. In particular it is contended that the bill of lading furnished by the seller beneficiary does not satisfy the stipulations embodied in the letter of credit, inasmuch as it cannot be termed as a "clean on board" bill of lading and it is not signed by the shipping company. Before embarking upon an examination of the contention raised by the plaintiff's counsel in this behalf it must be clearly understood as to what is meant by a clean bill of lading. There is no judicial authority defining what a "clean bill of lading" is but the UCP in art. 18 has illustrated it in a negative fashion. It is as under :

"18. (a) A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packing.

(b) Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states the clauses or notations which may be accepted."

13. So a clean bill of lading may be taken to be one of which does not contain any reservation or notation as to the apparent good order and condition. Thus, the superimposed clause by way of rubber stamped mark would have the effect of superseding/wiping out the printed matter. In other words, the superimposed clause is inconsistent with the printed matter and as such the bill in question cannot be called a clean bill of lading. Further, according to him, the said clause has not been properly authenticated. Similarly, he has stressed that the bill contains printed words "freight payable at Singapore" whereas it also bears the rubber stamped clause "freight prepaid" which are evidently contradictory to and

inconsistent with each other. Here again reliance has been placed by him on the judgment of my learned brother Sultan Singh J., in I.A. 3710/79, (*Interads Advertising (P.) Ltd. v. Palmex Enterprises* [1983] 53 Comp Case 550 (Delhi). Therein his Lordship, *inter alia*, noticed that the rubber stamp "shipped on board" in the bill of lading had been neither signed nor initialled by anybody. Further, the word "Singapore" was printed against the column "freight payable at" and there was also the rubber stamp "freight prepaid". These were held to be contradictory. With great respect, I choose to differ for the simple reason that there is no apparent inconsistency between the two, i.e., in the printed matter and in the superimposed clauses in the bill of lading. Surely, the rubber stamped words "shipped on board" do not in any manner detract from the printed acknowledgment to the effect that "the goods were in apparent good order and condition unless otherwise indicated in this bill of lading". Evidently, the superimposed clause does not indicate "otherwise" and as such the printed declaration regarding the apparent good order and condition of the goods holds good. If the bill of lading states that the goods are shipped in good order and condition without any qualifying endorsement it must be termed as "clean". It is a *prima facie* evidence of the external condition of the goods at the time of shipment. On a parity of reasoning there is no inconsistency or contradiction between the rubber stamped words "freight prepaid" and the printed column "freight payable at Singapore". Admittedly, the ship was laden at Singapore and it was to sail from that port. Evidently, Therefore, freight was payable at that place. Hence, the rubber stamp mark "freight prepaid" simply connotes that the same has been paid as envisaged and nothing more. I am fortified in this view of the matter by *M. Golodetz & Co. Inc. v. Czarnikow-Rionda Co. Inc.* [1979] 2 All ER 726 (QBD), in which a similar contention was raised but repelled. The bill of lading in that case acknowledged in the printed clauses shipment of the goods in apparent good order and condition. In addition, it contained a typewritten notation that the cargo covered by the bill had been damaged by fire and/or the water used to extinguish the fire. The words "freight prepaid" were stamped across the bill whereas the printed words "freight to pay" had not been deleted. So it was urged that the bill of lading was not clean and merchantable. While observing that the tender of documents which properly read and understood, called for further enquiry or were such as to invite litigation, it was clearly a bad tender. Donaldson J. repelled the contention regarding the bill of lading being unclean. He simply said "this is unarguable in the light of the Board's finding that the bill of lading as tendered was over stamped "freight prepaid" whether or not the words "freight to pay" were deleted. It was no different from a receipted account". These observations to my mind apply aptly to the case in hand and as such the bill of lading cannot be said to be unclean on account of the discrepancies put by the plaintiff's counsel. Further, I find no substance in the contention of the plaintiff's counsel that the rubber stamp notations had to be initialled, signed or dated separately by the carrier or his agent.

14. Article 16(a) of the UCP is directly in point. It is reproduced below for ready

reference :

"If words clearly indicating payment or prepayment of freight, however named or described, appear by stamp or otherwise on documents evidencing shipment or dispatch or taking in charge they will be accepted as Constituting evidence of payment of freight."

15. Evidently there is nothing in this article which requires rubber stamped words indicating shipment, etc., to be initialled, signed or dated by the carrier. Article 20(b) clarifies the position still further. It is as under :

"Loading on board a named vessel or shipment on a named vessel may be evidenced either by a Bill of Lading bearing wording indicating loading on board a named vessel or shipment on a named vessel, or by means of a notation to that effect on the Bill of Lading signed or initialled and dated by the carrier or his agent, and the date of loading on board the named vessel or shipment on the named vessel."

16. On a plain reading it is crystal clear that a notation to the effect that goods have been loaded on board a named vessel has to be signed or initialled and dated by the carrier or his agent only when loading on board a named vessel or (when) shipment on a named vessel is not evidenced by the bill of lading itself by words indicating the same. Thus, there is nothing in the bill of lading by way of superimposed clauses to adversely affect its negotiability in any manner. Hence, this objection of the plaintiff falls to the ground.

17. Equally ill founded is the argument of the learned counsel for the plaintiff that the bill of lading has not been signed by the shipping company. A glance at the bill of lading would reveal that it purports to emanate from M/s. Wellway Lines, defendant No. 4. However, it is not clear from the documents on record what the status of this concern vis-a-vis the ship, "OH DAI", on which the goods in question were laden, is. The bill purports to have been signed by Union Ocean Shipping (P.) Ltd. for and on behalf of the Master. The contention of the plaintiff is that the ship in question admittedly does not belong to Wellway Lines and as such it must be a chartered ship. As a necessary corollary the bill of lading issued in respect thereof would be subject to the conditions of the charter party and as such are not acceptable. Moreover, the bill of lading can by no means be said to have been signed by the shipping company as postulated in the letter of credit.

18. According to defendant No. 3, Wellway Lines is a shipping company as would be clear from the bill of lading itself. However, this is not so and even defendants Nos. 1 and 2 do not claim that Wellway Lines is a shipping company even though they refute that defendant No. 4 was or acted as a forwarding agent or that the bill of lading was under or subject to the terms and conditions of the charter party. They deny that the ship in question was a chartered ship. However, they admit that it did not belong to M/s. Wellway Lines. The plaintiff's counsel has also invited my attention in this context to letter dated 28th October, 1979, received by them from the Union Ocean Shipping (Pte.) Ltd., in which the latter

explained that M/s. Sophan Saengophas Navigation Ltd., S.A., were the owners of the motor vessel "OH DAI". It is further to be noted that they described themselves as "agents only" in the said letter. Thus, even though the status of Wellway Lines remains obscure and it is highly doubtful that Wellway Lines is at all a juristic person either as charter or shipping company, the fact remains that M/s. Union Ocean Shipping (Pte.) Ltd. acted as agents. So the question boils down to this : whether they were competent to sign the bill of lading or not. Sheldon in his book Sheldon's Practice Law of Banking, 19th Edition (1978) reprint, page 436, defines a bill of lading as a document issued and signed by or by the authority of a ship's captain acknowledging that the goods described in the bill have been duly received on board and undertaking to deliver the goods in the like order and condition as received to the consignee or to his order or assigns. That it is for the Master to sign the bill of lading is also acknowledged in Scrutton on Charter Parties, 18th Edition, p. 52, where it is stated, "After the shipment of good under a contract of affreightment, the bill of lading is signed by the carrier or his agent and delivered to the shipper ... The master, in his turn, is bound to sign bills of lading in respect of each parcel shipped within a reasonable time of presentation". Even the learned counsel for the plaintiff was fair enough to concede frankly that the master of the ship is competent to sign the bill of lading on behalf of the ship owner. However, he asserts that this authority cannot be further delegated by the master to anyone else. I do not think that such a board proposition can be accepted in the absence of any statutory requirement or judicial pronouncement to that effect. Generally speaking, when a bill of lading can be signed by the master of the ship there is no valid reason why it cannot be signed by his duly authorised agent on his behalf. Evidently, the bill of lading in question has been signed by the Union Ocean Shipping (Pte.) Ltd., which is a shipping company on behalf of the master as agent. EX facie, Therefore, it is a valid document. Needless to say, that at this stage, we have to take the documents on their face and there is no scope for further investigation or probe into the matter. It may also be pertinent to add here that there is nothing in the bill of lading that the vessel in question was under charter at the relevant time. So it cannot be deemed to be subject to the terms and conditions of the charter party. The argument advanced by the learned counsel for the plaintiff is too far-fetched to heed serious notice. Hence, I hold that the bill of lading which is a basic shipping document and is regarded as a symbol of the goods which it represents, is apparently in order and does not suffer from any inconsistency or flaw.

2. Defecting packing :

19. The next submission of the learned counsel for the plaintiff is that under the contract of sale, the cloves had to be packed in polythene coated gunny bags but actually the same were packed in simple gunny bags. However, the validity of this contention is open to question having regard to the basic fact that this requirement did not find place in the original letter of credit and it was only subsequently that the plaintiff, vide their letter dated 29th August, 1979,

requested defendant No. 3 to issue certain amendments to the above L/C by cable under advice to them. It, inter alia, required the packing of cloves to be done in polythene coated gunny bags, each bag containing 50 kg., net of the material. The stand of the defendant-bank is that they received the letter dated 29th August, 1979, of the plaintiff on 3rd September, 1979, and immediately thereupon they sent a cable on that very day to the advising bank imparting the requisite instructions of the plaintiff. However, they received a reply from the advising bank on 20th September, 1979, that the goods covered in the letter of credit had already been shipped and as such no amendment in the terms of the letter of credit could be implemented. Thus, it is contended that as per practice for documentary credits, no amendment of the terms of the letter of credit could be made without the consent of all the parties. Defendant No. 3 has also placed on record photostat copies of the correspondence which took place between them and the plaintiff on the one hand and between them and the advising bank along with their letter dated 20th September, 1979, enclosed the letter dated 18th September, 1979, which was written to them by defendant No. 1 stating that they has already effected shipment and were unable to comply with the amendment. Having regard to the fact that a telex was sent by defendant No. 3 to the advising bank on 3rd September, 1979 itself, which was the date of the shipment of the cargo, it can be safely assumed that the instructions for amendment of the letter of credit must have been conveyed to defendant No. 1 very late. That apart, it is beneficiary must be considered binding, though executory, the moment it is communicated to the beneficiary, so that, unless he consents, there can be no amendment. In other words, a letter of credit may be amended with the consent of the beneficiary but not otherwise. (See Law of Banking, 18th Edn., pp. 633-634 & 644), art. 3(c) of the UCP also lays down :

"Such undertakings can neither be amended nor cancelled without the agreement of all parties thereto. Partial acceptance of amendments is not effective without the agreement of all parties thereto."

20. Thus, there can be no manner of doubt that, once communicated, an irrevocable credit cannot be modified or cancelled without the agreement of all concerned. In this view of the matter, Therefore, the defendant bank is not obliged to take note of the alleged defect in the packing of goods and defendant No. 1 is not answerable to defendant No. 3 on that account even though the sale contract between the plaintiff and defendant No. 1 stipulated that the goods were to be packed in polythene coated gunny bags. For, unless the ale contract on which the credit is based is in some measure incorporated therein, the credit contract is independent of it and the banks are not normally concerned with the sale contract.

21. Faced with this situation the learned counsel for the plaintiff invited my attention to the fact that there is a reference to the original contract of sale between the plaintiff and defendant No. 1 on the letter of credit itself and as such all the terms and conditions of the contract of sale must be deemed to have been

incorporated therein. I am afraid such a broad proposition cannot be accepted in this case inasmuch as the letter of credit simply alludes to indent No. BG/147/79 dated 20th July 1979, in the context of credit in favor of the seller beneficiary. Certainly, it does not travel beyond that so as to embody wholesale the terms and conditions of the sale contract. Such a conclusion would be wide off the mark, especially when the letter of credit contains detailed instructions touching various aspects for compliance by the beneficiary under the credit.

22. To sum up, Therefore, it is difficult to hold ex facie that defendant No. 1 was bound to pack the goods in polythene coated gunny bags in order to avail of the facility of credit in its favor. If there is any infraction on his part in complying with the terms and conditions of the contract of sale, the plaintiff may seek redress against defendants Nos. 1 & 2 in appropriate proceedings. Surely, the bank's undertaking under an irrevocable credit is absolute so long as the beneficiary acts strictly within the terms and limitations of the credit. Thus, this contention too is devoid of any merit.

23. Last, but not the least, the learned counsel for the plaintiff has, during the course of his marathon arguments, called in question the negotiability of the bill of exchange drawn by the seller beneficiary, his precise contention being that it does not purport to have been signed by the drawer of the bill and it has been signed by one Kalawati. Alluding to s. 5 of the Negotiable Instruments Act, he has urged that the bill of exchange to be valid must be signed by the maker and in its absence it is preposterous to speak of acceptance of the bill by the plaintiff. A cursory glance at the draft would show that it purports to have been signed by one Kalavati as secretary of M/s. Bentrex and Company, defendant No. 1. It gives no further indication of her acting as an agent on behalf of the drawer. Admittedly, defendant No. 1 is a sole proprietary concern of defendant No. 2 and as such, in the normal course, the bill of exchange should have been signed by him as sole proprietor of defendant No. 1. It is to be noted that even the invoice purports to have been signed by the same Smt. Kalawati as secretary of defendant No. 1.

24. Under the English law, i.e., the Bills of Exchange Act, no person is liable as drawer or endorser of a bill, who has not signed it as such, provided of course, where a person signs a bill in a trade or assumed name he is liable thereon as if he had signed it in his own name (section 23). That being so, the draft in this case ought to have been signed by defendant No. 2, he being the sole proprietor of defendant No. 1, under which assumed name he has been carrying on his business. Further, s. 26(1) lays down that :

"Where a person signs a bill as drawer, endorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."

25. In the instant case even this requirement of law is completely missing, inasmuch as the Secretary of defendant No. 1, who signed the bill of exchange, has nowhere indicated that she signed it as an agent or in a representative capacity. Hence, the document apparently suffers from obscurity/ambiguity in this respect which may legitimately give rise to some kind of litigation regarding the liability of the person making it.

26. The position under the Indian law would appear to be just the same. Though s. 5 of the Negotiable Instruments Act requires the signatures to be made by the maker it does not require him to sign it by his own hand and an agent with authority may introduce the name of the maker to authenticate the instrument as that of the maker and such introduction of the name is sufficient signature. In other words, an agent can sign a bill of exchange on behalf of the principal. This legal proposition manifestly flows from s. 27 of the said Act. The first clause of the section simply enunciates the general rule of law that a person, who has the capacity as principal to do an act, may have the same act performed by an attorney or his authority and the delegated authority should be indicated by words such as "on behalf of" or "on account of" or "per pro" etc. For, if the act of the agent is not within the scope of the authority, the holder of such an instrument cannot sue the principal upon the bill or note. A signature "per pro" operates as notice that the agent has only a limited authority to sign and the principal is bound by such signature only if the agent was acting within the actual limits of his authority. It bears repetition that in the instant case the bill of exchange bears the rubber stamp of defendant No. 1 and the signature of one Kalawati as secretary thereof. Certainly, it cannot be readily assumed that she must have authority to sign the bill on behalf of the principal and there is no scope for any factual investigation at this stage.

27. The learned counsel for the defendants has also questioned the tenability of this argument on the ground that this plea as such was never raised by the plaintiff either in the correspondence or in the pleadings and it is only during the course of arguments that he has come forward with this objection for the first time. Secondly, she has canvassed rather fervently that 15th of October, 1979, was the deadline for the negotiation of bills and the defect in the bill of exchange could well be rectified by defendants Nos. 1 & 2, has the same been pointed out well in time, the negotiable set of documents having reached defendant No. 3 by 18th of September, 1979. It is urged that the plaintiff is estopped from seeking an equitable relief like that of an interim injunction, on account of laches on his part and he cannot be allowed to raise this plea to the detriment of the defendant at this belated stage. No doubt the argument put forth seems to be attractive but the plaintiff cannot be punished for mere delay on his part in pinpointing this serious flaw in the bill of exchange which is a document of vital importance especially when the discrepancy is patent on its face. It is noteworthy that in the letter dated 4th October, 1979, to defendant No. 3, the plaintiff specifically raised the objection that the shipping documents including the draft had been signed by the secretary of defendant No. 1 even though it was a

proprietary concern and the contract of sale had been signed by the proprietor. So, the omission to incorporate this objection in the plaint cannot be fatal. After all, replication has yet to be filed and no fresh facts need be investigated at this stage. In other words, the objection embodies a pure question of law and it goes to the root of the matter. So, exception can hardly be taken to it when the case is itself at a preliminary stage of hearing. Surely, the interests of justice demand that the mischief be avoided before it is too late. Hence, I uphold the objection taken by the plaintiff's counsel to the negotiability of the bill of exchange on the score of its having been signed by one Kalawati as secretary of defendant No. 1 and not by defendant No. 2, who is its sole proprietor.

28. The plaintiff seeks to interdict the defendants in two ways, in the first instance, he wants to restrain defendant No. 3 and its servants, etc., from in any manner making payment against the documents tendered by defendants Nos. 1 & 2 under the letter of credit in question, and, secondly, he wants to restrain defendant No. 3 and its servants, etc., from in any manner having recourse to the margin money covered by the said letter of credit or having recourse to the margin money or deposits lying with defendant No. 3 in relation to the said letter of credit. Evidently, the object and scope of these two reliefs are quite distinct and different considerations which are bound to weigh while granting or refusing the same.

29. The prima facie existence of a right and its infringement are the first condition for the grant of a temporary injunction. So, first of all, it has to be seen if there is a serious question to be tried in the suit and whether on the facts before the court there is probability of the plaintiff being entitled to the relief asked for by him. It is now well settled that the contractual relationship between the issuing banker and the seller under a documentary credit duly notified to the seller is separate from and independent of the original contract of sale between the buyer and the seller. It is not qualified by or subject to the terms of the contract of sale made between the buyer and the seller. It is by reason of the banker's undertaking to the seller which is absolute that creates a new contractual nexus and renders the banker directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. (See para. 133, Halsbury's Laws of England, 4th Edition, Vol. III). The autonomy of an irrevocable credit finds expression in clause (c) of the general provisions and definitions in the UCP. It is as under :

"Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts."

30. Thus, the buyer cannot enjoin the issuing banker from honouring a draft presented by the seller and accompanied by the required documents merely because the seller has failed to perform his contract with the buyer, for instance, by supplying goods of an inferior quality. The only exception to this rule is the case of an established fraud of which the banker has notice. The principle that

the commercial credit is not qualified by the underlying contract of sale is linked with one further important rule. Article 8(a) of the UCP provides that, "in documentary credit operations all parties concerned deal in documents and not in goods". Thus, in so far as the seller tenders the required documents, the banker is not entitled to reject them on the ground that the goods are not up to the contract. Further, art. 7 of the UCP casts a duty on the issuing banker or for that matter the negotiating banker 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. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit". Evidently, the right available to the banker to examine the documents before accepting a tender, made under a commercial credit, cannot be delegated to the buyer, i.e., the person at whose instance the credit is established. If the examination discloses that the documents do not comply with the terms of the credit and the issuing banker considers that they appear on the face not to be in accordance with all the terms and conditions of the credit, the banker must determine on the basis of the documents alone, whether to claim that the payment, the acceptance of the negotiations were not effected in accordance with the terms and conditions of the credit. Article 8(c) further lays down that the issuing bank shall have a reasonable time to examine the documents and to determine as above whether to make such a claim. In case such a claim is to be made, notice to that effect stating the reasons Therefore must be given by cable or other expeditious means to the bank from which the documents have been received, i.e., the remitting bank, and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto. [See Art. 8(d) & (e)].

31. Article 8(f) further lays down that, "if the issuing bank fails to hold the documents at the disposal of the remitting bank, or fails to return the documents to such bank, the issuing bank shall be precluded from claiming that the relative payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit". Not only that, even if the remitting bank draws the attention of the issuing bank to any irregularities in the documents or advises such bank that it has paid, accepted or negotiated under reserve or against a guarantee in respect of such an irregularity, the issuing bank shall not thereby be relieved from any of its obligations and such guarantee or reserve concerns only the relations between the remitting bank and the beneficiary. [See Art. 8(g)], Thus, having regard to the aforesaid provisions of the UCP there can be no room for doubt that it is for the issuing banker to scan the documents tendered by the seller beneficiary under the credit on his own and he is not to be guided by anyone else in the matter. He must take full responsibility for accepting or rejecting the documents and that too within a reasonable time. If the banker wrongfully refuses to accept a draft accompanied by the required documents he has to face any action which may be brought against him by the seller beneficiary for the amount of the commercial credit and interest, etc.

Further, it is equally well-settled that in order to constitute a valid tender, the documents must, in the first place, be merchantable and, secondly, must be of the type current in the trade in question. If the tender of a document does not strictly comply with the requirement of the commercial credit, the banker is entitled to reject it, it being immaterial whether the discrepancy is significant or minute. On authority too, it has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between the buyer and the seller must be settled between themselves but the bank must honour the credit. [See *Malas (Trading as Homzeh Malas and Sons) v. British Imex Industries Ltd.* [1958] 1 All ER 262; [1958] 2 QB 127; *R. D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* [1977] 2 All ER 862 (QB) and *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* 1978] 1 All ER 976.

32. In the first of these, Jenkins L.J., giving the judgment of the court, *inter alia*, observed :

"It seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice. It is also to be remembered that 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 no mean advantage when goods manufactured in one country are being sold in another. Furthermore, vendors are often reselling goods bought from third parties."

33. The legal position is thus well established that only in exceptional cases the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce and they must be allowed to be honoured, free from interference by the courts, otherwise, trust in international commerce could be irreparably damaged : *Harbottle's case* [1977] 2 All ER 862 (QB). Reference may also be made in this connection to *Tarapore and Co. Vs. V/O Tractoroexport and Another, and Harparshad & Co. Ltd. v. Sudarshan Steel Rolling Mills, F.A.O. (OS) 36 of 1979*, decided by a Division Bench of this court comprising of Chief Justice V. S. Deshpande and Harish Chandra J. on 1st August, 1979 (reported in [1980] 50 Comp Cas 709. These authorities re-affirm the well-known principle, that a letter of credit is independent of and unqualified by the contract of sale underlying the transaction and the autonomy of an irrevocable letter of credit is entitled to protection. As a rule the courts must refrain from interfering with autonomy.

34. To sum up, Therefore, it is for defendant No. 3 to examine the documents by defendants Nos. 1 & 2 under the letter of credit and decide for itself as to

whether to accept and honour the same or not. If the bank obeys as to whether to accept and honour the same or not. If the bank obeys the instruction and the mandate given by the plaintiff it can demand reimbursement from him but not otherwise. However, it is open to defendant No. 3 to make payment under reserve or indemnity so as to have a right of recourse against the seller beneficiary. Needless to say that where the irregularity is obvious, the banker takes the documents with his eyes open and should pay, if at all, only under indemnity or recourse, for he cannot look to his principal for reimbursement if the latter refuses to accept the documents. Surely, the bank cannot be dictated by the plaintiff in this behalf although there may be a lot of common sense on its part to consider the objections raised by the plaintiff before accepting or rejecting the documents on the ground of discrepancies, etc., looking from this angle the plaintiff has failed to make out a prima facie case entitling him to the grant of an ad interim injunction in the first form. Even otherwise, there are no compelling circumstances or special factors which would entitle the plaintiff to get an order of injunction restraining the defendant bank from making payment in terms of the letter of credit.

35. However, as observed earlier different considerations weigh while granting an ad interim injunction in Form II. Admittedly, the defendant bank is demanding of the plaintiff to make payment under the invoice and other documents tendered by defendants Nos. 1 & 2. In the event of default, Therefore, the plaintiff faces the threat of defendant No. 3 having recourse to the margin money and other moneys/deposits of the plaintiff lying with it in relation to the documentary credit. The plaintiff has in unequivocal terms challenged the validity and negotiability of the documents tendered by defendants Nos. 1 & 2 and has sought a decree or declaration that he is not liable to reimburse defendant No. 3 on their basis. A visual examination of the documents has revealed some patent defects and discrepancies in the bill of exchange as well as the certificate of quality as found above. The banker must comply rigidly with his instructions and where he does, he is entitled to the indemnity of an agent. The plaintiff does not suffer any harm so long as the money does not come out of their funds but they can surely ask for equitable relief, when they face real threat of recovery of the price of the goods, etc., by defendant No. 3 from them. Hence, they are justified in saying that not only they have a prima facie case but also they are likely to suffer irreparable injury, if the injunction is not granted. Since they have sought a declaration for immunity from payment to the defendant bank there is no other remedy open to them which would protect them from the consequences of the apprehended injury, i.e., recourse to margin money, etc. Thus, it appears to be a fit case where status quo should be maintained vis-a-vis the plaintiff and defendant Nos. 3. However, the grant of an injunction being an equitable relief, it will be expedient to put the plaintiff to terms and impose conditions to the grant of injunction so as to safeguard the interest of defendant No. 3.

36. Before parting with this matter I may also deal with the objection raised by the plaintiff with regard to the power of attorney executed by defendants Nos. 1

& 2 in favor of one Bhupinder Singh through whom they have filed the written statement as well as the reply to the application for ad interim injunction.

37. The contention raised is that this power of attorney has not been duly attested and authenticated and as such a delegation of authority by defendants Nos. 1 & 2 to the so-called attorney, Shri Bhupinder Singh, is bad in law. During the course of arguments the original power of attorney dated 19th December, 1979, which had been duly notarised by a Notary Public, Singapore, was produced in court and shown to me. However, the said power of attorney had not been authenticated by the Indian High Commission at Singapore. The precise objection raised by the plaintiff's counsel is that the court in India cannot take judicial notice of the authentication of a power of attorney by a Notary Public abroad. However, the learned counsel for the defendants, Mrs. Shyamla Pappu, has forcefully urged that by virtue of s. 85 of the Evidence Act the court shall presume that every document purporting to be a power of attorney and to have been executed before and authenticated by a Notary Public was so executed and authenticated. Her line of argument is that the said section is not confined to Notaries Public in India but would also cover Notaries Public of other countries. Thus, a certificate by a Notary Public is sufficient evidence of the execution of the instrument to which it refers. Reliance in this context has been placed on a judgment of this court in *National and Grindlays Bank Ltd. Vs. World Science News and Others*, . In the said case a power of attorney executed by the plaintiff-bank in favor of one John Herbert Keeble and duly authenticated by the Notary Public, London, was pressed into service. Having regard to the fact that the said power of attorney on the face of it appeared to have been executed before and authenticated by a Notary Public, Yogeshwar Dayal J. held (at p. 264) that, "In view of section 85 of the Evidence Act, the court has to presume that it was so executed and authenticated". It was urged on behalf of the opposite side that the Notary Public in s. 85 merely means Notaries appointed under the Notaries Act, 1952, and where a document purported to be a power of attorney it should have been authenticated by the Indian Consular or Vice Consular or the representative of the Central Govt. alone, and not by a Notary Public of a foreign country, before the court could presume it to be so executed and authenticated as contemplated by s. 85. However, this argument was repelled by his Lordship with the observation, "for one thing the Notaries Act, 1952, was not there when the Evidence Act which was the first Act of 1872 was enacted. Secondly, the purpose of ss. 57 and 85 is to cut down the recording of evidence. For such matters, like the due execution of a power of attorney in the present day of international commerce, there is no reason to limit the words "Notary Public" in s. 85 or s. 57 to "Notaries appointed in India". His Lordship also noticed a judgment of the Supreme Court in the case of *Jugraj Singh and Another Vs. Jaswant Singh and Others*, , in this context. Thus, his Lordship firmly held that such judicial notice cannot be limited to Notaries appointed in India only.

38. My attention was, however, invited to ss. 11 and 14 of the Notaries Act, 1952. The former lays down that reference to a Notary Public in any other law

shall be construed as a reference to a Notary entitled to practice under the said Act while the latter provides that the Central Govt., if satisfied that by the law or practice of any country or place outside India, the notarial acts done by Notaries within India are recognised for all or any limited purpose in that country or place, it may, by notification in the Official Gazette, declare that the notarial acts lawfully done by Notaries within such country or place shall be recognised within India for all purposes or, as the case may be, for such limited purposes as may be specified in the notification. Thus, this section contemplates reciprocal arrangements between India and other foreign countries for the recognition of notarial acts done by Notaries abroad or in India and vice versa. It may be pertinent to add here that some notifications have been actually issued by the Central Govt. establishing such reciprocal arrangements (See G.S.R. No. 103 dt. 17-1-64 with respect to Belgium & G.S.R. No. 102961 (sic), 9268 with respect to Notaries of Ireland).

39. In *Haji Abdul Gaffar v. Madan L. Khandelwal* [1966] 2 ILT Cal 235, a controversy like the present cropped up and it was held by A. N. Ray J. (as his Lordship then was) that :

"It is, Therefore rightly contended by counsel for the defendants that section 85 of the Evidence Act which contemplated that the court shall presume that every document purporting to be a Power of Attorney to have been executed before and authenticated by a Notary Public was so executed and authenticated will only apply when the relevant Notary Public was so executed and authenticated will only apply when the relevant Notary Public comes within the provisions of the Notaries Act. In the present case by reason of absence of reciprocal arrangements between India and Pakistan regarding the Powers of Attorney, it cannot be presumed to have been executed before and authenticated by a Notary Public."

40. Having regard to this conflict and the fact that the impact of s. 14 of the Notaries Act has not been considered by my learned brother, Yogeshwar Dayal J., I would with great respect keep my fingers crossed over the matter. Indeed, full dress arguments on the subject were not put forth. However, the power of attorney may be ex facie presumed to be in order for the purpose of this application having regard to the aforesaid decision of this court.

41. From the conspectus of the foregoing facts and the legal position, I am not inclined to interdict defendant No. 3 from paying to defendants Nos. 1 & 2. It is for defendant No. 3 to make up its own mind whether to pay the seller beneficiary under the letter of credit or to hold the shipping documents and the bill of exchange on collection basis as already intimated by it to the negotiating bank or to pay the amount of the draft under reserve/indemnity. However, on account of apparent flaws in the certificate of quality and the bill of exchange the plaintiff can legitimately ask for the restraint order against defendant No. 3 from having recourse to the margin money and other deposits, etc., lying with it in connection with the letter of credit. However, in order to safeguard the interest of

defendant No. 3 it will be just and equitable to put the plaintiff to terms, i.e., by way of furnishing security and indemnity. Hence, I confirm, the ex parte injunction granted, vide order dated 12th October, 1979, in part, i.e., second half, subject to the condition that the plaintiff furnishes security/indemnity bond for reimbursing defendant No. 3 in full with interest, etc., in respect of this letter of credit within a fortnight to the satisfaction of the Registrar. The latter may, however, take into account the extent of margin money and other deposits ,etc., already lying in deposit with defendant No. 3 in relation to this letter of credit.