

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

+ **CS(OS) 176/1997**

% **1st August, 2012**

M/S NATIONAL STEEL IND. LTD. Plaintiff
Through: Mr. G.L.Rawal, Sr. Adv. with Mr. Kuljeet
Rawal, Advocate.

VERSUS

M/S BHIWANI COLD ROLLING MILLS LTD. & ANR. ... Defendants
Through: Mr. Vishnu Mehra, Advocate with Ms.
Sakshi Gupta, Adv. for D-2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This suit being CS(OS) No.176/1997 has been filed by the plaintiff for recovery of ₹24,57,062/- against two defendants. The first defendant-company was the buyer of goods being H.R.coils from the plaintiff. Defendant no.2 is the banker which issued the letter of credit through which payment was to be made for the goods sold by the plaintiff to the defendant no.1.

2. The case of the plaintiff as pleaded in the plaint is that the plaintiff agreed to sell 17 H.R.Coils weighing 180.340 Metric Tonnes (MTs) to the

defendant no.1, and for payment of which, the defendant no.1 was to open an irrevocable letter of credit besides providing a cheque as collateral security. The defendant no.1 opened an irrevocable letter of credit with the defendant no.2-bank dated 12.4.1993. There is an amendment to this letter of credit issued on 4.5.1993 for extending the period for enforcing the letter of credit from 15 days to 30 days from the date of dispatch/shipment of the goods. The letter of credit was issued for an amount not exceeding 34 lacs. The plaintiff sold the goods to the defendant no.1 under the invoice No.48 dated 17.4.1993. The value of the goods was ₹ 30,57,124/-. The plaint in para 7 further makes averment that the documents were accepted by Mr. Diwakar Parikh of the defendant no.1 as the authorized signatory of the defendant no.1. Mr. Diwakar Parikh was the employee and Principal Officer of the defendant no.1 and he was authorized to accept the documents on behalf of defendant no.1 because neither the defendant no.1 nor the defendant no.2 ever informed that the said Mr. Diwakar Parikh is not authorized to accept the documents. The plaintiff further pleads that the goods were delivered to the defendant no.1 on 14.4.1993 and the plaintiff thereafter negotiated the Bill of Exchange for payment within the specified period of 30 days of shipment/dispatch, however, the defendant no.1 on 31.5.1993 informed the plaintiff that payment cannot be made as the Board of Directors of the defendant-company had not

accepted the goods, and also that the goods were of inferior quality. The plaint also makes averments with respect to the defendant no.2 not honouring the Bill of Exchange on the ground of an alleged discrepancy that there was no proof that the person who accepted the goods/Bill of Exchange for the defendant no.1, was a duly authorized employee of the defendant no.1/buyer-company. The plaint thereafter states that the plaintiff had already filed a writ petition before the Indore Bench, Madhya Pradesh High Court against the dishonest stand taken by the defendants and which writ petition was pending when the suit was filed. The plaint also makes an averment with regard to the cheque given as collateral security being thereafter presented, and which having been dishonoured, consequently, the plaintiff filed a criminal complaint under Section 138 of the Negotiable Instruments Act, 1881 before the concerned judicial Magistrate at Indore. The plaint also refers to the fact that the defendant no.1 made part payment of ₹ 17,38,039/- on 1.2.1994, and therefore, there only remained a balance of ₹13,19,035/- towards the principal amount, which is claimed in the suit. The plaintiff also claims interest on the balance at 18% per annum. Para 14 of the plaint seeks extension of limitation for filing of the suit on the ground that the writ proceedings were pending in the Indore Bench of Madhya Pradesh High Court.

3. Defendant no.1-company has been wound up and as per the statement of the plaintiff's counsel recorded on 6.7.2012, the plaintiff in the present suit is not claiming any relief against the defendant no.1-company.

4. Defendant no.2 has filed its written statement. In the written statement, the basic defence is that under the Uniform Customs and Practices for Documentary Credit, Revision 1995 (UCP 500) the bank is duty bound to honour the documents only in accordance with the terms of letter of credit, and since in the present case, the person who signed on behalf of the defendant no.1- company was not authorized to accept the Bill of Exchange, he not being an authorized person of the defendant no.1, the defendant no.2-bank was justified in refusing payment under the letter of credit. Another defence is that the plaintiff is not entitled to benefit of exemption from limitation under Section 14 of the Limitation Act,1963 and hence the suit is time barred.

5. In this case, issues were firstly framed on 30.1.2003 and which read as under:-

- “(1) Whether the plaint has been signed, verified and suit instituted by a competent person?
- (2) Whether suit is not maintainable in view of the preliminary objections No.2 about the plaintiff having filed an earlier proceedings by means of a writ petition in the Madhya Pradesh High Court.?

- (3) Whether defendant No.2 rightly refused encashment of letter of credit in favour of plaintiff for alleged discrepancies as set out in the written statement?
- (4) Whether the plaintiff is entitled to the suit amount?
- (5) Whether the plaintiff is entitled to any interest?
- (6) Relief.”

6. Thereafter, an additional issue was also framed to cover the issue as to whether the plaintiff is entitled to the benefit of Section 14 of the Limitation Act for the period for which proceedings were being pursued in the writ petition filed before the Madhya Pradesh High Court by the plaintiff. The additional issue was framed on 7.2.2007 and which reads as under:-

- (1) Whether the plaintiff is entitled to the benefit of Section 14 of the Limitation Act on account of the (petitioner prosecuting the writ petition before the Madhya Pradesh High Court in Mis. Pet. No. 1643/93?

ISSUE NO.1.

7. So far as issue no.1 is concerned, counsel for defendant no.2 does not seriously press the issue in view of the judgment of the Supreme Court in the case of ***United Bank of India Vs. Naresh Kumar AIR 1997 SC 3*** and which holds that the suits filed by companies should not be dismissed on technical grounds once the same are contested to the hilt. It has been held in the aforesaid Supreme Court judgment that Order 29 of Code of Civil Procedure, 1908 (CPC) sufficiently empowers the filing of the suit and signing of pleadings by a Principal Officer of a

company. I may note that in the present case, the suit has been instituted through Sh. V.K.Jain, who being the Regional Manager is a Principal Officer in terms of Order 29 CPC.

ISSUE NO.2

8. Issue No. 2 framed on 30.1.2003 and the additional issue framed on 7.2.2007 can be, and are therefore being disposed of together. The basic aspect is that since the suit has been filed beyond the period of three years from commencement of cause of action i.e. 3 years after refusal of the defendant no.2- bank to make payment under the letter of credit, whether, plaintiff is entitled to the benefit of exclusion from limitation the period spent in writ proceedings which were pending in the Indore Bench of the Madhya Pradesh High Court. The cause of action in the present case admittedly arose on 8.6.1993, being the date of the telegram Ex.P-9, by which the defendant no.2- bank advised the banker of the plaintiff that payment under the letter of credit has been refused because the same has not been pre-accepted by the authorized signatory of the defendant no.1. This telegram Ex.P-9 having been received by the agent of the plaintiff i.e. its banker, the same is deemed to have been received by the banker of the plaintiff on behalf of the plaintiff. The period of 3 years therefore begins on 9.6.1993. The suit therefore had to be filed on or before 8.6.1996. The suit has been filed on

22.1.1997 i.e. approximately 226 days beyond the period of limitation. The writ proceedings before the Indore Bench of the Madhya Pradesh High Court were filed on 17.8.1993 and they were concluded by the order of the Madhya Pradesh High Court dated 14.2.2001 which dismissed the writ petition on the ground of jurisdiction as also the fact that issue of contractual matters/issues cannot be decided in a writ petition.

9. Since the discussion on this issue of Section 14 of the Limitation Act, 1963 will considerably turn upon the language of the order dated 14.2.2001 passed by the High Court of Madhya Pradesh, I seek to reproduce the said order Ex.PW1/15 as under:-

“ Having perused the petition filed under Articles 226/227 of the Constitution of India and having perused the return and also the relief claimed therein I am of the view that the petition is misconceived and deserves dismissal. Indeed, it has otherwise rendered infructuous. It is apart from the fact that even when it was filed it was meritless.

2. In substance by filing this petition, the petitioner complained that despite the petitioner requesting the respondent no.1-Bank, it has declined to honour the letter of credit furnished by the petitioner in fulfillment of some commercial contract that the petitioner had entered into with some parties. In effect therefore the complaint is that the Bank has acted against the Banking norms when it did not react in favour of petitioner in one particular transaction which resulted in loss to the petitioner. The petitioner therefore challenges the issuance of one letter (Annexure P/3) which reads as under:-

**“YOUR OBC NO 540 UNDER LC SBP/303/93-94/005
THE DOCUMENTS DISCRIPENT BILL OF
EXCHANGE NOT PRE-ACCEPTED BY
AUTHORISED SIGNATORY**

OF MES LTD. ADVISE FURTHER INSTRUCTIONS

BRANCH MANAGER STATE BANK OF PTIALA

PARLIAMENT STREET NEW DELHI”

and further challenges the another letter dt. 18/6/93 (Annexure P/4) which reads a under:-

“Please refer to our telegram advising non-acceptance of documents under our L/C No.SBP/303/93-94/005 on account of discripency, i.e. Bill of Exchange not pre-accepted by authorized signatories of the Mohta Electo Stlle Ltd.

As no instructions has been received by us, we hereby return these documents.”

3. The respondent Bank is at Patiyala, I fail to appreciate as to how and on what basis, this petition was filed in Indore where apparently no cause of action must less substantial one has arisen. That apart, it is now more than 7 years that the transaction in question for which the letter of credit was furnished is over or must have been over. It related to one particular transaction that was entered into in 1993. It ended in 1993 itself. Nothing remains now even in the grievance that was raised in the petition.

4. In any event whether the petitioner has any grievance left or not, the same cannot be made subject matter of writ. Indeed, writ court is of no help to the petitioner to pass any orders. It is a case of clear contractual relations and thereby may be several reasons that must have been led for not accepting the petitioner's request. It is for the petitioner to file suit and claim damages if as a result of respondents some action or inaction, the petitioner has suffered any loss in the transaction for which the letter of credit was sought. In

substance, this petition was misconceived from all point of view and deserves to be dismissed.

5. Accordingly, I find no merit in the writ. It is accordingly dismissed.

No costs. Security amount if deposited, be refunded to the petitioner as per the rules.”

10. A reading of the aforesaid order dated 14.2.2001 shows that the defendant no.2-bank which was the respondent no.1 was situated at Patiala and therefore, the writ petition was not entertained on account of territorial jurisdiction. The aforesaid order also shows that the writ petition filed by the petitioner in the Madhya Pradesh High Court is therefore admittedly dismissed not on merits but on account of lack of territorial jurisdiction. The writ Court also refused to exercise jurisdiction as contractual issues are ordinarily not decided in a writ petition i.e the same are decided in a suit.

11. Learned counsel for the plaintiff relied upon the judgments of the Supreme Court in the cases of *ABL International Ltd. and Anr. Vs. Export Credit Guarantee Corporation, I. Ltd. (2004) 3 SCC 453* and *Kumari Shrilekha Vidyarthi and others and State of U.P. and others 1991 (1) SCC 212* to canvass the proposition that the plaintiff herein, and the petitioner in the writ petition was under a *bona fide* belief that the contractual issues can be heard in writ petition. Counsel for the plaintiff also argues that the writ petition filed in the Madhya

Pradesh High Court talks of the filing of the criminal complaint by the plaintiff at Indore because of the dishonour of the cheque given by the plaintiff as a collateral security and, therefore, the plaintiff had been legally advised, and which it bonafidely believed, that the Madhya Pradesh High Court could have jurisdiction. It is argued that a wrong plea with regard to the existence of the territorial jurisdiction that a writ Court will exercise jurisdiction although the issues may be of a contract would mean that the plaintiff herein and the petitioner in the writ petition, was bonafidely pursuing a civil case in a Court which did not have jurisdiction to decide the matter, and in any case, the writ petition was dismissed on account of “other cause of a like nature” in terms of Section 14 because the Indore Bench of the Madhya Pradesh High Court refused to exercise its writ jurisdiction only on such discretionary ground, and which is covered under the aforesaid expression appearing in Section 14 of the Limitation Act, 1963.

12. Since the language of Section 14(1) is relevant, I would like to reproduce the said sub-section-1 of Section 14. This provision reads as under:-

“14. Exclusion of time of proceeding bona fide in court without jurisdiction

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from

defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

Sub-section 1 of Section 14 has the following parts:-

(i) A plaintiff who files the suit beyond the period of limitation prosecutes with due diligence another civil proceeding.

(ii) The civil proceeding which is prosecuted with due diligence relates to the same matter in issue as that in the suit.

(iii) The civil proceeding which is prosecuted in a Court with due diligence, is prosecuted in good faith.

(iv) The Court, in which the civil proceeding was prosecuted with due diligence and good faith, because of lack of jurisdiction or other causes of like nature is unable to entertain it.

13. Let us see if the plaintiff has satisfied the aforesaid requirements of Section 14(1). That a civil proceeding was prosecuted with due diligence cannot be disputed because the civil proceeding being the writ petition was contested to the hilt i.e till a final judgment was passed therein. It can also not be disputed that the writ petition was dismissed because of lack of territorial jurisdiction and also because in my opinion on the basis of “other cause of a like nature” inasmuch as, refusal to exercise discretionary jurisdiction, in my opinion, will fall within the

expression, “other cause of a like nature” inasmuch as this expression is intended to cover dismissal of a case otherwise than on merits i.e on technical grounds.

The main aspect to be decided is whether the earlier proceedings in the writ petition in Madhya Pradesh High Court was prosecuted in good faith, inasmuch as the plaintiff has argued that there was good faith, whereas the counsel for defendant no.2 argued that there was lack of good faith.

14. Learned counsel for the defendants in support of his arguments relied upon the judgments of the Supreme Court in the cases of *M/s Consolidated Engineering Enterprises Vs. Principal Secretary Irrigation Department & Ors. JT 2008 (6) SC 22* and *Coal India Ltd. & Anr. Vs. Ujjal Transport Agency and Others (2011) 1 SCC 117*. The judgment in the case of *M/s Consolidated Engineering (supra)* was relied upon for the ingredients of Section 14(1), emphasis being laid on the argument that a suit which is filed cannot get the benefit of Section 14(1) of the Limitation Act, 1963 unless the suit is filed after the earlier proceedings initiated are withdrawn. Reliance is placed upon paras 12,14,17 and 19 of the judgment which read as under:-

12. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said Section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

- (2) The prior proceeding had been prosecuted with due diligence and in good faith;
- (3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;
- (4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;
- (5) Both the proceedings are in a court.

The policy of the Section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded.

14. We may notice that in similar circumstances the Division Bench of this Court in *State of Goa v. Western Builders*[JT 2006 (6) sC 125; 2006 (6) SCC 239] has taken a similar view. As observed earlier the intention of the legislature in enacting Section 14 of the Act is to give relief to a litigant who had approached the wrong forum. No canon of construction of a statute is more firmly established than this that the purpose of interpretation is to give effect to the intention underlying the statute. The interpretation of Section 14 has to be liberal. The language of beneficial provision contained in Section 14 of the Limitation Act must be construed liberally so as to suppress the mischief and advance its object. therefore, it is held that the provisions of Section 14 of the Limitation Act are applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award.

17. As this Court holds that Section 14 of the Limitation Act, 1963 is applicable to an application filed under Section 34 of the Act, 1996 for setting aside an award made by an arbitrator, the appeal arising from Special Leave Petition (C) No. 10311 of 2005 will have to be dismissed because the Division Bench of the High Court of Karnataka has in terms held that there was no lack of bona fide on the part of the respondents and that the respondents had diligently prosecuted the matter before the other court and had also immediately after coming to know the lack of jurisdiction of the court had filed the memo seeking withdrawal of the appeal and presented the same before the lower court which had the jurisdiction.

19. To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this Judgment have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essentially pre-requisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have

been prosecuted in good faith and with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard and fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith. As is evident from the facts of the case, initially the appellant had approached the court of learned civil Judge, Senior Division, Chitradurga for setting aside the award made by the arbitrator. On direction dated October 29, 2002 issued by the learned civil Judge (Senior Division), Chitradurga, the appellant had presented the application for setting aside the award before the learned District Judge, Chitradurga. Before the learned District Judge, Chitradurga an objection was raised by the respondent that the application was not maintainable before the said court and that the application was maintainable before the learned Judge, City civil Court, Bangalore. The District Judge, Chitradurga by an order dated February 3, 2003 held that it had no jurisdiction to entertain the application submitted by the applicant and accordingly returned the application for presentation before the appropriate court. The question of jurisdiction was seriously contested between the parties not only before the court of learned civil Judge (Senior Division), Chitradurga but also before the learned District Judge, Chitradurga. The question of jurisdiction had to be considered by the courts below because of establishment of City civil Court, Bangalore under a special enactment and in view of the definition of the word 'court' as given in Section 2(e) of the Arbitration and Conciliation Act, 1996 which means the principal civil court of original jurisdiction in a district. The record does not indicate that there was pretended mistake intentionally made by the appellant with a view to delaying the proceeding or harassing the respondent. There was an honest

doubt about the court competent to entertain the application for setting aside the award made by the arbitrator. The mere fact that the question of jurisdiction is an arguable one would not negative good faith because the appellant believed bona fide that the court in which it had instituted the proceeding had jurisdiction in the matter. By filing the application in the courts which had no jurisdiction to entertain the same, the appellant did not achieve anything more particularly when the lis was never given up. Under the circumstances this Court is of the opinion that the Division Bench of the High Court of Karnataka was not justified in concluding that the appellant had not prosecuted the matter in other courts with due diligence and in good faith. The said finding being against the weight of evidence on record, is liable to be set aside and is hereby set aside. We, therefore, hold that the appellant had prosecuted the matter in other courts with due diligence and in good faith and, therefore, is entitled to claim exclusion of time in prosecuting the matter in wrong courts. therefore, the appeal arising from SLP(C) No. 15619 of 2005 will have to be allowed.

It is argued on the basis of this judgment that once the plaintiff files a suit and subsequently comes to know of the lack of jurisdiction of the earlier Court, immediately thereafter, without waiting for the said earlier proceedings to be decided, the suit should be filed so as to get the benefit of Section 14(1) of the Act. The judgment in the case of *Coal India Ltd.* is relied upon for the proposition that the benefit of Section 14(1) was given in that case by the Supreme Court because the earlier proceedings were immediately withdrawn once they were found to be filed in a wrong forum.

15. In my opinion, considering the position of law, with regard to filing of writ proceedings even in contractual matters, and which position was laid down by

the Supreme Court way back in the year 1991 in the celebrated decision of ***Kumari Shrilekha Vidyarthi & Ors Vs. State of U.P. and Ors. JT 1990(4) SC 211***, it cannot be said that merely because contractual relations were in issue in the writ proceedings, filing and prosecuting of the same will show lack of good faith. Since the Supreme Court in ***Kumari Shrilekha Vidyarthi*** has said that Government cannot act like Dr. Jekyll and Mr. Hyde because reasonableness has to permit all actions of the Government/State i.e non-contractual or contractual, therefore, it cannot be said that the writ petition which was filed seeking enforcement of contractual relations, was totally lacking in good faith. So far as the issue of territorial jurisdiction is concerned, I have already noted that in the writ proceedings reference was made to filing of criminal complaint on the basis of dishonoured cheque and therefore this could have led to the belief of the writ proceedings being maintainable at Indore Bench of the Madhya Pradesh High Court. Of course, the advice of the lawyers in this regard may not be correct however, the same does not translate necessarily to the lack of good faith on behalf of the plaintiff to deny it the benefit of Section 14 of the Limitation Act, 1963. I also cannot subscribe to the view that once an objection is taken as to territorial jurisdiction, a person who has filed the civil proceedings must immediately withdraw the same and thereafter file it in a Court which the person defending the

earlier proceedings contented was the place where the civil proceedings ought to be filed. It is only when a Court takes a decision on existence of lack of territorial jurisdiction, if even thereafter proceedings are still further prosecuted there would be lack of good faith in that situation and consequently the benefit of Section 14(1) may not be available to such a person. Further, I may note that Section 14(1) is very liberal because it talks of prosecuting the earlier civil proceedings even till the highest Court of land i.e. at the stage of the appeals also. Accordingly, in my opinion, considering the facts of the present case, I do not feel that there was such lack of good faith so that it can be held that the lack of good faith is such by which the plaintiff cannot be given the benefit of Section 14(1). On the contrary, in my opinion, there is good faith on behalf of the plaintiff inasmuch as it is in fact during the pendency of the writ proceedings in the High Court of Madhya Pradesh that this suit came to be filed thereby showing that when the plaintiff was put in doubt, it did not wait for the proceedings in the Madhya Pradesh High Court to come to an end but it filed the suit in this Court during the pendency of the writ proceedings. Legally and strictly speaking the plaintiff could have waited, and in fact even contested the proceedings by challenging the order of the Madhya Pradesh High Court in appeal, however the plaintiff did not even wait for the writ proceedings to be decided, leave apart the aspect of challenging the order in

appeal, and therefore I hold that it cannot be said that the plaintiff did not prosecute the proceedings in Indore Bench of the Madhya Pradesh High Court in good faith. I therefore grant the benefit of Section 14(1) of the Limitation Act to the plaintiff and decide the additional issue framed on 7.2.2007 in favour of the plaintiff. Issue no.2 is accordingly decided against the defendant no.2 and in favour of the plaintiff.

16. Let me now take up issue nos. 4 and 5 framed on 30.1.2003 for disposal and which are the issues on merits.

17. The only aspect to be decided, for disposing of this issue is whether defendant no.2-bank was justified in refusing payment under the letter of credit in terms of its telegram Ex.P-9 which gave the reason for refusing to pay under the letter of credit that the bill of exchange was not pre-accepted by the authorized signatory of the defendant no.1/M/s. Bhiwani Cold Rolling Mills Ltd.

18. The proposition of law cannot be disputed that a bank is entitled to refuse payment under a letter of credit if the documents which are presented for negotiation and payment under a letter of credit are not negotiated as per the terms of the letter of credit. Let us therefore see the relevant terms of letter of credit in this regard so as to determine whether the defendant no. 2 was justified in rejecting payment under the letter of credit by the telegram Ex.P-9.

19. When we look at the letter of credit, the relevant term in the present case is term no.(ii) and which reads “Accepted bill of exchange(pre acceptance of MES Ltd. required)”. A reading of this term therefore in my opinion makes it more than abundantly clear that there was no requirement as claimed by the defendant no.2 that it must also be established by the plaintiff that the acceptance of Bill of Exchange on behalf of the defendant no.1-company was by its authorized signatory. If I allow such a defence to be accepted, then, as held by the Supreme Court in the catena of judgments, the commercial world and commercial transactions of sale will fail. If the bank was of the view that the Bill of Exchange could only be accepted by a specified person, and who as per the bank ought to be the authorized official, then, the term should have been worded accordingly, otherwise, there would be grave fraud which would be perpetuated upon the beneficiaries of letters of credit inasmuch as in all cases where banks want to refuse payment under the letter of credit (where the entity on whose behalf the letter of credit is issued is a company) then the bank will simply say that the person who has signed on behalf of the company has not been proved to be the authorized signatory, and therefore, the letter of credit cannot be paid. Said interpretation of a term of a letter of credit cannot be accepted as the entire purpose of letter of credit in a commercial world will be frustrated. This I say so because how can a buyer,

and for whose benefit a letter of credit is issued (and who is the plaintiff in this case) can ever at all dream that the bank will refuse payment under the letter of credit by stating that the officer who signed on behalf of the buyer-company was not authorized, though it is not a term in the letter of credit that the acceptance of the Bill of Exchange must be accompanied by a Board's resolution of the company or a power of attorney in favour of the person/official/employee who accepts the Bill of Exchange. In fact, it is not unknown that this issue is an issue with regard to indoor management of a company i.e. the authority of a person to act or not to act on behalf of the company is to be presumed in favour of third person such as the plaintiff in this case and, more so, in cases of letters of credit which only have a term that there should be an accepted Bill of Exchange and nothing more. There indeed was an accepted Bill of Exchange in this case. The Bill of Exchange was accepted by an officer of the defendant no.1 company/buyer. Nothing further thereafter need be gone into as regards the authority or alleged lack of authority in the person who signs on behalf of the company. As I have already said such strained interpretation of letter of credit will negate the whole purpose of a letter of credit whose object is to ensure certainty of payment in the commercial world. I must say that really the defendant no.2-bank is refusing to pay under letter of credit because it must be that it has failed to secure itself adequately for issuance of letter

of credit from the beneficiary/defendant no.1-company. Ordinarily, a bank which issues a credit takes sufficient securities or monies from the applicant of the letter of credit, and thereafter issues the letter of credit of the bank guarantee. Obviously, since the defendant no.1-company has gone into liquidation, and therefore, the defendant no.2 will not be able to recover the amounts which it has to pay under the bank guarantee to the plaintiff, therefore, the defendant no.2- bank is taking unnecessary defences, however in my opinion, to refuse payment to a seller of goods viz the plaintiff in this case will be a gross injustice to a seller of goods who sold the goods being secured in that belief.

20. I therefore, decide the issue nos. 4 and 5 as also issue no. 6 of relief in favour of the plaintiff by holding that plaintiff is entitled to the amount of ₹ 13,19,035/- as the principal amount. Section 80 of Negotiable Instruments Act, 1881 provides for grant of 18% rate of interest of a dishonoured instrument. A letter of credit is very much a negotiable instrument. Once there is dishonour of such negotiable instrument, the plaintiff will ordinarily be entitled to statutory rate of interest at 18% per annum in terms of Section 80 of Negotiable Instruments Act 1881, however, in my opinion, considering the recent trend of the judgments of the Supreme Court reported as ***Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others, 2005 (6) SCC 678, McDermott***

International Inc. v. Burn Standard Co. Ltd. and others, 2006 (11) SCC 181, Rajasthan State Road Transport Corporation v. Indag Rubber Ltd., (2006) 7 SCC 700, Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra, 2007 (2) SCC 720 & State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd (2009) 3 Arb. LR 140 (SC) which mandate granting of lower rates of interest as the rates of interest have fallen, I deem it fit that the plaintiff should only be entitled to interest at 12% per annum simple from the date of refusal by the defendant no.2 i.e. 8.6.1993 till the date of filing of the suit on 22.1.1997.

21. So far as the pendente lite and future interest are concerned, I am of the opinion that the plaintiff should be held entitled to pendente lite and future interest till payment at 9% per annum simple in the facts of the present case.

Relief:-

22. The suit of the plaintiff is therefore decreed for ₹ 13,19,035/- with interest @ 12% p.a simple from 8.6.1993 till the filing of the suit against the defendant no.2. Plaintiff will also be entitled to pendente lite and future interest at 9% p.a simple. The plaintiff will also be entitled to costs of the suit as per the rules of this Court. Decree sheet be prepared. The suit is decreed and disposed of accordingly.

AUGUST 01, 2012
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VALMIKI J. MEHTA, J.