(2005) 10 BOM CK 0068

In the Bombay High Court

Case No : Summons for Judgment No. 783 of 2003 in Summary Suit No. 897 of 2000

UBS AG — APPELLANT

Vs

State Bank of Patiala — RESPONDENT

Date of Decision : 28-10-2005

Acts Referred:

Citation : AIR 2006 Bom 73 : (2005) 4 ALLMR 990 : (2006) 3 BC 254 : (2006) 1 BomCR 62 : (2005) 107 BOMLR 815

Hon'ble Judges : S.U. Kamdar, J

Bench : Single Bench

Advocate : V.R. Dhond and Bhavini Menon, instructed by Humranwala and Co., for the Appellant; Virag Tulzapurkar, instructed by Wadia Ghandy and Co., for the Respondent

Judgement

This Judgment has been overruled by : UBS AG Vs. State Bank of Patiala, AIR 2006 SC 2250 : (2006) 3 BC 188 : (2006) 131 CompCas 399 : (2006) 3 CTC 600 : (2006) 11 JT 155 : (2006) 5 SCALE 492 : (2006) 5 SCC 416 : (2006) 3 SCR 239 Supp : (2006) AIRSCW 2731 : (2006) AIRSCW 1672 : (2006) 3 Supreme 37 : (2006) 5 Supreme 503

S.U. Kamdar, J.—The present three suits are filed under various Letter of Credit in U.S. Dollar. The terms and conditions of the said Letter of Credit covered by all three suits are identical and the defences raised in the present Summons for Judgment are also identical. All these three Summons for Judgment are therefore disposed off by this common order.

2. For the purpose of the present judgment the facts of one of the suit being Summary Suit No. 897 of 2000 is taken into consideration. The suit is filed for the recovery of U.S. Dollar 1,320,900 equivalent to Rs. 5,67,700/-. The claim arises on the basis of Letter of Credit. The few facts of the present case are briefly set out as under :

3. On 27.3.98 the defendant issued an irrevocable Letter of Credit for the sum of U.S. Dollar 1,320,900 in favour of the plaintiff bank. The said Letter of Credit was issued at the instance of company known as M/s. Hamco Mining and Smeltings Ltd and the beneficiaries were M/s. Forbevia S.A. The said Letter of Credit is supposed to have been issued for import of 255 tin ingots by M/s. Hamco Mining and Smeltings Ltd. On 30.3.98 the plaintiff confirmed the said Letter of Credit as issued by the defendant. The said Letter of Credit was originally valid till 23.9.98. On 6.4.98 the plaintiff bank made the payment under the said Letter of Credit to their constituent namely M/s. Forbevia S.A. who were the beneficiaries thereunder. On 22.7.98 the defendant issued a letter to the plaintiff accepting that they will make payment on the maturity date of the said Letter of Credit being 23.9.98. On 21.8.98 at the instance of M/s. Hamco Mining and Smeltings Ltd the defendant issued an extension of the maturity date of the said Letter of credit from 23.9.98 to 21.3.99. On 31.8.98 the plaintiff confirmed the said extension of maturity date. On 3.2.99 the advocate for the defendants informed the plaintiff about the fraud perpetuated by the applicant M/s. Hamco Mining Smeltings Ltd and beneficiaries M/s. Forbevia S.A. and put the plaintiffs on caution that there is a difficulty in honouring the said Letter of Credit and therefore the plaintiff should not negotiate the said export bills presented by the beneficiary. On 23.3.99 the plaintiffs called upon the defendant to remit the payment under the said Letter of credit and claimed that they will raise interest claim also. On 27.3.99 the defendants through their advocate stated that they will not be honouring the said Letter of Credit as the contract of Letter of Credit has been vitiated by fraud played by M/s. Hamco Mining and Smeltings Ltd and beneficiaries M/s. Forbevia S.A. On 7.4.99 the plaintiff rejected the contention of the defendant and demanded the payment of the amount. Ultimately on 30.6.99 the plaintiff addressed an advocate''s notice and since the payment was not made has consequently filed the present suit. In the present suit the Summons for Judgment is taken out for entering the judgment inrespect of the aforesaid claim amounts.

4. It is the case of the defendant that it has also come to their notice that a fraud has been committed in issuance of the said Letter of Credit. It is has come to the notice of the defendant that the constituent of the dependant bank while issuing the Letter of Credit has tendered various documents which are forged and fraudulent and thus the L.C. has been obtained by using the said fraudulent documents. This issue as to the fraud committed by the said constituent namely the promoters of M/s. Hamco Mining and Smeltings Ltd is a subject matter of investigation by the Director of Enforcement. It is the case of the defendant that the said Letter of Credit was obtained by the said Director with an intention to siphoned out a huge amount of money to a country outside India and in the commission of the said fraud the aforesaid Letter of Credit has been obtained by the said M/s. Hamco Mining and Smeltings Ltd. Thus it is the case of the defendant that they have been defrauded by their constituent namely M/s. Hamco Group of Industries in obtaining the said Letter of Credit. It is also the

case of the defendant that it has also come to their notice that the said Letter of Credit was issued and is sought to be encashed without import of any goods and on the basis of bogus documents. It is the case of the defendant that even the bill of lading and shipping documents used for obtaining the Letter of Credit and subsequent encashment thereof are fraudulent. In the aforesaid facts of the case the defendant informs the plaintiffs that they will not honour the said Letter of Credit and will not make the said payment on the date of maturity.

5. On the other hand the plaintiffs have contended that as far as the Letter of Credit is concerned it is a written contract and on the date of maturity i.e. 21/3/99 the defendants are bound and liable to perform the said commitment. Learned counsel for the plaintiff has contended that as far as the plaintiffs are concerned they are entitled to the said amount firstly because the Letter of Credit was valid, in so far as they are concerned. Secondly because even before communication by the defendant of the so called fraud played by the constituent of the defendant the plaintiffs had already paid over the amount to the beneficiary and thus are entitled to recover the same from the defendant.

6. On the other hand the learned Counsel for the defendant has contended that in the light of the fact that the Letter of Credit has been obtained by using fraudulent documents the defendant is not bound and liable to discharge his obligation under the said contract of Letter of Credit and in any event this raises a triable issue as to the validity of the said Letter of Credit issued by the defendant. It is also contended by the learned Counsel for the defendant that the case of the plaintiff that they have paid over the amount to the beneficiary ought not to be accepted because the original date of the maturity of the said Letter of Credit is 23.9.98 which has been extended admittedly to 21.3.99 and thus the plaintiff ought not to have made the payment till and until the date of the maturity. The defendant is not liable for the prior payment made by the plaintiff and therefore the defendant should not be made to pay merely because the plaintiff has paid the amount to their beneficiary.

7. It has been contended that the discounting of letter of credit by the plaintiff on 6.4.98 to the beneficiaries is a separate and independent transaction uncovered by the present letter of credit and if the plaintiff has any right to sue inrespect of the said discounting facility then the plaintiff should do so as against the beneficiary but cannot saddle the defendant with the liability in the present case when there is ex-facie fraud for in obtaining the said letter of credit. The learned Counsel for the plaintiffs has replied upon the judgment of the apex court in the case of Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others, and has contended that in so far as the fraud is concerned the plaintiff is not concerned with the so called fraud in obtaining the letter of credit because the plaintiff''s bank does not deal with the goods but only deals with the documents and the letter of credit transaction has to be treated as an independent transaction and cannot be affected by the so called fraud committed by the M/s. Hamco Mining and Smeltings Ltd.

8. It is further contended that under Clause 8 of the said Letter of Credit the plaintiff bank was entitled to negotiate and encash the said Letter of Credit and therefore discounting done by the plaintiff bank on 6.4.98 before the date of the maturity was legal and valid. It has been thus contended that once they have made payment to the beneficiaries as covered by the Letter of Credit then subsequent discovery of fraud by the defendant bank cannot put the clock back so as to make the Letter of Credit valid which has been already worked out by payment thereof. I have considered the rival contentions of the parties and I am of the opinion that a serious triable issue arises in the present suit. Firstly it is clear from the record that the fraud has been discovered in obtaining the Letter of Credit. The directors of the Hamco Mining and Smeltings Ltd have used fraudulent documents including the Bill of lading and shipping documents for the purpose of obtaining the said Letter of Credit. No goods have been imported and thus in my opinion prima-facie the said Letter of Credit document is vitiated by fraud which has been committed by Hamco Group of Industries as against the defendants in obtaining the said Letter of Credit. Secondly the contention of the learned Counsel that under Clause 8 of the agreement the plaintiff was entitled to encash and negotiate the said Letter of Credit cannot be accepted because prima-facie Clause-8 of the said agreement does not pertain to any discounting of the said Letter of Credit. According to me the discounting facility advanced by the defendant bank to his customer is an independent facility dehorse the Letter of Credit. If under the said independent facility the defendant has discounted the Letter of Credit and paid the beneficiary then in that event the plaintiff is not entitled to claim the amount on the ground that the amount having been paid to the beneficiary the plaintiff is entitled to the said amount. In my opinion the present suit raises serious triable issue and in that view of the matter I grant unconditional leave to defend the suit to the defendants.

9. Both the parties agree that other two Summons for Judgment being Summons for Judgment No. 784 of 2003 and Summons for Judgment being 786 of 2003 are identical and therefore for the same reasonings I grant unconditional leave to defend, suit is transferred to the list of Commercial Causes. Written statement or points of defence to be filed four weeks from today. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes. All the three Summons for Judgment dismissed in the said suits accordingly.

