

Ushdev International Ltd. Vs. Sims Copper Sdn.Bhd. and Others

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Court : Mumbai

Decided On : Apr-08-2014

Judge : The Honourable Chief Justice Mr. Mohit S. Shah & M.S. Sanklecha

Appeal No. : Appeal (L) No. 144 of 2014 In Notice of Motion No. 364 of 2013 In Suit No. 2060 of 2012 With Notice of Motion (L) No. 562 of 2014

Appellant : Ushdev International Ltd.

Respondent : Sims Copper Sdn.Bhd. and Others

Judgement :

Oral Order:(Chief Justice)

1. This appeal is directed against the order dated 3 March 2014 of the learned Trial Judge dismissing the notice of motion taken out by the appellant-plaintiff to restrain/injunct the respondent-defendant No.5 Bank (issuing Bank) from making any payment to respondent-defendant No.2-Bank (negotiating Bank) under the Letter of Credit dated 28 October 2011.

2. The above Notice of Motion was taken out by the appellant-plaintiff in a suit for permanent injunction to:-

(i) restrain respondent-defendant Nos.1 and 2-bank from acting in-furtherance of Letter of Credit on 28 October 2011 for US\$1.25 million; and

(ii) to declare the Bill of Lading dated 3 November 2011 null and void, being fraudulent.

3. The plaintiff entered into a contract for purchase of goods with defendant No.1. The goods were to be shipped by defendant No.1. A Bill of Lading is stated to have been issued. At the instance of the plaintiff, a Letter of Credit was issued by defendant No.5-Bank to the defendant No.2-Bank on 28 October 2011 wherein defendant No.1 was shown as beneficiary of US \$ 1.25 million. The Letter of Credit was subject to Uniform Customs and Practice for Documentary Credit (UCP) 600 and to have a complying presentation, it was necessary for the beneficiary to submit inter alia a valid Bill of Lading. The payment was to be made under the Letter of Credit within 180 days and also contained the following clause:-

œEven though LC is 180 days usance terms the negotiating bank may discount the credit confirming documents and pay beneficiary at sight basis only.?

4. Accordingly when the Bill of Lading purported to have been issued by defendant No.3-Shipping Company, was presented to defendant No.2-Bank, the same was accepted. Consequent to above, defendant No.2-Bank made payments by discounting and negotiating the Letter of Credit on 4 November 2011 and 8 November 2011 for different sums aggregating to US\$ 1.25 million.

5. It is the appellant-plaintiff's case in the plaint itself that the Bills of Lading purported to represent that goods had been shipped on board CSAV Renaico on 3 November 2011. Believing the documents to be true and genuine, the plaintiff had instructed its bank i.e. defendant No.5-Bank to accept the bill presented for payment on the due date. Accordingly, defendant No.5-Bank also sent two emails on 29 November 2011 and 30 November 2011 respectively to defendant No.2-Bank intimating its advice for payment in the aggregate of US\$ 1.25 million under the Letter of Credit.

6. Subsequently on 23 April 2012, the present suit came to be filed stating that the Bill of Lading dated 3 November 2011 purported to be issued by defendant No.3-Shipping Company was never issued by it but was a fabricated document. Thus, being a fraudulent document was non est. It is the appellant-plaintiff's case that it

was induced to accept documents and act thereon by being misled in view of fraudulent misrepresentation of the defendant Nos.1 and 2 and/or No.3 and/or No.4. The aforesaid acts of the defendant Nos.1 to 4 resulted in filing the suit, inter alia, seeking a declaration that the Bill of Lading dated 3 November 2011 is fraudulent and also seeking a permanent injunction restraining the defendant Nos.1 and 2 from acting in furtherance of Letter of Credit dated 28 October 2011.

7. The appellant-plaintiff also took out notice of motion for interim injunction during pendency of the suit. The Trial Court granted ad-interim relief on 25 April 2012 restraining defendant No.5-Bank from making any payment under the Letter of Credit. The above ad-interim order was continued till final disposal of the notice of motion. On 3 March 2014, the notice of motion was dismissed after hearing the learned counsel for parties. The plaintiff in this appeal challenges the order dated 3 March 2014 of the learned Trial Judge.

8. Mr.Sunip Sen, learned counsel for the appellant-plaintiff states that no goods under the contract were received by them. On enquiry, the plaintiff learnt that the Bill of Lading dated 3 November 2011 was fabricated. Mr. Sen submits that since the Bill of Lading was forged and fabricated, it was non-est and did not exist in law. Learned counsel places heavy reliance on the decision of the Supreme Court in **PremSingh and ors, v/s. Birbal and ors, (2006) 5 SCC 353**) in support of his contention that where the fraudulent misrepresentation is as regards the character of document, it is void abinitio, as against a fraud with regard to the contents of the document, is voidable. It is, therefore, submitted that in the instant case misrepresentation by defendant No.1 was fraudulent regarding the very existence of the document and therefore it was void. It is submitted that presentation of the Letter of Credit was a non-complying presentation by defendant No.1 and, therefore, defendant No.2-Bank was not supposed to make payment under the Letter of Credit. It is further submitted that under the Letter of Credit dated 28 October 2011, the maturity period was 180 days. However, defendant No.2-Bank made haste in making the payment under the Letter of Credit to respondent-defendant No.1 on 4 November 2011 and 8 November 2011. In the circumstances, he submits that the learned Trial Judge ought to have confirmed the ad-interim injunction and restrained the defendant No.5-bank from making any

payment to defendant No.2-Bank.

9. In reply, Mr.Rahul Narichania, learned senior counsel appearing for respondent-defendant No.2 has opposed the appeal. It is submitted that as per the settled legal position, Letters of Credit have to be honoured in letter and spirit as they form the 'life blood of International Commerce' subject to two exceptions viz: fraud and irretrievable injury. In support, reliance is placed on the decisions of the Supreme Court in **U.P. State Sugar Corporation v/s. Sumac International Ltd., (1997) 1 SCC 568**, **Federal Bank Ltd. v/s. V.M.Jog Engineering Ltd. and ors., (2001) 1 SCC 663** and **UBSAG v/s. State Bank of Patiala (2006) 5 SCC 416**).

10. It is submitted that in the present facts, neither of the above two exceptions are satisfied particularly because the defendant No.2-Bank had made the payment before it had any notice of fraud. In fact, it is the appellant-plaintiff's own case that the plaintiff believed the documents to be true and genuine and had instructed its bank i.e. respondent-defendant No.5 (Issuing Bank) to accept the bill presented for payment.

11. Further, it is submitted that the second exception is also not satisfied as no irretrievable injury is shown by the plaintiff as it has a remedy against the alleged perpetrators of the fraud. In the circumstances, it is submitted that no fault can be found with defendant No.2-bank accepting the Bill of Lading presented by respondent-defendant No.1 and making the payment. Hence, it is prayed that the appeal be dismissed.

12. In rejoinder, learned counsel for the petitioner sought to submit a completely new argument, which was never raised in the plaint, in the affidavit in support of the motion or at the hearing of the notice of motion before the learned Trial Judge or even in the appeal memo. The contention is that the payments made by the defendant No.2-Bank to defendant No.1 on 4 November 2011 and 8 November 2011 were not under the Letter of Credit and/or by discounting the bills but were independent loans advanced by defendant No.2-Bank to defendant No.1. This loan was to be paid by defendant No.1 upon expiry of the maturity period of Letter of Credit i.e. after 180 days. Therefore, it is submitted that no payment was made under the Letter of Credit before notice of fraud as the payment was to be made

only on 3 May 2012 that is after 180 days.

13. We have given anxious consideration to the rival submissions.

14. It is the settled position in law that letters of credit as stated by Justice Kerr in **R. D. Harbottle (Mercantile) Ltd. v/s. National Westminster Bank Ltd. 977(2) All E R 862**) are 'life blood of international commerce'. Therefore, the Letters of Credit must be honoured as per the terms incorporated therein irrespective of any dispute in the underlying contract between the parties to the Letter of Credit. The only occasion when the obligations under the Letter of Credit may be avoided is if it falls within one of the two exceptions viz: fraud or irretrievable injury. Moreover as held by the Apex Court in Federal Bank Ltd. (supra) an injunction on grounds of fraud against the negotiating Bank can only be obtained if the payment was not made before the notice of the fraud.

15. The case of appellant-plaintiff before us is that the Bill of Lading which was a necessary document for presentation so as to comply with Letter of Credit was a non-existing document being a fabricated document. In such a case, there was no presentation of the complying document and the defendant No.2-Bank could not have negotiated the Letter of Credit. It is submitted that the obligation of the negotiating Bank viz: defendant No.2-Bank was not to have honoured the Letter of Credit as the Bill of Lading was not genuine and, therefore, the mandate of the letter of credit was not complied with.

16. The aforesaid submission comes ill from the appellant for the simple reason that it was the appellant/plaintiff who in its plaint has categorically stated that Bill of Lading appeared to be true and genuine and it had instructed its issuing banker namely defendant No.5-Bank to accept the bill presented for payment by defendant No.2 on the due date. It is on the above basis that the issuing bank namely defendant No.5-Bank by its telex messages dated 29 November 2011 and 30 November 2011 had instructed defendant No.2-Bank to make payment to the beneficiaries as a consequence of Letter of Credit. It is in the aforesaid circumstances that the payments made by respondent-defendant No.2-Bank to respondent-No. 1 by discounting the Letter of Credit on 4 November 2011 and 8 November 2011 stood accepted. The aforesaid fact has been stated by

respondent-defendant No.2 in its affidavit filed on 22 January 2014 before the learned Trial Judge. The aforesaid fact of payment has not been disputed by the appellant-plaintiff either before the learned Trial Judge or even in its appeal memo. This payment made by defendant No.2-Bank was in the normal course of business and in the absence of knowledge of fraud prior thereto. The rights of defendant No.2-Bank under the Letter of Credit cannot, therefore, be thwarted.

17. Moreover, it is not even alleged that the respondent-defendant No.2-Bank had not taken reasonable care to ascertain that the document presented to them by defendant No.1 was on the face of it not in accordance with the terms and conditions of the Letter of Credit. In fact, the plaintiff itself has stated even in the plaint that the plaintiff itself believed the Bill of Lading presented by defendant No.1 before defendant No.2 as a genuine document and instructed defendant No.5 (issuing bank) to accept it. Therefore, we find that the Trial Judge was justified in refusing to restrain the defendant No.5-Bank from making payment to defendant No.2-Bank.

18. Before us, in his rejoinder, Mr. Sen, learned Sr. Counsel appearing for the appellant-plaintiff sought to contend that the payment made on 4 November 2011 and 8 November 2011 by respondent-defendant No.2-Bank to respondent-defendant No.1 were in fact, not as a consequence of discounting the payments due under the Letter of Credit dated 28 October 2011 but on account of a loan namely Offshore Foreign Currency loan facility extended by defendant No.2-Bank to defendant No.1. Thus, it is contended that no payment has been made by defendant No.2-Bank to defendant No.1 under the Letter of Credit before the fraud was detected and pointed out to defendant No.2-Bank. Therefore, the defendant No.5-Bank should be restrained from making any payment to defendant No.2-Bank under the letter of credit dated 28 October 2011.

19. This is a completely new case sought to be made by the appellant-plaintiff in its rejoinder when the same was not urged either before the Trial Court or in its appeal memo or even while making its, submissions in support of the appeal but only in rejoinder on the next date i.e. today. We, therefore, see, no reason to entertain this point being urged by the appellant-plaintiff so late in the day after the

Advocate for defendant No.5 (contesting Respondent) has addressed us in reply.

20. In any event, the documents dated 4 November 2011 and 8 November 2011 under which the payments have been made by the defendant No.2-Bank to defendant No.1 very clearly evidences the fact that the net amount was made available to defendant No.1 by the defendant No.2-Bank after the appropriate discount. Thus, we do not find any merit in the contention urged on behalf of the appellant-plaintiff. Therefore, even though the payment has been made by defendant No.2-Bank to defendant No.1 before being so directed by the plaintiff, there is no basis to allege that defendant No.2-bank was aware of any fraud before making the payment. In fact, the Supreme Court in the matter of Federal Bank Limited (supra) has very clearly stated that in order to obtain injunction in case of letter of credit/ bank guarantee, it is necessary for the plaintiff to prove that the banker had knowledge of the fraud. It is not the case of the plaintiff that the negotiating banker namely defendant No.2-Bank acted beyond its mandate in as much as it was not apparent on the face of the documents presented that the documents were fraudulent.

21. The defendant No.2-Bank not being a party to the fraud and having acted in accordance with its mandate under the Letter of Credit, the defendant No.5 cannot be restrained from making payment to the defendant No.2-Bank in the present facts.

22. We, therefore, do not find any merit in any of the above contentions. **Appeal** is, therefore, **dismissed**.

23. In view of the disposal of Appeal itself, **Notice of Motion (L) No.562 of 2014** does not survive for consideration and the same is also **disposed of** as such.

24. At this stage, learned counsel for the appellant-plaintiff requests for continuing the ad-interim injunction for some time in order to enable the appellant to have further recourse in accordance with law.

25. Learned counsel for the respondent-defendant No.2-Bank opposes the request and submits that when the notice of motion as well as appeal are dismissed, there

is no justification for continuing the ad-interim injunction.

26. In the facts and circumstances of the case, while we have found no merit in the appellant's contention, only having regard to the fact that the ad-interim injunction granted by the Trial Court has been operating since 25 April 2012, we direct that the ad-interim injunction operating till today shall continue for a period of four weeks from today. No extension will be granted.

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