

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Civil Revision No.5091 of 2017 (O&M)
Date of Decision: February 16, 2018

M/s Jindal Impex, E-384, Phase-IV, Focal Point, Ludhiana & another

...Petitioners

Versus

Malayan Banking Berhad, 418-424, Iind Floor, Jalan Pudu-55100, Kuala Lumpur, Malaysia & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

**Present: Mr.Sumeet Mahajan, Senior Advocate with
Mr.Amit Kohar, Advocate,
for the petitioners.**

**Mr.Ajay Monga, Advocate &
Mr.Paras Money Goyal, Advocate,
for respondent No.1.**

AMIT RAWAL, J.

Petitioner-M/s Jindal Impex, through its Sole Proprietor Shri Kuldip Jindal, who wanted to be impleaded as defendant No.2 in the suit titled as “Malayan Banking Berhad Versus State Bank of India” filed by invoking the provisions of Section XXXVII of the Code of Civil Procedure, has approached this Court seeking setting-aside of the order dated 6.7.2017 (Annexure P-15), whereby application moved under Order 1 Rule 10 CPC has been dismissed.

Before adverting to the rival contentions of the respective counsel for the parties to the lis, it would be apt to give brief preface of the matter.

As per the averments in the application, the petitioner sought to be impleaded as a party, i.e., defendant No.2. In the petition, it has been stated that the petitioner entered into an agreement with M/s SIMS Copper SDN, BDH, of Malaysia (Seller) for purchase of 50 M.T. of copper for USD 3,73,303.43 equivalent to ₹2,35,18,116.09. For the purpose of facilitating payment of price of goods, an agreement dated 21.11.2011 (Annexure P-1) was entered into between the petitioners and the seller.

The petitioner obtained a Letter of Credit dated 24.11.2011 (Annexure P-2) through State Bank of India, Civil Lines, Ludhiana/respondent No.2. The aforementioned Letter of Credit was duly communicated by the State Bank of India-respondent No.2 to the Negotiating Bank, i.e., the respondent-plaintiff. The shipment was expected to reach at Nhava Sheva Port, Mumbai (India) in the first week of January, 2012. The petitioner acquired the knowledge that the seller had forged various documents, including Bill of Lading on 29.11.2011 with the connivance of the plaintiff-bank, for, in the first week of January, 2012, State Bank of India informed the petitioner that the documents under the aforementioned Letter of Credit were received for acceptance. The documents supplied by the State Bank of India also included the Bill of Lading alleged to have been issued by the Shipping Agency.

The documents under Letter of Credit were accepted by the petitioner on 3.1.2012, as the petitioner, at that time, had no means to verify the authenticity of the Bill of Lading and other documents. After giving the acceptance, petitioner approached the local agent of Shipping Agency, namely, Expo Freight Pvt.Ltd. having its office at Ludhiana and handed over the copy of the Bill of Lading dated 29.11.2011. The Shipping Agent

sought some time to verify the Bill of Lading. However, the information provided by the aforementioned Shipping Agent on 25.1.2012 left the petitioner aghast as it was found to be forged document. The petitioner immediately approached the respondent-Bank and informed about the information received with regard to the forged document and further requested not to make payment against the Letter of Credit to the plaintiff-Bank. The petitioner also submitted written request (Annexure P4) of even date and Annexure P5 is the intimation received by the local agent with regard to the forged Bill of Lading. The local Shipping Agent of respondent No.2 informed the petitioner that the aforementioned goods have allegedly been delivered to some company in Los Angeles (USA) and Xiamen (China). Copy of the letter dated 3.2.2012 issued by the Shipping Agency with regard to the forgery of the Bill of Lading is Annexure P-6.

The main Shipping Agency lodged a complaint at Selangor (Malaysia) with the Malaysian Police against the seller for having committed fraud by forging the Bill of Lading dated 29.11.2011. Copy of the police report dated 27.2.2012 has been referred to by annexing as Annexure P-7. The petitioner, having left with no other option, immediately instituted the civil suit bearing No.34 dated 15.2.2012 for injunction against respondents No.1 and 2 with further restraint against respondent No.2 for making payment to respondent No.1 against the aforementioned Letter of Credit, along with an application for interim injunction. The aforementioned suit is pending adjudication. However, an application for amendment was moved which has been rejected, which is under challenge in Revision No.8584 of 2016.

Respondent No.1 also moved an application for rejection of the

plaint under Order 7 Rule 11 CPC. The injunction application reached to this Court vide Civil Revision No.7582 of 2013 and this Court, vide order dated 15.12.2015, maintained the order of the trial Court dated 25.2.2012, whereby the injunction sought for before the Civil Judge was restored. The respondent-Bank instituted the suit on 3.1.2015 against the plaintiff-bank for recovery of the amount alleged to have been paid to the Seller, i.e., M/s SIMS in respect of the goods. In the aforementioned suit, the Bank appeared and moved an application seeking leave to defend by taking objection of suit being barred by non-joinder of necessary parties. The petitioner, on having acquired the knowledge of the aforementioned suit, moved an application under Order 1 Rule 10 CPC dated 19.1.2016 (Ex.P13) for being impleaded as a party. The same was opposed by respondent No.1-plaintiff bank by filing reply dated 14.7.2016 (Annexure P-14), which has been dismissed by the Commercial Court/Additional District Judge, Ludhiana vide impugned order dated 6.7.2017 (Annexure P-15).

Mr.Sumeet Mahajan, learned Senior Counsel assisted by Mr.Amit Kohar, Advocate representing the petitioners submitted that the order of the Court is not sustainable in the eyes of law as it has committed grave error in not appreciating the fact that the presence of the petitioner is necessary as it would help the Court in determining the real matter/controversy in dispute, for, the suit hinges upon explanation of the fraud allegedly committed by the seller in connivance with the plaintiff-bank. The documents aforementioned are required to be placed on record. There is a real apprehension that the Bank may not contest the suit. The petitioner had also acquired the knowledge that the Bank had, in fact, not made the payment to the seller, but only advanced a loan known as “Onshore Foreign

Currency Loan (OFCL)”, which fact is evident from document dated 1.12.2011 (Annexure P-11). The aforementioned document showed that the payment was not made, but the seller had been advanced a loan, therefore, the petitioner has a direct interest in the subject matter of the suit. In support of his contention, he has relied upon the judgment rendered by the Hon'ble Supreme Court in **Thomson Press (India) Ltd. Versus Nanak Builders & Investors P.Ltd. and others, 2013 (2) R.C.R. (Civil) 875** to contend that scope of impleadment of a party whether necessary or proper has been duly explained in the aforementioned judgment and the present case is of such kind where impleadment of the petitioner as defendant No.2 in the aforementioned suit is essential and necessary for adjudication of the controversy.

Per contra, Mr.Ajay Monga, learned counsel representing respondent No.1/plaintiff bank submitted that there is no illegality or perversity in the order under challenge. The order cannot be said to have been passed without jurisdiction as the respondent-plaintiff is *dominus litus*. There was no privity of contract between the respondent-plaintiff bank and the petitioners. The Letter of Credit has to be honoured by the State Bank of India on demand being raised by the respondent-plaintiff bank. If at all, there was a breach of contract between the petitioner-applicant and the seller, the remedy lies elsewhere, i.e., independent suit, but not by impleadment. In support of his contention, he has laid an emphatic reliance upon the judgment rendered by the High Court of Delhi in **Anu Enterprise Versus State Bank of Mysore and Anr., 102 (2003) DLT 579** to contend that where the bank guarantee containing unequivocal and unconditional terms could be stayed or not encashed, injunction was denied to the

plaintiff. He drew the attention of this Court to Paras 9 and 10 of the said judgment to contend that any irrevocable and unconditional guarantee is required to be encashed as and when called upon by the Bank to pay as being due and outstanding. He has also cited the judgment rendered in **M/s Millenium Wires (P) Ltd. Versus The State Trading Corporation of India Ltd.and others, 2015 SCC Online 241** to contend that the matter pertaining to a permanent injunction against the Foreign Company for honouring the Letter of Credit reached upto the Hon'ble Supreme Court and it was held that the Court must be slow in granting an order of injunction restraining the realisation of a bank guarantee or Letter of Credit subject to the exceptions carved out therein, for, it would not be enough for a party to allege fraud but there has to be a clear evidence both as to the fact of fraud as well as to the bank's knowledge of such fraud. He also relied upon the decision rendered in **Federal Bank Ltd. Versus V.M.Jog Engineering Ltd. and others, (2001) 1 Supreme Court Cases 663** to contend that on similar lines, the Hon'ble Supreme Court, while noticing the Uniform Commercial Practice of Documentary Credits (1983) (UCP), held that the Bank cannot be injuncted for honouring bank guarantee/Letter of Credit, particularly on the ground of breach of contract between the buyer and the seller, for, contract of bank guarantee or letter of credit is always an independent of the main contract and the bank cannot refuse encashment and, thus, urged this Court for upholding the order by dismissing the revision petition.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr.Mahajan, for, the present case is not the one where this Court has

been called upon to decide the injunction matter, i.e., restraint against encashment of an irrevocable Letter of Credit, which had already attained finality, as noticed above.

The only question which has to be pondered and decided by me is as to whether in the circumstances and the facts explained above, which are yet to be proved, *prima-facie*, the petitioner-applicant would be a necessary or essential to be impleaded as defendant No.2 or not. The principles for impleadment of proper and necessary party had been point of debate and consideration in many Courts, including the Supreme Court, but recently in **Thomson Press (India) Ltd.'s case (supra)**, the Court had an occasion to carve out the following principles in Para No.22 for the purpose of impleadment as proper and necessary parties:-

“1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as Plaintiff or Defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the Suit.

2. A necessary party is the person who ought to be joined as party to the Suit and in whose absence an effective decree cannot be passed by the Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the Plaintiff.

5. In a Suit for specific performance, the Court can order

impleadment of a purchaser whose conduct is above board, and who files Application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the Application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.”

No doubt, the aforementioned principles had been carved out in respect of a dispute arrived at in a suit seeking specific performance of the agreement to sell where a bonafide purchaser, who had no privity to a contract entered between the vendor and the vendees, was allowed to be impleaded as a party, but the fact of the matter, in the circumstances noticed above, is that it has been reported that Bill of Lading, as per the letter (Ex.P6) is forged and a non-existing document. I am, therefore, of the view that it would be in the fitness of things in case the petitioner is allowed to be impleaded as defendant No.2 as it would enable the Court to adjudicate the dispute, particularly when the fraud had been pleaded. For the sake of brevity, the contents of letter dated 3.2.2012 (Annexure P-6) issued by the Diffreight Agencies (M) Sdn.Bhd. read as under:-

“Diffreight Agencies (M) Sdn.Bhd.

FREIGHT

“Without Prejudice”

Gur ref: DIF/SIMS/12/01-0065

3rd February, 2012

JINDAL IMPEX

E-384, Phase VI

Focal Point

Ludhiana 141010

India

Attn: Mr.Kuldip Jindal

Dear Sir,

Re: Diffreight Bill of Lading Number: DIFNSA11112138

We refer to the above.

Please be informed that the above mentioned bill of lading was not issued by Diffreight Agencies (M) Sdn.Bhd.

This shipment for the containers FCIU 2429041 and FCIU 2270448 through the above mentioned HBL has been booked and prepared by Sims Copper Sdn.Bhd.

We are awaiting an indemnity from them stating the same.

Kindly contact Sims Copper Sdn Bhd on the status of the above mentioned shipment.

Yours sincerely

*Reshma Yousuf Ghulam Yousuf
Director.”*

However, the aforementioned document would be subject to the mode of proof before the Court below, but for adjudication of the application, it can always be taken into consideration.

There is another aspect of the matter. Before the petitioner could give the acceptance on 3.1.2012, the respondent-plaintiff bank stated to have made payment on 1.12.2011 to the supplier, but on going through the documents, which had been referred to during the course of the hearing, i.e., Annexure P11, the respondent-plaintiff bank had financed the amount for a period of 90 days to the seller, i.e., equivalent amount 3,73,303.43 USD by terming it to be Onshore Foreign Currency Loan (OFCL) facility. Be that as it may, I am of the view that in such scenario and backdrop of the matter, the petitioner is a proper and necessary party to be impleaded as defendant No.2 in the suit.

Resultantly, the impugned order is set-aside. As a consequence thereof, the application moved by the petitioner for impleadment is allowed. Trial Court is directed to afford an opportunity to the petitioner to file the written statement in accordance with law.

Revision petition stands allowed.

February 16, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No