

Al Mustaneer Establishment for Trade Vs. Varuna Overseas Pvt. Ltd.

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Court : Delhi

Decided On : Feb-13-1998

Reported in : 1998IIAD(Delhi)481; 72(1998)DLT186

Judge : K. Ramamoorthy, J.

Acts : [Indian Contract Act, 1872](#) - Sections 17

Appeal No. : Suit No. 688/81

Appellant : Al Mustaneer Establishment for Trade

Respondent : Varuna Overseas Pvt. Ltd.

Advocate for Def. : Mr. Ravinder Sethi, ; Mr. S.N. Marwah, Sr. Advs., ; Ms. Na

Judgement :

ORDER

K. Ramamoorthy, J.

1. The plaintiff had instituted the suit on 30.5.1981 for the recovery of Rs. 31,57,322.57 against all the defendants and for the recovery of Rs. 3,08,440/- from defendants 17 and 18 in addition to the first relief jointly and severally and payment of interest. 18% per annum from the date of suit till the date of realisation. There are 19 defendants in the suit. The case of the plaintiff could be stated in the following terms.

The plaintiff is a Company carrying on business in Saudi Arabia and governed by the laws enforced in the Kingdom of the Saudi Arabia. The plaintiff placed two orders on 22.11.1978 bearing no. 548 of 1978 and 549 of 1978 with the first defendant for the purchase of 1000 metric tons Round bars each. The orders were placed through the agent of the first defendant in Saudi Arabia, who is called M/s. United Arab Agencies. The agent issued indents which contained the following terms and conditions;-

(a) The value of each indent was U.S. \$34,000/- (three lacs forty thousand),.

(b) all ships were to be made within 90 days;.

(c) The goods were to be delivered at Hoddeidah port.

(d) The payments was to be made by means of Letters of credit to be opened by the plaintiffs in favor of Defendant No. 1 through their bankers;.

The plaintiff later on obtained the confirmation from the first defendant through the 5th defendant Mr. Ravi Shankar Upadhaya. The plaintiff first requested to make arrangements for opening a Letter of Credit which should be made transferable. On 23.11.1978 the plaintiff opened a Letter of Credit through its bankers, The Al Saudi Al Francis with reference to two contracts. The first defendant was named as the beneficiary of the Letter of Credit. It was opened for U.S. \$ 80,000/- C & F Hoddeidah Port. The Letter of Credit provided that the reimbursement was to be made by sight drafts on the Banque Del' Inde Chine Et De Suez Chicago, Illinois, U.S.A. The Letter of Credit was valid up to 3.3.1979. The first defendant sent a telex message to the United Arab Agencies that the Letter of Credit should be amended by making a divisible so that the first defendant could arrange for the shipment of M.S. Round Bars from various suppliers on behalf of the first defendant. The first defendant assured that the shipment would be made in the month of February 1979. In the month of February 1979 Sh. Bharat Shah of M/s. United Arab Agencies, who was the agent of the first defendant, happened to be in India and contacted the 5th defendant Mr. Ravi Shankar Upadhaya who assured Mr.Bharat Shah that the consignment was actually in Bombay Port and was in the process of being loaded into the ship. Mr. Bharat Shah returned to Jeddah. He

received a telex message from Mr. Ravi Shankar Upadhaya, 5th defendant on behalf of the first defendant that on the 5th of March 1979 a shipment of approximately 500 metric tons of M.S. Round Bars was being effected on the same day. Mr. Ravi Shankar Upadhaya, 5th defendant, came to Jeddah and requested the plaintiff to extend the Letters of credit for a further period of three months. He stated that if the Letters of Credit were extended the entire consignment would be shipped within a few days. The plaintiff insisted that if the first defendant was prepared to give 10% performance guarantee from a scheduled bank the time for Letters of Credit could be extended. The bank guarantee was given on behalf of the 6th defendant M/s. Kupal Material and Metal Private Limited, who was not known to the plaintiff or to Mr. Bharat Shah, the agent of the first defendant. Later on, Mr. Ravi Shankar Upadhaya, the 5th defendant, gave an affidavit that the entire quantity agreed upon would be shipped within the extended period of Letters of Credit. He also agreed that if the consignment was not shipped the first defendant would reimburse the plaintiff. On the strength of the assurance given by Mr. Ravi Shankar Upadhaya on behalf of the first defendant and on his own behalf, the plaintiff gave instructions to its bankers for the extension of the Letters of Credit up to 25.5.1979. It appears that the Letter of Credit was transferred in favor of the 6th defendant M/s. Kupal Material and Metal Private Limited. The Letters of Credit had been encased by making false representations to the bank that the ship named (Nikkir) was never berthed at Hoddeidah Port. Defendants 15 and 16 when enquired gave evasive replies. The plaintiff's manager and Mr. Bharat Shah of the United Arab Agencies, the agent of the first defendant, came to India and found that a huge fraud had been committed. A criminal complaint was lodged against the first defendant and others in the Court of the Metropolitan Magistrate, New Delhi. The plaintiff came to know that defendants No. 6 to 14 had fabricated documents for encashing the Letters of Credit and money was received by them on 21.4.1979 from defendants 17 and 18. Defendants 15 and 16 had issued bills of lading dated 19.4.1979 stating that a shipment of M.S. Round Bars was made in Nikkir Ship in the Bombay Port. The bills of lading had been fabricated. Defendants 1 to 5 had joined in the fraud along with defendants 6 to 16. The Syndicate Bank (defendants 17 and 18) failed and neglected to scrutinise the documents before paying money

under the Letters of Credit. It is stated in the plaint that with reference that with the negligence of the defendants 17 and 18 that they had failed to make very crucial enquiries to find out the genuineness of the documents produced for receiving money under the Letters of Credit. Paragraph 13 of the plaint is relevant and it reads as under :-

That the plaintiff says that the defendants no. 17 and 18 before parting with the money failed to scrutinize the documents and to check up them carefully in accordance with the instructions and the conditions mentioned in the letters of credit. Defendants No. 17 and 18 failed to observe that the documents which were to be scrutinized before payment, were not even tendered to the bank for its perusal. Further defendants no. 17 and 18 failed to take into consideration that although the invoices, bills of lading were dated 19.4.1979, the G.R.-I form for the same were dated 18.1.1979 and were thus prima facie stale. The defendants no. 17 and 18 also failed to notice that the bills of lading did not bear signatures of any authorised person of a shipping company nor did the bills of lading mentioned the owner of the ship. The plaintiff says that under the amended letter of credit, the documents which were required to accompany, the bills of lading were inter-alia a certificate from the General Superintendent certifying in the docks that M.S. Bars are/were strictly as per Agents' Indent no. 548/78 and 549/78 dated 22.11.1978 as mentioned in the letter of credit in respect of the sizes, quantities etc. and also a certificate from the defendants nos. 6 certifying that the goods shipped are strictly in accordance with the agents' indent No. 548/78 and 549 of 1978 dated 22.11.1978 as mentioned in the letters of credit and that any claim received from the openers of the letters of credit M/s Al Mustaneer Establishment, Jeddah, Saudi Arabia, the plaintiff in this regard will be settled/paid by M/s Kupal Material & Metal Private Ltd., defendant no. 6 on first demand. None of these documents were tendered to defendants nos. 17 and 18 and yet the defendants No. 17 and 18 did not consider it necessary to call for the said documents from the defendants. The plaintiff says that the defendants No. 17 and 18 is not scrutinizing the documents tendered to it and not calling the documents required to it and not calling the documents required to be tendered, was grossly negligent in its duties as Bankers and were not entitled to make the payment under the said letter of credit to any person and are liable to the plaintiff for the amounts parted with by

the bank/defendants No. 17 and 18 under the said letter of credit.

Defendants 1 to 16 and 19 had received Rs.22,27,445.89 conniving with defendants 17 and 18. It is stated by the plaintiff that it never agreed for the transfer of Letter of Credit in favor of the 6th defendant and the first defendant had not discharged its obligations under the contract. 2. It is stated that defendants 15 and 16 had received a sum of Rs. 1,65,000/- as freight charges by producing forged receipts enabling the 6th defendant to receive the payment under the Letters of Credit.

3. Defendants 17 and 18 ought to have examined the documents produced before them with due care and diligence and they failed to discharge their duties.

4. The plaintiff claims interest. 18% per annum on the sum of Rs. 22,26,445.89 from 23.4.1979 up to 27.5.1981 the plaintiff had calculated the interest and had claimed a total sum of Rs. 31,57,322.57. In paragraph 18A, it is stated :-

'That the plaintiff says that the defendants 17 & 18 had given a performance guarantee, the same was performed only for 1200 metric tons. Thus the defendants 17 and 18 are bound to perform the said guarantee and pay to the plaintiff for the remaining 800 metric tons which were also never shipped to the plaintiff. Thus the defendants nos. 17 and 18 are liable and bound to make payment of US \$ 27200 equivalent to Rs.2,17,600/- (Rs. two lacs seventeen thousand six hundred) in addition to the amount claimed above with interest. 18% (eighteen) p.a. which comes to Rs. 90,840/- (Rs. ninety thousand eight hundred forty). An addition amount of Rs.3,08,440/- (Rs. three lacs eight thousand four hundred fifty) is due to the plaintiff from the defendants nos. 17 and 18.

The plaintiff had made the claim for Rs. 3,08,440/- against defendants 17 and 18 in addition to the sum of Rs.31,57,322.57.

5. On 1.4.1986 defendants 17 and 18 Syndicate Bank filed its written statement. The plea that is taken by the Syndicate Bank is that the negotiating bank is answerable only to the bank which established the Letter of Credit and there was no privity of contract between the plaintiff and the Syndicate Bank and, therefore,

the plaintiff cannot make any claim against the Syndicate Bank. It is stated in paragraph 7 in the written statement :-

M/s. Kupal Materials and Metal Private Limited (defendant No. 6) presented the export documents on 23.4.1979 for negotiation. The said defendant No. 6 also produced a photo copy of the letter intimating extension of the validity period of the Letter of Credit.

6. It is stated by the Syndicate Bank that it was not aware of the additional conditions imposed by the Canara Bank. It is asserted in paragraph 11 as under :-

It is, therefore, submitted that the answering defendants negotiated documents fully in accordance with the terms of the letter of credit in question. From the additional pleas, it will be seen that the answering defendants have no knowledge or information of the additional conditions because the same were communicated to the answering defendants subsequent to the negotiation was completed. There is nothing unusual in the bills of lading being of the date 19.4.1979 and G.R.I. forms were of 18.1.79. It is denied that the G.R.I. forms had become stale. The defendants had negotiated the documents fully in accordance with the provisions of the uniform customs and practice for negotiation of documentary credits which governs the negotiation of documentary letters of credit in question. It is denied that the bill of lading did not bear signatures of any authorised person of the shipping company. It is denied that the bills of lading did not mention the owner of the ship. In any event, non-mention if any, is immaterial. It is submitted that all the discrepancies sought to be now pointed out are after thoughts and if, in fact, there was any such discrepancy, the bank which established the letter of credit ought to have pointed out the same within reasonable time. The bank which established the letter of credit not only failed to point out any discrepancy within reasonable time but, in fact, has not raised any dispute till this date. Further, the said bank has paid the amount in accordance with its commitments. therefore, if the plaintiff is in any way aggrieved, its remedy is against the bank which established the letter of credit and not against the answering defendants. It is, therefore, denied that the answering defendants are in any way liable to pay any part of the amount to the plaintiff.

7. It is asserted in paragraph 12 that 'the payment was made in the normal course of banking transactions.' It is stated in paragraph 14 :

It is, however, submitted that by their letter dated 6.9.1979 the defendant No. 16 has admitted that certain bills of lading mentioned in the said letter were issued without actually receiving the goods. The said letter also mentions that a sum of Rs.1,65,519.40 was received by the said defendants No. 15 and 16 towards freight charges. Apart from the said letter, the answering defendants had no other information regarding the allegations made in para under reference.

8. According to the Syndicate Bank, it was not liable to pay any amount to the plaintiff. Stating to be additional pleas, in paragraph 21 it is stated by the Syndicate Bank:-

'The letter of credit in question was established by the bank, viz., Al Bank Al Saudi Al Francis. The said letter of credit was transferable and not restricted to any bank in particular. Originally, the period of validity of the letter of credit was till 3.3.1979. The Banque Nationale de Paris, Calcutta, confirmed the credit. The said Banque Nationale de Paris by their letter dated 2.4.1979 advised M/s Dhar General Overseas General Private Limited (who subsequently changed their name to Varuna Overseas Private Limited) that the validity of the letter of credit was extended up to 25.5.1979. The said letter also stated,

'all other terms and conditions remain unchanged'. There was nothing on the face of the letter to indicate that the extension was subject to any additional conditions. The defendant No. 7 as a transferee of the L/C submitted a photo copy of the above said letter to the answering defendants on 23.4.1979 and sought to negotiate the documents. Defendant No. 6 was already having dealings with the answering defendants and the answering defendants without having any reason to suspect the authenticity of the letter of the Banque Nationale de Paris negotiated the documents in the normal course. The said negotiation was accepted as correct by the confirming bank, viz., Banque Nationale de Paris, and also the opening bank. therefore, as far as the answering defendants are concerned, the transaction had come to an end long before the filing of the suit and the immediate parties to the letter of credit viz., the opening bank, the confirming bank and the

negotiating bank had no dispute whatsoever.'

9. The Syndicate Bank had prayed for the dismissal of the suit. Defendants 1 to 5 and 19 filed the written statement on 6.7.1987. The written statement had been signed by first defendant, second defendant, third defendant, 4th defendant, 5th defendant and 19th defendant. In paragraph 5 of the preliminary objections of the written statement, it is stated :-

A transferable letter of credit was opened by the plaintiff for it was known to the plaintiff that defendant No. 1 is not the supplier of the goods. Defendant No. 1 had the right to transfer the credit to the actual supplier. These facts were within the knowledge of the plaintiff through its agent. By opening a transferable Letter of Credit and on transfer of the same in favor of the actual supplier, i.e. defendant No. 6, a new contract came into existence between the plaintiff and defendant No. 6 on the same terms and conditions as indicated in the Letter of Credit. In these circumstances, the replying defendants state that the suit is bad in law and that the plaintiff has no cause of action against defendant No. 1 to 5 and 19 for the reason that the transfer of the Letter of Credit created a new contract and that such an arrangement was fully in the mind of the plaintiff and the defendant No. 1 and for this reason the credit was made transferable. On the actual transfer of the Letter of Credit in favor of defendant No. 6, the old contract between the plaintiff and defendant No. 1 was rescinded and a new contract came into existence between the plaintiff and the defendant No. 6 on the same terms and conditions as indicated in the Letter of Credit.

10. It is asserted by these defendants that the contract between the plaintiff and the first defendant had come to an end on 3.3.1979 on the expiry of the validity of the period in the Letter of Credit dated 23.11.1978. The plaintiff insisted on for performance guarantee for 10% of the value of the Letter of Credit, that was furnished by the 6th defendant through Syndicate Bank and that was accepted by the plaintiff and the period of validity of the Letter of Credit was extended by the plaintiff. therefore, according to these defendants there had been novation of the original contract and, therefore, a new contract had come into existence between the plaintiff and the 6th defendant. The plaintiff through its agent M/s. United Arab

Agencies directly approached the 6th defendant and obtained a guarantee dated 23.5.1979 and thus the plaintiff had accepted the 6th defendant to be liable to perform the obligations of the contract. The plaintiff had encased the performance guarantee given by the Syndicate Bank and, therefore, estopped from denying the novation of the old contract.

11. According to this defendant, the 5th defendant Mr. Ravi Upadhaya did not go to Jeddah for taking up the matter of extension of Letter of Credit. The guarantees relied on by the plaintiff, alleged to have been executed by the defendant, were without any authority by the first defendant. The first defendant did not authorise Mr. Ravi Upadhaya, the 5th defendant, to give any affidavit and the first defendant is not bound by the guarantees executed by the 5th defendant. According to these defendants, in any event, when the plaintiff relies on the guarantees executed at Jeddah, this Court has no jurisdiction to try the suit. These defendants would state that the plaintiff exercised coercion, duress for getting documents from the 5th defendant. It is stated:-

The replying defendants further state that the plaintiff with the help of Mr. A.J. Shah and Mr. B.J. Shah of United Arab Agencies had forcibly taken away the passport of defendant No. 5 and had threatened him that besides not being allowed to move out of Jeddah he would remain in their custody till he executes a guarantee. Defendant No. 5 had no authority on behalf of defendant No. 1 and other replying defendants to execute any guarantee. However, since his passport had been taken away and he was not allowed to move at his freewill he had no option but to do as asked for by Mr. A.J. Shah and Mr. B.J. Shah ostensibly for and on behalf of the plaintiff. The defendant No. 5 was not allowed to leave the office of M/s. United Arab Agencies, the agents of the plaintiff, except under escort and that too without his passport till he executed the guarantee as was required by the agents of the plaintiff. Defendant No. 5 was further threatened by Mr. A.J. Shah and Mr. B.J. Shah of M/s. United Arab Agencies that if he fails to execute the guarantee as required by them he will have to face dire consequences and may never be allowed to leave Jeddah as also lose his life. The threat to his life, the restriction on his movement, the taking away of his passport constituted duress and coercion, besides being criminal acts, in getting the guarantee deed executed

from defendant No. 5 by the agents of the plaintiff. The said guarantee deed is null and void besides being not binding on defendant No. 1 as having been executed without its authority and having been extracted from defendant No. 5 by coercion, threats of physical force and illegal detainment. The agents of the plaintiff, namely, M/s. United Arab Agencies, through its proprietors Mr. A.J. Shah and Mr. B.J. Shah, sent various telex messages to defendant No. 1 in the name of defendant No. 5 for authorising defendant No. 5 to execute the deed of guarantee as was required by the said agents of the plaintiff. The defendant No. 1 did not authorise defendant No. 5 to execute any guarantee and defendant No. 5 besides having executed the guarantee under duress and coercion, executed the same without any lawful authority from defendant No. 1. The said guarantee is not binding on anyone of the replying defendants, the said guarantees having been obtained by exercise of undue influence, coercion and duress are null and void and cannot form the subject matter of the present suit.

12. It is further stated in the written statement that the Syndicate Bank did not act as a prudent banker. Defendants 6 to 18 are guilty of fraud and conspiracy in fabricating various documents. Defendants 6 to 18 had acted in collusion with one another ignoring the provisions of Uniform Customs and Practice and also the Rules of International Commerce. Defendants 2 to 4 and 19 are neither necessary nor proper parties to the suit. In reply on merits, these defendants would deny liability. It is stated that two orders were placed on the first defendant by the agent of the plaintiff on 22.11.1978 for the purchase of 2000 MT of M.S. Round Bars. First defendant was only a merchant exporter and not a manufacturer. It was only for this reason that the plaintiff obtained a transferable Letter of Credit in favor of the first respondent so that the first defendant could transfer the same to any party which could export steel to the plaintiff. First defendant, therefore, availing the position transferred the Letter of Credit in favor of the 6th defendant who was doing export of steel, who was associated with Shah Brothers of Bombay, who were exporters of steel and Mr. Kirti H. Shah of Shah Brothers was also one of the directors of the 6th defendant M/s.Kupal Material and Metal Private Limited. The transfer to the 6th defendant was accepted by the plaintiff. It is stated by these defendants that when the original Letter of Credit had expired on 3.3.1979 and when the plaintiff had agreed to extend the Letter of Credit on the Syndicate Bank

furnishing performance guarantee for 68,000 US Dollars which was the 10% of the value of the Letter of Credit. The obligation of the first defendant had come to an end. It was the 6th defendant who had undertaken to shift the entire quantity of 2,000 MT M.S. Round Bars by January 1979. The first defendant would again reiterate the visit by the 5th defendant to Jeddah. According to the defendants, the 5th defendant landed at Jeddah on 9.3.1979. As stated above, the plaintiff exercised undue influence and duress and obtained documents from the 5th defendant. The validity of the period of Letter of Credit was extended up to 25.5.1979. These defendants would admit :-

'Defendant No. 1 forwarded the amendment to the Letter of Credit dated 2.4.1979 to their bankers Canara Bank to transfer the same in favor of defendant No. 6. However, on the reverse of the said extension (amendment) of the Letter of Credit, certain conditions were also imposed by defendant No. 1 which were to be complied with before the documents in respect of the shipment of the said quantity of 2,000 M.Tons of M.S. Round Bars could be negotiated. In view of the unfortunate history of the matter the conditions set out below were added by defendant No. 1 to protect the interest of the plaintiff although to benefit and obligation under the L/C had passed to defendant No. 6.

1. Negotiations of the document should be made on or before 25th May 1979.
2. The following certificates must be obtained from the transferee, M/s. Kupal Materials & Metals P. Ltd. at the time of negotiation of the documents and this may be sent to M/s. Dhar General Overseas P.Ltd., 8, Malcha Marg Market, Chanakyapuri, New Delhi Along with the non-negotiable copy of the documents:
 - a) A certificate from General Superintendent Certifying in the docks that the M.S. Bars are strictly as per agent indent No. 548/78 and 549/78 dated 22nd November 1978 as also mentioned in L/C in respect of the sizes, quantity and quality etc.
 - b) A certificate from M/s. Kupal Materials & Metals Pvt. Ltd. certifying that the goods shipped are strictly in accordance with the agent indent No. 548/78 and 549/78 dated 22nd November 1978 as mentioned in the L/C and that any claim received from the openers of the L/C (M/s. Al Mustaneer Establishment for Trade,

Jeddah, Saudi Arabia) in this regard will be settled/paid by M/s. Kupal Materials & Metals Pvt. Ltd. on first demand.

The L/C Extension Advice duly endorsed was forwarded by defendant No. 1 to Syndicate Bank, (defendant No. 17) vide its registered letter dated 13.4.1979 and a copy of the same to M/s. Kupal Materials & Metals Pvt. Ltd. (defendant No. 6). These letters were received by Syndicate Bank on 16.4.1979 and by Kupals on 17.4.1979.'

13. It may be noticed here that the letter dated 13.4.1979 and the receipt of those letters by the Syndicate Bank are not spoken to by the 5th defendant as Ex.D1W2 and Mr. Gupta as D1W3. It is stated by these defendants that sometimes towards the end of April 1979 the first defendant learnt from 6th defendant that the 6th defendant had shipped a quantity of approximately 800 MT M.S. Round Bars to the plaintiff. The first defendant by its letter dated 30.4.1979 wrote to the Syndicate Bank, 17th defendant, that the 6th defendant had shipped 800 MT of M.S. Round Bars and the copies of the non negotiable bills of lading had been sent to them by the 6th defendant. The first defendant requested the Syndicate Bank, 17th defendant, to pay their commission. On 2.5.1979 the first defendant received letter dated 26.4.1979 from the 17th defendant along with its commission one set of non negotiable document of each of the three bills of lading. The first defendant by letter dated 5.5.1979 wrote to the Syndicate Bank, 17th defendant, for the certificates relating to the condition of the consignment regarding the quality and quantity. The 6th defendant received a letter from Mr. B.J. Shah of United Arab Agencies (P.W.2) for the exact date of the shipment in the vessel Nikkir. On receiving the said letter from P.W.2 the first defendant sent a telex message to 6th defendant for information. The 6th defendant did not give any reply. By letter dated 18.5.1979 (Ex.D1W3/2) the 6th defendant informed the first defendant that a quantity of 799.26 MT of M.S. Round Bars had already been shipped but the balance 1200 MT could not be shipped in view of the ban imposed by the Govt. of India. On 29.5.1979 the first defendant informed the plaintiff that the 6th defendant had not shipped the entire quantity of 2,000 MT M.S. Round Bars and the plaintiff could encash the performance guarantee furnished by the 6th defendant for the sum of 68,000 US Dollars. On 14.5.1979 (Ex.D1W1/17) the Syndicate Bank

(defendant No. 17) wrote to the 6th defendant to furnish certificates as per the conditions of the transfer of Letter of Credit. They could show that the 17th defendant had not acted in accordance with the Banking Practice. It is stated that on 17.5.1979 a telephone call was received by the 5th defendant from P.W.2 Mr. B.J. Shah, who was in Calcutta, informing that the 799 MT of M.S. Round Bars for which bills of lading was issued were lying in the Warehouse of the 15th defendant Amphora Marine Consultants Pvt. Ltd., Bombay and Mr. Shah was only sceptical regarding the quality. It is stated 'on the basis of the said telephonic call, it was taken by defendant No. 1 that it was only a normal shipping delay. Since Mr. Shah was satisfied with the transaction, no fraud or foul play was suspected'.

14. The first defendant came to know that Mr. B.J. Shah P.W.2 was directly contacting the 6th defendant and obtained from the 6th defendant a guarantee bond dated 23.5.1979 which is certified by the 15th defendant M/s. Amphora Marine Consultants Pvt. Ltd. stating that the consignment would be loaded latest by the 30th June 1979 either by Vessel NIKKIR or by any other Vessel. It may be noticed that this document is marked by the first defendant through D.1W3 Mr. B.M. Gupta and marked as D1W3/13. It was only towards the end of June 1979 that Mr. Shah P.W.2 informed the first defendant that the goods had not been shipped and that the money had been realised without shipping the goods. It is only thereafter the first defendant made enquiries both with the 6th defendant and the 15th defendant and came to know that defendants 6 and 17 played a fraud and had defrauded the first defendant to the extent of Rs. 22.27 lakhs. The first defendant then wrote to its bankers Canara Bank, Chanakyapuri to keep the commission received from the 17th defendant (Syndicate Bank) in a suspense account pending the investigation regarding the alleged fraudulent transaction of documents by the 6th defendant. The 17th defendant Syndicate Bank in conspiracy with the 6th defendant to defraud the plaintiff negotiated the documents presented by the 6th defendant inspired by the fact that two certificates had to be furnished by the 6th defendant as per the conditions imposed at the time of the transfer of the Letter of Credit. The first defendant was not at all aware of the fraud. The 17th defendant had acted negligently. These documents would refer to the conduct of the 17th defendant as to how it had acted ignoring relevant provisions of the Banking Practice. It is stated :-

'It may further be submitted that in case defendant No. 17 had any reservations about the conditions of transfer of the L/C, it should have objected to such conditions when the same were imposed, while transferring the L/C and not after wrongful negotiation in utter disregard of such conditions imposed.

The replying defendants state that the position in law is that the negotiating/paying Banker must obey strictly the instructions in the Letter of Credit. In this case the Letter of Credit called for inter alia full set of 'Clean', 'On Board', 'Ocean' bills of lading stamped 'Liner Terms' issued to the order of shipper and endorsed to the order of Al Bank Al Saudi Al Fransi Jeddah marked 'Freight Prepaid'. It is an admitted fact that the Bill of Lading which the Syndicate Bank accepted and against which they paid does not bear the name of a Shipping Company.

The defendants further state that in Article 19(a)(i) of the Uniform Custom and Practice 1974 which is universally followed by Bankers it is clearly laid down that the bills of lading issued by forwarding agent will be rejected. Again in the book 'Documentary Credit Operation' published by the International Chamber of Commerce, Paris it is clearly stated that the Bill of Lading must be issued by a Shipping Company and bear the signature or the stamp of the Carrier or its agent. Admittedly the bills of lading was signed 'For Amphora Marine Consultants Pvt. Ltd.' and signed by a Director. Although the name of the ship NIKKI'R is given, the name of the Shipping Line is not given and the signature is not as agents of the Shipping Line but on behalf of the agents themselves. Further the corrections and alterations in the Bills of Lading were not duly authenticated by the signatory of the B/Ls.

Clearly such a bill of lading should have been rejected by the Bank as not conforming to the rules laid down by the Uniform Customs and Practice'.

15. These defendants refer to the criminal complaint made by the plaintiff and for the purpose of deciding the issues that is not relevant. These defendants ultimately prayed for the dismissal of the suit. In the additional plea, it is stated by these defendants 'the defendant No. 1, as already stated, has only received a commission of Rs.53,251.95 which amount, as already stated, on learning of the

fraud practiced by defendants No. 6 to 18, has been kept in a suspense account with the bankers. The fraud and collusion had been practiced by defendants 6 to 18 in collusion with each other. These defendants had stated:-

If in law it is held that a decree has to be passed against defendants No. 1 to 5 and 19 then the amount for which the said decree will be passed, the replying defendants will be entitled to recover the same from defendants No. 6 to 18 and a cross decree to that effect has to be passed by this Hon'ble Court in favor of the replying defendants and against defendants Nos. 6 to 18.

16. A specific relief has been prayed for by these defendants. These defendants had not paid any court fee and had not initiated any action under Order 8 Rule A CPC.

17. On 10.7.1987 defendants 6 to 8 and 10 filed their written statement. In the preliminary objections, it is stated that the plaintiff should prove its legal entity. The suit has not been filed by an authorised person. All the averments in the plaint are denied. These defendants had not committed any forgery or fabrication. There is no cause of action by the plaintiff against these defendants. These defendants had stated that this Court had no jurisdiction and these defendants are not liable to pay any amount.

18. The plaintiff had filed replications to the written statements by defendants and it is not necessary to set out the averments therein.

19. Following issues were framed on 25.10.1988 by this Court :-

ISSUES

1. Whether the plaint has been signed, verified and the suit filed by a duly authorised person?
2. Whether Delhi Courts have jurisdiction to try and entertain the suit?
3. Whether suit is bad for mis-joinder of parties?
4. Whether suit is bad for non-joinder of necessary parties?

5. Whether there was privity of contract between the plaintiff and defendants?
6. Whether defendant No. 1 was bound & liable to ensure delivery of the goods under orders No. 548 and 549 of 1978 to the plaintiff notwithstanding the transfer of letter of credit in favor of defendant No. 6 and in spite of performance guarantee issued by defendant No. 6?
7. Whether defendant No. 1 committed breach of contract in not supplying to the plaintiff the contracted goods.
8. Whether a fraud was committed by defendant No. 6 and its Directors defendants No. 7 to 14 as alleged in the plaint?
9. Whether the suit has abated on account of the legal representatives of defendant No. 14 having not been imp leaded?
10. Whether plaintiff is entitled to recover Rs.2,17,000/- from defendants No. 17 & 18 and if so, is plaintiff entitled to interest on the said amount?
11. To what amount, if any, the plaintiff is entitled and if so, from which of the defendants?
12. Whether there was novation of the original contract as pleaded by defendants No. 1 to 5 & 19?
13. Whether plaintiff is entitled to interest? If so, on what amount and for which period?
14. Relief'
20. Plaintiff examined Mr. Omer Mohamed Mossallam as P.W.1 and Mr. Bharat Kumar Shah B. as P.W.2. The first defendant examined Mr. Lalit Kaushik, working as LDC with CBI, New Delhi as D1W1, the 5th defendant Mr. Ravi Upadhaya as D1W2 and Mr. B.M. Gupta as D1W3.
21. The 6th defendant examined Mr. Kuldip Singh, a Director of the 6th defendant Co. as D6W1. The defendants 17 and 18 examined Mr. S.K. Issar as D17W1.

22. The plaintiff had filed documents Ex. P.1 to P.37 and P.39. There is no document marked as Ex. P.38. Wrongly at the time of the trial the document which should have been marked as Ex. P.38 had been marked as Ex. P.39. This is only to clear the record.

23. First defendant marked Ex.D1W1/1 to D1W1/17 through Mr.Ravi Upadhaya, the 5th defendant. Through Mr. B.M. Gupta D1W3 the first defendant marked Ex.D1W3/1 to D1W3/14. The 6th defendant did not file any documents. The Syndicate Bank defendants 17 and 18 did not file any documents.

24. Before I enter upon an analysis of the oral evidence and the documents filed by the parties, I feel it is better I record the chronological events as emerging out of the documents produced which would enable me to comment on the oral evidence later on when I consider it.

25. Ex. P.5 dated 9.11.1978 is an agreement between the first defendant now Varuna Overseas Pvt. Ltd., previously Dhar General Overseas Pvt. Ltd. United Arab Agencies was appointed as the agent of the first defendant. The agreement reads as under :-

'Agency Agreement.

First Party : M/s. United Arab Agencies, A1-Maghrabi Building Apartment No. 101, P.O. Box No. 1045, Jeddah as Agent. Second Party: M/s Dhar General Overseas Private Limited, 8, Malcha Marg Market, Chanakyapuri, N. Delhi-21 having its registered office at D.C.M. Premises, Bara Hindu Rao, Delhi-110006 as Supplier.

It is hereby agreed that the 'Second Party' has appointed the first party as their agent for the territory of Jeddah, Saudi Arabia for supply of engineering and allied items manufactured in India.

The Agent will try to attain maximum amount of business for the Supplier. This Agreement begins from 1st October, 1978 and will remain in force until 30th September, 1980. It can be further extended with the mutual consent of both the parties.

The Supplier will allow a commission not exceeding 5% on FOB value to the Agent on all orders received and realisations made through the Agent. The remittance commission will be made by Bank Draft after each negotiation of the documents and after the receipt of money into the Indian Bank.

The Agent will watch the interest of the supplier regarding procurement of business, opening the letter of credit and promoting further business.

In accordance to the above terms and conditions both parties affix their stamp and signatures hereunder.'

26. What is now stated by the first defendant is M/s United Arab Agencies was only an agent of the plaintiff. On 21.11.1978 a telex message was sent by the 5th defendant Sh. Ravi Upadhaya (Ex. P.26) on behalf of the first defendant to United Arab Agencies to get an order for S.No. 688.81 export of 2000 M.T. M.S Bars. The 5th defendant had mentioned therein that the Letter of Credit should be opened through Syndicate Bank, Foreign Exchange Branch, Connaught Place, New Delhi.

Under Ex. P.2 of 22.11.1978 the United Arab Agencies, acting as Commission Agents, what is called an order sheet No. 548/78 informed the plaintiff that the first defendant would be sending 1000 MTS of M.S. Round Bars. The total value is mentioned as 3,44,000/- US Dollars. The shipment was to be made from Indian within a period of 90 days from 22.11.1978. Ex. P.3 is of the same date which is also called order sheet No. 549/78 for 1,000 MT mentioning the same details about the quality and price as in Ex. P.2. On 23.11.1978 (Ex. P.1) the plaintiff opened Letter of Credit for 6,80,000 US Dollars in favor of the first defendant, which was called Dhar General Overseas Pvt. Ltd. The money was payable at Calcutta. The validity period was fixed up to 3.3.1979. On 2.12.1978 the first defendant wrote to the United Arab Agencies under Ex. P.6 in the following terms :-

'This has reference to your letter No. 972/78 dated 25th November, 1978 and your letter 977/78 dated 25th November, 1978. I was glad to know you had a pleasant stay in Delhi and I could make some minor contribution towards making your stay a happy one.

M/s. Ben-Mahfouz L/C of 500 tons is ready for execution but is still awaiting the two L/C amendments called for, but till date they have not come through. M/s Al-Mustaneer L/C of 2000 tons is being taken care of. I am awaiting the 'divisible' amendment which was agreed to be made by you.'

27. The 6th defendant (Kupal Material and Metal Pvt. Ltd.) on 22.12.1978 (Ex.D1W3/14) wrote to the first defendant requesting for the transfer of the Letter of Credit in the name of the 6th defendant :-

'With reference to the dimensions the undersigned had with your Mr. Ravi Upadhaya over the last many days for the transfer of L/C No. 2965. In this connection we have to mention that this L/C may please be transferred to us today definitely.

Kindly also refer our letter No. G.26/78/4564 dt. 21st Dec., 1978, wherein we requested you to transfer the balance 1000 M.Tons on our association M/s Oberai Exports, Sheraton Hotel, Nariman Point, Bombay.

Please note that all the shipments would be made by us only and also complete 2000 M.Tons of goods of this L/C would be shipped by us to Hodeidah in the same ship by January.

Please be sure that the transfer of this L/C would be done today itself, so that the arrangements of 2000 M.Tons can be made with our mills for the production.'

28. On 23.12.1978 the Manager, Canara Bank, Diplomatic Enclave, New Delhi sent a communication under Ex. P.36 in the following terms :-

'THE REQUEST OF OUR CUSTOMER DHAR GENERAL OVERSEAS PVT. LTD. 8 MALCHA MARG MARKET, CHANKYAPURI, NEW DELHI M 21 WE TRANSFER THIS L/C TO THE EXTENT OF US \$ 3,40,000/- (US DOLLARS THREE LACS FORTY THOUSAND ONLY) TO M/S KUPAL METALS & MATERIALS PVT. LTD., LOBBY NO. 3 KANCHANJUNGA BUILDING, 18 BARAKHAMBA ROAD NEW DELHI-110001, ON THE SAME TERMS AND CONDITIONS OF THE ORIGINAL L/C SUBJECT HOWEVER TO THE FOLLOWING CONDITIONS :-

1. AT THE TIME OF NEGOTIATION OF DOCUMENTS IN THE AFORESAID L/C, THE NEGOTIATING BANK WILL DEDUCT THE FOLLOWING AMOUNT AND REMIT THE SAME BY MEANS OF DEMAND DRAFT TO DHAR GENERAL OVERSEAS PVT. LTD., 8 MALCHA MARG MARKET CHANKYAPURI NEW DELHI-21 WITHOUT ANY COST TO THEM :

A) A SUM OF US \$ 5 PER M.T. THE CONSIDERATION AMOUNT FOR THE TRANSFER OF L/C ON 1000 M.T. WHICH WORKS OUT TO US \$5000/- EQUIVALENT TO INDIAN RUPEES.B) COMMISSION AT ONE PERCENT ON F.O.B. VALUE IS ALSO TO BE DEDUCTED AT THE TIME OF NEGOTIATION AND WILL BE PAID TO DHAR GENERAL OVERSEAS PVT LTD. 8 MALCHA MARG MARKET, CHANKYAPURI NEW DELHI-21 ON ACCOUNT OF THE COMMISSION PAYABLE TO THE FOREIGN AGENT.

2. ONE SET OF NON NEGOTIABLE DOCUMENTS SHOULD BE FORWARDED BY THE NEGOTIATING BANK TO DHAR GENERAL OVERSEAS PVT. LTD. 8 MALCHA MARG MARKET CHANKYAPURI NEW DELHI-21 Along with THE DRAFT.

3. ANY ENHANCEMENT IN THE VALUE OF L/C WILL ONLY BE TRANSFERRED AFTER GETTING INSTRUCTION FROM DHAR GENERAL OVERSEAS PVT. LTD. 8 MALCHA MARG MARKET CHANKYAPURI NEW DELHI-21.

4. ALL THE BANK CHARGES RELATING TO THE AFORESAID L/C REGARDING TRANSFER, AMENDMENT, NEGOTIATING ETC WILL BE BORNE BY M/S KUPAL METALS & MATERIALS PVT LTD. LOBBY NO. 3, KANCHANJUNGA BUILDING, 18 BARAKHAMBA ROAD, NEW DELHI 110001. A PAYMENT OF RS. 3351.66 HAS ALREADY BEEN EFFECTED TO M/S BANQUE NATIONALE DE PARIS CALCUTTA AS THEIR L/C CONFIRMATION CHARGES. THIS MAY BE REMITTED TO DHAR GENERAL OVERSEAS PVT LTD. ALONG WITH THEIR COMMISSION.

5. THE QUANTITY BREAKUP OF THE 1000 MT TO BE SUPPLIED BY YOU IS:

6mm/10mm/12mm/14mm/16mm.

100 MT/200MT/250MT/200MT/250MT.

6. THIS TRANSFER IS VALID FOR SHIPMENT AND NEGOTIATING up to 3.3.1979. THEREAFTER THE SECOND BENEFICIARY WILL NO MORE BE A PARTY TO THIS TRANSFER UNLESS AGREED TO, IN WRITING BY DHAR GENERAL OVERSEAS PVT. LTD. THIS TRANSFER IS EFFECTED BY US WITH- OUT ANY RISK, RESPONSIBILITY AND UNDERTAKING ON OUR PART.'.

29. Mr. B.M. Gupta (D1W3), who was working with the first defendant at the relevant time, would state in his evidence that Ex. P.36 is a transfer endorsement of part of Letter of Credit in favor of the 6th defendant. On 25.12.1978 the first defendant Dhar Overseas wrote to the bankers in Jeddah of the plaintiff (Ex.P.7) in the following terms :-

'Sub: L/c No. 2965 amounting to US \$.6,80,000 for 2000 tons of M.S. Round Bars. We have received the above referred L/C, duly confirmed by Banque Nationale De Paris, Calcutta. It has been observed from the L/c that while opening the same Along with the expiry date, the expiry place has been mentioned as Calcutta-India. We shall be thankful if you kindly amend the L/c, so that the negotiation of the documents is not restricted to Calcutta only but anywhere in India. Since it is un-restricted L/c, the bankers take it otherwise and feels that it is restricted only to Calcutta.

You are requested to kindly delete the word 'Calcutta' from the column of 'Expiry place' and confirm us accordingly at an early date.'

30. On the 19th of January 1979 (Ex. P.8) the first defendant wrote to P.W.2 Mr. B.K. Shah of United Arab Agencies in the following terms :-

'I have just, received your letter No. 62/79 dated 15.1.79, pointing out the irregularities in our first business. I would like to explain that these are not irregularities but delays on the part of the bank. The B/L for 500 tons was issued by the bank to us on the 18th January 1979, as the documents were negotiated on

the 16th of January, 79. This was received by us in our office this morning, and immediately on receipt of this I am sending you the same for your information. I hope this would satisfy you.. With reference to the Yemen steel L/C it has been transferred and would be executed in time. The L/c validity is till March 79, but shipment would be affected by Feb.79. Please be rest assured about it.

With regards to the sundry goods, they are lying in the docks and the B/L would have by now been taken by our shipping agent in Bombay. Immediately on receipt of the same they will be passed on to you.

With regards to the sample of brushes and sanitary fittings I distinctly remember leaving one set of paint brushes with Mr. Abdul Qayyum. I would request you to kindly check with him once again. However am posting 1 paint brush to you.

I have been really trying to give personalised service and would sincerely and earnestly assure you not to get any feeling of past experience which resulted in the absence of business for a long time between our two firms. You yourself would agree that it is the first time that we have affected steel shipment much before the L/C expiry date and the delay in dispatch of B/L was only because the bank could forward it on the dates mentioned above. I hope this would pacify you on the above points.'

31. On 27.1.1979 (Ex. P.12) first defendant again wrote to P.W.2 in the following terms :-

'I have, on the 25th January, '79 immediately after return from Bombay, sent you a telex which I quote below :-

'STEEL PRICES UNDER REVISION BY SAIL (.) REGRET AT PRESENT CANNOT BOOK

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