Adani Wilmar Ltd v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA ("Rabobank Nederland")
[2002] SGHC 128

Case Number : Suit 909/2001

Decision Date : 15 June 2002

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Prem Gurbani and Alvin Looi (Gurbani & Co) for the plaintiff; Peter Gabriel and K Muralithrapany (Gabriel Peter & Partners) for the defendant

Parties : Adani Wilmar Ltd — Cooperatieve Centrale Raiffeisen-Boerenleenbank BA ("Rabobank Nederland")

Admiralty and Shipping – Bills of lading – Endorsement and delivery of bills of lading by defendant to third party – Whether bank has title as pledgee to sell – s 12 Sale of Goods Act (Cap 393, 1999 Ed)

Contract – Formation – Main terms and conditions set out in fax – Whether parties have a concluded agreement

Contract – Contractual terms – Conditions precedent – Whether payment of import duty and advancement of loan constitute conditions precedent to formation of contract

Contract – Frustration – When frustration occurs – Whether contract for sale of oil frustrated – Refusal of legal owner to transfer bill of entry to plaintiffs – Whether legal owner's refusal frustrates contract – Foreign court issuing injunction against sale of oil – No attempt made by party to contract to discharge – Whether defendants can rely on injunction as ground of frustration

Contract – Mistake – Parties mistakenly believing that legal owner will transfer import document to plaintiffs – Legal owner refusing to effect transfer – Whether possession of oil still deliverable to plaintiff despite refusal – Whether mistake goes to the root of contract

Judgment

GROUNDS OF DECISION *Cur Adv Vult*

1. The plaintiff is an Indian company dealing in vegetable oil. It claimed that it had entered into an oral agreement with the defendant bank to purchase 9,000 m.t. of degummed rapeseed oil from it. The bank's case is that there was no binding contract between them, and if there was a contract, it was not enforceable.

2. The events leading to the dispute started in 1999 when Shweta International Pte Ltd ("Shweta"), a Singapore company, purchased rapeseed oil from Germany. Shweta obtained financial assistance from the bank to pay for the oil and pledged the oil to it as security. Shweta sold the oil on to Lanyard Foods Ltd ("Lanyard") of India. When the oil arrived at Kandla in India, the import document known as the bill of entry was issued in the name of Lanyard, and Lanyard took delivery of the oil and deposited it into customs-bonded tanks.

3. Difficulties arose when Lanyard did not pay Shweta and in turn Shweta did not pay the bank. The bank decided to exercise its power of sale as pledgee. In October 2000, Mahesh Mehta, Senior Manager of the Trade and Commodity Finance department of the bank and his subordinate, Sunil Kumar s/o Ragnath ("Sunil Kumar"), entered into negotiations with Chetan Kumar s/o M.A. Parikh ("Chetan Parikh"), the plaintiff's representative on the sale of the oil. This led to Sunil Kumar sending a fax on 19 October.

4. The fax reads in full:

Adani Wilmar Limited

Dear Sirs

Sale of Degummed Rapeseed Oil (9,000 + 5%, at pledgor's option) ex-tank Kandla

We confirm having sold to you:

Goods : Degummed Rapeseed Oil ex-tank Kandla

Quantity : 9,000 MT plus 5% (at pledgor's option). Weight ex-tank final.

Quality : As it where is basis. ITS Survey report attached final.

Price : Rp170/10 kg ex-tank basis inclusive of custom duty. Payment would be made in form of a demand draft drawn on a bank in Mumbai, duly approved by Rabobank, Singapore Branch. The draft would be directly handed over to an authorised Bank nominated by Rabobank, Singapore Branch. Delivery will be made as mentioned below.

Custom Duty : The custom duty will be paid upfront for the whole consignment and Bill of Entry will be transferred to you upon payment of custom duty. Lanyard Foods Limited would assist in the necessary transfer of Bill of Entry.

Delivery : Over a period of 60 days till 19 Dec 2000 on minimum 700 mt basis upon payment received in Singapore. In any case, full payment must be received by 19 Dec 2000.

Storage Charges : Storage charges up to 19 Dec 2000 would be borne by Rabobank, Singapore Branch for account of Shweta International Pte Ltd and thereafter borne by Adani Wilmar directly.

Broker : Direct Sale.

Governing Law : Singapore.

Confirmed by

…….. ……..

Jacqueline Chang
For Rabobank Singapore Branch
As Pledgor

Hemanshu Gandhi
For Shweta International
Pte Ltd
As Owner & Unpaid Seller of Goods

……. ……..

Haresh Gandhi
For Lanyard Foods Limited
Local Receiver of Goods

Mr Rajesh Adani
For Adani Wilmar
Limited
Buyer of Goods

5. The plaintiff's case is that the negotiations had culminated in an agreement which terms were set out in the fax.

6. The bank took a contrary position. The defence filed referred to various facts and issues which could have been pleaded

more concisely and clearly than they were, but in effect there were three lines of defence. The first is that no agreement was concluded and the fax of 19 October was a draft agreement for sale and purchase which was subject to conditions, and those conditions were not met. The conditions were:

(i) Shweta and Lanyard must agree to the sale;

(ii) a written sale agreement was to be executed by the plaintiff, defendant, Shweta and Lanyard;

(iii) the plaintiff was to pay the import duty on the oil; and

(iv) Wilmar Trading Pte Ltd ("WTPL"), a shareholder of the plaintiff company, was to take an interest-free loan of $1.4m from the bank and advance it to the plaintiff to pay the import duty[1].

7. The second line of defence is that if there was a contract it was not enforceable when it became impossible of performance and was frustrated because

(i) Lanyard did not agree to transfer the bill of entry to the plaintiff, and

(ii) on or about 1 November 2000 there was an order restraining the sale of the oil[2].

8. The last line of defence is that if a contract was concluded it was vitiated because both parties had acted in the mistaken belief that the bill of entry can be transferred to the plaintiff[3].

9. The bank also made a counterclaim against the plaintiff. It was a curious claim for the loss it suffered loss when the contract was not carried out. Nothing in the pleadings or evidence explained the basis of the claim for loss on a contract which existence it denied, and which it had refused to perform. The counterclaim was withdrawn in the course of the trial subject to the bank paying costs in the counterclaim up to the time of withdrawal.

10. Four persons were involved in the negotiations for the sale of the oil. They are Rajesh S. Adani ("Rajesh Adani") the Managing Director of the plaintiff, Chetan Parikh, Sunil Kumar and Mahesh Mehta.

11. The first three persons gave evidence in these proceedings. The plaintiff had summoned Mahesh Mehta as a witness but did not call him, and offered him to the bank, but the bank did not take up the offer.

12. Chetan Parikh's evidence is that he came to know of the oil from Mahesh Mehta when they met on 13 October 2000. This was followed up by negotiations over the telephone between himself, Rajesh Adani and Mahesh Mehta. Eventually they agreed on the price at 170 Rps/10 kgs on the basis that the bank will pay the import duty.

13. He went to the bank and met with Mahesh Mehta and Sunil Kumar to tie down details on the delivery of the oil to the plaintiff and the bank's payment of the import duty. Sunil Kumar told him that the bank could not pay the import duty itself because it was not the importer of the oil in India and that it needed the plaintiff's assistance as an importer to pay the duty on its behalf. Chetan Parikh suggested that he should speak to Rajesh Adani who was familiar with customs procedures. He also made it clear that the plaintiff did not want to be involved with Shweta and Lanyard in the purchase.

14. On 19 October, he received the fax from Sunil Kumar. He was surprised that Shweta and Lanyard were included as parties in the contract. He went to seek clarification from Mahesh Mehta and Sunil Kumar on that. Sunil Kumar assured him that the plaintiff did not have to worry over that because Shweta and Lanyard were included as an internal matter between the bank and Shweta.

15. After 19 October he followed up with the bank on the payment of the import duty, but little progress was being made. He sent faxes and spoke with Mahesh Mehta and Sunil Kumar, but with no result until matters came to a head on 13 November,

when the bank took the position that there was no contract between them. Further efforts made to proceed with the purchase also failed.

16. Rajesh Adani's evidence was consistent with Chetan Parikh's. He spoke with Mahesh Mehta over the telephone and informed him that the plaintiff would only buy the oil if the bank paid the duty. When the transaction stalled, he wrote to the bank on 30 October, 8 November and 10 November to press it to perform the contract but the bank did not respond till 13 November when it denied that there was a contract to perform.

17. Sunil Kumar gave the bank's account of the events. He and Mahesh Mehta met with Chetan Parikh on 18 October. In the ensuing discussion they told Chetan Parikh that the original seller of the oil was Shweta, and the original buyer was Lanyard, and that the bank was selling the oil as pledgee. They also told him that the oil was in bonded storage tanks and the bill of entry was issued in the name of Lanyard, but Lanyard had not paid the customs duty, and had agreed to transfer the bill of entry to the plaintiff for it to take delivery of the oil.

18. Sunil Kumar went on to say that it was clear to all the parties that Lanyard was to be a crucial party to the sale[4] and that the plaintiff was to be responsible for the payment of the duty[5]. However the plaintiff did not have the resources to pay and it was agreed that the bank would consider making a loan to WTPL which was a customer of the bank, to be used for that purpose[6].

19. After that meeting, he prepared a draft contract and faxed it to Chetan Parikh on 19 October. Chetan Parikh's response after receiving the fax was that it was broadly acceptable save for two items – first that the 60 day delivery period was to run from the date of the transfer of the bill of entry, and second that the sale was not a direct sale, and that a broker was to be involved.

20. He then turned his attention to the loan to WTPL, the transfer of the bill of entry from Lanyard's name to the plaintiff's and the delivery orders to be issued to enable the plaintiff to take delivery.

21. The loan to WTPL was put in the charge of his colleague Lynn Ng. She submitted a credit memorandum with another officer, Angeline Tang on 20 October to the bank's credit committee. Although the credit committed approved the proposed facility the offer of the facility was not carried through.

22. On 27 October, he received telephone calls from Shweta and Lanyard that there were rumours of a customs duty increase, and that they did not wish to proceed with the transaction with the plaintiff. He informed Mahesh Mehta, Jacqueline Chang and Lynn Ng of this[7]. (In this regard what he did not do is more significant than what he did. The plaintiff was not informed of Shweta and Lanyard's decision. It would be expected that if the plaintiff and the bank had agreed that the sale was subject to Shweta and Lanyard's agreement, that Sunil Kumar or the bank would notify the plaintiff of Shweta and Lanyard's decisions.)

23. Legal proceedings were taken out in respect of the oil in India. Punjab National Bank ("PNB") sued for monies owing to it by Lanyard. On 1 November PNB obtained an interim injunction restraining the bank from parting with any property of Lanyard that it held. The bank succeeded in having the order set aside on 5 July 2001, but it was reinstated on appeal on 25 July.

24. The plaintiff was not a party to the legal proceedings in India. The bank did not invite their participation as it had already taken the position on 13 November 2000 that there was no contract of sale between them. Nevertheless two matters in the Indian proceedings are of relevance. First, there was a consent order which released part of the oil to ten parties upon payment[8]. Second, the bank by its representative, Mufazal Kantawala, deposed in an affidavit filed in those proceedings that the bank had sold a substantial portion of the oil before the injunction was issued.

25. There was a body of contemporaneous documents which shed light on the disputed matters.

26. The first is an email dated 18 October from Chetan Parikh to Rajesh Adani, Sunil Kumar and Mahesh Mehta. This email, which preceded Sunil Kumar's fax of 19 October reads in part

> *The deal has been finalised between AWL, India and RaboBank Spore*
>
> on flwg terms:-
>
> Cargo: Degummed Rape Seed Oil
> Quantity: Approx. 9,700 mtons
> Price: Rs. 17,000/- per mton
> Weights: ex-tank Kandla final. Material is in six (6) stowage tanks lying at Friends and Friends, Kandla.
>
> …
>
> Duty: Past, Present and Future for account of sellers RaboBank. AWL is not accountable for duty increase/decrease.
>
> …
>
> AWL has to give the schedule for taking delivery.
>
> Rabobank has to inform buyers where to effect payment at the rate of Rs. 17,000/- pmt in order to take daily/periodic delivery.
>
> (Emphasis added)

27. The first sentence which referred affirmatively to a concluded contract was not contradicted by Mahesh Mehta or Sunil Kumar. The latter said that he did not read the email when it was received, printed out and filed[9]. This email showed that Chetan Parikh regarded there to be a concluded contract, and expected Mahesh Mehta and Sunil Kumar to be of like mind. He is unlikely to send this message if he knew that there was no contract, because Mahesh Mehta and Sunil Kumar would contradict and correct him when they read the message. He would not know that Sunil Kumar would not read messages that were received and filed.

28. Sunil Kumar's fax of 19 October set out in para 6 also referred to the oil being sold to the plaintiff. Nothing in the fax indicated that the sale was subject to any other conditions than those mentioned.

29. The next document of relevance is the credit memorandum of 20 October. The salient parts of this memorandum read –

> Credit memorandum dated 20 October 2000, by Lynn Ng/Angeline
>
> Tang of Rabobank, Singapore Branch
>
> Client: Wilmar Trading Pte Ltd
>
> Request:1. To grant Wilmar Trading Pte Ltd USD1,400,000
> a 2 month Short Term Advance of upto USD1.4 min on an interest-free basis, to pay for the import duty in relation to Adani Wilmar's purchase of 9,000 mt of Degummed Rapeseed Oil (part of the cargo held by the Bank for account of Shweta).
>
> 2. Next internal review date: May 2001

Purpose/Rationale:

To expedite the sale of the rapeseed oil held by the Bank as security under Shweta International Pte Ltd.

Executive Summary: Background to the request

Shweta International Pte Ltd had defaulted on their payments to the Bank, and we had subsequently enforced our security rights over the edible oils stored in India, under the Collateral Management Agreement.

9,000 mt of rapeseed oil sold to Adani Wilmar Limited

1) Rabobank had arranged to sell 9,000 mt of rapeseed oil to Adani Wilmar Limited at the *price of Rp170/10 kg* (*inclusive of the custom duty payable*). As it is likely that there would be an increase in the import duty in November, *it is in the interest of the Bank to make an immediate upfront payment of the import duty* prior to the announcement.

2) However, *as the Bank is not in the position to pay the customs duty directly in India, we have to pay the customs duty via Adani-Wilmar*. Adani-Wilmar had in turn, requested Wilmar Trading to fund the customs payment. Wilmar Trading was only agreeable to this provided that the loan is extended on an interest-free basis, since it is the Bank that will benefit from the lower duty paid.

3) The delivery of the oil would take over a period of 2 months, and *under the terms of our sales agreement*, the storage charges would be borne by Rabobank. As such, we are requesting that the tenor of this exceptional interest free Short Term Advance be set at 60 days.

……

3) Modus operandi

a) The oil will be delivered against cash (Rp) payment from Adani Wilmar, with payment collected through our nominated bank, DBS Mumbai, and converted into USD for remittance to us.

b) *The USD1.4 mln loan will be retired upon receipt of the sales proceeds.*

Recommendation

1. We recommend that the interest free loan of upto USD1.4 mln, be extended to Wilmar Trading Pte Ltd. This exposure is necessary *to enable the Bank to make an immediate upfront payment on the customs duty*, to avoid the import duty hike anticipated in November 2000.

(Emphasis added)

30. This credit memorandum was submitted to the bank's Credit Committee of Singapore ("CCS") which noted in its acceptance of the recommendation that

> Concurred
>
> *CCS understands that*
>
> *Wilmar Trading is doing this as a favour for Rabobank* and has requested for an interest free financing for 60 days. Given the expect increased in custom duty, fear of price falling further and the further deterioration in cargo quality, CCS is prepared to concur with this request despite the fact that there will be no personal guarantee.
>
> (Emphasis added)

31. When the bank failed to offer the loan to WTPL Lynn Ng sent an email to it on 31 October to explain that

> I had obtained approval for the above facility and had prepared a letter of offer …
>
> However, I was informed by my colleague, Sunil, who had negotiated the sale of the oil with Kamlesh, that *there were some issues pending at our end*, which will materially impact the transaction being contemplated. As such, I was instructed to hold back the issuance of the letter.
>
> (Emphasis added)

32. Apparently Sunil Kumar had informed her that there were issues pending *at the bank's end*. It is also apparent that he did not inform her that the sale had fallen through because Shweta and Lanyard did not agree to it.

33. The next set of relevant documents is an exchange of email messages between Sunil Kumar and Jacqueline Chang (Assistant General Manager and head of the Trade and Commodity Finance department) on 6 November. In the first message, Sunil Kumar reported to her on the problems that had arisen

> Mr Chetan Parikh, broker for the above transaction, came to see me today after leaving a couple of messages for me.
>
> He indicates that Rabo had a verbal commitment to deliver the oil to Adani Wilmar and would expect us to perform on the contract although our understanding was that all 4 parties (Rabo, Lanyard, Shweta and Adani) should sign on the contract. He mentioned that Adani Wilmar had to deliver the refined reapeseed to its own buyers and would be in default if the oil was not delivered. Hence, any loss incurred could be claimed from Rabo.
>
> I subsequently spoke to Rajesh Adani, the promoter of Adani Group. He indicated that despite the injunction (which is known to them), we should consign the BLs to them and they would get the injunction lifted themselves, being the consignee under the BLs. However, when I inquired whether Rabo's obligations would end if the injunction was not lifted, he was non-committed on this issue.

34. Jacqueline Chang's response was

> This is a tricky situation. In a sense, it's not a bad thing that we did not succeed with pulling the deal through with Wilmar as we would not have been able to allow delivery of oil (and risk getting ourselves sued!).

> As discussed, Adani's proposal that they could work around the order or better still to lift the order would mean going directly against Lanyard, which is a risk that I am not prepared to take. Lanyard could very well frustrate our sale efforts and the complications could be exponential. In any case, it is not possible (?) to consign B/Ls to Adani when it had already been used, and 1/3 released to ITS and shipowner during discharge. Furthermore, some of the cargo may have import duty paid by Lanyard or its buyers further complicating the matter …
>
> Unless Adani is willing to pay us against release of oil – thereafter all risks assumed by them, I will not support Adani's proposal.

35. What did she mean when she wrote that the bank "did not succeed with pulling the deal through with Wilmar"? On the face of it, she appeared to accept that there was a deal which the bank could not perform, not that there was no agreement at all.

36. Even when matters went up to the head of the department, the bank did not inform the plaintiff that there was really no contract to perform. It only did that after receiving several series of letters from the plaintiff demanding that it performed the contract. In its letter of 8 November signed by Rajesh Adani, the plaintiff stated *inter alia*

> We understand that you are having difficulty amounting to delay at your end for timely delivery of the cargo. Neither you (Rabobank) nor us (AWL) can deny the fact that we have concluded the deal between us on a willing buyer/seller basis. It was your expressed desire that we take the delivery of oil urgently so that Rabobank receives the payment quickly. We agreed only with an intention to help Rabobank in the matter.
>
> We negotiated with you for the entire quantity of 9000 MT (+/- 5%) at an agreed and established price of Rs 17,000 PMT. Both the parties were satisfied with the deal including the agreed price.
>
> In my discussion with Mr. Sunil Kumar & Mr Mahesh Mehta, I had categorically stated that the deal is exclusively between Rabobank & Adani Wilmar Ltd, India and we have nothing to do with either Lanyard or Shweta. I was given assurance that the matter with Lanyard & Shweta and will be sorted out by Rabobank and I "need not worry about it". However, having concluded the deal we have been send a draft contract, whereby Shweta & Lanyard had been brought into the picture.
>
> We would like to make it clear that our (AWL) dealing was with Rabobank only and at no time we had discussion or an interest to have an understanding or dialogue with either Shweta or Lanyard.
>
> We hope that Rabobank will not thrust onto us to resort to any unpleasant means to rightfully take delivery of the oil sold by you to us. Having concluded the deal over long discussions, we now cannot accept any turnaround on the deal, which has been concluded honorably. We stand to lose a huge sum of monies if we do not receive the oil, Rabobank and AWL are answerable to each other for timely performance.

37. Faced with notice of "unpleasant means", the bank finally took a stand on the matter when it replied on 13 November that

> We do not agree to your allegation that there is a concluded agreement between us for the sale of 9000 Mt Degummed Rapeseed Oil as all negotiations are subject to contract. Furthermore, the Bill of Entry relating to the goods is in the name of Lanyard Foods Ltd. Without Lanyard Foods Ltd's co-operation to transfer the Bill of Entry into buyers' name, the sale cannot be proceeded. You are full aware of this fact. The draft contract faxed to you was sent on the premise that all four parties will agree to the terms therein.

> You have no doubt that there is an injunction preventing the sale or disposal of the goods by Lanyard Foods Ltd. Of course, any sale which we or anyone can enter into must be subject to the ability of the parties to perform. Until the injunction is vacated, we cannot continue to discuss the sale of the goods.
>
> On Friday 10 November 2000, there was a discussion between our Mr Mehta and your Mr Rajesh Adani when we told you that there is a possibility for Lanyard to agree to sell through us a quantity of about 6000 Mts. This however is subject to the injunction against the sale of the cargo being lifted.
>
> As you are aware there is an application by us to lift the injunction fixed for hearing tomorrow. If we succeed with this, then the possibility of a sale of about 6000 Mt on the cargo can be discussed further and subject to contract we will work towards this.

38. However, this position taken by the bank was contradicted by an affidavit filed by Mufazal Kantawala on behalf of the bank on 5 December in the Indian proceedings where he deposed

> I say that the Applicants [the bank] are ready and will to sell and dispose off the said goods under the orders of this Hon'ble Tribunal and account for the sale proceeds to this Hon'ble tribunal pending determination of their Application to set aside/vacate the order dated 1/11/2000. I say that the Applicants are entitled to right of sale of the said cargo. In fact *a substantial portion of cargo was sold by the Applicants even before any orders were passed* by the Hon'ble DRAT. The Appellants [Punjab National Bank] were well aware of the sale/s but are deliberately feigning ignorance.
>
> (Emphasis added)

39. When Sunil Kumar was referred to the affidavit, he was unable to explain that statement and he maintained that there was no sale of the oil by the bank to the plaintiff or any other party[10]. If the bank had not sold the oil to other parties the deponent was most probably referring to the transaction with the plaintiff, and was calling it a concluded sale.

40. Jacqueline Chang, Lynn Ng and Angeline Tang and Mufazal Kantawala did not give any explanation to their statements which stated or implied that there was a concluded agreement. The three bank officers had left the bank by the time of the action, but there was no suggestion that they or Mufazal Kantawala were unable or unwilling to give evidence. The reasonable inference to be drawn is that the bank did not want to explain or qualify what was written.

41. Looking at the evidence in its totality, the plaintiff had been consistent throughout that there was a contract, the bank's position to the contrary was contradicted by its own documents. I find that the plaintiff had proved on a balance of probabilities that there was a concluded agreement on the sale of the oil. That disposed of the questions whether Shweta and Lanyard had to agree to the sale and whether there was to be a written agreement.

42. The next issue is whether the plaintiff or the bank was to pay the custom or import duty. The fax of 19 October made it clear that the plaintiff was to pay for the oil by *a* demand draft, without any obligation on it to pay the import duty separately. If there was any doubt, that it is surely settled by the statements in the credit memorandum of 20 October that "it is in the interest of the Bank to make immediate upfront payment of the import duty", and as "the Bank is not in the position to pay the customs duty directly in India, we have to pay the customs duty via Adani-Wilmar."

43. On the related issue of the loan to WTPL to pay the duty, that was not referred to as a condition to the sale in the faxes of 18 October when the terms were set out by Chetan Parikh and of 19 October when the terms were set out by Sunil Kumar, and not even in the bank's letter of 13 November when it set out its reasons for stating that there was no agreement. If it was such a condition all that time, it should have been mentioned. But even if there was this condition, it was the bank which held back the loan because of issues pending at the bank's end, as stated in Lynn Ng's email of 31 October. The bank cannot rely on its own default as a defence.

44. I will now examine the defence that the agreement was discharged on the ground of frustration. A contract is said to be frustrated when something renders it physically or commercially impossible to be fulfilled, or transforms the obligation to perform into a radically different obligation. The bank pleaded that if there was a contract, it was frustrated on two grounds.

45. The first ground was that Lanyard did not agree to transfer the bill of entry to the plaintiff. This alone does not discharge the contract unless Lanyard's refusal rendered the performance of the contract impossible. Sunil Kumar's evidence is that he had been informed by the customs authorities that a new bill of entry could be obtained without the co-operation of Lanyard. He deposed in his affidavit of evidence-in-chief

> I was told by the customs authorities that … notwithstanding that the bill of entry is in the name of the Defendants' [the bank's] defaulting client is to obtain a court order from the Indian court. Since the Defendants are the pledgees to the goods, they can make an application to the Indian Court stating that their client has defaulted in the facility and the goods have not been paid by the importer, the Defendants are seeking to enforce the security against their client by obtaining possession over the goods for the purpose of selling the said goods to satisfy the outstanding amount[11].

The advice had come from the deputy commissioner in charge of Kandla port[12].

46. However he did not act on the advice and regarded it was incorrect. His decision was not influenced by any contradicting information from the customs authorities, but because the opinion of the bank's expert witness, Mathew D'Silva, a retired assistant commissioner of customs and customs consultant. It was curious that neither Sunil Kumar nor D'Silva went back to the customs authorities to check if the original advice stood and reflected the prevailing customs practice. This was a serious omission because if the advice was correct, possession of and title in the oil can pass without Lanyard's co-operation.

47. It transpired that the expert D'Silva had given his opinion in the mistaken belief that the customs duty on the oil was paid and that the goods had been cleared from customs[13]. He relied on s 149 of the Customs Act 1962 and came to his conclusion that "no Bill of Entry shall be authorised to be amended after the goods have been cleared for Home Consumption or deposited in a bonded warehouse (under section 149 of Customs Act 1962)."[14] Section 149 reads

> Amendment of documents – Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the custom house to be amended:
>
> Provided that no amendment of a bill of entry or a shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be.

48. The plaintiff's expert witness Vikram S Nankani, an advocate practising in custom laws disagreed with that opinion. He said that D'Silva's reliance on the proviso in s 149 was misplaced because s 149 did not affect ss 30 and 41, and s 30(3) empowers the customs authority to permit an import manifest or import report which is incorrect or incomplete to be amended or supplemented in the absence of any fraudulent intention. The provision reads

> 30(3) If the proper officer is satisfied that the import manifest or import report is in any way incorrect or incomplete, and that there was no fraudulent intention, he may permit it to be amended or supplemented.

49. He went on to state that

> 2.5 There is, however, no provision under the said Act, which either prohibits or permits the cancellation of Bills of Entry (whether for home consumption or for warehousing) filed by any person claiming to be the importer and substitution thereof by a fresh Bill of Entry by another person also claiming to be the importer. The Courts in India have, however, accepted the right of foreign seller or the owner of the goods to sell the goods to a new buyer after import of goods into India. This view has been taken by the Calcutta High Court in Taiping International [1997 (89) ELT 457]. The Courts in India have also recognised the right of the foreign seller or owner to recall/re-ship the goods after the same have been imported into India. This view has been taken by the Supreme Court of India in Union of India – Vs – Sampatraj Dugar [1992 (58) ELT 163]. Although there is no provision in the said Act for acceptance or recognition of such rights, the Courts have followed the common law principles like the rights of an unpaid seller, in laying down this law. Similarly, in the absence of any provision either prohibiting or permitting substitution, of the bill of entry by the new buyer in lieu of the one already filed by an importer, such substitution would be governed by the general law of contract and sale of goods, subject to the conditions prescribed by sub-section (3) of Section 30 of the said Act, as set out above. Resort to the general law is necessary in respect of areas not covered by the said Act.
>
> 2.6 Under the General Law of Contract and Sale of Goods, the bill of lading is a document of title. The holder or endorsee of the bill of lading has the custody of (constructive) and control over the goods. Upon surrender of the original and negotiable copies of the bills of lading, the holder thereof can obtain fresh bill of lading in the name of any other person. Upon receipt of fresh bills of lading drawn in the name of a new person (read as buyer also) the holder of the fresh set of bills of lading as owner of the goods, can endorse the bills of lading in favour of the new person (buyer) and instruct the carrier through its agents to give effect to the fresh bills of lading and carry out consequential amendment in the manifest. This means that the steamer agent in India shall make an application for amendment of the manifest, which subject to the provisions of sub-section (3) of Section 30, the proper officer may allow. In the event such an application is allowed, the basis of the bill of entry filed by the first person disappears and consequently, the new importer whose name is now substituted in the manifest, can file the Bill of Entry[15].

The bank's expert did not offer any comments on these statements.

50. There was no authoritative evidence that a bill of entry cannot be issued in the plaintiff's name without Lanyard's assistance. Upon reviewing the two experts' opinions and Sunil Kumar's evidence, I find that the bank had not proved that the bill of entry could not be changed without Lanyard's agreement, or that the contract was frustrated by Lanyard's refusal to co-operate.

51. The second ground of frustration the bank relied on was the injunction issued in India against the sale of the oil. The existence and terms of the injunction were established, but its effect on the transaction was not. Such an injunction may be discharged, and in fact, this was done in respect of the sale of some of the oil to ten other parties. The prospect of obtaining a discharge is enhanced if security is offered, but the bank did not offer security when it applied to discharge the injunction[16] and it did not enquire with the plaintiff if it was prepared to assist in the application. The truth of the situation was that it had repudiated the agreement with the plaintiff, and did not take any action to discharge the injunction for the purpose of proceeding with the sale to it. The bank cannot say that it was prevented by the injunction from performing the contract.

52. The bank's final defence is mistake – that it and the plaintiff had entered into the contract under the mistaken belief that the bill of entry could be transferred. The fax of 19 October stated that Lanyard was to assist in the transfer of the bill of entry. Insofar as Lanyard would not offer its assistance, it can be said that both parties were mistaken in the belief or expectation that it would. But that is not the end of the matter. Contracts are robust creatures, they do not fall to just any mistake. Only mistakes which lie at the root of the contract would have that effect.

53. Lanyard's assistance to transfer the bill of entry was not a critical part of the contract. The contract was for the bank to sell the oil to the plaintiff. The transfer of possession of the oil to the plaintiff was an essential part of the transaction, but the manner of the transfer was not. If Lanyard would not co-operate and the contract remains in force, other ways would have to be found to deliver possession of the oil to the plaintiff. The mistake here did not release the bank from its obligations.

54. In the course of the trial, Sunil Kumar revealed that the bills of lading to the oil had been endorsed and handed over to Lanyard sometime between September 1999 and April 2000. This was not disclosed to counsel for either party earlier. Consequently the plaintiff applied for and was granted leave to amend its statement of claim to add a further claim that the bank had breached the term implied by s 12 of the Sales of Goods Act (Cap 393) that the bank had the right to sell the oil[17].

55. The bank admitted that the bills of lading were endorsed and handed over to Lanyard by its agent in India, Caleb Brett (Canada) Ltd. It pleaded that this was done without its knowledge or authorisation, and that there was no intention to pass any property to Lanyard, but only to enable it to take the oil from the vessel to store it in bonded storage tanks. The bank also claimed that there was no consideration for the endorsement and that Lanyard admitted in a letter of 16 August 2000 that it had not paid for the oil, and the title lies with Shweta[18].

56. Sunil Kumar's evidence was that he and Mahesh Mehta found out in April-June 2000[19] about the endorsement and delivery to the bills of lading to Lanyard. The bank did not explain why it took no action to have the bills of lading endorsed and delivered back to it, or any other action to rectify the situation.

57. The bank sought to tender in evidence the letter from Lanyard dated 16 August. Counsel for the plaintiff objected on the ground that the letter was not disclosed during discovery, and that it should be formally proved by the writer. I accepted the force of the objections and ruled that the letter was not admissible in evidence.

58. Even if the bank was not aware of and had not authorised the endorsement and delivery of the bills of lading, title to the oil had passed to Lanyard by the endorsement and delivery of the bills of lading in the absence of any clear and admissible evidence to the contrary. The bank would have no right to sell the oil as pledgee. Consequently, the plaintiff have also established its case under s 12.

59. I give judgment to the plaintiff with costs and order that the damages payable to it be assessed by the Registrar.

Sgd:

Kan Ting Chiu

Judge

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[1] Re-amended Defence para 6

[2] Re-amended Defence para 8

[3] Re-amended Defence para 8A

[4] Affidavit of Evidence-in-Chief of Sunil Kumar para 29

[5] Affidavit of Evidence-in-Chief of Sunil Kumar para 31

[6] Affidavit of Evidence-in-Chief of Sunil Kumar paras 32 and 34

[7] Affidavit of Evidence-in-Chief of Sunil Kumar para 63

[8] Affidavit of Evidence-in-Chief of Sunil Kumar para 70 and pages 162-171

[9] Notes of Evidence page 567

[10] Notes of Evidence page 706

[11] Affidavit of Evidence-in-Chief of Sunil Kumar para 18

[12] Notes of Evidence page 498

[13] Notes of Evidence page 369

[14] Expert Witness Report of Mathew D'Silva para 10

[15] Expert Witness Report of Vikram S. Nankani

[16] Notes of Evidence page 702

[17] Amended Statement of Claim para 7

[18] Re-amended Defence and Counterclaim para 7A

[19] Notes of Evidence page 742