
(2013) 06 CAL CK 0005
In the Calcutta High Court
Case No : CS No. 302 of 2002

R.K. Mishra and Co.

APPELLANT

Vs

Al-Arafah-Islami Bank Ltd.

RESPONDENT

Date of Decision : 14-06-2013

Acts Referred:

Citation : (2013) 4 CHN 442 : (2014) 2 WBLR 622

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Arindam Sinha, Debraj Mukherjee and Sourav Basu, for the Appellant; S. Chowdhury, Rupak Ghosh and N. Khanjoy for the Defendant No. 1, for the Respondent

Judgement

Soumen Sen, J.—A documentary credit is defined in the Uniform Customs and Practice for Documentary Credits formulated by the International Chamber of Commerce (hereinafter referred as UCP 500) to which most credits are made subject, as any arrangement, however named or described, whereby a bank (the "Issuing Bank"), acting at the request and on the instructions of a customer (the "Applicant") or on its own behalf, (i) is to make a payment to or to the order of a third party (the "Beneficiary") or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary, or

(ii) authorises another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)), or

(iii) authorises another bank to negotiate, against stipulated document(s), provided that the terms and conditions of the credit are complied with.

It follows that documentary credit transactions involve at least three parties: the buyer (the applicant for the credit), the seller (the beneficiary under the credit) and the bank issuing the credit (the issuing bank), usually there are four parties, with the introduction of a second (intermediary) bank.

In order to bring uniformity in matters pertaining to documentary letter of credit the International Chamber of Commerce Paris have published a set of rules called Uniform Customs and Procedures for Documentary Credit (UCPDC) wherein a documentary credit has been defined as any arrangement, however named or described that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation Banks holding documents under a letter of credit are guided by the UCPDC Rules.

2. The letter of credit under consideration is governed by UCP 500.

3. The plaintiff is the importer. The defendant No. 3 is the overseas buyer. At the instance of the defendant No. 3, the defendant No. 1 issued an irrevocable letter of credit in favour of the plaintiff on August 26, 1999. The defendant No. 2 was the advising bank. The original letter of credit dated 26th August, 1999 was amended on 30th August, 1999 in respect of two clause which, however, are not important in deciding the present dispute.

4. The plaintiff in terms of the agreement with the defendant No. 3 entered early second week of August, 1999 shipped the materials on 8th of September, 1999 after due pre-shipment inspection and approval by the defendant No. 3 with an intimation to the defendant No. 1. Indian Bank was the negotiating bank. The plaintiff on 7th September, 1999 submitted the required documents to the Indian Bank in order to enable the said bank to negotiate with the issuing bank and realize the sale proceeds and credit the same in the accounts maintained by the plaintiff with the negotiating bank. The issuing bank by a telex dated 19th September, 1999 dispatched on 21st September 1999 informed the negotiating bank its inability to negotiate and release payments under the said letter of credit in view of the following discrepancies noticed by the issuing bank:--

(1) "ON BOARD" NOTATION ON B/L ABSENT (.)

(2) BENEFICIARY'S CERTIFICATE NOT SET AS PER CLAUSE NO. 05 PAGE NO. 02 OF THE CREDIT (.)

(3) DRAFT DRAWN ON AL-ARFAH-ISLAMI BANK LTD. ONLY AND "A/C APPLICANT NOT MENTIONED (.)

(04) PACKING LIST SENT INSTEAD OF DETAILED PACKING LIST (.)

5. The negotiating bank was informed that in accordance with Article 14 of UCP 500 the issuing bank is refusing to accept the said document and would hold the documents at the disposal of the presentee treating the same as "collection basis. The negotiating bank was further informed that the issuing bank had referred above discrepancies to the drawee and would revert on hearing from the decree.

6. The said communication was preceded by an earlier communication dated 16th September, 1999 from Standard Chartered Bank, namely, the advising bank under the letter of credit in which the advising bank expressed its inability to

honour the claim due to the reason "no reimbursement authority". It was represented by the advising bank in the said communication that the said defendant No. 2 had taken up the matter with the issuing bank and would revert to the negotiating bank at the earliest. The negotiating bank on 23rd September, 1999 in response to the telex dated 19th September, 1999 answered to the issues raised by the issuing bank in refusing to remit the fund. The negotiating bank while admitting that in the Bill of Lading "On Board" notation was absent, however, requested the issuing bank to release the payment. The negotiating bank by a telex dated 28th September, 1999 reminded the issuing bank for early release of payment. The advising bank thereafter on 29th September, 1999 informed Indian Bank that they are unable to release payment since the issuing bank had informed the advising bank not to honour any claim under the said L/C until further instructions and the negotiating bank was requested to take up the matter with the issuing bank regarding payment.

7. The issuing bank subsequently by a telex dated 9th October, 1999 expressed its inability to release any payment in view of discrepancies without obtaining prior approval from its Central Bank (Bangladesh Bank) because of the fact that the Central Bank could allow payment under such discrepant documents only on production of bill of entry but in view of the fact that the defendant No. 3 being the applicant, did not submit the bill of entry for onward submission to Bangladesh Bank for approval, it is not possible for the issuing bank to release payment. The plaintiff was advised to take up the matter with the defendant No. 3. The defendant No. 3 on 27th November, 1999 requested the issuing bank to release payment covered under the letter of credit and assured the defendant No. 1 of being able to release the shipping documents within 30th December, 1999. The said letter recorded that previously the issuing bank was requested to accept the shipping documents which according to the issuing bank was so far found to be discrepant. The issuing bank did not release payments which have resulted a series of correspondence being exchanged between the plaintiff, the issuing bank, The Indian High Commission and the Central Bank. The issuing bank returned the shipping documents to the negotiating bank on 20th July, 2000 on the ground that the said documents were being held by the issuing bank at the disposal of the presentee treating the same on "collection basis" and, thereafter, on 11th March, 2000 seeking disposal instruction of the documents to which no response was received by the issuing bank. Moreover, in spite of best efforts of the issuing bank, the importer, namely, the defendant No. 3 did not come forward to release the documents. In the meantime, the importer informed that the goods supplied by the exporter was also not in accordance with the proforma invoice and refused to accept the documents. In view of the aforesaid, the issuing bank expressed its inability to hold the documents any further and the entire documents were accordingly returned.

8. Mr. Sabyasachi Chowdhury, the learned Counsel appearing on behalf of the defendant No. 1 in justifying the action of the defendant in refusing to pay under the irrevocable letter of credit submitted that the issuing bank was justified in

refusing to accept the said documents and release payments in view of failure on the part of the plaintiff to present "On Board Notation". It was submitted that this document is required to accompany the letter of credit and in absence thereof the negotiating bank and the beneficiary under the letter of credit cannot insist payment. The said document would show that the goods were carried properly to the destination and in absence of such certification, the lawful entry of the goods in the country of import becomes questionable. It was argued that even the negotiating bank by its telex message dated 23rd September, 1999 admits the existence of "only one discrepancy", namely, "On Board Notation". The evidence would also establish that such discrepancy was present and it was neither removed nor rectified. It was argued that the said letter of credit was valid till 25th October, 1999 and in view of the fact that such discrepancy was neither removed nor rectified, the defendant No. 1 had no obligation to pay under the said documentary credit. The letter issued by the defendant No. 3 dated 27th September, 1999 cannot be construed as a waiver of discrepancy and no payment could be demanded on the basis thereof. The plaintiff was interested in getting the payment on "collection basis" which, inter alia, envisaged that the defendant No. 3 would come and get the documents released from the defendant No. 1 within 30th December, 1999 by making payment of the amounts covered under the L/C to the defendant No. 1. In other words, the defendant No. 1 would collect the payment from the defendant No. 3 and handed over to the plaintiff within 30th December, 1999 as assured by the defendant No. 3 by its letter dated 27th November, 1999. It was argued that such understanding of the plaintiff that the documents were held on "collection basis" and payment would be released only on payment being received from the defendant No. 3 would be evident from the letter of the plaintiff dated 1st January, 2000.

9. When the defendant No. 3 did not get the documents released upon payment (as the same was held on collection basis) and was insisting on payment only on the basis of the letter dated 27th November, 1999, the defendant No. 1 categorically informed the negotiating bank by the letter of 11th March, 2000 that "simple acceptance is not enough to release payment" and that "THE APPLICANT IS NOT COMING FORWARD TO TAKE THE DOCS AGAINST PAYMENT AND WE ARE UNABLE TO HOLD THE DOCS FOR INDEFINITE PERIOD. HENCE, WE REQUEST YOU TO GIVE US YOUR DISPOSAL INSTRUCTIONS OF THE DOCS IMMEDIATELY...."

10. Even thereafter, no disposal instructions were received and documents were ultimately returned on 20th July, 2000. The plaintiff being fully aware of the situation and having accepted the position, started talks with another importer to sell the goods at a reduced rate.

11. The plaintiff by the above, had accepted the position that the documents were being held by the defendant No. 1 on collection basis. The L/C having been expired on 25th October, 1999 itself and the defendant No. 3 not releasing the documents upon payment either within December, 1999 as assured or even

thereafter, which prompted the plaintiff to look for different buyer after the documents were returned.

12. Mr. Chowdhury further argued that even if it is assumed that the letter of the defendant No. 3 dated 27th November, 1999 is construed as a waiver of discrepancy but the same would not confer any liability on the defendant No. 1. In this regard he had relied upon the opinions of ICC Banking Commission, in particular, to query No. 85 and reference No. 267, where the ICC Banking Commission concludes that "the receipt of a waiver from the applicant, either direct or via the beneficiary, does not bind the issuing bank to accept the documents. The decision of whether or not to comply with the waiver is one for the issuing bank to decide in its sole judgment". Similar conclusion is also there in query No. 90, reference 327 where upon analysis and conclusion the ICC Banking Commission has reiterated its earlier opinion.

13. It was argued that it would thus appear that waiver by the applicant does not bind the issuing bank to honour the documents. The question, therefore, according to Mr. Chowdhury would arise that in the instant case though not being obliged to honour the documents legally, did the bank exercise its discretion bona fide. In this context, the local laws are to be taken in consideration and the case of the defendant No. 1 is that the guidelines of the Bangladesh Bank, being the Central Bank of Bangladesh, did not permit release of any money under L/C, unless regulation No. 23 was complied with.

14. He has relied upon the deposition of the witness of the defendant No. 1 to question nos. 151 to 153. In relying upon the regulation Nos. 23, 24, 26 and 27 of the said guidelines, it was argued that once the documents are discrepant, there is no question of entitlement of payment under L/C. The release of payment if documents are discrepant has to be on collection basis and in such a situation, the guidelines come into effect and the exchange control copy of the Customs bill of entry and other documents in compliance of the said guidelines are to be filed by the importer, before the defendant No. 1, being the authorized dealer (AD) can release payment.

15. Mr. Arindam Sinha, learned Counsel appearing on behalf of the plaintiff submitted that although various issues have been raised in the pleadings but the plaintiff would restrict its argument on the aspect of waiver of discrepancies by the issuing bank. It was argued that if a bank refuses a document, it must give notice to that effect to the person from whom the documents are received as contemplated under Article 14 of the UCP 500 which, however, provides that if the issuing bank decides to refuse a document, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but not later than the close of the 7th banking day following the day of receipt of the documents. If the issuing bank fails to act in accordance with the provisions of the article, the issuing bank should be precluded from claiming that the documents are not in compliance with the terms and conditions of the credit. It was argued that it would be evident from the record that the

issuing bank had received the documents on 9th September, 1999 (Exhibit "E5) and on 16th September 1999, the advising bank refused to honour the claim only on the ground of "no reimbursement authority". Subsequently, on 21st September, 1999 the telex dated 19th September, 1999 issued by the issuing bank was received in which the issuing bank refused to accept the said documents on account of certain discrepancies which, inter alia, include "On Board Notation Absent" on the bill of lading. The issuing bank did not consider absence of "On Board Notation on the Bill of Lading" to be an essential condition for negotiating the said documents and the same would be evident from the first communication received by the negotiating bank from the advising bank on 16th September, 1999 which sought to deny payment on a totally different ground, namely, "no reimbursement authority".

16. It was argued that there is an overall time limit for giving notice of the 7th Banking day following the day of receipt of documents and having regard to the fact that the said telex was sent only on 21st September, 1999 which is beyond the time stipulated under Article 14(d) of the UCP 500, it is not open for the defendant No. 1 to refuse the said documents. Moreover, having regard to the subsequent facts, namely, the letter issued by the purchaser dated 27th November, 1999, waiving the discrepancies the issuing bank ought to have released the payment to the plaintiff. The reason for non-release of fund and payment under the L/C appears to be lack of fund being maintained by the defendant No. 3 with defendant No. 1. The plaintiff cannot be made to suffer for the same. The act of the defendant No. 1 in refusing to release fund is contrary to the established universal banking practice and guidelines mentioned in UCP 500.

17. The facts that emerge from the evidence is that at least one discrepancy exists in the documents submitted for negotiations under the L/C. The negotiating bank appears to have admitted such discrepancy.

18. If the documents presented complying with the terms of the credit, it becomes easier for the bank to whom such documents are presented to act in accordance with the terms of the payment obligation. The problem arises where the bank found on examination of documents that the documents do not comply with terms and conditions of the credit. Although Article 14(b) of the UCP 500 used the word "may" which is permissive, a bank taking up documents that are not compliant would not be entitled to reimbursement, such bank would usually refuse to take up the documents where there are discrepancies in the documents. Ordinarily, an issuing bank in the normal circumstances would first seek its customers' instructions as to whether to waive the discrepancies. This does not, however, extend the period mentioned in Sub-Article 13(b) of UCP 500 with regard to the obligation of the issuing bank to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly within 7th banking days following the day of receipt of the documents. This overall time limit for giving

notice of the 7th Banking day following the day of receipt of the documents needs to be adhered to by the issuing bank in terms of the aforesaid articles. Whether the bank has acted without delay is a question of fact. However, it might be difficult to justify a delay to the next following business day unless the decision to release the documents is taken up shortly before the close of business, in which case notification on the next banking day would be expected more so, as there is an overall time limit for giving notice of the seventh banking day following the day of receipt of the documents (*Seaconsar Fort East Ltd. v. Bank Markazi Jomhuri Islami Iran* (1999) 1 Lloyd's Rep. 36). The beneficiary upon being notified that the documents are not compliant may either to seek to remedy the deficiency by presenting a fresh document which is not discrepant or if he is unable to do so for whatever reasons it may be, he might ask the confirming bank to seek a waiver from the issuing bank in relation to the discrepancy. In most of the cases, it depends upon the buyer to waive discrepancies and ratifies issuing bank's acceptance of such discrepant documents. It was obligatory on the part of the bank in such notification stating the discrepancies in respect of which the bank refused the documents and to indicate specially as to whether the bank is holding the documents at the disposal of the presenter or is returning them to the beneficiary and act, accordingly, by placing the documents at the disposal of the presenter. If it does not do so, it would be precluded from claiming that the documents are not in compliance with the credit.

19. The plaintiff is required to establish at trial that the issuing bank had allowed the stipulated period of 7 days to lapse and thereby forfeited its right to refuse the negotiation of the said documents. It has to be established that the issuing bank received negotiated documents and sat over the matter beyond 7 days and is thereby precluded from refusing to make payment under the Letter of Credit. The negotiating bank has not been made a party. A notice to produce was issued to the negotiating bank on the basis of which the negotiating bank had produced few documents. The said documents per se would not establish that the issuing bank had overstepped the period of 7 days from the date of receipt of such documents for negotiation and thereby precluded from refusing to make payment under the Letter of Credit in terms of Article 16(d) of UCP 500. Mr. Sinha had relied upon a telex message dated 9th October, 1999 from the issuing bank to the negotiating bank where the issuing bank had made a reference of a telex dated 9th September, 1999 for USD 10, 750. Mr. Sinha would contend that the said date would show that on that date itself the bank had lodged the claim with the issuing bank. Mr. Sinha had strenuously attempted to establish the said fact from the cross-examination of the witness of the issuing bank. The evidence of the witness on behalf of the issuing bank would not establish that the said issuing bank had overstepped the period and thereby precluded from denying payment. Curiously, the witness of the issuing bank was not asked to produce the fax message dated 9th September, 1999 nor any witness from the negotiating bank was produced in support of the contention that such message

was received by the issuing bank on 9th September, 1999 and in view thereof fax message dated 21st September, 1999 is beyond the period of 7 days and, accordingly, the issuing bank is precluded under Article 16(d) of UCP 500 to deny its obligation to make payment cannot be accepted.

20. It is true that the communication of 16th September, 1999 does not refer to any of the four discrepancies which are mentioned in the subsequent telex dated 19th September, 1999 and sent only on 21st September, 1999, however, it is undisputed that at least one discrepancy was noticed. The issuing bank in communicating the discrepancy categorically stated that they were holding the said documents on collection basis and had referred the discrepancies to the drawee, namely, the buyer. The negotiating bank as also the plaintiff noticing such discrepancies did not take any steps to remove or rectify such discrepancies on or before 25th October, 1999. On 27th November, 1999, the seller in referring to an earlier communication in which the seller appears to have requested the bank to release the payment reiterated that the seller had waived such discrepancies and requested the defendant No. 1, namely, the issuing bank to make payment. The said earlier letter is not on record.

21. Mr. Chowdhury has relied upon the opinions of ICC Banking Commission with regard to if the waiver from the applicant binds the issuing bank to honour the documents. He refers to query Nos. 85 and 90 that were answered by the ICC Banking Commission which are reproduced hereinbelow:--

85. Now the beneficiary is claiming that we have no right to reject the documents due to the following:

- 1) Acceptance of discrepancies by the applicant binds the issuing bank.
- 2) The bank's right to reject documents as per sub-article 9(d)(I) does not apply when a discrepant document is presented.

Therefore, kindly advice us:

- 1) As an issuing and paying bank, are we obliged to negotiate discrepant documents?
- 2) Would a discrepant document be considered as an amendment to the original L/C terms and conditions?

The applicable sub-Articles for the bank to consider are 14(b) and

We presume that question 2 should refer to the fact that if a discrepancy is accepted, whether this becomes an amendment to the credit for any future drawings. The acceptance of one set of discrepant documents does not necessarily imply that documents presented with similar issues will automatically be accepted-Local law would decide on this issue.

Provided sub-article 14(d)(1) is complied with by the issuing bank and a valid rejection of documents is given within the seven banking days following receipt

of the documents, the issuing bank is relieved of its undertaking to effect settlement. The receipt of a waiver from the applicant, either direct or via the beneficiary, does not bind the issuing bank to accept the documents. The decision of whether or not to comply with the waiver is one for the issuing bank to decide in its sole judgment.

90. Whether the receipt by an issuing bank of a waiver from the applicant binds the issuing bank to honour the documents. As you have stated, sub-article 14(c) allows the issuing bank, in its sole judgment, to approach the applicant for a waiver of any discrepancy(ies) observed. In previous opinions, the ICC Banking Commission has decreed that the receipt by an issuing bank of a waiver from the applicant does not bind the issuing bank to honour the documents.

22. Mr. Chowdhury has referred to the guidelines issued by the Bangladesh Bank which is required to be complied with in the event, the payments are to release in favour of the plaintiff on "collection basis".

23. The fact that it was open for the plaintiff and Indian Bank to remove and rectify the one admitted discrepancy during the validity of the letter of credit and claim payment under the L/C, the plaintiff and the negotiating bank having put to notice of such discrepancies and in admitting that one discrepancy exists ought to have taken up and/or rectified the said discrepancy since the issuing bank had categorically indicated that they are holding the documents on "collection basis". The reason for not taking steps in spite of such notice and insisting on payment notwithstanding such discrepancies remained unexplained and the conduct is inexplicable. The negotiating bank was not made a party in the proceeding. The plaintiff would urge that they had no notice of such discrepancies from the Indian Bank until the documents were produced by the Indian Bank on subpoena. This is a matter between the plaintiff and the negotiating bank for which the defendant No. 1 cannot be held liable and/or responsible. The discretion exercised by the defendant No. 1 in not negotiating such discrepant document and accepting the request of the defendant No. 3 on the background of the aforesaid facts cannot be said to be arbitrary.

24. Moreover, as discussed above, the plaintiff has failed to establish that the defendant-issuing bank has refused the said documents beyond the 7th banking day following receipt of the said documents. In view of the aforesaid, the suit stands dismissed against the defendant No. 1.

25. The defendant No. 3 is the overseas buyer. The evidence on record shows that a contract was entered into between the plaintiff and the said defendant No. 3 pursuant whereof the goods were shipped and reached its destination. Prior to shipment, the goods were inspected by the defendant. Even when the controversy relating to the discrepancy of the Letter of Credit was going on between the plaintiff-issuing bank and the negotiating bank, the said defendant, had duly acknowledged its liability and requested the issuing bank to release payment under the L/C. In spite of all opportunities being given to the defendant

No. 3 to contest this proceeding, the said defendant, has failed to appear and file his written statement. The transaction having been proved inasmuch as the said defendant No. 3 had admitted its liability, there shall be a decree for USD 10,750. Inasmuch as the said transaction is a commercial transaction and the goods have not been delivered gratuitously, the plaintiff shall be entitled to interest at the rate of 10% per annum from the date of the institution of the suit till realization.

26. The department is directed to draw up the decree expeditiously. Urgent certified photocopy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.