
(1987) 11 DEL CK 0026

In the Delhi High Court

Case No : Interim Application No. 6850 of 1986 and Suit No. 2555 of 1986

U.K. Paints (P) Ltd.

APPELLANT

Vs

Oriental Bank of Commerce and Others

RESPONDENT

Date of Decision : 10-11-1987

Acts Referred:

Citation : (1991) 70 CompCas 609 : (1987) ILR Delhi 513

Hon'ble Judges : Jagdish Chandra, J

Bench : Single Bench

Advocate : Rajeev Sawhney, C.R. Soma Sekharan and R.S. Sharma, for the Appellant;

Judgement

Jagdish Chandra, J.

(1) This is an application of the plaintiff U.K. Paints (India) Pvt. Ltd. New Delhi against defendant No. 1 Oriental Bank of Commerce (A Govt. of India Undertaking). Nehru Place New Delhi under Order 39 Rules 1 and 2 of the CPC seeking to restrain the letter from appropriating any of the present or future credit balances in any of the plaintiff's account with defendant No. 1 towards the retirement of the documents received against the latter of credit No. NP/URD/ILC/86/162 dated 11-9-1986 opened by the plaintiff with defendant No. 1, as also restraining defendant no. 1 from appropriating/utlising or otherwise admitting the sum of Rs. 40 lacs deposited by the plaintiff with defendant no. 1 and held under Fixed Deposit Receipt No. 476/86 dated 11-9-1986.

(2) Defendant No. 2 Drechat Chemic B. v. Spuiweg 74. 3311 G.V. Dordrecht, Holland is the foreign seller having defendant No. 4 Vijay Dyes and Chemicals, Bombay as its agent in India. Defendant No. 2 is a Dutch Trading Company carrying on the business in the whole-sale export of Chemicals including Titanium Dioxide, pharmaceuticals from Holland. Defendant No 3 is a Dutch Bank through whom defendant no. 2 had negotiated that Letter of Credit opened by the plaintiff With the bank-defendant no. 1.

(3) Vide telex dated 28-8-1986 defendant No. 2, through its agent defendant no. 4 offered to supply to the plaintiff "RL 68 Rutile Titanium Dioxide at the rate of Us \$ 2060 per metric ton Gif Bombay, and the plaintiff confirmed the same vide its telex dated 29-8-1986. On 1-9-1986 the plaintiff received a telex message from defendant no. 4 (acting as agent of defendant no. 2) advising the plaintiff that defendant no 2 had confirmed the order for supply of 300 Mt of the said goods, and requested that the letter of credit be opened by the plaintiff immediately in favor of defendant No. 2. The plaintiff also received from defendant no. 4 the Indent No. SLH/Drecht/2501 dated 1-9-1986. The plaintiff accordingly opened an irrevocable letter of credit dated 11-9-1986 with the bank-defendant no. 1 for Us \$ 309.000 Gif Bombay in favor of defendant no. 2 covering shipment of 150 Mt of the said goods as per the aforesaid Indent dated 1-9-1986, available, by negotiation of drafts drawn on the plaintiff as applicant at sight for 100 per cent of the invoice value accompanied by a set of various documents and subject to various conditions and instructions therein contained. One of the conditions of this Letter of Credit was that the negotiating Dutch Bank defendant no. 3 could claim reimbursement from the Bank of California. International, New York, Usa which had been authorised by the issuing bank defendant no I to honour the claims of Dutch Bank defendant no. 3 drawn under the said credit if the documents were as per the conditions incorporated in the said letter of credit.

(4) On 23-9-1986 the plaintiff received from defendant no. 2 directly a telex advice confirming that they had shipped 150,000 Kg. net weight of the said goods of the value of Us \$ 309.000 by Weiho Career Rotterdam, Bombay on 23-9-1986 vide Bill of Landing No. 10.

(5) Defendant no. I received directly from Dutch Bank defendant no. 3 on 617 October 1986 by post a set of documents stated to have been negotiated by defendant no. 3 against the letter of credit and when the plaintiff saw those documents, the plaintiff found a number of discrepancies therein and pointed out the same to the officials of defendant no. 1 and further told that for reasons of discrepancy the documents were not acceptable to it (plaintiff).

(6) Thereafter, the plaintiff contacted defendant no. 4 agent of defendant no. 2 on 8-10-1986 and advised them that the documents received against the L.C. were not in order and were not being cleared from the bank-defendant no. I and this was further confirmed by the plaintiff by its telex dated 9-10-86 sent to defendant no. 2. Defendant no. 4, in turn, advised its principal defendant no. 2 vide telex dated 8-10-1986 about the various discrepancies found on the documents and requested for its clarification in respect thereof.

(7) On 15-10-1986 defendant no. I handed over a formula presentation memo dated 7-10-1986 which, however, was not accompanied by any documents. On 17-10-1986 defendant no. 1. sent a telex message to the Dutch Bank defendant no. 3 confirming that the documents received against the L.C. had various discrepancies and were not, Therefore, in accordance with the terms of the L.C.

and were, thus, being held by defendant no. 1 at the disposal of defendant no. 3 and for their further instructions.

(8) On 22-10-1986 the plaintiff received from defendant no. 4 a telex message reproducing therein the telex message received by defendant no. 4 from their principal defendant no. 2 wherein they suggested the return of the documents and offered to send the documents after renewal and a copy of this was handed over by the plaintiff to defendant No. 1.

(9) But defendant no. 1, however, insisted that the plaintiff also submitted a formal letter in reply to its presentation memo dated 7-10-1986 which had been handed over to the plaintiff on 15-10-1986, and so a formal reply was given by the plaintiff vide letter dated 23-10-1986 confirming that in view of various discrepancies in the documents that plaintiff was not accepting the same. The plaintiff also advised defendant no. 1 that on account the said discrepancies in the documents, defendant no. 2 had agreed to take back the documents.

(10) A registered A.D. letter dated 27-10-1986 was sent by defendant no. 1 to the plaintiff wherein it was stated that in its opinion the discrepancies pointed out by the plaintiff in its letter dated 23-10-1986 were not justified but nevertheless defendant no. 1 was taking up the matter with the foreign bank defendant no. 3. It was further stated in that letter that the plaintiff was liable to pay the amount of the bill, i.e, Rs, 40,08,124.80 P. together with up-to-date interest at the rate of 17.5 per cent and their commercial/telex charges and the plaintiff was called upon to provide sufficient funds in its accounts to meet that liability. On receipt of this letter the plaintiff's representatives contacted defend no. 1 and advised that its demand was unjustified and the documents received against the L.C. having been rejected were to be returned to the foreign bank defendant no. 3 without payments. But by another letter dated 10-11-1986 defendant No. 1 again made the same demand on the plaintiff for retiring the documents against the L.C. by further asserting that the documents are drawn strictly in accordance with the terms and conditions of the L.C. and further that the Dutch Bank defendant no. 3 had reimbursed itself by debiting defendant no. 1 head office account on 29-9-86, and that defendant no, 1 could not send back the documents to defendant no. 3 as requested by the plaintiff, since the documents were strictly drawn as per L.C. terms, In this letter defendant no. 1 further threatened the plaintiff that in case of " default on the part of the plaintiff in the matter of retiring the documents, defendant no. 1 would appropriate a fixed deposit of Rs. 40 lacs made by the plaintiff with defendant no. 1 as the said fixed deposit amount was being held by defendant no. 1 as margin against outstanding under the L.C. or for the adjustment of import bills. The averments in this letter were refuted by the plaintiff vide its letter dated 11-11-1986 and the plaintiff stood fast to its earlier position and advised defendant no. 1 not to remit any money against the L.C. on the basis of the afore said defective documents and also not to appropriate the amount of plaintiff's fixed deposit of Rs. 40 lacs.

(11) The plaintiff had come to know by 11-11-1986 that in fact the vessel Weiho Career had not carried the goods in question for which reason the bill of lading dated 23-9-1986 attached with the L.C. is asserted by the plaintiff as totally false with a further assertion that an attempt has, thus, been made to defraud the plaintiff and that defendant no. 2 had fraudulently negotiated false and incorrect documents against the L.C. The plaintiff vide telex dated 11-11-1986 informed defendant no. 2 that the plaintiff had received no information from defendant no. 2 regarding the goods' shipment and that it had been confirmed that goods were not on the vessel Weiho Career. In this telex the plaintiff called upon defendant no. 2 to advise its banker defendant no. 3 to call back the documents and to pay interest and other bank's charges. Immediate reply by return telex as to what action was being taken was solicited in this telex failing which legal action was threatened. A letter dated 12-11-1986 issued by Mis. Parekh Marine Agencies (P) Ltd., Bombay, the agents of the shipping company in question that issued the Bill of Lading, confirmed that the consignment of 150 Mt of the said goods had not been loaded on the vessel M.V. Weiho Career.

(12) The plaintiff, for the first time, received on 17-11-1986 from defendant no. 1 a set of photo-copies of the documents received by it from defendant no. 3 and negotiated by defendant no. 2 under the L.C., and the original documents were never given to or accepted by the plaintiff and the same have remained with defendant no. 1 as the same had been rejected by the plaintiff being not in accordance with the terms and conditions of the L.C.

(13) The plaintiff has pointed out a number of defects in title various documents in para 35 of the plaint and the same are reproduced below :- "(a) The Bill of Exchange is defective and not in accordance with the terms of the Letter of Credit as it does not bear the license number which is in contravention of Condition No. 17 of the L.C. (2) The Invoice is defective and not in accordance with the terms of the L.C. as- (a) The Invoice states that 150,000 kgs net weight of Titanium Dioxide Rutile Grade RI 68 is as per indent No. SlnlDrecht12501 dated 1-9-86 of M/s. Ajay Dyes and Chemicals, Bombay." whereas in terms of the L.C. the indent is of M/s. Vijay Dyes and Chemicals, Bombay", and ""Messrs Ajay Dyes and Chemicals, Bombay" who are a totally, unknown party and whose indent is neither known to the plaintiff and the pods supplied against the indent of M/s. Ajay Dyes and Chemicals are not acceptable to the plaintiff. (b) Further, the indent issued by M/s Vijay Dyes & Chemicals of Bombay bears "No. SLH/Drecht12501 "whereas the indent referred to in the invoice bears No. "SLn/Drecht/2501." 519 (c) The invoice bears a certificate that the goods are of "Dutch Origin", whereas in terms of the indent dated 1-9-86 which is mentioned in the opening paragraph of the Letter of Credit and as such forms and integral part of the L.C. it is expressly provided that the country of origin of the goods in question is to be "France". (d) Under the terms of the Letter of Credit read along with Indent, the shipping marks are required to show the goods as "made in France" whereas there is no such mention on the invoice under the heading "Marks and NRS". (3) There is no manufacturer's analysis report filed in

contravention of Condition No. 8 of the L.C. The L.C. read along with the indent clearly stipulates that the French manufacturer's certificate "analysis report must be attached. A document purporting to be an analysis report signed by defendant no. 2 itself has been submitted which is not a document called for under the L.C. (4) There is no Certificate of Quality issued by the manufacturer of" the goods submitted in contravention of Clause 6 of the L.C. A document purporting to be a Certificate of Quality and signed by defendant no. 2 has been received along with the other documents but it is not a document stipulated under the L.C. Further, even this purported certificate of quality enclosed states that the material shipped is as stated in Indent No. SLH/Drecht 2501 dated 1-9-1986 of M/s. Vijay Dyes and Chemicals" whereas the Letter of Credit refers to Indent "No. SLN/Drecht/2501 dt. 1-9-1986". (5) The Certificate of Origin is not in accordance with the provisions of the L.C. read along with the letter of indent as they expressly provide that the country of origin of the goods to be "France"; whereas the certificate received under the Letter of Credit indicates that the country of origin of" the said goods is "Netherland". (6) In contravention of clause 7 of the L.C. no corticated from the steamer company has been provided declaring that the carrying vessel is a Conference Line Vessel or a vessel registered with the Lloyds and not more than 15 years of age. The vessel on which the goods were allegedly shipped is M.V. Weiho Career and Coil Shipping and Transport B. V. that has issued the certificate does not state that it is the steamer company and it also does not state that M.V. Weiho Career is the carrying vessel. (7) The said certificate is in contradiction to the Bill of Lading which indicates that the shipping company is M.T.O. Maritime Transport Overseas Gmbh. (8) The Bill of Lading is contrary to the term of the L.C. which required that a "Stripped on board" bills of lading were required to be furnished. A shipped on board bill of lading can be issued only by the master of the Vessel and in the present case the bill of lading has been issued by "Coil Shipping and Transport BV" and that too as accept only. (9) The Bill of Lading appears to be an incomplete document as the document received with the defendant no.1 has printed on it "page 2", and "page I" of the said document has not been received and Therefore the contents of the said page-1 or the terms and conditions that may be stipulated therein are not to the notice of the parties, and hence the Bill of lading being an incomplete document is not acceptable. (10) The Insurance Policy is in contravention of Article 35 of the Uniform Customs and Practice for Documentary Credits subject to the terms of which the said Letter of Credit was opened. The Insurance cover is issued by Mees & Zoonen Insurance Brokers and Pension Consultants; whereas Article 35 of the Uniform Customs and Practices for Documentary Credits expressly states that such cover notes issued by brokers "will not be accepted unless specially authorised by the credit" and there is no such authority under the credit.

(14) Among the defects pointed out above the certificate of the origin of goods is glaringly defective in as much as in the letter of indent dated 1-9-1986 which finds mention in the opening paragraph of the letter of credit and as such forms

an integral part of the L.C., it is expressly provided that the country of origin of the goods in question is to be "France" whereas invoice bears a certificate that the goods are of "Dutch Origin".

(15) The learned counsel for the plaintiff contended that the bank-defendant no. 1 which issued the letter of credit was bound to peruse the documents received from the foreign bank from Holland meticulously and so to be sure that the documents received were in exact compliance with the terms of the L.C., and in view of the defects therein was not bound or entitled to honour the bill-of-exchange drawn by the seller and sent through the Dutch Bank along with other documents, and the necessary consequence thereof would be that defendant No. 1 was not entitled to receive the price of the goods in question from the plaintiff who had rejected the documents being defective, as pointed out above (being not in conformity with the letter of credit), nor was defendant no. 1 entitled to appropriate or utilise the fixed deposit amount of Rs.40 lacs of the plaintiff with defendant no. 1, for paying off the price of the goods in question to the seller defendant no. 2 or to the seller's negotiation Holland bank defendant no. 3. The learned counsel relies upon *United Commercial Bank Vs. Bank of India and Others*, which has held as follows :-

"THE opening of a confirmed letter of credit constitutes a bargain between the bankers and the seller of the goods which imposes on the banker an absolute pay .. However, the banker is not bound or entitled to honour the bills of exchange drawn by the seller unless they, and such accompanying documents as may be required there under, are in exact compliance with the terms of the credit. Such documents must be scrutinised with meticulous care."

(16) This authority supports fully the contention of the learned counsel for the plaintiff. According to the facts of this authority the plaintiff there agreed to supply *Sizola Brand Pure Mustard Oil* to the Bihar State Food and Civil Supplies Corporation which in turn. depend a letter of credit in favor of the plaintiff in a bank. The railway receipt and other documents evidencing dispatch of the goods by the plaintiffs therein to the Corporation revealed the description of the goods "as *Sizola Brand Pure Mustard Oil unrefined*". The bank which issued the letter of discrepancies in the description of the goods and that score claims were State and agreed to make payments only under reserve. The plaintiff therein agreed to that arrangement. On the Instructions from the State Corporation that the goods were not acceptable to it the bank which issued the letter of credit recalled the payments made under reserve along with stipulated interest. The Supreme Court held that there was no prima facie case in favor of the seller and not even the balance of convenience It was held that a payment under reserve" is understood in banking transaction to mean that the recipient of money may not deem it as his own but must be prepared to return it -on demand. Regarding the balance of convenience it was held that it clearly lay in allowing the normal banking transactions to go forward. As the issuing bank had made the payment of price to the negotiating bank "under reserve" it was entitled to recall that

payment from the negotiating bank for the reason that there were discrepancies in the description of goods as a result of which the seller in that case could not be said to have any prima facie case against the issuing bank so as to restrain the issuing bank from recalling the payments from the negotiating bank which had been made "under reserve". In the case in hand the plaintiff buyer does have a prima facie case in its favor against the issuing bank defendant no. 1 for the reason that the issuing bank was not bound or entitled to honour the bill of exchange drawn by the foreign seller, as there was no exact compliance with the terms of the letter of credit, especially in regard to the "Origin" of the goods. The question which necessarily arises in this case is in regard to the existence of the prima facie case between the plaintiff buyer on the one hand and the issuing bank defendant No. 1 on the other. This question is not between the two banks-issuing bank defendant no. 1 on the one hand and negotiating foreign bank defendant No. 3 on the other.

(17) After finding the existence of a prima facie case in favor of the plaintiff buyer the other two questions regarding balance of convenience and irreparable loss have to be examined and have to be in favor of the plaintiff before it is granted the temporary injunction. The learned counsel for the plaintiff contended that obviously both these questions should be answered in favor of the plaintiff. The plaintiff was not bound to accept the goods of an altogether different origin and had rejected the documents received by the issuing bank from the foreign negotiating bank on account of the discrepancies in the documents on the one hand and the letter of credit on the other which the issuing bank was bound to take notice and in respect of which the issuing bank did write to the negotiating bank and which were also considered discrepant by defendant no. 4 Indian Agent of the foreign seller defendant no. 2, and if the plaintiff were made to accept the defective documents, it would suffer an irreparable loss especially in view of the origin of goods being different from what were mentioned in the letter of indent which formed integral part of the letter of credit finding a mention in the opening paragraph thereof.

(18) The learned counsel for defendant no. 1 invited the attention of the Court to the observations appearing in para 51 on page 1440 in the Supreme Court authority *United Commercial Bank v. Bank of India and others* (supra) which are reproduced below:-

"EVEN if there was a serious question to be tried, the High Court had to consider the balance of convenience. We have no doubt that there is no reason to prevent the appellant from recalling the amount of Rupees 85,84,456. The fact remains that the payment of Rs. 36,52,960 against the first lot of 20 documents made by the appellant to the Bank of India was a payment under reserve while that of Rs. 49,31,496 was also made under reserve as well as against the letter of guarantee or indemnity executed by it. A payment "under reserve" is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of

convenience clearly lies in allowing the normal banking transactions to go forward. Furthermore, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim, injunction was granted."

(19) The Supreme Court further pointed out the undesirability of the issuance of granting injunctions to restrain the performance of the contractual obligations arising out of a letter of credit between one bank and another, and made the following observations :-

"THE courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction . between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail. It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life- blood of international commerce. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

(20) The perusal of the aforesaid observations would go to show that the same are meant when the question of injunction to restrain the performance of the contractual obligations arises out of a letter of credit or a bank guarantee between one bank and another bank. The case in hand is different in the sense that the disputed question regarding restraining the performance of contractual obligations arising out of the letter of credit is between the buyer plaintiff on the one hand and the issuing bank defendant no. 1 on the other, and this Question is not between the issuing bank defendant no. 1 on the one hand and the negotiating foreign bank defendant no. 3 on the other.

(21) The main point in controversy, as pointed out by the Supreme Court at page 1434 in the aforesaid authority, was whether the Court should in a transaction between a banker and a banker granting injunction at the instance of the beneficiary (seller) of an irrevocable letter of credit, restraining the issuing bank from recalling the amount paid under reserve from the negotiating bank, acting on behalf of the beneficiary against a document to guarantee indemnity at the instance of the beneficiary and then on page 1440 the Supreme Court observed that the Question that must necessarily arise is whether in the facts and circumstances of the case there is a prima facie case and, if so, as to between whom ? It was then further observed that it could not be disputed that if the suit were to be brought by the negotiating bank, the High Court would not have granted any injunction as it was bound by the terms of the contract, and what could not be done directly could not be achieved indirectly in a suit brought by the seller plaintiff therein. In that case the negotiating bank was bound to refund the money paid to it "under reserve" by the issuing bank and, thus, could not

succeed in obtaining any temporary injunction against the issuing bank and the seller too would meet the same fate as that of the negotiating bank. Those facts are distinguishable from the facts of the case in hand for the reason that, as held by the aforesaid Supreme Court authority, and already pointed out above, the issuing bank is not bound or entitled to honour the bills of exchange drawn by the seller unless they, and such accompanying documents as may be required there under, are in exact compliance with the terms of the letter of credit and that such documents must be scrutinized with meticulous care. So, under the two sets of circumstances the contractual obligations on the part of the bank sought to be restrained by means of a temporary injunction. is clearly distinct and different, inasmuch as the negotiating bank in the Supreme Court authority was bound to refund the payments received under reserve on account of defective documents whereas in the case in hand the issuing bank was bound not to honour the bill of exchange on account of defective documents. In this view of the matter, the aforesaid observations of the Supreme Court regarding the courts usually refraining from granting injunction to restrain the performance of the contractual obligations arising out of a letter of credit between one bank and another bank are not application in the case in hand and so in the facts and circumstances the twin Question of balance of convenience irreparable loss has to be answered in favor of the plaintiff.

(22) In view of the aforesaid discussion, the plaintiff prayer for the grant of temporary injunction is accepted and consequently the bank defendant no. 1 is restrained from appropriating, utilising or otherwise adjusting any of the present or future credit balances in any of the plaintiffs accounts with defendant No.1 including the sum of Rs. 40 lacs deposited by the plaintiff with defendant no. 1 and held under fixed deposit receipt no. 476186 dated 11-9-1986. towards the retirement of the documents received against the aforesaid letter of credit dated 11-9-1987. No order as to costs.

The aforesaid observations are only prima facie and shall not affect either way the decision of the suit on merits.