

(2009) 10 MAD CK 0213

Madras High Court

Case No: OSA No. 72 of 2009 and MP No"s. 1 and 2 of 2009

Garware-Wall Ropes Limited
Geosynthetic Division

APPELLANT

Vs

Marg Limited (Formerly Marg
Constructions Ltd.) and Federal
Bank Ltd.

RESPONDENT

Date of Decision: Oct. 12, 2009

Acts Referred:

- Constitution of India, 1950 - Article 14

Citation: (2009) 5 LW 513 : (2009) 8 MLJ 1585

Hon'ble Judges: R. Subbiah, J; M. Chockalingam, J

Bench: Division Bench

Advocate: T.V. Ramanujun for Udwadia and Udeshi Solicitors, for the Appellant; R. Krishnamoorthy for S. Raghunathan, for R1 and M. Vaidyanathan, for R2, for the Respondent

Final Decision: Dismissed

Judgement

M. Chockalingam, J.

This appeal has arisen from the order of the learned Single Judge of this Court allowing an application in O.A. No. 1202 of 2008 filed by the first respondent/plaintiff seeking for interim injunction restraining the appellant/first defendant from claiming or demanding any amount under the letter of credit No. MDSC/INLC/ML/I/08-09 dated 14.7.2008 or under its amended one dated 4.8.2008 issued by the second respondent without delivery of materials at the site and consequently restraining the second respondent from effecting any payment to the appellant under the letter of credit.

2. The above application has been filed by the first respondent/plaintiff with the following averments:

(a) The first respondent, a construction company, called offers from several contractors for various works at the proposed Port including construction of a reinforced wall around the Port. The appellant submitted its offer on 16.6.2008 for supply of Soil reinforcement consisting of Tensar Geogrids, Polymer Connectors, Geotextile, etc., for the Reinforced Soil Retaining Wall System. As per Clause III of the offer, the payment was to be made through an irrevocable letter of credit payable in thirty days from the date of invoice and bill of lading with lorry receipt. As per Clause VI, the supplies were to be commenced within 8 weeks and completed within 12 weeks from the date of opening of the letter of credit. The first respondent issued a letter of award on 17.6.2008. The value of the order was Rs. 2,04,08,700/-. As per Clause 2 of Annexure I to the Letter of Award, 95% of the order value was required to be paid through irrevocable letter of credit. The balance 5% of order value was to be retained by the plaintiff as retention money which was to be released on expiry of defects liability period. As per Clause 4 of Annexure I, the appellant agreed to complete the total supply of materials within 8 weeks from the date of receipt of the order. On 23.6.2008, the letter of award was modified, and the time schedule for completion of the supplies was extended to 12 weeks. The payment terms was also amended to 100% of the order value to be paid through irrevocable letter of credit on the appellant furnishing a bank guarantee for 5% of the order value.

(b) The appellant submitted a proforma invoice for supply of materials on 28.6.2008. On 14.7.2008, the second respondent issued an inland irrevocable letter of credit for an aggregate sum of Rs. 2,03,84,373/-. In terms of the letter of credit, the appellant was required to submit certain documents for negotiating payment under the letter of credit. The second respondent agreed that payment would be effected only in the event of compliance with the terms and conditions of the letter of credit and presentation and delivery of documents specified in the letter of credit.

(c) On 22.7.2008, at the request of the appellant, the conditions with regard to the time schedule for supply was modified. On 4.8.2008, the letter of credit was modified. The appellant failed to supply the materials in accordance with the terms of the work order. Payments have been effected with regard to supplies that were made by the appellant upto 12.9.2008. After 12.9.2008, no materials have been delivered by the appellant at the Port site. With regard to the work of construction of the reinforced wall, the appellant submitted its offer dated 18.6.2008. The first respondent has awarded the same to the appellant under the letter of award dated 19.6.2008. On 30.10.2008, the first respondent was surprised to receive a request from the second respondent to accept a bill of exchange drawn by the appellant and negotiated for payment under the letter of credit. As no materials had been delivered by the appellant after 12.9.2008 and all payments for materials delivered at site had been effected, the first respondent immediately requested the second respondent to provide the documents furnished by the first respondent for claiming payment under the letter of credit. On perusal of the documents, the first

respondent was surprised to note that the appellant had alleged that certain materials were despatched on 15/16.10.2008 and had furnished the lorry receipts signed by its engineer purportedly at the Port site acknowledging delivery of materials. But, the said materials have not been actually delivered till date at the first respondent's project site. The appellant is playing a fraud on the first respondent by claiming payment under the letter of credit for materials which have not been delivered till date.

(d) The first respondent wrote a letter to the appellant on 3.11.2008. The first respondent has found several discrepancies in the documents submitted by the appellant and it was also brought to the notice of the second respondent vide letter dated 4.11.2008. The first respondent is given to understand that the second respondent bank despite being fully aware of the aforesaid facts may not reject the fraudulent claim made by the appellant. The appellant has also set up a ground that the goods had been delivered. On verification of the entry register maintained at the Karaikkal Port, the first respondent found that neither the appellant's materials nor any of their lorries/vehicles had entered the Port on 16.10.2008. The appellant is clearly making a false and fraudulent claim under the letter of credit. In the event of the second respondent being compelled to effect payment under the letter of credit in respect of a claim which is based not only on fraudulent documents but also on discrepant documents, the first respondent would suffer irretrievable injury and hardship. The appellant has not only failed to complete the delivery of materials but also completely failed in execution of the work. Irreparable hardship and great prejudice would be caused to the first respondent, if the appellant is not restrained from perpetuating a fraud on the first respondent and to restrain the second respondent bank from effecting any payment contrary to the terms and conditions of the letter of credit dated 14.7.2008 and as amended on 4.8.2008. Hence the application.

3. The appellant herein filed a counter affidavit with the following averments:

(a) The appellant made supply of goods on various dates including 14.8.2008, 31.7.2008, 6.8.2008, 21.8.2008 and 12.9.2008 apart from the materials despatched on 15.10.2008 and 16.10.2008. The plaintiff has also made payments to the tune of Rs. 77 lakhs. The letter of award dated 18.6.2008 with regard to design and construction of Soil Reinforcement Wall at the Karaikkal Port is a separate and independent work project as agreed to by both the parties, and the LC was issued separately towards the above letter of award. The execution of the second letter of award dated 18.6.2008 has absolutely no connection to the supply of the materials more fully stated in the first letter of award dated 17.6.2008. Without the plaintiff completing his part of the work, the appellant will not be in a position to complete the project and execute the second letter of award. The remaining materials were actually despatched by the appellant through the Transporters, and when the goods reached the destination port site, the plaintiff did not allow the entry of goods into

the site premises. The plaintiff failed to accept delivery. The six carriers were lying in the main road for several days with the materials. Due to the sudden change of attitude and complete non-cooperation of the plaintiff, the appellant left with no other option than to take the materials to Pondicherry and the same were unloaded and stocked at the godown of M/s. Praveen Transporters, Pondicherry. The above materials worth more than Rs. 1 crore are still kept in that godown since 22.10.2008 on payment of huge sums of money creating loss and hardship to the appellant which cannot be compensated in terms of money.

(b) While the matter stood thus, the appellant proceeded to invoke the letter of credit for the balance amount based on the fact that the goods despatched to be delivered at the Karaikkal Port site were in fact reached the destination as per the condition of the letter of credit dated 14.7.2008, but not allowed to pass the gate of the plaintiff. The appellant by despatching and delivering/reaching it at the destination port site had complied with all the necessary conditions set forth in the letter of credit dated 14.7.2008. Article 14 of UCP 600 provides for a time within which the discrepancies if any to be communicated to the nominated banks. When the time limit prescribed by the UCP 600 expires, the banks have no alternate but to permit the invoking of LC.

(c) It is only due to the fault and non-acceptance on the part of the plaintiff that the appellant was unable to unload the materials on the aforesaid dates and the appellant cannot be faulted for the mistakes of the plaintiff. In fact, the plaintiff is guilty of perjury, suppression and misrepresentation of material facts. The appellant was not a party to the communication dated 3.11.2008. Even assuming that there are discrepancies, the second respondent bank ought to have written to the nominating bank within five days following the day of presentation namely 26.10.2008 in this case. The second respondent chose to reply only by 4.11.2008 which is well after the stipulated five days as per Article 14(b) of UCP 600. By effecting delivery at Karaikkal port site before 26.10.2008 the appellant has complied with and completed all the conditions enumerated in the letter of credit dated 14.7.2008. Under the circumstances, the plaintiff has not made out any case, much less a prima facie case to warrant an order of injunction as against the appellant. The balance of convenience was also not in favour of the plaintiff but is in favour of the appellant. Hence the application was to be dismissed.

4. The learned Single Judge on enquiry allowed the application granting injunction as prayed for. Hence this appeal at the instance of the appellant before this Court.

5. The learned Senior Counsel Mr. T.V. Ramanujun appearing for the appellant would submit that the order of the learned Single Judge is erroneous; that even after the proforma invoice was issued, no letter of credit was opened by the plaintiff and hence the appellant was constrained to send a letter dated 7.7.2008; that thereafter only, the letter of credit was opened on 14.7.2008; that the plaintiff issued another letter of award dated 18.6.2008 which is a separate one; that the appellant

had complied with all the terms and conditions set forth in the letter of credit dated 14.7.2008 and so also had complied with its duties and responsibilities and is thus entitled to negotiate the letter of credit for payments; that the finding of the learned Single Judge that physical delivery to the plaintiff was a pre-condition for negotiating the irrevocable letter of credit is erroneous since no such condition ever existed in the terms of the said letter of credit; that all the documents including the lorry receipt - consignor copy certified by Garware Engineer at Karaikkal Site were submitted to the second defendant by the appellant and the terms in the letter of credit were complied with; that under the circumstances, the appellant is entitled to negotiate the letter of credit; that in fact the appellant has negotiated the letter of credit only after complying with the terms of the letter of credit; that it is pertinent to note that when the appellant delivered the goods at the Karaikkal Port site, it was the plaintiff who refused to accept the same; that the lorry receipts with the seal of Tarangambadi Check Post and subsequent letter and email sent to the appellant by its carriers M/s. Dhoble Good Carriers would clearly establish that the goods were in fact transported and tendered for delivery to the first respondent/plaintiff at the destination project site Karaikkal Port; that the fact that the transporter has transported the goods to the destination port site at Karaikkal and also the fact that all the vehicles were standing outside the destination port site for four days and also the affidavit of the transporter namely M/s. Praveen Transport, that the goods were transported from Karaikkal to their godown in Pondicherry would make it clear that the appellant completed its part of delivery of transporting the goods to the destination port site at Karaikkal; that under the circumstances, the appellant company was proper in negotiating the letter of credit dated 14.7.2008 and the amended one dated 4.8.2008; and that the fact that the appellant having transported and made available the goods at the doorsteps at the destination port site would amount to delivery of materials at the site.

6. Added further the learned Senior Counsel that the ratio decidendi of the Supreme Court in *Federal Bank Ltd. v. V.M. Jog Engineering Ltd.* (2001) 1 SCC 663 that the Court should not issue injunction restraining encashment thereof on the ground of breach of main contract between the buyer and the seller as the contract of letter of credit is independent of the main contract between the parties should have been applied by the learned Single Judge; that since the plaintiff has refused to accept the goods so delivered, there was no prima facie case made out by the plaintiff; that it is pertinent to point out that it is the appellant who would be put to irreparable loss and hardship if the letter of credit is not negotiated by the appellant; that having complied with all the terms and conditions enumerated in the letter of credit, the appellant is entitled to negotiate the letter of credit; that apart from that, the first respondent has not made out a case of fraud; that the second respondent bank is governed by UCP Rules while honouring the letter of credit and has illegally withheld to honour the letter of credit; that no irreparable injury is likely to be caused to the first respondent in case temporary injunction sought by him is

refused, and under the circumstances, the order of the learned Single Judge has got to be set aside.

7. The learned Senior Counsel for the first respondent in his sincere attempt of sustaining the order of the learned Single Judge has made his submissions. The Court also heard the learned Counsel for the second respondent.

8. This Court paid its anxious consideration on the submissions made.

9. As seen above, pending the suit, the first respondent/plaintiff filed the above application for an order of interim injunction to restrain the appellant/first defendant from claiming or demanding any amount under the letter of credit dated 14.7.2008, referred to above, or under its amended one dated 4.8.2008, issued by the second respondent bank without delivery of materials at the site.

10. Admittedly, pursuant to the offers called for by the first respondent/plaintiff, the appellant/first defendant submitted an offer for supply of Soil Reinforcement consisting of Tensar Geogrids, Polymer Connectors, Geotextile, etc., for the Reinforced Soil Retaining Wall System. The reading of Clause III of the offer would make it clear that the payment was to be effected through an irrevocable letter of credit payable in 30 days from the date of invoice and bill of lading with lorry receipt. The value of the order was Rs. 2,04,08,700/-, and the appellant/first defendant also submitted a proforma invoice for supply of materials. It is also admitted that on 14.7.2008, the second respondent bank issued an Inland Irrevocable Letter of Credit for an aggregate sum of Rs. 2,03,84,373/-. Certain conditions were imposed in the letter of credit itself to be complied with prior to making payments under the said letter of credit. While the matter stood thus, the controversy has arisen between the parties.

11. The case of the first respondent/plaintiff is that no materials were delivered by the appellant/first defendant after 12.9.2008; but, surprisingly the appellant has alleged that certain materials were despatched on 15/16.10.2008, and in fact, they were not delivered till the date of filing the suit. It was also further urged by the first respondent/plaintiff that the appellant has played fraud upon the plaintiff claiming payment under the letter of credit for the materials which were actually not delivered, and under the stated circumstances, the plaintiff has not accepted the bill of exchange drawn by the appellant/first defendant. Contrarily, it is contended by the appellant that the appellant/first defendant offered to supply the materials within 12 weeks from the date of opening the letter of credit; that the materials were despatched by the appellant through the transporters M/s. Dhoble Goods Carriers in six heavy vehicles; that even after crossing the check post from the destination to the port site, where it must be taken delivery, and when the goods were ready to be unloaded, it was the plaintiff who did not allow the entry of the goods, and thus, it was a fault on the part of the plaintiff to take delivery, and under such circumstances, awaiting for a period of four days, the materials were taken to

Pondicherry and stocked in a godown of M/s. Parveen Transporters, Pondicherry.

12. In short, the case of the appellant is that the goods were actually transported; that they have reached the destination; but, it was the plaintiff who refused to take delivery; that once the goods were actually transported, it was beyond the control of the appellant, and hence the non-delivery of the goods was due to the refusal on the part of the plaintiff to take delivery for which the appellant was not responsible; that apart from that, even for the non-delivery, the plaintiff could sue for damages on the strength of the contract entered into between the parties; and that as far as the letter of credit was concerned, it was an independent agreement between the appellant and the banker, the second respondent herein, which has got to be honoured. It is contended by the first respondent's side that there was neither delivery nor an attempt to make delivery of the materials; that the delivery of goods was a condition precedent for invoking the letter of credit; that it is also evident under Clause 7(2) of the letter of credit; that in the past also, a letter of credit was opened, and as agreed between the parties and also as stipulated in the letter of credit only after the actual delivery was made and after the same has been countersigned by the Engineer of the plaintiff company, it was encashed; but, in the instant occasion, the materials were not actually delivered, and hence the appellant/first defendant could not negotiate the letter of credit. It is contended by the appellant's side that the delivery of goods has nothing to do with the negotiation of the letter of credit in question since it is an independent agreement, and even in case of non-delivery, an injunction cannot be granted to negotiate an irrevocable letter of credit.

13. Admittedly, the materials were not actually delivered by the appellant to the first respondent/plaintiff. It is also admitted that they are in the custody of the appellant. In order to substantiate the fact that the goods were actually transported engaging M/s. Dhoble Goods Carriers, the appellant has filed an affidavit from the Carriers and also relied on a fax message and also a letter addressed to the plaintiff by the transport company stating that though the goods were taken to the port site, they could not be unloaded or delivered, and they were waiting for a period of four days, and under the circumstances, arrangement has got to be made for the delivery of the goods without further delay. The appellant has also further relied on a telephonic communication made by an official of the appellant Mr. Metta Sudhakar with one V. Raman, the Head Projects of the plaintiff company, on 19.10.2008, telling about the failure on the part of the plaintiff to accept the delivery of goods. Relying upon these documents, it is contended by the appellant's side that when the plaintiff did not take delivery of the materials and when the communication was received from the Carriers, the appellant immediately informed through its official to the plaintiff to take delivery of the materials. On the contrary, it is contended by the first respondent/plaintiff that there was no attempt made to deliver the goods, and these communications were between the appellant and its Carriers, and it had nothing to do with the first respondent/plaintiff. The first respondent/ plaintiff has

also relied on an affidavit filed by the Head- Projects of the plaintiff stating that it was true that there was a telephonic conversation between the Project Head and also Metta Sudhakar an official of the appellant/first defendant and it was not with regard to the delivery of materials in question, but with regard to the progress of the confirmation/erection work under the letter of award dated 18.6.2008. It could be seen that the materials were actually transported and taken to the port site engaging M/s. Dhoble Goods Carriers. But, after going through all the materials available, in the considered opinion of the Court, it would not suffice for negotiating the letter of credit in question.

14. At this juncture, it would be more apt and appropriate to look into the settled principles of law which deal with the grant of injunction restraining the encashment of letter of credit. The Apex Court in a case reported in [Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company](#), has held as follows:

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.

15. A perusal of the above decision would make it abundantly clear that when an unconditional letter of credit was given, the beneficiary was entitled to realise in terms thereof irrespective of any pending dispute relating to the terms of the

contract. The bank which gives such guarantee was bound to honour as per its terms irrespective of any dispute raised by its customer. The Courts should not grant an order of injunction to restrain the realisation of the letter of credit as a matter of course but should be slow. Since the letter of credit is an independent and a separate contract and it is also absolute in nature, the existence of any dispute between the parties to the contract cannot be a ground for issuing an order of injunction to restrain the enforcement of a bank guarantee or a letter of credit. To the above, the Apex Court has given two exceptions namely (i) Fraud of an egregious nature which would vitiate the very foundation of such a letter of credit and the beneficiary is attempting to take advantage of the situation; and (ii) If the encashment of an unconditional letter of credit is allowed, it would result in irretrievable harm or injustice to one of the parties concerned. If these principles of law settled by the Apex Court in the above cited decision are applied, this Court is of the considered opinion that it is a fit case where the Court has to grant an interim injunction for the following reasons.

16. Admittedly, the materials have not been actually delivered by the appellant to the first respondent, and also they are in the custody of the appellant/first defendant. The case of the appellant is that it is true that it was not delivered because there was a refusal to take delivery of the materials by the first respondent/plaintiff when an attempt was made. After looking into the materials available and in particular the letter of credit dated 14.7.2008, and the other circumstances, this Court is of the view that the appellant/first defendant is not entitled to negotiate the letter of credit in question. It is true that the delivery or the non-delivery of the materials is actually a dispute which exists between the appellant and the first respondent, and hence it cannot be a ground for issuing an order of injunction to restrain the enforcement of the letter of credit since the letter of credit in question is an independent and a separate contract between the appellant and its banker. Under such circumstances, as to the question of delivery, the parties will have their recourse open against each other. But, in the case on hand, the appellant beneficiary is not entitled to realise the letter of credit since the appellant has not acted in terms of the letter of credit. The irrevocable letter of credit relied on by the appellant is filed as D5 dated 14.7.2008. Inter alia Clause 7 of the letter of credit imposes other conditions. Clause 7(2) reads: "Delivery at Karaikkal Port Project site Marg Ltd". Hence before the letter of credit in question was to be negotiated by the appellant, one among the conditions imposed was the delivery of the materials at Karaikkal Port Project site. In the instant case, admittedly, it was not done. It could be seen that for the negotiation of the letter of credit though irrevocable, the delivery of the materials is shown as condition precedent, and without satisfying that condition, the appellant is not entitled to negotiate or encash the letter of credit in question. As per the above settled principles of law by the Apex Court, a beneficiary is entitled to realise the letter of credit in terms thereof, but not otherwise. In the case on hand, the appellant beneficiary is not entitled to realise the

letter of credit since he has not acted in terms thereof by performing the condition as found in the letter of credit itself namely Clause 7(2), and hence the dispute relating to the delivery of materials between the parties has nothing to do with the above terms found in the letter of credit.

17. Apart from the above, as rightly pointed out by the learned Senior Counsel for the first respondent that on the earlier occasions, the letter of credit was encashed only after proper delivery was made. The learned Senior Counsel also took the Court to the earlier delivery note wherein the counter signature of the first respondent's Engineer is also found.

18. The Apex Court in the decision cited above, has pointed out two exceptions referred to above, under which circumstances injunction could be granted restraining the beneficiary to negotiate and encash a letter of credit. In the instant case, in the considered opinion of the Court, both the exceptional circumstances are noticed. Firstly, having agreed with the second respondent bank to negotiate the above letter of credit only after the delivery of the materials, the appellant has made an attempt to negotiate the same even without delivering the materials. This would be indicative of the fact that the said attempt was actually made in breach of the agreement between the appellant and the second respondent bank as envisaged under the said letter of credit. It can even be stated as a fraudulent conduct on the part of the appellant. Secondly, if such encashment of the letter of credit is allowed, there is all possibility of resulting in irretrievable harm or injustice to one of the parties namely the first respondent/plaintiff. Therefore, keeping in mind the above settled principles of law enunciated by the Apex Court and applying the same to the present factual situation as seen above, this Court is of the considered opinion that it is a fit and proper case where interim injunction has got to be granted as rightly done by the learned Single Judge. The order of the learned Single Judge does not require any interference in the hands of this Court.

19. In the result, this original side appeal fails, and the same is dismissed confirming the order of the learned Single Judge. The parties will bear their own costs. Consequently, connected MPs are also dismissed.