(2013) 04 DEL CK 0393

In the Delhi High Court

Case No : C.S. (OS) No. 2185/2001

Nirlon Ltd.		APPELLANT
	Vs	
M/s. Union Bank of India and Others		RESPONDENT

Date of Decision : 29-04-2013

Acts Referred:

Citation : (2013) 4 AD 517 : (2013) 136 DRJ 188

Hon'ble Judges : M.L. Mehta, J

Bench : Single Bench

Judgement

M.L. Mehta, J.

I.A. 12238/2006 (under Order XXXVII Rule 3(5) & 7, CPC)

1. This order disposes the application of the defendant seeking leave to defend the suit. The instant suit was filed by the plaintiff under Order XXXVII of the CPC (for short ''the Code'' for recovery of Rs. 20, 92, 802. 40P/- (Twenty Lakhs Ninety Two Thousand Eight Hundred and Two Rupees and Forty Paise) along with pendent lite and future interest thereon at the rate of 18% per annum. The plaintiff is a public limited company registered under the Companies Act 1946 and is engaged in the business of the manufacture and sale of various kinds of conveyor belts, Nylon Tyre Cord Fabric, Nylon Industrial Fabric etc. Defendant nos. 1 and 2 are Public Sector Banks constituted under the Banking Companies Acquisition and Transfer of Undertaking Act, 1980. Defendant no. 3 is a private limited company constituted under the Companies Act, 1956 and is inter alia engaged in the manufacture of rubber products.

2. It is the case of the plaintiff that defendant no. 3 placed an order with it for the supply of conveyor belting fabric vide a purchase order dated December 19, 1998. It was agreed between these two parties that the payment in respect of the goods would be made by means of documentary letters of credit (for short L/C). In pursuance of the same, defendant no. 3 directed its bank, M/s. Bank of India, to open a number of L/Cs in favour of the plaintiff.

3. The plaintiff submits that the instant suit is with respect to L/C No. 16/24 (for short ''the said L/C''), which was for a sum of Rs. 20, 92, 802. 40P/- (Twenty Lakhs Ninety Two Thousand Eight Hundred and Two Rupees and Forty Paise) dated June 12, 1999 and was due to expire on September 5, 1999. The said L/C was opened by the defendant no. 2 and forwarded to defendant no. 1, the plaintiff''s banker. The plaintiff submits that it delivered all requisite documents as required under the said L/C like invoices, bills of exchange, delivery challans etc to its banker, defendant no. 1. On these documents being duly verified, the defendant no. 1 forwarded them to defendant no. 2.

4. The plaintiff contends that defendant no. 2 had failed to inform the plaintiff or defendant no. 1 regarding discrepancies or as to whether it was returning the documents or not and had continued to hold the documents till December 1999, when it finally decided to return the same to the plaintiff, after which the said L/C had already expired in September 1999.

5. The plaintiff contends that the defendant no. 2 was in violation of not only the spirit and terms of the said L/C, but was also in violation of Uniform Custom and Practice for Documentary Credits (1993 Revised) (International Chamber of Commerce Publication No. 500) (for short ''UCP 500''). In furtherance of the same, the plaintiff has referred to Article 13(b) of the UCP 500, which provides that the issuing bank and the confirming bank should, within a period of not more than seven banking days, either take up or refuse the documents. The provision further goes on to state that the party from whom the documents have been received should be informed whether it has been accepted or refused. The plaintiff contends that the refusal or acceptance of the L/C was informed to it beyond the prescribed period of seven days and thus the defendant no. 2 was in violation of the UCP 500.

6. The plaintiff contends that because the defendant no. 2 had failed to return the said documents within the prescribed period, it was bound to make the payment to the Plaintiff under the said L/C. Consequentially, the plaintiff through their advocate served a legal notice dated February 2, 2000 u/S 43(1)(a) of the Companies Act, 1956, calling on the defendants to pay a sum of Rs. 20, 92, 802. 40P/- (Twenty Lakhs Ninety Two Thousand Eight Hundred and Two Rupees and Forty Paise) along with interest thereon at the rate of 18% per annum. The plaintiff submits that on receiving a frivolous reply to the said legal notice, they approached this Court by filing the present suit.

7. In its application for leave to defend, the defendant no. 2 contends that at the request of defendant no. 3, it had opened the said L/C in favour of the plaintiff. Under the terms of the said L/C, the defendant no. 2 undertook to pay the price of the supplied goods to the plaintiff provided all the documents were presented in accordance with the terms of the said L/C. The defendant no. 2 further contends that it had received a set of documents for a sum of Rs. 20, 92, 802. 40P/- (Twenty Lakhs Ninety Two Thousand Eight Hundred and Two Rupees and Forty Paise). On finding certain discrepancies, the defendant no. 2 submits that,

it had intimated the same to defendant no. 1 vide a letter dated July 2, 1999, giving the details of the discrepancies. A reminder to this letter was sent by the defendant no. 2 on August 19, 1999 and by registered post on August 21, 1999. The defendant no. 2 contends that on the basis of these discrepancies, it refused to make the payment and had advised defendant no. 1 that it was holding the documents pending instructions from the negotiating bankers. And that on not receiving any instructions from the defendant no. 1, the defendant no. 2 returned all the documents drawn under the said L/C vide letters dated November 11, 1999 and December 6, 1999. The defendant no. 2 contends that it had brought to the notice of defendant no. 1 regarding the discrepancies immediately and because of this, the undertaking by the defendant no. 2 in the L/C no longer existed and that there was no question of making any payment under the said L/C.

8. I have heard the Counsels for the parties and have perused the records.

9. At the first instance, the Ld. Counsel for the defendant raised various technical issues that the plaintiff company had not produced it''s certificate of incorporation and that there was no authorized signatory to file the suit. It was further contended that the reliefs sought by the plaintiffs fell outside the ambit of an Order XXXVII proceeding and should be dismissed on this ground alone.

10. The Ld. Counsel for the defendant argued that the plaint had not stated as to when the letter dated 02.07.1999 was received by the defendant no. 1. The Counsel submits that the application of UCP 500 to the said L/C was not in dispute. The only issue that arose as to whether the documents were returned within the prescribed period of seven banking days, the knowledge of which was only with defendant no. 1 and thus the same could not be averred by the plaintiff. It was further submitted that the said letter dated July 2, 1999 nowhere stated that the documents were given to defendant no. 3.

11. In response, the Ld. Counsel for the plaintiff, argued that the letter sent by the defendant no. 2 to defendant no. 1, dated 02.07.1999, did not mention about refusal or acceptance of the documents but had merely intimated the defendant no. 1 of certain discrepancies and also stated that it would be sending the submitted documents to the defendant no. 3 for acceptance.

12. The counsel further contended that the defendant no. 2 was in violation of the UCP 500 Articles. Relying on the decisions of the Apex Court in the cases of Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others, and UBS AG Vs. State Bank of Patiala, the Ld. Counsel argued that the rules under the UCP 500, provide for a number of Articles that apply to all documentary credit and are binding upon the parties thereto unless otherwise agreed and that this set of rules cast a duty on the Issuing Bank (defendant no. 2 herein) to comply with the provisions of the same.

13. The Ld. Counsel for the plaintiff further submits that all the relevant documents and letters are on record and that all the issues were purely legal in

nature and based on the letters of the defendant no. 2 dated July 2, 1999 and August 19, 1999, there was no clear refusal or acceptance of the documents.

14. In its rejoinder, the defendant argued that no acceptance on its part meant that the documents were rejected. It was further contended that the defendant no. 2 never returned the documents to defendant no. 3 but was holding them pending instructions from the negotiating bank i.e. defendant no. 1.

15. Before proceeding to decide the matter at hand, it would be pertinent to note the settled law on the aspect of what would constitute a triable issue, which would allow the defendant leave to defend in cases under Order XXXVII of the Code. The Apex Court in the case of AIR 1990 2218 (SC) had occasion to lay down the test to determine as to what would constitute a triable issue. The Court held as follows:

3. Leave is declined where the court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he was a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

16. Thus it is clear that only issues which are those of facts can be taken to be as triable issues. The defendant in the present case has contended that the date on which the letter dated July 2, 1999 was received by the defendant no. 1 was not averred in the plaint and that this issue was one of fact. This defence was taken with regard to the contention of the plaintiff that the defendant no. 2 had failed to inform the plaintiff regarding the acceptance or refusal of the document within the prescribed period of time i.e. seven working days.

17. On reading the letter dated July 2, 1999, it is seen that the defendant no. 2 had stated that it would send the same to the defendant no. 3 for acceptance. At this juncture, it would be appropriate to reproduce the relevant portions of the said letter.

3. We have presented the documents to the applicant for their acceptance. In the meantime, we hold the documents at your own risk and responsibility. Please also note that we disown any responsibility for the goods or its condition and we are unable to store, insure the goods. However, we will deliver the documents to

the applicant if finally accepted prior to your instruction otherwise.

It is clear to me that this communication was neither a refusal nor an acceptance on the part of the defendant no. 2 regarding the documents. Thus, I find no merit in the contention of the defendant no. 2 that no acceptance would mean an implied refusal.

18. There is a clear violation of provisions under the UCP 500, especially with regard to Article 13(b) which clearly stipulates that the issuing bank should intimate the party (plaintiff herein) whether it has decided to take up or refuse the documents submitted. Article 14(c) further provides that incase the issuing bank decides to approach the applicant (defendant no. 3 herein) for waiver of the documents, that still does not extend the period prescribed in the aforesaid Article 13(b). Article 14(e) finally states that if the issuing bank fails to act in accordance with the provisions of this Article (Article 14), then it is precluded from claiming that the documents are not in compliance with the terms and conditions of the L/C. In reading the all the above provisions together, it is clear that the information of refusal or acceptance of the documents should be made within a period of seven banking days. The defendant no. 2 has clearly exceeded this period by a large margin, travelling beyond the expiry of the L/C, when the documents were finally returned on November 30, 1999.

19. The Apex Court, in the case of "Federal Bank Ltd. vs. V.M. Jog Engineering Ltd. & Ors., (Supra)", examined the provisions of the UCP Rules regarding refusal of documents. The Court held that:

49. Clause (d) of Article 16 of the 1983 Revision states that, if the issuing bank decides to refuse, it must give notice to the bank from which it received the documents or to the beneficiary, if it directly received from him. Such notice must state the discrepancies in respect of which the issuing Bank refuses the documents and must also state whether it is holding the documents at the disposal of or is returning them to, the presentation (remitting bank or the beneficiary, as the case may be). Sub-clause (e) reads:

Article 16(e): If the Issuing Bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this Article and/or fails to hold the documents at the disposal of, or to return them to, the presentation, the issuing Bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.

Thus, where the Issuing Bank does not respond within reasonable time it cannot, under the UCP, dispute the documents later.

(emphasis supplied)

20. Further in the case of Madura Coats Limited Vs. Bank of India and Another, , the Ld. Single Judge of this Court observed that:

19. In any event, as observed in Royal Bank of Scotland plc. v. Cassa Di

Risparmio Delle Provincie Lombard, (1993) Financial Times 21-01-1992 (CA), it must be recognised that (UCP) terms do not constitute a statutory code. As the title makes clear, they constitute a formulation of customs and practices, which the parties to a letter of credit can incorporate into their contracts by reference,. If it is found that the parties have explicitly agreed to such a term, then the search need go no further, since any contrary provision in UCP must yield to the parties'' expressed intention. It will also be of advantage to refer to the decision in Bankers Trust Co. v. State Bank of India, (1991) 2 LR 443 in which it was held that the Bankers Trust was barred from refusing or objecting documents in question because it had taken an unreasonable and inordinate time to examine and reject them

(emphasis supplied)

21. In the present case, the defendant no. 2 had clearly submitted to the rules as provided under UCP 500. Further as examined above, the defendant no. 2 was in clear violation of Articles 13 and 14 of the UCP 500 with regard to intimating the plaintiff about discrepancies within the prescribed time of seven banking days.

22. In light of the above factual matrix and the legal provisions applicable to them, it is found that the defendant no. 2 has not set up any triable issue and thus its application under Order XXXVII Rules 3(5) and 7 is liable to be are hereby dismissed. Consequentially, the application of leave to defend is dismissed and suit is decreed in favour of the plaintiff. Accordingly, a decree for a sum of Rs. 20,92,802.40p id passed in favour of the plaintiff and the defendant no. 2. The plaintiff shall also be entitled to pendente lite and future interest at the rate of 12% per annum. Decree be drawn accordingly.

