# Globus Agronics Limited Vs. Banque National De Paris and anr.

Globus Agronics Limited Vs. Banque National De Paris and anr.

**SooperKanoon Citation** : sooperkanoon.com/697399

**Court** : Delhi

**Decided On :** May-06-1999

**Reported in** : 1999IIIAD(Delhi)780; 79(1999)DLT500; 1999(50)DRJ212; (1999)122PLR42

**Judge** : S.K. Mahajan, J.

**Acts** : Code of Civil Procedure (CPC), 1908 - Order 7, Rule 11

**Appeal No.** : No. 9814/98 in Suit No. 1111/98

**Appellant** : Globus Agronics Limited

**Respondent** : Banque National De Paris and anr.

**Advocate for Def.** : Mr. M.S. Nargolker, Sr. Advocate, ; Mr. M. Taiyab Khan and ;

**Advocate for Pet/Ap.** : Mr. Mr. H.L. Tikkuwith,;Ms. Yashmeet Kaur; Mr. R.K. Tomma and;

**Judgement** :
ORDER

**S.K.Mahajan, J.**

1. The plaintiff filed the suit under Order 37 of the Code of Civil Procedure for recovery of Rs.3,50,84,500/- on the allegations that it had contracted to sell

'Fermentation Ethanol' made from Molasses to an overseas party named M/s Kolmar PetroChemicals AG, Switzerland. Under the agreement entered into between them on 29.9.1997 and the buyer was to provide a Documentary Irrevocable Letter of Credit payable at sight at the counters of an Indian bank against presentation of documents for payment of price of goods under the said contract. On the request of the buyer and in terms of the agreement between the parties defendant no.2 as banker of the buyer issued a confirmed Letter of Credit in favor of the plaintiff envisaging payment through defendant no.1 bank at its counter in Delhi. The value of the Letter of Credit was US$ 7,40,000/- with unit sale price as US$ 370/- per MT. The terms of irrevocable Letter of Credit were stated to have been amended by issue of confirmation letters by both the defendants. The value of the Letter of Credit was increased to US$ 7,55,000/- (plus and/or minus 5%) and unit price increased from US$ 370 per MT to US$ 377.50 per MT. Defendant no.1 is alleged to have confirmed its duties and obligations to the plaintiff in payment of amount under the Letter of Credit upon presentation of documents and recovered from the plaintiff the charges in relation to the confirmation of the Letter of Credit established in favor of the plaintiff by debiting plaintiff's current account with defendant no.1. The agreed quantity of Fermentation Ethanol duly inspected in accordance with the contract by the notified agency were exported to the buyer and the documents drawn in terms of the Letter of Credit were tendered for payment at the counters of defendant no.1.The documents were found by defendant no.1 to be in accordance with the Letter of Credit and the plaintiff was assured that its account will be credited with the amount covered by the Letter of Credit. No payment was, however, credited to the account of defendant no.1 bank either within a reasonable time or during the validity of the irrevocable Letter of Credit or at all. On being asked as to why the payment was not being made, some evasive pleas were taken by defendant no.1 for non-payment of the amount to the plaintiff. A notice dated 26.12.1996 was served upon the defendants, reply to which was received by the plaintiff. It was stated that the defendants by virtue of being the opening bank and the confirming bank assumed distinct and independent obligations to pay to the plaintiff the amount in the suit which is the value of the irrevocable Letter of Credit. As the amount was not paid inspire of the notice having been served upon the defendants, the plaintiff filed this suit under Order 37 of the Code of Civil Procedure stating the same to be covered by classes of suits defined in the said Order.

2. On the summons being served upon the defendants, defendant no.2 besides filing an application for leave to defend also filed an application under Order 7 Rules 10 and 11 read with Section 151 C.P.C. for rejecting the plaint and/or returning the same for presentation to the proper court on the ground that this Court has no territorial jurisdiction to try and determine the present suit. It is this application of defendant no. 2 which is being disposed of by this order.

3. The case set up by defendant no.2 in this application alleging that this Court has no territorial jurisdiction to try the suit is that:

(a) the transaction between the parties was governed by the Uniform Customs and Practice for Documentary Credits 1993 revision (for short referred to as UCP 500);

(b) in terms of UCP 500 defendant no.2 was the 'issuing bank' and under the subject letter of credit the said defendant designated defendant no.1 as the 'nominated bank' and stated that the payment of the Letter of Credit shall be made at sight at the counters of defendant no.1;

(c) defendant no.1 was not and never had been the agent of defendant no.2 at any point of time and was not bound to act on the directions of defendant no.2;

(d) defendant no.1 being so entitled under UCP 500, did not accept the designation/responsibility of a nominated bank under the subject letter of credit as requested by defendant no.2 and instead preferred to remain only an advising bank within the meaning of UCP 500;

(e) documents to be paid under the Letter of Credit are not payable at New Delhi but had to be sent to defendant no.2 at Basle, Switzerland for payment;

(f) the execution of the Letter of Credit was at Basle, Switzer land, the performance and payment under the same was also to be only at Basle, Switzerland, defendant no.1 has acted agent of plaintiff by sending the documents to defendant no.2 and not vice a versa and no part of cause of action has accrued within the territorial jurisdiction of this Court.

4. On these averments it is stated by defendant no.2 that this Court has no territorial jurisdiction to decide this suit.

5. It is not disputed that the Letter of Credit is subject to Uniform Customs and Practice for Documentary Credits 1993 revision, published by the International Chamber of Commerce, Paris (commonly known as UCP 500). According to defendant No.2, for the purpose of deciding this application it will be useful to know as to what is meant by credit, the issuing bank, the advising bank, the nominated bank and confirming bank etc. within the meaning of UCP 500. Article 2 gives the meaning of credit whereas Article 7 mentions about the liability of the advising bank. Liability of the issuing and confirming bank is mentioned in Article 9 whereas the term 'nominated bank' appears in Article 10 of UCP 500. These Articles read as under:

'Article 2 Meaning of Credit

For the purposes of these Articles, the expressions 'Documentary Credit(s)' and 'standby Letter(s) of Credit: (hereinafter referred to as 'Credit(s), mean any arrangement, however, named or described whereby a bank (the 'Issuing Bank') acting at the request and on the instructions of a customer (the 'Applicant') or on its own behalf,

i. is to make a payment to or to the order of a third party (the 'Beneficiary'), or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary.

or

ii. authorises another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)),

or

iii. authorises another bank to negotiate, against stipulated document(s), provided that the terms and conditions of the Credit are complied with.

For the purpose of these Articles, branches of a bank in different countries are considered bank.

Article 7 Advising Bank's Liability

a. A credit may be advised to a Beneficiary through another bank (the 'Advising Bank') without engagement on the part of the Advising Bank, but that bank if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the Credit which it advises. If the bank elects not to advise the Credit, it must so inform the issuing Bank without delay.

b. If the Advising Bank cannot establish such apparent authenticity it must inform, without delay, the bank from which the instructions appear to have been received that it has been unable to establish the authenticity of the Credit and if it elects nonetheless to advise the Credit it must inform the Beneficiary that it has not been able to establish the authenticity of the Credit.

Article 9 Liability of Issuing and Confirming Banks

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).

b. A confirmation of an irrevocable Credit by another bank (the 'Confirming Bank') upon the authorisation or request of the Issuing Bank, constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated 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 Confirming Bank - to accept Draft(s) drawn by the Beneficiary on the Confirming 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 Confirming 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 negotiate 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).

c. i. if another bank is authorised or requested by the Issuing Bank to add its confirmation to a Credit but is not prepared to do so, it must so inform the issuing Bank without delay.

ii. Unless the issuing Bank specifies otherwise in its authorisation or request to add confirmation, the Advising Bank may advise the Credit to the Beneficiary without adding its confirmation.

Article 10 Types of Credit

a. All Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation.

b. i. Unless the Credit stipulates that it is available only with the Issuing Bank, all Credits must nominate the bank (the 'Nominated Bank') which is authorised to pay, to incur a deferred payment undertaking, to accept Draft(s) or to negotiate. In a freely negotiable Credit, any bank is a Nominated Bank.

Presentation of documents must be made to the Issuing Bank or the Confirming Bank, if any, or any other Nominated Bank.

ii. Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate. Mere examination of the documents without giving of value does not constitute a negotiation.

c. Unless the Nominated Bank is the Confirming Bank, nomination by the Issuing Bank does not constitute any undertaking by the Nominated Bank to pay, to incur a deferred payment undertaking, to accept Draft(s), or to negotiate. Except where expressly agreed to by the Nominated Bank and so communicated to the Beneficiary, the Nominated Bank's receipt of and/or examination and/or forwarding of the documents does not make that bank liable to pay, to incur a deferred payment undertaking, to accept Draft(s), or to negotiate.'

6. It is the contention of Mr.Valmiki Mehta, learned counsel for defendant no.2 that defendants 1 and 2 are separate entities and in this case defendant no.1 had refused to act as the nominated bank but was acting only as an advising bank. He has drawn my attention to a document dated 1.10.1997 whereby defendant no.1 while acknowledging the Letter of Credit had informed defendant no.2 as under:

'IF THE CREDIT IS EXCLUSIVELY AVAILABLE WITH OUR BANK, OR TO BE CONFIRMED/REIMBURSED BY US, PLEASE NOTE THAT THIS ADVISE IS NOT TO BE CONSIDERED AS OUR COMMITMENT TO CONFIRM LCS, REIMBURSE CLAIMS AND NEGOTIATE DOCUMENTS. WE AT OUR DISCRETION MAY DECLINE TO CONFIRM/NEGOTIATE/REIMBURSE WITHOUT ASSIGNING ANY REASON THEREON. PLEASE GET THE RELEVANT PROVISIONS OF LC AMENDED SUITABLY.'

7. According to Mr. Mehta this advice clearly shows that there was no obligation on the part of defendant no.1 to make payment of the amount under the Letter of Credit to the plaintiff as it was acting only as an advising bank. Under Article 7 of UCP 500 a credit may be advised to a beneficiary through the advising bank without engagement on the part of the advising bank, but that bank, if it elects to advise the credit, shall take reasonable care to check the apparent authenticity of the credit which it advises. If the bank elects not to advise the credit, it must so inform the issuing bank without delay. According to Mr.Mehta, it is the liability of only the confirming bank/nominated bank to make payment under the Letter of Credit and this liability cannot be extended to the advising bank. Under Article 9 an irrevocable Letter of Credit constitutes a definite undertaking of issuing bank to pay at sight if the credit provides for sight payment. A confirmation of an irrevocable Letter of Credit by another bank upon the authorisation or request of issuing bank, constitutes a definite undertaking of the confirming bank, in addition to that of the issuing bank, provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and the terms and conditions of the credit are complied with.

8. At this stage of deciding the application of the plaintiff that this Court has no territorial jurisdiction to try this suit, in my view, it would not be appropriate to give

any finding as to whether defendant no.1 had no liability under the letter of credit to make payment to the plaintiff. Whether the liability of the advising bank is only restricted to confirmation of documents or it is also liable to make payment under the letter of credit will be decided only at the time of consideration of the application for leave to defend the suit. All that has to be seen by the court at this stage is whether any part of cause of action has arisen within the territorial jurisdiction of this Court and if so whether this Court has territorial jurisdiction to try the suit.

9. A bare perusal of the letter of credit which is the basis of the suit shows that the documentary credit was available by payment at sight at the counters of defendant no.1 at New Delhi against presentation of documents in original unless otherwise stated. It is not disputed by any of the Defendants that the documents were presented by the Plaintiff to Defendant No.1 in Delhi. It is also the admitted case of the parties that the documents being found in accordance with the letter of credit, Defendant No.1 recovered from the Plaintiff charges for acting as such by debiting the account of the plaintiff with the Bank. The question whether defendant no.1 is liable or not is not to be considered at this stage. As a bare perusal of the letter of credit shows that the amount was payable in Delhi, in my view, no further arguments were required on this question. Under section 20 of the Code of Civil Procedure a suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises. In terms of the letter of credit the money was payable in Delhi. The place where money is payable will be a forum for filing the suit, though the document itself was executed outside the jurisdiction of that forum. Moreover, defendant No.1 carries on business in Delhi. That itself can give jurisdiction to Delhi Courts. Apart from a specific clause appearing in the letter of credit that the amount was payable in Delhi, in my view, as the documents were also accepted by defendant no.1 in Delhi for transmitting them to defendant no.2, there cannot be any escape from the conclusion that a part of cause of action has accrued within the territorial jurisdiction of this Court. The reference to 'issuing bank', 'confirming bank' etc. in U.C.P. 500, in my view, has no relevancy to the questions involved in the present application.

10. For the foregoing reasons I am of the view that this Court has territorial jurisdiction to try the suit. There are no merits in the application and the same is accordingly dismissed with costs assessed at Rs.5,000/-.