

(2009) 07 CAL CK 0082

Calcutta High Court

Case No: G.A. No"s. 1062, 1557 and 2558 of 2009, A.P.O.T. No"s. 214 and 225 of 2009 and C.S. No"s. 13 and 111 of 2009

Shree Krishna Timber Co. Pvt.
Ltd.

APPELLANT

Vs

MGA International Pte. Ltd. and
Others

RESPONDENT

Date of Decision: July 20, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 3, Order 39 Rule 4

Citation: (2010) 1 BC 333 : (2009) 4 CALLT 92

Hon'ble Judges: Pinaki Chandra Ghose, J; Indra Prasad Mukerji, J

Bench: Division Bench

Advocate: P. Chatterjee, Tilak Kr. Bose, Debnath Ghosh, Sadhan Bose and P. Sarawagi, for the Appellant; S.N. Mukerjee Ratnanko Banerjee and P.N. Mullick and A.K. Routh and S. Pal Chowdhury, for the Respondent

Final Decision: Allowed

Judgement

Indra Prasad Mukerji, J.

These are two appeals preferred by the appellant/ buyer from a judgment and order of the Hon'ble Court of the first instance dated 21st May, 2009 in G.A. No. 1062 of 2009 connected with C.S. No. 13 of 2009 and order dated 12th June, 2009 passed by the said Court in inter alia G.A. No. 1062 of 2009 (though the C.S. No. in the order is described as 13 of 2009, which ought to have been C.S. No. III of 2009), which cumulatively had the effect of discharging and or vacating the part of the interim order dated 23rd April, 2009 restraining the respondents from honouring the Letter of Credit relating to bill of lading dated 2nd May, 2009.

2. Since issues of facts and law are common in both these appeals, they are heard together, and are being disposed of by a common judgment.

3. The appellant is an Indian buyer. The respondent No. 1 is the seller having its business in Singapore. The appellant contracted with the respondent No. 1 to buy from them about 800 logs of wood, described as Guyana Round Logs, valued at US \$321, 480. The seller was to load the above consignment of logs in May 2008 from any port in Guyana and ship them CIF, Kolkata by the vessel M.V. Destiny (later renamed as M.V. Maystar). It was to draw a Bill of Exchange for 100% invoice value.

4. Payment was to be made by irrevocable Letter of Credit. The Letter of Credit dated 6th May, 2008, was issued by the respondent No. 2, an Indian Bank. As is usual in Banking practice, the respondent No. 3, a Singapore Bank was the negotiating Bank. In the Letter of Credit the respondent No. 3 reserved to itself a "recourse" clause that is the right to realising money from the beneficiary, in the event money under it had been received wrongfully by beneficiary.

5. Up till December 2008, the appellant believed the respondent No. 1 when it said that there was delay in shipment of goods. However, in the first week of December 2008 the respondent No. 1 disclosed to the appellant that the vessel had on or about 4th December, 2008 sunk near Malta. Even at this stage the appellant did not disbelieve the respondent No. 1.

6. In such circumstances it instituted C.S. No. 13 of 2009 (Shree Krishna Timber Pvt. Co. Ltd. v. MGA International Pte. Ltd.) in this Court for extending the due date of bill of exchange drawn by the respondent No. 1 in favour of the appellant.

7. During the hearing of an interlocutory application in this suit G.A. No. 182 of 2009 a suggested order was passed whereby the Letter of Credit would be extended by the respondent No. 3 by 90 days. The suit would stand dismissed as withdrawn on expiry of 90 days.

8. Now, the appellant, as assignee of the respondent No. 1, the seller, lodged a claim against the insurers of the goods claiming indemnity for its loss. On or about 24th March, 2009, the surveyor of the insurer made a report.

9. This report startled the appellant, by the disclosures made in it. The appellant appointed its own private inquiry agents. According to the appellant the information received by them from such report of the insurers and its own sources would show that they was complete fraud by the seller in complicity with the Bank.

10. The case of the appellant is revealed when on or about 21st April, 2009, it filed another suit in this Court being C.S. No. 111 of 2009, particularly for restraining payment of the Letter of Credit and since the Letter of Credit had already been paid by the respondent No. 3, the appellant sought a mandatory injunction directing the respondent No. 3 to take action under its rights of recourse and realise the paid sums from the respondent No. 1 and for other protective reliefs.

11. The prima facie case of fraud tried to be made out by the appellant in the Court of the first instance is discussed below.

12. The bill of lading is dated 2nd May, 2008 showing that the port of loading was Georgetown, Guyana.

13. The original Mate's Receipts signed by the master showed that the vessel was in Georgetown, Guyana on 22nd October, 2007.

14. Apparently the vessel never sailed from Guyana.

15. The vessel was detained at Cape Verde a place distant from Guyana in January, 2008 and continued to be in detention till November 2008, according to the report of the Trans Ocean Marine and General Survey Agencies dated 24th March, 2009 at page 181 to 184 of G.A. No. 1558 of 2009 and A.P.O No. 241 of 2009.

16. Report of movement of vessel obtained from Lloyd Website showed that the vessel set sail from Cape Verde only on 14th November, 2008.

17. The seller, the respondent No. 1 was buying the self-same logs from one Parama Company Ltd. of Guyana under the Mate's Receipt dated 22nd October 2007. The respondent No. 3 was the financier of this transaction. Hence, it was named as consignee in the bill of lading where the notified party was the respondent No. 1.

18. After purchase of the above goods, the respondent No. 1, entered into contracts with 4 parties in India for sale of the self-same goods with delivery at the port of Kandla. Some shipping documents regarding the above transaction have been annexed to the interlocutory application as well as the stay petition before us.

19. In the above Indian transaction with delivery at Kandla, the respondent No. 3 was also the negotiating Bank.

20. Now, the bill of lading was one of the documents to be lodged by the seller, respondent No. 1 with the respondent No. 3. If the respondent No. 3 was a party to the above transaction it knew that the vessel could not sail from the port Georgetown Guyana in May 2008 and that the bill of lading was a false document. It ought to have been aware and was aware that the respondent No. 1 was trading with the selfsame goods with different parties at the same time.

21. As there was collusion and connivance involved between the respondent No. 1 and the respondent No. 3, the respondent No. 3 honoured the Letter of Credit. As there was apparent fraud the said respondent ought not to have honoured the Letter of Credit.

22. The Courts are very familiar nowadays about the law regarding Letter of Credit. Normally when a Letter of Credit is unconditional and irrevocable, as is this one, the Court does not restrain its invocation. An accepted exception is fraud when the Court may be approached to restrain encashing of the Letter of Credit.

23. In this case, the appellant alleges fraud as stated above.

24. Now in the said C.S. No. 111 of 2009, the appellant moved an interlocutory application being G.A. No. 1076 of 2009 for restraining payment under the Letter of Credit. The application was moved ex parte before the Court of first instance. It was heard on 23 April, 2008. The Court prima facie held:

Having considered the facts of the case and in view of the report of the insurance company wherefrom it appears that the vessel M.V. Destiny on and from 21st January, 2008 to November 2008 was detained at Cape Verde the question of the said vessel being berthed at the port of loading in George Town, Guyana cannot arise. The said vessel sailed from Cape Verde only in November 2008. Therefore, prima facie it appears that a fraud has been committed in issuing the bill of lading dated 2nd May, 2008 and the facts of the case entitles the petitioner to an order restraining the respondents from giving any effect to the Letter of Credit and all documents relating thereto in respect of the bill of lading dated 2nd May, 2008. Accordingly the seller is restrained from withdrawing any sums from its Bank accounts without leaving a sum of US \$ 321,401.55 equivalent to the existing rate in rupees on 23rd April, 2009 till 6th May, 2009.

Matter to appear in the list on 4th May, 2009.

The petitioner is directed to communicate this order along with a copy of the application to the respondents.

25. Now having said to have discovered the fraud, the appellant made another application being G.A. No. 1062 of 2009 in C.S. No. 13 of 2009 for recalling the said order dated 13 March, 2009, passed at the suggestion of the parties. In this application the respondent No. 3 appeared and made elaborate oral submissions for vacating the order dated 23rd April, 2009. It is at this stage that the respondent No. 3 appeared for the first time.

26. Another order was passed on 21st May, 2009 holding that the order dated 23rd April, 2009 was to continue till 10th September, 2009. Another order was passed on 12th June, 2009 in "G.A. No. 182 of 2009, G.A. No. 1062 of 2009 and C.S. No. 13 of 2009".

27. The tenor of the order is clarificatory. It says that by the original order dated 23rd April, 2009, respondent was to mean only the seller and any other addition in the order was inadvertent. Further the reference to respondents in the order dated 21st May, 2009 also referred only to one respondent that is the seller,

28. The appellant takes serious exception to this order. It alleges that the effect of this order is that the injunction on the respondent Banks from paying the Letter of Credit is vacated. Further the order has been passed in C.S. No. 13 of 2009 which had nothing to do with the matters in controversy and which concerns only the Letter of Credit.

29. The appellant argues that the order of injunction which had passed on 23 April, 2009 on appreciation of *prima facie* case and after recording that such case had been made out, could not be varied on oral submissions made by the respondent No. 3, in another application made by the appellant that is G.A. No. 1062 of 2009 In C.S. No. 13 of 2009 being a previous suit for vacation of the order dated 13 March, 2009. Further, the variation in the interim order was not supported by any affidavit or petition or any material placed before the Court. Our attention has been drawn to Order 39 Rule 4 of the Code of Civil Procedure, in support of the above submissions.

30. Before us, the respondent No. 3 has also made elaborate submissions. It contends that it is merely a negotiating Bank and did not have the slightest knowledge of any fraud on the part of the seller, respondent No. 1. We have been shown a passage from *Jack on Documentary Credits*. 4th edition which says that if a Banker in spite of exercise of due diligence cannot discover any fraud or is not a party to any fraud, at the time of making payment under the Letter of Credit, the payment is good and cannot be reversed by them. It is submitted that the Bank is in no way a party to the fraud or had no knowledge of any fraud at the time of payment under the Letter of Credit. The Letter of Credit was paid on the basis of usual documents, which were required to be furnished for the purpose of obtaining payment under a Letter of Credit including a bill of lading. The documents were apparently in order and there was no impropriety on the part of the Bank to negotiate such documents and make payment.

31. We feel that *prima facie* there is some evidence of fraud by the seller. Complicity of the Bank also cannot be ruled out, at this *prima facie* stage on an appreciation of the above *prima facie* case. The Court of the first instance had also recorded that there was a *prima facie* case of fraud and passed the order of injunction dated 23 April, 2009.

32. The Code of Civil Procedure, 1908 permits grant of *ex parte* order of injunction where the Court is satisfied that the delay caused by service of notice would defeat the purpose for which the injunction is proposed to be made (see Order 39 Rule 3 of the Code of Civil Procedure, 1908). Once an order of injunction is passed such injunction may be discharged or varied only on an application made by any party dissatisfied with such order. An exception to the above rule is when a party has obtained such order of injunction by making a false or misleading statement in the application in which such *ex parte* order of injunction was granted [see Order 39 Rule 4 of the Code of Civil Procedure, 1908]

33. Undisputedly, the order of injunction restraining payment by Letter of Credit dated 23 April, 2009 was *ex parte*. But at the time of grant of such injunction the Court noted the case of fraud of the appellant stated above, and recorded a *prima facie* finding that a case of fraud had been made out.

34. The respondent No. 3 sought discharge of this order of injunction in an application made by the appellant/plaintiff in the earlier suit being in G.A. No. 1062 of 2009 in C.S. No. 13 of 2009. It sought to do so by oral submission alone. No application or affidavit was tendered by it to support its case for discharge of injunction.

35. However, on such submissions being made the Court by its order dated 21st May, 2009 and 12 June, 2009 vacated the order of injunction granted on 23rd April, 2009.

36. We feel that, here, the Hon"ble First Court has fallen into error. It ought not to have vacated the said order of injunction without the respondent No. 3 filling an application or affidavit in support of its case. More so, there was such necessity when the Court held while passing the order dated 23rd April, 2009 that the appellant had made out a *prima facie* case.

37. We are of the view that this order passed by the Hon"ble First Court ought not to have been varied on oral submissions but on proper evidence being placed before it as required under Order 39 Rule 4 of the CPC discussed above.

38. In such circumstances, we are of the view that the injunction restraining the respondent Nos. 2 and 3 from making payment under the Letter of Credit should be reinstated and should continue for a period of 6 weeks from date initially. Accordingly, the directions contained in the orders dated 21 May, 2009 and 12 June, 2009 regarding vacation of the order of injunction restraining the respondent Nos. 2 and 3 from paying the Letter of Credit are set aside. The rest of the orders will remain untouched.

39. The Hon"ble First Court is requested to dispose of all pending applications before it in the above suit and pass appropriate orders. The parties will be at liberty to the Hon"ble First Court for extension of the above interim order, if necessary.

40. The appeals are thus allowed.

41. There will be no order as to costs.

Urgent certified photocopy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Pinaki Chandra Ghose, J.

42. I agree.