
(2008) 12 CAL CK 0052
In the Calcutta High Court
Case No : F.M.A. No. 463 of 2007

Verson Trading Company

APPELLANT

Vs

Mrs. Sanjida Begum and Others

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2008) 12 CAL CK 0052

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Koushik Dey, Nikhil Kr. Roy and Partha Basu, for the Appellant;
Krishnayan Sen and Sarathi Dasgupta, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This first miscellaneous appeal is at the instance of the defendant No. 2 in a suit for declaration and permanent injunction and is directed against Order No. 52 dated 2nd March, 2006 passed by the learned Judge, Fourth Bench, City Civil Court at Calcutta, in Title Suit No. 1616 of 2003, thereby allowing an application under Order XXXIX Rules 1 and 2 of the CPC filed by the plaintiff by restraining the defendants from realising the amount covered under the Letters of Credit of 42,225 US Dollars in favour of the defendant No. 2 or enforcing the said Letters of Credit till the disposal of the suit. Being dissatisfied, the defendant No. 2 has come up with the present first miscellaneous appeal.

2. The plaintiff-respondent No. 1 filed a suit being Title Suit No. 1616 of 2003 in the City Civil Court at Calcutta thereby praying for the following relief:

a) Declaration that the Letter of Credit being No. 4048/KOL/D/58 on Bank of India, Overseas Branch, Kolkata-700001 is still subsisting.

b) Permanent injunction restraining the defendants from encashing withdrawing and or realising the amount covered under the Letter of Credit being No. 4048/

KOL/D/58 on Bank of India, Overseas Branch, Kolkata-700001 in favour of M/s. Versions Trading Co., Dubai.

c) Enquiry into damages.

d) Cost of the suit with full advocates fees.

e) Such other order or orders as the Learned Court may deem fit and proper.

3. The case made out by the plaintiff-respondent No. 1 may be summed up thus:

(a) The plaintiff deals with the business of manufacturing of polyethylene pipes and fittings of various kinds and polymers, as a result, she is required to import and purchase raw materials such as PVC Resins from different sources.

(b) The defendant No. 2 is a trading company who supplies the necessary raw materials for manufacturing and trading of plaintiff's products and for that purpose, they appointed the defendant No. 1 as their agent in Calcutta.

(c) Pursuant to negotiation for supply of PVC Resins, the plaintiff accepted the offer of the defendants and communicated the acceptance of the said offer of the defendant No. 2 through its local agent, the defendant No. 1. Under the agreement, the defendant No. 2 was required to supply 100 Metric Ton in gross and 100 Metric Ton in net PVC OFF Grade K-67 Resins for a total price of 42,225 US Dollars and to deliver the above materials at Kolkata Port and for the same, the plaintiff had to issue Letters of Credit for 75 days from the date of bill of lading.

(d) As per the said agreement, the plaintiff opened a Letter of Credit for 42,225 US Dollar in Bank of India, Overseas Branch, the respondent No. 3, on behalf of the plaintiff in favour of the defendant No. 2 as beneficiary.

(e) The defendant No. 2 informed the plaintiff that the aforesaid raw materials were shipped in 5 containers containing 94 packets dated 5th September, 2003 for delivery of those articles at CIF Kolkata Port.

(f) The aforesaid consignment arrived at Kolkata Port on 24th September, 2003 and upon arrival of the above consignment, the plaintiff filed the bill of entry and paid the customs duty charges. The consignment was loaded at Central Warehousing Corporation, Circular Garden Reach Division Road, Kolkata-700043 by the agent of the defendant.

(g) During unloading of the above consignment at Central Warehousing Corporation, it was found that the material dispatched by the defendant No. 2 contained other chemicals which were not matching with the specification of PVC OFF Grade K-67 agreed to be supplied. It was further found that neither any stamp, sticker, packing slip and batch was there nor could the contents confirm that the subject product was made by the POLY beek, Germany. Those materials were not in export worthy JAMBOO bags as mentioned in packing list. There was even shortage in number of bags and in place of 94 JAMBOO bags as mentioned

in the packing list, total 88 bags were found. Moreover, several bags were found in torn condition and the material was seeped in the containers itself.

(h) Upon inspection of the materials and having knowledge of the above irregularity, the plaintiff issued several letters to the Insurance Company intimating the shortage and facts to the shipping company at Germany and their Indian agent.

(i) On request of the plaintiff, the defendant sent one Mr. B.C. Barmecha, President of Ravi Enterprises, Kolkata to visit the warehouse, to ascertain the damages etc. and upon inspection, Mr. Barmecha acknowledged the irregularities complained and the shortage of the materials supplied and reported the matter to the defendant No. 2. The plaintiff made several representations to the defendant No. 2 for compensating the loss sustained but the defendant No. 2 did not take any step to remedy the breach.

4. In connection with the aforesaid suit, the plaintiff came up with an application for temporary injunction thereby praying for restraining the defendant from encashing or withdrawing, realising the amount covered under Letters of Credit till the disposal of the suit.

5. The application was contested by the appellant by filing written objection and the objection taken by the appellant may be summed up thus:

(1) The defendant No. 1 was not the agent of the defendant No. 2 and the said defendant No. 1 was the liaison about the deal in between the plaintiff and the defendant No. 2. The defendant No. 1 not being the agent of the defendant No. 2, the question of inspection of warehouse for ascertaining the loss of the plaintiff did not arise.

(2) The plaintiff requested the defendant No. 2 for supply of the sample of the goods and the defendant supplied the same as to the requirement of the plaintiff and the plaintiff on being satisfied ordered for supply of the goods. The defendant strictly in accordance with the sample supplied the goods to the plaintiff and the plaintiff accepted delivery on plaintiff's full satisfaction.

(3) The goods so sold were grade material and according to specification. As uniform packing practically not possible there was variance of 10%. On arrival of the consignment, the subject consignment had been realised by the plaintiff and the delivery of consignment was accepted by the plaintiff without any protest and that there was no document to prove that the bags were in torn condition.

(4) The Letter of Credit was issued as an irrecoverable letter in the name of the beneficiary, M/s. Verson Trading Company. An irrevocable Letter of Credit cannot be cancelled unless its beneficiary agrees to such cancellation.

(5) No part of the cause of action of the suit arose within the jurisdiction of the City Civil Court at Calcutta as the consignment was unloaded at Central Warehousing Corporation which was beyond the territorial jurisdiction of the City

Civil Court. Moreover, the value of consignment being 42,225 US Dollar equivalent to more than a sum of Rs. 17,00,000/-, which exceeded the pecuniary jurisdiction of the City Civil Court at Calcutta.

6. The learned Trial Judge on consideration of the materials on record came to the conclusion that the plaintiff had made out a strong prima facie case and as such, it was a fit case that an injunction should be granted restraining the defendant No. 2 from encashing the irrevocable Letter of Credit and/or realising the amount covered under the said Letter of Credit.

7. Being dissatisfied, the defendant No. 2, the supplier of the goods, has come up with the present first miscellaneous appeal. None appears on behalf of the plaintiff-respondent in spite of service of notice. The bank has entered appearance and has supported the defendant No. 2. After hearing the learned Counsel for the parties and after going through the materials on record, we find that undisputedly an irrevocable Letter of Credit was issued in favour of the bank concerned for the benefit of the defendant No. 2. It further appears that pursuant to the agreement, the defendant supplied the goods which were accepted by the plaintiff but after acceptance, it raised dispute as regards the quality as well as quantity alleging breach of agreement. It is not even the case of the plaintiff that she returned the goods to the plaintiff. In our view, the law regarding injunction for encashment of the irrevocable Letter of Credit in this type of international transaction is now well settled. As pointed out by the Supreme Court in the case of *Tarapore and Co. Vs. V/O Tractoroexport and Another*, , the opening of a confirmed Letter of Credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute that may be between the parties as to whether the goods are up to the contract or not. A vendor of goods selling against a confirmed Letter of Credit, the Apex Court continues, is selling under the assurance that nothing will prevent him from receiving the price and if the buyer has an enforceable claim, that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer. According to the Supreme Court, the Letter of Credit is independent of an unqualified transaction and the autonomy of an irrevocable Letter of Credit is entitled to protection.

8. In the subsequent decisions of the Supreme Court, the said view has been all along accepted with this variation that in case of fraud, injunction may be granted as an exception and the bank must be party to such fraud. It is pointed out that mere dispute as to quality of goods alleging breach of agreement cannot amount to fraud. At this juncture, it will not be out of place to refer to the following observations of the Supreme Court in the case of *Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Others*, :

56. In several judgments of this Court, it has been held that Courts ought not to grant injunction to restrain encashment of Bank guarantees or Letters of Credit. Two exceptions have been mentioned - (i) fraud and (ii) irretrievable damage. If

the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39, Rule 1, C.P.C. can be issued. It has also been held that the contract of the Bank guarantee or the Letter of Credit is independent of the main contract between the seller and the buyer. This is also clear from Article 3 of the UCP (1983 Revision). In case of an irrevocable Bank guarantee or Letter of Credit the buyer cannot obtain injunction against the Banker on the ground that there was a breach of the contract by the seller. The Bank is to honour the demand for encashment if the seller prima facie complies with the terms of the Bank Guarantee or Letter of Credit, namely, if the seller produces the documents enumerated in the Bank Guarantee or Letter of Credit. If the Bank is satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the Bank Guarantee or Letter of Credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. While doing so it must take reasonable care. It is not permissible for the Bank to refuse payment on the ground that the buyer is claiming that there is no breach of contract. Nor can the Bank try to decide this question of breach at that stage and refuse payment to the seller. Its obligation under the document having nothing to do with any dispute as to breach of contract between the seller and the buyer. As to its knowledge of fraud or forgery, we shall presently deal with it.

Knowledge of fraud:

57. Decided cases hold that in order to obtain an injunction against the Issuing Bank, it is necessary to prove that the Bank had knowledge of the fraud.

58. Kerr, J. said in *R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.* 1978 QB 146 (at 155) that irrevocable Letters of Credit are "the life blood of international commerce". He said : "Except possibly in clear cases of fraud of which the banks have notice, the Courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration.... Otherwise, trust in international commerce could be irreparably damaged." Denning M. R. stated in *Edward and Owen Engineering Ltd. v. Barclays Bank International Ltd.* 1978 QB 159, that "the only exception is where there is a clear fraud of which the bank had notice". Browne, L.J. said in the same case: "but it is certainly not enough to alleged fraud, it must be established" and in such circumstances, I should say, very clearly established". In *Bolivinter Oil S.A. v. Chase Manhattan Bank* (1984) 1 All ER 351 at p. 352, it was said "where it is proved that the Bank knows that any demand for payment already made or which may thereafter be made, will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not be sufficient that this rests upon the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time "before the injunction is vacated". Thus, not only must "fraud" be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. In *United Trading Corpn. S.A. v. Allied Arab Bank Ltd.* (1985) 2 Lloyds Rep 554, it

was stated that there must be proof of knowledge of fraud on the part of the Bank at any time before payment. It was also observed that it "would be sufficient if the corroborated evidence of the plaintiff usually in the form of contemporary documents and the unexplained failure of a beneficiary to respond to the attack, lead to the conclusion that the only realistic inference to draw was "fraud" ". In *Guarantee Trust Co. of New York v. Hannay* (1918) 2 KB 623 (KB), the Banker accepted the documents without any knowledge of fraud or falsify and it was held that the defendants could not counter-claim from the Bank. However, it would be the Banker's duty to refuse the documents which on their face bear signs of having been altered (See *Re : Saloman and Nandszus*, (1899) 91 LT 325. That was a c.i.f. contract. This Court in *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others*, also held that knowledge of the Bank as to the fraud or forgery had to be prima facie established.

9. We, thus, find that in this case the learned Trial Judge has not followed the aforesaid well-accepted principles of law approved by the Supreme Court. In our view, if there is any dispute as regards the quality or quantity of the goods, the parties are required to settle that dispute but that cannot be a ground for injunction restraining encashment of Letter of Credit when the plaintiff had retained the goods. The learned Trial Judge in this case from the materials on record merely recorded a finding that there was prima facie case of variation of the quality and the quantity of the goods agreed to be supplied and such fact, according to the learned Trial Judge, was sufficient to grant injunction as prayed for.

10. We, therefore, set aside the order impugned and hold that having regard to the well-settled law of the land regarding enforcement of irrevocable Letter of Credit, the learned Trial Judge committed substantial error of law in not following the same and erred in law in granting injunction. In the fact of the present case, the plaintiff was not entitled to get the injunction as prayed for.

11. The appeal is, thus, allowed. In the facts and circumstances, there will be, however, no order as to costs.

Bhaskar Bhattacharya, J.

12. I agree.