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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) No. 574 OF 2014
IN
NOTICE OF MOTION No. 375 OF 2013
IN
SUIT No. 786 OF 2012
Alongwith
NOTICE OF MOTION (L) No. 2126 OF 2014

The Chief Manager,
Malayan Banking BHD ... Appellant
Vs.
M/s. MMTC Limited & Ors. ... Respondents

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Mr. Rajesh Patil, Asmant Nimbalkar & Meet Sawant i/b Meghna M. Kadam, for the Appellant.

Mr. Rajinder Kumar, for the Respondent No. 7.

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CORAM : V. M. KANADE, &
Dr. SHALINI PHANSALKAR-JOSHI, JJ.

RESERVED ON : OCTOBER 5, 2015

PRONOUNCED ON : OCTOBER 7, 2015

PC.

1. The Appellant has filed this appeal, being aggrieved by the judgment and order passed by learned Single Judge, in Notice of Motion No. 375 of 2013 on 24th July, 2014. By the said order, the learned Single Judge was pleased to allow the motion, taken out by the Plaintiff, in terms of prayer clause (a) restraining the Appellant herein

from honouring the Letter of Credit and also restraining Defendant No. 2 Bank from making any payment under the Letter of Credit to Defendant Nos. 3 and 4.

2. None appears on behalf of the Respondents. We had in our order dated 25th August, 2015 specifically mentioned that if the Respondents do not appear on the next date, the appeal would be decided in their absence. Again on the next date i.e. 1st September, 2015 none appeared on behalf of the Respondents. Again by giving same warning, the matter was adjourned, as a last chance on 2.9.2015. Even today when the matter was called out, neither Respondents nor their counsel remained present. Learned advocate Mr. Rajinder Kumar appeared for Respondent No. 7. He submitted that he has nothing to argue.

3. Brief facts, which are relevant for the purpose of deciding this appeal are as under:

. For the sake of convenience parties shall be referred to as the Plaintiff and the Defendants. Appellant is original Defendant No. 5, who is the negotiating bank; Respondent No. 3 (original Defendant No. 2) is the issuing bank, who has issued the Letter of Credit;

Respondent No. 2 (original Defendant No. 1) is the buyer; Respondent No. 1 (original Plaintiff) had entered into an agreement with Defendant No. 1. Respondent No. 4 (original Defendant No. 3) had supplied the goods.

4. Defendant No. 3 (supplier) and Defendant No. 1 (buyer) had entered into an agreement dated 22.11.2011 for sale of 75 Mt. Copper Wire Rod. Simultaneously, a Letter of Credit for an amount of US $ 5,44,500 was issued by Defendant No. 2 at the instance of the Plaintiff in favour of Defendant No. 3 (supplier). On 12.12.2011 documents were presented to Defendant No. 5 (negotiating bank, Appellant herein), and since there was compliance with the terms of the credit, payment was made to Defendant No. 3 on discounting Letter of Credit dated 2.12.2012. Defendant No. 2 vide its letter dated 6.1.2012 informed Defendant No. 5 that all documents pertaining to Letter of Credit have been accepted, and therefore, Respondent No. 3 should make payment upon maturity of Letter of Credit. Defendant No. 2 – the buyer of goods on 30.1.2012 informed the Plaintiff that they cannot stop the payment, which was due and also informed Defendant No. 5 (appellant herein) about the fraud being played by the

supplier. However, by that time, Defendant No. 5 had already made payment on 12.12.2011.

5. The Appellant by its letter dated 9.2.2012 informed Respondent No. 3 and demanded Respondent No. 3 to honour payment on maturity date of the Letter of Credit.

6. The Plaintiff filed a suit in this Court vide Suit No. 786 of 2012 for permanent injunction, restraining Defendant No. 2 from honouring the Letter of Credit, and restraining Respondent No. 5 from making any payment under the Letter of Credit, to Respondent Nos. 3 and 4. In the in plaint paragraphs 40, 44, allegation of fraud was made against Defendant Nos. 3 and 4. In the said suit, a motion was taken out by the Plaintiff, seeking ad-interim reliefs. Apparently, Defendant No. 5 filed their reply to the said notice of motion and also filed a written-statement. By the impugned order, the learned Single Judge was pleased to allow the notice of motion in terms of prayer clause (a) by judgment and order dated 24th July, 2014.

7. Learned counsel appearing on behalf of the Appellant submitted that there was a similar suit filed by the Plaintiff in Delhi High Court, in which the learned Single Judge refused to grant interim

relief in favour of the Plaintiff. This order was confirmed in appeal before the Division Bench of the Delhi High Court and finally Apex Court also confirmed the said order passed by the Delhi High Court.

8. Learned counsel appearing on behalf of the Appellant has invited our attention to the said judgment passed by the Apex Court in Civil Appeal Nos. 3103 / 2015 and 3104 /2015. He submitted that facts of the present case and the said case are identical. He submitted that in the said suit, which was filed in the Delhi High Court, similar averments were there regarding fraud. However, in the present case, no averments of fraud have been made at all in the present suit.

9. None appears on behalf of the Respondents though sufficient opportunity was given to the Respondents to appear in this case.

10. Before adverting to the rival submissions, taking into consideration the facts of the case, submissions made by the learned counsel appearing for the Appellant and the submissions which have been made by the Plaintiff before the learned Single Judge, it will be profitable to take into consideration the law on injunction on honouring Letter of Credit by the banks. The Apex Court in the aforesaid appeals mentioned hereinabove, in paragraph 12 has laid

down the said law as under :

> "12. We would uphold and restate the law on injunction against honouring Letter of Credit by a Bank as summed up by the learned Single Judge as follows:
>
> (1) The Court must be slow in granting an order of injunction restraining the realisation of a bank guarantee or Letter of Credit.
>
> (2) There are two exceptions to the above rule. The first is that it must be clearly shown that a fraud of a grievous 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.
>
> (3) 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."

11. From the above observations, it can be seen that normally while granting injunctions against encashing the bank guarantee for making payments, the Court should be very cautious and should be slow in interfering in the normal practice of honouring the Letter of Credit. In the present case, no averments have been made against the

Appellant of fraud. The learned Single Judge also has noted that no averments have been made by the Plaintiff in the plaint about commission of fraud by the Appellant herein. We are of the view that the learned Single Judge has not taken into consideration the law laid down by the Apex Court in granting the order of injunction, restraining the realisation of the bank guarantee or honouring the letter of credit. The impugned order, which is passed by the learned Single Judge is contrary to the law laid down by the Apex Court and the High Court. The impugned order is, therefore, liable to be set aside. Hence, appeal is allowed. The impugned order passed by the learned Single Judge is set aside; the order of injunction granted by the learned Single Judge is vacated.

12. In view of disposal of the appeal, Notice of Motion (L) No. 2126 of 2014 filed therein does not survive and is accordingly disposed of.

Sd/- Sd/-
[Dr. SHALINI PHANSALKAR-JOSHI, J.] [V. M. KANADE, J.]

Vinayak Halemath

CERTIFICATE

Certified to be true and correct copy of the original signed Order.