IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.24 OF 2017

WITH

CIVIL APPLICATION NO.29 OF 2017

WITH

CIVIL APPLICATION NO.137 OF 2017

M/s.Eurobond Industries Private Ltd. ...Appellant
Versus
M/s. Matec SRL & Anr. …Respondents

Mr. A.M.Saraogi for the Appellant and Applicant in C.A No.29 of 2017 and C.A.No.137 of 2017.
Ms.Savita Mundra for Respondent No.2

CORAM: M.S.SONAK,J
DATED: 7th March 2017

PC:-

1. Heard Mr. Saraogi, learned counsel for the appellant and Ms Savita Mundra, learned counsel for respondent No.2.

2. Mr. Saraogi states that respondent No.1 has been duly served and necessary affidavit of service to that effect has been filed.

3. The challenge in this appeal is to the order dated 12 January 2017, by which, learned Trial Judge has declined the ad-interim

relief to the appellant -plaintiff restraining respondent No.2 Bank from honouring its commitments under the Letter of Credit (LC) issued by it. At the request of Mr. Saraogi, learned counsel for the appellant, the notice of motion in the suit itself is taken up for final disposal. Ms Savita Mundra, learned counsel for respondent No.2 Bank, states that she has no objection for adoption of this course of action.

4. Mr. Saraogi, learned counsel for the appellant, submits that the appellant has already paid 25% of the purchase price towards the purchase and installation of machinery to respondent No.1. This corresponds to an amount of Rs.38,00,000/-. He submits that balance payment had to be made in instalments, which are specifically set out in the summary of general conditions attached to the contract between the parties. Such amounts have been secured by way of LC issued by respondent No.2 - Bank.

5. Mr. Saraogi contends that this is a case of fraud and breach of trust on the part of respondent No.1, which has failed to supply and install the appropriate machinery, despite receipt of the amount of Rs.38,00,000/-. Mr. Saraogi clarifies that the machinery was dispatched but the same is defective and is yet to be installed. He relies upon the documents, which according to him, establish that respondent No.1 has failed to supply the appropriate machinery and install the same. He relies upon certain documents in which respondent No.1 has even tendered apology for such default and given assurances of rectification.

6. Mr. Saraogi submits that there is a difference between security granted by way of bank guarantee and LC. He submits that in case of LC, a restraint can be imposed where it is clear that there is a serious breach on the part of beneficiary. In any case, he submits that this is the case of fraud and criminal breach of trust on the part of respondent No.1 beneficiary and therefore, restraint order is due as otherwise, respondent No.1 will be unduly enriched. He submits that irretrievable loss will occasion the appellant, in case, the interim relief as applied for in the motion is declined. He submits that the amount which is claimed by respondent No.1 is fully secured, since the same is lying in the appellant's bank account maintained with respondent No.2 Bank. Further Mr. Saraogi submits that an amount of Rs.45,00,000/- has already been deposited by the appellant before learned Trial Judge, as a condition for availing the ad-interim relief granted by this Court. For all these reasons, Mr. Saraogi submits that the notice of motion is liable to be made absolute.

7. Ms Savita Mundra, learned counsel for respondent No.2-Bank, which has issued the LC submits that respondent No.2-Bank is not at all concerned with the contractual disputes between the appellant and respondent No.1. The Bank is required to comply with the terms, subject to which the LC was issued. In this case, respondent No.1 has furnished necessary documents as prescribed in the LC and there are persistent demands from the reciprocal bank. She submits that the terms of the LC are governed by Uniform Customs and Practice for Documentary Credits (UCP 600)

and in case, the bank does not honour the LC, the confidence of the foreign bank and foreign party, in the banking transactions in India will suffer a dent. For all these reasons, Ms Mundra submits that the notice of motion is liable to be dismissed with costs.

8. The rival contentions now fall for my determination.

9. The submissions made by Mr. Saraogi basically relate to breach of contract alleged to have been committed by respondent No.1 in the matter of supply and installation of machinery. Based upon the documents produced on record, even if it is to be accepted that there is some *prima facie* case of breach is made out, that by itself, is by no means sufficient to restrain respondent No.2 from honouring the commitments undertaken by it under the LC. It is not sufficient to merely allege fraud against the contracting party and on such basis, secure a restraint in the matter of encashment of a bank guarantee or restraining the payments under a LC.

10. In this case, the terms subject to which the LC was issued by respondent No.2 Bank are governed by UCP 600. There is no serious dispute on this score. Article 5 of UCP 600 clearly stipulates that the banks deal with documents and not with goods, services or performance to which the documents may relate. Article 13 which deals with the bank to bank reimbursement arrangement provides that an issuing bank must provide a reimbursing bank with a reimbursement authorization that conforms with the availability stated in the credit. Such reimbursement authorisation

should not be subject to an expiry date. Further, an issuing bank will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank in accordance with the terms and conditions of the credit. The reimbursing bank's charges are for the account of the issuing bank.

11. In this case, if the contract between the appellant and respondent No.1 is perused, then, the balance payments had to be made in terms of the time schedule prescribed, for which reference point was the Bills of Lading. The LC also makes specific reference to full set of "*clean*" "*on board*" Ocean Bills of Lading made out to order of AXIS Bank Ltd. marked "*freight prepaid*", evidencing shipment of merchandise. The Bills of Lading had to must state full name and address of both applicant and AXIS Bank Limited as parties to be notified.

12. There is nothing on record dispute the statement made on behalf of respondent No.2 bank that the documents required to be furnished as per the LC were indeed furnished to respondent No.2 Bank. The Bank is not at all concerned with the disputes between the appellant and respondent No.1 in terms of the contract between them. On basis of such disputes or by merely styling as such disputes as fraud or criminal breach of trust, it is not ordinarily permissible for the contracting party to secure a restraint upon the bank honouring its commitments under the LC. This is

also not a case where any fraud or criminal breach of trust is being alleged against the respondent No.2 Bank.

13. The Hon'ble Supreme Court in ***Federal Bank Ltd vs. V.M. Jog Engineering Ltd. and anr. - (2001) 1 SCC 663*** **,** at paragraph 55, has held thus:

> *“**55.** In several judgments of this Court, it has been held that courts ought not to grant injunction to restrain encashment of bank guarantees or letters of credit. Two exceptions have been mentioned — (i) fraud, and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39 Rule 1 CPC can be issued. It has also been held that the contract of the bank guarantee or the letter of credit is independent of the main contract between the seller and the buyer. This is also clear from Articles 3 and 4 of UCP (1983 Revision). In case of an irrevocable bank guarantee or letter of credit the buyer cannot obtain injunction against the banker 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 face 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. While doing so it must take reasonable care. It is not permissible for the bank to refuse payment on the ground that the buyer is claiming that there is a breach of contract. Nor can the bank try to decide this question of breach at that stage and refuse payment to the seller. Its obligation under the document having nothing to do with any dispute as to breach of contract between the seller and the buyer. As to its knowledge of fraud or forgery, we shall presently deal with it”.*

14. Further, the Hon'ble Supreme Court in *Federal Bank Ltd. (supra),* has also held that in order to obtain injunction against the issuing bank, it is necessary to prove that the bank had knowledge of the fraud. By reference to decision of Kerr, J. said in ***R.D. Harbottle (Mercantile) Ltd. vs. National Westminster Bank Ltd. - (1977) 2 ALL ER 862,*** the Hon'ble Supreme Court has tacitly accepted the position that LCs' are the "*lifeblood of international commerce*". Incidentally, in *Federal Bank Ltd. (supra),* the Hon'ble Supreme Court has also considered the terms of Uniform Customs and Practice for Documentary Credits 1983 (UCP), since such terms were incorporated in the LC in the said case.

15. In ***UBS AG vs. State Bank of Patiala – (2006) 5 SCC 416,*** the Hon'ble Supreme Court did not approve the grant of any unconditional leave to defend the suit seeking a restraint upon payment in terms of irrevocable LC. The Hon'ble Supreme Court has held that international commerce operates on trust and relies to a large extent on arrangements between banks on behalf of their respective clients, giving rise to "UCP 500" which governs the LC involved in the said case.

16. There is no merit in the contention of Mr. Saraogi that there is difference in the law relating to grant of injunctions when it comes to a bank guarantees on one hand and the LC on the other. The basic principle in both cases is that the contract of bank guarantee or LC are independent and autonomous contracts. Such contracts are independent of and unqualified by the contract of

sale or other underlying transactions between the parties *inter se.* Therefore, the bank issuing a bank guarantee or LC, is normally unconcerned with the underlying contract between the buyer and the seller. Subject to certain well known exceptions therefore, there is no question of grant of any injunction to restrain a bank from honouring its commitments under a bank guarantee or LC.

17. In ***U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers (P)Ltd. - (1988) 1 SCC 174,*** the Hon'ble Supreme Court at paragraph 21, has held as follows:

> *"**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 a well settled principle of law in India, as I shall presently notice from some of the decisions of the High Court and decisions of this Court."*

18. In ***Tarapore & Co. Madras vs. M/s. V/O. Tractors Export Moscow – (1969) 1 SCC 233,*** the Hon'ble Supreme Court observed that irrevocable LC had a definite implication. It was

independent of and unqualified by the contract of sale or other underlying transactions. It was a mechanism of great importance in international trade and any interference with that mechanism was bound to have serious repercussion on the international trade of this country. The Hon'ble Supreme Court reiterated that the autonomy of an irrevocable LC was entitled to protection and except in very exceptional circumstances courts should not interfere with that autonomy.

19. It is by now well settled that a bank issuing or confirming a LC is not concerned with the underlying contract between the buyer and seller. Duties of a bank under a LC are created by the document itself. The LC in the present case is an independent transaction. Respondent No.2 Bank is not concerned with the contract and/or dispute between the appellant, i.e., Opener and respondent No.1, i.e., beneficiary. In absence of fraud or some other act on the part of issuing bank i.e., respondent No.2, there can be no restrain against respondent No.2 from honouring the commitments undertaken by it in terms of the LC.

20. In this case, it is not possible to accept the contention of Mr.Saraogi that irretrievable loss will occasion the appellant, in case the interim relief is declined. Even if the amount is received by respondent No.1 in pursuance of the LC, it is always open to the appellant to recover such amounts upon establishing that there was indeed breach of contract. Respondent No.1, in this case, is a company, which appears to be based in Italy. There is nothing

brought on record to demonstrate that recovery of amounts, if found due and payable, will be impossible or extremely difficult.

21. In case of ***Itek Corporation vs. The First National Bank of Boston etc. - 566 Fed Supp 1210, 1217,*** the United States District Court, Massachusetts made the following observations that in case where an exporter in USA had entered into an agreement with Imperial Government of Iran:

> *"Because I find that Itek has demonstrated that it has no adequate remedy at law, and because I find that the allegations of irreparable harm are not speculative, but genuine and immediate, I am satisfied that Itek will suffer irreparable harm if the requested relief is not granted".*

The aforesaid was in the context of extremely strained relationship between USA and Iran, rendering it virtually impossible for an exporter from USA to make any recoveries from party in Iran.

22. The Hon'ble Supreme Court in ***Svenska Handelsbanken vs. M/s. Indian Charge Chrome and ors. - (1994) 1 SCC 502,*** has held that "*irretrievable injury*" is of the nature as noticed in the case of *Iteck Corporation (supra)*. In *Svenska* (supra), the contract was between a party based in India and a party based in Sweden. In paragraphs 88 and 89, the Hon'ble Supreme Court has observed thus :

> "***88.*** *The High Court was also in error in considering the question of balance of convenience. In law relating to bank guarantees, a party seeking injunction from encashing of bank guarantee by the suppliers has to show prima facie case of es-*

tablished fraud and an irretrievable injury. Irretrievable injury is of the nature as noticed in the case of Itek Corpn. Here there is no such problem. Once the plaintiff is able to establish fraud against the suppliers or suppliers-cum-lenders and obtains any decree for damages or diminution in price, there is no problem for effecting recoveries in a friendly country where the bankers and the suppliers are located. Nothing has been pointed out to show that the decree passed by the Indian Courts could not be executable in Sweden.

89. *The High Court totally ignored the irretrievable injury which will be caused to defendant 12 in not honouring the bank guarantee in international market which may cause grievous and irretrievable damage to the interest of the country as opposed to the loss of money to the borrower/plaintiff. There was no question of defendant 4 not making any demand. The instalments for repayment of the loans had already been fixed and liable to be paid without demand by defendant 4. Defendant 12 is under a duty to pay the instalments regularly on a fixed date without any demand to defendant 4."*

23. Applying the aforesaid legal principles to the facts and circumstances of the present case, the notice of motion is liable to be dismissed. The appellant has not only failed to make out a *prima facie* case of fraud but further, this is also not a case where irretrievable loss will occasion the appellant, in case, the relief of restraint upon the respondent no. 2 Bank in the matter of honouring its commitments under the LC is declined. In fact, if the relief as applied for by the appellant is to be granted, the same might result in a crisis of confidence in the banking system of India. Accordingly, this appeal and the notice of motion is liable to be dismissed and is hereby dismissed.

24. In pursuance of the ad-interim order, the appellant has deposited a sum of Rs.45,00,000/- or thereabouts before learned

Trial Judge. Now that the notice of motion is dismissed, the appellant will be entitled to withdraw such amount together with interest, if any, that may have accrued thereupon, only after respondent No.2 Bank makes payment to respondent No.1 in terms of the LC. Learned Trial Judge should therefore, permit withdrawal of such amount only after ascertaining from respondent No.2 Bank that it has honoured its commitment under the LC and not before.

25. It is made clear that the observations of this order are only tentative and *prima facie* for the purposes of deciding the notice of motion and should not be construed as expression of opinion on the merits of controversy between the appellant and respondent No.1. It is clarified that the payments which respondent No.1 may receive in pursuance of the LC, shall ultimately be subject to final orders that may be made in the pending suit.

26. In view of disposal of main appeal, the civil applications do not survive and the same are also disposed of.

27. Mr. Saraogi seeks for extension of ad-interim relief for a period of ten days from today. Upon consideration of the legal position and upon its application to the facts and circumstances of the present case, there is no case made out for continuation of the ad-interim relief. Accordingly, the request for continuance is rejected.

(M.S.SONAK,J)