IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Writ Petition No.7958 of 2016

Rajlaxmi Agrotech India Pvt. Ltd. .. **Petitioner.**

Versus

Loading-4 Mineral Material,
346 EL Sudan ST, EL Shorta Towers,
Mohandeseen Giza, Egypt
And Others. .. **Respondents.**

Shri. R.R. Mantri, Advocate, for petitioner.

Shri. Amol Joshi, Advocate, for respondent No.1.

Shri. S.V. Warad, Advocate, for respondent No.3.

CORAM: T.V. NALAWADE, J.

DATE : 23 NOVEMBER 2016

ORDER:

1) The petition is filed to challenge the judgment and order of Misc. Civil Appeal No.11/2016 which was pending in District Court Jalna. The appeal was filed by original defendant No.1 of Special Civil Suit No.34/2014 which is pending in the Court of the Civil Judge Senior Division Jalna to challenge the order of temporary injunction made by the trial Court against it. The appeal is

allowed by the District Court and the order of temporary injunction granted in favour of the present petitioner, plaintiff is set aside. Both the sides are heard.

2) The suit is filed for relief of mandatory injunction and for demurrages by present petitioner. It is against respondent No.1, who is the company from Egypt. It is the case of the petitioner, plaintiff that it had placed order to purchase Egyptian Rock Phosphate from defendant No.1 which was 1000 M.T. and the goods were to be delivered at factory of the plaintiff situated at village Gundewadi, Tahsil and District Jalna. It is contended that for payment of the price, irrecoverable letter of credit is given for the plaintiff by defendant No.3, bank in favour of beneficiary, defendant No.1. It is contended that the amount was to be realized only after making of actual delivery at the aforesaid destination but till the date goods are not delivered. It is contended that defendant No.1 is trying to realise, invoke the letter of credit and so cause of action has taken place for the suit. It is contended that defendant No.2, transport company, was engaged by defendant No.1 and so defendant No.2 is

impleaded in the suit. In the suit, relief is claimed to direct defendant No.1 to deliver the goods at the aforesaid destination or give amount of demurrages of Rs.81.55 lakh for not delivering the goods as per the contract. Relief of injunction is claimed to prevent defendant No.1 from invoking the letter of credit.

3) Defendant No.1 filed written statement and reply. It denied the contention that the goods were to be delivered at the factory premises situated at Jalna District of the plaintiff. It contended that the goods were reached already to its destination, I.C.D., Aurangabad but the plaintiff has failed to get cleared the goods and so the plaintiff has committed default. The bank has also filed written statement and it has admitted that necessary documents which are required to be produced are already produced by defendant No.1. The written statement of the bank shows that the bank is not disputing its obligation to pay bill amount to the negotiating bank of defendant No.1 on its due date i.e. 29-4-2014 (para 2 of the additional written statement of defendant No.3).

4) Both the sides produced documents before the trial Court. The trial Court held that the goods were to be delivered at the factory premises of the plaintiff and as the goods were not delivered at that destination, defendant No.1 cannot be allowed to invoke the letter of credit. District Court has held that the goods were to be reached upto I.C.D. Aurangabad and as there was irrecoverable letter of credit and as the law is well settled with regard to the rights of beneficiary to invoke letter of credit, injunction cannot be granted.

5) This Court has carefully gone through the entire record. There is copy of purchase order dated 13-9-2013 placed by the present petitioner with defendant No.1. It shows that, plaintiff had agreed to purchase 1000 MT (plus/minus 10%) of Egyptian Rock Phosphate at the rate of 96 USD per M.T. and the goods were to be reached upto I.C.D. Aurangabad via Nhava-Seva/JN Port India. Plaintiff had agreed to make payment within 180 days by giving letter of credit which was to be irrecoverable. Though in the purchase order the plaintiff had informed that its destination was Jalna, he wanted to

take it to Jalna, the price quoted was for reaching the goods at I.C.D. Aurangabad. The proforma invoice sent by defendant No.1, the supplier shows that it agreed to sell 1000 MT (plus/minus 10%) of the aforesaid goods. The invoice shows that partial shipment was permitted and it had agreed to supply at the rate of 96 USD per M.T. at I.C.D. Aurangabad. It had agreed to accept irrecoverable letter of credit of 180 days.

6) There is copy of letter of credit on the record and it shows that it was irrecoverable and the rules which were to apply for the transaction were U.C.P. latest version rules. At F45A description of goods and/or Services is given:

> "F45A : Description of Goods and/or Services:
>
> Rock Phosphate Quantity 1000 MT Plus/Minus 10 percent, rate USD 96.00 per MTS Plus/Minus 10 percent for gross DDU ICD Aurangabad, India via Nhava Sheva Port/JN Port, India value Incoterm (R) 2000. As per Proforma Invoice No.031002013 DTD 3-10-2013."

At F47A of the letter of credit there are some additional conditions and additional condition No.5 shows that the credit was issued subject to the Uniform Customs and Practice for Documentary Credits 2007 Revision, International Chamber of Commerce, Publication No.600.

7) U.P.C. 600, copy of rules is produced on the record. Article 7 of these rules shows that if the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour the letter of credit. Article 15 shows that when the issuing bank determines that the presentation is complying it must honor the letter of credit.

8) In the present matter, it is not disputed that the goods are reached to the agreed destination i.e. I.C.D., Aurangabad. It appears that the trial Court misinterpreted the term "DDU" and the destination was presumed as the address of plaintiff mentioned in the purchase order and due to that the trial Court had given the relief of temporary injunction. Learned counsel for the supplier has produced on record copy of long forms and meaning of international commercial terms (Incoterms). This shows

that DDU means "Delivered Duty Unpaid". Further meaning is given that in such cases the buyer assumes the import customs clearance and payment of customs duties and taxes. The duty in respect of insurance is also mentioned but that point is not involved in the present matter. Admittedly in the present matter customs duty is not paid by the plaintiff. The goods were reached at I.C.D. Aurangabad and as there was no clearance the demurrage charges are now payable and it has become a big amount. Thus, prim facie, the plaintiff has committed default. In any case, the bank, defendant No.3 has admitted that there has been compliance of supplying the necessary documents and so it is bound to honour the letter of credit. In such cases, at this stage there is no need to go into further details of the default.

9) Learned counsel for the petitioner, plaintiff placed reliance on one so called correspondence made by the defendant No.2, Transporter with defendant No.1, supplier and submitted that as the transporter was engaged by the supplier, it needs to be presumed that the delivery was to be given at the factory place of the

plaintiff from Jalna District. This submission is not acceptable. Though there is copy of correspondence made by the defendant No.2 to defendant No.1 it also does no show that defendant No.2 had agreed to collect the goods from I.C.D. Aurangabad and then give delivery at factory place of the plaintiff from Jalna District. In respect of this correspondence dated 27-10-2013 made by defendant No.2 it was submitted by the learned counsel for the plaintiff that this amount was already paid by the plaintiff to the transporter. Defendant No.1 has not admitted that defendant No.2 was appointed as agent or transporter by defendant No.1. In any case, the original terms and conditions mentioned in the letter of credit need to be considered and the other record like purchase order, invoice is already discussed by this Court. At this stage, no other inference is possible and it needs to be presumed that the goods were to be reached up to I.C.D. Aurangabad and that was done as per the agreement by defendant No.1. Necessary documents are already supplied to the bank and so that the beneficiary, defendant No.1 is entitled to encash the letter of credit and realise the amount due. The rate quoted in the purchase order and the rate accepted in the invoice are also relevant factors in this regard and due to that also the contention of the plaintiff cannot be accepted at this stage.

10) Unfortunately, the trial Court did not consider the law developed in respect of realization of the amount by encashing letter of credit by the beneficiary. The District Court has rightly referred and used the cases reported as **1969 (1) SCC 233 (M/s Tarapore & Co. Madras v. V.O. Tractors And Another);** and, **(2015) 4 SCC 228 (National Bank Ltd. v. Ghanshyamdas Agrawal)**. The liability of the bank issuing credit is discussed in Tarapore's case and in the present case defendant No.3 has admitted that it is liable. In the National Bank's case (cited supra) also the Apex Court has laid down that there is strict liability on the bank which issues letter of credit and it must discharge the liability otherwise the international trade and commerce will virtually and indubitably come to a standstill. Learned counsel for the respondent No.1, supplier placed reliance on some observations made in the case reported as **(1988) 1 SCC**

174 (U.P Cooperative Federation Ltd. v. Singh Consultants And Engineers (P) Ltd.). Relevant observations are at para 21 and they are as under :

> "**21**. In the instant case, the learned Judge has proceeded on the basis that this was not an injunction sought against the bank but this was the injunction sought against the appellant. But the net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly. But a maltreated man in such circumstances is not remedyless. The respondent was not to suffer any injustice which was irretrievable. The respondent can sue the appellant for damages. In this case, there cannot be any basis for apprehension that irretrievable damages would be caused if any. I am of the opinion that this is not a case in which injunction should be granted. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of fraud or in case of question of apprehension of irretrievable injustice has been made out. This is the well settled principle of the law in England. This is also well settled principle of law in India, and I shall presently notice from some of the decisions of the High Court and decisions of this Court."

In this case the Apex Court has laid down that if damages can be given in case it is found that there was right to invoke the letter of credit or bank guarantee, then injunction cannot be given to prevent the beneficiary from realizing the amount. This Court has already observed that there is sufficient material to hold prima facie that it is the plaintiff who is at fault and there is a right to defendant No.1 to realize the amount as the goods are already reached to the agreed place.

11) The aforesaid discussion shows that by misusing the process of law, the plaintiff has successfully prevented the defendant No.1 company from realizing the amount in respect of the goods supplied. This Court holds that it is not possible to interfere in the decision given by the District Court. In the result, the petition stands dismissed.

12) Learned counsel for the petitioner submitted that there was interim relief in favour of the plaintiff right from the beginning till today and he requested for continuation of the said relief which would prevent defendant No.1 from invoking letter of credit. Other side counsel has strongly opposed. Learned counsel for the petitioner alternatively submitted that if the amount is invoked, direction be given to keep that amount in Court till decision of the suit and the suit can be expedited. The submissions made by the learned counsel for the

petitioner are not at all acceptable in view of the right given to the beneficiary in respect of letter of credit. Such relief is refused. It is unfortunate that for such a long period the plaintiff has prevented the defendant No.1 from invoking the letter of credit. Authenticated copy is allowed to both sides.

Sd/-
(T.V. NALAWADE, J.)

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