

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

Reserved on: 02.11.2012
Date of decision: 07.01.2013

+ **RFA (OS) 20/2007**

TIRUPATI TEXKNIT LIMITED (T.T. LTD.) Appellant

Through: Ms. Shilpi Jain Sharma, Advocate.

Versus

HABIB BANK LIMITED AND ORS. Respondents

Through: Sh. Pramod. B. Agarwala with
Sh. Aayush Agarwala, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

% Facts:

1. In this appeal, an unsuccessful plaintiff impugns the judgment and order of a learned Single judge of this Court, dismissing its suit for recovery of money from the first respondent (hereafter called “the defendant Bank”).
2. The Plaintiff is a public limited Company constituted under the Companies Act, 1956. It owns 100% export oriented spinning mills and carries on the business of manufacturing, trading, exporting hosiery, yarn, fabric and textiles. The respondent Bank is incorporated in Pakistan having its branches in Pakistan as well as Bangladesh. The second respondent (hereafter “the buyer”), on the other hand, is a company incorporated in

Bangladesh and carries on the business of importing and exporting garments, yarn, etc. The third respondent was a sole proprietorship/partnership concern which was appointed as the Indenting agent, by the Plaintiff, for hosiery products in Bangladesh. The Plaintiff and the third Respondent had agreed that business procured by the latter would be on the basis of terms and conditions intimated by the Plaintiff from time to time.

3. On 02.11.1994, by Indent No. 23/TTL-33/94, an order was placed on the Plaintiff by the buyer for export of goods. The buyer requested the defendant Bank to establish an irrevocable letter of credit bearing No. HBL/CTG/060/BB/94 dated 22.11.1994 in favour of the Plaintiff for an amount of US Dollar 33,340/- (approximately Rs. 13,00,000/- = @Rs. 39.00 per US Dollar). The terms and conditions governing this letter of credit were stated in the said letter of credit itself. The original letter of credit provided that payment would be made within 120 days D.A basis for full invoice value of the shipment. The facts established are that the goods were shipped through the carrier, on 30-11-1994. However, the payment terms were subsequently amended on 12.01.1995 stating that the payment would be made on realization of export proceeds basis instead of 120 days D.A. basis. This was through a telex, addressed to the Plaintiff's banker, with the stipulation that if the plaintiff did not confirm or deny, an amendment would be deemed to be accepted. The amendment (to the LC) was that payment would be 120 days after realization of export proceeds. Again, there is no dispute that the Plaintiff forwarded the documents in conformity with the terms of the letter of credit to its bank for negotiation. The Plaintiff's bank under reference No. FOBC/6482 sent the documents for payment to the

defendant bank. Despite several attempts on the part of the Plaintiff, the bank did not make the payment to it in terms of the credit. Due to the failure on the part of the bank to make the payment, the Plaintiff was forced to write to the High Commission of India to intervene in the matter. The plaintiff was constrained to cause legal notice to be issued; ultimately it instituted a suit (out of which the present appeal arises) before this Court, suing for the price of the goods shipped to the buyer.

4. The bank resisted the suit, stating that firstly that the buyer wrote to it (the bank) along with a letter from the third Respondent stating that the Plaintiff had agreed to a discount (agreed to accept USD 21,400/- instead of USD 33,340/-). It was further stated that the consignment which was received by the buyer from the Plaintiff had in turn been exported by it to Russia, but the proceeds had not been realized and that upon receipt of export proceeds, the bank would make the payment. The Bank also argued that with the amendment, that had been agreed to by the plaintiff and not objected to by the confirming bank, the terms of the letter of credit had been materially altered, in that payment became due only in the event of receipt of consideration from the purchaser of the goods (to whom the buyer had sold them). It was emphasized that this change in the terms of the credit, rendered it a contingent contract, in which payment depended upon the receipt of money pursuant to further export and sale of goods. Despite the bank's best efforts, that consideration had not been received; the matter had to even be reported in accordance with Bangladesh law, to the Central Bank of that country, as there was some suspicion of collusion between the buyer and its purchaser. However, in the absence of any receipt of amounts from the buyer's Russian purchaser, the plaintiff could not claim the benefit of

credits, even if the documents presented by it conformed to the terms of the letter of credit.

5. The learned Single judge, by the impugned judgment, dismissed the suit. The reasoning which persuaded the Single Judge was that with the communication of the proposed amendment by the Banker – whereby the terms of its obligations were materially altered- it was open to the plaintiff to reject the proposed amendment. Instead, it did not reject the amendment; in terms of the proposed amendment, the liability of the Banker changed to one from an unconditional contract, to one whereby the credit was contingent upon receipt of consideration by the further purchaser. So long as that condition remained fulfilled, the contingency contemplated by the parties did not occur; as a result, the bank could not be made liable in terms of the letter of credit. The relevant reasoning in the impugned judgment is extracted below:

“19. The letter of credit as amended on 10-1-1995 obliged the bank to remit payment under the letter of credit on realization of the export proceedings.

20. For reasons best known to the plaintiff, plaintiff opted benefit of a L.C. which casts an obligation on the bank to remit payment if bank realizes the export proceedings.

21. Unfortunately, defendant No.1 did not realize the export proceeds.

22, Learned counsel for the plaintiff places reliance upon Section 46 of the Contract Act.

23. I am afraid, Section 46 of the Contract Act has no role to pla vis-à-vis plaintiff and defendant No. 1 for the reason; as noted above, letter of credit clearly stipulated that liability of the bank to remit payment would be contingent upon the bank realizing the export proceeds.

24. Learned counsel for the defendant is correct when he states that the letter of credit would be a contingent contract as

per Section 31 of the Indian Contract Act, 1872.

25. I accordingly dismiss the suit against defendant No. 1. I decree the suit against defendants 2 and 3 as prayed for....”

6. The Plaintiff argues that the irrevocable letter of credit opened by the Banker is not a contingent contract as held by the Learned Single Judge. On the other hand, Section 46 of the Indian Contract Act, 1872 applies to the instant case. That provision reads as follows:

"46. Time for performance of promise, when no application is to be made and no time is specified.- Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.- The question "what is a reasonable time" is, in each particular case, a question of fact."

It was argued, in addition that in the facts of this case, the Bank in fact allowed the plaintiff to ship the goods according to the schedule contemplated originally; when they were so shipped, the terms of the letter of credit were different. Much later, in January, the proposed unilateral amendment was alleged to have been made effective. The plaintiff had committed itself irrevocably, and did not protest. That did not mean that in law it had consented to the amendment, which could not be construed as erasing its legal entitlements.

7. It is contended that the Uniform Customs and Practice governing commercial credits, 1993 edition which is globally accepted and followed in respect of all commercial credit documents and instruments, including letters of credit issued by bankers, stipulates that there should be clear, and unequivocal acceptance of amendment, and not a deemed one. In the circumstances of this case, the confirming bank, i.e. the plaintiff's banker,

never accepted the amendment; the plaintiff too did not express its acceptance. On the other hand, the banker, i.e. the first defendant owed an obligation to the plaintiff, as the beneficiary, to disclose full particulars, since in this case the amendment was dictated by, and at the behest of the buyer. It suited the buyer's purpose to postpone payment for goods received and used by it; the banker violated the confidence reposed in it, in not disclosing any material particulars. Even when the opportunity arose, during the hearing of the suit, the banker did not disclose all the facts, such as identity of the Russian buyer, the time for performance, who was the seller, the purchase price, the banker involved in that transaction, the correspondence exchanged between the Bangladesh seller and the Russian buyer, for release of payments, etc. Therefore, the plea of *bona fides* could not be legitimately put forward. Since these were established facts, Section 46 of the Contract Act applied, and the defendant Banker's plea about not receiving the amounts, was not acceptable. Without prejudice to this plea, the banker could not claim that the amendment relied on by it discharged its obligations, in view of express provisions of UCP-5000 (1993). Reliance was placed on Article 10, which pertained to amendment to say that under no circumstance could an unconditional and irrevocable commercial letter of credit, be changed into a conditional or revocable one, after the beneficiary/seller of the goods had shipped the goods in accordance with the original terms, and acted to its disadvantage. To countenance such a plea would be to undermine the sanctity of international commercial credit documents, and dilute bankers' absolute liability in that regard. The findings of the Single Judge, to the effect that the amendment altered the nature of the credit document into a contingent contract, were questioned as

erroneous.

8. The Banker contended that under the amended Letter of Credit it was obliged to make payment only on realization of export proceeds and not otherwise. Therefore, unless and until the export proceeds were received, the banker was not supposed to make any payment. Further, being a bank it was not under an obligation to ascertain the authenticity of the documents provided to it. Reliance was placed on Article 15 of the UCP which stipulates that:

“Banks assume no liability to or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s) or for the general and/or particular conditions stipulated in the document(s) or superimposed thereon, nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s) or for the good-faith or acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignee or the insurers of the goods or any other person whomsoever.”

Therefore, the bank denied that it did not fulfill its obligations. It was for the banker to ensure that the terms and conditions of the irrevocable letter of credit were fully met with. Also, the amendment made to the letter of credit is what shall be binding upon the Bank. Thus, the payment had to be remitted to the Plaintiff only on realization of export proceeds and not on the 120 days D.A. basis.

9. Further, the banker relied on the fact that the third defendant is the agent of the Plaintiff and it was only that party, i.e., the Plaintiff issued a *proforma* invoice to the buyer for supply of the fabric to manufacture the garments. Moreover, it was through the agent that the Plaintiff had requested

the banker for extension of the validity of the shipment date. Therefore, it would not be incorrect to state that being the agent of the Plaintiff, the third defendant was authorized to make amendments to the LC. A perusal of Article 10 of Uniform Customs and Practice for Documentary Credits clarifies that an irrevocable LC can be amended when there is agreement of the issuing bank and the beneficiary. Article 10 reads as follows:

- "Amendments.*** *a. Except as otherwise provided by article 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary.*
- b. An issuing bank is irrevocably bound by an amendment as of the time it issues the amendment. A confirming bank may extend its confirmation to an amendment and will be irrevocably bound as however, choose to advise an amendment without extending its confirmation and, if so, it must inform the issuing bank without delay and inform the beneficiary in its advice.*
- c. The terms and conditions of the original credit (or a credit incorporating previously accepted amendments) will remain in force for the beneficiary until the beneficiary communicates its acceptance of the amendment to the bank that advised such amendment. The beneficiary should give notification of acceptance or rejection of an amendment. If beneficiary fails to give such notification, a presentation that complies with the credit and to any not yet accepted amendment will be deemed to be notification of acceptance by the beneficiary of such amendment. As of that moment the credit will be amended.*
- d. A bank that advises an amendment should inform the bank from which it received the amendment of any notification of acceptance or rejection.*
- e. Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.*
- f. A provision in an amendment to the effect that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded."*

10. The banker argues that the Plaintiff accepted the amendment, in accordance with Article 10 of UCP, through its Banker, Oriental Bank of Commerce. Thus, conditions for amendment of an irrevocable LC are fully satisfied and therefore, the amended conditions of 'Payment will be made on realization of export proceeds basis instead of 120 days DA basis' will be taken into consideration and hence, the banker was not obliged to make payments before the realization of proceeds of the export. Furthermore, the Banker also stated that the amended letter of credit was a contingent contract under Section 31 of the Indian Contract Act, 1872 because the liability to remit payment was to arise only on the realization of export proceeds. Section 31 of the Act reads as follows:

"31. Contingent contract defined.- A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."

Reliance can be placed on the ruling in *Panchanan Dhara & Ors. v. Monmatha Nath Maity* (2006)5SCC340 where the Supreme Court, while clarifying the nature of a contingent contract, held that when the terms of contract are changed without ascertaining the date for performance, there is no difficulty in accepting that such change is permissible under law.

"22. An almost identical question came up for consideration before a Division Bench of this Court in S. Brahmanand and Ors. v. K.R. Muthugopal (Dead) and Ors, AIR 2006 SC 40 wherein this Court laid down the law:

'Thus, this was a situation where the original agreement of 10-3-1989 had a "fixed date" for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for

performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promise may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party. Thus, in this case there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article...."

11. The Bank therefore submitted that since the letter of credit is a contingent contract and falls within the ambit of Section 31 of the Indian Contract Act, 1872, therefore, any amendment made to the effect of its performance without fixing any specific date of its performance is not bad in law. Further, the banker is under an obligation to make good the payment once export proceeds are realized. Therefore, there was no uncertainty as to the performance of the contract, per se.

12. There is not much dispute about the facts; the plaintiff's grievance is in regard to the Banker's refusal to make payments for the shipment of textiles consigned by it, pursuant to the contract entered into with the second defendant buyer. The impugned judgment has held that the second defendant is liable. The latter had entered appearance and filed a written statement. Interestingly the buyer (second defendant) alleged in its written statement that:

"It is further submitted that this defendant exported the ready made garments to M/S TOO AROVISTA RUSSIA, under a contract of sale dated 14-1.1996 and shipment made per vessel M.V Fong Yun under Bill of Lading No. DXX-207 dated 7-4-96 and after shipment of the

said goods on 7-4-96, this defendant submitted full set of shipping document to defendant No. 1 for negotiating the bill....”

The narration of facts noticed earlier disclose that after the shipment was made by the plaintiff, on 30-11-1994, the first defendant Banker wrote to the plaintiff on 12-1-1995 about the amendment. According to the second defendant however, the contract between it and its Russian buyer matured a full year later, on 14-1-1996, and the goods were shipped by a Bill of Lading dated 7-4-1996. No explanation is forthcoming from the first defendant banker, whose claim that the payment under letter of credit would be made only on realization of export proceeds, was misleading, because as on that date- i.e. the date of the amendment, there was no contract for further export. This mistake – in the understanding of the plaintiff, was on account of the withholding of facts by the first and second defendant. There is no other plausible explanation, because both these defendants are silent on this aspect. In this regard, the circumstances emerging point to the first defendant’s culpability, and disregard of its duty it owed to the commercial credit document intended for the benefit of the seller, i.e., the plaintiff in the present case. This duty was explained in Harfield in 95 Banking Journal, 596: August, 1978, in the following terms:

“ The banker cannot owe a fiduciary or a quasi-fiduciary duty to his customer in a commercial credit transaction because, by the very nature of the transaction, entered into at the customer’s request, the banker is obliged to split his loyalties and to maintain a position of strict impartiality induced by the equal but diametrically opposed contractual pressures exerted by the beneficiary and by the account party. The loyalty of the commercial credit banker is to the commercial credit agreement and to the commercial credit itself not to the parties. He has the position of Jovian impartiality which is created by the peculiar relations extant in a commercial credit

transaction.”

The absolute nature of the liability of a banker (who issues a letter of credit) was explained by the English Court of Appeal in *Malas (Hamzeh) & Sons v. British Imex Industries Ltd.* (1958) 2 Q.B. 127 as follows:

“...the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay....”

13. The plaintiff seller and the Banker are agreed on the fact that UCP 500 (1993 edition) govern the credit issued by the latter. An important stipulation as to amendment forms part of that document; it reads as follows:

- “d. A bank that advises an amendment should inform the bank from which it received the amendment of any notification of acceptance or rejection.*
- e. Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.*
- f. A provision in an amendment to the effect that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded.”*

It is immediately apparent from Article 10 (f) that an amendment proposed unilaterally stipulating *“that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded”*. In the present case, the amendment relied on by the defendant bank precisely falls within the prohibition, and cannot be relied upon; it has no effect.

14. The UCP is an attempt to globalize and standardize norms governing international documentary credit instruments and has been recognized time and again as a source of law, albeit customary law. This was so stated in *Glencore International AG v Bank of China* [1996] 1 Lloyd’s Rep 135, 148:

“Practice is generally governed by the Uniform Customs and Practice

for Documentary Credits (the "UCP"), a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. When courts, here and abroad, are asked to rule on questions such as the present they seek to give effect to the international consequences underlying the UCP."

In Schetze & Fontane, *Documentary Credit Law throughout the World* (2001) (ICC Publication No 633), there is a useful discussion (@ para 2.2.4) of the relationship of national law and the UCP:

"While the UCP aim to harmonise worldwide trade practices and aim to safeguard the interests of the international trade and banking community, national laws vary from country to country. The application of national laws to issues not expressly addressed by the UCP can result in a de-internationalisation of the rules and conflict with their purpose. The application of national laws and doctrines needs to be handled carefully. If the UCP generally address an issue in question but do not provide for an explicit solution to a particular aspect of it, there is also the option of considering whether a solution can be found in a general rule contained in the UCP. An interpretation of the UCP in accordance with their aims and evaluations is generally preferable."

Similarly, in Kurkela, in *Letters of Credit and Bank Guarantees under International Trade Law* (2006) (ICC Publication No 966), at para V.I.4 states that:

"The interpretation of such rules should be global and universal and a court must recognise the international nature of the UCP and approach its construction in that spirit. It and should avoid parochial concepts and meanings."

Most recently, the Court of Appeal, in England, in *Fortis Bank SA/NV and another v Indian Overseas Bank* [2011] EWCA Civ 58 held that:

“...a court must recognise the international nature of the UCP and approach its construction in that spirit was drafted in English in a manner that it could easily be translated into about 20 different languages and applied by bankers and traders throughout the world. It is intended to be a self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literalistic and national approach must be avoided....”

15. On an application of the above principles, it is held that in view of the express provision of Article 10 (f) the defendant banker cannot legitimately avoid its liability to honour its letter of credit, issued on 22.11.1994 without the amendments proposed and deemed by it to have been incorporated. That amendment cannot be said to have any effect.

16. There is an additional reason why the plaintiff must succeed. In *Gunwantbhai Mulchand Shah and Ors v Anton Elis Farel & Ors* (2006) 3 SCC 634, the Supreme Court clarified what constitutes ‘reasonable time’ in terms of Section 46 of the Indian Contract Act, 1872:

"10. The reliance placed on Section 46 of the Contract Act by learned Counsel for the defendants would also be an aspect that has to be considered when finally deciding whether the suit could be held to be in time and whether in a suit filed 29 years after the agreement for sale any relief could be granted to the plaintiffs. The applicability of Section 46 of the Contract Act, and if applicable, what is the reasonable time, in this case has to be determined. The aspect of delay will have relevance while considering whether the plaintiffs would be entitled to the discretionary relief of specific performance, even if they satisfy

the other requirements of the Specific Relief Act. But those aspects can be decided only after taking evidence in the case and giving the plaintiffs an opportunity to show that they had always been and they are ready and willing to perform their part of the contract and to show that they had paid the entire consideration and had been put in possession of the property, and nothing further remained for them to perform and all that remained was the execution of the sale deed in their favour and their failure to sue earlier does not disentitle them to the relief of specific performance either on the ground that the suit was barred by limitation or on the ground of delay and laches on their part or on the ground that the discretion of the court in terms of Section 20 of the Specific was not liable to be exercised in their favour in the circumstances of the case. All these pleas available to the defendants cannot enable the dismissal of the suit as barred by limitation under Article 54 of the Limitation Act, as things now stand."

The Court is of the opinion that payment under the letter of credit should have been made to the plaintiff within a 'reasonable time'. It was for the Banker and the buyer to establish that they made reasonable efforts to fulfill their obligations. *Arguendo*, even if it is assumed that the amendment was accepted by the Plaintiff, the said defendants had to satisfy that export proceeds could not be realized so that the bank could avoid remittance of payment altogether. The Plaintiff had argued that it was the liability of Banker to realize the payment from the Russian bank and remit the payment to it. However, no such efforts were made by the banker. The banker has not stated or disclosed who the Russian buyer was; as discussed previously, the defendant Bangladeshi buyer's pleadings disclose that the contract with the Russian buyer was entered into by it, after the amendment, and the letter of credit for that transaction was issued still later. This contradicted the position of the banker. The

banker therefore had to establish that there was a valid contract in existence under which the exports to the Russian buyer's consideration could be realized. These contradictory pleas of the two parties on the one hand, and complete lack of particulars, in the form of documents, on the other, not only highlights divergent stands, but also that the entire plea of contingent nature of the contract is unfounded. Therefore, the learned Single Judge, in this court's opinion, fell into error in holding that the subsequent amendment to the letter of credit transformed it into a contingent contract.

17. The Plaintiff had contended that the agent was not authorized by it to give any discounts as alleged by the banker defendant. It was agreed between the plaintiff and the said agent/ third Defendant that in case of any claim/complaint arising, the latter would represent the Plaintiff but that would not entitle it (third Defendant) to settle the issue or allow any claim or rebate on behalf of the Plaintiff without prior consent in writing from the Plaintiff. No such consent was sought from the Plaintiff. In any case, the concession or discount has not been established. When the Plaintiff agreed to payment against realization it was only to extend cooperation for maximum 30-60 days in order to help Respondent No. 2 to overcome its temporary financial difficulties. Therefore, it would not be incorrect to state that 'payment subject to realization' would not mean that the export proceeds would never be realized or that the Defendants can take unreasonable time to fulfill its obligation.

18. In view of the above discussion, this Court holds that the defendant banker cannot escape its liability to honour the letter of credit

in the terms originally issued by it, on 22.11.1994, and it cannot rely on the amendment purportedly made in January, 2005; the same is held to be not binding upon the plaintiff. The defendant buyer was held liable, and the impugned judgment has directed decree to be drawn against it. Furthermore, the plaintiff is also justified in stating, in view of the facts established on the record, in contending that the payment was to be made to it, in terms of Section 46 of the Contract Act, within reasonable time. The suit as against the first defendant bank therefore succeeds and is decreed. The said defendant shall also be jointly liable along with the other judgment debtor/defendant for the amounts under the letter of credit. The impugned judgment is therefore set aside; the appeal is consequently allowed, but without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JANUARY 07, 2013