

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 282/2018**

% **21st March, 2018**

M/S RAMCO STEELS PRIVATE LIMITED Appellant
Through: Mr. Sandeep Bajaj, Ms.
Aakanksha and Ms. Shourya
Mittal, Advocates.

versus

STATE BANK OF INDIA & ANR. Respondents

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) by the plaintiff in the suit impugning the judgment of the trial court dated 7.10.2017 by which the trial court has dismissed the suit filed by the appellant/plaintiff for recovery of Rs.27,22,124.50 from two defendants. Defendant no. 1/respondent no. 1 is the State Bank of India which was the banker of the appellant/plaintiff at New Delhi. Defendant no. 2 in the suit is the foreign buyer.

2. The facts of the case are that appellant/plaintiff pleads that it had a contract to export elastic clips to the respondent no.2/defendant no. 2 in Brazil and these materials were dispatched to the respondent no.2/defendant no. 2 by sea on 15.9.1998, 25.9.1998 and 7.10.1998. The documents with respect to the goods in question being bill of lading and other connected documents were handed over to the respondent no. 1/defendant no.1/bank for delivery to the Bank of the importer at Rio de Janeiro in Brazil against collection of the price of the goods. The documents were to be presented to the foreign buyer at Rio de Janeiro in Brazil, sixty days after shipment of the goods. In case of failure of the foreign buyer to make payment within sixty days then appellant/plaintiff also claims to be entitled to interest at 15.5% per annum from the respondent no.2/defendant no. 2/foreign buyer. In the plaint it is further pleaded that the respondent no.1/defendant no. 1/bank is guilty of negligence because the respondent no.1/defendant no. 1/bank did not take requisite steps to obtain the acknowledgement slips from the courier company showing delivery of the documents to Bank of the respondent no.2/defendant no.2 in Brazil. No steps, it is pleaded, were taken by the respondent

no.1/defendant no. 1/bank to find out the whereabouts of the documents as the documents are pleaded not to have reached the Bank in Brazil. It is noted that admittedly the Bank in Brazil was nominated by the appellant/plaintiff. Accordingly, against the respondent no.1/defendant no.1 decree was claimed on account of negligence in handling and forwarding the documents to the nominated bank in Brazil by respondent no.1/defendant no.1 not getting proof of delivery of documents. As against the respondent no.2/defendant no. 2 the appellant/plaintiff pleads its entitlement on account of the fact that the goods have been received by the respondent no.2/defendant no. 2 but the respondent no.2/defendant no. 2 has not made payment of the goods inspite of receipt of the goods.

3. Respondent no.2/defendant no. 2/foreign buyer did not appear in the suit inspite of service and was therefore proceeded *ex-parte*. It was only the respondent no.1/defendant no. 1/bank which contested the suit. The respondent no.1/defendant no. 1/bank pleaded that it is not as if the Bank in Brazil to whom documents were sent for collection by the respondent no.1/defendant no. 1/bank was the nominated or corresponding or contractual bank of the respondent

no.1/defendant no.1/bank, but this Brazilian bank was the bank directly nominated by the appellant/plaintiff for the respondent no.1/defendant no.1 to send documents of the goods. The respondent no.1/defendant no.1/bank denies any liability on the ground that there is no negligence committed by it. Respondent no.1/defendant no.1/bank pleaded that by sending the documents for collection the respondent no.1/defendant no.1/bank assumes no responsibility or liability for payment because it only acts as an agent of the appellant/plaintiff to receive the payment and that if payment is not received then the appellant/plaintiff has necessarily to sue the foreign buyer or the foreign bank in Brazil. It was also pleaded by the respondent no.1/defendant no.1/bank that as per the information received by it from the Brazilian bank the appellant/plaintiff had settled the matter with the respondent no.2/defendant no. 2. The respondent no.1/defendant no.1/bank claimed that parties were governed by Uniform Rules for Collection of International Chamber of Commerce as per which the respondent no.1/defendant no.1/bank has no liability towards the appellant/plaintiff with respect to transactions which are subject matter of the suit. The respondent

no.1/defendant no.1/bank has also pleaded that the instructions by the appellant/plaintiff to the respondent no.1/defendant no.1/bank were only to send the documents to the Brazilian bank nominated by the appellant/plaintiff and there were no instructions to send the documents to the respondent no.2/defendant no. 2/foreign buyer. Respondent no.1/defendant no. 1 also pleaded that since the appellant/plaintiff has been cheated by the Brazilian/foreign buyer, therefore the appellant/plaintiff would only have claim against respondent no.2/defendant no.2/foreign buyer. As per the respondent no.1/defendant no.1 the facts of the present case show that the appellant/plaintiff was not a normal exporter because a normal exporter who wants secured payments secures the payment through a confirmed letter of credit whereas in the present case export was done by the appellant/plaintiff and moneys were sought to be payable on submitting of documents of goods in Brazil to the Brazilian buyer. The respondent no.1/defendant no.1 also pleaded that respondent no.2/defendant no. 2 and the Brazilian bank were located in very remote and crime infested area and the respondent no.1/defendant no.1/bank does not have any regular business with any bankers in

Brazil and therefore the bank in Brazil was nominated by the appellant/plaintiff (and which was also the bank of the foreign buyer) and that Bank was not corresponding bank of the respondent no.1/defendant no.1 as understood in the banking parlance with reference to Uniform Customs and Practices for Documentary Credit. Accordingly, respondent no.1/defendant no.1 prayed for dismissal of the suit including on the ground that the respondent no.1/defendant no.1 does not exercise any control over the Brazilian bank which was nominated by the appellant/plaintiff and the role of respondent no.1/defendant no.1 was only as an agent of the appellant/plaintiff and it was not guilty of any negligence.

4. After pleadings were completed the trial court framed issues and parties led evidence in the form of deposition of the witnesses and parties also proved documents, and these aspects are found in paras 3 to 5 of the impugned judgment and these paras read as under:-

“3. Replication is filed by the plaintiff controverting the allegations raised by the defendant in the written statement and reiterating the contents of the plaint. Upon completion of pleadings the following issues are framed for adjudication on 27.10.2005.

Issues:

1. Whether the plaintiff is entitled for a decree for recovery of Rs. 27,33,124.50/- from the defendant ? OPP

2. Whether the plaintiff is entitled for interest, if so, on what amount, at what rate and for what period ? OPP
 3. Whether the defendant no. 1 Bank acted without negligence and with due diligence in dealing and handing with the documents of the plaintiff ? If so to what effect ? OPD
 4. Whether this court has no jurisdiction to try the present suit as alleged by the defendant ? OPD
 5. Relief.
4. The plaintiff has examined its Director Sh. B.M. Mittal as PW-1. PW-1 besides his affidavit in evidence has tendered the following documents into evidence:
- (i) Board Resolution dated 17.09.2001 as Ex. PW1/1.
 - (ii) Letter dated 24.09.1998 as Ex. PW1/2.
 - (iii) Invoice cum certificate of origin bearing no: 15.09.1998 dated 15.09.1998 as Ex. PW1/3 and letter dated 24.09.1998 in respect thereof as Ex. PW1/4.
 - (iv) Invoice cum certificate of origin dated 15.09.1998 as Ex. PW1/5.
 - (v) Letter dated 29.09.1998 as Ex. PW1/6.
 - (vi) Invoice cum certificate of origin bearing no: ME/02 dated 25.09.1998 as Ex. PW1/7.
 - (vii) Letter dated 29.09.1998 in respect thereof as Ex. PW1/8.
 - (viii) Invoice cum certificate of origin bearing no: ME/03 dated 29.09.1998 as Ex. PW1/9.
 - (ix) Letter dated 14.10.1998 as Ex. PW1/10.
 - (x) Invoice cum certificate of origin bearing no: ME/04 dated 07.10.1998 as Ex. PW1/11.
 - (xi) Letter dated 14.10.1998 as Ex. PW1/12.
 - (xii) Invoice cum certificate of origin bearing no: ME/05 dated 07.10.1998 annexed to the letter dated 14.10.1998 as Ex. PW1/13.
5. The defendant no: 1 bank has examined its Deputy Manager as DW-1. DW-1 besides the affidavit in evidence has tendered into evidence the following documents i.e.
- (i) Fax Message dated 24.06.1998 received from defendant no. 2 by the plaintiff and delivered to defendant no: 1 bank as Ex. DW1/1.
 - (ii) Telex Message to the Brazillian Bank dated 31.12.1998 & 06.01.1999 as Ex. DW1/2 & Ex. DW1/3.
 - (iii) Letter dated 13.01.1999 written to the Brazillian Bank as Ex. DW1/4.
 - (iv) Telex Message dated 14.01.1999 to the Brazilian Bank as Ex. DW1/5.
 - (v) Letter dated 17.06.1999 to the Brazilian Bank as Ex. DW1/6.
 - (vi) Letter dated 17.06.1999 to the Counsel General of India at Brazil as Ex. DW1/7.

- (vii) Letter dated 24.06.1999 to the representative office at Brazil as Ex. DW1/8.
- (viii) Letter dated 02.07.1999 received from Representative Office as Ex. DW1/9.
- (ix) Application for extension of time as Ex. DW1/10.
- (xi) Letter dated 14.07.1999 to the representative office as Ex. DW1/11.
- (xii) Letter dated 15.07.1999 received from Representative office as Ex. DW1/12.
- (xiii) Letter dated 16.07.1999 written to RBI as Ex. DW1/13.
- (xiv) Letter dated 16.07.1999 received from RBI as Ex. DW1/14.
- (xv) Letter dated 19.08.1999 to the Representative Office as Ex. DW1/15.
- (xvi) Letter dated 09.08.1998 received by the defendant bank from the plaintiff alongwith e-mail message as Ex. DW1/17.
- (xvii) Letter sent by the defendant to the plaintiff as Ex. DW1/18.
- (xviii) Letter dated 21.10.1999 sent by the Defendant Bank to the Representative Office as Ex. DW1/19.
- (xix) Letter dated 23.10.1999 to the Brazilian Bank as Ex. DW1/20.
- (xx) Communication dated 03.11.1999 received from the Representative Office as Ex. DW1/21.
- (xxi) Letter dated 22.11.1999 sent by the Representative Office as Ex. DW1/22.
- (xxii) Letter dated 10.12.1999 sent by the Representative Office as Ex. DW1/23.
- (xxiii) Letter dated 18.01.2000 sent by the Representative Office as Ex. DW1/24.
- (xxiv) Message received from Representative office as Ex. DW1/25.
- (xxv) Letter dated 03.02.2000 received by the Representative from the Brazilian Bank as Ex. DW1/26.
- (xxvi) Application for extension of time dated 10.02.2000 submitted by the plaintiff to the Reserve Bank of India as Ex. DW1/27.
- (xxvii) Letter dated 17.02.2000 written by the defendant to the plaintiffs as Ex. DW1/28.
- (xxviii) Communication dated 29.02.2000 received from Reserve Bank of India as Ex. DW1/29.
- (xxix) Communication dated 02.03.2000 received from the Representative office at Brazil as Ex. DW1/30.
- (xxx) Communication dated 02.03.2000 received from Brazilian Bank as Ex. DW1/31.
- (xxxi) Letter dated 03.03.2000 as Ex. DW1/32.
- (xxxii) Proforma Invoice as Ex. DW1/36.

(xxxiii) Forwarding memos in proforma invoices, bill of lading relating to the payment for collection sent to the Brazilian Bank as Ex. DW1/37.”

5. Trial court has held that respondent no.1/defendant no.1/bank cannot be held guilty of negligence because respondent no.1/defendant no.1/bank had duly couriered the documents to the nominated bank of the appellant/plaintiff in Brazil. The respondent no.1/defendant no.1/bank sent by courier the relevant documents of the goods for collection to the Brazilian Bank with the covering letter and this was proved in evidence as Ex.DW1/37. Trial court has held that Brazilian Bank is not the corresponding bank of the respondent no.1/defendant no.1, and it was only as per the instructions of the appellant/plaintiff that the respondent no.1/defendant no.1 appointed BANCO SUDAMERIS BRASIL, SAO PAULO, IPANEMA BRANCH, as the bank at Brazil to whom the documents were couriered and transmitted. Trial court has also held that the respondent no.1/defendant no. 1/bank could not locate proof of delivery only in respect to one consignment out of six, but however it is noted that this is not factually correct as stated by counsel for the appellant/plaintiff because there were a total of only three courier transmissions with one courier containing two sets of documents (total six set of documents),

and it is one courier receipt with respect to which there was no proof of delivery.

6. I may note that in the impugned judgment proof of delivery is used in substitution of courier receipts, however, the issue was with respect to proof of delivery. Following are the relevant observations of the trial court for holding the respondent no.1/defendant no. 1/bank to be not liable:-

“7. The instructions of the defendant number 1 are to release the documents entrusted to the defendant number 1 to the defendant number 2 after collecting the payment from the defendant number 2 and the payment received in US dollars was to be credited to the account of the plaintiff and in case the defendant number 2 did not make payment within 60 days of the dates mentioned in the invoices interest at the rate of 15.5% per annum was to be charged from the defendant number 2 and in case the defendant number 2 failed to make the payment beyond, 30 days thereafter, the defendant was required to return the documents to the plaintiff. The plaintiff seeks to recover a sum of rupees 27,32,124.50 from the defendants 1 and 2 jointly and severally alleging that despite the expiry of the period of 60 days the defendant no: 1 failed to remit the amount of the invoices into the account of the plaintiff and failed to return the documents to the plaintiff in case the payment is not received from the defendant number 2 in terms of the specific instructions of the plaintiff issued vide letter dated 24th of September 1998 and the defendant no: 2 has failed to make the payment in terms of the invoices.

The goods/material was not supplied to the defendant number: 1 and the defendant number 1 is not the importer/purchaser of the goods liable to pay the amount under the invoices, the defendant number 1 banker was entrusted with the duty to arrange the crediting of the payments made by the defendant number 2 in the account held by the plaintiff with the defendant number 1 bank, however the defendant number 1 is being sought to be made liable along with the defendant number 2 for the amount of the invoices on the ground that the defendant number 1 while handling and forwarding the documents to the associate bank in Brazil failed to exercise due care and diligence and infact has acted in a callous and negligent manner thereby causing loss to

the plaintiff. The defendant on the other hand denies that the defendant number 1 was negligent in any manner whatsoever and contends that the defendant number 1 duly forwarded the documents entrusted by the plaintiff to the banker of the defendant number 2 at Brazil following the directions and instructions of the plaintiff, and the plaintiff was required to ensure payment by the defendant number 2 and the defendant number 1 bank's role was limited to the extent of arranging for crediting of the payment received from the defendant number 2 into the account of the plaintiff held with the defendant number 1 and that the Defendant No. 1 is in no manner whatsoever liable / answerable for the acts and omissions of the banker of the defendant number 2 at Brazil or of defendant number 2 as the defendant number 1 bank has no control over the defendant number 2 or the banker of the defendant number 2 at Brazil or enjoys any privity of contract with the banker of the defendant number 2 or the defendant number: 2.

8. Admittedly the payments for the goods/material dispatched were not be received from the defendant number 2 directly by the defendant number 1 in India. The plaintiff had exported its goods and materials and the purchaser was based at Brazil. The arrangement was for the defendant number 1 to transmit the documents to the bank based at Brazil and the defendant number 2 was to collect the bill of lading and other associated documents of title to the goods / material imported, from the bank at Brazil after making payment of the invoices to the bank at Brazil and the bank at Brazil was required to remit the payment in dollars to the defendant number 1, scheduled bank in India through its Calcutta representative and this payment was to be credited to the account of the plaintiff held with the defendant number 1. The plaintiff alleges that the defendant number 1 was working as an agent of the plaintiff and has not acted with due care and diligence in the execution of the agency. An agent is employed to do any act for another or to represent another in dealings with 3rd persons. The person for whom such act is done, or who is so represented is called the principal. No consideration is necessary to create an agency. An agent cannot lawfully employ another to perform acts he has expressly or impliedly undertaken to perform personally unless by the ordinary custom or trade a sub agent may or from the nature of the agency sub agent must be employed. Sub agent is a person employed by an agent and under the control of the original agent in the business of the agency. It is only where an agent without having authority to do so has appointed a person to act as sub agent the agent stands towards such person in relation of a principal to an agent and is responsible for his acts both to principal and 3rd persons and the principal is not represented by or responsible for the acts of the person so employed and nor is that person responsible to the principal however where an agent holding any express or implied authority to name another person to act for the principal in the

execution of the agency has named another person accordingly such person is not subagent but an agent of the principal for such part of the business of the agency as is entrusted to him. The defendant number 1 admits that the defendant number 1 was acting as an agent of the plaintiff. The nature of the agency was such that the defendant number 1 bank was required to transmit the documents i.e. bills of lading, invoices cum certificate of origin amongst others to a bank at Brazil. The nitty-gritts of the transaction are succinctly put by DW1 in the course of cross examination as follows:

“Q: What is the procedure which the bank follows for collection ?

A: First step is to send the documents to the designated or identified branch made by the exporter himself, in second step, we send the documents for collection to the said designated or identified branch.

Thirdly, the bank pass on the instructions as given by the exporter to the foreign identified bank. Fourthly, if the money does not come within the stipulated period, then we use to send the reminders and follow up the case vigorously.”

9. BANCO SUDAMERIS BRASIL, Sao Paulo, IPANEMA BRANCH (hereinafter referred to as the ‘Brazilian bank’) was identified as the bank at Brazil to which the documents were to be transmitted by the defendant number 1 to be released in favour of the defendant number 2 upon payment by the defendant number 2 of the amount of the invoices within 60 days of the date mentioned in the invoices. The Defendant No. 1 had sent by courier the invoices/bills of exchange for collection to the Brazilian bank along with covering letter containing the detailed instructions, tendered into evidence as Exhibit DW1/37. Before reflecting upon the instructions conveyed vide Exhibit 1/37 I shall dwell on the aspect of the appointment of the Brazilian bank to collect the payment from the defendant no. 2 at Brazil. The plaintiff contends that the Brazilian bank is the associate bank of the defendant number 1, the defendant number 1 on the other hand contends that the Brazilian bank is designated as the agency to collect the payment against the Bills of exchange, at the instance and as per the instructions and in accordance with the agreement between the plaintiff and defendant no: 2 and the Brazilian Bank is not the associate bank of the defendant no: 1. The defendant no: 1 in support of its positive assertion relies upon a communication exchanged inter-se the plaintiff and defendant no: 2 dated 24.06.1998 /16/09/1998 tendered as Ex. D-12, an admitted document. The communique besides enclosing the proposed invoice after modifications also discloses to the plaintiff the banker of the defendant no: 2 in Brazil and the account details of the defendant no.2. The defendant no: 1 could not have become privy to this communique unless supplied by the plaintiff as it is not addressed to the defendant no: 1. The Brazilian bank is the banker of the defendant no: 2 as identified by the defendant no: 2 and it is on the

instructions and as per the directions of the plaintiff that the defendant no: 1 had duly followed the instructions in appointing Banco Sudameris Brazil, S.A., Ipanema, Branch as the bank at Brazil to whom the documents entrusted to the defendant no: 1 were to be transmitted. The document is put to PW1 during the course of cross examination and the PW1 also admits that Banco Sudameris Brazil was nominated at the instance of the defendant no: 2 by the plaintiff. The relevant portion of the cross examination is reproduced here under:

“...Ex.D-12 is the message received by the plaintiff company from the foreign buyer regarding the mode of collection.”

Q: Is it correct that Banco Sudameris Brazil SA is the banker of the foreign buyer M/s Farcom DO Brazil ?

A: It is correct.

Q: Is it correct that Banco Sudameris Brazil SA is not the corresponding bank of the defendant no: 1 bank?

A: It is correct. Vol: The plaintiff company checked up from the defendant no: 1, the name of their associate bank in Brazil and since the bank was figuring in their list and the buyer also wanted the same bank, we ask the defendant no: 1 to negotiate the documents through this bank.”

The defendant no: 1 has not exercised any discretion and did not nominate the Brazillian Bank of its own accord and choice and volition, but as per and in accordance with the directions and instructions of the plaintiff.

10. The defendant transmitted the documents so entrusted by the plaintiff alongwith a covering letter, Ex. D1/37. The specific instructions imparted by the defendant no: 1 were that “documents as under to be delivered against payment”. The instructions are reiterated in full detail toward the end of the letter in the following terms:

“If any delay in acceptance or payment, advise us promptly and report the date of first presentation and the date acceptance or payment, giving reasons.

If it is not paid on presentation / maturity, please collect overdue interest @ 15.51 p.a. from the date of its due date to the date of payment from the drawees and remit the proceeds. Its subject to the Uniform Rules for collection. ICC Publication no: 552.

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Disbursement

Proceeds to our Calcutta office A/C 544-7-21930 with CHASE MANHATTAN BA reference no: 52/0727/129225/98/CD under advice to us:

“Special Instructions

TO BE DELIVERED ONLY UPON PAYMENT OF BILL ON 6.12.98.... BILL OF EXCHANGE DATE. IF NOT PAID ON 6.12.1998..... OUR INSTRUCTIONS. REPEAT DO NOT DELIVER

DOCUMENTS IF NOT PAID BY 60 DAYS FROM B/E
DATE 7.10.98.

Not once but twice it is reiterated that the documents are to be delivered only upon payment of bill, and not in fine print but in bold letters to drive home the imperative nature of the instructions.

XXXXX

XXXXX

XXXXX

12. It would have been an immensely material circumstance if it could be inferred that one of the courier receipts were not produced as the defendant no: 1 infact failed to transmit one of the bill of ladings out of the six bills of landing thereby failing to discharge its agency with the due care and diligence. The failure to trace out one of the courier receipts is rendered inconsequential as the plaintiff itself admits categorically that the documents were transmitted to the Brazilian Bank and alleges that the Brazilian Bank released the documents without receiving any payment and the defendant no: 1 is liable for the acts and omissions of the associate bank. It is not the case of the plaintiff that as the defendant no: 1 did not duly transmit one of the bills of lading and the defendant no.1 has therefore failed to discharge the agency with due care and diligence. If the documents are lost in transit by the courier company, the defendant no: 1 again could not be held liable for the dereliction at the end of the courier company, however, in case the defendant no: 1 bank in the first instance failed to transmit any of the documents entrusted to it by the plaintiff, the liability would have fallen squarely on the shoulders of the defendant no: 1, however, it is the own case of the plaintiff that all the documents were duly received by the Brazilian Bank and the Brazilian Bank released the documents in favour of the defendant no: 2 without collecting the payment due under the invoice. Whether or not the defendant no: 1bank could be held liable for the acts and omissions of the Brazillian Bank is another aspect of the matter. Moreover the plaintiff does not disclose any action taken at its end to recover the payment/goods from the defendant no.2 in respect of the courier receipts the details of which are divulged by the defendant no.1. In view thereof, the circumstance of the defendant no: 1 failing to produce one of the courier receipts out of six is in itself not sufficient to draw an inference of liability against the defendant no: 1.”

7.(i) Learned counsel for the appellant/plaintiff argues before this Court that the case of the appellant/plaintiff is not with respect to documents of goods not being couriered to the Brazilian bank but that

the respondent no.1/defendant no.1/bank did not get proof of delivery with respect to the three courier transmissions, with one courier containing two sets of documents.

(ii) In my opinion, once the undisputed position emerges on record that the Brazilian bank was not the corresponding bank of the respondent no.1/defendant no.1, and that the Brazilian Bank was only the bank which was specifically nominated by the appellant/plaintiff and therefore the respondent no.1/defendant no.1/bank at the directions of the appellant/plaintiff sent the couriers to the bank at Brazil, the only liability of the respondent no.1/defendant no.1 was if the shipping documents were not properly couriered. It is not the case of the appellant/plaintiff that the shipping documents/documents of goods were not properly couriered to the bank at Brazil. A bank such as the respondent no.1/defendant no.1 who acts as an agent of the appellant/plaintiff to courier the documents cannot be held to be responsible if the courier company does not deliver the documents to the Brazilian bank or if the courier company does not give the proof of delivery. There is no liability which is fastened on the respondent no.1/defendant no. 1/bank in the subject transactions that the

respondent no.1/defendant no.1/bank also had to necessarily collect the proof of delivery for the three courier transmissions. Even assuming for the sake of arguments that respondent no.1/defendant no.1/bank had to take proof of delivery, the counsel for the appellant/plaintiff concedes that from September, 1998 till the suit was filed in October, 2001, no letter was sent by the appellant/plaintiff to respondent no.1/defendant no.1/bank asking for proof of delivery. No bank, that too only an agent bank for couriering the documents of goods, can be suddenly asked many years after couriering that why the bank does not have any proof of delivery and therefore it/bank is negligent. Therefore, in my opinion, appellant/plaintiff cannot succeed in alleging any negligence against the respondent no.1/defendant no. 1/bank for not obtaining the proof of delivery because the duty of the appellant/plaintiff is restricted to couriering the documents to the Brazilian bank and there is no allegation by the appellant/plaintiff against the respondent no.1/defendant no.1/bank that the documents were not properly couriered to the Brazilian bank which was nominated by the appellant/plaintiff itself.

8. So far as the case of the appellant/plaintiff against the respondent no.2/defendant no. 2/foreign buyer is concerned, admittedly this foreign buyer could have been sued only for two types of causes of action. One cause of action would be if the respondent no.2/defendant no. 2/foreign buyer would have received the goods but not made payments to the appellant/plaintiff. The second cause of action would be that the respondent no.2/defendant no.2/foreign buyer in spite of contracting to receive the goods failed to receive the goods. It is not disputed before this Court that the second cause of action was not the cause of action of the subject suit and the cause of action against the respondent no.2/defendant no. 2/foreign buyer was for payment of the price of goods on account of respondent no.2/defendant no. 2/foreign buyer having received the goods.

9. In my opinion, appellant/plaintiff cannot successfully seek a decree against the respondent no.2/defendant no. 2/foreign buyer because it is seen from the record that the liability of the respondent no.2/defendant no. 2/foreign buyer would be only if the goods are found to have been received by this foreign buyer/ respondent no.2/defendant no. 2. There is nothing whatsoever filed on

record of the trial court by the appellant/plaintiff that the respondent no.2/defendant no. 2 had received the goods by first taking delivery of the documents from its own bank at Brazil. Once there is no evidence of respondent no.2/defendant no. 2 having taken delivery of the goods, no liability can be fastened on the respondent no.2/defendant no. 2/foreign buyer for making payment for the goods which never were received.

10. There is no merit in the appeal. Dismissed.

MARCH 21, 2018

AK

VALMIKI J. MEHTA, J