

*** Reportable
HIGH COURT OF DELHI AT NEW DELHI**

+ OMP No. 648/2007

Date of decision : December 5th, 2007

M/s Impex Trading Gmbh PETITIONER.

! Through : Mr. Raman Kapur, Advocate
Mr. J.N. Patel, Advocate
Mr. Guru Saran Singh, Advocate

Versus

\$M/s. Anunay Fab. Ltd. & Ors. RESPONDENTS

^ Through : Mr. A.S. Chandhiok, Sr., Advocate
Mr. Ajay Garg, Advocate
Mr. Vijay K. Jain, Advocate

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**CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH**

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

ARUNA SURESH, J. (Oral)

1. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') filed by the petitioner against the respondents seeking interim relief for restraining the respondent No. 1 from encashing/invoking Letter of Credit No. DIA101180 for

321346.14 Euro (Rs. 1,89,72,276.11p in Indian currency) or in the alternative some interim measure or relief be provided to the petitioner to secure the amount of 1,83,754.91 (Rs. 1,08,48,889.89p in Indian currency) till the dispute in the proposed arbitration between the petitioner and the respondent No. 1 is adjudicated upon by the arbitral tribunal.

2. Petitioner company entered into three separate agreements with the respondent for supply of manufactured goods/items to the petitioner. These agreements are:

(1) Consignment Contract No. PJN 1192/07 dated February 22, 2007 for supply/export of Fitted Bed Sheet, solid color, knitted 100% polyester micro fiber, single jersey 135-140 gsm with rubber band stitched inside around the whole sheet size 100 X 200+27 cms edges around with machine washable 60 degrees of the value of 74648.88 Euro.

(2) Consignment Contract No. PJN 1194/07 dated February 22, 2007 for supply/export of roman Shade, printed 100% Polyester micro fiber 110 gsm, size 100 x 170 cms with wooden bar on top, with 2 metal ears, with metal weight bar on bottom including fixtures (2 hooks, 2 dowels, 2 screws)

with colour matching draw rope of the value of 1,12,797.60 Euro.

(3) Consignment Contract No. PJN 1198/07 for supply/export of children bed set, 2 pieces set, printed 100% polyester micro fiber 110 gsm, Duvet covers and pillow case with color matching YKK-zipper with white plastic head, with machine washable 60 degrees of the value of 1,33,860 Euro.

3. As per the agreements, respondent No. 1 was required to provide Oekotex standard 100 certificate free of charge. On the request of the petitioner, respondent No. 3, the bankers of the petitioner at Germany, opened an irrevocable Letter of Credit (hereinafter referred to as 'L/C') bearing No. DIA101180 dated 17.7.2007 for 3,24,716.64 Euro with date and place of expiry being September 03, 2007 and D-Bielefeld in favour of respondent No. 1.

4. The amount of the L/C was reduced for short supply of consignment goods and also because of some consignments of goods relating to fitted sheets of orange colour and yellow colour were found on testing by accredited textile laboratory in Germany 'Forschungsinstitut Hohenstein' mutually appointed by the petitioner and the respondent

- No. 1, to be contaminated with forbidden AZO dye stuff and they did not comply with the Oekotex 100 Standards.
5. The consignment goods sent under contract No. PJN 1194/07 were sent on the condition that if the petitioner's final client cancelled the order on account of non production of valid Oekotex 100 Standard certificate, the petitioner shall have the right to return the goods to the respondent No. 1 and to claim back the paid amount. The consigned goods under the consignment contract No. 1194/07 were rejected by the final client at Germany and the goods had to be transported back by the petitioner. Petitioner claims a total amount of 183754.91 Euro inclusive of his transportation and penalty charges imposed upon it by the final client against respondent No. 1. Since there is an arbitration clause in the agreements, present petition has been filed by the petitioner under Section 9 of the Act seeking interim relief for restraining the respondents from encashing the Letter of Credit.
6. Respondent No. 1 has contested this petition alleging that as per article 3 of the UCP in case of an irrevocable bank guarantee or L/C, the buyer cannot obtain injunction against the banker or the seller on the ground that there

was a breach of the contract by the seller. Respondent No. 2 to 4 are not a party to the agreements and therefore, petition under Section 9 of the Act is not maintainable against them. Petitioner has not been able to prima facie make out a case of fraud or that the alleged fraud was also in the knowledge of the bank issuing L/C. Petitioner has also not been able to show that an irreparable injury shall be caused to it or is likely to be caused if the relief sought for by it is not granted. It is further averred that the agent of the petitioner in India had conducted the pre-dispatch inspection of the consignments under contract No. PJN 1194/07 and other contracts. It was on the satisfaction of the petitioner, the goods were dispatched in September 2007. As and when the petitioner raised any objections regarding short supply or goods not upto Oekotex certificate standard, the respondent No. 1 immediately modified/reduced the L/C amount. Petitioner was aware that the respondent No. 1 has the oekotex certificate with regard to articles i.e. woven fabric made of 100% polyester, dyed which was sent to the petitioner by the respondent on 21.6.2007. Petitioner never informed the respondent No. 1 as to whether the goods under the contract No. PJN 1194/07 was also submitted to the said Lab for quality test. It is further averred that there is no

violation of the terms and conditions of the L/C and the petitioner as well as its bankers have accepted the documents submitted by the respondents No. 1 & 2 after verifying the same for encashment of the said L/C. Therefore, present petition is not maintainable.

7. Maintainability of the petition is also challenged on the grounds that the petitioner has not invoked the arbitration clause in the agreement till date or even after the filing of the present application.

8. I have heard learned counsel for the parties and have carefully perused the record.

9. Learned counsel for the petitioner conceded that there is no dispute regarding the consignments of goods vide consignment contract PJN 1192/07 and PJN 1198/07 and the petitioner is ready and willing to make the payments of the goods sent under the said contracts totaling to 208508.88 Euro and the dispute therefore remains only in respect of agreement PJN 1194/07.

10. Clause 12 of the consignment contract PJN 1194 is an arbitration clause which reads as follows:

“That the parties to the agreement, agreed that all the disputes or difference whatsoever, arising between the parties, out of or relating to the construction, meaning or/and operation or effect of this contract, or the breach thereof, shall be settled by the Arbitration in accordance with the Rules of Arbitrators of the Indian Council of Arbitration by the Arbitrators nominated by both the parties and the Award made, in pursuance thereof, shall be binding on the parties, at New Delhi.”

11. Since the goods supplied by the respondent No. 1 under this consignment contract were rejected by the final buyer of the petitioner and the petitioner has claimed return of the money against this consignment contract as well as transportation charges and the penalty levied upon it by the final buyer, a dispute has arisen between the petitioner and the respondent No. 1 in terms of the arbitration clause. The petitioner has not referred the dispute to the arbitral tribunal till date for adjudication upon the dispute inter se the parties. Much has been said about the non issuance of Oekotex standard certificate having not been issued by the respondent No. 1 in respect of the goods supplied vide consignment contract No. PJN 1194/07. My attention has also been drawn to a letter dated 22.9.2007 written by the

petitioner to the respondent No. 1 whereby the petitioner reserved its rights to return back the goods covered under the said contract because no valid oekotex standard certificate was presented by the respondent No. 1 in case the goods were rejected by the final buyer. Whereas according to the respondent No. 1, oekotex standard certificate was sent to the petitioner vide letter dated 21.6.2007. These issues are not to be considered in this application as these are the matters and disputes to be decided by the arbitral tribunal. The only issue before me for consideration is whether the petitioner is entitled to the relief as claimed for restraining the respondents from invoking the L/C No. DIA101180 which was issued on 17.7.2007 and date and place of expiry is shown as 3.9.2007 and beneficiary is shown to be respondent No. 1. As per this L/C, the deferred payment was 90 days after B/L date. The rules applicable are UCP latest version. After the L/C was opened on 14.9.2007 by the respondents No. 3 & 4, bill of exchange for 321346.14 Euro was issued. As per this bill of exchange, the payment was to be made to the Order of Bank of Baroda, CFS branch, Law Garden, Ahmedabad, India. Thus, it is clear that L/C was negotiated and enforced.

12. Clause 47A of the L/C reads as follows:

“Additional conditions

After receipt of credit conform documents in Bielefeld, we will cover the bank presenting documents according to their instructions 90 days after date of Bill of Lading.”

13. The bill of lading in respect of the goods covered under impugned agreement is dated 7.9.2007. Therefore, since bill of exchange had already been issued, the L/C has been acted upon. It is pertinent to say that there is only one bill of lading for all the three consignment contracts and no separate L/C has been prepared in respect of consignment No. PJN 1194/07 and only one bill of exchange is prepared for all the three consignments. Therefore, L/C cannot be bifurcated into two by separating the claim of the petitioner in respect of consignment No. PJN 1194/07.

14. Under these circumstances, respondent No. 1 cannot be restrained from invoking the L/C as prayed in para (a) of the prayer clause. However, interest of the petitioner can be protected by issuing appropriate directions to the respondent No. 1 as an alternative relief as claimed in para (c) of the prayer clause. The claim of the petitioner is for

1,16,207.76 Euro as against the consignment order No. PJN 1194/07.

15. Petitioner has also sought restraining order against respondents No. 2 to 4 who happened to be the bankers of the respondent No. 1 and petitioner respectively. This L/C is governed by rules laid down in UCP latest version.

16. Article 3 of UCP 500 reads as follows:

“Credits v. Contracts

a. Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.

b. A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank.”

17. Article 9 lays down the guidelines for the banks regarding

their liability of issuing and confirming. The relevant portion of Article 9 of UCP 500 is reproduced as below:

“a. An irrevocable Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with:

i. if the credit provides for sight payment – to pay at sight;

ii. if the credit provides for deferred payment – to pay on the maturity date (s) determinable in accordance with the stipulations of the Credit;

iii. if the Credit provides for acceptance:

a. by the Issuing Bank – to accept Draft(s) drawn by the Beneficiary on the Issuing Bank and pay them at maturity,

or

b. by another drawee bank- to accept and pay at maturity Draft(s) drawn by the Beneficiary on the Issuing Bank in the event the drawee bank stipulated in the Credit does not accept Draft(s) drawn on it, or to pay Draft(s) accepted but not paid by such drawee bank at maturity;

iv. if the Credit provides for negotiation – to pay without recourse to drawers and/or bona fide holders, Draft(s) drawn by the Beneficiary and/or document(s) presented under the Credit. A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider

such Draft(s) as an additional document(s).”

18. Thus, it is clear that respondents No. 2 to 4 are regulated in their working by various articles of the UCP 500. Therefore, in case of any irrevocable bank guarantee or L/C, the buyer cannot obtain injunction against the bank on the ground that there was breach of the contract by the seller. Bank has no option but to honour the demand for encashment if the seller complies with the terms and conditions of the bank guarantee or L/C. 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 L/C and there is no discrepancy, the bank is bound to honour the demand of the seller for encashment. Bank cannot refuse payment on the ground that the buyer is claiming that there is breach of contract nor the bank can decide the question of breach and refuse payment to the seller. The liability of the bank under the document is independent of any dispute as to breach of contract between the seller and the buyer.

19. In ***Federal Bank Ltd. v. V.M. Jog Engineering Ltd. - AIR 2000 SC 3166***, it was observed:

“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, C.P.C. 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 Art.3 of the 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 Letter of Credit, namely, if the seller produces the documents enumerated in the Bank Guarantee or 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 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 no 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."

20. The observations made in ***Federal Bank Ltd. (supra)*** case were followed by this Court in ***M/s. Nissho Iwai Corporation v. Mauria Udyog Pvt. Ltd. & Anr. - 1110 (2004) DLT 620 (DB)*** and it was observed:

"This Court having considered the material brought on record can at best observe that a dispute has arisen between the parties as to the quality of the material supplied by the appellant and the same can only be settled after a full-fledged inquiry/ trial. The important question, however, is as to whether such a dispute can ipso facto be termed as a fraud on the part of the supplier of the goods thereby disentitling them to receive the price of the goods so supplied. In our opinion, the answer would be a plain 'No' because at this stage it is difficult to hold that the material so supplied was in fact defective or did not conform to the specifications or if it was so what was the extent and nature of the defect. In any case, we are informed that the petitioner has now amended its suit by incorporating the relief of

recovery of damages/compensation. The issue can appropriately be considered and answered by the Civil Court only after the parties have gone to trial. Thus, looking at the matter from all possible angles, it cannot be said that the LOCs in question would be vitiated by fraud or any irretrievable damage would be suffered by the respondent entitling them an injunction. Therefore, we are of the considered opinion that the plaintiff-respondent No.1 failed to make out a prima facie case so as to entitle them of any restraint order against the payment of the LOCs either in full or in part.”

21. Coming back to the facts and circumstances of this case, petitioner has not alleged any fraud played on it by the respondent No. 1. No letter was issued to the bankers by the petitioner informing any fraud having been played upon it. The bank, therefore, could not have any knowledge of the fraud, if any. Present case does not even fall in the exceptions to Article 3 of UCP 500. Therefore, present petition under Section 9 of the Arbitration and Conciliation Act against the bankers who are not even party to the consignment agreement and the arbitration clause is not maintainable and deserves dismissal qua respondents No. 2 to 4.

22.To conclude, the claim of the petitioner for restraining the respondent No. 1 from invoking the L/C No. DIA101180 dated 17.7.2007 is rejected. However, the interest of the petitioner can be protected by other measures. Hence, it is ordered that respondent No. 1 shall be entitled to invoke the said L/C DIA101180 dated 17.7.2007 and receive payment subject to it furnishing bank guarantee for 1,16,207.76 Euro (Rs. 68,60,906.15 in Indian currency) within one week to the satisfaction of the Registrar General.

23. Petition stands disposed of accordingly.

December 05, 2007
jk

ARUNA SURESH
(JUDGE)