

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

Judgment delivered on March 18, 2015

+ **OMP (I) 85/2015**

SHREE KRISHNA PAPER MILLS & INDUSTRIES LTD.

..... Petitioner

Through: Mr.Ravi Gupta, Sr. Advocate with
Mr.Ankit Jain, Advocate

versus

GAIL (INDIA) LTD. & ANR.

..... Respondent

Through: Mr.Sanjay Jain, ASG with Ms.Poornima
Maheshwari, Ms.Shreya Sinha,
Mr.Dharmender, Advocates for
respondent No. 1

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. The present petition has been filed by the petitioner seeking the following reliefs:-

“(a) Restrain the respondent No.1 from invoking the Letters of Credit bearing Nos.6011ILCRE140001 & 6011ILCRE130001 for an amount of Rs.18,08,000/- & Rs.25,00,000/- respectively, issued by Respondent No.2, till the time the disputes are finally adjudicated by an Arbitrator;

(b) Restrain the respondent No.2 from making any payment to respondent No.1 towards invocation of the 'Letters of Credit' bearing Nos.6011ILCRE140001 & 6011ILCRE130001 for an

amount of Rs.18,08,000/& Rs.25,00,000/- respectively, till the time the disputes are finally adjudicated by an Arbitrator;

c) Pass an ex-parte interim order in terms of prayers (a) &(b) above;

And/or

Pass such other orders which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case in favour of the Petitioner.”

Facts

2. It is the case of the petitioner in the petition that it is engaged in the business of paper coating at its unit at T-4, Old Industrial Area, Bahadur Garh District, Jhajjar, Haryana. For the purpose of this business the petitioner requires Regassified Liquid Natural Gas (RLNG) and accordingly entered into a Gas Sale Agreement dated December 25, 2008 with the respondent No.1 for supply of RLNG. According to the petitioner, under the terms of the agreement the respondent No.1 was to supply the gas at the unit situated at Jhajjar, Haryana. The respondent No.1 was to supply 59000 MMBTU's to the respondent every year and in terms of the agreement the petitioner was required to maintain letters of credit with the respondents. In total the petitioner has provided two letters of credit for an amount of Rs.43,08,000/-. The petitioner in its petition would state that under clause 8.1(b)(i) the petitioner prior to the

commencement of each year was to give written notice to the respondent No.1 of the quantities of the gas which the petitioner required during each calendar year. It is the petitioner's case that the petitioner had not been able to utilize the entire gas within its unit, it addressed a communication dated July 26, 2013 to the respondent No.1 requesting it to reduce the monthly allotment of gas from 5000 MMBTU to 2000 MMBTU with immediate effect. The said request was followed by another request on August 22, 2013, whereby the petitioner had requested the respondent No.1 to reduce the allotment of gas to 1500 MMBTU every month with effect from September 01, 2013. The petitioner would state that it had received an e-mail dated September 09, 2013 from the respondent No.1 requiring the petitioner to renew the letters of credit and to further enhance the value of letters of credit to Rs.65.13 lacs. According to the petitioner, it had specifically vide communication dated September 11, 2013 informed the respondent No.1 that the letters of credit was on the basis of 5000 MMBTU per month and it had already informed the respondent No.1 for reduction to 1500 MMBTU per month and hence the value of letters of credit be reduced accordingly. The petitioner would also state that the respondent No.1 vide its e-mail dated September 20, 2013 had informed the petitioner that the request of the petitioner for surrender for RLNG gas quantity every

month is being examined and would be decided in terms of the policy of respondent No.1. According to the petitioner, till date no such decision has been communicated by the respondent No.1 to the petitioner.

3. Despite sending the letters of credit for an amount of Rs.25,00,000/-, the respondent No.1 still insisted upon the petitioner to send the letters of credit for an amount of Rs.65.13 lacs which compelled the representative of the petitioner to meet the officers of the respondent No.1 and explain them the entire situation. The petitioner would state that the officers had assured the representative that they would expedite the decision on the request of the petitioner for reduction in the quantity of the gas per month and called upon the petitioner to maintain the letters of credit which was earlier existing i.e. Rs.43.08 lacs till the reduction in allocation of gas per month is finalized. On such assurance, the petitioner arranged for another letters of credit for remaining amount of Rs.18.08 lacs. The petitioner's case is also that it had given a tentative requirement of 18000 MMBTU per annum but the respondent No.1 had prepared its own schedule for allocation of the gas to the petitioner.

4. Having not heard from the respondent No.1, the petitioner addressed a communication dated June 26, 2014 requesting the respondent No.1 to reduce the gas supply from 1500 MMBTU to 800 MMBTU per month. Unfortunately, without deciding the issue of

reduction in gas allocation the respondent No.1 in an illegal and mala fide manner issued a communication dated February 28, 2015 and demanded an amount of Rs..1.62 Crores from the petitioner herein. It is the case of the petitioner that while making a demand for the said amount the respondent No.1 had not even referred to its request for reduction of gas supply. In fact, the petitioner had disputed the said amount by taking a stand that no amount is due and payable to the respondent No.1 for the calendar year 2014. In this regard the petitioner's case is that it has utilized 8613.621 MMBTU gas for which an amount of Rs.87,07,595/- already stands paid to the respondent No.1. The respondent No.1 still vide its e-mail dated March 05, 2015 insisted upon the payment of Rs.1,62,11,232.65/- and have threatened that if the said amount is not paid by March 11, 2015 the respondent No.1 shall invoke letters of credit. The request of the petitioner to keep the payment in abeyance has been refused by the respondent No.1 threatening the invocation of letters of credit and accordingly the petitioner has filed the present petition.

5. Mr.Ravi Gupta, learned Senior Counsel for the petitioner would submit that when a request for reduction of allocation of gas is under consideration, the respondent could not have invoked the letters of credit. In this regard he has taken me through the various

communications exchanged between the parties. He has referred to various provisions of the contract to state that there is no power to terminate the contract by the petitioner. He would refer to Article 14(b)(i), as the only clause wherein a penalty has been prescribed in the eventuality, the buyer's annual intake is less than 90%. The difference between the quantity taken and 90% shall be calculated and deficiency thereof needs to be paid by the buyer. According to him, the penalty under 14(b)(i), which is in the nature of damages, could only be demanded if the loss is proved by the respondent No.1. He would also state that in terms of Article 19.3, in the eventuality the petitioner fails to take gas as agreed by it the respondent No.1 was within its right to terminate the contract. Unfortunately the respondent No.1 has not terminated the contract, but has kept the same alive and made a demand for Rs.1.62 Crores in terms of the letter dated February 28, 2015. He would rely upon the judgment of this Court in the case of ***Taxmaco Ltd. vs. State Trading Corporation of India 2006 (4) RAJ. 269 (Delhi)*** to contend, merely because the petitioner has not taken/consumed the gas as it had agreed would not enable the respondent No.1 to impose penalty which is in the nature of damages being barred by Section 73 & 74 of the Contract Act. On similar proposition, he would rely upon the judgment of this Court in ***Lalit Kumar Bagla vs. Karam Chand Thapper & Bros.***

(CS) Ltd. 2013 (IX) AD (Delhi) 24.

6. Mr.Sanjay Jain, learned Additional Solicitor General of India assisted by Ms.Poornima Maheshwari, Advocate, who had appeared on advance notice would contend that the gas which is being supplied to the petitioner is being imported from outside India. The RLNG is one of the inputs used for paper coating. When the agreement was executed between the parties, the RNLG was the only viable material available. According to him, the Gas Sale Agreement entered between the parties stipulate that in the beginning of the year the purchaser must commit the amount of gas, it would take from the respondent No.1. He would also state that there is nothing in the agreement to stipulate the amount of gas to be taken in a year can be reduced before the end of the calendar year. He would also state that since the respondent No.1 has a back to back agreement with the original supplier, the commitment made by the purchaser should be adhered to. He would state that the demand now made for Rs.1.62 Crores by the respondent No.1 is 1/3rd of Rs.4.24 Crores which the petitioner was liable to pay for the year 2014. He would state that Article 14(b)(i) is clear and it encompasses in itself a situation of this nature and the demand is not illegal. In the end he would state that the respondent No.1 has invoked the letters of credit for Rs.43,08,000/- even though the amount has not yet been credited in the

account of the respondent No.1.

7. Having heard the learned counsel for the parties, I note that it is the case of the petitioner in the petition that the respondent No.1 has not invoked the letters of credit. The petition was filed on an apprehension that the letters of credit may be invoked. Mere apprehension cannot be a ground for the petitioner to seek an injunction. Since it has been contended by Mr.Sanjay Jain, ASG that the respondent No.1 has invoked the letters of credit, this Court thought it fit to examine the issue of invocation of the letters of credit by the respondent No.1. Before I proceed to examine the issue, I may only state here that the submissions advanced by Mr.Ravi Gupta, learned Senior Counsel for the petitioner are primarily on the merits of the dispute. The agreement does stipulate dispute resolution through arbitration and the parties, more particularly the petitioner must invoke the said remedy.

8. The law on invocation of the bank guarantees or letters of credit is well settled. The Supreme Court in ***Federal Bank Ltd. Vs. V.M.Jog Engineering Ltd. and Ors., (2001) 1 SCC 663*** observed that the Court ought not to grant injunction, to restrain invocation of bank guarantees or letters of credit. The Supreme Court carved out two exceptions to this rule, viz. fraud and irretrievable damage. It further observed that the contract of bank guarantee or letter of credit is independent of the main

contract between the seller and the buyer. In case of an irrevocable bank guarantee or letter of credit, the buyer cannot obtain injunction against the final payment on the ground that there was a breach of the contract by the seller. The bank is to honour the demand for encashment if the seller, prima facie, complies with the terms of the bank guarantee or the letter of credit namely, if the seller produces the documents enumerated in the bank guarantee or the letter of credit. If the bank is satisfied on the basis of the documents that they are in conformity with the list of documents mentioned in the bank guarantee or the letter of credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment. It is not permissible for the bank to refuse the demand on the ground that the buyer is claiming that there is a breach of contract. The obligation of the bank under the documents has nothing to do with any dispute as to breach of contract between the seller and the buyer. The Supreme Court also observed that in order to obtain injunction against the issuing bank that it is necessary to prove that the bank had knowledge of fraud. The Supreme Court relied on the observations of ***Kerr, J. in R.D. Harbottle (mercantile) Ltd. Vs. National Westminster Bank Ltd. (1978) QB 146:(1977) 2 All England Reporter 862*** to state that irrevocable Letters of Credit are “lifeblood of international commerce” and also observed as under:

"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.....Otherwise, trust in international commerce could be irreparably damaged."

Denning M,R, .stated In Edward and Owen Engineering Ltd. v. Barclays Sank International Lid. (1978) Q.B. 159 that 'the only exception is where there is a clear fraud of which the bank had notice': Browne, LJ. said in the same case : "but it is certainly not enough to alleged fraud, it must be established" and in such circumstances, I should say, very clearly established", in Bolvinter Oil S.A.v. Chase Manhattan Bank, (1984) 1 All E.R, 351 at P. 352, it was said 'where it is proved that the Bank knows that any demand for payment already made or which may thereafter be made, will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not be sufficient that this rests Upon the uncorroborated statement of the customer,, for irreparable damage can be done to a bank's credit in the relatively brief time "before the injunction is vacated". Thus, not only must 'fraud' be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. In United Trading Corp. S.A. v. Allied Ards Bank, (1985) 2 Lloyds Rep, 554, it was stated that there must be proof of knowledge of fraud on the part of the Bank at any time before payment".

9. In the present case, the only allegation of fraud averred by the petitioner is that the demand made by the respondent No.1 without taking the decision on the request made by the petitioner is fraudulent and mala fide. Such an action would not constitute fraud. The petitioner has not pleaded irreparable damage or special equities. Nor it is the case of the petitioner that the invocation is not in terms of the letters of credit. I note that the letters of credit is irrevocable and it covers delayed payments, penalty, overdraft, taxes, duties and changes therein etc.

10. Insofar as the judgments relied upon by the learned Senior Counsel for the petitioner are concerned, in *Taxmaco (supra)* this Court was considering the objections filed under Section 30 & 33 of the Arbitration Act, 1940 against the award of the Arbitrator, which is not the case here. The award given by the Arbitrator was on the merits of dispute between the parties. The petitioner herein is not precluded from raising the plea urged now before the learned Arbitrator if at all the petitioner decides to invoke the arbitration clause. The judgment is inapplicable, considering a limited prayer of injunction made in this petition. In *Lalit Kumar Bagla (supra)* also the learned Single Judge of this Court was considering an appeal impugning the judgment of learned Additional District Judge who had decided disputes between the parties on merits. The petitioner would be within its right to urge the proposition

which has been urged now, before the Arbitrator. The issue in this lis being very limited, this judgment is also not applicable.

11. I do not see any merit in the petition. The same is accordingly dismissed. Anything said in this judgment must not be construed as an expression on merits.

12. No costs.

(V.KAMESWAR RAO)
JUDGE

MARCH 18, 2015/km