

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

**SUMMONS FOR JUDGMENT NO. 6 OF 2016
IN
SUMMARY SUIT NO. 405 OF 2015**

Malayan Banking Berhad	...Plaintiff
Vs.	
Indusind Bank Limited	Defendant

....

Mr. Rajesh Patil i/b Meghana Kadam for the Plaintiff.
Mr. Chetan Kapadia a/w Ms. Ambreen Saheed i/b MDP & Partners for the Defendant.

...
CORAM : K. R. SHRIRAM, J.

DATE : 11th JULY, 2016

JUDGMENT.:

1. The Plaintiff has filed the suit claiming a sum of Rs. 3,47,87,865.42 along with interest at 12% per annum from the date of filing of the suit or such other rate as this Hon'ble Court may deem fit and proper.

2. The Plaintiff is a bank situated in Malaysia. Sometime in December, 2011 MMTC Ltd. ("Buyer"), a Government of India organization placed an order for purchase of copper wire rod from one M/s. Synergic Industrial Marketing Services SDN. BHD., a company in Malaysia ("Seller"). At the instance of MMTC Ltd., the Defendant issued an irrevocable Letter of Credit dated 2nd

December, 2011 for USD 544,500/- (+ / - 3%). The letter of credit was available for negotiation with the Plaintiff and was governed by UCP-600. The beneficiary viz., the seller submitted the documents to the Plaintiff and since the documents were in accordance with the requirements of the letter of credit, the Plaintiff negotiated the documents and paid the amount to the beneficiary. This negotiation took place on 12th December, 2011 and the amount paid was USD 367,697.22 and USD 184,491.12. The letter of credit which the Defendant issued to the Plaintiff required certain documents to be submitted for receiving payment. The payment to be made was 90 days usance from the date of Bill of Lading. The Plaintiff forwarded the documents to the Defendant and the Defendant relayed its message dated 6th January, 2012, confirming its acceptance of the documents and undertook to reimburse the Plaintiff with the amount of letter of credit on the maturity date, i.e., 5th March, 2012. The message copy whereof is at Page 43 to the plaint reads as under :

*“Documents accepted to mature on 05/March/2012.
We shall remit proceeds upon maturity as per
instructions according to LC terms”.*

3. Thereafter, on 1st February, 2012, almost a month later, the Defendant sent a message to the Plaintiff that they have been

informed by their applicant, i.e., MMTC Ltd., that some of the documents submitted were forged and the matter was being investigated. This was followed by a message dated 7th February, 2012, in which the Defendant made it clear that they will not be making payment on the due date, i.e., 5th March, 2012, as the documents mentioned stood refused. It is necessary to note that, on 6th January, 2012 the Defendant had accepted the documents as required under the LC terms and after almost one month, i.e., on 7th February, 2012, the Defendant states the documents are refused.

4. While the Defendant took this stand, MMTC Ltd. filed a suit in this court bearing Suit (Lodging) No. 446 of 2012 and on 2nd March, 2012 obtained an ad-interim order from restraining the Defendant from paying the Plaintiff under the letter of credit issued by the Defendant. This ad-interim order was confirmed by an order dated 24th July, 2014. The Plaintiff herein carried the matter in appeal. Before the appeal came to be heard and disposed, the Plaintiff filed the present suit which came to be lodged on 3rd March, 2015 (though incorrectly written as 3rd February, 2015 by the Registry). The appeal was allowed by a judgment pronounced on 7th October, 2015. In the judgment the

appellate court has observed that while granting injunction against honouring letter of credit by a bank, the court must be slow in granting an order of injunction restraining the realization of a letter of credit subject to the exception that it must be clearly shown that fraud of a grievous nature has been committed and to the notice of the bank. It is also observed that, 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. With this legal proposition in mind, the Division Bench, has noted that there were not even averments of fraud made in the suit let alone averments being made against the Plaintiff of fraud. In fact, while setting aside the order of the Single Judge, it was also observed that the Single Judge also had noted that no averments have been made about commission of fraud by the Plaintiff. It is necessary to note that, even in the present case, except for a bald statement, there are no averments anywhere in the affidavit in reply that the Plaintiff was aware of the fraud, when it accepted the documents from the beneficiary. It is not even the case of the Defendant that the fraud was apparent on the face of the documents. In fact, even the Defendant was not aware of any fraud and it had also accepted the documents on 6th January, 2012.

5. Against the said judgment of the Division Bench, MMTTC had preferred a Special Leave Petition (SLP) which came to be dismissed summarily.

6. The entire basis of the suit is the irrevocable letter of credit that the Defendant had issued to the plaintiff. The main contention raised on behalf of the Plaintiff, since it had no knowledge of any alleged fraud perpetrated by the supplier before accepting the documents and making the payment, is that the Defendant bank could not refuse to reimburse the Plaintiff of payments already made by the Plaintiff under the letter of credit. It is also the case of the Plaintiff that the Plaintiff had no knowledge of any alleged fraud said to have been committed with regard to the underlying transactions covered by the documents.

7. The counsel for the Plaintiff submitted that there was no escape for the Defendant and the Defendant will have to pay under the letter of credit. The counsel submitted that the letter of credit issued by the Defendant was an irrevocable letter of credit which required certain documents to be submitted to be entitled for payment and those documents, admittedly, have been submitted.

He also submitted that Defendant had also by its message dated 6th January, 2012 confirmed that the documents were in order and that they would make payment on the due date and, therefore, the amount was payable and the Defendant cannot renege on their obligations under the letter of credit.

8. The Defendant in their affidavit in reply have not denied any of these facts but according to the Defendant the supplier has played a fraud and MMTC has filed a criminal complaint and that is being investigated by the police and until the investigation is completed no amount is payable.

They have also submitted that MMTC has also filed by a suit namely Suit No. 786 / 2012 referred earlier and until that suit is concluded no amount is payable.

It is also submitted that the Plaintiff made the payment to the supplier before the required 90 days from the date of Bill of Lading and the Defendant brought to the notice of the Plaintiff about the fraud within the 90 days period and therefore no amount is payable.

It is also baldly alleged, without any substance or basis, that the supplier was in collusion with the Plaintiff right from inception

with dishonest and ulterior motive to defraud the Defendant. This last point has no substance or basis and requires to be rejected. Simply, alleging fraud is not enough. There has to be some strong *prima facie* or corroborative evidence of the fraud allegations. It is also necessary to note that there is no communication from the Defendant to the Plaintiff alleging that the Plaintiff was involved in the fraud with the supplier and right from inception the Plaintiff knew about this fraud.

9. As regards the submission of the Defendant that even after accepting the documents and assuring payment they could still, before the 90 days period was over, refuse to make payment, I am afraid, it is not correct. Under Article 16(d) of UCP-600 rules, which is applicable to the suit letter of credit, the Defendant if it had decided to refuse to honour or negotiate, should have no later than the close of the fifth banking day following the day of presentation communicated its refusal. In this case the Defendant by its message dated 6th January, 2012 has gone ahead and accepted the documents and have also assured payment. In fact the Defendant in its written statement filed in Suit No. 786 of 2012 has accused MMTC of not coming with clean hands and has

alleged that MMTC has suppressed material facts from the court. The Defendant has also stated in its written statement in the said suit that the Defendant will have no objection and will submit to the orders of the Court with regard to honouring of letter of credit, i.e., this suit letter of credit. The Appellate Bench of this court refused to grant any injunction restraining the Defendant from making the payment under this suit letter of credit to the Plaintiff and the Supreme Court refused to interfere. In effect the Appellate Court has confirmed that Defendant had to make the Payment to the Plaintiff. The Defendant has also not made out any case of fraud against the Plaintiff beyond bald allegations. Letters of credit, also called documentary credits are the most common method of payment for goods in the export trade and have been described by many courts as “ the life blood of international commerce”. Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being equivalent to cash in hand. The law relating to letters of credit is founded on two principles:

- (a) the autonomy of the credit; and
- (b) the doctrine of strict compliance.

The credit is separate from and independent of the underlying

contract of sale or other transaction. A bank which operates a credit is concerned only with whether the documents tendered correspond to those specified in the instructions. The letter of credit transaction is thus a paper transaction. The only case in which – exceptionally – the bank should refuse to pay under the credit occurs if it is proved to its satisfaction that the documents, though apparently in order on their face, are fraudulent and that the beneficiary or the other bank was involved in the fraud. This is usually referred as the “fraud exception”.

10. I find support in the judgment relied upon by the counsel for the Plaintiff, ***UBS AG Vs. State Bank of Patiala***¹ in which paragraph 22 and 35 read as under:

22. The main contention raised on behalf of the appellant Bank is that since it had no knowledge of any fraud perpetrated by the constituent of the respondent Bank before making payment under the letter of credit in question, the respondent Bank could not refuse to reimburse the appellant Bank of payments already made to the beneficiary under the letter of credit before such intimation was received. It was also the case of the appellant Bank that since it had no knowledge of the fraud said to have been committed with regard to the bills of lading and the letter of credit itself, it negotiated documents presented before it by the beneficiary and made payment accordingly as per the instructions of the respondent Bank.

35. The facts of these three appeals are clear and simple. The letters of credit were issued by the issuing bank to the

1. (2006) 5 SCC 416

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.

11. The counsel for the Defendant relied upon *State Bank of Hyderabad Vs. Rabo Bank*²; *Bankay Bihari G. Agrawal and Ors. Vs. M/s. Bhagwanji Meghji & Ors.*³; a judgment of the Court of appeal in England in the matter of *Montrod Ltd. Vs. Grundkotter Fleischvertriebs GmbH*⁴; and a judgment of the privy council in *Alternative Power Solution Ltd. Vs. Central Electricity Board and Another*⁵.

12. As regard *State Bank of Hyderabad (Supra)* in the said judgment, the Apex Court has only set out the factors to be kept in mind while hearing an application for summary decree.

2. 2015 (10) SCC 521

3. 2001 (1) Mh.L.J. 345

4. 2002 (1) WLR 1975

5. 2015 (1) WLR 697

13. As regards *Bankay Bihari G. Agrawal (Supra)* the counsel for the Defendant submitted that the summons for judgment was taken out after almost 13 months of filing the suit. In my view, it is not such an inordinate delay or a factor to be considered to warrant granting unconditional leave to defend it. In any event the delay in taking out summons for judgment beyond the period of 6 months prescribed by Rule 227 does not automatically entitle Defendant to unconditional leave to defend.

14. Coming to *Montrod Limited (Supra)*, the counsel submitted that if the documents are forged and the same are nullity, they cannot be accepted and hence no payment was due and payable. In fact, in *Montrod Limited*, the Court of appeal held that a beneficiary who had presented documents in good faith was entitled to payment even if the documents had no commercial value and were 'nullities'. In this case *Montrod*, who were the applicants in the credit, made a claim against *Grundkotter*, seeking a declaration from the Court that no valid certificates of inspection had been issued which were capable of satisfying the letter of credit's requirement. *Grundkotter* had presented documents which on their face complied with the terms of the credit and there was

no proof of fraud on their part. The Court concluded that the so-called 'nullity' exception, argued for by *Montrod*, was not an exception recognized by English law as entitling the bank to refuse payment under the letter of credit in the face of a conforming presentation. The nullity of the documents tendered did not therefore provide an independent ground for refusal of payment and an exception to the principle of the autonomy of the credit.

15. The essence of the letter of credit transaction lies in its documentary character, i.e., where the goods are represented by a bill of lading, this document of title is used as a means of financing the transaction. The underlying requirement in the contract as evidenced in a letter of credit is that payment has to be made against the documents submitted unless it can be shown that the day when the Plaintiff accepted the documents, the Plaintiff was aware about the fraud or that the documents were forged. The bank must determine on the basis of the documents alone whether or not they comply with the mandate. According to the doctrine of strict compliance the bank is within its rights when refusing documents tendered, which do not contain all documents or particulars specified in the Credit. Beyond this the bank is not

obliged to go and should not go. If the Defendant wanted to refuse the documents, it should have brought to the notice of the Plaintiff about the fraud and should have refused the documents within the close of the fifth banking day following the presentation, which the Defendant did not. On the contrary the Defendant has admitted and accepted the documents. Moreover, in the affidavit in reply the Defendant has in para 9 (iv) has stated as under :

“(iv) On 3rd January 2012, MMTC Ltd., vide their letter Ref. No. MMTC/ F & A/CWR/VIII/2011-12 dated 3rd January, 2012, communicated their acceptance of Bills drawn under the Letters of Credit and to make payment of both the bills on the respective due dates and accordingly, as per standard banking practice, the acceptance of bills and due dates for payment i.e. 5th March, 2012, was communicated to the presenting bank i.e. Plaintiff, through electronic medium (SWIFT), on 6th January, 2012”.

Therefore, not only the Defendant but even its constituent MMTC has accepted that the documents were in accordance with the letter of credit. Hence, the amounts were payable to the Plaintiff by the Defendant under the letter of credit.

16. As regards *Alternative Power Solutions Limited (Supra)*, considering the same, in my view this judgment also confirms the proposition that the banks engaged in a letter of credit transaction

are, in principle, not involved in any dispute arising between the parties to the underlying contract of sale subject to one exception to this rule; the fraud exception. Therefore, the bank is bound to pay unless the demand of the Plaintiff was clearly fraudulent.

In other words, if the Plaintiff, for the purpose of drawing on the credit, fraudulently presents to the Defendant documents that contain, expressly or by implication material representations of fact that to his knowledge are untrue only then payment can be refused. The emphasis here is 'to the Plaintiff knowledge' that the documents presented were expressly or by implication fraudulent. In this case, it is not even the case of the Defendant that the Plaintiff was aware of any fraud.

17. As regards the defence that the Plaintiff should not have paid within the 90 days period provided in the letter of credit, the same also cannot be accepted. The 90 days period in the credit only means that once the documents are accepted, the Defendant has 90 days to pay. Its liability to pay is crystallized but date of payment is deferred.

18. The defendant also took a stand, that the claim is time barred. The submission of the Defendant is incorrect because the moment, the Defendant accepted the documents the liability to pay has got triggered. The 90 days time to pay, i.e., the maturity date, was 5th March, 2012 and the suit was lodged on 3rd March, 2015. The date on which the Defendant refused to pay cannot be the date of reckoning as the plaintiff in my view, is entitled to wait till the maturity date and consider that date as the date the cause of action arose.

19. In the circumstances the Defendant has not raised any triable issues. The Defendant has no defence, and the defence setup is only illusory, sham and moonshine. The letter of credit is not denied. The fact that the letter of 6th January, 2012 was written by Defendant accepting the documents and agreeing to remit the proceeds is not denied. The appeal court in the suit filed by MMTC, refused to injunct the Defendant from remitting the payment to the Plaintiff and this would in a way, amount to endorsing the factual and legal position, that the amount was payable by the Defendant to the Plaintiff. That facts then prevailing are the same set of facts even now prevailing. I see no

reason why the Defendant should not pay. I would add that the Defendant should have paid soon after the Apex Court dismissed the SLP of MMTC. Therefore, this is a fit case where the Plaintiff should be granted summary decree. The summons for judgment is disposed accordingly and the suit also is decreed in favour of the Plaintiff. The Plaintiff is also entitled to cost in the sum of Rs. 2,00,000/- (Two lakhs).

20. The decree be drawn up accordingly.

21. At the request of the counsel for the Defendant, this order stayed for a period of four weeks.

(K. R. SHRIRAM, J.)