*   IN THE HIGH COURT OF DELHI AT NEW DELHI

+   CS(OS) Nos.1830/2010 & 1831/2010

%   31st March, 2016

1. **CS(OS) No.1830/2010**

TATA MOTORS LIMITED ..... Plaintiff

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Darpan Wadhwa, Advocate, Ms. Nandini Gore, Advocate, Mr. Akhil Sachhar, Advocate, Mr. Abhishek Roy, Advocate, Mr. Shantanu Agarwal, Advocate, Mr. Raghav Kacker, Advocate, Ms. Neha Khandelwal, Advocate and Mr. Arnav, Advocate.

versus

JSC VTB BANK ..... Defendant

Through: Mr. A. B. Dial, Senior Advocate with Mr. Rajiv Nanda, Advocate, Ms. Sumati Anand, Advocate and Mr. Manish Kumar Vikkey, Advocate.

2. **CS(OS) No.1831/2010**

TATA MOTORS LIMITED ..... Plaintiff

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Darpan Wadhwa, Advocate, Ms. Nandini Gore, Advocate, Mr. Akhil Sachhar, Advocate, Mr.

Abhishek Roy, Advocate, Mr. Shantanu Agarwal, Advocate, Mr. Raghav Kacker, Advocate, Ms. Neha Khandelwal, Advocate and Mr. Arnav, Advocate.

versus

JSC VTB BANK ..... Defendant

Through: Mr. A. B. Dial, Senior Advocate with Mr. Rajiv Nanda, Advocate, Ms. Sumati Anand, Advocate and Mr. Manish Kumar Vikkey, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

I.A. No.16722/2010 (under Order XXXVII Rule 5 CPC by defendant) in CS(OS) No.1830/2010

1. This is an application under Order XXXVII Rule 5 of the Code of Civil Procedure, 1908 (CPC) filed on behalf of the defendant seeking leave to defend in the subject Order XXXVII suit.

2. The facts of the case as stated in the plaint are that the plaintiff is the seller of goods. The buyer of the goods originally was Closed Joint-Stock Company, Cars and Engines of Ural (CJSC Amur) and which buyer

was subsequently changed to “Trade House Amur”. Plaintiff pleads that it sold 32 units of truck chasis to the Trade House Amur and which was covered by the subject Letter of Credit dated 11.10.2008 for US$ 406,400. The further case in the plaint is that the defendant is the issuing bank, and when the plaintiff as the beneficiary of the letter alongwith the Letter dated 21.10.2008 presented documents to the defendant (through advising bank) for payment attaching therewith the documents as required under the letter of credit, defendant refused to make the payment on the ground of four discrepancies in the documents presented. The four discrepancies and its effect have been dealt with by the plaintiff in paras 23 to 26 of the plaint and these paras read as under:-

> “23. The first alleged discrepancy stated by the Defendant in the letter dated 12.11.2008 was that the Port of Discharge mentioned in Bill of Lading did not correspond to with Clause 44F of the Letter of Credit, which says “Port of Discharge: St. Petersburg, Russia”. The Bill of Lading submitted by the Plaintiff stated “St. Petersburg, Ru”. It is stated that using a short form for the “Russia”, which is commonly written as “Ru” can in no way be considered a discrepancy. The Port of Discharge is the city or town and not the country. All the parties were aware that St. Petersburg is in Russia, and the entire transaction related to shipments to Russia; the Defendant bank and the buyer are also Russians. The shipping company also transported it to St. Petersburg, Russia. Therefore, it is stated that the Defendant was only looking for an excuse not to release the payment.
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> 24. The second alleged discrepancy stated by the Defendant bank was that the seal numbers in commercial invoices/packing list do not correspond with the seal numbers in the Bill of Lading. The Packing List submitted by the Plaintiff had eight (8) seal numbers with a prefix “APL”, while in the Bill of Lading the prefix was not mentioned. However, there was no

difference/discrepancy in the seven digit seal numbers. It is stated that "APL" is the name of the shipping company which shipped the goods and the prefix was written for easy reference. It is stated that there was no such requirement to mention seal numbers without a prefix in the Letter of Credit. Further, there was no doubt that the seal numbers did not match.

25. The third alleged discrepancy stated by the Defendant bank was that the certificate of origin had been issued by "Tata Motors Ltd.", instead of "Tata Motors Limited, International Business". It is submitted that undoubtedly the legal entity is Tata Motors Limited itself. The division in Tata Motors Limited was 'International Business', which is only a division and not a separate entity. It is stated that it was obvious that there was no discrepancy and the same was an excuse to avoid payments. The discrepancies raised by the Defendant Bank are untenable has been further fortified by the purported discrepancy raised by the Defendant Bank stating that the letter of credit provides that the certificate or origin uses the word 'Ltd' whereas the documents uses the word 'Limited'. It is submitted that such discrepancies are untenable and ought to be dismissed at the outset.

26. That the fourth alleged discrepancy stated by the Defendant Bank was that the DHL receipt evidenced dispatch of one set of original invoice and 1/3 B/L to CJSC Amur instead of Trade House Amur. It is stated that the documents submitted i.e. the bill of lading and the original invoices were in the name of Trade House Amur at the address Mantaznikov Street 2B, Ekaterinburg, Sverdlovsk region, Russia, 620050. The envelope for dispatch of these documents through DHL was also addressed to the same address which was provided in the letter of credit. However, the only obvious typographical error was that the DHL courier was addressed in the name of "CJSC Amur" instead of "Trade House Amur". It is pertinent to note that in the other transactions namely for letter of credit bearing no.ILC 08EKBR0041 and ILC 08EKBR0042 the consignee name was "CJSC Amur" with the same address. It is relevant to note that the DHL courier was in fact received by "Trade House Amur" and it was never stated by them that they never received these documents. Further, Trade House Amur received the consignment on the basis of the originals that were received by them. This is also fortified by the letter dated 26.5.2009 addressed by CJSC Amur to the Plaintiff wherein it has been explicitly stated that the 32 SKD Kits have been receive by Trade House Amur."

3. Accordingly, the plaintiff has sought a money decree of US$ 406,400 alongwith *pendente lite* and future interest @ 18% per annum

simple alleging that the defendant wrongly refused payment under the letter of credit raising reasons of discrepancies but which discrepancies were not discrepancies in the eyes of law.

4. The leave to defendant application has been argued on behalf of the defendant by Mr. Adarsh B. Dial, Senior Advocate. It is firstly argued on behalf of the defendant that the four discrepancies as found, and especially the fourth discrepancy of the consignee being shown in the courier receipt as CJSC Amur instead of Trade House Amur, will be major discrepancies, and therefore for all the four discrepancies the defendant was entitled to refuse the payment under the letter of credit. The second argument urged on behalf of the defendant is that admittedly the plaintiff took back the documents for correcting the discrepancies and thereafter represented the documents after expiry of the letter of credit on 2.1.2009, and therefore the plaintiff has admitted to the existence of the discrepancies and since after correcting the discrepancies, the documents are represented after expiry of the letter of credit on 2.1.2009, the plaintiff is hence not entitled to payment under the subject letter of credit. Thirdly it is argued that the plaintiff admits having received back the chasis units as per the plaint and thus defendant is entitled to leave to defend. On these grounds unconditional

leave to defend is sought on behalf of the defendant. Learned senior counsel for the defendant has also relied upon certain paras of the judgment of the Supreme Court in the case of ***United Commercial Bank Vs. Bank of India and Others (1981) 2 SCC 766*** and which are stated hereinafter, and on the basis of these paras of the judgment of the Supreme Court, it is argued that since banks only deal in documents and since the documents presented in this case were discrepant; especially the fourth discrepancy of the consignee being CJSC Amur instead of Trade House Amur; the defendant was entitled to refuse the payment under the letter of credit. The relevant paras of the judgment of the Supreme Court in the case of ***United Commercial Bank (supra)*** which are relied upon are paras 39, 40 and 44 to 46 and these paras read as under:-

> "39. The relevant authorities uniformly lay down in dealing with commercial letters of credit that the documents tendered by the seller must comply with the terms of the letter of credit, and that the banker owes a duty to the buyer to ensure that the buyer's instructions relative to the documents against which the letter of credit is to be honoured are complied with. The rights of a banker are described in HALSBURY'S LAWS OF ENGLAND, 4th Edn., vol. 3, para 141 at p. 106 :
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>> Unless documents tendered under a credit are in accordance with those for which the credit calls and which are embodied in the promise of the paying or negotiating banker, the beneficiary cannot claim against the paying banker, and it is the paying banker's duty to refuse payment. The documents must be those called for, and not documents which are almost the same or which will do just as well. The banker is not called upon to know or interpret trade customs and terms. It has been held that where mandate is ambiguous and a paying banker acts in a reasonable way in

pursuance of it, he may be protected. But this general rule cannot be stretched so far as to protect a banker who pays against documents describing goods in terms which are similar to, but not exactly the same as, those stipulated in the credit.

The description of the goods in the relative bill of lading must be the same as the description in the letter of credit, that is, the goods themselves must in each case be described in identical terms, even though the goods differently described in the two documents are, in fact, the same. It is the description of the goods that is all important. The reason for this requirement is stated in Davis' LAW RELATING TO COMMERCIAL LETTERS OF CREDIT, 2nd Edn. p. 76:

> It is not only the buyer who faces the risk of dishonesty or sharp practice on the part of the seller. For, in many instances, the banker looks to the goods for reimbursement of the whole or part of the amount he pays under the letter of credit. It is equally to his interests to ensure that such documents are called for by the letter of credit as will result in goods of the contract description being ultimately delivered. The buyer is not compelled to enter into the sales contract nor, is the banker compelled to issue the letter of credit. If either of these contracts is entered into then it is for the buyer and the banker respectively to safeguard themselves by the terms of the contract. Otherwise they must be prepared to bear any ensuing loss.
>
> But the liability thus imposed on the issuing banker carries with it a corresponding right that the seller shall, on his part, comply with the terms of the letter of credit and the seller's obligations have been construed as strictly as those of the banker.

We have already referred to the statement of law in Halsbury's Laws of England which found a place in PAGET'S LAW OF BANKING, 8th Edn. p. 648, and we may at the risk of repetition reproduce the same, to the effect:

> Unless documents tendered under a credit are in accordance with those for which the credit calls and which are embodied in the promise of the intermediary or issuing banker, the beneficiary cannot claim against him; and it is the banker's duty to refuse payment. The documents must be those called for and not documents **which are almost the same or which seem to do just as well.**

40. In the light of these principles, the rule is well established that a bank issuing or confirming a letter of credit is not concerned with the

underlying contract between the buyer and seller. Duties of a bank under a letter of credit are created by the document itself, but in any case it has the power and is subject to the limitations which are given or imposed by it, in the absence of the appropriate provisions in the letter of credit.

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44. The appellant was under a duty to its constituent, the Bihar Corporation, to scrutinize the documents, and could not be compelled to make payment particularly when the description in the documents did not tally with that in the letter of credit. It was fully entitled to exercise its judgment for its own protection. When the appellant against the first lot of 20 documents refused to make payment except 'under reserve' and against the second lot of 27 documents even 'under reserve' the remedy of the plaintiffs was to approach the 'openers', i.e., Bihar Corporation, to instruct the appellant to effect a change in the description of the goods from 'Sizola Brand Pure Mustard Oil' to Sizola Brand Pure Mustard Oil "Unrefined" in the letter of credit. Instead of adopting that course, the irregularity in the description in documents tendered for payment was sought to be got over by the plaintiffs by instructing their bankers, the Bank of India, to execute a letter of guarantee or indemnity. When the bills of exchange tendered to the Bihar Corporation were dishonoured when presented on August 3, 1978, the legal consequences must follow as between the appellant and the Bank of India. There was the inevitable chain of events which could not be prevented by the grant of an injunction.

45. The appellant presumably knew little or nothing about mustard oil. Bankers are not dealers in mustard oil in such a case as this, but dealers in documents only. The appellant as the issuing bank was presented with documents and asked to pay a very large sum of money in exchange for them. Its duty was not to go out and determine by physical examination of the consignments, or employment of experts, whether the goods actually conformed to the contracts between the buyer and the seller, nor even determine either from its own or expert advice whether the documents called for the goods which the buyer would be bound to accept. The banker knows only the letter of credit which is the only authority to act, and the documents which are presented under it. If these documents conform to the letter of credit, he is bound to pay. If not, he is equally not bound to pay. The letter of credit called for 'Sizola Brand Pure Mustard Oil' while the railway receipts carried the description "Siloza Brand Pure Mustard Oil 'Unrefined' and it was not within the

province of the appellant to say that the latter description meant identically the same thing as the former.

46. In the action against a purchaser for reimbursement, it is only necessary to prove that the goods tendered were the goods purchased, no matter how described, i.e., the purchaser was offered that which he had contracted for, while in such a case as this, in an action by the beneficiary against the issuing bank, it makes no difference whether the goods tendered were in fact identical to the goods purchased, the only question being : Did the documents conform to the letter of credit?"

(emphasis is mine)

5. Learned senior counsel for the defendant has placed great emphasis on the observations made by the Supreme Court in the case of ***United Commercial Bank (supra)*** that the bank only deals in documents and not in goods as stated in Halsbury's Laws of England as also quoted in Paget's law of banking, 8th Edition, page 648 referred to in para 39, and that the documents which are called for by and presented to the defendant/issuing bank must be documents which are specifically the documents called for in terms of the requirements of the letter of credit and not the documents which are 'almost the same' or 'seem to do just as well'. Reliance is also placed upon para 45 of the judgment in the case of ***United Commercial Bank (supra)*** that banks are not expected to know anything about the description of goods or in any manner the addresses or entities which are in issue, and that the bank only has to see the documents presented in conformity to the letter of credit.

6. Learned senior counsel for the defendant has in support of the second ground relied upon the judgment of Fujian High People's Court (China) titled as ***South Korean Hyosung Corp. Vs. China Everbright Bank (Xiameng Branch) 2005 LC Case Summaries*** to argue that the representation of the documents by the plaintiff after correction of the discrepancies emphasized and showed that the discrepancies existed. The relevant paragraphs of the judgment of this case which are relied upon are as under:-

> "**South Korean Hyosung Corp. V. China Everbright Bank (Xiameng Branch)**
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> **2005 LC CASE SUMMARIES**
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> *Civil Judgment (2003) Min Jing Zhong Zi No.069; Fujian High People's Court (China)*
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> Abstracted by JIN Saibo and YANG Wantao of Zhonglun Law Firm
>
> **Topics**: Waiver, Discrepancy; Independence Principle; Typing Error; Quantity of Cargo Indicated on Bill of Lading Inconsistent; Re-Presentation; Cure, Re-Presentation; **Late Presentation**; UCP500 Article 42; UCP500 Article 43
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> **Type of Lawsuit:** Beneficiary sued Issuer for wrongful dishonor.
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> **Parties:** Appellant/Plaintiff in the First Instance Trial/Beneficiary-South Korean Hyosung Corporation
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> Appellee/Defendant in the First Instance Trial/Issuing Bank-China Everbright Bank (Xiameng Branch)
>
> Correspondent Bank-HANVIT Bank
>
> **Underlying Transaction:** Purchase of 204 metric tons of ABS colophony manufactured by Korean/Kumho Chemical Co.

LC: Documentary LC for US$230,520. Subject to UCP500.

Decision: The Fujian High People's Court rejected the appeal by Beneficiary from the Civil Judgment (2002) Xia Jing Chu Zi No.234 by Xiameng Intermediate People's Court in favour of Issuer.

Rationale: The re-presentation of documents implies agreement with discrepancies asserted in the refusal of the first presentation. The failure to make a timely re-presentation justifies refusal of the documents under UCP500 Articles 42 and 43.

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On 22 November 2000, Issuer informed Correspondent Bank of three discrepancies: (1) the bill of lading indicates that the quantity of cargo is 680 bags while other documents indicate the quantity is 8160 bags; (2) the name of the manufacturer on the packing bill/weight bill is not consistent with LC, which shall be "KOMHO CHEMICALS CO., LTD" instead of "KUMHO CHEMICALS, INC"; (3) the spelling of the name of the Issuer is wrong, which shall be "BANK" instead of "BNAK". Issuer then refused to take up the documents submitted and indicated that it was holding the documents, for further instructions. Correspondent Bank subsequently forwarded a re-presentation of some of the documents with corrections, including commercial invoice, packing bill/weight bill and certificate of quantity/weight.

On 11 December, Correspondent Bank made yet another re-presentation of new documents, including a bill of exchange, commercial invoice, bill of lading, packing bill, certificate of beneficiary, certificate of quantity, certificate of country of origin, and insurance policy. Issuer, however, rejected the documents, asserting the following discrepancies: (1) **late presentation** of the documents; and (2) quantity of cargo indicated on bill of lading was still inconsistent with that on the other documents.

Beneficiary sued Issuer for wrongful dishonor. The trial court entered judgment for issuer. On appeal, affirmed.

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The appellate court noted that three discrepancies were raised by the Issuer in response to the initial presentation, i.e., mistake of the name of the manufacturer, type of the name of the issuing bank, and the difference of the quantity between the bill of lading and other documents. The beneficiary objected at first, but later compromised by exchanging documents concerned. The appellate court decided that it was implied that the beneficiary, by changing documents, waived its right to claim that the documents initially presented were in compliance with the LC." (underlining added)

7. Learned senior counsel for the plaintiff in response to the argument of the defendant placing reliance upon the ratio of the judgment of the Supreme Court in the case of ***United Commercial Bank (supra)*** argues that the ratio in the case of ***United Commercial Bank (supra)*** was given when the earlier Uniform Customs and Practice (UCP 500 or even possibly the earlier edition existing in the year 1981) was existing, but UCP 500 has been thereafter replaced by UCP 600, and which is admittedly the document which is to be considered between the parties to the contract and the present suit. Article 14 of UCP 600, and more particularly its sub-Articles (d) and (f) specifically deals with the issue at hand and that these articles show that minor discrepancies should not be considered as a ground for the issuing bank to refuse payment under the letter of credit. It is specifically argued by referring to Articles 14(d) & (f) of the UCP 600 that minor discrepancies in important documents being commercial invoice, transport document/bill of lading and an insurance contract has to be taken very material whereas minor discrepancies in other documents are not to be treated as that relevant for the issuing bank to refuse payment. Relying upon sub-Article (f) of Article 14

of the UCP 600 alongwith its sub-Article (d), it is further argued by the learned senior counsel for the plaintiff that there should be a practical understanding of the contents of the documents other than the invoice, bill of lading and insurance contract and that only the latter documents have to be read very strictly with respect to they being in conformity with the requirements of the documents to be presented under the letter of credit for they not having any discrepancies. Article 14 of the UCP 600 relied upon is reproduced as under:-

> " **Article 14 Standard for Examination of Documents**
>
> a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.
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> b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.
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> c. A presentation including one or more original transport documents subject to articles 19, 20, 21, 22, 23, 24 or 25 must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment as described in these rules, but in any event not later than the expiry date of the credit.
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> d. <u>Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit</u>.
>
> e. In documents other than the commercial invoice, the description of the

goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit.

f. <u>If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d)</u>.

g. A document presented but not required by the credit will be disregarded and may be returned to the presenter.

h. If a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it.

i. A document may be dated prior to the issuance date of the credit, but must not be dated later than its date of presentation.

j. When the addresses of the beneficiary and the applicant appear in any stipulated document, they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email and the like) stated as part of the beneficiary's and the applicant's address will be disregarded. However, when the address and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit.

k. The shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit.

l. A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules."

(underlining added)

8. I am unable to agree with the arguments which are urged on behalf of the defendant and it is held that the leave to defend application is

therefore liable to be and is accordingly dismissed for the reasons given hereinafter.

9. So far as the ratio of the judgment of the Supreme Court in the case of ***United Commercial Bank (supra)*** is concerned, and the paras thereof which are relied upon by the defendant are concerned, ordinarily no doubt they would have squarely applied in favour of the applicant and against the plaintiff for allowing of the leave to defend application, but it is noted that the judgment in the case of ***United Commercial Bank (supra)*** was rendered when the UCP 500 (or the earlier edition of UCP) was applied. Realizing the difficulties of the commercial world with respect to certain types of discrepancies in documents and its non-treatment in UCP 500 and earlier editions of UCP, UCP 600 hence was amended. UCP 600 brought in Article 14 with its sub-Articles (d) and (f) that minor discrepancies in certain important documents being the commercial invoices, bill of lading or insurance contract can be good grounds for the issuing bank to refuse payment but discrepancies in other documents which can be understood as per Article 14(d) should not be treated as major discrepancies i.e if data is in accordance with the other data as found in the documents, and when that is so, the discrepancies would not be treated as major discrepancies for an

issuing bank to refuse payment under the letter of credit on the ground of such alleged discrepancies. The language of sub-Article (d) of Article 14 of the UCP 600 is very categorical that the data in a document has to be read in context with the letter of credit and when that is done, it is seen that as per the subject letter of credit when the documents were presented, the bill of lading and the commercial invoices were in the name of Trade House Amur and not CJSC Amur. Also, the address of the consignee as mentioned in the address in the courier receipt, which was wrongly addressed not to Trade House Amur instead of CJSC Amur, was the same. Accordingly, in accordance with sub-Articles (d) and (f) of Article 14 of the UCP 600, when the documents are read as a whole, it is found that commercial invoices and the bill of lading which were meant to be seen, were in fact received by the Trade House Amur and they contained no discrepancies. The discrepancy of the courier receipt being addressed not to the consignee but to a different name, in the facts of the present case would not make the discrepancy a major discrepancy as per the sub-Articles (d) and (f) of Article 14 of the UCP 600 when taken with the other data of the documents presented to the defendant/issuing bank and reading of which makes it clear that the goods which were sold by the plaintiff were in fact sold, shipped to and received by the buyer M/s Trade House Amur and as reflected from the commercial invoices and the bill of lading. As already stated above, the address of CJSC Amur and the Trade House Amur is the same and the plaint notes that in fact the original buyer was CJSC Amur but by an agreed addendum to the contract, Trade House Amur was also entitled to buy for CJSC Amur. Therefore, I hold that all the four discrepancies as referred to by the plaintiff in paras 23 to 26 of the plaint are not major discrepancies and by applying sub-Articles (d) and (f) of Article 14 of UCP 600, it is held that the defendant is not entitled to leave to defend on this basis.

10. So far as the argument of the defendant by placing reliance upon the ratio of the Fujian High People's Court (China) in the case of ***South Korean Hyosung Corp. (supra)*** is concerned, I respectfully disagree with the ratio of the said judgment by noting that the said judgment would not be binding upon this Court. There are also valid reasons that this Court is disinclined to accept the ratio of the judgment in the case of ***South Korean Hyosung Corp. (supra),*** inasmuch as, a vested legal right of a seller under a letter of credit cannot be defeated by the issuing bank once the documents were otherwise presented in time and these documents were not so discrepant so as to fall outside the scope of Articles 14(d) and (f) of the UCP

600. Thus the defendant/issuing bank could not have refused the payment under the letter of credit. Merely because plaintiff has acted as a matter of abundant caution to get the discrepancies corrected does not mean that a right of the plaintiff which existed when the documents were first presented within the validity of the LC period till 2.1.2009 is destroyed by the subsequent action of representation after 2.1.2009. In the facts of the present case, in the opinion of this Court, the issue of waiver cannot be pleaded against the plaintiff and it cannot be pleaded against the plaintiff that plaintiff has admitted the 'discrepancies' by representing the documents by correcting the 'discrepancies'. Once the discrepancies are not legal discrepancies which could have prevented the defendant from making the payment under the letter of credit, an act of the plaintiff as an abundant caution to represent documents after the correction of 'discrepancies' cannot be used to wipe away the right of the plaintiff created on account of presentation of the documents within time i.e before the expiry of the letter of credit. In spite of a pointed query to the defendant, no law could be cited to this Court which takes away a vested right of a beneficiary although the beneficiary has originally presented documents for payment under the letter

of credit, though with 'discrepancies', but when 'discrepancies' are no discrepancies in the eyes of law.

11. I would like to note that the learned senior counsel for the plaintiff has rightly brought to the attention of this Court that the judgment in the case of ***South Korean Hyosung Corp. (supra)*** was rendered under the UCP 500 and not UCP 600 which is applicable to the present case and clearly therefore for this additional reason the ratio of the judgment in the case of ***South Korean Hyosung Corp. (supra)*** cannot be applied in the facts of the present case.

12. I note that I have referred to the arguments urged on behalf of the defendant with respect to waiver only as a matter of completion of narration because on behalf of the plaintiff it was rightly argued that this point is not specifically and categorically taken up in the leave to defend application and once a ground is not urged in the leave to defend application such a ground cannot be argued for granting leave to defend. Though learned senior counsel for the defendant sought to draw the attention of this Court to pages 4 to 6 of the leave to defend application, it is noted that the object of pleading is to give notice to the opposite party of a case of a party and that by vague pleading surprise cannot be sprung on opposite parties

during the course of arguments. In fact therefore the plea of waiver urged on behalf of the defendant that the plaintiff is estopped from questioning the validity of the discrepancy on account of representing the documents after correcting the discrepancy cannot even be urged on behalf of the defendant.

13. Finally, it was sought to be urged by drawing the attention of this Court to para 32 of the plaint that the plaintiff has received back the 32 units of truck chasis from the buyer of the goods and therefore the defendant is entitled to leave to defend. Para 32 of the plaint reads as under:-

> "32. The failure on the part of the Defendant to release payments under the Letter of Credit has caused enormous loss and damages to the Plaintiff. Therefore, in an endeavour to mitigate losses, the Plaintiff was compelled to enter into an Agreement dated 23.7.2009 with Trade House Amur for the return of the same 32 Units. However, the Plaintiff has suffered substantial losses and has incurred substantial costs because of the return of the units. It is pertinent to note that the 32 Units wee customized for Trade House Amur and there is no ready market for the same. Without prejudice to the aforesaid, it is submitted that the Letter of Credit is a separate and distinct contract from the arrangement between the Plaintiff and Trade House Amur and the obligations of the Defendant to release payments under the Letter of Credit remains unaffected and absolute. It is further submitted that the return of 32 units does not absolve the Defendant of its obligations under the Letter of Credit."

14. In my opinion, contents of para 32 of the plaint are not such that the plaintiff is disentitled to seek payment under the subject letter of credit for two reasons. The first reason is that this Court would not like to go into the merits of the matter whereby this Court has to look into the underlying

contract and the amendment thereto or actions therein for the reason that this cannot be done as this Court can only look into whether the issuing bank/defendant has rightly or wrongly paid or not paid under the letter of credit as per the presentation of documents required. It is applicable law that courts only look at the letter of credit and the documents presented thereunder and courts do not go into the facts of the underlying transaction between the buyer and the seller. The second reason is that even in para 32 of the plaint, plaintiff pleads that the losses have been caused to the plaintiff in spite of return of goods because the 32 units were customized and specifically made for the buyer and there is no market available for these customized truck chasis resulting in losses to the plaintiff. I therefore reject the argument urged on behalf of the defendant that on the basis of the averments made in para 32 of the plaint, the defendant is entitled to leave to defend.

15. Learned senior counsel for the defendant sought to place reliance upon certain paras of Paget's Law of Banking with respect to presentation of the documents after expiry of the letter of credit, but I need not refer to these paras, because, I have held that I am looking at the issue with respect to presentation of documents being valid because they were

validly presented before the expiry of the letter of credit on 2.1.2009, and I am not deciding the leave to defend application with respect to presentation of the documents post 2.1.2009 after correction of the 'discrepancies' by the plaintiff.

16. That finally takes us to the aspect of what is the rate of interest which should be granted to the plaintiff. As per Order XXXVII CPC, the plaintiff is entitled to liquidated amount with or without interest arising. The question is that what should be the rate of interest which should be payable in this case. On behalf of the defendant, it is sought to be argued that Federal Bank rate is now almost zero and LIBOR is negative and therefore plaintiff is not entitled to any interest. Once again learned senior counsel for the plaintiff drew the attention of this Court to the fact that defendant has not even pleaded this aspect in the leave to defend application. In any case, in my opinion, even if this aspect is not pleaded in the leave to defend application, the issue ultimately boils down to the discretion of the Court under Section 34 CPC. Once there are statutory powers under Section 34 CPC, I exercise the same and since Section 34 specifically allows grant of rate of interest @ 6% per annum simple, and the learned senior counsel for the plaintiff on instructions states that plaintiff will be satisfied with interest

pendente lite and future @ 6% per annum simple, the suit of the plaintiff will be decreed, by dismissing the leave to defend application, for a sum of US$ 406,400 as converted into the Indian rupees on the date of this judgment vide ***Forasol Vs. Oil and Natural Gas Commission, AIR 1984 SC 241*** and with *pendente lite* and future interest on this amount at 6% per annum simple. Parties are left to bear their own costs.

I.A. is therefore dismissed.

+ CS(OS) No.1830/2010

17. Since the leave to defend application is dismissed, the suit of the plaintiff for recovery of US$406,400 is decreed with *pendente lite* and future interest @ 6% per annum simple, leaving the parties to bear their own costs.

Since the suit is decreed, all the pending applications would stand disposed of accordingly.

I.A. No.16723/2010 (under Order XXXVII Rule 5 CPC by defendant) in CS(OS) No.1831/2010

18. The reasons given while dismissing I.A. No.16722/2010 in CS(OS) No.1830/2010 are adopted *mutatis mutandis* in this case by noting the variation that defendant has taken up the plea of waiver in the leave to defend application in this case but the aforesaid judgment in CS(OS)

No.1830/2010 deals with the aspect that even if the defence of waiver is pleaded, plaintiff is legally not estopped from enforcing its rights because the original presentation of documents was within and before the expiry of the period specified in the letter of credit.

I.A. stands dismissed and disposed of.

<u>+ CS(OS) No.1831/2010</u>

19. Since the leave to defend application is dismissed, the suit of the plaintiff for recovery of US$ 768,000 is decreed with *pendente lite* and future interest @ 6% per annum simple, leaving the parties to bear their own costs.

Since the suit is decreed, all the pending applications would stand disposed of accordingly.

MARCH 31, 2016 **VALMIKI J. MEHTA, J**
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