

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

C.R. No.362 of 2016
M/s Oil & Gas Development Company Limited
Versus.
M/s Excel Techno Solutions FZE, U.A.E. and another

Date of Hearing: 27.01.2017
Petitioner by: Ms. Sara Seerat, Advocate
Respondent No.1 by: Mr. Nadeem Younas, sole proprietor M/s
Excel Techno Solutions, FZE

MIANGUL HASSAN AURANGZEB, J:- Through the instant civil revision petition, the petitioner, M/s Oil and Gas Development Company Limited, impugns the order dated 20.07.2016, passed by the court of the learned Civil Judge, Islamabad, whereby the petitioner's application under Section 41(b) of the Arbitration Act, 1940 ("the 1940 Act"), was dismissed. Through the said application, the applicant/petitioner had sought an interim injunction to restrain respondent No.1 (M/s Excel Techno Solutions FZE, U.A.E.) from encashing the irrevocable Letter of Credit dated 13.03.2014, for an amount of US\$ 202,008/-.

2. The record shows that on 19.02.2014, the petitioner (purchaser) and respondent No.1 (seller/supplier), entered into a contract ("the Contract") for the supply of a Fire Engine Lorry (Group-B) for the Jhal Magsi Gas Field Development Project ("the Lorry"). The contract price was agreed to be US\$ 202,008/-, which was to be paid through an irrevocable Letter of Credit. 90% of the contract price was to be paid by the petitioner on shipment, whereas the remaining 10% was to be paid upon delivery of the Lorry at Karachi. In accordance with the terms of the Contract, the petitioner, on 13.03.2014, established an irrevocable Letter of Credit for an amount of US\$ 202,008/- issued by respondent No.2 (United Bank Limited). Respondent No.1 was the beneficiary under the said Letter of Credit.

3. Clause 23 of the Contract provides for the differences and disputes arising out of or in connection with the Contract to be

resolved through arbitration under the provisions of the 1940 Act. After the execution of the Contract, disputes and differences developed between the petitioner and respondent No.1, causing the latter to institute arbitration proceedings without the intervention of the court. These arbitration proceedings are still pending. During the pendency of the arbitration proceedings, respondent No.1 was pressing for the encashment of the Letter of Credit. This caused the petitioner to file an application before the Court of the learned Civil Judge, Islamabad, under Section 41(b) of the 1940 Act, seeking an interim injunction against the encashment of the said Letter of Credit. Respondent No.1 contested the said application by filing a written reply. Vide order dated 20.07.2016, the learned Civil Court dismissed the petitioner's application for interim injunction. The said order dated 20.07.2016 has been assailed in this civil revision petition.

4. Learned counsel for the petitioner submitted that respondent No.1 was under an obligation to supply the Lorry within a period of four months of the establishment of the Letter of Credit; that respondent No.1, instead of supplying the Lorry within the time stipulated in the Contract, vide letter dated 09.02.2015, invoked the *force majeure* clause in the Contract; that *force majeure* was not raised in accordance with the provisions of the Contract; that on 13.03.2015, respondent No.1 informed the petitioner that the expected date of arrival of the Lorry was 13.04.2015; that when the Lorry arrived at Karachi, the Customs Authorities issued a show cause notice to the petitioner stating that the equipment did not fall within the definition of a "new vehicle" under the Import Policy Order, 2013, because it was manufactured more than one year before the date of importation; that the contractual default on the part of respondent No.1 caused the petitioner to encash the performance guarantee for an amount of Rs.2,207,293/-, which had been furnished by the petitioner in accordance with the terms of the Contract; that M/s Bureau Veritas, the party engaged to perform the post shipment inspection, also confirmed that the Lorry was a used one and did not fall within the definition of a "new vehicle" as required by the laws of Pakistan; that respondent No.1 had submitted a forged inspection

report certifying that the Lorry was new; that due to the fraudulent acts on the part of respondent No.1, the petitioner paid Rs.9,397,051/- in order to have the equipment cleared from the customs authorities; that the said allegation of fraud is a valid ground for restraining the encashment of the Letter of Credit; that respondent No.1 during the pendency of the arbitration proceedings pressed the petitioner for the encashment of the Letter of Credit; that the learned Civil Court erred by dismissing the petitioner's application for interim injunction; that the learned trial court erred by not appreciating that fraud committed by respondent No.1 was apparent on the face of the record; and that respondent No.1 had committed serious breaches of contract, which justified the petitioner to seek an injunction to restrain the encashment of the Letter of Credit.

5. Learned counsel for the petitioner further submitted that it was not until 09.02.2015 (i.e. almost seven months after the due date of shipment) that respondent No.1 informed the petitioner about the grounding of the vessel in the Arabian Sea, and its return to Dubai. It was further submitted that vide facsimile dated 10.03.2015, respondent No.1 informed the petitioner that the expected date of arrival of the vessel carrying the Lorry was 13.04.2015; that the equipment arrived at Karachi on 13.04.2015; and that the post shipment inspection report shows that the Lorry was not new, but a used one. Learned counsel for the petitioner prayed for the revision petition to be allowed, and for the respondents to be restrained from encashing the Letter of Credit. In making her submissions, the learned counsel for the petitioner placed reliance on the law laid down in the case of U.D.L. Industries Limited Vs. Hongguang Electron Tube Plant (PLD 1997 Karachi 553).

6. Mr. Nadeem Younas, the sole proprietor of respondent No.1 appeared in person and brought on record letter dated 17.09.2015 from the petitioner to the Additional Secretary, Ministry of Commerce, Government of Pakistan. He submitted that perusal of the said letter shows that respondent No.1 had complied with its contractual obligation of shipping the Lorry on 10.07.2014 (i.e. within

a period of four months of the opening of the Letter of Credit); that the vessel on which the Lorry was loaded, was grounded in deep sea; that after the vessel was cleared, the Lorry was shipped back to the port of loading, wherefrom the said consignment was reloaded on an alternative vessel; that the Lorry was finally delivered at the port at Karachi on 16.04.2015; that the delay in the supply of the Lorry owing to the vessel being grounded in deep sea, was beyond human control; and that respondent No.1 was, therefore, justified in invoking the *force majeure* clause in the Contract. Mr. Nadeem Younis prayed for the petition to be dismissed so that the irrevocable Letter of Credit could be encashed.

7. I have heard the contentions of the learned counsel for the petitioner and Mr. Nadeem Younis, and have perused the record with their able assistance.

8. The facts leading to the filing of this civil revision petition are set out in paragraphs 2 to 3 above and need not be recapitulated. Before dealing with the rival submissions of the parties, I deem it appropriate to discuss the settled proposition of law with the respect to judicial interference against the invocation of the letter of credit. The scope of judicial interference is very limited and the same has been emphasized by the Superior Courts in a number of cases which shall be discussed later.

9. As per “the Law & Practice of International Trade” by Clive M. Schmitthoff, letters of credit, also called documentary credits, are the most frequent method of payment for goods in the export trade. They have been described by English judges as “*the life blood of international commerce*”. The feature common to all types of letters of credit is this: in accordance with the agreement between the seller and the buyer in the contract of sale, the buyer arranges that payment of the price is made by a bank, normally at the seller’s place, on presentation of specified documents, which usually include the transport documents, and the performance of other conditions stated in the credit and advised by the bank to the seller. On presentation of the documents the bank pays the purchase price, according to the terms of the credit, by sight payment, deferred

payment, or by acceptance or negotiation of a bill of exchange drawn by the seller. The essence of the letter of credit transaction is its documentary character, i.e., where the goods are represented by a bill of lading, this document of title is used as a means of financing the transaction.

10. The law relating to letters of credit is founded on two principles: (i) the autonomy of the credit; and (ii) the doctrine of strict performance. According to the first principle, the credit is separate from and independent from the underlying contract of sale or other transaction. The second principle is that the bank is entitled to reject documents which do not strictly conform with the terms of the credit. The only case in which the bank should refuse to pay under the letter of credit is where it is proved to its satisfaction that the documents are fraudulent and the beneficiary/seller was involved in the fraud. It is also well settled that a bank issuing or confirming a letter of credit is not concerned with the underlying contract between the buyer and seller. Obligations of a bank under a letter of credit are created by the document itself. The bank is also subject to the limitations which are given or imposed by the provisions in the letter of credit. In the case at hand, the letter of credit is an irrevocable one, and the bank is not in anyway concerned with the terms of the underlying contract. Reference in this regard may be made to the following case law:-

- (i) In the case of Haral Textiles Limited Vs. Banque Indosuez Belgium, S.A. (1999 SCMR 591), the Hon'ble Supreme Court, after making reference to a catena of case law and treaties, held as follows:-

“12. From the above-cited case-law and the celebrated treatises on the subject, it appears that the effect of an irrevocable Letter of Credit is to substitute the issuing bank for the buyer as to the person who undertakes to buy the shipping documents and this undertaking is absolute in the sense that so long as the documents of title to the goods which the seller tenders to the bank are in accordance with the terms of the contract, the bank is under an obligation to accept the same regardless of any dispute between the seller and the buyer as to the quality of the goods or otherwise. Any dispute between the seller and the purchaser is extraneous in such a case. On the basis of the above legal position an elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character which do not call for interference by a Court of law. The above system would break

down completely if a dispute as between the seller and the purchaser was to have the effect of freezing the sum in respect of which the Letter of Credit was opened.

It is only in exceptional cases that the Court will interfere with the machinery of irrevocable obligation assumed by banks for the reason that they are the life blood of international commerce. The above exceptional cases include, where it is proved that any demand for payment already made or will thereafter be made will clearly be fraudulent or when there is a challenge to the validity of a Letter of Credit on a ground akin to fraud or concealment of material facts.

It may be observed that holder in due course of a Bill of Exchange executed in respect of a Letter of Credit stands on a higher pedestal than a simpliciter beneficiary under a Letter of Credit. It may be stated that the interest of innocent parties, who may hold drafts upon Letter of Credit, should not be made to suffer by a reason of rights that may exist between the parties to the contract in reference to which the Letter of Credit was issued. It would be a sad day in the business world, if for every breach of contract between the buyer and the seller, a party may come to a Court of equity and enjoin payment on drafts drawn upon a Letter of Credit issued by a bank which owes no duty to the buyer in respect of the breach.”

- (ii) In the case of Abdul Kadir Jangda Vs. My Bank Ltd. (2007 CLD 349), the Hon'ble High Court of Sindh, has held as follows:-

“14. Transactions against irrevocable L.Cs. are bank to bank transactions so far as the question of rights, obligations and payment is made by one bank to another. They enjoy the sanctity of the transactions between the Bank to the Bank in the course of international trade pertaining to terms covering the Irrevocable L.C., the matter has been examined in detail by the Honourable Supreme Court in the case of Haral Textiles Limited v. Banque Indosuez Belgium 1999 SCMR 591. The effect of Irrevocable L.C. has been held to substitute the issuing Bank in place of a buyer. The issuing Bank thus undertakes to buy the shipping documents. This undertaking is absolute and so long as the documents of title to the goods conform to the terms and conditions of the contract as specified in the L.C., it is an obligation of the Bank to accept the documents regardless of any dispute between the seller and the buyer as to the quality of goods shipped under the L.C. This transaction between two Banks is independent of any dispute between the seller and the buyer. International Commerce involving transactions based on L.C. are carried on the footings that conform credits by Bankers of that charter, They do not call for any interference by the Court of law and derive their strength based on recognized banking practices, such charter does not involve interference by the Court of law except only in exceptional circumstances where a clear case of fraud is involved challenging the validity of L.C. on a ground akin to fraud or concealment of material facts. As to the question of the Holder of Bill of Exchange in due course executed in respect of L.C.; it stands on higher pedestal than a

simpliciter beneficiary under a L.C., so that the interest of innocent parties, who may hold drafts drawn upon the L.C. is protected.”

- (iii) In the case of Haroon Rashid Chaudhri Vs. Muslim Commercial Bank (2006 CLD 1140), the Hon'ble Lahore High Court has held as follows:-

“Thus, it is obvious that at best the grievance of the plaintiff is a breach of contract by the supplier who did not supply the goods as agreed and as described in the Bill of Lading, Commercial Invoice and the Letter of Credit. In view of the Autonomy Principle the Bank is not concerned with the underlining contract between the buyer and the seller and is not responsible for breach of any term thereof nor takes responsibility of the quality of the goods as it deals with documents and not the goods purported to be supplied under the Letter of Credit.”

- iv) Jenkins L.J., in the case of Hamzeh Malas and Sons Vs. British Imex Industries Ltd. (1958 (2) Q.B. 127), has held as follows:-

"We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character and in my judgment, it would be wrong for this court in the present case to interfere with that established practice."

11. The Superior Courts have refused the grant of an injunction to restrain the encashment of an irrevocable letter or credit in the cases of Messrs Kohinoor Trading (Pvt.) Ltd Vs. Mangrani Trading Co. (1987 CLC 1533), Banque Indosuez Belgium Vs. Haral Textile Ltd. (1998 CLC 582), and Progressive Fibres Ltd. Vs. Hyusung Corporation (1999 YLR 478).

12. The exception that has been carved out by the courts in interfering with the obligations under a letter of credit is a case of fraud of an egregious nature, which shakes the conscience of the court, vitiates the entire underlying transaction, and leads to an irretrievable injury. The parties including the bank must know about it. The fraud in such a case must be by the beneficiary and not by somebody else. It was not permissible to restrain the encashment of a letter of credit by simply alleging fraud. If that was possible in law,

all that a buyer had to do to stop payment under a letter of credit was to allege fraud against the seller. A restraint on the encashment of an irrevocable letter of credit has major implications on the international commerce, and hinders the autonomous nature of the transaction. There is no *res integra* that an irrevocable letter of credit is an independent contract and the Courts ought not to interfere with its encashment unless the case falls within the purview of exception mentioned above.

13. In the case at hand, the allegations of fraud made by the petitioner against respondent No.1 in the application under Section 41(b) of the 1940 Act, are contained in Paragraphs 12, 13 and 16 of the said application, which is reproduced herein below:-

“12. That it is imperative to mention that the Respondent submitted a false inspection report certifying the equipment was new, which has been proven by an act intended to commit fraud upon the Applicant.

13. That owing to the various fraudulent acts of the Respondent, the Applicant has had to incur charges amounting to Rs.9,397,051 to have the equipment cleared from Pakistan Customs.

16. The owing to the acts of the Respondent, which are in violation of common commercial practices and contain evidence of fraudulent conduct, the Applicant had a good prima facie case in his favour.”

(Emphasis added)

14. Order VI, Rule 4, C.P.C. mandates that when the fraud is basis of any action, its particulars have to be furnished. Order VI, Rule 4, C.P.C. is reproduced herein below:-

“Particulars to be given where necessary.— In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the form of aforesaid particulars (which dates and items if necessary) shall be stated in the plaint.”

(Emphasis added)

15. It is well settled that full particulars of fraud have to be spelt out with clarity in the pleadings so as to meet the requirement of law. General allegations in this regard would not be sufficient. Reference in this regard may be made to the following case law:-

- (i) In the case of Lanvin Traders, Karachi Vs. Presiding Officer, Banking Court No.2, Karachi (2013 SCMR 1419), it has been held that an elementary principle of pleadings was that where allegations of fraud misrepresentation, collusion or

mala fide were attributed, necessary particulars and details in such context were to be unfolded in the application/pleadings, and any bald or vague statement to such effect was of no legal consequence.

- (ii) In the case of Government of Sindh Vs. M/s. Engineering Enterprises (PLD 2015 Sind 457), it has been held as follows:-

“The law requires that whenever the practice of fraud and misrepresentation is alleged by a party, the particulars of fraud or misrepresentation with all the necessary details have to be mentioned in the pleadings. The burden to prove the factum of fraud or misrepresentation would always be upon the person who alleges the same; unless it is so apparent that its ingredients could be discerned floating on the face of the record.”

16. In addition to above, law to the said effect has also been laid down in the cases of Ghulam Sabir Vs. Mst. Nur Begum and others (PLD 1977 SC 75), Sahib Noor Vs. Ahmad (1988 SCMR 1703), and M/s Dadabhoy Cement Industries Limited Vs. National Development Finance Corporation (PLD 2002 SC 500).

17. Now, the only allegation of fraud against respondent No.1 made with a degree of specificity by the petitioner in its application under Section 41(b) of the 1940 Act, was that respondent No.1 submitted a false inspection report certifying that the equipment was new. Whether or not respondent No.1 was truthful in certifying so is yet to be determined/established in an adjudicatory process before a competent forum. The burden of proof lies on the party alleging fraud. Fraud must be proved by producing unimpeachable, impartial and confidence inspiring evidence. Mere allegations could not partake proof required under the law. Courts have to be careful in coming to a finding fraud and should satisfy themselves that the finding is based on reliable evidence. At this stage, I do not find any material on the record which would by itself cause me to deduce fraudulent conduct on the part of respondent No.1. This is particularly so when the petitioner in its letter dated 17.09.2015 took the position that delay in the import of the Lorry was owing to the vessel grounding in deep sea and was beyond human control.

Nonetheless, the petitioner will have an opportunity to establish fraud through an adjudicatory process before the competent forum.

18. It was a term of the Contract between the petitioner and respondent No.1 that the payment for the Lorry would be made by way of an irrevocable letter of credit to be arranged by respondent No.1. In compliance with the said term of the contract, respondent No.1 made the necessary arrangement and accordingly an irrevocable Letter of Credit dated 13.03.2014, for an amount of US\$ 202,008/- was opened by respondent No.2 (United Bank Limited). The issuing bank (respondent No.2) and the confirming bank under the Letter of Credit have no concern in any manner with the dispute regarding the underlying contract between the petitioner and respondent No.1. Respondent No.2 is obliged by the terms of Letter of Credit itself to perform its obligations without any reference whatsoever to the claim raised by any of the parties to the underlying contract.

19. Mr. Nadeem Younas did not deny that as per the Letter of Credit, the last date of shipment was 12.07.2014. He submitted that the petitioner was informed that the Lorry was loaded on to a vessel on 10.07.2014. According to him, the delay in the arrival of the Lorry at Karachi was due to the fact that the vessel was grounded in deep sea. This, he submitted, was a *force majeure* event and beyond the control of respondent No.1. After the vessel returned to the port of shipment, the Lorry was re-loaded on another vessel which reached Karachi on 16.04.2015.

20. Whether the Lorry that has been delivered is new or old; whether it is as per the description in the Contract or not; whether or not respondent No.1 is justified in claiming that it was absolved from liability by invoking the *force majeure* clause in the Contract cannot be gone into by the bank. Contractual disputes between the parties to the Contract containing an arbitration clause are beyond the pale of jurisdiction of the learned Civil Court or this Court to resolve. These are matters to be resolved in accordance with the dispute resolution mechanism enshrined in the Contract.

The learned Civil Court or this Court cannot delve into the contractual disputes between the petitioner and respondent No.1 or else, it will be tantamount to usurping the jurisdiction of the arbitral tribunal. The Court is only to determine the question whether, during the pendency of the arbitration proceedings, the petitioner was justified in seeking an injunction to restrain the encashment of the Letter of Credit.

21. If all the terms of the letter of credit have been fulfilled to the satisfaction of the bank, which has opened an irrevocable letter of credit, it cannot refuse to pay on the plea that the Lorry has been delivered late or that it does not correspond the description in the contract. The bank is not entitled to withhold payment after its obligation to pay has arisen merely because a simple allegation of fraud has been made against the seller/respondent No.1.

22. As regards the case law relied upon by the learned counsel for the petitioner, in the case of U.D.L. Industries Limited Vs. Hongguang Electron Tube Plant (Supra), it was held by the Hon'ble High Court of Sindh that *“prima facie an exceptional case of fraud, forgery, mischief and injustice touching the violation of the terms of the Letter of Credit is required to be made out by the plaintiff seeking interim injunction to restrain the encashment of a Letter of Credit”*. In the said case, the Hon'ble High Court did not restrain the confirming bank from making payment under the Letter of Credit. However, given the peculiar facts and circumstances of the said case, the Hon'ble High Court took the view that the whole transaction was vitiated by fraud on the part of the seller which could not be ignored. Therefore, as the defendants in that case did not have ostensible assets in Pakistan, the Hon'ble High Court allowed the Letter of Credit to be encashed subject to the furnishing of a bank guarantee. I find the facts of this case to be distinguishable, and, as mentioned above, the documents on the record, do not cause me to take a prima facie view that fraud was committed by respondent No.1.

23. In view of the foregoing discussion, this civil revision petition is found to be devoid of merit and is, accordingly dismissed. There

shall be no order as to costs. Since this judgment disposes of a civil revision petition arising from an order dismissing an application for interlocutory relief, the observations made herein are of a tentative nature and ought not to prejudice the case of any party in the arbitration proceedings.

**(MIANGUL HASSAN AURANGZEB)
JUDGE**

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*

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