

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

Reserved on: 12.11.2013
Pronounced on: 10.12.2013

+ **RFA (OS) 139/2013, C.M. NO.17920/2013 (for stay)**

STATE TRADING CORPORATION OF INDIA LTD.

..... Appellant

Through: Mr. Dinesh Agnani, Sr. Advocate
with Ms. Leena Tuteja, Advocate.

versus

M/S. MILLENNIUM WIRES (P) LTD. AND ORS.

..... Respondents

Through: Mr. Ajay Monga with Mr. Ateev.
K. Mathur and Mr. Devmani Bansal,
Advocates, for Resp. No.5.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. This is an appeal from an order of the learned Single Judge rejecting the plaint in CS(OS) 545/2012 under Order VII Rule 11 Code of Civil Procedure (hereafter “CPC”). The suit – of Millennium Wires, (hereafter “Millennium”) the first plaintiff and State Trading Corporation (STC, the second plaintiff) sought a permanent injunction against the Allahabad Bank; it also sought to restrain the other defendants, including the fourth defendant, the Malayan Bank (hereafter the “foreign bank”) from honouring a Letter of Credit (LC) issued by the Allahabad Bank at the behest of STC.

2. The suit relates to an ‘Associateship’ agreement (dated 02.12.2011,

hereafter “*the AA*”) between the STC and Millennium for the import of continuous cast copper rods. Millennium had been, as per its case before the learned Single Judge, importing such rods from Synergic Material Services PTE Ltd. and Synergic Industrial Material Services Malaysia, group companies based in Singapore and Malaysia respectively (hereinafter “*Synergic, Singapore*” and “*Synergic, Malaysia*” respectively, and collectively as “*the Synergic companies*”). With a view to importing 400 metric tons of the rods, STC and Millennium entered into the agreement. Under the AA, STC was to import the rods for Millennium through the Synergic companies. Further, the agreement also stipulated that Millennium shall provide STC with margin money as advance of 25% of the value of the letter of credit to be opened by STC (Clause 4, agreement), along with a 25% cash advance and a post-dated cheque for 102.5% of the value of the consignment in favour of STC along with a legal undertaking. (Clause 3, of the agreement). The AA also provides for STC’s trading margin (Clause 5, AA), and stipulates in Clause 7, importantly, that Millennium shall,

“7.....approve acceptance of quantity and quality certificate issued at loan port by Supplier/Manufacturer. Hence, the Buyer [MWPL] shall ensure that quality and quantity are in order.....”

3. Under the structure of the transaction, an LC was to be opened by STC through Allahabad Bank, payable to the two Synergic companies through foreign bank (the negotiating and beneficiary bank). STC and Millennium stated- in the plaint, that the manner in which the transaction was worked was as follows: Oral orders were placed by Millennium on the two Synergic companies and thereafter, the latter sent sales contract/proforma invoices to STC. The proforma invoices were then to be issued by Synergic, Singapore in favour of STC, specifically mentioning

Millennium's name as "A/c - Millennium Wires Pvt. Ltd." On the acceptance of the said proforma invoice, final invoice was to be issued by the two Synergic companies, as the case may be, which on acceptance by Millennium was to be sent back to the two companies, and this constituted the contract between STC/Millennium on one side and the two Synergic companies on the other. At that stage, LCs were to be opened by STC through Allahabad Bank payable to the two Synergic companies, as the case may be, through foreign bank.

4. In terms of this arrangement, the rods were despatched from Port Klang, Malaysia with the final destination being the International Container Depot, Ludhiana. A number of documents were, in the ordinary course, sent by the Synergic companies to Allahabad Bank, the issuing bank, with a copy to STC. These included a bill of lading, letter of credit, beneficiary certificate, beneficiary's letter of undertaking, facsimile letter, inspection report, test certificate, advice of import bills received, invoice, packing list, marine cargo insurance policy, certificate of Malaysian origin, and shipping agent's certificate. Here, it is stated that the advance copy of these documents were sent through courier to STC, which in turn sought acceptance from Millennium. The STC averred that the courier receipt of dispatch of the above documents was one of the negotiable documents presented under the LCs to Malayan Bank and sent to Allahabad Bank. Under this arrangement, STC states, the Synergic companies could negotiate the LCs with the foreign bank for release of the payment, which in turn was entitled to claim the amount from Allahabad Bank.

5. A total of four LCs were opened by STC for the import of the rods from Synergic, Singapore. These were:

- a. L/C No. 0189111FLU000150, opened on 07.12.2011. This was negotiated by Malayan Bank with Allahabad Bank on

14.12.2011. Acceptance was conveyed by Millennium to Malayan Bank on 23.12.2011. The bill of lading for the shipment of goods was dated 08.12.2011. The final payment for this LC has been made by Malayan Bank to Synergic, Singapore.

- b. L/C No. 0189111FLU000151, opened on 07.12.2011. This was negotiated by Malayan Bank with Allahabad Bank on 12.12.2011. Acceptance was conveyed by Millennium to the foreign bank on 31.12.2011. The bill of lading for the shipment of goods was dated 09.12.2011. The final payment for this LC has been made by the foreign bank to Synergic, Singapore.
- c. L/C No. 0189111FLU000154, opened on 17.12.2011. This was negotiated by the foreign bank with Allahabad Bank on 22.12.2011. The bill of lading for the shipment of goods was dated 31.12.2011. The final payment for this LC has been made by the foreign bank to Synergic, Singapore.
- d. L/C No. 0189111FLU000159, opened on 02.01.2012. This was negotiated by the foreign bank with Allahabad Bank on 06.01.2012. Acceptance was conveyed by Millennium to the foreign bank on 16.01.2012. The bill of lading for the shipment of goods was dated 07.01.2012.

6. The plaintiffs, Millennium and STC contended before the learned Single Judge that the two Synergic companies had defrauded STC, because the documents concerning shipment of the products were false and fabricated. Both before the learned Single Judge, and in the appeal memorandum presently, instances of alleged fraud have been urged by

STC. It was argued that the Synergic companies made false statements as to sending couriers with the relevant documents (as mentioned above) to STC, and that on checking with DHL and Skynet Courier, (the courier companies involved), the shipment waybill numbers were found to have no attached package sent to STC, or that these waybill numbers did not exist. Based on this, it was argued that the two Synergic companies had fabricated the documents in question, and thus, played a fraud on STC.

7. It was argued furthermore, based on the plaint allegations, that the bills of lading for the shipments were also forged, as the shipping Agent denied having ever issued them, and that no shipment had in fact been physically sent, as was falsely communicated to STC and Millennium. Also, based on correspondence with the authorities at Port Klang, it was argued that the vessels on which the shipment was alleged to have been sent were not available for loading at the port on the days indicated by the bills of lading, further pointing to fraud. Therefore, given that the bills of lading, which were the ultimate proof of export, were fabricated, it was argued that clear evidence of fraud is available, so as to annul the letters of credit in this case.

8. In view of these arguments, and the evidence of fraud played by the two Synergic companies upon STC, and also Millennium, the plaintiffs, STC and Millennium approached the learned Single Judge for a decree of permanent, mandatory and perpetual injunction against Synergic, Singapore from claiming any benefit under the LCs in question, and against the foreign bank to prevent any action, or release of funds, under the LC.

9. The defendants, i.e. the Synergic companies and the foreign bank, in response to the summons, entered appearance and resisted the suit claim. The foreign bank also filed an application for rejection of plaint, under Order VII Rule 11 CPC. In this, it was urged that it had accepted the

documents since they were in conformity with the terms of the LCs. The LCs were negotiated on 12th, 14th and 22nd December 2011 and 6th January 2012 respectively. The amounts were accordingly paid to Synergic Singapore. The stand is that any dispute between STC and Synergic Singapore could not impede reimbursement to be made to the foreign bank in accordance with UCP-600 (Uniform Customs and Practice for Documentary Credits, Sixth Edition) hereafter referred to by its acronym “UCP-600”. It is stated that the foreign bank did not receive any notice in accordance to Article 16 of UCP-600 from the Allahabad Bank. It was stated that as regards LC No. 151, no notice under Article 16 of UCP-600 was received from the said Allahabad Bank. A message dated 31st January 2012 was received from Allahabad Bank that it would not make payment under the said LC as the STC “*alleged the documents to have been fabricated and that the Letter of Credit was fraudulently negotiated.*” With respect to LC No. 154, the stand is that no notice from STC under Article 16 of UCP-600 was received by the foreign bank. It was only on 15th March 2012 it received copy of the order dated 2nd March 2012 from the lawyers of the Plaintiffs. In relation to LC No. 159 it is stated that Allahabad Bank confirmed receipt of the documents by a message dated 16th January 2012 and undertook to make the payment. However, later it reiterated that STC had alleged that the documents were fabricated.

10. Contrary to this, STC had argued that with respect to LCs 150, 154 and 159, “*the plaintiffs (i.e. STC and MWPL) came to know that the Defendant No. 2 company had manufactured courier receipt to demonstrate export and had falsely declared that fax message have been sent and further fabricated other documents to prove exports*”. With respect to LC 151, STC had argued that the documents received were duly rejected and this fact was communicated to Allahabad Bank.

11. In this context, Allahabad Bank's stand was that "*after receiving from Plaintiff No. 2 acceptance of the sets of documents received from the Defendant No.4, the answering Defendant No.1 communicated the same to the Defendant No. 4 advising the due dates of payment in respect of the following three LCs: (a) 0189111FLU000150 (b) 0189111FLS000154 (c) 0189112FLU000159.*" Thus, the Allahabad Bank confirms that with respect to these 3 LCs, at the least, complying presentation was made, and that acceptance from STC (and Millennium) was made.

12. The foreign bank contended that in terms of UCP-600 once the LC stands paid by the negotiating bank, it is an irrevocable undertaking of the issuing bank to make the payment especially when it has accepted the documents and agreed to pay on the date of maturity. It is stated that there is no allegation of fraud against Allahabad Bank, the Synergic Companies and the foreign bank, the plaint had to be rejected. The foreign bank also relied on the judgment of the Supreme Court in *United Commercial Bank v. Bank of India*, (1981) 2 SCC 766. It stated that payments were made by it (the foreign bank) to Allahabad Bank without any knowledge of fraud and therefore, Allahabad Bank was obliged to honour its commitment under each of the LCs in terms of UCP-600. As regards LCs 150, 154 and 159, the foreign bank, in line with the stand of Allahabad Bank, maintains that the documents were accepted by STC, and thus, no dispute arises in that regard. As regards LC 151, the foreign bank argues that, again, notice under Article 16 of UCP-600 was made, such that payment under the LC could be enjoined within the framework of UCP-600, which is argued to regulate the entire LC transaction, as opposed to the contractual relations between STC/Millennium and the Synergic companies.

13. The foreign bank also sought vacation of the interim stay granted by the order dated 2nd March 2012. Reliance was placed upon Articles 4, 5, 15

and 16 of UCP-600 to argue that the underlying contract is independent of the letter of credit, which constitutes a distinct agreement to pay upon complying presentation in terms of UCP-600. Specifically, it was argued that once the documents required to release the payment under the LC have been presented, and are in compliance with the requirements under the terms of the LC, then the bank is under an obligation to make the payment irrespective of the views of the purchaser, as any dispute that the latter may have against the seller is to be raised *inter se* in alternate proceedings. Thus, it was argued that “*as there is no discrepancy in the documents ... non-acceptance of documents by Plaintiff No.2, in such circumstances, is of no consequence.*”

14. The learned Single Judge rejected the suit under Order VII, Rule 11, for failure to disclose a cause of action. Though the learned Single Judge records and appreciates the various allegations of fraud levelled by STC against the two Synergic companies, the plaint was rejected on two grounds: *first*, that a letter of credit constitutes an independent transaction, obligations under which are not contingent on the intricacies of the underlying contract, but rather, on the presentation of the necessary documents to the bank in question; *secondly*, that given the general proscription on interfering with letters of credit, the only limited exception is that of fraud played upon by the seller on the purchaser, if, crucially, the paying bank has notice of such fraud. In the absence of such notice, the learned Single Judge held, the obligation to pay under the LC continues and the defrauded party will have to pursue independent litigation against the seller to recover the money. Accordingly, the learned Single Judge also vacated the interim stay granted by the order dated 02.03.2012 in IA No. 4103/2012 in CS(OS) 545/2012. In reaching this decision, and in reliance on various decisions of the Supreme Court, the learned Single Judge

concluded on the points of law involved in this case as follows:

“30. The law in regard to the LCs can therefore, be summarised as under:

(i) The Court should be slow in granting an order of injunction restraining the realization of a bank guarantee or a LC;

(ii) There are two exceptions to the above rule. The first is that it must be clearly shown that fraud of an egregious nature has been committed and to the notice of the bank. The second is that injustice of the kind which would make it impossible for the guarantor to reimburse himself, or would result in irretrievable harm or injustice to one of the parties concerned, should have resulted.

(iii) It is not enough to allege fraud but there must be clear evidence both as to the fact of fraud as well as to the bank’s knowledge of such fraud.”

15. In the absence of any substantial pleadings on the knowledge of the foreign bank of the fraud, the learned Single Judge held that the cause of action disclosed in the plaint which comprised solely of allegations of fraud against the two Synergic companies and not of any specifics of fraud committed by the foreign bank, or of notice given to the foreign bank of the fraud, was insufficient to merit the final prayer, and thus liable to rejection under Order VII Rule 11 CPC.

16. The appellant argues that the fraud urged here was of a kind that could clearly be termed “egregious” and manifestly perceptible for anyone to see, to justify a remedy in equity. It was argued that the documents clearly revealed that the bills of lading were issued much prior to the dates when the goods could be shipped in terms of the contract and especially contrary to the terms of the letters of credit. Counsel for the STC sought to urge that the instructions clearly were to ship the goods by the end of December; yet the bill of lading revealed that it was issued at least two weeks prior to that; furthermore, there was clearly a manipulation, visible to

the naked eye. The failure or omission by the Allahabad bank to notify the foreign bank about discrepant documents and return them in accordance with UCP-600 did not mean that the Court had to deprive itself of the jurisdiction to grant equitable relief, of injunction.

17. The limited question that arises in this case is whether payment by the negotiating bank under a letter of credit can be enjoined. As the Supreme Court recognized in *United Commercial Bank v. Bank of India*, AIR 1981 SC 1426,

“48.....[i]t is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which these merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.”

This principle is also reflected in Article 4(a), UCP-600, which is binding as regards the LC contracts are concerned:

“(a) A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its

relationships with the issuing bank or the beneficiary.

A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.”

Similarly, Article 5 also creates the distinction between the documents to be presented to the bank for release of payment, and the products/goods that those documents are concerned with ultimately, in the following words:

“Banks deal with documents and not with goods, services or performance to which the documents may relate.”

18. It is well-established in Indian law, as the learned Single Judge correctly noted, that payment under an LC can be enjoined *only* when (a) there is a possibility of irretrievable damage, in that the buyer may not be able to recover the money already released by the negotiating bank, or (b) where there is fraud in the underlying transaction which is brought to the notice of the bank. This was clearly recognized by the Supreme Court in *Federal Bank Ltd. v. VM Jog Engineering Ltd. and Ors.*, (2001) 1 SCC 663:

“57. In several judgments of this Court, it has been held that Courts ought not to grant injunction to restrain encashment of Bank guarantees or Letters of Credit. Two exceptions have been mentioned - (i) fraud and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39, Rule 1 CPC can be issued. It has also been held that the contract of the Bank guarantee or the Letter of Credit is independent of the main contract between the seller and the buyer. This is also clear from Arts. 3 and of the UCP (1983 Revision). In case of an irrevocable Bank guarantee or Letter of Credit the buyer cannot obtain injunction against the Banker on the ground that there was a breach of the contract by the seller.....”

19. The bank's obligation, in this case of the foreign bank, is to honour the LC, and in the words of the Court,

“if the seller prima facie complies with the terms of the Bank Guarantee or Letter of Credit, namely, if the seller produces the documents enumerated in the Bank Guarantee or Letter of Credit. If the Bank is satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the Bank Guarantee or Letter of Credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment.”

20. This obligation is not affected merely because the buyer disputes the due performance of the contract. The obligation is unaffected, as long as the documents presented are in accordance with the terms of the LC. That is the essence of the documentary autonomy of the LC. In this case, the documents presented for LCs 150, 154 and 156 were in order, and this was never disputed by STC or Millennium. Quite to the contrary, STC admitted to having conveyed its acceptance with respect to these three LCs to Allahabad Bank. As regards LC 151, the foreign bank's position is that the documents complied with the requirements under the LC, and, the obligation therefore, to pay was triggered. Here, Article 16, UCP-600 is crucial, which reads as follows:

“Discrepant Documents, Waiver and Notice:

(a) When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.

(b) When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b).

(c) When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

(1) that the bank is refusing to honour or negotiate; and
(2) each discrepancy in respect of which the bank refuses to honour or negotiate; and

(3) (a) that the bank is holding the documents pending further instructions from the presenter; or

(b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or

(c) that the bank is returning the documents; or

(d) that the bank is acting in accordance with instructions previously received from the presenter.

(d) The notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.

(e) A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16 (c) (iii) (a) or (b), return the documents to the presenter at any time.

(f) If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.

(g) When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made.”

21. Article 16(f), therefore, casts a responsibility on the issuing and confirming banks to be diligent in following the provisions of Article 16, failing which the documents would be deemed to constitute complying performance for the purpose of releasing payment under the LC, with or

without the waiver from the buyer. Crucially, the decision as to whether the documents constitute complying presentation is solely that of the issuing bank (i.e. its “*sole judgment*”, in terms of the sub-clause (b), in this case, Allahabad Bank), which may, in case a discrepancy in the documents is found, approach the buyer for a waiver. However, in a case where the issuing bank does decide that the documents do not meet the compliance requirements under the LC, in terms of clause (c), such notice must be given “*no later than the close of the fifth banking day following the day of presentation.*”

22. Thus, in case the payment under the LC is to be enjoined, a notice under Section 16 is mandatory, within the terms of that article. In this case, as regards LCs 150, 154 and 159, the documents were accepted by Allahabad Bank, and no notice was given under Section 16, thus rendering payment under those LCs by the foreign bank proper. As regards LC 151, the only LC as regards which STC/Millennium claim to have rejected the documents, two points are important: *first*, that under Article 16, UCP, it is the sole judgment of Allahabad Bank to determine whether the documents constitute a complying presentation, and if that bank does so determine, the non-acceptance by the buyer (STC/Millennium) is not determinative. However, if Allahabad Bank were to determine that the documents do not constitute complying presentation, the same could be waived by STC/Millennium. In this case, however, as regards LCs 150, 154 and 159, no such question arose; whereas with regard to LC 151, the refusal to honour the LC by Allahabad Bank (after receiving notice of non-acceptance by STC) came *after* 5 days from presentation of the LC by the foreign bank. In such a case, the terms of Article 16(d), read with 16(f), are clear, in that payment under the LC subsequently by the foreign bank cannot be objected to.

23. In this context, it would be necessary to recollect the status of UCP-600 and all its previous versions. International documentary credit practise and law has been codified as a collaborative (and one may add, co-operative) effort and spirit to ensure consistency of approach of all banking and financial institutions dealing with such instruments. The importance of recognizing the normative compulsions and binding effect upon those dealing with such instruments has been underlined time and again. In Schetze & Fontane, *Documentary Credit Law throughout the World* (2001) (ICC Publication No 633), there is a useful discussion at paragraph 2.2.4 on the relationship of national law and the UCP where the meaning of the UCP is in dispute or UCP does not contain an express provision for the issue that is before a national court:

"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."

The Court of Appeals in the UK, recognized this principle in *Glencore International AG v Bank of China* 1996 (1) Lloyd's Rep 135:

"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.”

24. Dealing with a somewhat analogous set of circumstances, the UK Court of Appeals, in *Fortis Bank SA/NV and another v Indian Overseas Bank* 2011 (2) Lloyd’s LR 33, held that:

“It is fundamental to the operation of letters of credit that, when the issuing bank determines that the documents do not conform, it may reject them. If it does, then it cannot be entitled to retain the documents, as it is implicit in rejection that it has refused to accept them. It must either hold them at the disposal of or in accordance with the instructions of the presenter or return them. Therefore once the issuing bank has rejected the documents, it cannot do anything else but act in accordance with its chosen option. Thus, it was not necessary to spell out in the article the issuing bank’s obligation to act in accordance with the notice. It was implicit in the wording of the article.

38 Second, the obligation to act in accordance with the notice is what is required by the standard international banking and trading practice set out at paras 31—35 above. It is necessary to make letters of credit work in practice so that the presenter can deal with the goods which are represented by the documents which the issuing bank has rejected. The consequences of the inability of the presenter to deal with the documents are too well known to need enumeration; illustrations are obvious such as in the case of a perishable cargo, or where the market falls or where the ship arrives and seeks to discharge the cargo..”

Thus, the issuing bank (in this case, the Allahabad Bank) was under an obligation to state its position and either accept or reject the documents. It chose to accept the documents and after considerable lapse of time, informed the foreign bank about the discrepancy. Clearly it could not do

so, in view of Article 16 UCP.

25. Coming finally to the question of fraud, STC alleges fraud by the two Synergic companies upon itself. While fraud is an exception to honouring an LC, it is crucial such the foreign bank had notice or knowledge of such fraud *before* it made the payment, in order for the exception to be applicable. This question was considered by the Supreme Court in *UBS AG v. State Bank of Patiala*, 2006 (5) SCC 416, in the following terms:

“31. The facts of these three appeals are clear and simple. The Letters of Credit were issued by the issuing bank to the confirming-bank with a request to inform the beneficiary that an irrevocable Letter of Credit had been established for the sum indicated therein to be paid by the Appellant-Bank on negotiation of documents to be presented by the beneficiary. Such documents having been presented by the beneficiary to the Appellant-Bank, it made payment under the Letter of Credit to the beneficiary and was entitled to receive reimbursement for the same from the Respondent-Bank. If the fraud had been detected earlier and the Appellant-Bank had been informed of such fraud and put on caution prior to making payment, the Respondent-Bank may have had a triable issue to go to trial. That is not so in these three cases. In these cases, the fraud was detected after the Letters of Credit had been negotiated and hence such fraud alleged to have been committed by the constituent of the Respondent-Bank cannot be set up even as a plausible defence in the suit filed by the Appellant-Bank.” (emphasis supplied).

26. The fact that fraud in itself existed or exists, is insufficient, but what is material is that, notice of such fraud to the foreign bank must be proven – a factor recognized by the Supreme Court in *Himadri Chemicals Industries Limited v. Coal Tar Refining Co.*, (2007) 8 SCC 110, in stating that

“XXXXXX XXXXXX XXXXXX

11.....the evidence must be clear both as to the fact of fraud and as to the bank's knowledge....."

27. In order, therefore, to disclose a cause of action, both elements must be pleaded. Whist the plaint in this case disclosed sufficient pleadings (and supporting evidence) as to the alleged fraud played upon STC/Millennium by the two Synergic companies, the only reference to the foreign bank's knowledge of such fraud is found in paragraphs 17 and 47 of the plaint which only disclose the mere *assertion* that the foreign bank "*is in active collusion with*" the Synergic companies, and that the facts give "*rise to a suspicion, that it (Malayan Bank) is hand in glove*" with the Synergic companies.

28. There is no doubt that the "*failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars*" (*Liverpool and London SP and I Asson Ltd. v. MV Sea Success I and Another*, (2004) 9 SCC 512; at the same time, in cases of fraud, the Court has recognized that

"144. the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, wilful, default, or undue influence."

(emphasis supplied)

29. The plaint, in the present case refers casually and vaguely, without referring to *any* details, to the question of notice of fraud on the foreign bank, which forms a crucial part of the cause of action. As recognized by the Supreme Court in *ITC Limited v. Debts Recovery Appellate Tribunal and Others*, (1998) 2 SCC 70, the mere circumstance that the goods were not shipped would not, *ipso facto*, lead to an inference of fraud and further particulars are to be placed on record. As the Court noted:

"27..... non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller

may be in breach of the contract but that by itself does not permit a plaintiff to use the word 'fraud' in the plaint and get over any objections that may be raised by way of filing an application under Order 7 Rule 11 CPC. As pointed out by Krishna Iyer, J. in T. Arivandandam's case, the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7 Rule 11 (a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on 'fraud', the Bank cannot take shelter under the words 'fraud' or 'misrepresentation' used in the plaint.”

30. The ratio in *UP Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174, in the opinion of this Court, too applies squarely to this case. The Supreme Court observed that the:

“48.....bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract.....” (emphasis supplied).

31. Indeed, the “*whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court*” (*Azhar Hussain v. Rajiv Gandhi*, 1986 SCR (2) 782, paragraph 12). Thus, in such a case, given the absence of any particulars pleaded, or any evidence to support, the claim that the foreign bank colluded with the Synergic companies, or even had notice of such fraud, the claim as disclosed in the plaint is bound to fail, as the cause of action pleaded does not entitle STC to the remedy it prays for. In other words, even if fraud as alleged is proved (by the Synergic companies on STC/Millennium), this would not lead to the remedy that the foreign bank is to be prevented from releasing any benefit, or the Synergic companies are to be refused any benefit, under the LCs in question.

32. Thus, for the reasons above, this Court finds no reason to interfere

with the order of the learned Single Judge. The appeal and pending application are accordingly dismissed, but with no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**NAJMI WAZIRI
(JUDGE)**

DECEMBER 10, 2013