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

SUMMONS FOR JUDGMENT NO.78 OF 2017
IN
COMMERCIAL SUIT NO.87 OF 2012

Standard Chartered Bank And Another … Plaintiffs
Versus
ICICI Lombard General Insurance Co. … Defendant

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Mr.Kevic Setalvad, Senior Advocate a/w Mr. Burzin Somandy, Ms. Sneha Munj And Ameya Kulkarni I/b Ms. Tejaswita Nalawade for the Plaintiffs.
Mr. Soli Cooper, Senior Advocate a/w Mr. Shyam Kapadia, Mr. Naval Sharma And Mr. Keanan Nagporwala I/b Tuli & Co. for the Defendant.

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CORAM : S.C. GUPTE, J.

DATE : 26 APRIL 2018

<u>ORAL JUDGMENT</u> :

. Heard learned Counsel for the parties.

2 This Commercial Summary Suit is for recovery of a sum of Rs.33 Crores together with interest. The claim arises on a written contract of insurance covered under a policy known as 'Export Credit Insurance Policy' dated 14 June 2008 ("ECIP") issued by the Defendant in favour of the two Plaintiffs herein.

3 The first Plaintiff is a bank, who had extended certain credit facilities to one Masumi Overseas Private Limited ("MOPL") *inter alia* for exports of gold jewellery. The second Plaintiff is the State Trading Corporation ("STC"), through whom the exports were to be made. The second Plaintiff

and MOPL entered into an agreement dated 15 December 2006 for exports of gold jewellery by MOPL through STC to certain prospective foreign buyers. The agreement *inter alia* required MOPL to obtain export orders for gold jewellery from prospective foreign buyers in the name of STC. It is the case of the Plaintiffs that pursuance to this agreement, MOPL obtained export orders from five foreign buyers, who are named in the plaint. These buyers were purportedly based in United Arab Emirates (UAE). It is the Plaintiffs' case that STC sold goods aggregating several million dollars to these foreign buyers and raised invoices/bills for such sales. Tri-parte Agreements for these export sales were executed between STC, MOPL and each of these foreign buyers. MOPL, with a view to ensure that the foreign buyers made due payment of the prices of the gold jewellery sold to them by STC, secured STC by executing corporate guarantee in favour of STC upto a maximum sum of Rs.100 Crores. In addition to the corporate guarantee, directors of the MOPL executed personal guarantees in favour of STC for payment of purchase price of the exports of gold jewellery in the event of failure on the part of MOPL to pay the due amount. Pursuance to and in consequence of entering into all these agreements, the Defendant herein agreed to insure the receipt of receivables of the Plaintiffs from the foreign buyers under a policy titled as ECIP. The policy had a total cover of Rs.1,75,00,00,000/-. Under this policy, the Defendant agreed to indemnify the insured, that is to say, Standard Chartered Bank (“SCB”) and STC, in the event of failure to remit the insured debt by the foreign buyers. It is the Plaintiff's case that the foreign buyers failed to remit the export sale price and as a result, the Plaintiffs have become entitled to invoke ECIP. It is the Plaintiffs' case that they have complied with all terms and conditions of the policy and that the Defendant is liable to indemnify the Plaintiffs towards the insured debt.

4 In reply, it is submitted by the Defendant that firstly, the present Suit, insofar as STC is concerned, is barred by Law of Limitation. It is submitted that STC is a co-insured with SCB and, insofar as STC's Suit is concerned, STC having applied for impleadment as plaintiff to the suit on 25 July 2014, their suit for recovery of insured claim for which the cause of action arose between January-March 2009, is barred by Law of Limitation. Secondly, it is submitted that insofar as the export sales covered by the insured policy are concerned, they were fraudulent sales and officers of STC had actively connived with MOPL and foreign buyers for making wrongful gain unto themselves and unlawful loss to the Defendant. The Defendant relies on reports of Controller and Auditor General of India (“CAG”) as well as Central Vigilance Commission (“CVC”) and answers given by the Minister of State in the Ministry of Commerce And Industry in the Parliament, in support of its claim of fraud. At any rate, the Defendant submits that STC is guilty of breach of contract of insurance *inter alia* by failing to act with diligence and also to take various steps thereunder with a view to protect the Defendant as an insurer.

5 It is not in dispute that STC was a co-insured with SCB under the suit contract of insurance. The cause of action for filing of the present suit did arise between January-May 2009 when the insured buyers, whose debts were indemnified in the contract of insurance, defaulted in making payment for export sales effected in their favour by STC. The present suit was filed initially only by SCB on 8 December 2012. The suit is on the footing that the claim under the insured policy was filed against the

Defendant (by SCB) on 7 July 2010 and by its letter dated 23 August 2010, the Defendant for the first time refused to honour its obligation under insured policy. It is submitted that the Suit filed on 8 October 2012 being within three years of such refusal is within time. It appears that at that stage, STC did not join the suit under its capacity as co-insured under the policy. It claims to have settled the *inter se* disputes between itself and SCB in a proceeding before Debt Recovery Tribunal, namely, Original Application No.222 of 2012 filed by SCB against STC. Consent terms were filed between SCB and STC in that suit providing *inter alia* for payment of about Rs.23.29 crores by STC to SCB as settlement amount and corresponding entitlement of STC to step into shoes of SCB and to be impleaded and allowed to prosecute the present commercial summary suit originally filed by SCB. In pursuance of these consent terms, STC applied for impleadment by taking out a chamber summons in the present suit, being Chamber Summons No.717 of 2014. This Court allowed the chamber summons and impleaded STC as co-plaintiff, keeping the Defendant's objection on the ground of limitation open. It is an admitted position that the Suit is today prosecuted by STC, though there is joint vakalatnama on behalf of SCB and STB, claiming to have stepped into shoes of SCB. The impleadment is, however, on the footing that STC is entitled to sue in their own right as co-insured along with SCB. What is argued before this Court, however, is that STC can prosecute the present suit in its capacity as an assignee of SCB under the consent terms. Insofar as their rights as co-insured along with SCB are concerned, the defence of limitation raised by the Defendant herein does give rise to triable issues. Insofar as the assignment is concerned, it is the Defendant's case that under the contract of insurance, no assignment is permissible except with the consent of the insurer, i.e. the Defendant. In the premises, even as assignee of SCB, the entitlement of STC to step into shoes of SCB gives rise to triable issues.

6 More importantly, however, the Defendant's case is based on a fraud alleged to have been committed by officers of STC in connivance with MOPL and foreign buyers to make a wrongful gain to themselves and so as to cause a wrongful loss to the Defendant-insurer. It is submitted that there have been several discrepancies in the actions of the parties, including STC, in the operations of the credit linked insurance scheme for imports and exports under which the present contract of insurance (ECIP) was entered into between the parties. It is submitted that CAG report, which extensively goes into the various transactions covered under the credit linked insurance scheme, observes that as early in the year 2005-2006, there were defaults in as many as 71.43 per cent transactions and in the years between 2006-2007 and 2009-2010 these defaults aggregated to about 99 per cent of transactions. It is submitted that the extent of defaults is nothing but a clear indication of fraud or malpractice to which STC was also a party. It is submitted that various business firms/associates had undertaken exports of gold jewellery through STC and that in all these transactions, no due diligence was exercised by STC to ensure the credibility of suppliers and purchasers before entering into business transactions with them. It is submitted that the tools available to STC for taking care of default in payment by foreign buyers were not properly utilized by STC. It is submitted that these matters are being investigated even by Central Bureau of Investigation ("CBI") and a scam of the magnitude of about Rs.725 crores is unearthed and is being investigated

by various Government agencies. It is submitted that even in her reply to a question in Parliament, the Minister of State in the Ministry of Commerce and Industry, replied that on the basis of findings of internal investigations and following due procedure, departmental proceedings were initiated against seven officials of STC and major penalties had already been inflicted in as many as six cases and that STC had lodged a criminal complaint with CBI, Mumbai against various associates, insurance consultants and official involved. Even the reports of CVC suggests several wrongdoings in this behalf.

7 The allegations made in the reply to the Summons for Judgement and supporting material in the form of reports of CAG and CVC and the Parliamentary discourse produced by the Defendant, does call for a full scale trial on oral and documentary evidence.

8 Mr. Setalvad, relies on a judgement of the Supreme Court in the case of **Galada Power And Telecommunication Limited Vs. United India Insurance Company Limited**[1] and submits that, as held in this judgement, once an insurer fails to mention particular ground for repudiation, it cannot subsequently raise that ground for repudiation of the claim. The proposition of law stated by the Supreme Court in **Galada Power And Telecommunication** is based on the principle of waiver. Waiver, in turn, requires knowledge of the right and informed action on the part of the party waiving such right. In the present case, the alleged fraud was unearthed later in point of time and was raised as a ground of defence after it was known. That is perfectly in order and no exception can be taken to

1 (2016) 14 Supreme Court Cases 161

it. In any event, even this aspect is a matter of trial and leave to defend cannot be refused on this contention.

9 It is quite apparent that these defences *bona fide* arise on the pleadings of the parties and material already placed before the Court. These defences cannot be described either as implausible or improbable. These are substantial defences, which merit and warrant unconditional leave to defend.

10 In the premises, the following order is passed :-

: **O R D E R** :

(i) The Defendant is granted unconditional leave to defend the Commercial Summary Suit ;

(ii) Written Statement to be filed by the Defendant, latest by 15 June 2018;

(iii) Place the Suit for directions on 18 June 2018;

(iv) The Summons for Judgement is disposed of.

(S.C. GUPTE, J.)