

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO (OS) No. 186/2009 & CM No. 6769/2009

% Date of decision : 12.05.2009

M/S. GLOBAL STEEL PHILIPPINES (SPV – AMC)

... ..APPELLANT

Through : Dr. A.M. Singhvi & Mr. A.S. Chandhiok,
Sr. Advs. with Mr. Gaurav Mitra,
Mr. Sachin Midha, Ms. Reha Mitra &
Ms. Kirti Kumar, Advocates.

- V E R S U S -

STATE TRADING CORPORATION OF INDIA LTD. & ORS.

... ..RESPONDENT

Through : Mr. Sandeep Sethi, Sr. Adv. with
Mr. Arvind Nayyar & Mr. Sindhu Sinha,
Advocates for Respondent No. 1.

Mr. Pradeep Dewan & Mr. Rajiv Samaiyar,
Advocates for Respondent No. 2.

Mr. Rajiv Nayar, Sr. Adv. with
Mr. Mahesh Agarwal, Mr. Rishi Agrawala,
Mr. Akshay Ringe & Mr. Nikhil Rohatgi,
Advocates for Respondent No. 3.

Mr. Amar Gupta, Mr. Mayank Mishra &
Mr. Chetan Chopra, Advocates for
Respondent No. 4.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

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

SANJAY KISHAN KAUL, J. (ORAL)

Caveat No. 31/2009

Learned counsel for the respondent / caveator has entered appearance and the caveat is discharged.

FAO (OS) No. 186/2009 & CM No. 6769/2009

1. Learned counsel for the appellant has filed in Court an affidavit of Mr. Abhishek Kumar, Authorised Representative of the appellant, stating that he would like to withdraw the last sentence of ground 'n' of the appeal at page 32 of the paper book, which had crept in inadvertently and that he tendered unconditional apology for the same. The request made in terms of the affidavit is acceded to and the apology accepted. The last sentence of ground 'n' accordingly stands deleted.
2. The appellant entered into an Agreement dated 04.04.2005 with respondent No. 1 / State Trading Corporation (STC) for purchase of various goods from time to time giving authority to respondent No. 1 to execute contracts and place purchase orders on behalf of the appellant. In terms of this arrangement, the payment is to be made by respondent No. 1, which is to be reimbursed by the appellant. It is in pursuance to this arrangement that a contract dated 29.01.2009 was executed on 05.02.2009 by respondent No. 1 on behalf

of the appellant with respondent No. 3 for purchase of 40000 MT of “Prime Continuous Steel Slabs” for a consideration of US \$ 1,60,00,000, which price was amended to US \$ 1,50,52,000. The payment of the goods was through an irrevocable Letter of Credit (for short, ‘LC’) to be arranged by respondent No. 1. In fact, a Tripartite Agreement was arrived at in terms thereof. The LC was accordingly opened in accordance with the principles laid down in Uniform Customs and Practice for Documentary Credit 2007 Revision, ICC Publication No. 600 (for short, ‘UCP 600’). The appellant claims to have received a letter dated 24.03.2009 from the service provider of the port of discharge that no loading or unloading of cargo would take place at Iligan port commencing from 8th April, 2009, which was specified as a private port, in view of the disputes between the service provider and its stevedores. The appellant claims to have also got a certificate issued by the Chamber of Commerce and Industry, Foundation of Iligan certifying that effective from 08.04.2009, 4K Development Corporation had served a notice of not providing stevedoring services until all the pending issues were resolved with finality. Respondent No. 1 / STC, in turn, informed respondent No. 3 on 25.03.2009 about this fact and invoked the *force majeure* clause contained in clause No. 21 of the

contract signed between the parties on 05.02.2009 as there was a strike-like situation beyond the control of either the appellant or respondent No. 1. Respondent No. 3 sent an e-mail asking for the official letter signed and stamped by STC together with the certificate issued by the Chamber of Commerce on the same date, i.e., 25.03.2009.

3. The appellant pleads that in view of the aforesaid documents, the *force majeure* clause contained in clause No. 21 was correctly invoked. The said clause reads as under :-

“21. Force Majeure :

The Parties shall be released from responsibility for a failure to fulfil completely or partially their obligations under the present contract if it is a consequence of force majeure circumstances such as fire, flood, earthquake, war, military operations of any kind, blockades, prohibition of export / import, strikes or some other contingencies beyond control of the Parties if such circumstances directly affect the execution of the present contract. In such case the time for the fulfillment of the obligations under the present contract shall be extended for the period during which such circumstances last. If such circumstances last for more than 2 months the Parties shall have the right to refuse further fulfillment of its obligations under the present contract and in that case neither Party shall have the right to claim compensation for eventual losses from the other Party. The Party to whom it becomes impossible to meet its obligations under the present contract in the circumstances mentioned above is obliged to advise immediately the other Party regarding commencement and cessation of the circumstances preventing fulfillment of its obligations. Certificates issued by the Chamber of Commerce of the country where such circumstances occurred shall be sufficient proof of the existence of such contingencies and their duration.

The Force Majeure (Exemption) clause of the International Chamber of Commerce (ICC Publication No. 421) is hereby incorporated in this contract.”

(Emphasis supplied)

4. The grievance of the appellant is that despite the aforesaid *force majeure* clause being invoked, respondent No. 3 shipped the goods on 28.03.2009 and 05.04.2009. These shipments were, thus, alleged to be in breach of the terms and conditions of the contract dated 29.01.2009 and a manifestation of fraudulent intent of respondent No. 3. The appellant apprehending that the LC would be presented to respondent No. 4 filed a civil suit on the original side of this Court for perpetual and permanent injunction along with an application for interim relief thereby seeking to restrain respondent No. 3 from presenting the documents to respondent No. 4 for encashment of the LC dated 27.02.2009 or, if already presented, from encashing the document and / or taking any steps in furtherance thereof. A restraint order was also sought against respondent No. 4 from accepting any document for encashment of the LC or, if already accepted, from encashing such documents and / or taking any steps in furtherance thereof. An ad interim ex-parte order was passed in favour of the appellant on 06.04.2009. Respondent No. 3 filed an application for vacation of stay under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 (for short, ‘CPC’).

5. Learned Single Judge heard both the interlocutory applications and decided the same by the impugned order dated 08.05.2009 whereby the injunction application of the appellant was dismissed and the interim orders vacated. This order is now challenged in appeal.
6. Dr. A.M. Singhvi, learned senior counsel for the appellant, crystallized his submissions thus :-
 - (i) The *force majeure* clause clearly provided for strike or some other contingencies beyond the control of the parties, if it directly affected the execution of the contract. In such eventuality, the time for fulfillment of obligations under the contract stood extended for a period during which such circumstances lasted, but in case such circumstances lasted for more than two months, the parties had the right to refuse further fulfillment of the obligations under the contract. A certificate issued by the Chamber of Commerce of the country where such circumstances occurred was to be treated as sufficient proof of the existence of such contingencies and their duration. Since the operation of the contract dealing with the LC and other conditions prescribed "*The terms and conditions of LC should correspond to the terms and conditions of the*

contract : conditions, which are not included in the contract, cannot be included into LC", it implied that the *force majeure* clause stood incorporated as a term of the LC. The *force majeure* clause provided for conclusivity of the procedure, which had been followed in the present case.

- (ii) The fact that the procedure prescribed by the *force majeure* clause has been followed was apparent from the notice dated 24.03.2009, certificate of Chamber of Commerce dated 25.03.2009 and the response of respondent No. 3 through e-mail dated 25.03.2009. Once this procedure had been followed, respondent No. 3 should have kept the shipments in abeyance and ought not to have shipped the goods on 28.03.2009 and thereafter on 05.04.2009.
- (iii) The LC in question was not a case of a classic unconditional bank guarantee or LC. The terms of the contract were such that they envisaged the incorporation of those terms and conditions in the LC and, thus, both the contract and the LC had to be read together for interpreting the obligations under the LC.
- (iv) LC is normally payable on presentation, but, in the present case, the LC itself provided for payment after 180 days from the date of bill of lading being

issued. The terms of the LC originally envisaged no such period, but subsequently they were so amended to incorporate the period of 180 days credit for which even necessary price adjustment was made.

(v) The shipment of goods in the circumstances amounts to fraud.

7. Learned senior counsel for the appellant submits that though the impugned judgment is an elaborate one, learned Single Judge has fallen into various errors while vacating the injunction.
8. We have heard learned counsel for the parties at length.
9. It is not in dispute that the LC is an independent contractual document. The disputes between the contracting parties are to be settled by arbitration in London but the banks are not party to that contract. Thus, what is sought to be restrained by filing the suit is payments to be made under the LC.
10. Learned Single Judge while examining the legal position has focused on the two aspects — the terms and conditions of the Agreement being read into the LC and the plea of fraud. The legal position on grant of injunction against LC has been succinctly discussed from para 31 onwards by reference to various authoritative pronouncements of different High Courts and the Apex Court. The ratio, which clearly emerges,

is that the bank which opens an LC is not concerned with the relationship between the seller and the customer or of the performance of the contractual obligations and the general principle that LC must not be interfered with by courts as the same had a major implication upon international commerce. So long as the documents accompanying the LC are presented, the LC must be honoured on its terms. The exception to this, of course, is a fraud of gross nature and such fraud should be by the beneficiaries. Learned Single Judge has found that the plaint is silent about the alleged fraud of egregious nature in respect of the LC and in the absence of specific pleadings in this behalf, no case on fraud is made out. The LC was found to be guided by UCP 600 Rules. A finding was reached that the clauses of the underlying Agreement dated 29.01.2009 cannot be read into the LC.

11. It may be noticed that there is some factual dispute even as to the invocation of the *force majeure* clause as respondent No. 3 contended that the excuse of a strike was only a ruse to get out of the obligations under the LC. This was more so as the port in question was a private port with the appellant having an interest in its management. The aspect of the LC providing for a deferred payment of 180 days has also been examined in the impugned order and the learned Single Judge has

found force in the contention of respondent No. 4 that the deferment of payment is a matter of extended credit by respondent No. 4 vis-à-vis respondent No. 2 (confirming bank and issuing bank respectively), but not for the confirming bank to defer encashment of the LC. Respondent No. 4 was not party to the underlying contract nor to any addendum about the extension of time for presentation of the LC to 180 days. It has been noticed that respondents No. 1 to 3 have already initiated the arbitration proceedings.

12. Learned senior counsel for the appellant fairly concedes that unless we agree to his principal submission of reading the terms and conditions of the contract between the parties into the LC, the case of the appellant really cannot go far. In fact, the complete case of the appellant is predicated on the fundamental plea of the *force majeure* clause of the contract being incorporated into the LC in view of what is set out in the contract. The other pleas of the procedure being followed for *force majeure* clause, etc. would only flow from the same. This, in turn, is dependent on the construction of the LC since the appellant pleads that the present case is not one of unconditional LC. Thus, all the first three submissions of learned senior counsel for the appellant, as noticed at the inception itself, have a common thread running through them.

13. We are afraid that we cannot accept the plea of learned senior counsel for the appellant, which is the premise of practically all the submissions. The LC is undisputedly a separate contract. The contract dated 29.01.2009 only prescribes the requirement of opening of an LC. Such LC was to be issued after the draft was approved by the seller (respondent No. 3). It is not in question that LC has, in fact, been issued and there is no challenge to issuance of the LC. We are of the view that the mere stipulation that the LC should correspond to the terms and conditions of the contract does not imply that the terms and conditions of contract, in turn, stood incorporated in the LC. The object of such a stipulation is only that the LC should meet with the financial terms. Not only that, it has clearly been stipulated that the LC is subject to UCP 600 Rules. Thus, it can hardly be said that the LC is not governed by the UCP 600 Rules.
14. There is no doubt that clause 21 does provide for *force majeure* clause and the manner of its invocation and as to how it would come into force. That is, however, a dispute between the parties to the contract as to whether the *force majeure* clause stood properly invoked and whether respondent No. 3 should have still proceeded to load the goods for shipment. Such disputes have to be settled in terms of clause 22 of the contract, which is the arbitration clause. We may once

again note that the arbitration clause providing for the proceedings to be conducted in accordance with the London Maritime Arbitrators Association stand already invoked by respondent No. 3 and it is in those proceedings that this aspect would be settled.

15. We are unable to accept the plea of learned senior counsel for the appellant that the LC in the present case is an extraordinary document not falling in line with a normal LC. In fact, the endeavour of learned senior counsel for the appellant was to read the LC as a conditional document as he could not dispute that otherwise a confirmed LC must be honoured on its presentation. However, such a plea of conditional LC is only predicated on the premise of conditions of contract being incorporated into the LC, which plea we have already rejected. In our considered view, the LC must be read as a separate contract as per its own terms.
16. As far as the plea of learned senior counsel for the appellant about the LC providing a deferred payment is concerned, that aspect arises when the LC is presented and is honoured as per its terms. The banking channel would be governed by the terms and conditions of the LC and would naturally abide by the same. This plea has also been dealt with in the impugned order by reference to the terms and conditions of the LC itself, which provide that payment has to be made upon

presentation of confirming documents by the encashing bank to respondent No. 3. If there is some extended credit *inter se* banks, which has varied the total amount payable under the LC, that would not imply that credit is to be given contrary to the stipulation in the LC. In fact, the contract cannot really be looked into nor the two documents read together as pleaded by learned senior counsel for the appellant, i.e., the contract and the LC. On the other hand, the LC has to be read by itself and its terms and conditions enforced.

17. The plea of fraud lacks in any material particulars being set out in the plaint. The only general allegation of the alleged fraud is that respondent No. 3 shipped the goods despite invocation of the *force majeure* clause. This is really no matter of fraud, but at best a plea of breach of contract.
18. In the end, we may note that the Supreme Court itself has extended caution on various occasions through authoritative pronouncements of interfering with such international commercial transactions supported by LC contrary to UCPs has an adverse impact on international trade. If the appellant is ultimately able to establish its case against respondent No. 3 in the arbitral proceedings based on the *force majeure* clause, the claim for the amount paid under the LC can also be adjudicated at that time and the appellant is not without

the remedy of seeking recovery of such amount paid under the LC.

19. The Supreme Court has succinctly set out in Wander Ltd. & Anr. v. Antox India P. Ltd., 1990 (Supp) SCC 727 the scope of interference by the Division Bench against the exercise of discretion by the Single Judge. It has been observed in para 14 as under :-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate would have taken a different view may not justify interference with the trial court’s exercise of discretion. After referring to these principles, Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph, (1960) 3 SCR 713 = AIR 1960 SC 1156 :-

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseinton & Co. v. Jhanaton*, 1942 AC 130, “... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is

well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.”

(emphasis supplied)

20. We find the reasoning of learned Single Judge unexceptionable and do not find any ground to interfere with the well-reasoned order of the learned Single Judge.

21. Dismissed.

SANJAY KISHAN KAUL, J.

May 12, 2009
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SUDERSHAN KUMAR MISRA, J.