
(1960) 11 MAD CK 0035

In the Madras High Court

Case No : C.C.C. App. No's. 54 and 61 of 1957

The Eastern Bank Ltd.

APPELLANT

Vs

Sha Misrimal Bharajee, Merchants, Madras and another

RESPONDENT

Date of Decision : 03-11-1960

Acts Referred:

Citation : (1960) 11 MAD CK 0035

Hon'ble Judges : Ramachandra Iyer, J;Rajagopalan, J

Bench : Division Bench

Advocate : V. Tyagarajan and M.A. Rajagopalan, for the Respondent

Judgement

Ramachandra Iyer, J.—This appeal arises out of the decree in O. S. No. 1134 of 1955, which was instituted on the Original Side of this Court as C. S. No. 130 of 1952 and later transferred for disposal to the City Civil Court, Madras. The suit was tried along with O. S. Nos. 1135 and 1144 of 1955. The facts, which gives rise to the claim in the suit, are similar to those in those two suits, except that the terms of the letters of credit in the case are different from those in the other suits. The appellant, who was the plaintiff in the suit (to be referred to as the buyer) entered into three contracts with the British Mercantile Co., New York (to be referred to as the seller) for the purchase of Fresh Monsanto Polystyrene Injection moulding powder (not re-ground) for an approximate value of Rs. 36,250, the quantity, price and the manner of its payment being specified in the contracts. In pursuance of the three contracts, the buyer opened two letters of credit, Exs. B.1 and B.2, with the Eastern Bank Ltd., Madras, the first respondent (which will be referred to as the Bank), for 7625 dollars. The Bank had no branch of its own at New York and they intimated the Marine Midland Trust Co. of New York under Exs. B. 28 and B. 29 to open letters of credit for payment of the bills that might be presented by the seller. In purported performance of the contract, the seller delivered to the Ellerman and Bucknull Steamship Co. (to be referred to as the ship owner) certain consignments in re-used fiber drums. The mate's receipt given to the shipper on the arrival of the goods at the wharf for being

carried by S. S. "City of Luck-now " described them as being packed in "re-used drums." At the request of the seller, the shipowner, after, taking a letter of indemnity to cover against any loss for non-mention of the word "re-used" in relation to the drums, issued clean bills of lading, stating that the goods were received in apparent good order and condition in drums, without in any way qualifying the same. The bills of lading were promptly negotiated by the seller with the Marine Midland Trust Co. New York; he obtained a payment of 6998⁷⁵ dollars under the letters of credit. The bills of lading were, in due course, forwarded to the Eastern Bank Ltd., Madras, who notified their arrival to the buyer; the latter paid into the bank the sum of Rs. 33,749-14-6 under protest (he having become wiser as to the contents of the consignment by reason of previous experience), took the bills and obtained delivery of the goods. The goods were found to contain only coal dust and factory shavings as before. In the action against the shipper in the American Courts, the buyer realised a sum of Rs. 9988-15-0 before the date of the present suit. There has also been a receipt of a further sum of Rs. 3615-10-6 subsequent thereto. The suit, out of which, this appeal arises, was instituted by the buyer for recovery of a sum of Rs. 23,760-15-6 against the bank as well as the ship owner, The claim against the bank was based on the footing, that what were presented to them by the seller were unclean bills of lading which they had no authority to negotiate and pay, and that, at any rate, no payment should have been made under Ex. B-2, the second letter of credit, as the bills of lading, presented as they were on the last day fixed for performance of the contract, did not comprise the entire quantity contracted for. The case against the shipowner was the same as in the other two cases, namely, that there was a misrepresentation, or breach of duty on its part in not disclosing in the bills of lading that the goods were packed in "re-used drums" which, if done, would have prevented the seller from obtaining any moneys under the letters of credit. Both the bank as well as the shipowner contested the suits, the former stating that the documents accepted were in conformity with the terms of the letters of credit, and the latter repudiating its liability to the buyer. The learned trial Judge rejected the case, that the bills of lading presented to the bank were not clean bills; he held that the bank would be acting within its authority in negotiating them. There was, however, an infirmity in regard to the payment under one of the two letters of credit, viz., Ex. B, 2. The learned Judge held that the bank was in error in accepting the shipping documents which related only to a part of the goods contracted for and paying the monies, when they must have known that the buyer was entitled to reject the goods when they arrived at Madras for the reason that the quantity contracted for had not been supplied within the time stipulated. He, therefore, held that the bank was liable to refund the amount paid under the letter of credit, Ex. B. 2 He apportioned the total loss sustained by the buyer, between Exs. B. 1 and B. 2, and, after giving credit for the amounts received after the suit, passed a decree against the bank for a sum of Rs. 8346. The suit against the shipowner was dismissed for the reason that, even if it had mentioned in the bills of lading that the goods were packed in re-used drums, thereby making the

bills unclean ones, the bank would nevertheless have paid the amounts, as the terms of Exs. B. 1 and B. 2 were couched in such a wide language as to authorise payments regardless of the fact whether the bills were clean or unclean. The buyer has filed C. C. C. A. No. 61 of 1957, praying for a decree for the full amount of the claim against the shipping company, and also for the balance of the amount against the bank. The bank has filed C. C. C. A. No. 54 of 1957, against the decree which directed them to pay the sum of Rs. 8436 to the buyer.

2 The learned Counsel for the parties submitted that it would be convenient to dispose of first the liability of the shipowner, leaving the liability of the bank to be determined after that has been ascertained. We, therefore, proceed to consider C. C. C. A. No. 61 of 1957 in so far as the claim against the shipowner, the 2nd respondent, is concerned.

3 In the judgment delivered just now in the connected appeals C. C. C. A. Nos. 52 and 53 of 1957, we have discussed the liability of a shipowner in regard to representations made in bills of lading. It is unnecessary to advert to that matter again. As we indicated earlier there is one important feature which distinguishes this case from the other two appeals, namely, the terms of the letters of credit. For the reasons which we have given in the judgment in the other appeals, it must be held that the shipowner, with the knowledge that the bills of lading would be negotiated, gave at the request of the seller clean bills of lading, while as a matter of fact only unclean bills of lading should have been given. What remains to be considered then is whether the loss sustained by the seller was the direct result of the shipowner's conduct or would have occurred independent of it. The shipowner's case is that, having regard to the comprehensive terms of the credit, loss would have occurred even if it had granted unclean bills. It is necessary, therefore, to consider whether that is so.

4 Ex. B-1 is typical of the two letters of credit opened by the buyer with the Eastern Bank Ltd. The material portion of the letter is as follows :

We here by authorise and request you and/or your Agents and/or representatives at New York to open a confirmed and irrevocable bank credit in favour of Messrs. British Mercantile Co., Ltd., etc., and to make payment or payments thereunder on our behalf...against documents purporting to be invoices, shipping specifications, bills of lading and policies and/or certificates of insurance covering marine and war risks.....we agree that this credit is subject to U. S. A., regulations and practice.

You and/or your agents and/or representatives are not to be responsible in any way for the genuineness, regularity or accuracy of such documents, if apparently in order It is understood that this agreement and all questions arising thereunder are to be construed according to English law.

5. It will be seen that the terms of the letter of credit do not expressly stipulate that payment thereunder should be made only on presentation of clean bills of

lading.

6. As stated earlier, in pursuance of Exs. B-1 and B-2, the bank opened in its turn irrevocable letters of credit with the Marine Midland Trust Co., of New York. Exs. B-28 and B-29 are the two letters of credit opened by the Eastern Bank Ltd., with the bank at New York. Exs. B-28, which can be taken as an example, proceeded to set out the purport of Ex. B-1. Cl. 3 therein described the nature of the shipping document on which payment could be made; that stated :

Clean "On Board" the bills of lading in complete sets of at least two signed copies to be made out to the order of the Eastern Bank Ltd., or to order blank endorsed and marked by the shipping Co., "freight paid.

7. Thus, whatever might be the meaning to be attached to or the effect of the letter of credit opened by the buyer with the bank at Madras, the latter, acting in pursuance of the authority of the constituent, opened letters of credit with the New York banker, expressly stipulating that the payment should be made only against clean bills of lading. The learned Counsel for the appellant contended that it was the duty of the shipowner to have issued a bill of lading with a recital that the drums used for packing were re-used drums, and that its failure to do so, in the circumstances of this case, enabled the seller to obtain monies from the bank at New York which he would not have otherwise got. In support of that contention, it was urged that it was really immaterial whether the terms of Exs. B. 1 and B. 2 did not specifically restrict payment only against clean bills of lading, as, according to the learned Counsel, whenever a credit note authorised payment against bills of lading, it must be read as authorising payment against clean bills of lading. In other words, even though a letter of credit did not, on its terms, preclude a payment against an unclean bill of lading, the recognised practice was to interpret the letter as authorising payment only against clean bills of lading. It is said that the practice is so universal and so well understood by the commercial community as to justify a technical meaning being given to the word "bill of lading" (except where there are express words indicating a contrary intention) in a letter of credit as a clean bill of lading. In our opinion, the contention appears to be well founded.

8. In Halsbury's Laws of England, (Simonds Edn.), Vol. 2, at page 218, it is stated that the bills of lading ""must be clean unless the credit authorises the acceptance of bills which are not." In the Law of Banker's Commercial Credits by Gutteridge, 2nd Edn., it is stated at p. 65:

In the absence of any instructions in the banker's mandate the documents must be such as are usual in the trade in question, and which the customer could in his turn require a sub-purchaser to accept in satisfaction of a contract of re-sale. To use the words of Lord Sumner in *Hansson v. Home I and Horley*, The documents have to be handled by banks, they have to be taken up or rejected promptly and without any opportunity for prolonged inquiry; they have to be such as can be re-tendered to sub-purchasers, and it is essential that they

should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce. Or, as has been said, the documents must be in merchantable order.

9. Commenting on the above extract, note (g) in the same page stated:

It was apparently on this ground that it was suggested by Scrutton L.J., that where a credit calls for the tender of bills of lading it is implied that "clean" bills of lading are meant; *National Bank of Egypt v. Hannavig's Bank* (1919) 1 LR 69.

Again at p. 77

There is no doubt that it is the universal practice today to decline bills of lading which are not clean except where the bank has authority to accept unclean bills or where he feels justified in taking the risk; A banker cannot be expected to know what bills of lading are used in particular trades [of *Raynor v. Hambros Bank* (1943) 1 K. B. 37], and it is submitted that even where a bill is usual in the trade a paying banker would be entitled to reject a "dirty" bill, unless he had authority to accept it—in other words, a "dirty" bill cannot normally be in the contemplation of the buyer for, save in abnormal circumstances, a buyer would prefer to have documents declined by his banker's correspondent than have the trouble of suing his supplier for breach of contract, at any rate, where the bill of lading disclosed what seemed to be a weakness in the goods or packing which might affect their value. And a banker is not in a position to judge of the seriousness of the "clashing," certainly not to the extent of knowing whether the buyer would wish him to accept or refuse.

10. In *British Imex Industries v. Midland Bank* (1958) 1 AER 264, the relevant agreement was a general one as in the instant case. It did not stipulate that a credit was available only against presentation of clean bills of lading. Salmon J., observed at p. 268 :

The letter of credit stipulated that payment would be made against bills of lading without qualification. The plaintiffs suggest that this does not necessarily mean clean bills of lading. In my judgment when a credit calls for bills of lading, in normal circumstances it means clean bills of lading. I think that in normal circumstances, the ordinary business man who undertakes to pay against the presentation of bills of lading means clean bills of lading; and he would probably consider that that was so obvious to any other business man that it was hardly necessary to state it. That seems to have been the view taken by Bailhache J. in *National Bank of Egypt v. Hannavig's Bank Ltd.* (1919) 1 LR 69. I entirely agree with it. No doubt, as was pointed out by the Court of Appeal in that case (*ibid* at p. 70), there may be circumstances when, for instance, business has been disorganised by war, in which a credit against bills of lading is not necessarily a credit against clean bills of lading. That is a point which it is unnecessary to decide in this case, for in this case there are no special circumstances, and I read "bills of lading" in the letter of credit as meaning clean bills of lading.

11. The argument of Mr. O. T. G. Nambiar for the shipowner was not so much as to say that that was not the practice of the banks, but that under the usage recognised in commerce the use of the word "re-used" in the description of the packing material would not make the bill unclean. The learned Counsel contended that, in the interpretation of Exs. B. 1 and B. 2, the English Law and English commercial usage should not be looked into, as the document itself stated that the credit was subject to U. S. A- regulations and practice. This, according to the learned Counsel, imported the American commercial practice contained in Ex. B. 27, namely, "Uniform Customs and Practice for Commercial Documentary Credit" issued by the International Chamber of Commerce. Cl. 18 of Ex. B. 27, which we noticed in the other appeals, stated that a bill would not be deemed to be unclean merely because the word "re-used" is used with reference to a package. The learned trial Judge has given reasons why the "Uniform Customs and Practice" should not be adopted in the present case. We agree with him. For one thing Ex. B. 27 came into existence in 1951, later than the date of the suit documents; there is no evidence about the earlier commercial practice. We have adverted in our judgment in the connected appeals to the fact, that the practice set out in Ex. B. 27, was merely recommended for adoption. The letter of credit in the instant case specifically states that all questions arising thereunder are to be construed according to English Law. In our opinion, if the words "re-used drums" had been used in the bills of lading with reference to the packages received on board, the bills would have been unclean ones.

12. The authorities, to which we have referred above, show that, if a letter of credit authorises payment against bills of lading, such payment should be made only against clean bills of lading. This view is confirmed by the fact, that the bank itself understood Ex. B. 1 only in that sense. The bank, while opening the credit with its agent at New York in pursuance of Ex. B. 1, executed Ex. B. 28. That document specifically stipulated that payment by the New York banker should be only against clean bills of lading. Mr. Barker, the accountant of the Eastern Bank Ltd., while giving evidence stated, "We wrote to our agents the details of the credit in our letter copy Ex. B. 28 and B. 29." He also stated that the rules contained in Ex. B. 27 were recommendations, and had not been circularised to the banker's constituents. It is clear from the evidence that Ex. B. 1 was interpreted or understood by the parties as authorising payment only against clean bills of lading, and this is consistent with the law and practice stated above. Indeed, there is no evidence in this case that the clause was ever interpreted otherwise.

13. On behalf of the shipowner, it was contended that this plea was not taken in the plaint, and that, therefore, it should not be allowed to be taken in appeal. A reading of paragraph 6 (f) of the plaint and paragraph 13 of the written statement would make it clear that what the parties contemplated was only negotiation of clean bills of lading. The correspondence between the parties also shows that the parties themselves construed the authority to the bank under

Exs. B. 1 and B. 2 as warranting payment on presentation of clean bills of lading. In Ex. B. 18, a letter written by the buyer to the shipowner's agent, it was specifically stated that the banker of New York, had been instructed to accept only clean bills of lading. There is no denial of that statement in the reply, Ex. A. 25. Again, in Ex. B. 24, the notice issued by the buyer to the shipowner, it was reiterated that, if the shipowner had correctly stated that there was defective packing in re-used drums that factor alone would have been sufficient to entitle the banker to refuse to negotiate all the drafts. There was no denial of this in the shipowner's reply, Ex. A. 25. It must, therefore, be taken as proved that on the terms of Exs. B. 1 and B. 2, the bank could only have paid on presentation of clean bills of lading.

14. The learned Counsel for the shipowner contended that, notwithstanding the practice referred to above, a bank could not be said to be acting in excess of its authority, if it interpreted a letter of credit according to its tenor. We cannot, however, accept the contention, in the view we have taken, namely, Exs. B. 1 and B. 2, understood in accordance with the usage in commerce, would entitle the bank to pay only against clean bills of lading- It follows that the failure of the shipping company to disclose the fact that the drums used were re-used drums, had enabled the seller to obtain monies under credit, and that it should, therefore, be held liable for the loss.

15. This conclusion can be reached by another line of reasoning as well. Assuming that Exs. B. 1 and B. 2 authorised payment against even unclean bills of lading, what the Eastern Bank Ltd., did was to open letters of credit in terms of Ex. B. 28 and 29 with the intermediary or paying banker, namely, the Marine Midland Trust Co., of New York. The authority of the bank of New York was limited by the terms of Exs. B. 28 and 29. Those documents admittedly did not authorise negotiation of unclean bills of lading. Therefore, the New York Bank would not have paid if the shipowner had issued bills of lading making a correct representation of facts. The damage sustained by the buyer by reason of the payment by the American Bank would, therefore, be directly attributable to the default of the shipowner.

16. The learned City Civil Judge declined to hold the shipping company liable on the ground that, even if the concerned bills of lading had described the drums as re-used drums, the banker would have been within his rights in paying the amount to the shipper. This is obviously incorrect, having regard to the terms of Exs. B. 28 and 29 which do not authorise payment against unclean bills of lading.

17. Learned Counsel for the shipowner then argued thus: the authority of the banker in the instant case would have to be decided only on the basis of Exs. B. 1 and B. 2 and not on the terms of Exs. B. 28 and 29, as there was no privity of contract between the bank at New York, and the buyer. If the bank at New York had paid in excess of authority conferred on it under Exs. B. 28 and 29, it was entirely a matter between itself and its principal, namely, the Eastern Bank Ltd., which could ratify the acts of its agent done in excess of authority; the buyer

could have no legitimate grievance except when the terms of Exs. B. 1 and B. 2 were contravened.

18. We cannot agree with this contention. If the question arose between the Eastern Bank Ltd., and the constituent, it may be (we are not to be understood as deciding the point) that the former could plead that its liability to the latter should be decided on the terms of Exs. B. 1 and B. 2. That is not the case here. The point for consideration is whether the shipowner's breach of his duty or a fraudulent misrepresentation by it in a document of title, has directly resulted in a loss to the buyer. In the proved circumstances of the case, it is clear that the New York Bank would not have paid against unclean bills of lading. One cannot assume for this purpose that the paying bank at New York will not act upto the terms of Exs. B. 28 and 29, and proceed to pay the seller in excess of its own authority. There is a causal connection between the default of the shipowner and the loss, and this would be sufficient to sustain the claim of the buyer for damages against the shipowner. We are, therefore, unable to agree with the conclusion arrived at by the learned Judge that this loss was not the direct result of the omission on the part of the shipowner to issue unclean bills of lading. The result is that the appellant would be entitled to a decree against the shipping company for the sum of Rs. 20,145-5-0 with subsequent interest and costs here and in the Court below. The appeal in so far as it relates to the Eastern Bank Ltd., will be adjourned to 3rd November 1960.