

Indian Bank vs M/S Satyam Fibres (India) Pvt.Ltd on 9 August, 1996

Equivalent citations: AIR 1996 SUPREME COURT 2592, 1996 (5) SCC 550, 1996 AIR SCW 3228, 1996 () CCJ 1272, 1996 () ALL CJ 1279, (1998) 2 COM LJ 421, (1996) 7 JT 135 (SC), (1996) 3 BANK LJ 11, (1997) 2 CPR 187, (1997) 5 SUPREME 485, (1996) 4 ICC 76, (1996) 3 CIV LJ 739, (1998) 92 COM CAS 149, (1997) 1 APLJ 14

Author: S. Saghir Ahmad

Bench: Kuldip Singh, S. Saghir Ahmad

PETITIONER:

INDIAN BANK

Vs.

RESPONDENT:

M/S SATYAM FIBRES (INDIA) PVT.LTD

DATE OF JUDGMENT: 09/08/1996

BENCH:

KULDIP SINGH, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T S. SAGHIR AHMAD. J.

These are two appeals against the judgments of the National Consumer Disputes Redressal Commission, New Delhi.

2. The facts on record indicate that the respondent had entered into Contract No.31/89 with a French Firm M/s STE Kolori (for short, 'Buyer') for supply of 1 lac metres of cotton grey sheeting of

the value of French Francs 4,37,500/-. In due course, the goods were shipped to the Buyer and on 09.06.90, respondent drew two Bills of Exchange on the Buyer for French Franc 3,50,000/- and French Franc 87,500/-. The draft mentioned at the top that the Bills of Exchange had to be co-accepted by the Buyer's bank. These documents were sent by the appellant to that Bank on 18.6.90 as requested by the respondent but on 9.7.90, the documents were returned unpaid. However, on the instructions of the respondent, the documents were re-presented to Banque Leumi, Paris on 13.7.90. On 9.4.91, on the instructions of the respondent, a telex was sent to Banque Leumi, Paris to transfer the documents to another French Bank, namely, Society Lyonnaise De Banque, Lyon, France, and on the same day, fresh Bills of Exchange dated 6.3.91 were sent to the French Bank at the request of the respondent. In these Bills of Exchange, there was no clause for co-acceptance by the French Bank which, however, returned the documents unpaid on 9.8.91.

3. On 26th August, 1991, respondent forwarded a fresh set of Bills of Exchange for being sent to the French Bank. The Bills of Exchange, on their face, specifically provided for acceptance by the Buyer and co-acceptance by the French Bank.

4. It appears that the Buyer, namely, M/s STE Kolori went under liquidation and an order was passed by the Commercial Court at Lyon, France for winding up the firm. The Court also appointed a Liquidator who wrote to the respondent to file its claim.

5. On 1st January, 1992, Napean Sea Rood Branch of the appellant at Bombay wrote a letter to the French Bank that payment of the Bills of Exchange forwarded to it earlier may be made. The French Bank wrote on 9.1.92 that the Bills of Exchange had not been paid as the Buyer was under

liquidation. The Bank also, during course of correspondence, wrote that under French Law, co-acceptance by the Bank, was not permissible nor would it have given the Bank Guarantee, even if a request was made in that regard by the appellant for and on behalf of the respondent. It was, at this stage, that respondent gave a notice dated 26.3.92 to the appellant claiming the entire amounts of the Bills of Exchange and subsequently filed a complaint before the National Consumer Disputes Redressal Commission at New Delhi (for short, 'Commission') claiming the value of the goods shipped to the Buyer at France, from the appellant. The Commission by its judgment and order dated 16.11.93 allowed the claim with the direction to the appellant to pay to the respondent French Francs 4,10,000/- with interest (in rupees) at the rate of 18% on the rupee equivalent of the above amount with effect from 31st December, 1989 together with a sum of Rs. 10,000/- as costs to the respondent. It was against this judgment that the claimant filed, in this Court, Civil Appeal No.1737 of 1995. The connected Civil Appeal No.1334 of 1995 has been filed against the judgment and order dated 13.12.94 by which the Commission has rejected the Review Petition filed by the appellant. Both the appeals were admitted by this Court on 20.2.95 and are being disposed of by this Judgment.

6. It may be stated that the Commission, while decreeing the claim of the respondent, had relied upon the Uniform Rules for Collection made by the International Chamber of Commerce as also the

covering letter of the respondent dated 26th August, 1991 accompanying the two Bills of Exchange, which, according to the Commission, on the face of it, indicated that co-acceptance of the French Bank had to be obtained and since the appellant, while forwarding the Bills of Exchange to the French Bank, had not indicated in its letter that the Bills had also to be co-accepted by the French Bank, it acted negligently. This omission was also treated by the Commission as deficiency in service.

7. Review of this judgment was sought by the appellant on the ground that the respondent's letter dated 26th August, 1991 accompanying the Bills of Exchange did not mention that co-acceptance of the French Bank had to be obtained. It was pointed out to the Commission that the letter dated 26th August, 1991 which was placed on the record by the respondent and in which a specific mention was made that co- acceptance from French Bank had to be obtained, was a letter forged by the respondent to obtain a decree in its favour. The appellant contended that this letter was never issued to the appellant. The letter dated 26.8.91 which was actually issued to them did not contain any direction for obtaining co-acceptance by the French Bank. The Commission in its judgment dated 13.12.94 (disposing of the review application) has considered both the letters and has reproduced the contents thereof but it did not go into the question whether the letter filed by the respondent was a forged letter or not.

8. The relevant portion of the findings recorded by the Commission in its judgment passed on the review application is quoted below :-

" The Opposite Party - Bank - has alleged that the letter of 26th August, 1991 from the Complainant to the Opposite Party - Bank which was the letter with which the Bills of Exchange were submitted to the Opposite Party - Bank - for collection, did not specifically direct the Bank to secure co- acceptance of the Bills of Exchange by the French Bank. The Opposite Party - Bank - has alleged that the letter of 26th August, 1991 submitted as Annexure 'A' to the Complaint petition bearing No.2776 was not the true letter sent by Complainant; it is a forgery & fabrication. The true letter of the same date (i.e. 26th August, 1991) was No.2775 which was the covering letter of Bills of Exchange and this letter did not contain the material instructions regarding co- acceptance by the French Bank. For facility the two letters are reproduced below :

(i) Letter No.2776 of 26th August, 1991 from the Complainant to the Opposite Party - Bank:

"We refer your letter dated 14.8.1991 informing us about return of documents Nos. 0005207 (FOBC 17794) and 0005208 (FOBC 17795) for Rs. 3,50,000 and FF 87,000/ respectively.

In this connection we are enclosing fresh sets of Bills of Exchange with a request to kindly represent the documents immediately to our buyer through M/s Societe Lyonnaise De Banque, Lyon, France. Kindly note that the Bills of Exchange have to be accepted by our buyer and co-accepted by the bank viz; Societe Lyonnaise De Banque for payment on 31.12.1991."

(ii) The letter No.2775 of 26th August, 1991 from the Complainant to the Opposite Party Bank:

"We refer your letter dated 14.8.1991 informing us about return of documents Nos.0005207 (FOBC 17794) and 0005208 (FOBC 17795) for Rs.3,50,000 and FF 87,000/-

respectively.

In this connection, we are enclosing fresh sets of Drafts with a request to kindly represent the documents immediately to our buyer through M/s. Societe Lyonnaise De Banque, Lyon, France."

It will be noticed from the letters reproduced above that the material instruction regarding co-acceptance of the Bills of Exchange by the French Bank is absent in the letter No.2775 whereas it is specifically recorded in the letter No.2776. According to the Opposite Party - Bank - the letter of 26th August No.2776 is a forgery created by the Complainant for the purpose of this case. During the hearing there was considerable effort on the part of the Opposite Party-Bank

- to prove that the letter No.2776 was never issued and this has been forged to support the case of the Complainant whereas the Complainant vehemently maintained that this was a genuine letter and that there was evidence to support its contention. We did not think it necessary to go into this question. We only pointed out to the Complainant that in the ordinary course of correspondence, in its letter of No.2776 the Complainant should have stated that this was in continuation of its previous letter No.2775 and that the letter No.2776 was necessitated by the omission in the letter No.2775 of the vital directions regarding co-acceptance of the Bills of Exchange. We did not get a satisfactory answer to this question.

We have also once again gone through the records of the case, the oral arguments and the written submission made by the parties at the rehearing limited to the question of the letter No.2776 being a forgery and its effect on the findings corded in the order of this Commission of 16th November, 1993.

It will be observed from the order that the Bills of Exchange clearly specified that the same were to be co-accepted by the foreign bank besides being accepted by the buying French Firm. In these circumstances it was the duty of the Opposite Party Bank to ensure co-acceptance by the foreign Bank. The responsibility of the Bank to obtain co-acceptance of the Bills of Exchange is also manifest from the Rules of Collection laid down by the International Chamber of Commerce. As the collecting bank on behalf of its customer (Complainant) who had entrusted the task of collection of Bills of Exchange to it the Opposite Party - Bank, the latter is responsible for seeing that the form of acceptance of Bills of Exchange is complete and correct.

The Rules require that "all documents sent for collection must be accompanied by collection order which is to be made by the Bank in accordance with the instructions of the client or the principal.

The instructions for co-

acceptance by the foreign bank on the Bills of Exchange were clear and unambiguous and as such even if we ignore the covering letter No.2776 of 26th August, 1991 said to have been sent by the Complainant to the Bank on the ground that this is a forged document, it will not affect the decision already arrived at in any manner.

9. As pointed out earlier, the Commission did not decide the question whether the letter dated 26th August, 1991, filed by the respondent was a forged letter as it was of the opinion that even if both the letters, namely, the letter filed by the appellant in Review Petition as also the letter filed by the respondent in the original proceedings, were ignored, the appellant was still under a liability to have mentioned in its letter to the French Bank to whom the Bills of Exchange were forwarded, that the French Bank had also to co-accept the Bills before delivering the documents to the Buyer as the respondent had specifically mentioned this requirement in the Bills of Exchange drawn on and addressed to M/s STE Kolori and their Bankers, namely, Societe Lyonnaise De Banque, Lyon, France. This finding, like the findings recorded by the Commission in its original judgment dated 16.11.93, is based on the interpretation of certain Clauses of the Rules of the International Chamber of Commerce.

10. There are two Banks, namely, the Indian Bank, Bombay (appellant) through whom the Bills of Exchange were forwarded and the French Bank, namely, Societe Lyonnaise De Banque, Foreign Department, Lyon, France for payment. It is not disputed that the Banks had to act in accordance with the Uniform Rules for Collection made by the International Chamber of Commerce (hereinafter referred to as ICC Rules). The extent of liability, default, negligence or deficiency in service, on the part of either or the Banks would, Therefore, depend on a correct reading and interpretation of the ICC Rules which, we unhesitantly say, at the outset, were misread, misunderstood and misinterpreted by the Commission.

11. Clause B of the ICC Rules which came into force with effect from January 1, 1979 contains Definitions some of which (which are relevant for this case) are reproduced below :-

"1. (i) "Collection" means the handling by banks' on instructions received of documents as defined in

(ii) below, in order to a) obtain acceptance and/or, as the case may be, payment, or b) deliver commercial documents against acceptance and/or, as the case may be, against payment, or c) deliver documents on other terms and conditions.

(ii) "Documents" means
financial documents and/or
commercial documents:
(a) "financial documents"

means bills of exchange, promissory notes, cheques, payment receipts or other similar instruments used for obtaining the payment of money;

(b) "Commercial documents" means invoices, shipping documents, documents of title or other similar documents, or any other documents, whatsoever, not being financial documents.

2. The "parties thereto" are :

(i) the "principal" who is the customer entrusting the operation of collection to his bank;

(ii) the "remitting bank" which is the bank to which the principal has entrusted the operation of collection;

(iii) the "collecting bank" which is any bank, other than the remitting bank, involved in processing the collection order;

(iv) the "presenting bank" which is the collecting bank making presentation to the drawee.

3. The "drawee" is the one to whom presentation is to be made according to the collection order." Clause C provides as under :-

"All documents sent for collection must be accompanied by a collection order giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such collection order, and in accordance with these Rules.

If any bank cannot, for any
reason, comply with the
instructions given in the

collection order received by it, it must immediately advise the party from whom it received the collection order."

Article 2, 3 as also Article 15 provide as under:-

"Article 2 Banks must verify that the documents received appear to be as listed in the collection order and must immediately advise the party from whom the collection order was received of any documents missing.

Banks have no further
obligation to examine the
documents.

Article 3

For the purpose of giving

effect to the Instructions of the principal, the remitting bank will utilise as the collecting bank:

(i) the collecting bank nominated by the principal, or in the absence of such nomination,

(ii) any bank, of its own or another bank's choice in the country of payment or acceptance, as the case may be.

The documents and the collection order may be sent to the collecting bank directly or through another bank as intermediary.

Banks utilising the services of other banks for the purpose of giving effect to the instructions of the principal do so for the account of and at the risk of the latter.

The principal shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws or usages.

Article 15

The presenting bank is

responsible for seeing that the form of the acceptance of a bill of exchange appears to be complete and correct, but is not responsible for the genuineness of any signature or for the authority of any signatory to sign the acceptance.

12. Clauses 2 and 3 specify the parties to the transaction for purpose of "Collection" as defined in Sub-clause 1(i) of Clause B. These parties are the "Principal" who entrusts the operation of "Collection" to his Bank. This, in the instant case, would be the respondent as the respondent entrusted the operation of "Collection" to the appellant. The other party is the "Remitting Bank", namely, a Bank to whom the operation of "Collection" is entrusted by the "Principal". In the instant case, the "Remitting Bank" would be the appellant as it was this Bank to whom the respondent had entrusted the job of "Collection". Another Bank which is involved in the whole transaction is the "Collecting Bank". According to the definition, this would be a Bank other than the "Remitting Bank". There is, yet, a third Bank, namely, the "Presenting Bank" which, according to the definition, is, in fact, the "Collecting Bank" making presentation to the "Drawee". "Drawee" has been defined in Sub-clause 3 of Clause 8 as the person to whom presentation is made according to the collection order. Although, in the definition, there are three banks, namely, the "Remitting Bank", the "Collecting Bank" and the "Presenting Bank", the identity of "Collecting Bank" and the "Presenting Bank" is the same as the "Collecting Bank" not only collects the documents from the "Remitting Bank", it also presents those documents to the "Drawee" for payment. The "Remitting Bank"

cannot be the "Collecting Bank" or the "Presenting Bank" as the "Collecting Bank" has been defined in the ICC Rules as a Bank OTHER THAN THE REMITTING BANK".

13. Clause C which has already been extracted above requires that the documents sent for "Collection" must be accompanied by a collection order. The collection order has to contain complete and precise instructions so as to enable the Bank to act in accordance with the instructions

contained in the collection order and in accordance with the ICC Rules. This will also be clear from the definition of "Collection" as set out in Sub-clause 1(i) of Clause B, which means "the handling by Banks, ON INSTRUCTIONS RECEIVED, of documents", which are either "Commercial or Financial" as defined in Sub-clause (ii)(a) and (b). The definition of "Financial Documents" also includes Files of Exchange. The words "for the purpose of giving effect to the INSTRUCTIONS OF THE PRINCIPAL" occurring in Article 3 also make it clear that the Principal has to give instructions separately (in addition to the documents) to the Remitting Bank to . enable it to instruct the Collecting Bank accordingly.

14. "Acceptance" is dealt with in Article 15 which indicates that the responsibility of seeing that the Bill of Exchange is accepted, completely and correctly, is that of the "Presenting Bank".

15. The Commission, while disposing of the complaint of the respondent by its original order dated 16.11.93, had held that not only the Bill of Exchange but the covering note accompanying those Bills clearly indicated that the Bill was to be accepted by the Buyer and co-accepted by the Foreign Bank. It, then, proceeded to say as under:-

"The Rules for Collection laid down by the International Chamber of Commerce leave no room for doubt that as per Article 3 of the said Rules, for giving effect to the instructions of the principal, i.e., the customer entrusting the operation of collection to his Bank, the remitting bank (viz. the Bank to which the principal has entrusted the operation of collection) is the collecting Bank. As observed earlier, under Article 15 it is the presenting Bank which is responsible for seeing that the form of acceptance of a Bill of Exchange appears to be complete and correct. Under Item C "General Provisions and Divisions" of the above Rules "All documents sent for collection must be accompanied by a collection order which has to be made by the Bank in accordance with the instructions of the client or the principal". The opposite party Bank failed to do so. We reject its plea that it was not responsible to obtain the co-acceptance of the Bank and there was no deficiency of service on its part."

16. A mere perusal of the above passage of the Commission's judgment indicates that the Commission fell into a serious error in treating the "Remitting Bank" as the "Collecting Bank" and, then, fastening liability on the appellant by observing that the appellant had not acted in accordance with Article 15 of the ICC Rules under which it was the responsibility of the "Presenting Bank" to see that the "Documents" were accepted in accordance with the instructions of the "Principal". The Commission thus treated appellant not only as the "Remitting Bank" but also as the "Collecting Bank" and 'Presenting Bank" which is not permissible as the identity of "Remitting Bank" is different and distinct from that of the "Collecting Bank" and/or the "Presenting Bank".

17. As pointed out earlier, the main judgment of the Commission is based on the ground that there was letter dated 26.8.91 which contained specific instruction that there had to be co-acceptance by the Foreign Bank.

18. As against this. there is, admittedly, another letter of 26th August, 1991 from the respondent to the appellant which does not contain this instruction. When this letter was filed before the Commission and a review of the judgment was sought on the ground that the letter containing the instruction for obtaining co-acceptance of the French Bank was never issued to the appellant and that the only letter issued on that date was the letter in which this instruction was not mentioned, the Commission, instead of deciding the controversy as to whether the other letter relied upon by the respondent was, at all, sent or issued to the appellant, proceeded to decide the controversy on the ground that even if no such letter was issued, the recital in the Bill of Exchange about co-acceptance by the French Bank was enough and the appellant having not acted in terms of the Bill of Exchange and having not obtained the co-acceptance of the French Bank, was liable to pay to the respondent the entire price of the goods supplied to the Buyer to whom the documents would not have been delivered had it been mentioned that before delivering the documents to the Buyer, co-acceptance by the French Bank was necessary, as in that event, the documents would have been either returned, as was done on previous occasions, or the French Bank would have given co-acceptance and thus made payment of the entire amount to the respondent.

19. In view of the findings recorded by us that under the ICC Rules, it is the responsibility of the "Principal" to give or send specific and precise instructions to the Bank besides sending the "Commercial/Financial Documents", Commission was under a duty to decide as to whether the appellant had issued the letter containing the requirement of co-acceptance by the French Bank. The Commission could not legally avoid to decide this question particularly as the appellant had contended before the Commission that the letter No.2776 of 26th August, 1991 was forged and fabricated by the respondent and that the only letter issued by the respondent was letter No.2775 dated 26th August, 1991. The contents of both the letters have already been reproduced by the Commission in its judgment by which the review application has been disposed of which would indicate that in the letter No.2775, there is no requirement to obtain co-acceptance by the French Bank whereas in the other letter, namely, letter No.2776, this condition has been specifically mentioned.

20. By filing letter No.2775 of 26.8.91 along with the Review Petition and contending that the other letter, namely, letter No.2776 of the even date, was never written or issued by the respondent, the appellant, in fact, raised the plea before the Commission that its judgment dated 16.11.93, which was based on letter No. 2776, was obtained by the respondent by practising fraud not only on the appellant but on the Commission too as letter No.2776 dated 26.8.91 was forged by the respondent for the purpose of this case. This plea could not have been legally ignored by the Commission which needs to be reminded that the Authorities, be they Constitutional, Statutory or Administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as Fraud and Justice never dwell together (*Fraus et jus nunquam cohabitant*). It has been repeatedly said that Fraud and deceit defend or excuse no man (*Fraus et dolus nemini patrocinari debent*).

21. In *Smith v. East Elloe Rural District Council* (1956) AC 736, the House of Lords held that the effect of fraud would normally be to vitiate any act or order. order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake

which prejudices a party, the Court has the inherent power to recall its order. (See: Benoy Krishna Mukherjee vs. Mohanlal Goenka AIR 1950 Cal. 287; Gajanand Sha & Ors. vs. Dayanand Thakur AIR 1943 Patna 127; Krishna Kumar vs. Jawand Singh AIR 1947 Nagpur 236; Devendra Nath Sarkar vs. Ram Rachpal Singh ILR (1926) 1 Lucknow 341 = AIR 1926 Oudh 315; Saiyed Muhammad Raza vs. Ram Saroop & Ors. ILR (1929) 4 Lucknow 562 = AIR 1929 Oudh 385 (FB); Bankey Behari Lal & Anr. vs. Abdul Rahman & Ors. ILR (1932) 7 Lucknow 350 = AIR 1932 Oudh 63; Lekshmi Amma Chacki Amma vs. Mammen Mammen, 1955 Kerala Law Times 459.) The Court has also the inherent power to set aside a sale brought about by fraud practised upon the Court (Ishwar Mahton & Anr. vs. Sitaram Kumar & Ors. AIR 1954 Patna 450) or to set aside the order recording compromise obtained by fraud. (Bindeshwari Pd. Chaudhary vs. Debendra Pd. Singh & Ors. AIR 1958 Patna 618; Smt. Tara Bai vs. V.S. Krishnaswamy Rao AIR 1985 Karnataka 270).

24. We may now turn to the next and allied questions; what is forgery, whether forgery is a fraud and whether in the instant case, forgery and fraud are proved?

25. Forgery has its origin in the French word "Forger", which signifies:

"to frame or fashion a thing as the smith doth his worke upon the anvill. And it is used in our law for the fraudulent making and publishing of false writings to the prejudice of another mans right (Termes de la Ley) (Stroud's judicial Dictionary, Fifth Edition Vol. 2).

26. In Webster Comprehensive Dictionary, International Edition, 'Forgery' is defined as :

"The act of falsely making or materially altering. with intent to defraud; any writing which, if genuine, might be of legal efficacy or the foundation of a legal liability."

27. This Definition was adopted in Rembert vs. State 25 Am. Rep. 639. In another case, namely, State vs. Phelps 34 Am. Dec. 672, it was laid down that forgery is the false making of any written instrument, for the purpose of fraud or deceit. This decision appears to be based on the meaning of forgery as set out in Tomlin's Law Dictionary.

28. From the above, it would be seen that fraud is an essential ingredient of forgery.

29. Forgery under the Indian Penal Code is an offence which has been defined in Section 463, while Section 464 deals with the making of a false document. Section 465 deals with the making of a false document. Section 465 prescribes punishment for forgery. "Forged document" is defined in Section 470 while Section 471 deals with the crime of using as genuine, the forged document.

30. Forgery and Fraud are essentially matters of evidence which could be proved as a fact by direct evidence or by inferences drawn from proved facts.

31. The Privy Council in Satish Chandra Chatterjee vs. Kumar Satish Kantha Roy & Ors. Air 1923 PC 73, laid down as under:

"Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who made them-- proved by established facts and inferences legitimately drawn from those facts taken together as a whole. Suspensions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused or fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so many a clever and dexterous knave would escape.

32. The above principle will apply not only to court of law but also to statutory tribunals which, like the Commission, are conferred power to record evidence by applying certain provisions of the Code of Civil Procedure including the power to enforce attendance of the witnesses and are also given the power to receive evidence on affidavits. The Commission under the Consumer Protection Act, 1986 decides the dispute by following the procedure indicated in Section 22 read with Section 13(iv) and (v) of the Act.

33. Sub-section (iv) of Section 13 which has been made applicable to the proceeding before the Commission lay down to the proceeding before the Commission lay down that it shall have the same powers as are vested in a Civil Court under the Code Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:-

(i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;

(ii) the discovery and production of any document and production of any document of other material object producible as evidence:

(iii) the reception of evidence on affidavits.

(iv) -----

(v) issuing of any commission for the examination of any witness; and

(vi) -----

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The commission has, thus, jurisdiction not only to examine a witness on oath but also to receive evidence in the form of affidavits.

34. The parties, in the instant case, have filed their affidavits annexing therewith a host of documents. These affidavits and documents were treated as evidence in the case. It was on the basis

of this evidence that the main case, as also the Review Petition, were decided by the Commission.

35. Since the evidence of the parties is already on record and all vital facts either stand admitted or proved, we proceed now to consider whether forgery and fraud are established. This we are doing in view of the facts and circumstances of this case otherwise we would have either remanded the case to the Commission or directed the respondent to approach the Civil Court.

36. Paragraphs 2, 3, 4, 5, and 6 of the Review Application filed by the appellant before the Commission are as under:

"2. In brief, the case of the complainant before this Hon'ble Commission was that it had by its letter of the 26th August, 1991, which letter enclosed the bills of exchange in question, gave specific instruction to the Opposite Party -

-- the Bank -- for securing a co- acceptance by Societe Lyonnaise de Banque (the French Bank) before handing over the documents of title to the goods. Based upon this letter, the veracity of which was not questioned by the Opposite Party at that stage in the circumstances indicated hereinafter, this Hon'ble Commission was pleased to hold that the Opposite Party was responsible for not carrying out the instructions contained in the letter dated 26th August, 1991, (Exhibit A to the Complaint) and thereby liable in damages caused to the Complainant. It is correct that the complainant had annexed a copy of the letter dated 26th August, 1991 with this Complainant. However, the Opposite Party- the bank failed to notice that this letter so annexed was not the same as the letter on 26.8.1991 as a covering, however with a vital difference that the body of the letter did not contain the material instruction regarding co-acceptance by the French Bank.

3. The letter produced before this Hon'ble commission bears the same date as the letter actually given to the Bank purports to be a covering letter (as also was the letter given to the Bank) and bears a reference No. 2776 the Bank is 2775. Due to these apparent similarities, whilst drawing up the pleadings of the material alterations made to the contents of the letter were overlooked. The Opposite Party states that the letter as produced before this Hon'ble Commission was not a true copy of the letter given to the Bank.

4. One of the reasons why this lapse occurred is because the true significance and import of the letter was not understood and appreciated. After receiving a copy of the order of this Hon'ble Commission, it was found that the whole case had turned against the bank based upon the letter of the Complainant produced before the Commission. It is thereafter when the copy of the letter which is with the Bank was perused, it was found that there is a material variation between that copy which was given to the Bank and its purported true copy which was produced by the Complainant before this Hon'ble Commission. However, to eliminate the possibility as to whether, in addition to the letter given to the Bank bearing reference No. 2775,

another letter having reference No. 2776 of a same dated was also given to the Bank, a through search was made of the records of the Bank at the Napean Sea Road and other connected Branches including the head office. The search has revealed that the Bank has not received the letter bearing reference No. 2776 of 26th August, 1991 the contents of which are as the purported copy produced by the Complainant before this Hon'ble Commission. What was given by the complaint to the Bank as a covering letter was a letter being reference No. 2775, a copy of which is annexed hereto and marked as Annexure I and the original of which shall be produced at the time of hearing. Affidavit of the then manager of the said branch confirming that the said letter dated 26th August, 1991 annexed as Exhibit "A" to the Complaint was not received by the Bank is annexed hereto and market Annexure "II".

5. A perusal of this letter shows that the material instructions in relation to co-acceptance by the French Bank are absent in this letter. The Opposite Party is advised to stated that considering the fact that a letter dated 26th August, 1991, bearing REF:SF:E:2775 was given as a covering letter to the Bank, it is inconceivable that a second letter also as a covering letter would be given to the Bank. The letter of 26th August, 1991 stated that it is "...enclosing fresh set of drafts....". There are some other discrepancies between this letter and the letter produced by the Complainant, as hereafter set out.

6. The Opposite Party further submit that the xerox copy of the purported letter produced before this Hon'ble Commission by the Complainant purports to bear and initial on the right-hand side of the letter. The Opposite Party submits that this initial is not of any of the officials of the Napean Sea Road Branch of the bank at the relevant time. The Opposite Party is, therefore, advised to submit that this letter is a forgery created by the Complainant for the purpose of the present case."

37. The respondent filed a reply to the Review Application in paragraph 4 by which he stated as under:

(a) The Complainant by its letter dated 26th August 1991 bearing reference No.SF: E: 2775 forwarded to the Opponent fresh set of Drafts with a request to present the aid documents to the huyer (vis. M/s STE Kolori) through M/s. Societe Lyonnaise De Banque, lyon, France.

The copy of the said letter which is on the file of the said letter which is on the file of the Complainant is annexed hereto tan market Exhibit 'A'.

(b) The said letter dated 26th August 1991 bearing Reference No. EF:E: 2775 though delivered to the Opponent, the carbon copy of the said letter available with the Complainant, does not bear any acknowledgement of receipt. The said letter is also mentioned in the Outward Register maintained by the Complainant. Hereto annexed and market Exhibit 'B' is a copy of the relevant page of the Outward Register of the Complainant. The Complainant craves leave to refer to and rely upon the Outward Register maintained by it for the relevant period when produced.

(c) After the delivery of the said letter dated 26th August 1991 bearing Reference No. SF:E: 2775 the Complainant noticed that the said letter did not request the Opponent to have the said Bills of Exchange co-accepted by the Foreign Bank viz. Societe Lyonnaise De Banque, Lyon, France. In the circumstances, the Complainant immediately addressed another letter to the Opponent also dated 26th August 1991 bearing Reference No.SF:E: 2775 wherein they gave specific instructions to the Opponent to have to the said Bills of Exchange accepted by the buyer viz . M/s STE Klori and co-accepted by the Foreign Bank viz. Societe Lyonnaise De Banque. The said letter has been annexed as Exhibit 'A' to the plaint and has also been annexed hereto as Exhibit 'C'. The said letter was delivered to the Opponent and the same bears the initials of the persons who received the said letter in the Opponent and the same bears the initials of the person who received the initials of the person who received the said letter also bears the rubber stamp of the Opponent.

(d) The said letter dated 26th August 1991 bearing Reference No. SF:E: 2775 is also mentioned in the Outward Register maintained by the Complainant. Exhibit 'B' hereto which is the relevant page of the Outward Register not only shows the entry of the said letter bearing Reference No. SF:F: 2775 but also the entry of the aforesaid letter bearing SF:E: 2776.

(e) From the aforesaid it is evident that there were to letters both dated 26th August, 1991 which were addressed by the Complainant to the Opponent.

(f) The Complainant says that pursuant to the filing of the original complaint, the Complainant's Advocates gave inspection of the documents, referred to and relied upon by the Complainant, to the Opponents Advocate. The said inspection was taken on 14th October, 1992 and at the said time the carbon copy of the letter dated 26th August, 1991 bearing Reference No.SF:E: 2776 was inspected by the Opponents Bank. The fact of the inspection having been taken has been recorded by the Opponents Advocated in their letter by the dated 16th October, 1992 which is annexed hereto and marked Exhibit 'D'.

(g) The Complainant states that after the said Review Application was served upon the Complainant, the Complainants Advocate addressed a letter dated 28th December, 1993 to the Opponents Advocates pointing out that the said Review Application was totally false and misconceived inasmuch as the said letter dated 26th August, 1991 bearing Reference No.SF:E: 2776 was not a fabricated letter and bore the rubber stamp of the Opponent as also the initials of the person who received the same in the Opponent Bank. The Complainants Advocates by the said letter also requested for inspection of the letter dated 26th August, 1991 bearing Reference No. SF:E:2775 and the Inward Register maintained by the Opponent Bank. Hereto annexed and marked Exhibit 'E' is a copy of the said Complainant's Advocates letter dated 28th December, 1993.

(h) The opponent by their
Advocates' letter dated 20th

December, 1993 appointed time for inspection of the said letter. The Opponent Advocates by the said letter also stated that their client had not entered the said letter bearing Reference No.SF:E:2775 in their Inward Register as as the Inward Register was formerly only maintained in respect of registered letters which were entered therein. Hereto annexed and market Exhibit 'F' is a

copy of the said dated 29th December, 1993.

(i) Pursuant to the appointment fixed in that regard the Complainant and their Advocates attended the Office of the Opponents Advocates on 3rd January, 1994 and took inspection of the said letter dated SF:E; 2775. The Complainant at the said time also gave inspection of the carbon copies of the letter bearing Reference No. SF:E:2775 and SF:E:2776 available on the file of the Complainant. Inspection of the Outward Register of the Complainant was also given to the Opponent and its Advocates. The given and taking of the said inspection was recorded by the Opponent Advocates in their letter dated 4th January, 1994 (Exh. 'D' hereto) and also by the Complainant in their Advocates letter also dated 4th January, 1994. Hereto annexed and marked Exhibit 'G' is a copy of the aforesaid letter dated 4th January, 1994.

38. Other relevant paras of the respondent's reply are paragraph 7 to 15.

39. The Respondent's denial that it had fabricated the letter No. 2776 is also contained in various other paras of its reply.

40. The appellant filed a rejoinder affidavit before Commission. Paras 3,7,12,21 are quoted below-

"3. It is only after having perused the Reply of the Complainant that the Opposite Party has further realised that the Complainant has played a calculated fraud with an intention to secure an order from this Hon'ble Commission. the Complainant has all along played a fraud on this Hon'ble Commission in making it believe that the Bills of Exchange have been forwarded by the alleged letter dated 26th August, 1991 bearing No. 2776 annexed as Exhibit "A" to the Complaint. Having now read the tenor of the Reply of Complainant, the Opposite party has realised that the Complainant has with mischievous and malafide intent in its pleadings before this Hon'ble Commission cleverly avoided making reference to the different letters said to have been delivered to the Opposite Party and the aforesaid fact is clear and evident by the language of he pleadings. The Opposite Party further submits that after going through the said reply of the complaint to the Review Petition it has become very clear that the Complainant has deliberately played a fraud and now put forward a false case in the said reply to further perpetrate the said fraud. The Opposite Party submits the letter bearing No. 2775 dated 26th August, 1991 and the said letter bearing No. 2776 dated 26th August, 1991, both purport to enclose therewith set of Bills of Exchange. It is an admitted position that only one set of Bills were forwarded for the purpose of forwarding the same to the foreign party for its acceptance. The fact that both letters set out that Bills of Exchanges are forwarded therewith itself indicates that they were not meant for substitution. Even the language of both letters belies the false case of substitution now put up by the complainant. It is thus clear that the Complainant has misguided this Hon'ble Commission by relying upon a letter bearing ref. No. 2776 dated 26th August, 1991 purporting to suggest that by the said letter, the said Bills of Exchange were forwarded for the purpose of acceptance, whereas in fact the said letter bearing No. 2776 dated 26th August, 1991 was never received by the Opposite party.

7. With reference to paragraph 4(c) of the said Reply, the Opposite Party denies that after delivery of the said letter dated 26th August delivery of the said letter dated 26th August, 1991 bearing No. 2775 the Complainant noticed that the said letter did not contain a request to the Opposite party to have the said Bills of Exchange co-accepted by the foreign Bank and therefore addressed another letter to the Opposite Party also dated 26th August, 1991 bearing NO. 2776 wherein the complainant give specific instructions to the Opposite party to have the said Bills of Exchange accepted by the Buyer and co-accepted by the foreign Bank. The Opposite Party says and submits that the alleged letter dated 26th August, 1991 bearing No. 2776 is not genuine letter. The Opposite Party craves leave to refer to the Outward Register allegedly maintained by the complainant, when produced. The Opposite party submits that the Outward Register maintained by the Complainant does not appear to be genuine Outward Register as the same has entries containing references to letters of a later date bearing outward number of an earlier date. The Opposite Party says and commits that no reliance can be placed upon the said alleged Outward Register alleged to have been maintained by the Complainant. The opposite party says and submits that the alleged initials of the person who received he said letter is not initial led by any officer/staff member of Indian Bank working in its Nepean Seas Road Branch at the relevant time. The Opposite Party says that prior to the filling of the Review Application the Opposite Party obtained verification from the officers and staff members attached to the Nepean Sea Road Branch of the Opposite Party who certified and stated that the alleged initial on the alleged office copy of the Complainant is not their initial. The Opposite Party states and submits that the mere fact that a rubber stamp appears on the alleged letter cannot be itself confer any authenticity. It is pertinent to note that the Complainant has obtained and alleged acknowledgment on the officer copy of the alleged letter 26th Aug. 1991 bearing reference No. 2776 when, in fact no such letter was delivered by the Complainant to the Opposite Party. It is further pertinent to note that the Complainant did not think it fit or necessary to obtain any acknowledgement on office copy of letter dated 26th August, 1991 bearing No. 2775 when the original documents i.e. the Bills of Exchange were delivered to the Opposite Party therewith but the complainant has allegedly obtained and acknowledgement on the alleged letter dated 26th August, 1991 bearing No. 2776. Copy of Statement signed by the Officers and staff members at the Nepean Sea Road Branch of the Opposite Party certifying that the alleged initials on the on alleged acknowledgement does not belong to any of them in hereto annexed and marked Annex "I".

12. With reference to paragraph 7 of the said Reply, the Opposite Party denies the contention of the Complainant that the letter dated 26th August, 1991 bearing No. 2775 was not disclosed by the Complainant before this Hon'ble Commission as the said letter was substituted by the alleged or at all. The Opposite Party submits that it is for the first time that the Complainant has pleaded substitution. This plea of substitution has been pleaded only after the fraud has been detected by the Opposite Party and brought to the notice of this Hon'ble Commission. If the plea of substitution is to be believed, the Complainant would have withdrawn the letter dated 26th August, 1991 bearing No.

2775 at that point of time itself since the Complainant had taken no acknowledgement for the same. The Opposite Party denies the contention of the Complainant that the nondisclosure was not with a view to suppressing information, as alleged or otherwise. The Opposite Party further denies the contention of the Complainant that the nondisclosure was inadvertent as alleged at all. The Opposite Party states that the second letter dated 26th August, 1991 bearing No. 2776 was never delivered by the Complainant to the Opposite Party.

15. With reference to paragraph 10 of the said Reply, the opposite party states that it is pertinent to note that despite Complainant having accepted the fact that letter dated 26th August, 1991 bearing No. 2775 was addressed to the Opposite Party and the Opposite Party would act on the instructions contained therein. The Complainant ought to have drawn reference to the letter No. 2775, if assuming without admitting that the alleged letter No. 2776 was in fact delivered. The Opposite Party states that, it is admitted by the Complainant that the two letters both dated 26th August, 1991 bearing Nos. 2775 and 2776 are materially different from each other. The Opposite Party states that the Complainant has not explained in any part of the reply as to what warranted the submission of the alleged letter dated 26th August, 1991 bearing No. 2776 on the same dated after submission of a letter on the same subject, also dated 26th August, 1991 bearing No. 2775 without providing for any reference to the earlier letter or without making any mention about the submission of the earlier letter to the Opposite Party. The Opposite Party submits that the absence of continuity of reference to the earlier letter cannot be termed as an omission, as alleged, by the Complainant, particularly who, according to the Complainant itself the second letter is intended to be substitution of the contents of the earlier letter.

21. With reference to paragraph 21 to 24 of the said Reply, it is pertinent to note that the Complainant says that the Complainant was willing to have the goods delivered to the Buyer not only letter acceptance of the Bills of Exchange by the Buyer but also co-acceptance by the foreign bank. The Complainant has, till date no brought to the notice of the Opposite Party and/or this Hon'ble Commission the basis of the aforesaid statement, as to whether there is any agreement between the complainant and the foreign Buyer, or the Complainant and the foreign bank for co-acceptance. There is no documentary or any evidence brought in by the Complainant to show any alleged contract for co-acceptance. In the absence of the foreign bank being party to the present proceedings, the statement of the Complainant that the Complainant was willing to sell the goods only if there was co-acceptance, is not sustainable and cannot be believed. The Opposite Party says and submits that the history of the present transaction between the complainant and the foreign buyer indicates that the goods were already shipped in June, 1990 prior to the forwarding of the said Bills of the Exchange for acceptance in August, 1991. The Opposite Party denies that the Opposite Party has been negligent in that the Bills of Exchange are to be accepted as per tenor of the instrument. The Opposite Party denies that the Complainant is entitled to sue the Opposite Party and recover from the Opposite Party the amount of Bills of Exchange with interest, as alleged or otherwise. The Opposite Party says that the only claim which the Complainant has is against the foreign Buyer and / or foreign bank and not against the Opposite Party. It is foreign pertinent to note that the Complainant states that there is no privity of contract between the foreign bank and the Complainant. If the aforesaid statement is to be believed, then the question of the foreign bank being required to co- accept the Bills of Exchange cannot and does arise."

41. We have also gone through other affidavits and documents, filed either in this Court or before the Commission, which have been brought on record here.

42. We must say immediately that the circumstance, in the instant case, are glaring and the intrinsic evidence available on the record is clinching, so much so, that no other inference is possible except to hold that the letter No. 2776 of 26th August, 1991 was forged by the respondent in order to obtain a decree from the Commission for a huge amount of French Francs 4,10,000/- It will appear that -

(i) The respondent does not deny that it had sent and issued letter No. 2775 dated 26th August, 1991 to appellant:

(ii) The respondent does not deny that this letter does not contain any direction to the appellant to obtain co-acceptance from the French Bank:

(iii) The respondent says that it had issued letter NO. 2776 dated 26th August, 1991 in substitution of the earlier no. 2775 of the event dated;

(iv) the fact that this letter was sent in substitution of letter No. 2775 dated 26th August, 1991 is not mentioned in the letter itself:

(v) The respondent does to say that the letter NO. 2775 dated 26th August, 1991 should be treated as cancelled;

(vi) The respondent had corresponded with the appellant and had even given a notice dated 26.3.92 through its counsel to the appellant claiming the amounts due under the Bill of Exchange on the ground of negligence but nowhere does the respondent says that the letter No. 2776 dated 26th August, 1991 was substitution of letter No. 2775 of that date:

(vii) Even the original complaint filed before the Commission , the respondent does not say anywhere that they had issued letter No. 2776 of 26th August, 1991 in substitution of the letter NO. 2775 of that date.

(viii) The plea that letter NO.

2776 was issued in substitution of letter no. 2775 was asserted by respondent for the first time in review proceedings when the appellant filed this letter before the commission. The respondent's silence still the stage, therefore, becomes eloquent indicating that this letter was no in existence till then:

(ix) What was the mode of payment agreed upon between the respondent and the buyer in France has not been indicated. Nor has any correspondence, or for that matter, any agreement in writing between the respondent and the buyer, been filed or brought on record to indicate the terms of contract or agreement or, at least, to

indicated the mode of payment, was specifically mentioned by it in its "Collection Order" to the appellant.

(x) The respondent and already come to the know that the buyer was under liquidation as the liquidator himself had written to the respondent to file its claim in respect of the goods supplied by it to the Buyer.

(xi) There was some correspondence with French Bank and the French Bank wrote to the appellant, which was also brought to the notice of the respondent, that co-acceptance by a French Bank was not permitted under French Law and that, if insistence for co-acceptance by the French Bank meant furnishing of bank guarantee, the French Bank would have refused to furnish that guarantee even if it was required of it in the letter accompanying the Bills of Exchange. (this assertion by the French Bank is in consonance with the Preamble of ICC Rules which says that "these provisions apply to all Collections... Unless contrary to the provisions of a national state or local law and/or regulation which cannot be departed from.") It was, thus, apparent to the respondent that there was little hope the entire amount covering the goods supplied by it to the French Buyer would be paid and therefore, it acted in a dexterous and sophisticated manner to fasten the liability on the appellant by branding it as negligent is not writing specifically to the French Buyer for co-acceptance in spite of its letter NO. 2776 of 26.8.91 and to support this plea by evidence, it forged the letter in question forgetting that there existed another letter NO. 2775 of that date in which the requirement of co-acceptance by French Bank was indicated. Indeed, the Persian saying that "DAROGH GO RA HAFIZA NA BASHAD" (A LIAR HAS NO MEMORY) is the still the time tested truth.

In the face of overwhelming evidence, the entry in the respondent's record indicating that letter NO. 2776 was issued cannot be accepted. Significantly, the copy of the disputed letter bears and endorsement of "Receipt and Rubber Stamp" allegedly of the appellant but the copy of the admitted letter No. 2775 does not bear any endorsement of receipt which the respondent had acted.

43. In view of the above, and if the letter No. 2776 (forged by the respondent) is excluded from the evidence, there remains only the letter No. 2775 of 26.8.1991 in which it was not indicated by the respondent to the appellant to write to the French Bank to deliver the documents only on co-acceptance by it. The appellant, in the circumstances, was justified in not mentioning co-acceptance by the French Bank. The case of the respondent being false and based on fabricated evidence has to be dismissed.

The appeals are consequently allowed, and both the judgments of the Commission, namely judgments dated 16.11.1993 and 13.12.1994 are set aside and the Original Complaint of the respondent is dismissed with costs quantified at Rs. 25,000/-.