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Judgment Sheet
IN THE LAHORE HIGH COURT,
LAHORE.
(JUDICIAL DEPARTMENT)

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R.F.A No. 1583/2015

M.L. Traders, etc.

Versus

Habib Bank Ltd, etc.

JUDGMENT

Date of hearing: **06.06.2024.**

Appellants by: Mr. Muhammad Imran Malik,
Advocate.

Respondents by: Mr. Moeez Tariq, Advocate.

ASIM HAFEEZ, J. This and connected appeals, bearing R.F.A No. 1584/2015 and RFA No.1443/2015 [latter preferred by respondent No.1 for seeking modification of the judgment and decree under reference], are directed against consolidated judgment and decree dated 28.07.2015, in terms whereof Banking Court decreed the recovery suit, instituted by respondent No.1 [hereinafter referred as the ‘financial institution’], for Rs.7,268,401 with costs [against claimed amount of Rs.10,306,894/-]. And action for claiming damages of Rs.32,817,314/-, sought by the appellants, was dismissed.

2. Brief facts, relevant for the adjudication of subject matter appeals, are that on the request of the appellants, the financial institution extended finance by way of allowing opening of letter of credit [at sight] bearing L/C No.800371/0813 dated 13.09.1997. Letter of Credit (hereinafter referred to as ‘Credit’) was subjected to the terms of Uniform Practice for Documentary

Credits (1993 Revision), International Chamber of Commerce, Publication No.500 [UCP 500]. Financial institution brought action on 19.09.1999 under jurisdiction conferred by the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997, latter repealed through the Financial Institutions (Recovery of Finances) Ordinance 2001.

It is the case of the financial institution that the documents, inclusive of proforma invoice, bill of lading and letter of credit, were duly presented and accordingly honored by the financial institution by making payment to the confirming / negotiating Bank of the beneficiary, after failure of the appellants to make payments in terms of their obligations, despite persistent demands. Financial institution claimed that forced Payment against Documents (PAD), after lapse of stipulated time, stood converted into Finance against Imported Merchandise [FIM]. On the converse, appellants brought action for claiming financial damages on the premise that payment made by the financial institution was contrary to the terms of Credit, which prohibited option of transshipment. Appellants alleged that despite knowledge and intimation that carrier birthed at the port of Singapore, where goods were de-stuffed and shifted to another container and then transported to port of destination through another carrier financial institution acted contrary to the obligations. Both suits were consolidated, and evidence was recorded. Upon conclusion of the trial the suit for recovery was decreed and suit for damages dismissed.

3. Learned counsel for the appellants pleaded that payments made by financial institution were contrary to the terms of Credit, hence no enforceable obligation could be placed on the appellants to repay the wrongly disbursed

amounts. Adds that transshipment was specifically prohibited, whereby goods in question were required to be shipped directly from the port of shipment to the port of discharge. And such material condition was conspicuously breached. Further submits that factum of violation of condition of Credit was discussed with the officials of the Bank, which despite awareness proceeded to make payment. Submits that interception with the goods during transshipment and change of carrier caused damage to the goods, which resulted in appellants' failure to honour third party commitments and damages ensued. Submits that documentary evidence produced proved factum of breach of terms of the Credit. Learned counsel cited following decisions "Master Muhammad Bashir Vs. Moinuddin" (1990 CLC 703), "Muhammad Arshad Khan Vs. Chairman, M.D.A and 6 others" (1997 MLD 3066), "Bashir Ahmad Vs. Abdul Wahid" (PLD 1995 Lahore 98), "Habib Bank Limited Vs. Judge Banking Court and others" (2015 CLD 1875), "Crescent Leasing Corporation Limited through Constituted Attorney Vs. Messrs Sarhad Goods Transport Company and 3 others" (2013 CLD 854), "Rehmatullah Khan and another Vs. Ghulam Farid and others" (2009 SCMR 371), "Administration Municipal Corporation, Multan through T.M.O and 2 others Vs. Haider Zaman Qureshi" (2012 MLD 948), "Shah Nawaz and another Vs. Nawab Khan" (PLD 1976 S.C 767), "MCB Bank Limited Vs. Sunshine Cloth Limited" (C.O.S No. 152/2010), "United Bank Limited Vs. Messrs Ilyas Enterprises through Proprietor Mr. Ilyas Malik and 2 others" (2004 CLD 1338).

4. Learned counsel for the financial institution submits that jurisprudence regarding the scope and extent of liability under the Credit facility is well settled, evolving the principle that "bank(s) deal in the documents and not concerned with the goods underlying Credit". And *albeit* any damage caused, if any actually occasioned as alleged, would neither discharge the bank from

fulfilling its contractual obligations under the Credit and nor shall it absolve appellants from fulfilling their obligation to repay the amounts paid to the beneficiary of the Credit. Adds that documents, including bill of lading and letter of credit, were accepted by the appellants and no discrepancy was pointed or raised before the liability to pay triggered. Submits that sufficient evidence was led to prove default of obligation under the terms of irrevocable letter of credit. Financial institution seeks modification of the amount subject of decree. Following decisions are cited to support contentions, reported as "Messrs Sazco (Pvt) Ltd Vs. Askari Commercial Bank Limited" (**2021 SCMR 558**), "S.A. Hameed and others Vs. Allied Bank of Pakistan Limited and others" (**2004 CLD 1620**) and "Habib Bank Limited Vs. Tauqeer Ahmed Siddiqui and another" (**2009 CLD 312**).

5. Heard. Record perused.

6. During course of hearing, we asked learned counsel for financial institution to inform about the date when payment was made to the beneficiary under the terms of letter of Credit, and date, when allegedly facility of PAD [payment against documents], was created. Learned counsel could not provide specific dates for the payment and creation of PAD, who elaborated that PAD facility was converted in FIM facility, factum whereof was recorded on 16.02.1998 in the Statement of Account [Exh.P-13] and overdue amount of Rs. 8,594,691/- was debited for adjustment of PAD.

7. Notwithstanding, non-availability of critical dates and requisite details, we proceed to deal with the elephant in the room; that whether the financial institution was under any legal obligation to make payment to the beneficiary under the Credit arrangement, when one of the core conditions therein was

allegedly violated during the course of shipment – violation being clause prohibiting transshipment. There is no cavil that Banks may decline request for payment to the beneficiary under the Credit, upon receiving the documents, on the premise that terms of Credit, regarding the prohibition qua transshipment, were violated provided such recusal is legally and contractually justified, drawing support from the conditions encapsulated in the bill of lading. On the contrary, Banks cannot justify denial of payment obligation, simplicitor on the ground of alleged violation of provision of transshipment in Credit, provided incidence of violation comes within one of the exceptions provided under Article 23 of UCP 500 – relevant and applicable to the Credit under reference.

Whether the terms of bill of lading were examined and considered by the Banking Court for the purposes of deciding the option with the financial institution, either to make payment or opt recusal, as the case may be in terms of the conditions in bill of lading. Both learned counsel extensively argued regarding the scope and effect of condition of prohibition of transshipment in the Credit, but none had either referred to any specific corroborating clause in the bill of lading nor highlighted the exclusion or inapplicability of the exceptions provided under Article 23, *ibid.* – that obligates the Bank to make payment under Credit despite prohibition qua transshipment. Notably, no such condition is found appearing at the front page of bill of lading, sued and relied upon, or on the reverse page of bill of lading [incidentally terms of the bill of lading on the reverse page were not provided with the record and we strongly believe that said terms were not discussed before the Banking Court, since evidently, Banking Court had not recorded any finding with reference to any

such condition, reiterating prohibition qua transshipment in the bill of lading vis-à-vis corresponding condition of the Credit].

Needless to mention that for the purposes of determining the enforceability of obligation of the financial institution, notwithstanding induction of condition of prohibition of transshipment in the Credit, analysis of the terms of bill of lading and evaluation of exceptions in Article 23 of the UCP 500, [*inter alia* the conditions discussed in clause (d) thereof], must be undertaken and necessarily be adjudicated upon, without which determination neither the conclusiveness of the obligation of the financial institution would be ascertained nor corresponding obligation of the applicant of the Credit is determinable.

Article 23 of UCP 500 is reproduced for ease of reference,

“Article 23. Marine/Ocean Bill of Lading

- a. *If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:*
 - i) *appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:*
 - *the carrier or a named agent for or on behalf of the carrier, or*
 - *the master or a named agent for or on behalf of the master.*

Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting, and
 - ii) *indicates that the goods have been loaded on board, or shipped on a named vessel. Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment. In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading*

which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment. If the bill of lading contains the indication "intended vessel," or similar qualification in relation to the vessel, loading on board a named vessel must be evidenced by an on board notation on the bill of lading which, in addition to the date on which the goods have been loaded on board, also includes the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named as the "intended vessel". If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading, and

iii) indicates the port of loading and the port of discharge stipulated in the credit, notwithstanding that it:

(a) indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge, and/or

(b) contains the indication "intended" or similar qualification in relation to the port of loading and/or port of discharge, as long as the document also states the ports of loading and/or discharge stipulated in the Credit, and

iv) consists of a sole original bill of lading, or if issued in more than one original, the full set as so issued, and

v) appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the bill of lading(short form/blank back bill of lading), banks will not examine the contents of such terms and conditions, and

vi) contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only, and

vii) in all other respects meets the stipulations of the Credit.

b. For the purpose of this Article, transhipment means unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit.

c. Unless transhipment is prohibited by the terms of the Credit, banks will accept a bill of lading which indicates that the goods will be transshipped, provided that the entire ocean carriage is covered by one and the same bill of lading.

d. Even if the Credit prohibits transhipment, banks will accept a bill of lading which:

- i) indicates that transhipment will take place as long as the relevant cargo is shipped in Container (s) , Trailer(s) and/or "LASH" barge (s) as evidenced by the bill of lading, provided that the entire ocean carriage is covered by one and the same bill of lading, and/or
- ii) incorporates clauses stating that the carrier reserves the right to tranship."

[Emphasis supplied]

We observed that Banking Court failed to undertake such crucial inquiry into material facts and conspicuously ignored determination of critical questions, touching the exceptions appearing in Article 23 of UCP 500, for instance, firstly, whether bill of lading had provided ‘continuous cover to the goods – [covering voyage from Sydney Australia to Karachi, Pakistan] from the port of shipment to port of discharge – and secondly whether bill of lading contained any condition regarding specific disclaimer of liability on the part of the ship owner carrier in event of transshipment – both questions had material affect qua the obligations of the parties, the appellants and financial institution, and assist in determining the context of prohibition of transshipment in the Credit.

8. We examined various clauses of APPLICATION AND AGREEMENT FOR IRREVOCABLE DOCUMENTARY CREDIT FREELY NEGOTIABLE IN BENEFICIARY'S COUNTRY, which are found relevant for the purposes of determining the controversy under reference – in particular clause 17 thereof – “*Irrespective of the port to which shipment are affected we shall purchase the documents o lodgment under clause 1 above*” - but evidently not considered and appreciated by the Banking Court. It is evident that Banking Court adjudged claims erroneously without indicating or considering the terms and conditions of bill of lading in the context of the scope and effect of Article

23 of UCP 500. In wake of these lapses judgment under reference is found not sustainable in law.

9. During hearing of the appeals, we inquired from learned counsel for the financial institution that whether bill of exchange – referred in the evidence in chief of PW-1 – is produced and available on record, who stated that no such bill of exchange is available. Non-availability of bill of exchange or failure to produce have had its own consequences qua the claims. We observed that one of the conditions of letter of credit reads as,

“Your manually signed drafts in duplicate drawn on the importers at sight for full invoice value of shipment(s) and marked “Drawn under the Habib Bank Limited Credit No.800371/0813 must accompany the documents”

10. Likewise, the recitals of APPLICATION AND AGREEMENT FOR IRREVOCABLE DOCUMENTARY CREDIT FREELY NEGOTIABLE IN BENEFICIARY'S COUNTRY referred to negotiation of manually signed drafts drawn on the applicant of the Credit. Notably bill of exchange was referred in the affidavit in evidence but not produced on record. What would be the effect of non-presentation of the drafts with the documents? Does it indicate compliance or otherwise? Banking Court was required to examine and decide regarding the effect of non-production or non-availability of the drafts, whatever may be the case. This another lapse on the part of the Banking Court further weakens the judgment under challenge.

11. Additionally, there are few other aspects / issues, which were not considered by the Banking Court, for instance what was the fate of the goods in question – since the title of the goods, constructive or otherwise, vests in the holder of bill of lading. As per terms of bill of lading, freight was prepaid and

effect thereof needs to be considered while determining factum of obligations of the parties. Appellants claimed that goods were damaged as a consequence of alleged transshipment. It appears that goods in question were insured. What was the role and responsibility of the Insurance company, in the facts and circumstances encountered. This aspect was not considered by the Banking Court. Furthermore, financial institution alleged that Credit facility, upon payment being transformed into PAD facility, and eventually converted into FIM facility. Whether cause of action was rested on the Credit arrangement or FIM facility, which triggers another moot question that whether doctrine of novation is attracted and what was the cause and effect of novation, if it actually happened. In the context of an incomplete, bald and inconclusive adjudication the judgment impugned need not to be examined in the context of ratio settled in the case-law cited.

12. In view of the aforesaid we arrived at a conclusion that judgment and decree assailed does not constitute a valid, fair and proper adjudication of all-inclusive issues / questions, which judgment even dealt with the partial issues superficially. Questions raised and left unattended had jettisoned the lawful existence of the judgment, which needs to be declared ineffective and illegal.

13. We, hereby, set-aside the impugned judgment and decree dated 28.07.2015 and allow instant and connected appeal bearing R.F.A No.1584/2015 and decide to remand the matter, in terms of the directions *infra*, to the Banking Court in wake of numerous unattended issues / questions. We direct / observe that the suits, preferred by the appellants and respondent No.1, shall be deemed pending and the Banking Court will proceed to frame

additional issues, in the context of the observations recorded regarding unattended issues / questions, and call upon the parties to lead evidence on additional issues and thereafter decide the suits afresh on merits without being influenced by any observation recorded *supra*, since aforesaid observations are solely for the purpose of deciding appeals and not intended to prejudice any of the parties or influence determination of the *lis* on merits.

14. Once judgment in question is set-aside appeal of the financial institution, RFA No.1443/2015 becomes infructuous. No order as to the costs.

(Muhammad Sajid Mehmood Sethi)
Judge

(Asim Hafeez)
Judge

*M. Nadeem/**

Approved for reporting.

Judge

Judge