

IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

Civil Revision No.7582 of 2013 (O&M)

Date of decision: 15.12.2015

Malayan Banking Berhad (Maybank), Menara Maybank

.....Petitioner

versus

Shri Kuldeep Jindal and others

.....Respondents

CORAM: Hon'ble Mr.Justice Kuldip Singh

Present: Mr.Ajay Monga,, Advocate for the petitioner
Mr.Arun Jain, Senior Advocate with
Mr.V.M. Gupta, Advocate for respondent No.1
Mr.Vikas Chatrath, Advocate with
Ms.Neeru Thakur, Advocate for respondent Nos.2 & 3
Mr.N.C.Kinra, Advocate for respondent No.5

1. *Whether Reporters of Local Newspapers may be allowed to see the judgment ?* **yes**
2. *To be referred to the Reporters or not ?* **yes**
3. *Whether the judgment should be reported in the Digest?* **yes**

Kuldip Singh, J.

Malayan Banking Berhad (Maybank) – defendant No.6

before the lower Court has filed the present revision against the order dated 16.9.2013, passed by the learned Additional District Judge, Ludhiana, vide which, the order dated 25.2.2012, passed by the learned Civil Judge, Junior Division, Ludhiana, dismissing the application of the plaintiffs was reversed and the injunction application filed by the plaintiffs under Order 39 Rules 1 and 2 read with Section 151 CPC was allowed whereby defendant Nos.1 and 2 i.e. State Bank of India were restrained from releasing the letter of credit in favour of defendant No.6 (the present revisionist).

Brief facts of the case which are required to be noticed for the purpose of disposal of the present revision are that the plaintiff M/s Jindal Impex through its sole proprietor Kuldeep Jindal is engaged in import of copper wire/ rod. Defendant No.3 M/s Sims Copper is engaged in business of supplying of copper wire and rods to the customers throughout the world. Defendant No.3 has appointed defendant No.5 i.e. Diffreight Agencies as its shipping agent, who in turn has appointed defendant No.4 i.e. Expo Freight Pvt. Ltd. as forwarding agent at Ludhiana, who keeps liaison and contact with the importers, who imports copper wire and rods from defendant No.3. Defendant No.5 is the shipper of defendant No.3 who carries the goods from Malaysia to various destinations and issues bill of lading on behalf of defendant No.3 for the goods handed over to him for export to various customers in India and other places. Defendant No.6, the present petitioner, is a collecting bank appointed by defendant No.3 to whom the letter of credit (LC) is sent on the completion of transactions by issuing bank i.e. Defendant Nos.1 and 2 State Bank of India. According to the plaintiff, he placed order for import of 50 Mts of copper wire with defendant No.3, who issued provisional sale contract/ proforma invoice dated November 21, 2011, quoting rate and other terms and conditions of letter of credit to be got issued by the plaintiff. Accordingly, the plaintiff opened letter of credit from defendant No.2 in favour of defendant No.3 through its negotiating bank defendant No.6 for USD 367150. The various terms and conditions of the letter of credit are mentioned in the said letter.

The intimation of opening of letter of credit was given to the

consignor/ exporter and negotiating bank, after which the goods were to be delivered by the exporters to the shipper and then shipper issues the bill of lading. The bill of lading along with letter of credit is sent by the exporter to the bank where the letter of credit is opened by the consignee importer. The bill of lading is issued only when the goods are sent against the letter of credit and put on board and container no. is written. Defendant No.2 State Bank of India intimated the receipt of bill of lading along with other documents and call upon the plaintiff to accept the documents to enable the plaintiffs to receive the consignment through defendant No.4 agent who is representative of defendant No.5 at Ludhiana. Defendant No.3 issued invoice dated 29.11.2011 in favour of the plaintiffs. Payment of the said invoice is to be made within 90 days from the bill of lading dated 29.11.2011. It is stated that plaintiffs bona fide and in routine accepted the bill of lading along with the documents received from defendant No.2 bank. It is further alleged that in the last week of January 2011, when the plaintiffs tracked the movement of the container in which defendant No.3 exporter alleged to have sent the goods for delivery to the plaintiff, he was shocked to know that the goods were in fact sent to Los Angeles (USA) and Manila (Philippines) and that were accordingly delivered. In this way, according to the plaintiff, defendant No.3 in connivance with defendant Nos.4 to 6 have defrauded him and he prays for cancellation / revocation of letter of credit dated 24.11.2011.

In the written statement, defendant Nos.1 and 2 admitted to have issued letter of credit and took the stand that they cannot be

restrained from making the payment to defendant Nos.3 and 6 and that as per record available with them, defendant No.6 the present petitioner has already made the payment to defendant No.3. Moreover, as per international norms and banking rules, the plaintiffs are not entitled to any injunction against the defendant bank.

After hearing both the parties, the learned Civil Judge, Junior Division took the view that equally efficacious remedy by way of recovery of damages is available with the plaintiffs. It was further observed that defendant No.6 has already released the amount in favour of defendant No.3 as per the agreement and documents available with them. Defendant No.3 has already received the amount and that stopping defendant Nos.1 and 2 from releasing the amount in favour of defendant No.6 will undoubtedly malign the goodwill of defendant Nos.1 and 2 in the international market.

Aggrieved by the said order, the plaintiffs went in appeal before the learned Additional District Judge, Ludhiana, who set aside the order of the lower Court and allowed the application.

I have heard learned counsel for the parties and have also carefully gone through the file.

The admitted facts of the case are that plaintiffs had placed order for certain goods with defendant No.3 and to honour the commitment, he opened letter of credit with State Bank of India. As per procedure, when the exporter i.e. Defendant No.3 would deliver the goods for shipment, a bill of lading is issued by the said shipping agent. Then the LC along with the bill of lading is presented to the negotiating bank defendant No.6, which is situated at Kulalumpur.

Thereafter, the negotiating bank will make the payment and make the claim from the bank issuing the LC.

Now the facts of the case reveals that in fact defendant No.3 committed fraud. He did not dispatch the goods and is stated to have produced the letter of credit along with the bill of lading before the negotiating bank defendant No.6 -present petitioner which honoured the same and released the payment and thereafter it made the claim from State Bank of India. Vide the impugned order, State Bank of India has been restrained from honouring the LC.

Now the question would arise as to whether in such circumstances, the bank issuing LC can be restrained from honouring its commitment of irrevocable undertaking to pay the said money to the negotiating bank? I find the reply in negative. Annexure P1 is the irrevocable letter of credit dated 26.11.2011, issued by the State Bank of India in favour of the present petitioner -defendant No.6. Defendant No.3 M/s Sims Copper is mentioned as beneficiary. The documents required to be produced before the negotiating bank were also mentioned in the said letter. Now defendant No.3 is stated to have committed a fraud with the plaintiffs by not dispatching the goods and yet claiming the payment from negotiating bank on the basis of a fake bill of lading.

In such circumstances, the matter has been examined by the Hon'ble Apex Court in Millenium Wires (P) Ltd. and others v. The State Trading Corporation of India Ltd. and others, 2015 (4) SCALE 62, wherein an application under Order 7 Rule 11 CPC was allowed and the plaint was dismissed under the similar circumstances. The

Apex Court while noticing the grounds on which plaint was rejected, laid down statement of law on the said point 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.

The Apex Court further went on to observe as under:-

13. It would suffice to say here that injunctions against the negotiating banks for making payments to the beneficiary must be given cautiously as constant judicial interference in the normal practices of market can have disastrous consequences as it affects the trustworthiness of the Indian banks and markets.

14. Furthermore, it appears that the Malayan Bank had forwarded the documents presented by the Synergic Companies to the Allahabad Bank. Out of four Letters of Credit, Allahabad Bank had accepted the presentation of documents in two Letters of Credit with the consultation of the STC. Only one of the presentation was rejected while there is no information with respect to the response of the Allahabad Bank on

presentation of documents of the fourth Letter of Credit. Even on the Letter of Credit for which the presentation was rejected, the response was made after 19 days while UCP- 600 provides that rejection or any objection against the presentation must be communicated to the negotiating bank of the beneficiary within 5 days.

Applying the said pronouncement of the Apex Court, it will be seen as to whether the negotiating bank i.e. the petitioner bank was aware about the fraud or was party to the same? I find the reply in negative. There is nothing on file to show that defendant No.6- petitioner bank knew that bill of lading is fake and that in fact no goods have been actually dispatched. Even the plaintiff came to know much later that goods which are stated to have meant for him have been in fact dispatched to some other destination i.e. in Los Angeles (USA) and Manila (Philippines). As such, in such circumstances, the first appellate Court erred in granting the injunction. The Apex Court has also referred to the Uniform Customs and Practice for Documentary Credits Sixth Edition (for short, 'UCP 600'), published by International Chambers of Commerce, whereby the banks were bound to release the payment in terms of letter of credit, if the complying presentation is made by the beneficiary.

Learned counsel for the petitioner has argued that the negotiating bank deals with the documents and not the goods. The negotiating bank was supposed to check up the documents and not to check up whether the goods have been actually dispatched to correct destination and as to whether it meets the quality and requirements of the consignee. In Federal Bank Ltd. v. V.M. Jog Engineering Ltd. and

others, AIR 2000 Supreme Court 3166, the Hon'ble Apex Court dealt with UPC and made the following observations:-

“34. This point mainly deals with the UCP Code (1983 Revision) which was incorporated by reference into the L/C. As the interpretation of the UCP is commercially of considerable importance, we would like to deal with the relevance of the UCP Code in Some detail.

35. This Court had occasion in United Commercial Bank v. Bank of India, 1981] 2 SCC 766 (at 780} to refer to the Uniform Customs and Practices for Documentary Credits (UCP for short) by which the 'General provisions and Definitions and the Articles following are to apply to all documentary credit and binding upon all parties thereto unless otherwise expressly agreed'. The UCP states that it shall be deemed incorporated into each documentary credit if there are words in the Credit indicating that such credit was issued subject to Uniform Customs and Practices of Documentary Credits.

36. The UCP has been formulated by the international Chamber of Commerce, Prof. R.M. Goode described it as the 'most successful harmonising measure in the history of international commerce'. Prof, E.P. Ellinger stated that the UCP was the result of necessity and the need for use of banks as; agents in international trade. The first UCP was drafted in 1929, the next one in 1933, then in 1951, 1962 and 1974 and 1983. The 1983 version (relevant in the case before us) was used in 170 countries, (It was revised in 1990 and 1993), (The New York version of if revised in 1993). (See Principles of International Trade Law by Indira Carr, 2nd Ed, 1999).

37. In the absence of incorporation, the UCP will not apply but it can be taken into account as part of mercantile customs and practices and most of it is also treated as part of common law, barring a few differences. If an

express term in the contract contradicts the UCP terms, the contract prevails, Mustill, J. in Royal Bank of Scotland plc. v. Cassa di Risparmio delle Provincie Lombarde, (1993) (Financial Times 21 Jan, 1992) said : ".....it must be recognised that (the UCP) terms do not constitute a statutory code. As the title marks clear, they constitute a formulation of customs and practices, which the parties to a letter of Credit can incorporate into their contracts by reference. If it is found that the parties have explicitly agreed such a term, then the search need go no further, since any contrary provision in UCP must yield to the parties' expressed intention."

Learned counsel for the plaintiffs – respondents has argued that since fraud was committed and the negotiating bank immediately on seeing the documents released the payment without verifying genuineness of the bill of lading, therefore, the negotiating bank was negligent and was rather party to the fraud and not entitled to the payment.

I am of the view that there is nothing at this stage to presume that negotiating bank was party to the fraud. They acted in ordinary course of business and released the payment. The bill of lading was transferred by them to State Bank of India and as per complaint itself, the State Bank of India sent the same to the plaintiffs, which accepted the same in routine. Meaning thereby that the bill of lading was also accepted by the plaintiffs. The letter of credit issued by the State Bank of India in favour of defendant No.6 petitioner is irrevocable. Therefore, no injunction can be issued for restraining the State Bank of India defendant Nos.1 and 2 from releasing the

payment against said irrevocable letter of credit. The balance of convenience is in favour of defendant Nos.1 and 2 and 6 negotiating bank. The plaintiffs have the equally efficacious remedy of suing the supplier for damages for non-supply of goods.

It being so, I am of the view that learned Civil Judge, Junior Division has rightly refused to grant the injunction and that the first appellate Court erred in reversing the order of the lower Court and granting ad interim injunction.

Consequently, the present revision is allowed. The impugned order dated 16.9.2013, passed by the learned Additional District Judge, Ludhiana is set aside and the order dated 25.2.2012, passed by the learned Civil Judge, Junior Division, Ludhiana dismissing the injunction application is restored.

15.12.2015*gk***(Kuldip Singh)
Judge**