

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ C.R.P. 76/2008 & CM No.6800/2008

Reserved on : 6th April, 2009

% Date of Decision : 15th April , 2009

INTERNATIONAL BUSINESS
CORPORATION

..... Petitioner
Through: Mr. R.K. Dhawan, Advocate

versus

BHAGIRATH DOLKHERIA
& ORS

..... Respondents
Through: Mr. Jayant K. Sud, Advocate
with Mr. Anupam Mishra,
Advocate and Mr. Atul Sahi,
Advocate for Respondent
No.1.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the 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 the Digest?Yes

J U D G M E N T

MANMOHAN, J

1. Present Civil Revision Petition has been filed challenging order dated 17th January, 2008 by virtue of which respondent no. 1/plaintiff's suit has been held to be maintainable.

2. Mr. R.K. Dhawan, learned Counsel for petitioner contended that the present suit was not maintainable in view of Section 69(2) of Indian Partnership Act, 1932 (hereinafter referred to as 'IP Act') as well as Article 3(b) of Uniform Customs and Practice for Documentary Credits (hereinafter referred to as 'UCP 500'). I may mention that though the plea of territorial jurisdiction was

urged by petitioner before trial court, but this ground was not urged before me.

3. Mr. Dhawan submitted that present suit filed by respondent no. 1 was not maintainable as Shri Bhagirath Dolkheria was neither authorized by the partnership firm nor by its partners to file the present suit in his independent name. According to him, the suit was, therefore, barred by Section 69(2) of the IP Act, which reads as under :-

“69. Effect of non--registration (1).....

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the person suing are or have been shown in the Register of firm as partners in the firm.”

4. On a perusal of the plaint, I find that in its paragraph no. 1 it has been categorically averred as under :-

“1) That the plaintiff is a partnership concern registered under partnership Act and Sh. Bhagirath Dolkheria, is one of the partner and duly authorized person to institute the present suit.”

5. Moreover, trial court has given cogent reasons for rejecting this plea of the petitioner. The relevant para of impugned order is reproduced hereinbelow :-

“15. On the careful scrutiny of the rival contentions on this aspect and on the perusal of the material on record, I am of the considered view that as per the averments made in the suit, it is categorically stated that the Partnership is a registered Partnership Firm and the suit has been filed on the averments that the plaintiff is a Partnership Concern registered under Partnership Act and Sh. Bhagirath Dolkheria, is one of the partner and duly authorized person to institute the present suit. Even the photocopy of the Registration Certificate of the Firm dated 15.07.1969 has been filed on behalf of the plaintiff

dated 10.01.2008, which has been allowed to be filed upon hearing vide order dated 10.01.2008. It clearly shows that the firm is a Registered Partnership Firm. Since the date of its registration is 15.07.1969 and the name of Sh. Bhagirath Dolkheria has been mentioned at serial number – 1 of the firm, I do not have any reason to disbelieve the photocopy of the Registration Certificate at this stage and if any of the defendant is having any doubt, it has to be proved at the stage of trial and the defendant can take appropriate action against the plaintiff if his submissions proved to be contrary. Under these circumstances, the submissions on behalf of the defendants that the suit is not maintainable on account of statutory provisions contained in section 69(2) of the Indian Partnership Act 1932, do not hold good as the firm is duly Registered Firm since 1969 and Sh. Bhagirath Dolkheria has instituted the present suit as a partner in the firm. Since the partnership concern is a registered firm and the suit has been filed by a partner on the behalf of the firm, there is no statutory bar contained in section 69(2) of the Indian Partnership Act 1932.”

6. During the course of arguments, Mr. R.K. Dhawan, learned counsel for petitioner contended that trial court should not have examined photocopy of Registration Certificate of the Firm dated 15th July, 1969 as a certified copy of said document had not been filed along with plaint. In my opinion, since present suit was filed in the year 1996, that is prior to 2002 amendment in CPC, plaintiff at that relevant time had only to file original of the documents that he sued upon. Plaintiff at that stage did not have to file originals of documents that he relied upon. In any event, the said issue is of academic interest as trial court vide separate order dated 20th May, 2008 has allowed respondent no. 1's application to place on record a copy of Registration Certificate of Firm dated 15th July, 1969. It is pertinent to mention that the said order has not been challenged by petitioner till date. Consequently, in my view, present suit is not barred by provision of Section 69(2) of IP Act.

7. Mr. Dhawan next submitted that present suit was not maintainable against petitioner by virtue of Article 3(b) of UCP 500, which reads as under :-

“b. A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank.”

8. According to Mr. Dhawan, Article 3(b) of the UCP 500 concretizes the rule that credits are separate transactions from the sales or other contract(s) on which they may be based. He states that by virtue of this Article, a beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank. In other words, the undertaking of a bank to pay under the credit is not subject to the claims or defences by the Applicant resulting from his relationship with the Issuing bank or the Beneficiary.

9. Mr. Jayant K. Sud, learned Counsel for respondent no. 1 submitted that UCP 500 was not applicable to the present case as it was a domestic transaction. In this regard he relied upon a judgment of Hon'ble Supreme Court in ***Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. & Ors.*** reported in ***(2001) 1 SCC 663 at 679***, wherein it has been held as under:-

“37. In the absence of incorporation, UCP will not apply but it can be taken into account as part of mercantile custom and practices and most of it is also treated as part of common law, barring a few differences. If an express term in the contract contradicts UCP terms, the contract prevails.....”

10. Mr. Sud further stated that petitioner could not be deleted from the array of parties in present case as the stand of petitioner

and issuing bank was identical. He further pointed out that the same counsel had initially appeared both for issuing bank as well as for petitioner.

11. As far as applicability of UCP 500 is concerned, I may mention that the UCP was first published in 1933 by the International Chamber of Commerce and there have since been revisions in 1951, 1962, 1974, 1983 and 1993. Revision, ICC Publication No. 400, is commonly referred to as UCP 400. The 1993 Revision, ICC Publication No. 500, is commonly referred to as UCP 500. Article 1 of UCP 500 provides :

“The Uniform Customs and Practice for Documentary Credits, 1993 revision, ICC Publication No. 500, shall apply to all Documentary Credits (including to the extent to which they may be applicable, Standby Letter(s) of Credit) where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit.”

12. It follows that the UCP is a body of rules binding on banks and applicants who have adopted them for particular transactions. It is not law, as has sometimes been suggested. The correct approach was set out by Mustill LJ in ***Royal Bank of Scotland Plc v Cassa di Risparmio delle Provincie Lombarde*** reported in ***[1992] 1 Bank LR 251*** wherein it has been held as under:-

“Undeniably the Uniform Customs and Practice have an important role in the conduct of international trade. They expound technical terms; they promote consistency; and they enable the parties to express their intentions briefly, without the need to negotiate and set out all the terms of the relationship at length. Nevertheless, whilst not

belittling the utility of the UCP, it must be recognized that their terms do not constitute a statutory code. As their title makes clear they contain a formulation of customs and practice, which the parties to a letter of credit transaction can incorporate into their contracts by reference. This being so, it seems to me that the obvious place to start, when searching for a contractual term material to a particular obligation, is the express agreement between the parties. If it is found that the parties have explicitly agreed such a term, then the search need go no further, since any contrary provision in UCP must yield to the parties' expressed intention. If on the other hand the agreement is silent in the material respect, then recourse must be had to UCP, and if a relevant term is found there, that term will govern the case."

13. In my view, Article 3(b) of UCP 500 provides that a beneficiary cannot avail himself of the contractual relationships between the banks or between the applicant and the issuing bank. In my opinion, though the said Article incorporates the principle of autonomy, it does not create a bar to the maintainability of present suit.

14. As far as issue of mis-joinder of parties is concerned, I agree with trial court that it is not covered by the expression "barred by any law" under Order 7 Rule 11 CPC. In any event, respondent no. 1 being plaintiff is *dominus litis* and is entitled to implead anyone. Moreover, a court is entitled to implead any person if the court is of the opinion that it is a proper and necessary party. It is settled law that a necessary party is one without whom no effective order can be made and a proper party is one whose presence is necessary for complete and final decision on question involved. In the present case, petitioner is certainly a proper and necessary party and cannot be deleted at this stage. In fact, if the petitioner had not been impleaded in the present suit proceedings, the said suit would have been liable to

be dismissed for non-joinder of an essential party. Moreover, the averments in suit filed by respondent no. 1 disclose a cause of action against petitioner.

15. Consequently, present petition and pending application being devoid of merits are dismissed with costs of Rs. 5,500/-. Moreover, keeping in view the fact that present suit was filed in the year 1996, I direct the trial court to expeditiously dispose of the same in accordance with law by the end of this calendar year. It is made clear that trial court would unnecessarily not adjourn the suit proceedings at request of any of the parties.

MANMOHAN, J

APRIL 15 , 2009
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