

(2017) 06 BOM CK 0160
In the Bombay High Court
Case No : 849 of 2016

M/s.Plazma Technologies Pvt.Ltd.

APPELLANT

Vs

JSM Technologies & Ors.

RESPONDENT

Date of Decision : 05-06-2017

Acts Referred:

Citation : (2017) 06 BOM CK 0160

Hon'ble Judges : S.C. Gupte

Bench : SINGLE BENCH

Advocate : Mustafa Doctor, Narayan Sahu, Yogesh Chawak, Chirag Dave, S.S. Kulkarni, Naveen B. Khaire

Judgement

1. The second appeal challenges an order passed by the District Court, Pune in a civil appeal. By the impugned order, the learned District Judge allowed the first Respondent's appeal and set aside the judgment and decree passed by the court of Civil Judge, Junior Division, Pune in favour of the Appellant.

2. The Appellant (original Plaintiff) filed the present suit against Respondent No.1 and three others for a perpetual injunction restraining invocation of a letter of credit. According to the Plaintiff, it had placed a purchase order with Respondent No.1 (original Defendant No.4) on 29 March 2007 for purchase of one THINK 3 Plazma Software Solution and one Microsoft Software. For payment of price of these goods, the Plaintiff caused to establish a letter of credit through its banker, namely, Defendant No.3. Defendant No.1 was the issuing bank for this letter of credit, whereas Defendant No.2 was a negotiating bank. The letter of credit was for a sum of Rs.26,88,687/-. On 30 May 2007, the Plaintiff received two compact discs from Defendant No.4 towards the delivery of the contracted goods. It is the Plaintiff's case that this delivery was merely a part delivery and that unless and until the goods, which were optical device, were installed and viewed, the delivery could not be said to be complete. The Plaintiff relies on conditions mentioned in Annexure VI to the purchase order. It is the Plaintiff's case that Defendant No.4 was bound by a negative covenant not to invoke the letter of

credit, unless and until the goods were installed and implemented to function properly. The Plaintiff relies upon a status report of implementation dated 13 November 2007 in this behalf. On 16 November 2007, Defendant No.3 informed the Plaintiff that Defendant No.4 had submitted documents to the negotiating bank, i.e. Defendant No.2, for invocation of the letter of credit and the negotiating bank had, in turn, written to Defendant No.1, the issuing bank, to arrange for payment of the bill under the letter of credit. According to the Plaintiff, none of the invoices was in accordance with the terms of the contract, since there was failure to certify that the "goods are as per order". According to the Plaintiff, the invocation of the letter of credit, in the premises, was fraudulent, without completing the delivery of the goods. It is also the case of the Plaintiff that the negotiating bank did not issue any certificate of compliance of credit, as required under the contract. The Plaintiff, accordingly, challenged the invocation on two grounds, firstly, on the ground of such invocation not being in strict compliance with the terms of the letter of credit and secondly, on the ground of fraud committed by Defendant No.4.

3. The trial court allowed the Plaintiff's suit partly decreeing the same inter alia by a declaration that Defendant No.4 was not entitled to invoke the letter of credit and Defendant Nos.1 and 3 banks were not bound to honour such invocation unless and until the goods were delivered as per the purchase order. The court also declared that the action of Defendant No.4, supported by Defendant Nos.1 and 2, in invocation of the letter of credit was contrary to the contract. The court, accordingly, restrained Defendant Nos.1, 2 and 4 by a perpetual injunction from invoking the letter of credit till compliance of the purchase order and delivery and implementation of the software as per the terms of the purchase order. Defendant No.4 came in appeal before the District Court. The District Court by its impugned order set aside the judgment and decree passed by the trial court and allowed the civil appeal with costs.

4. Learned Counsel for the Appellant (original Plaintiff) submits that the invocation of the letter of credit, in the present case, was not in accordance with the terms thereof. Learned Counsel submits that the letter of credit was established against documents, which included invoices signed by the beneficiary or his constituted agent for gross FOR/CIF/C&F/C&I/Exworks value of the goods certifying goods to be as per order / indent and evidencing dispatch of the undemoted goods. Learned Counsel submits that there is no certification in the invoices in the present case that the goods were as per order / indent. The documents on record show that the goods as per order / indent were (i) THINK 3 PLM Software Solution, Quantity 1 No., Rate Rs.25,87,187/and (ii) Microsoft Software, Quantity 1 No., Rate Rs.1,12,500/. The terms of invocation of the letter of credit inter alia confirmed the engagement of the issuing bank with the drawers, endorsers and /or bona fide holders that the letter of credit would be duly honoured on presentation of documents or at maturity. Except as otherwise expressly stated in the letter of credit, the credit was subject to Uniform Customs and Practice for Documentary Credits (1994 Revision) International Chamber of

Commerce Publication No.500. The negotiating bank enclosed the relevant documents drawn on account of the beneficiary, which inter alia included a bill of exchange drawn for Rs.26,99,687/, five sets of tax invoices for delivery of the two products, namely, one THINK 3 Plazma software solution and one Microsoft software, along with five sets of packing list and a delivery challan. The negotiating bank requested for verification of the documents and confirmation (i) that the same were in order as per letter of credit, (ii) that the payment of the bills would be made on the due date directly to the negotiating bank and (iii) that the signatories of letter of credit had the requisite authority to sign the letter of credit for the amount. From the advice of the negotiating bank, it is clear that it did not find any discrepancy in the documents and accordingly, declared its intention to discount the bills at request of the drawer. The bill of exchange was signed by the drawer. The tax invoices reflected the description of the goods in accordance with the order / indent and the receipt of the goods was endorsed by the Plaintiff on the delivery challan. On these facts, the invocation is complete in accordance with the terms of the letter of credit and the issuing bank is clearly liable to honour the letter of credit and reimburse the negotiating bank.

5. A letter of credit, it is trite law, is a separate contract, absolute in nature, and not dependent on the existence or otherwise of disputes between the parties to the underlying contract. The underlying contract may be an occasion for issuance of the letter of credit, but disputes under such contract have no bearing on the liability of the bank issuing the letter of credit to honour the same so long as its invocation is in accordance with its terms. What is the obligation of the issuing bank under the letter of credit in the present case? Its obligation is to reimburse the negotiating bank upon the latter sending it/to its branch office "the full set of original documents by Registered Mail alongwith a certificate of compliance of the terms and conditions of the credit and request for demand draft / pay order / credit advice." The credit carries its confirmation and engagement "with the drawers, endorsers and/or bonafide holders of draft(s) drawn under and negotiated in conformity with the terms and conditions of this credit which will be duly honoured on presentation of documents or at maturity." By its communication dated 31 May 2007, the negotiating bank forwarded the full set of original documents and requested for confirmation of payment by the issuing bank to it on the due date. It also clearly indicated that there were no discrepancies found in the documents. This can certainly be termed as sufficient compliance with the terms of invocation. Learned Counsel for the Appellant submits that there was no "certificate of compliance of the terms and conditions of the credit" on the part of the negotiating bank. There is no merit in the submission. The certificate of compliance, to qualify as such certificate, need not be in any particular form. It may well contain a statement that "the documents comply with the terms and conditions of the credit" or that "there are no discrepancies in the documents". In banking parlance, discrepancies in the documents imply "noncompliance with terms and conditions of credit". Indeed, the form used by the negotiating bank in the present case clearly demonstrates

this. The certification made by the negotiating bank here is by stating the discrepancies, if any, found in the documents, which the issuing bank is called upon to accept. In the present case, such discrepancies are stated to be nil. There is a line drawn across the space left for the statement of deficiencies. If the negotiating bank, thus, certifies that there are no discrepancies (which the issuing bank have to consider to accept or not), the certification of compliance with the terms of credit is clearly complete. There is nothing further that the negotiating bank needs to do.

6. There is a bill of exchange drawn under, and negotiated in conformity with, the terms and conditions of the credit, and it is accompanied by presentation of documents. The issuing bank must, in that case, honour its engagement with the bonafide holder of the bill. It must honour the letter of credit and pay against the bill and the documents presented to it on the due date.

7. Learned Counsel for the Appellant submits that the documents submitted are not in accordance with the requirements of the letter of credit. The submission is on the footing that the invoices signed by the beneficiary do not certify that the goods are as per order / indent. Even this submission is clearly fallacious. The invoices issued by Defendant No.4 in the present case clearly specify the goods which are as per order/ indent. If the invoices set out the description of the goods which is as per the purchase order and further certify that the sale of the goods specified in the invoice has been made, and the transaction of the sale covered by the invoices has been actually effected, by the beneficiary, the invoices veritably answer their contractual description. The particular document described in the letter of credit must be understood in its commercial sense - as two commercial contracting parties would understand. The Plaintiff's argument amounts to this : The invoices specify the goods and confirm the sale as per the description, which is the exact description in the order / indent, but they do not certify that the goods are the same as specified in the order / indent. That is just wanton word play. There is no commercial sense in it.

8. In any event, it is not the case of the issuing bank either that the invocation is not in accordance with the terms of the letter of credit (by reason of want of certification of compliance) or that the documents submitted were not in accordance with the conditions of the credit (by reason of want of certificate as to the goods being as per order/indent). In its written statement, Defendant No.1 does not dispute that the documents were as per the letter of credit or that full set of the documents alongwith certificate of compliance was received from the negotiating bank.

9. Under the Uniform Customs and Practice for Documentary Credits, ICC Publication No.500 ("UCP") applicable to the letter of credit in the present case, the issuing bank, the confirming bank, if any, or a nominated bank acting on their behalf, is required to examine stipulated documents for their compliance with the letter of credit by international standards, within a reasonable time, not to exceed seven banking days following the day of the receipt of the documents.

It must determine whether to take up or refuse documents. If in its opinion, the documents appear on their face not to be in compliance with the terms and conditions of credit, it has to in its sole judgment approach the applicant for waiver of the discrepancy(ies) within the aforesaid time. And if it does refuse the documents, it must give notice to that effect, within the aforesaid time, to the bank from which it received the documents, or to the beneficiary, if it received the documents directly from him. In the present case, the issuing bank admittedly did not find any discrepancy in the documents. It never refused the documents or give any notice in that behalf to the negotiating bank. Under the UCP, it is, in that case, bound to honour, and pay on, the letter of credit.

10. Alternatively it is submitted by learned Counsel for the Appellant / Plaintiff that the goods not being installed and delivery not being fully implemented, the demand of payment under the letter of credit is a fraudulent demand. Learned Counsel seeks to refer to the purchase order and particularly Annexure VI thereof in this context. This argument, again, is clearly without any substance. It envisages a contractual dispute between the seller (beneficiary of the L/C) and the purchaser (the party who opened the L/C), which has nothing to do with the obligations of the issuing bank under the letter of credit. For excusing payment under a letter of credit, the fraud alleged must be of an egregious nature which would vitiate the very foundation of the letter of credit and which the beneficiary seeks to take disadvantage of. That is not the case here.

11. The lower appellate court, in the premises, cannot be said to have committed any error of law in appreciating evidence or applying the correct principles of law. The lower appellate court found that as far as Instruction No.3 for the negotiating bank, i.e. production of certificate of compliance, is concerned, there was fulfillment of the same in the facts of the case. There is, as the lower appellate court rightly observed, no instruction to the negotiating bank that, unless the software is implemented, there is no complete delivery. It also correctly applied the law of bank guarantees and letters of credit to the facts of the present case. It held that the subject letter of credit was an independent and separate contract, which was absolute in nature, and unless a fraud, of the nature referred to by the Supreme Court in the case of Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company, (2007) 8 SCC 110, is established, which vitiates the letter of credit, injunction could not be granted against invocation of the letter of credit. The court did not find any such fraud in the present case. The impugned order, in the premises, does not suffer from any infirmity. No substantial question of law arises in the facts of the case.

12. The second appeal is, accordingly, dismissed with costs.

13. In view of the dismissal of the second appeal, the civil application does not survive and the same is also disposed of.

14. Learned Counsel for the Appellant seeks continuation of the adinterim protection granted in the second appeal. Learned Counsel for Respondent No.1

opposes the application. A interim protection operating in the second appeal is continued for a further period of six weeks from today.