

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) 2198 of 2003

Reserved on: 28th July 2009

Decision on: 26th August 2009

MADAN KUKREJA Plaintiff
Through Mr. Ashok Gurnani, Advocate

versus

BANQUE SCALBERT DUPONT S.A. & ANR. Defendants
Through Mr. Peeyoosh Kalra with
Mr. Vikram Grover and
Mr. Kamal Sharma, Advocates

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
26.08.2009

S. Muralidhar, J.

1. This suit seeks a decree against the Defendant No.1 for a sum of Euro 49,842/- along with *pendente lite* and future interest at 16.5% annum together with costs.

The case of the Plaintiff

2. The Plaintiff describes himself as the Proprietor of a concern under the name and style of M/s Super Fashion, which is an exporter of garments. Its export destinations are claimed to be the United States of

America (USA), Canada and Europe. The Plaintiff claims that the

concern has acquired the status of a government recognized export house. Defendant No.1 is a bank headquartered in France, having an office in Delhi. It is stated to be fully owned by the Credit Industriel et Commercial (CIC), a joint stock company incorporated under the laws of France and having its head office at Paris. CIC has a representative office in New Delhi established under permission of the Reserve Bank of India (RBI) by a letter dated 18th February 1997. Defendant No.2 is the Syndicate Bank with which the Plaintiff has an account. It is stated that the Defendant No.2 is only a proforma party.

3. According to the Plaintiff, in and around the second week of January 2003, M/s Li & Fung (India) Pvt. Ltd. ('Li & Fung India'), having its registered office at New Delhi, the principal of which was Li & Fung, Hong Kong, held out as an agent of M/s Promod S.A. located in France and approached the Plaintiff at his office in Delhi. They evinced interest in purchasing woven ladies dresses and ladies blouses required by M/s Promod S.A. Consequent upon negotiations and discussions, M/s Li & Fung India, acting as an agent of M/s Promod S.A., placed on the Plaintiff purchase order Nos. 86302101 dated 21st January 2003, 86302102 dated 22nd January 2003 and 86305001 dated 19th February 2003 for a supply of total number of 8300 pieces of woven ladies dresses and ladies blouses. The payment was to be effected through an irrevocable letter of credit (LC) No. DCLCK 409960 dated 8th November 2002 already established by Li & Fung Hong Kong through Hong Kong & Shanghai Banking Corporation (HSBC) at Hong Kong in favour of the Plaintiff. In terms of the said LC, the goods were

required to be shipped to France to Defendant No.1 Bank as consignee and to notify M/s Promod S.A. upon arrival of the goods in France. It is stated that the goods were inspected by the representatives of M/s Li & Fung India at various stages of production. Shipping Agreements dated 22nd April 2003, 29th April 2003 and 7th May 2003 were received by the Plaintiff from Promod S.A. through Li & Fung India. A final inspection was also carried out by the representatives of the Li & Fung India and a certificate of inspection was issued to the Plaintiff, approving the goods for shipment.

4. Thereafter the goods were shipped by the Plaintiff under House Airway Bills (HAWB) Nos. 022288 dated 7th May 2003 and 022294 dated 9th May 2003. The total value of the shipment was Euro 45390. In the HAWB, the consignee was shown as the Defendant No.1 Bank with Promod S.A. being shown the party to be notified upon the arrival of the goods at the destination. The dispatch of the goods, however, took place after the LC dated 8th November 2002 had expired on 4th May 2003. According to the Plaintiff, Li & Fung India assured the Plaintiff that notwithstanding the expiry of the LC, the documents on presentation would be honoured. Accordingly after the shipment of the goods, the Plaintiff prepared the necessary documents relating to the said shipment such as invoices, packing list, certificate of origin etc. Along with the said HAWB, these documents were presented by the Plaintiff to Defendant No.2 with the request that they should be sent to the Defendant No.1 Bank on collection basis. This procedure had to be

resorted to since the LC, which expired on 4th May 2003 was not

extended despite requests by the Plaintiff.

5. Acting on the request of the Plaintiff, Defendant No.2 by a letter dated 29th May 2003 forwarded the documents to Defendant No.1 on collection basis with instructions that the documents should be released upon payment (DP). Among the documents sent were Invoice No. 232 dated 16th April 2003 for Euro 24,000/-, Invoice No.235 dated 16th April 2003 for Euro 13,590/- and Invoice No. 268 dated 6th May 2003 for Euro 7,800/-, the packing list, the weight list, GSP Certificate of Origin issued by the Textile Committee, the purchase orders and the two HAWBs. Copies of the invoices, the originals of the packing list, GSP Certificate, weight list, Certificate of Origin, HWAB etc. were also handed over to the representatives of Li & Fung India.

6. It is stated that even before the dispatch of the aforementioned documents to Defendant No.1, it issued release orders on 19th May 2003 and 21st May 2003 in respect of the entire shipment of the goods in favour of the Promod S.A. According to the Plaintiff, the Defendant No.1 did this without instructions from the Plaintiff or Defendant No.2. This was stated to be contrary to the international norms of banking. It is stated that since Li & Fung had handed over the original export certificate to Promod S.A., the latter was able to take delivery of the goods against release orders. The Plaintiff alleges that the actions of Defendant No.1 Bank were in breach of its contractual obligations and duties as a banker. Defendant No.1 is also alleged to have breached the trust and faith reposed upon it by the Plaintiff. In particular it is stated

that in the forwarding letter dated 29th May 2003 it was specifically indicated that the documents were being forwarded for collection “subject to Uniform Rules for Collection (1995 Revision) International Chamber of Commerce, Publication No.522 read along with ICC Document No.470/822 Rev of April 6, 1998”. It is stated that while forwarding the documents to the Defendant No.1, the Defendant No.2 had instructed the Defendant No.1 to remit the proceeds in respect of the invoices by DD/TT on Mumbai in India in equivalent US Dollars or credit the account of Defendant No.2 Bank with Dresdner Bank, A G, D 60301, Frankfurt AM Main.

7. By a letter dated 7th June 2003, the Defendant No.1 returned the documents to Defendant No.2 because “Promod refused to pay it”. Consequently, it was stated that “this collection is a documentary one and you must know that the law tells a bank is never obliged to pay such a remittance.” However, the Defendant No.2 informed the Defendant No.1 as under:

“Your refusal to pay and act of returning the documents is not understandable when the goods covered by the said documents consigned to you have been released on 19.5.2003 and 21.5.2003 against your release order. Since the documents stand utilized so you are under definite obligation to pay the same. Please remit the proceeds along with the up to date interest from the date of release of goods.

Regards.

Syndicate Bank, Nehru Place, New Delhi.”

8. The documents which were again presented on 21st June 2003 by the
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Defendant No.2 to the Defendant No.1 were returned on 4th July 2003. A third presentation was made on 8th August 2003 which again was refused and returned by the Defendant No.1 to Defendant No.2 on 19th August 2003.

9. The case of the Plaintiff is that under no circumstances should Defendant No.1 have issued the aforementioned release orders in favour of M/s Promod S.A. without receiving the payments especially when the instructions were release only on DP basis. In response to the legal notice sent to it, it was contended by the Defendant No.1 in its reply dated 30th October 2003 that it had acted on the basis of the LC No.181-01-0032057-1 issued by it in the account of M/s Promod S.A. favouring Li & Fung Hong Kong. That had been advised through HSBC, Hongkong on 3rd April 2003. It was stated that the set of documents covered by HAWB No.022288 dated 7th May 2003 and HAWB No.022294 dated 9th May 2003 were presented by Standard Chartered Bank, Hong Kong under the said LC on behalf of the Li & Fung Hong Kong. Since payment was to be effected out of the said LC, Defendant No.1 closed the file. On the above basis, the Plaintiff filed the present suit against Defendant No.1 for recovery of the sum as noticed earlier.

The case of the Defendant No.1

10. The case of the Defendant No.1 in its written statement is that the suit is bad for non-joinder of Promod S.A. in France, Li & Fung, Hong Kong and Li & Fung India as parties to the suit. It is maintained that

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there is no privity of contract between the Plaintiff and Defendant No.1 in relation to the transaction in question. It is accordingly prayed that the Defendant No.1 is not a proper party to the suit and should be deleted as such. It is then contended that this Court has no territorial jurisdiction to try the suit. Defendant No.1 carries on its business at France. The suit could not be filed without the Plaintiff seeking leave to sue the Defendant No.1. It is stated that Promod S.A. was bound to remit payment to Li & Fung Hong Kong in terms of the LC issued by the Defendant No.1. It is stated that the decision of Defendant No.1 not to handle the collection forwarded to Defendant No.2 was in accordance with URC 522. In any event, banks were under no obligation to handle either a collection or any collection instruction or subsequent related instruction in terms of URC 522.

11. Elaborating on the objection as to the territorial jurisdiction, it is pointed out by Defendant No.1 that it is permitted by RBI by a letter dated 18th February 1997 to open an office in New Delhi purely as a liaison office without transacting any type of banking business. Further, RBI had prohibited the representative office from negotiating any commercial activity.

12. A reference is made to the LC dated 3rd April 2003 opened by Defendant No.1 in favour of Li & Fung, Hong Kong. This LC was opened under instructions of Promod S.A. The above LC was freely negotiable by any bank in Hong Kong. It is maintained that the Defendant No.1 was concerned only with the instruction received from

Promod S.A. for opening a suitable documentary credit and to ensure that the terms and conditions governing payment to Li & Fung Hong Kong were incorporated in the LC.

13. It is stated that the documents sent for collection by the Defendant No.1 Bank was received much after on 5th June 2003. It is maintained that the Defendant No.1 could not be held responsible for the callousness of the Plaintiff. The Plaintiff, if at all, could have turned to Li & Fung, Hong Kong for payment.

Issues:

14. After the replication was filed, this Court framed the following issues on 18th October 2005:

“1. Whether the Courts of Delhi have no territorial jurisdiction to entertain the present suit in which no relief is claimed against the other Defendant (Syndicate bank) and no leave under Section 20 of the CPC has been obtained against Defendant No.1 which has no presence in India? OPD1

2. Whether the suit is bad for non-joinder of proper and necessary parties as stated in the written statement? OPD1

3. Whether the Plaintiff is entitled to enforce any obligation against the Defendant No.1 either directly or through Defendant No.2? OPP

4. Whether the Plaintiff is entitled to claim any sum arising out of any liability from the transaction in question and if so, to what amount it is entitled? OPP

5. If Issue No. 4 is held in favour of Plaintiff, whether the Plaintiff is entitled to claim interest @ 16.5% or at all and if so, for what period and on what amount? OPP

6. If issues No.4 and 5 are held in favour of Plaintiff; who is/are the entity(es) against whom such claim is

enforceable?

OPP

7. Relief.”

15. The Plaintiff examined himself as PW1. He was cross-examined by the learned counsel for the Defendant No.1. An affidavit of Mr. Vijay Chopra was also filed on behalf of the Plaintiff. He was, however, not cross-examined. The Defendant did not choose to lead any evidence. The arguments of Mr. Ashok Gurnani, the learned Advocate for the Plaintiff and Mr. Peeyoosh Kalra, the learned Advocate for the Defendant No.1 have been heard.

16. ***Issue No.1:***

Whether the Courts of Delhi have no territorial jurisdiction to entertain the present suit in which no relief is claimed against the other Defendant (Syndicate bank) and no leave under Section 20 of the CPC has been obtained against Defendant No.1 which has no presence in India?

The preliminary objection of the Defendant No.1 is that since it only has a liaison office in New Delhi, this Court lacks territorial jurisdiction to try this suit in terms of Section 20 (a) CPC. A reference is made to the letter dated 18th February 1997 of the RBI to point out that the Defendant No.1 was in fact not permitted to carry on any commercial activity or banking business in India. The only stage at which Defendant No.1 came into picture was when the documents in question were forwarded to it for collection by Defendant No.2. These documents were received by it in France. It is accordingly contended that even for the purposes of Section 20 (c) CPC, no part of the cause of action arose in New Delhi. Reference is made to the judgment of the

Supreme Court in *Federal Bank v. V.M. Jog Engineering Ltd.* AIR 2000 SC 3166.

17. It is further submitted by the learned counsel for the Defendant No.1 that in another set of transactions involving the Plaintiff and Defendant No.1, the dispute has been referred to arbitration. That dispute involves the Li & Fung Hong Kong as well as Li & Fung India, HSBC, Promod S.A. and the Defendant No.1. That was the suit filed by the Plaintiff herein in which an application was filed by the Defendant No.1 under Section 45 of the Arbitration and Conciliation Act, 1996. By an order dated 14th December 2004, the learned Additional District Judge (ADJ) allowed the said application and directed the Plaintiff herein to refer the matter to arbitration in terms of the arbitration clause contained in the placement memorandum dated 29th October 2002. It is submitted that the similar placement memorandum has been issued in the present case and therefore on this ground also this Court has no jurisdiction to entertain the suit. It is submitted that in view of the arbitration clause and the fact that in the said suit the Plaintiff has chosen to implead apart from the Defendants 1 and 2 Promod S.A., Li & Fung Trading India and Li & Fung Hong Kong, obviously they were proper and necessary parties even as far as the present suit is concerned. It is accordingly contended that the suit is bad for non-joinder of necessary parties. A reference is also made to the judgment of this Court in *Jaspal Singh Sahni v. Kuwait International Finance Co. S.A.K.* 71 (1998) DLT 740 where it is held

that a Corporation cannot be sued at a place where it has a subordinate

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office except where the cause of action arises therein and that merely having a branch office will not give the Court jurisdiction to entertain a suit. A reference is also made to the decision in ***Kensoft Infotech Ltd. v. R.S. Krishnaswami* 146 (2008) DLT 657**, ***State of Rajasthan v. Swaika Properties* (1985) 3 SCC 217**, ***Frank Finn Management Consultants v. Subhash Motwani* 154 (2008) DLT 95**; ***Corporation Bank v. Bahri Exports* ILR (1991) Delhi I 627**, ***Jai Narain N. Sadh Shadwara v. Pan American World Airways* 30 (1986) DLT 497**.

18. In reply to the preliminary objection, counsel for the Plaintiff while referring to the decisions in ***South India Shipping Corp. Ltd. v. Export-Import Bank of Korea* [1985] 2 All ER 219**; ***Re Oriel Ltd. [1985] 3 All ER 216***; ***Actiesselskabet Dampskib "Hercules" v. Grand Trunk Pacific Railway Company* [1912] 1 KB 222**, contended that where the Defendant is a foreign company, the test is whether it can be served notices within the jurisdiction of the court. The expression "carries on business" in Section 20(a) CPC would include a liaison office. The expression "business" according to Mr. Gurnani need not be the very business which is the subject matter of the suit. Jurisdiction is also to be determined with reference to the place where the effect of the wrong is felt. The Plaintiff, being located within the jurisdiction of the court, has suffered the loss and therefore this Court has jurisdiction to entertain the suit. Reference is made to certain observations of this Court in ***Frank Finn Management Consultants v. Subhash Motwani***. A reference is made to the communication of the RBI to emphasize

that as long as the Defendant has an office within the jurisdiction of

this Court and could be served there, it cannot be said that this Court has no jurisdiction. A reference is made to the correspondence between the Plaintiff and the Defendant No.1 where letters were addressed to the office of the Defendant No.1 in New Delhi.

19. Section 20(a) CPC envisages that every suit shall be instituted in a court within the local limits of whose jurisdiction the Defendant “actually and voluntarily resides, or carries on business, or personally works for gain”. In the context of the present case, the Plaintiff has to show that the Defendant No.1 “carries on business” within the local limits of this Court’s jurisdiction. The letter dated 18th February 1997 of the RBI which has been referred to by both the parties reads as under:

“February 18, 1997
Mr. H. Dexant,
Director,
Representative Offices &
International Products,
Campagnie Financiere de CICet de 1 Union Europeenne
4 rue Gaillon 75107 Paris Cedex 02

Dear Sir,

Permission to open a Representative Office in New Delhi

Please refer to your application dated 2nd September 1996 requesting for your permission to establish a Representative Office in New Delhi. We are pleased to convey our approval to your bank for opening a Representative Office in New Delhi on the following terms and conditions.

- a) The Representative Office should function purely as a liaison office without transacting any type of banking business.

- b) The Representative Office should not undertake any commercial activity.
- c) The Authorisation to open a Representative Office would not in any way confer a right on the bank for setting up a branch later.
- d) The bank should comply with all local laws/regulations while operating the Representative Office in India.
- e) All the expenses of the Representative Office should be met out of inward remittances in free foreign exchange from the bank's Head Office.
- f) The Representative Office should furnish to us on a yearly basis:-
 - (i) certificate from auditor to the effect that during the year no income was earned by/accrued to the office in India.
 - (ii) of remittances received from abroad duly supported by bank certificates.
 - (iii) Certified copy of the audited final accounts of the office in India, and
 - (iv) annual report of the work done by the office in India stating therein the details of the major activities undertaken including trade financing for which the office has rendered liaison services.

- 2. The bank shall apply to the Government of India in the usual course for the VISA requirement of expatriate official for posting at the Representative office.
- 3. Please inform us the date of opening of the Representative Office with its full address telephone, fax numbers and the name of the local representative when the office is opened.
- 4. The receipt of this letter may please be acknowledged.”

20. There is merit in the contention of the Plaintiff that although the permission was granted only to operate as liaison office, the requirement that the Defendant No.1 should furnish on an yearly basis an Annual Report stating “the details of the major activities undertaken including trade financing for which the office has rendered liaison services” shows that it was envisaged that a liaison office was not merely meant to be a post office and was meant to transact some business. In *Scottish and Newcastle International Ltd. v. Othon Ghalanos Ltd.* [2008] 2 All ER 768, the Defendant was a company established in Cyprus. The Plaintiffs Scottish & Newcastle established in England, sued the Defendant company for recovery of the price of the goods sold by it to the Defendant in the English Court. A reference is made to Article 5(1)(b) of Council Regulation (European Council) 44/2001 “on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters”. In terms of the said Regulation, a person domiciled in a Member State may be sued in another Member State in the case of sale of goods “where under the contract, the goods were delivered or should have been delivered”. The question whether Section 32 of the Sale of Goods Act 1979 “of England” applied was answered in the affirmative. That provision envisaged that “where, in pursuance of a contract, of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer”. It was held that since the goods were entrusted to the carrier for being delivered to the buyer in Cyprus, the

place of shipment would be also the place of delivery for the purpose of Article 5(1)(b) of the Regulations in all types of FoB contracts. Accordingly, it was held that Section 32 of the Sale of Goods Act applied despite express reference to Limassol Cyprus as the place of delivery in the contract. The fact that the buyer would not in practice inspect the goods until after their arrival in Cyprus counted for nothing, as it was commonplace in international sales.

21. In *South India Shipping Corp. Ltd. v. Export-Import Bank of Korea*, a question that arose was whether the Defendants had an established place of business within Great Britain. It was held that since the Defendant bank “had both premises and staff within the jurisdiction, and was carrying on business activities which included conducting external relations with other banks and financial institutions, carrying out preliminary work in relation to granting or obtaining loans and giving publicity to the foreign bank, it had established a place of business within Great Britain and it was irrelevant that the bank did not conclude any banking transactions at the London office or having banking dealings with the general public”. In arriving at the conclusion, the court followed an older decision in *Actiesselskabet Dampskib “Hercules” v. Grand Trunk Pacific Railway Company*. There the Plaintiffs were a company registered in accordance with the laws of Norway. The Defendants were Railway Company incorporated in Canada. The action was brought to recover demurrage upon the Plaintiffs’ ship “*Hercules*” alleged to have become

Plaintiffs and the Defendants, was a question. The ship carrying a cargo of steel rails for use in the construction of the Defendants' railway. The office of the Defendants was in Montreal. Four of the Directors, however, were residents in Great Britain and formed a London Committee, which under the powers conferred by the company's by-laws, dealt with the issue of its capital for construction of railway. The whole of the loan capital was raised by the London Committee and remitted to the Canada. The money raised by the Committee was paid into an account at a London bank and remittances were made to Canada. The Plaintiff then sued the Canadian Corporation in the Court in London. It was held by Lawrence J. that the action was maintainable in London. The Defendant then appealed. The Court of Appeal dismissed the Defendant's appeal. Vaughan Williams L.J. held that "doing what it did the London board was carrying on the business of the company, and that it makes no difference that they pay no rent for the office in which they carry it on. The office is the office of the company; the business is advertised in every way as being carried on at the office. The appeal must therefore be dismissed". Concurring with that opinion Buckley L.J. observed: "We have only to see whether the corporation is "here"; if it is, it can be served. There are authorities as to the circumstances in which a foreign corporation can and cannot be said to be "here"; that best test is to ascertain whether the business is carried on here and at a defined place". On the facts of that case, it was stated that "the Defendant company is a resident here and is carrying on business here so as to be capable of being served with a writ".

22. In *Re Oriel Ltd.*, the question was whether the Defendant company had an established place of business in England. The company had been registered in Isle of Man and therefore was not registered in England. The Directors, of course, were the residents in Lancashire. It was held that “in order to prove that the company had an established place of business in England for the purpose of Section 106 (of the Companies Act 1948) at the relevant date it had to be shown that at that date there was an apparently permanent and specific location in England associated with the company from which it habitually or regularly carried on business, although it was not necessary for the company to own or lease such premises”. A reference was made to the Scottish case of *Lord Advocate v. Huron and Erie Loan and Savings Co 1911 SC 612* and it was observed that “when the word ‘established’ is used adjectively, as it is in Section 106, it connotes not only the setting up of a place of business at a specific location, but a degree of permanence of recognisability as being a location of the company’s business. If, for instance, agents of an overseas company conduct business from time to time by meeting clients or potential customers in the public rooms of a hotel in London, they have no doubt, carried on business in England, but I would for my part find it very difficult to persuade myself that the hotel lounge was an established place of business. The concept, as it seems to me, is of some more or less permanent location, not necessarily owned or even leased by the company, but at least associated with the company and from which habitually or with some degree of regularity business is conducted”.

23. As far as the decisions of our courts are concerned, in ***Kensoft Infotech Ltd. v. R.S. Krishnaswami* 146 (2008) DLT 657**, the principal office of the Defendant company was in Mumbai. It was found on facts that none of the Defendants resided or carried on business or personally worked for gain within the jurisdiction of the court at Delhi. Defendant No.3 had a branch office at New Delhi along with twenty-three other branch offices all over the country. A reference was made to the judgments in ***Oil & Natural Gas Commission v. Utpal Kumar Basu* (1994) 4 SCC 711** and ***State of Rajasthan v. Swaika Properties*** where it was held that the expression “cause of action” connotes a bundle of facts which gives the Plaintiff a right to relief against the Defendant, and mere service of notice at the registered office of a company does not give rise to a cause of action within that territory unless service of such notice was an integral part of the cause of action. It was noticed that the cause of action means every fact which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the court. It was held that the location of the subordinate office of the Defendant No.3 at Delhi *ipso facto* cannot vest the court with territorial jurisdiction to decide the suit. Even the leave of the court to sue the Defendants at New Delhi as envisaged by Section 20(b) CPC had not been sought. Section 62 of the Copyright Act provided an additional forum to the Plaintiff at Mumbai. Moreover, there was not a whisper in the plaint that the infringement of the copyright by Defendants 1 to 3 were within the jurisdiction of the court in Delhi. The location of the subordinate office of one of the Defendants per se would not vest jurisdiction in

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this court.

24. In *Frank Finn Management Consultants v. Subhash Motwani*, it was held that the magazine allegedly containing the defamatory article though edited, printed and published in Mumbai did not contain any limitation that it was for circulation in Mumbai only. The Plaintiff had registered office in Delhi and the magazine had its circulation in Delhi. It was also placed on the website of the Defendants. In the circumstances, it was held that this Court had a jurisdiction to try the suit. The court pointed out by reference to decided cases that the phrase “wrong done” in Section 19 CPC would clearly take in not only the initial action complained of but its result and effect as well. Section 19 was wide enough to take in those places where the Plaintiff actually suffered the loss because of the alleged wrongful act.

25. None of the above cases decided by our courts provides an answer to the issue that arises in this case in relation to Section 20(a) CPC. The question really is whether in view of RBI’s letter dated 18th February 1997 Defendant No.1 can be said to be carrying on business within the jurisdiction of the court. The said letter no doubt restrains Defendant No.1 “from negotiating any commercial activity and functioning purely as a liaison office without transacting any type of banking business”. However, in terms of the law explained in *Re Oriel Ltd.* and *South India Shipping Corp. Ltd.*, it cannot be said that Defendant No.1 does not carry on business within the jurisdiction of

this Court. The question whether service could be effected on
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Defendant No.1 by serving notice upon it at its office in New Delhi should, in the considered view of this Court, be answered in the affirmative. As pointed out in *Re Oriel Ltd.*, one test is about the physical location of a business at a specific place also “a degree of permanence or recognisability as being a location in the office business”. On that parameter, it is safe to assume that there would certainly be a name board outside the representative office of Defendant No.1 at New Delhi and business enquiries are not precluded from being made at the said office. It cannot, therefore, be said that the Defendant No.1 does not carry on a business activity within the jurisdiction of this Court. Jurisdiction for the purposes of Section 20 (a) CPC is certainly attracted.

26. It is not in dispute that the goods were handed over to the carrier within the jurisdiction of this Court for being sent to France. The cause of action being a bundle of facts and goods having been entrusted for delivery and dispatched from New Delhi, the contention of the Plaintiff that a part of cause of action arose within the jurisdiction of this Court is found acceptable. The net result is that this Court has jurisdiction to entertain the suit. The issue is, therefore, answered in favour of the Plaintiff and against Defendant No.1.

27. Issue No.2:

Whether the suit is bad for non-joinder of proper and necessary parties as stated in the written statement?

The arguments of Defendant No.1 may be briefly recapitulated. In

Federal Bank v. V.M. Jog Engineering, it was observed by the Supreme Court in para 56 that “the contract of the Bank guarantee or the Letter of Credit is independent of the main contract between the seller and the buyer”. Relying on this observation, it is sought to be contended that there is no privity of contract between the Defendant No.1 and the Plaintiff since the claim was being made against the Defendant No.1 in relation to a contract that the Plaintiff had with Defendant No.2 and Promod S.A., which is not even a party to the suit. Accordingly it is contended that Defendant No.1 is not a proper party to this suit. A reference has been made to the arbitration proceedings arising out of a suit filed by the Plaintiff in which the Plaintiff chose to make all the other parties as co-Defendants. It is contended that the present transaction is no different from that which forms the subject matter of the said suit where the dispute has ultimately been referred to arbitration. Therefore the suit is bad for non-joinder of those parties.

28. In order to appreciate the above contention, the sequence of the transactions requires to be appreciated. The first stage of the transaction is the placing of purchase orders on the plaintiff on behalf of Promod S.A. by Li & Fung India Pvt. Ltd. on 21st January 2003, 22nd January 2003 and 19th February 2003. Li & Fung India Pvt. Ltd. acted as agents of Promod SA. The second stage of the transaction is that Li & Fung, Hong Kong issued three placement memoranda on the Plaintiff, two of which were undated and one of which was dated 4th April 2003. The LC for this transaction was established by HSBC

Hong Kong in favour of Li & Fung Hong Kong which is dated 8th November 2002. The third limb of the transaction was that under HAWBs dated 7th May 2003 and 9th May 2003 goods were shipped to France. It requires to be noted that the said two HAWBs were prepared and the goods despatched after 4th May 2003 the date of expiry of the LC dated 8th November 2002 opened by HSBC Bank in favour of Li & Fung, Hong Kong.

29. In the meanwhile on 3rd April 2003 Defendant No.1 opened an irrevocable and transferable LC (No.181-01-0032057-1) for Euro 77,190 in favour of Li & Fung, Hong Kong under instructions from Promod S.A. The said LC was advised to Li & Fung Hong Kong through HSBC Hong Kong and was freely negotiable by any bank in Hong Kong. It is stated that Promod S.A. had sourced certain items from Li & Fung Hong Kong for which payment had to be made under the LC. In order to meet the requirement of Promod S.A. Li & Fung Hong Kong arranged the supply of the requisite goods through its subsidiary in India, i.e. Li & Fung India. It is claimed by Defendant No.1 that it had no privity of contract with the Plaintiff, and that the goods were to be consigned to it with notifying instructions to Promod S.A. so as to provide for a mechanism of obtaining confirmation of delivery.

30. The next stage was that the goods on arrival in France were released by the Defendant No.1 to Promod S.A. on 19th and 21st May

2003. This is really the bone of the controversy. According to the Defendant No.1 it was still acting on the instructions of Promod S.A. and was assured that the transaction was covered by the LC in favour of Li & Fung, Hong Kong. The documents forwarded by Defendant No.2 to Defendant No.1 on 29th May 2003 had not yet reached Defendant No.1. This is where the Defendant No.1 first came into the picture. The question really is whether it can be said that there is a privity of contract between the Defendant No.1 and the Plaintiff.

31. As far as the Plaintiff is concerned, it instructed the Defendant No.2 to forward the documents to Defendant No.1. The fact that the Defendant No.1 received the said instructions only on 5th June 2003 much after the goods had been released to Promod S.A. does not entirely disconnect Defendant No.1 from the series of transactions since the claim in the suit is based on those transactions. Whether Defendant No.1 can be made liable or not is a different issue, which will be dealt with later. However, for the purposes of the present issue it cannot be said that in the context of the claim made by the Plaintiff, Defendant No.1 is not even a proper party to the present suit.

32. There however does appear merit in contention of Defendant No.1 that that there is no plausible explanation given by the Plaintiff for not proceeding against any of the other parties, viz., Li & Fung Hong Kong, Li & Fung India, and mainly Promod S.A. In the considered view of this Court, these were necessary and proper parties to the suit.

While it could be argued that it is entirely up to the Plaintiff to limit its

claim against one or more Defendants, given the case set up by the Plaintiff, it appears inconceivable why the Plaintiff would choose not to proceed against the other parties. This is particularly intriguing given that in another set of transactions involving the Plaintiff and Defendant No.1, the Plaintiff had initially filed a suit impleading Li & Fung Hong Kong, Li & Fung India, HSBC, Promod S.A. and the Defendant No.1. That dispute was thereafter referred to arbitration.

33. Interestingly during the cross-examination of the Plaintiff, he was asked whether he was “aware that the original documents which were handed over by you to Li & Fung India were presented to Defendant No.1 bank by Standard Chartered Bank for payment on June 14th 2003?” His answer was: “It is correct. (vol.) HSBC Bank, Li & Fung Hong Kong **in connivance with each other tried to obtain payments from defendant No.1 and they attempted to recover the amount from defendant No.1 through Standard Chartered Bank after dropping HSBC Bank. Standard Chartered Bank later had to withdraw the said document.**” (emphasis supplied) In reply to a further question whether defendant No.1 was aware of the “malafide intentions of Li & Fung Hong Kong” he replied: “I cannot say whether defendant No.1 was aware or not.” It is indeed strange that despite claiming to know of the role of Li & Fung Hog Kong and HSBC Bank, the Plaintiff made only Defendant No.1 a party to this suit.

34. The suit, therefore, must be held to be bad for non-joinder of

necessary and proper parties. The issue is answered in favour of Defendant No.1 and against the Plaintiff.

35. Issue Nos.3 and 4:

3. Whether the Plaintiff is entitled to enforce any obligation against the Defendant No.1 either directly or through Defendant No.2?

4. Whether the Plaintiff is entitled to claim any sum arising out of any liability from the transaction in question and if so, to what amount it is entitled?

The case of the Plaintiff is that a copy each of the HAWBs accompanied the consignment. From the release order in relation to the goods released by the Defendant No.1, it is apparent that there is a reference therein to the HAWB. It is accordingly contended by the Plaintiff that Defendant No.1 used the said document for effecting release of the goods to Promod S.A. The payment in relation to the goods were remitted to Li & Fung Hong Kong in terms of a LC which is not the LC which was mentioned in the HAWB that accompanied the consignment. According to the Plaintiff, the Defendant No.1 was under a duty of care to ensure that the seller (in this case the Plaintiff) whose name is clearly mentioned in the HAWB receives the money. Reference has been made to the various provisions of the text of the ICC Uniform Rules for Collection (ICC Publication No.522) [hereinafter referred to as URC 522] to emphasise that the Defendant No.1 was under an obligation to act in good faith and with reasonable care and that any release of goods without receipt of payment (which would then be remitted to the seller), would constitute a breach of that obligation.

36. The other specific case set up by the Plaintiff is that the Defendant No.1 is guilty of the tort of conversion. It is submitted that in the facts and circumstances of the case, whether the goods have been allowed to be taken by the consignee without payment being received therefor by the buyer, the definition of the tort of conversion as understood in local parlance stands satisfied. Counsel for the Plaintiff relies upon the definition of “conversion” contained in Thomson’s Dictionary of Banking (12th Edition), Pitman Publication and decisions in ***Bloom Dekor Ltd. v. Subhash Himatlal Desai (1994) 6 SCC 322***; ***Dhian Singh Sobha Singh v. Union of India 1958 SCR 781***; ***Mulliner v. Florence V-III QBD 484***; ***Bute (Marquess) v. Barclays Bank Ltd. V-III QBD 365***; ***A.L. Underwood Ltd. v. Bank of Liverpool & Martins 24 1 K.B. 775***; ***Trustees of the Port of Bombay v. Premier Automobiles Ltd. (1981) 1 SCC 228*** and ***State of Gujarat v. Memon Mahomed Hazi Hasam (Dead) AIR 1967 SC 1885***.

37. Reference is made to the following averment in the written statement of Defendant No.1:

“The Plaintiff should have pursued Li & Fung, Hong Kong or its bankers HSBC, Hong Kong for repayment since, by his own admission, the documentary credit under which the Plaintiff should have been paid expired before he consigned the goods. The documentary collection drawn by the Plaintiff on Promod SA which was forwarded by the Defendant No.2 was received by the Defendant No.1 on June 5, 2003, after the goods had already been released to Promod SA on May 19 & May 21, 2003. Therefore, the

question of the Defendant No.1 not having acted in good faith or with reasonable care does not arise.”

It is submitted with reference to the above statement, that if it is true that the documents were received by Defendant No.1 only on 5th June 2003, then the HAWB number could not have been mentioned in the release documents dated 19th and 21st May 2003. Further, there is no reference to the precautions taken by Defendant No.1 before it released the goods. A reference is made to Articles 4, 9 and 10 of the URC 522 in this regard. Reference is also made to the 2nd Schedule to the Carriage by Air Act, 1972. A reference is also made to para 33 of the written statement where it has been stated that “Defendant No.1 issued the release orders on instructions of Promod SA under its LC. The Defendant No.1 will rely on the statements of facts made in paragraph nos. 19 and 21 hereinbefore in this regard. It was not for the Defendant No.1 to ascertain whether payment in respect of the said goods had been made and released to the Defendant No.2 bank as this Defendant was acting within its LC and conforming to the international banking practices including the provisions of UCP 500.”

38. A reference is also made to para 6 of the written statement where it is mentioned that “the freight forwarder as per the instructions in the house airway bill had notified Promod SA regarding arrival of the shipments in France. This notification indicated Li & Fung as the shipper and included the invoices raised by the Plaintiff which referred to the documentary credit no. DCLCK 409960. Upon receiving the

notification, Promod SA instructed the Defendant No.1 on May 19 & May 21, 2003 to issue release orders to the freight forwarder. The Defendant No.1 complied with Promod SA's instructions and issued release orders on the basis of which the freight forwarder released goods to Promod SA on the aforesaid dates.”

39. In reply, it is submitted by the learned counsel for the Defendant No.1 that there are two separate and distinct transactions. One is the actual shipment of the goods from India to France by the Plaintiff through a carrier for being delivered to the entity in France. The second is the transaction concerning the payment for the goods against documents. Reference is made to the decision of the Supreme Court in *Federal Bank v. V.M. Jog Engineering Ltd.* (supra). In the event of the seller not receiving the payment for the goods supplied he should proceed against the buyer or the agent of the buyer, which in the instant case the seller has chosen not to do.

40. It is submitted that there is no obligation on the Defendant No.1 at all to act as a collecting bank. This much is clear according to the Defendant No.1 from Article 4 of URC 522. According to the Defendant No.1, the LC opened by Li & Fung Hong Kong in favour of the Plaintiff expired on 4th May 2003. The attempts by the Plaintiff to have the LC renewed failed. Thereafter, the seller decided to opt for the URC 522 route and requested its banker, i.e., the Defendant No.2 to forward the documents to the Defendant No.1 for collection.

However, by the time the documents were received by Defendant

No.1, the goods were already been released as the LC opened by Promod SA in favour of Li & Fung. Since the Defendant No.1 was assured that the goods were covered by the LC, there was no obligation on it to ensure that the seller receives the money.

41. It is also pointed out by learned counsel for Defendant No.1 that in the instant case, there are two invoices for the same transaction. One copy of the invoice shows the consignee to be Promod SA and the other to be Defendant No.1. It is submitted that PW1 when cross-examined, was unable to explain this discrepancy satisfactorily. A reference is made to the request for release of the goods to Promod SA which according to the Defendant No.1 was the most crucial document. An indemnity was given in the request for release whereby Defendant No.1 stood indemnified against any claims that could be made against it on account of the goods being released to Promod SA. It is stated that in so far as this letter in the format mentioned was obtained from Promod SA, no greater duty of care could be expected from Defendant No.1. It is submitted that the duties have been specified in Article 4 sub-clause 1(b) and (c) URC 522. According to the Defendant No.1, there was no prior agreement with the bank. A reference is made to the proviso to Article 10 URC 522 in this regard. It is submitted that the Defendant No.1 never came into picture till it received a letter from the Defendant No.2 forwarding the documents requesting it to make collection. Without prior consent of the Defendant No.1, its name was simply included in the HAWB as consignee. The Defendant No.1 only received a small commission for

collection. In any event, it could have never undertaken that task where the goods already stood released before the request for collection was received by it. In the above circumstances, there was no obligation at all on Defendant No.1 to get back to the Plaintiff before releasing the goods to Promod SA.

42. The above submissions have been considered. Both parties have relied upon the provisions contained in URC 522. Article 1 thereof reads as under:

“1 Application of URC 522

- a The Uniform Rules for Collections, 1995 Revision, ICC Publication No.522, shall apply to all collections as defined in Article 2 where such rules are incorporated into the text of the “collection instruction” referred to in Article 4 and are binding on all parties thereto unless otherwise expressly agreed or contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from.
- b Banks shall have no obligation to handle either a collection or any collection instruction or subsequent related instructions.
- c If a bank elects, for any reason, not to handle a collection or any related instructions received by it, it must advise the party from whom it received the collection or the instructions by telecommunication or, if that is not possible, by other expeditious means, without delay.”

43. The above provisions envisage a remitting bank and the collecting

bank which in this case would be Defendants 2 and 1 respectively. Collection means the handling by banks of documents as defined in 2(b) which could be the following kinds of documents, i.e., financial documents including bills of exchange, promissory notes, cheques and similar instruments used for obtaining the payment of money. Commercial documents are invoices, transport documents, documents of title or other similar documents. In the present case, the LC would be part of the financial documents whereas the HAWB would be the part of the commercial documents.

44. Article 4 of URC 522 talks of collection instructions. Article 4(a)(i) states that all documents sent for collection must be accompanied by a collection instruction indicating that the collection is subject to URC 522 and giving complete and precise instructions. It further adds that banks will not examine documents in order to obtain instructions. Article 4(c) (ii) says that “the collecting bank will not be liable or responsible for any ensuing delay as a result of an incomplete/incorrect address being provided.” Although Article 9 requires the banks to act “in good faith and exercise reasonable care”, Article 10 maintains that “goods should not be dispatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank”.

45. The proviso to Article 10 envisages a situation, as in the present case, where goods are dispatched directly or consigned to the

collecting Bank for release against payment without prior agreement.

The said proviso reads as under:

“a Goods should not be dispatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank.

Nevertheless, in the event that goods are dispatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party dispatching the goods.”

46. In the instant case, the LC opened by Li & Fung Hong Kong in favour of the Plaintiff expired on 4th May 2003. Admittedly the said LC could not be renewed. Therefore by the time the goods were despatched accompanied by copies of two HAWBs on 7th May 2003 and 9th May 2003 it was clear to the Plaintiff that the said transaction of collection of payment on the instruction of Plaintiff could not be gone through. Therefore the Plaintiff on the strength of these documents opted for the URC 522 route which is that the Defendant No.2 could forward the documents for collection to the Defendant No.1. The Plaintiff has not been able to produce any evidence to show that the prior consent of the Defendant No.1 was obtained before its name was indicated as the consignee. No satisfactory explanation is also forthcoming as to how in the invoice the change to this effect was made by the Plaintiff and in what circumstances. Be that as it may, it appears to this Court in terms of the proviso to Article 10 of URC 522

which is heavily relied upon by the Plaintiff itself that no liability can attach to the Defendant No.1 bank since the documents were dispatched directly to it showing it as a consignee without prior agreement with it. It is clearly mentioned in the proviso to Article 10(a) that “such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party dispatching the goods”. The cross-examination of the Plaintiff has revealed that admittedly there was delay on the part of the Plaintiff in getting Defendant No.2 to send the documents for collection on DP basis to Defendant No.1. It appears that in the first place Li & Fung India delayed the process of inspection and thereafter the Plaintiff kept waiting for the LC to be extended by Li & Fung Hong Kong. If in the meanwhile on the instructions of Promod S.A. Defendant No.1 released the goods on the basis of the separate LC dated 3rd April 2003, and the request letter of Promod S.A. incorporating an indemnity clause, it could not be faulted for doing so without seeking instructions from the Plaintiff.

47. This Court also finds the submission that Defendant No.1 committed the tort of conversion to be without substance. The definition of conversion as contained in Thomson’s Dictionary of Banking is where there is wrongful interference with another person’s property, “inconsistent with the owner’s right of possession.” A banker would be liable for conversion “if he delivers to an unauthorised person articles left with him by a customer for safe custody”. In the

the address of a bank with whom there is no prior agreement it is not possible to accept the contention of the Plaintiff that in the facts and circumstances of the instant case, Defendant No.1 bank should be held liable for conversion.

48. It is also not possible to accept the contention of the learned counsel for the Plaintiff that in dispatching the goods to France by indicating the Defendant No.1 to be the consignee, the transaction was one of the bailment in terms of Section 148 of the Contract Act. The definition of “bailment” under Section 148 of the Contract Act envisages delivery of goods to Defendant No.1. In this case, according to the Defendant No.1, however it never came into picture as far as taking delivery of the goods was concerned. The explanation that it has offered to the effect that it had no occasion to examine the HAWBs that accompanied the consignment is plausible. Upon the arrival of goods in France, the buyer Promod SA was notified by the freight forwarder. Promod SA then made a request to Defendant No.1 for release of the goods by mentioning the HAWB number in the letter of request. There was no occasion for the Defendant No.1 to examine what the HAWB stated. In any event, since the payment for the said transaction was covered by the LC opened in favour of Li & Fung Hong Kong and since the request for release itself indemnified Defendant No.1, the goods were released by it to the buyer, i.e., Promod SA. In the circumstances, the basic ingredient of bailment vis-à-vis Defendant No.1 is non-existent. While it is true that in *State of*

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be bailment and the relationship of a bailor and a bailee in respect of a property without there being an enforceable contract, on the facts of the present case, the said principle will not apply. None of the other judgments relied upon by the learned counsel for the Plaintiff can apply to the facts of the present case.

49. There is also merit in the contention of learned counsel for Defendant No. 1 that there is no satisfactory explanation given by the Plaintiff for the discrepancy in the two invoices for the same transaction. One copy of the invoice shows the consignee to be Promod SA and the other to be Defendant No.1. The Plaintiff's answer in the cross examination was that for re-import the documents are made in the name of the buyer and for bank documents "as per the letter of credit." This answer is vague and does not explain how the name of the consignee in the original invoice (Ex. P 48) (Promod S.A.) could be changed to the Defendant No.1 in the other invoice (Ex.P 38).

50. In view of the above findings, this Court answers issue Nos. 3 and 4 in the negative, i.e. in favour of the Defendant No.1 and against the Plaintiff.

51. *Issue No.5:*

If Issue No. 4 is held in favour of Plaintiff, whether the Plaintiff is entitled to claim interest @ 16.5% or at all and if so, for what period and on what amount?

In view of the findings in relation to issue Nos. 3 and 4, the question of

the Plaintiff being entitled to claim interest does not arise. Accordingly, this Court answers issue No.5 in the negative, i.e. in favour of the Defendant No.1 and against the Plaintiff.

52. Issue No.6:

If issues No. 4 and 5 are held in favour of Plaintiff; who is/are the entity(es) against whom such claim is enforceable?

Since issues Nos. 4 and 5 have been answered in favour of Defendant No.1, this issue also does not arise for consideration and is answered as such.

53. In view of the above findings, this suit is dismissed with costs.

S. MURALIDHAR, J.

AUGUST 26, 2009
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