

SUPREME COURT OF INDIA

Fargo Freight Ltd.

Vs.

Commodities Exchange Corporation

C.A.Nos.456-457 of 2002

(S. N. Variava and A. Pasayat, JJ.)

03.08.2004

JUDGEMENT

S. N. VARIAVA, J.:-

1. These Appeals are against the Order of the Delhi High Court dated 17th July, 2001.
2. Briefly stated the facts are as follows :

The Appellants are the owners of vessel "DEKHODA" . They had chartered out the said vessel to the 1st Respondent. In respect of freight and demurrage charges, certain amounts became due and payable. For remitting this amount, the permission of the Reserve Bank of India was required. According to the Appellants, the 1st Respondent, through its Banker, the 2nd Respondent, was to apply for the Reserve Bank of India permission. In the meantime , parties agreed that the irrevocable Standby Letter of Credit would be opened. The 1st Respondent thus gave to the

Appellants irrevocable Standby Letter of Credit issued by the 3rd Respondent. After receipt of the irrevocable Standby Letters of Credit, the Appellants delivered possession of the cargo to the 1st Respondent. In respect of the amount of freight, Reserve Bank of India permission was taken and the amount was remitted. The 1st Respondent then raised the dispute in relation to the liability for the sum of USD 267, 000 for demurrage.

3. As the 1st and/or 2nd Respondents were not applying for Reserve Bank of India permission the Appellant invoked Arbitration as per the Charter Party Agreement. The Appellants then filed Suit No. 1746 of 1996, in the Delhi High Court. In the suit , the only allegations were against the 1st and 2nd Respondents. Even though the 3rd Respondent was a party to the suit, there were no allegations against them. However, the following prayers were made in the suit :-

"(a) Grant of decree of mandatory injunction directing the Defendants to keep the irrevocable Letter of Credit, issued by Global Trust Bank, Calcutta, bearing No.CA/FLC/011/96 dated 20th May, 1996 alive beyond it is present date of expiry 15th August, 1996, till the dispute is settled between the parties by the Arbitral forum culminating in a decree.

b) Grant a decree of permanent injunction directing the Defendants to perpetually keep alive the irrevocable Letter of Credit, issued by Global Trust Bank, Calcutta, bearing No. CA/FLC/011/96 dated 20th May, 1996 till the dispute is settled between the parties by the Arbitral forum culminating in a decree."

4. On 24th July, 1996 the Appellants obtained an ex parte ad interim order directing the Respondents to keep alive the irrevocable Letter of Credit. This meant that even if the 1st Respondent took no step to keep the Letter of Credit alive, the 3rd Respondent would be bound to keep it alive. At this stage, it must be mentioned that the 3rd Respondent was only the issuer of the Letter of Credit. It is settled law that a Letter of Credit transaction is a separate and independent transaction from the contract, if any, between the opener and the beneficiary Respondent. As issuer of the Letter of Credit, the 3rd Respondent was not concerned with the dispute between the Appellant and 1st Respondent. In the absence of any allegations against the 3rd Respondent bank, the Court should not have directed them to keep alive and/or extend the expiry date of Letter of Credit. The correct order should have been to call upon the 1st Respondent to keep alive the Letter of Credit. The Appellants by their letters dated 24th July, 1996 and 3rd August, 1996 intimated the 3rd Respondent about the passing of the said order.

5. At this stage, it must also be mentioned that while passing the ex parte ad interim injunction, the Court had also directed, Summons in the suit and Notice on the I.A., to be issued. The returnable date of both was 22nd of Nov., 1996. Thus, before 22nd Nov., 1996 the matters should not have been taken up for hearing. However, it appears that on 29th August, 1996 the Court confirmed the ex parte order even though the returnable date was 22nd Nov. 1996. The 3rd Respondent appeared

to have no knowledge of this hearing on 29th of August, 1996. The ex parte order is confirmed only after hearing Advocates for the 1st Respondent. Even at this stage the Court does not correct its order to only direct the 1st Respondent to keep it alive. The 1st Defendant had filed an Appeal against the order dated 29th August, 1996. However, that Appeal came to be withdrawn by the 1st Respondent on 12th March, 1998.

6. The 3rd Respondent obeys the order of the Court and extends the validity of the Letter of Credit from time to time. Thereafter, on 28th of May, 1997 the 3rd Respondent files an application for vacating the order. They contended that they were independent third parties and thus they could not be directed to extend the Letter of Credit. They contend that at the most the Court could direct Respondents 1 and 2 to apply to have the Letter of Credit kept alive and/or give adequate security. They point out that the order against them is prejudicially affecting them inasmuch as at the time of issuing the Letter of Credit they have taken certain securities on the footing that the validity of the Letter of Credit was only till 15th August, 1997. They point out that by having to keep the Letter of Credit open they are suffering a loss inasmuch as the value of the security has gone down. They pray that the Court may permit them to deposit in Court the sum of Rs. 28.34 lacs and 63,600 shares of the 2nd Respondent, which were taken by them as security while issuing the Letter of Credit.

7. On 14th January, 1998 the Appellants secure an Award in the Arbitration proceedings instituted against the 1st Respondent. Under the Award, they became entitled to receive US \$ 291,634.61 and \$ 29,368.24 plus interest at the rate of 8% p.a.

8. On 2nd Nov., 1998 the Appellants filed an Enforcement Petition being OMP No. 263 of 1998 in the Delhi High Court. Thus petition is for enforcement of the English Award dated 14th January, 1998. In this petition, the Appellants apply for a decree and an order permitting them to apply to the Reserve Bank of India. At the hearing of this application, the 3rd Respondent point out that the expiry period of the Letter of Credit was 15th August, 1996. They submit that they are not bound to make payment against this Letter of Credit. They submit that they cannot be made liable and that an order of the Court should not prejudicially affect them. They point out that they were not concerned with the dispute between the Appellants and the 1st Defendant. The Court instead of deciding these contentions records as follows :-

"He had also urged that the letter of credit on which reliance is being placed was to expire on 15-8-1996 and, therefore, the Bank is not bound to make payment against this document. This is the matter which will be dealt with subsequently"

"If and when the permission from the Reserve Bank of India is forthcoming, the extent of the liability of Respondent No. 3 in terms of and against the subject Letter of Credit would fall for adjudication. Learned counsel for Respondent No. 3 relies on some pronouncement of the Apex Court to the effect that is it has suffered loss on account of an injunction obtained by the opposite

party its liability to this extent would be diminished. Arguments on this point may be addressed on the next day of hearing."

9. The Court grants a decree in terms of the Award and permits the Appellants to apply to the Reserve Bank of India for permission to remit the amount.

10. Pursuant to this, the Appellants by their letter dated 2nd Sept., 1999, seek permission of the Reserve Bank of India for remittance of the demurrage. On 23rd Sept., 1999, the Reserve Bank of India grants permission in the following terms :-

"Remittance of USD 267000.00 in terms of Order passed by Delhi High Court in favour of M/s. Fargo Freight Ltd. Switzerland - A/c M/s. Commodities Exchange Corporation Ltd.

Please refer to your letter No. CAL/SR /873/99 dated 16th Sept., 1999 on the captioned subject. In this connection we advise having accorded our "in principle" approval for the above remittance subject to your ascertaining, prior to effecting the remittance, that no appeal is pending against the above Court Order/Award."

11. The Appellants then approach the 2nd Respondent for certification of Reserve Bank of India approval as is required under the Letter of Credit. The 2nd Respondent so certify on 11th Oct., 1999.

12. The 3rd Respondent now presses his application. Arguments are heard on this application on 6th Oct., 1999. Judgment is reserved and only delivered on 16th March, 2000.

13. On 30th Oct., 1999 the Appellants present to the 3rd Respondent a Bill of Exchange , Commercial Invoices and approval of RBI as certified by the 2nd Respondent. The 3rd Respondent conveys discrepancies in relation to the documents presented on 3rd Nov., 1999. The Negotiating Bank does not agree that there are discrepancies. The 3rd Respondent reiterates that there are discrepancies. The 3rd Respondent thereafter returns all the documents to the Negotiating Bank on 8th Feb., 2000. On 14th Feb. 2000 the Negotiating Bank remits the documents to the Appellants.

14. As stated above, on 16th March, 2000 the Delhi High Court delivered its judgment in the application of the 3rd Respondent. The Delhi High Court holds that by extending time and not

challenging the Orders the 3rd Respondent and acquiesced thereto. The High Court holds that the Appellants are not concerned with the nature and extent of collateral obtained by the 3rd Respondent. The Court holds that the 3rd Respondent should have obtained an appropriate order from the Court to safeguard itself. The Court holds that the 3rd Respondents are negligent. The Court holds that the 3rd Respondent cannot be allowed to deposit the amount of Rs. 28.34 lacs and the shares in Court and they must remain liable under the Letter of Credit.

15. On 21st July, 2000 the Enforcement Petition filed by the Appellants is taken up for hearing. To be noted that the Enforcement Petition is under Sections 46 to 49 of the Arbitration and Conciliation Act, 1996. It necessarily could be against the 1st Respondent only. The Court proceeds to consider whether or not the 3rd Respondent was entitled to reject the documents on the basis of discrepancies. The Court holds that there are no discrepancies and directs payment in terms of the irrevocable Standby Letter of Credit. On the same day, the Court also takes up Suit No. 1746 of 1996 and noting that it has already directed payment, disposes of the Suit as having become infructuous.

16. The 3rd Respondent file Appeals against the Orders dated 16th March, 2000 and 21st July, 2000. The Appeals have been allowed by the impugned judgment. The Division Bench holds that the contention of the 3rd Respondent, that time could not be extended and they could not be made to suffer by an order of this Court, have not been dealt with. The Division Bench holds that there is no estoppel and that the 3rd Respondent could not be said to have acquiesced. The Division Bench notes that a Letter of Credit is independent of the transactions between the parties and that the issuing bank is not concerned with the disputes between the parties. The Division Bench holds that in a proceeding to execute the Award, no order could have been passed against the 3rd Respondent as they were not concerned with the Award. The Division Bench holds that if at all a claim had to be made against the 3rd Respondent then garnishee proceedings under Order 21, Rule 46 of the CPC should have been taken out. The Division Bench thus set aside the above mentioned two orders and remits the interim applications back to the single Judge for adjudicating in accordance with the procedure laid under Order 21, Rule 46, CPC.

17. Mr. Sundaram on behalf of the appellants has submitted that the Appellants as beneficiary of the Letter of Credit, were entitled to receive the amounts under the Letter of Credit. He submitted that a Standby Letter of Credit is in the nature of security. In support of this submission, he relies upon the following observations in the case of *New Braunfels National Bank, Et Al v. James T. Odiorne, Receiver of Southern International Insurance Co. Ltd.* (780 SW 2d 313).

"A letter of credit is termed "commercial" when the underlying transaction involves the sale of goods and the credit becomes payable upon the presentation of documents showing that the seller has complied with the sales agreement, a credit is termed "standby" when it functions in a non-sale setting and generally becomes payable upon certification of the obligor's non-compliance with the underlying agreement. See *Republic Nat'I Bank*, 578 SW 2d at 113-14."

18. He submits that the proceedings for enforcement of the Award are in the nature of execution proceedings and that in such execution proceedings the appellants were entitled to make a claim even against the 3rd respondent by virtue of S. 145, Civil Procedure Code. He submits that by not immediately challenging the order, calling upon them to keep alive the letter of credit, the 3rd respondent had acquiesced in the order. He submitted that by keeping quiet the 3rd respondent has assisted the 1st respondent and 2nd respondent in playing a fraud on the appellants. He submitted that the appellants' claim was under the Letter of Credit. He submitted that such claim arose only after the Award given by the Arbitrator. He submitted that, therefore, the appellants were entitled to have the Letter of Credit kept alive and also to claim in the Letter of Credit in these proceedings. He submitted that the learned single Judge had rightly held that there were no discrepancies and that the rejection by the 3rd respondent, on the ground that there were discrepancies, was not valid.

19. On the other hand Mr. Sanghi submitted that the 3rd respondent was merely an issuer of the Letter of Credit. He submitted that the 3rd respondent was not concerned with the dispute between the appellants and the 1st respondent. He submitted that a Letter of Credit is an independent transaction which has to be enforced strictly in accordance with its terms and conditions. He submitted that one of the terms and conditions was that the presentation of the documents was to be on or before 15th August, 1997. He submitted that the 3rd respondent being an independent party, not concerned with the disputes between the 1st and 2nd respondents, could not have been called upon to keep the Letter of Credit alive. He submitted that at the highest the Court could have called upon the 1st and/or 2nd respondent to have the Letter of Credit kept alive. He pointed out that no order should have been passed against the 3rd respondent as there were no averments made against the 3rd respondent in the suit filed by the appellants. He submitted that merely because the 3rd respondent obeyed orders of this Court could not mean that they had acquiesced and/or that they are estopped from raising the contentions that after 15th August, 1997 they were not liable to honour the Letter of Credit. He submitted that, therefore, the presentation of the documents after 15th August, 1997 was not valid and the 3rd respondent could not be forced to pay.

20. In the alternative, he submitted that even if this Court holds that the time had been validly extended and that the presentation was within the validity period of the Letter of Credit, the documents presented were not in accordance with the Letter of Credit and were discrepant. He submitted that the Court could not have been, in these proceedings, decided whether there were discrepancies and could not have been called upon the 3rd respondent to pay the amount.

21. We have heard the parties. In our view, Mr. Sanghi is right that a Letter of Credit is an independent transaction. The issuing bank is not at all concerned with the contract and/or dispute between the opener and the beneficiary. Also to be noted that the 3rd respondents were not parties to the arbitration proceedings and there is no Award directing payment by the 3rd respondent. In our view, Mr. Sanghi is also right that the Court should not have passed an interim order, which affected the rights of an issuing banker. In the absence of fraud or some other act on the part of the issuing bank, they cannot be called upon to extend the validity period. At the highest the Court could have

directed the 1st respondent to keep alive the Letter of Credit. By directing an issuing bank to keep a Letter of Credit alive, the Court is likely to cause prejudice to the issuing bank inasmuch as the value of the security may deteriorate. We cannot accept the submission of Mr. Sanghi that the 3rd respondent was not bound by the interim order. However, wrong the order may be the 3rd respondent was bound by the order. By not immediately challenging the order and keeping the Letter of Credit alive, the 3rd respondent took the risk of having to pay, if documents in conformity with the Letter of Credit, were presented to it. They were bound to extend from time to time the validity period of the Letter of Credit. The 3rd respondents were negligent in not pursuing their application and in not having the orders directing them to keep the Letter of Credit alive, set aside or challenged in a high of form. However, obeying an order of the Court does not amount to acquiescence and does not estopp 3rd respondent from contending that they cannot be made liable as documents presented are discrepant.

22. Between the parties, there is a serious dispute as to whether or not discrepant documents had been submitted to the 3rd respondent. We do not wish to express any opinion on that question as it may prejudice either one or the other party.

23. The question, which really needs to be answered, is whether in these proceedings any order could have been passed against the 3rd respondent directing them to make payment.

24. As stated above, the suit was a limited suit. The only prayer was that the Letter of Credit be kept alive. In the suit, there are no averments or allegations against the 3rd respondents. Once the Letters of Credit was kept alive, the suit became infructuous. The learned Judge was right in dismissing the suit as having become infructuous. In this suit, with an amendment and there being proper averments and prayers, the dispute between the appellant and 3rd respondent pertaining to discrepancy could not have been decided.

25. The enforcement petition was for enforcing the English Award. It was under Ss. 46 to 49 of the Arbitration and Conciliation Act, 1996. In such proceedings, the enforcement has necessarily to be between the parties to the Award. In such proceedings, serious disputes regarding the liability of third persons to pay up could not be decided. Once the dispute arose, as to whether or not the documents were discrepant, the Court should have directed the appellants to have that dispute decided by a competent Court in an appropriate proceeding. Provisions contained in Part II of the Arbitration and Conciliation Act, 1996 do not permit Courts to decide such disputes with third parties in such proceedings. To that extent, the Division Bench is right. Such a dispute could not have been decided in these proceedings. In our view, however, the Division Bench was wrong in remitting the matter back for following the procedure under O. 21, R. 46, C.P.C. Order 21, Rule 46, C.P.C., deals with garnishee proceedings. These apply when monies of the judgment-debtor are in the hands of third parties. In cases of Letter of Credit the liability of the issuing bank is an entirely independent liability. It cannot be said that the monies payable by the issuing bank are monies belonging to the judgment-debtor. Thus, the claim, if any, can only be decided in independent

proceedings which should have been adopted by the appellants.

26. In this view, we see no infirmity in the judgment of the Division Bench to the extent that it sets aside the orders directing payment to be made by the 3rd respondent to the appellants.

27. At this stage, Mr. Sundaram after taking instructions from his clients informs the Court that the appellants are willing to accept the sum of Rs. 28 lacs and 63600 shares, which had been offered by the 3rd respondent to be deposited in the High Court. He states that the appellants will accept these in full discharge of the liability of the 3rd respondent under the Letter of Credit and that the appellants will seek to recover the balance from the 1st respondent in terms of the Award.

28. As the 3rd respondent had themselves offered and with a view to put an end to this unfortunate litigation, we direct as follows :

The Registry of this Court to pay to the appellants a sum of Rs. 28 lacs, with accrued interest thereon, from out of the amount deposited by the 3rd respondent in this Court pursuant to the order dated 14th January, 2002. The balance of the amounts so deposited, along with interest accrued thereon, to be returned to the 3rd respondent. The 3rd respondent is also in possession of 63600 shares of the 2nd respondent. The transfer forms for such shares are in the name of the 3rd respondent. The 3rd respondent is directed to sell these shares in consultation with the Advocate-on-Record of the appellants. The sale proceeds thereof to be handed over to the appellants. On payment of this amount of Rs. 28 lacs with accrued interest thereon and on sale of the 63600 shares, the 3rd respondent shall stand discharged of its liability under the Letter of Credit.

29. The appeals stand disposed of in the above terms. There will be no order as to costs.

Order accordingly.