(2012) 05 DEL CK 0503

In the Delhi High Court

Case No : Regular First Appeal (OS) 100 of 2009

Madan Kukreja APPELLANT

Vs

Banquet Scalbert Dupont S.A. and Anr RESPONDENT

Date of Decision : 23-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20

Citation : (2012) 05 DEL CK 0503

Hon'ble Judges : Siddharth Mridul, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Ashok Gurnani, for the Appellant; Peeyosh Kalra, Advocate and Mr. Kamal Sharma, Advocate for R-1., for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—The undisputed facts of the present case are as follows: (i) The appellant, Madan Kukreja, carries on business under the name and style "M/s.Super Fashion" being the sole proprietor thereof and exports garments after fabricating the same; (ii) Respondent No. 1 is a bank having an office at Delhi with headquarters at France and is fully owned by Credit Industrial et Commercial (CIC), incorporated under the laws of France, having headquarters at Paris; (iii) Respondent No. 2 (a proforma party), is the banker of M/s.Super Fashion; (iv) In the second week of January 2003, M/s.Li & Fung (India) Pvt. Ltd. as the agent of its principal Li & Fung, Hong Kong, approached Madan Kukreja and placed three orders No. 86302101 dated January 21, 2003, Ex.P-32, No. 86302102 dated January 22, 2003, Ex.P-33, and Order No. 86305001 dated February 19, 2003, Ex.P-35 for ladies-woven dresses and blouses to be supplied to Li & Fung Hong Kong, requiring payment to be made through an irrevocable letter of credit established by Li & Fung, Hong Kong through HSBC, Hong Kong; (v) In terms of the three orders, Letter of Credit was opened by HSBC Hong Kong, having a term that the goods would be shipped with the respondent No. 1 named as consignee and M/s Promod S.A to be notified when the goods would be dispatched ;(vi) No prior consent of respondent No. 1 was obtained for it to be the consignee of the goods. It may be highlighted that the letter of credit opened by HSBC Hong Kong was at the asking of Li & Fung Hong Kong. The LC number is DCLCK 409960 and is dated November 08, 2002.

2. The goods were actually meant for M/s Promod S.A and admittedly the respondent No. 1 had opened an irrevocable letter of credit, at the asking of M/s Promod S.A in favour of Li & Fung Hong Kong which bears No. 181-0100322057-1. The said letter of credit was to be negotiated in terms thereof.

3. The letter of credit in favour of the appellant, opened by HSBC Hong Kong, expired on May 04, 2003 and admittedly the appellant sent the goods through air naming respondent No. 1 as the consignee. It may be highlighted that the goods were sent by air after May 04, 2003. The appellant claims that Li & Fung Hong Kong India assured him that notwithstanding the letter of credit expiring, the documents would be honoured on presentation. Accordingly, the appellant instructed his bankers, Syndicate Bank to negotiate the documents and the said bank, under cover of its letter dated May 29, 2003, forward the documents, on collection basis with instructions that the documents should be released upon payment, to respondent No. 1.

4. The grievance of the appellant in the plaint is that prior to said date, i.e. on May 19, 2003, respondent No. 1 issued the release order enabling M/s Promod S.A to receive the goods from the airlines without making any payment.

5. Eschewing reference to a protracted correspondence between the appellant and its banker on the one side and respondent No. 1 on the other, suffice would it be to state that it would be useless to note the same, as nothing turned thereon, suit was filed by the appellant against respondent No. 1, impleading Syndicate Bank as a proforma party and praying for a decree to be passed pertaining to the value of the goods received by M/s Promod S.A. and needless to state, apart from denying its liability to pay respondent No. 1 took a stand that the suit was not maintainable in the absence of Li & Fung Hong Kong as also M/s Promod S.A being impleaded as defendants.

6. On the pleadings of the party, the following issues were settled:

1. Whether the Courts of Delhi have no territorial jurisdiction to entertain the present suit in which no relief is claimed against the other Defendant (Syndicate Bank) and no leave u/s 20 of the CPC has been obtained against the Defendant No. 1 which has no presence in India? OPD-1

2. Whether the suit is bad for non-joinder of proper and necessary parties as stated in the written statement? OPD-1

3. Whether the Plaintiff is entitled to enforce any objection against the Defendant No. 1 either directly or through Defendant no. 2? OPP

4. Whether the Plaintiff is entitled to claim any sum arising out of any liability from the transaction in question and if so, to what amount it is entitled? OPP

5. If Issue No. 4 is held in favour of the Plaintiff, whether the Plaintiff is entitled to claim interest @ 16.5% or at all and if so, for what period and on what amount? OPP

6. If Issues No. 4 and 5 are held in favour of the Plaintiff; who is/are the entities)against whom such claim is enforceable? OPP

7. Relief?

7. Deciding Issue No. 1 in favour of the appellant, with respect to Issue No. 2, the learned Single Judge has held that the suit was liable to be dismissed on account of not impleading Li & Fung Hong Kong and M/s Promod S.A. as parties, who have been held to be necessary parties; and in respect of Issues No. 3 and 4, which were debated with reference to ICC Uniform Rules for Collection (URC) 522, has held against the appellant and the result is the suit filed by the appellant being dismissed.

8. The discussion by the learned Single Judge would reveal that the evidence established that respondent No. 1 never handed over the documents sent by Syndicate Bank under Ex.P-25 i.e. Syndicate Bank letter dated May 29, 2003 to M/s Promod S.A. and in fact had returned the same to Syndicate Bank on June 05, 2003 i.e. the date the day it received the documents for collection. This finding of fact was not challenged before us during arguments of the appeal. The appellant was fighting the battle with reference to the letter dated May 19, 2003, written by respondent No. 1 to M/s Promod S.A. As per the appellant, the said letter is a release order and on the strength of the same M/s Promod S.A. managed to receive the goods from the airlines without making any payment.

9. We thus proceed to note the two letters i.e. the letter dated May 29, 2003 written by Syndicate Bank to respondent No. 1 and the letter dated May 19, 2003 (which appellants calls a release order) which respondent No. 1 wrote to M/s Promod S.A.

10. Letter dated May 29, 2003, Ex.P-25, written by Syndicate Bank to respondent No. 1 reads as under:

Syndicate bank Nehru place, new delhi Shakuntala apartments, I floor 59, nehru place, New delhi? 110 019 Telex : 03171495safein Swift: synbinbba101 Fax no.

Mail to

Banquescalbertdu Pont sa 33, avenuele Corbusier 59800 lillee, dept 59

France

Documentary Bills sent on Collection Always Quote in all Correspondence Our Ref: 1010403C650509

Drawer : Super fashion (26/08/91) F33/1 okhlaindl area Phase ii New delhi 110020 Shipment of READYMADE GARMENTS Tenor : Sight FROM: DELHI CARRIER NAME: BL/AWB No:

Drawer: Pramodsa Cheminduverseau 59847 Marco en bapdeul Cedexfrance Currency : EUR Amount:45,390.00 TO FRANCE Dated

Shipment of Currency : EUR READYMADE GARMENTS Amount:45,390.00 Tenor : Sight From: Delhi To France Carrier Name: BL/AWB No : Dated

Documents Enclosed : As per schedule attached

Please follow instructions marked [x]

[x] Please Acknowledge receipt

[x] Please deliver documents against payment

[x] Please advise non Payment by airmail

[x] Store and insure goods, in bond, in necessary

[x] Collect your charges from drawees. Do not waive.

In reimbursement credit our a/c no without any loss of exchange to us, quoting our above mentioned Ref no. we forward this remittance for collection

Subject To The Uniform Rules For Collections [1995 Revision] International Chamber Of Commerce Publication No522, Read Along With Icc Document No. 470/822 Rev Of April 6, 1998

Please remit proceeds as under:

[ ] By D.D./T.T on Mumbai, India in equivalent USD

[ ] By Telex/SWIFT

Illegible D-60301

Frankfurt Am Main

11. Letter dated May 19, 2003 written by respondent No. 1

reads as under:

Cic Banques

Documentary Credit No. 181-0100322057-1

ITS

Marc Merenda Fax 03 20 87 60 51

Bank Transfer Voucher Date 19 May 2003

The Order Of: Promod Chemin Du Verseau 59847 Marcq En Baroeul Cedex

With This We Authorise The Delivery Of The Merchandise Which Is Coming From Li & Fung

Consignee In Our Name Relative To The Merchandise This Is

LTA NO.074 56195790/22294

24 Package

Sladies 100% Conton Dres

Order No. 86305001 Tablicrepe

1300 Pieces A Usd 6.60/Piece Sur 5880

Under Reference No. 181-01-0032057-1

This All Expenses In Charge Of The Receiver The Goods

Thanking You, Yours Faithfully

Banque scalert duponet

12. Undisputably, Ex.P-25 written by Syndicate Bank to respondent No. 1 had reached it on June 05, 2003 and the airlines had released the consignment to M/s Promod S.A. much prior thereto. It is thus clear that M/s Promod S.A. did not receive the airway bill from respondent No. 1 and how it received the goods from the airlines has remained a mystery, and this is a good ground to hold that M/s Promod S.A. would be a necessary party.

13. Apart from the fact that it was ultimately M/s Promod S.A. which was to pay for the goods, the payment to be made by M/s Promod S.A. to Li & Fung Hong Kong which had in turn to make the payment to the appellant, on the subject of a necessary party, as held by the Supreme Court in the decision reported as Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd. and Others, , a necessary party need not always be a party for or against whom a decree is to be made; a necessary party would encompass any party in whose absence no effecting decree could be passed.

14. It simply needs to be highlighted by us that it was Li & Fung India Pvt. Ltd. which acted as the Indian branch of Li & Fung Hong Kong to place three placement orders upon the appellant and for payment whereof HSBC Hong Kong opened a letter of credit on November 08, 2002 in favour of the appellant at the asking of Li & Fung Hong Kong. The letter of credit expired on May 04, 2003. Under different House Airway Bills dated May 07, 2003 and May 09, 2003, goods were shipped. On April 03, 2003 defendant No. 1, under instructions of M/s Promod S.A. opened a letter of credit No. 181-01-032057-1 in favour of Li & Fung Hong Kong. Goods had arrived in France and on May 19, 2003 respondent No. 1 wrote the letter dated May 19, 2003, which appellant claims to be the release order. But prior thereto, M/s Promod S.A. had received the goods from the airlines.

15. We would discuss the effect of respondent No. 1''s letter dated May 19, 2003, but suffice would it be to state that under the circumstances it has to be held that Li & Fung Hong Kong and M/s Promod S.A. were certainly a necessary party.

16. There is a reason why the appellant has not impleaded them as defendants. On an earlier occasion, in a similar dealing with Li & Fung Hong Kong which in turn had a dealing with M/s Promod S.A., on money not being received, when appellant sued respondent No. 1 and said two parties by impleading them as defendants, the matter was referred to arbitration, the seat of the arbitration being abroad (it is not clear where).

17. The learned Single Judge has correctly held that the suit was liable to be dismissed for not impleading a necessary party.

18. Faced with the problem that M/s Promod S.A. received the goods from the airlines without the airway bills and other documents supplied to it by respondent No. 1; meaning thereby the appellant fully being aware that it was not the documents sent by its banker on May 29, 2003 which resulted in the airlines handing over the consignments to M/s Promod S.A., it was sought to be urged that it was respondent No. 1''s letter dated May 19, 2003 which authorized M/s Promod S.A. to receive the goods from the airlines. The appellant styles the said order as a release order. It was urged that in the three orders Ex.P-32, Ex.P-33 and Ex.P-35 it was specifically mentioned that the goods should be despatched to the order of respondent No. 1.

19. We begin our discussion, by highlighting that consent of respondent No. 1 was never taken to be named as the consignee of the goods nor was its prior consent ever taken to either handle or at as the collecting agency.

20. We have extracted hereinabove, in paragraph 12 above the said letter dated May 19, 2003 and would simply highlight that it refers to documentary credit No. 181-0100322057-1 i.e. the letter of credit opened by respondent No. 1, at the asking of M/s Promod S.A. in favour of Li & Fung Hong Kong and makes no reference to any document pertaining to the appellant. We do not understand as to in what way the letter is a release order. Surely, the airlines do not release goods entrusted to them for carriage by air on the strength of such letters. It is trite that airlines delivered the goods at the place of destination upon the airway bill being presented by a person acting on behalf of the consignee. The appellant knows this and thus seeks to make out a case with reference to URC 522. The same has been noted and discussed by the learned Single Judge in paragraphs 42 to 46 of the impugned decision, and we concur.

21. We quote. Said paragraphs read as under:

42. The above submissions have been considered. Both parties have relied upon the provisions contained in URC 522. Article 1 thereof reads as under:

1. Application of URC 522

a. The Uniform Rules for Collections, 1995 Revision, ICC Publication No. 522, shall apply to all collections as defined in Article 2 where such rules are incorporated into the text of the "collection instruction" referred to in Article 4 and are binding on all parties thereto unless otherwise expressly agreed or contrary to the provisions of a national state or local law and/or regulation which cannot be departed from.

b. Banks shall have no obligation to handle either a collector or any collection instruction or subsequent related instructions.

c. If a bank elects, for any reason, not to handle a collection or any related instructions received by it, it must advise the party from whom it received the collection or the instructions by telecommunication or, if that is not possible, by other expeditious means, without delay.

43. The above provisions envisage a remitting bank and the collecting bank which in this case would be defendants No. 2 and 1 respectively. Collection means the handling by banks of documents as defined in 2(b) which could be the following kinds of documents, i.e., financial documents including bills of exchange, promissory notes, cheques and similar instruments used for obtaining the payment of money. Commercial documents are invoices, transport documents, documents of title or other similar documents. In the present case, the LC would be part of the financial documents whereas the HAWB would be the part of the commercial documents.

44. Article 4 of URC 522 talks of collection instructions. Article 4(a)(i) states that all documents sent for collection must be accompanied by a collection instruction indicating that the collection is subject to URC 522 and giving complete and precise instructions. It further adds that banks will not examine documents in order to obtain instructions. Article 4(c)(ii) says that "the collecting banks will not be liable or responsible for any ensuing delay as a result of an incomplete/ incorrect address being provided." Although Article 9 requires the banks to act "in good faith and exercise reasonable care", Article 10 maintains that "goods should not be despatched directly to the address of a bank of consigned to or to the order of a bank without prior agreement on the part of that bank

45. The proviso to Article 10 envisages a situation, as in the present case, where goods are despatched directly or consigned to the collecting Bank for release against payment without prior agreement. The said proviso reads as under:

a Goods should not be despatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank.

Nevertheless, in the event that goods are despatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods.

46. In the instant case, the LC opened by Li & Fung Hong Kong in favour of the plaintiff expired on 4th May 2003. Admittedly the said LC could not be renewed. Therefore by the time the goods were despatched accompanied by copies of two HAWBs on 7th May 2003 and 9th May 2003 it was clear to the plaintiff that the said of collection of payment on the instruction of plaintiff could not be gone through. Therefore the plaintiff on the strength of these documents opted for the URC 522 route which is that the defendant No. 2 could forward the documents for collection to the defendant No. 1. The plaintiff has not been able to produce any evidence to show that the prior consent of the defendant No. 1 was obtained before its name was indicated as the consignee. No satisfactory explanation is also forthcoming as to how in the invoice the change to this effect was made by the plaintiff and in what circumstances. Be that as it may, it appears to this Court in terms of the proviso to Article 10 of URC 522 which is heavily relied upon by the plaintiff itself that no liability can attach to the defendant No. 1 bank since the documents were despatched directly to it showing it as a consignee without prior agreement with it. It is clearly mentioned in the proviso to Article 10(a) that "such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods." The cross-examination of the plaintiff has revealed that admittedly there was delay on the part of the plaintiff in getting defendant No. 2 to send the documents for collection on DP basis to defendant No. 1. It appears that in the first place Li & Fund India delayed the process of inspection and thereafter the plaintiff kept waiting for the LC to be extended by Li & Fung Hong Kong. If in the meanwhile on the instructions of Promod S.A. Defendant No. 1 released the goods on the basis of the separate LC dated 3rd April 2003, and the request letter of Promod S.A. incorporating an indemnity clause, it could not be faulted for doing so without seeking instructions from the plaintiff.

22. We highlight that under no documentary letter of credit opened by respondent No. 1 in favour of the appellant did Syndicate Bank send the documents to respondent No. 1 requiring payment to be collected and then only the documents being handed over to M/s Promod S.A.

23. Article 1(b) of ICC 522 reads: "Banks shall have no obligation to handle either a collection or any collection instruction or subsequent related instruction.'' Article 10(a) reads: "Goods should not be despatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank. Nevertheless, in the event that goods are despatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods.'' Article 10(b) reads: "Banks have no obligation to take any action in respect of the goods to which a

documentary collection relates, including storage and insurance of the goods even when specific instructions are given to do so. Banks will only take such actions if, when, and to the extent that they agree to do so in each case. Notwithstanding the provisions of sub-Article 1(c) this rule applies even in the absence of any specific advice to this effect by the collecting bank.

24. Thus, in the teeth of the language of Article 1 and Article 10(a) and (b) of URC 522, since respondent No. 1 never consented to be the consignee of the goods nor ever consented to handle either a collection or to receive the documents, the question of it being liable as sought to be urged by the appellant does not arise.

25. It was lastly sought to be urged that respondent No. 1, having committed the tort of conversion, would be liable to make payment to the appellant.

26. Now, in relation to property conversion would be a wrongful interference with another person''s property and in the case of a banker, it would be liable for conversion if it unauthorizedly delivers the article left behind by a customer for safe custody. The respondent No. 1 never handed over or delivered any article sent by or on behalf of the appellant, much less unauthorizedly to M/s Promod S.A. We repeat, M/s Promod S.A. received the goods from airlines by May 21, 2003 and the documents were sent for collection by Syndicate Bank to the respondent No. 1 on May 29, 2003. In any case, the appellant is not the customer of respondent No. 1. The appeal fails and dismissed with costs against the appellant and in favour of respondent No. 1.