

Himadri Chemicals Industries Ltd vs Coal Tar Refining Company on 7 August, 2007

Equivalent citations: AIR 2007 SUPREME COURT 2798, 2007 AIR SCW 5080, 2007 CLC 1506 (SC), (2007) 4 RAJ LW 3500, (2007) 3 CALLT 86, 2007 (3) ARBI LR 139, 2007 (9) SCALE 631, 2007 (8) SCC 110, (2007) 139 COMCAS 706, (2007) 3 ARBILR 139, (2007) 3 RECCIVR 768, (2007) 4 ICC 215, (2007) 9 SCALE 631, (2007) 2 WLC(SC)CVL 513, (2007) 4 ALL WC 3438

Author: Tarun Chatterjee

Bench: Tarun Chatterjee, P.K.Balasubramanyan

CASE NO.:
Appeal (civil) 3522 of 2007

PETITIONER:
Himadri Chemicals Industries Ltd

RESPONDENT:
Coal Tar Refining Company

DATE OF JUDGMENT: 07/08/2007

BENCH:
Tarun Chatterjee & P.K.Balasubramanyan

JUDGMENT:

JUDGMENT [Arising out of SLP [C] No. 13775 of 2007] TARUN CHATTERJEE, J.

1. Application for permission to file special leave petition is allowed. Leave granted.
2. This appeal is directed against the judgment and order dated 21st June, 2007 passed by a Division Bench of the Calcutta High Court whereby an appeal preferred against an order dated 5th June, 2007 of a learned Single Judge of the same High Court was dismissed and the order of the learned Single Judge was affirmed. The learned Single Judge by his order dated 5th June, 2007 had vacated an interim order of status quo granted earlier on an application filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for an order of injunction restraining the respondent from receiving any payment under a Letter of Credit.
3. At this stage, we feel it proper to narrate the facts which have given rise to the filing of this appeal in this Court.

4. The appellant entered into a contract on 29th May, 2006 with the respondent by which the respondent had agreed to supply 26,000 metric tones of Extra Hard Pitch (Reprocessing Grade) (in short goods) to the appellant as per schedule set out in the contract. In the said contract, one of the terms of payment was that a Letter of Credit will be opened and accordingly an irrevocable Letter of Credit was opened by the appellant in favour of the respondent. Initially, under the said Letter of Credit, payment was to be made at sight . The document against which payment was to be made, was received directly by the banker of the appellant and on presentation of the document it was found by the banker of the appellant that the description of the goods was not as per the terms of the Letter of Credit. Accordingly, the banker of the appellant by a Letter dated 11th September, 2006, intimated the aforesaid fact to the appellant and sought advice whether the appellant was willing to waive the discrepancies indicated in the Letter dated 11th September, 2006. In response to this query of the banker, the appellant waived the discrepancies and accepted the documents by a letter dated 3rd October, 2006 and also agreed to make the payments in the following manner:

With reference to the above and further to your swift message dated 3/10/2006, We are accepting the documents with discrepancy and the payment will be made after 180 days from today. We accept to make the following payments. (Emphasis supplied) Total amount against above mentioned three (3) Bills Euro 2348915.00 Less: Advance payment already Made through Central Bank of India Kol. Main Office Euro 387788.82 Amount to be paid against the above three Bills Euro 1961126.18

5. Before accepting the documents and agreeing to make payments, by a communication dated 28th September, 2006, the respondent had given the appellant two options:- (i) either to negotiate the document and resolve the quality issue; or (ii) reject the shipment document.

6. Thereafter, correspondence was exchanged between the appellant and the respondent and the Letter of Credit was amended and payment at sight was substituted by the words 30 days from the shipment date . On the basis of the amended Letter of Credit, the payment was, thereafter, payable on or before 10th April, 2007. The amendment of the terms of Letter of Credit was informed to the bankers of the respondent which was accepted by the respondent as well. The issue regarding the quality of goods remained undecided although an inspection report was submitted by SGS India Pvt. Ltd. with the concurrence of the respondent. In spite of various steps taken by the appellant and promises made by the respondent, no effective step was taken to resolve the dispute regarding quality of the goods and hence the application under Section 9 of the Act was filed by the appellant to stop release of payment under the Letter of Credit without first resolving the issue regarding the quality of goods of the second consignment supplied by the respondent to the appellant. Therefore, in the application for injunction, it was pleaded that the act of the respondent for not resolving the dispute on the quality of goods in the second consignment amounted to fraud as the respondent had dishonestly and with ulterior motive not resolved the dispute as raised by the appellant and in any event, an order of injunction should be granted, otherwise, it would not be possible for the appellant to recover the money released under the Letter of Credit as the respondent is a foreign company from Iran and has no assets in India.

7. The respondent raised a plea for vacating the interim order of status quo granted by the learned Single Judge on the application for injunction filed u/s 9 of the Act alleging the following facts:- Goods were dispatched to the appellant by the respondent under two shipments. So far as the first shipment was concerned, goods were received, documents negotiated and payment released. Therefore, there could not be any dispute in respect of the goods relating to the first shipment. By the second shipment, the respondent had dispatched 12,503 metric tones of goods to the appellant which arrived at Calcutta from Iran by a vessel called M.V. Iran Takhti. Out of the aforesaid 12,503 metric tones of goods so dispatched and arrived at Calcutta, documents relating to 2503 metric tones of goods were negotiated by the Central Bank of India, Calcutta and payment released. However, for the balance 10,000 metric tons, documents were not negotiated and no payment was released. It was further alleged by the respondent that there was no reason for not negotiating the documents or effecting release of the payment as payments for part consignment as noted hereinabove were already released. It was also the case of the respondent in support of its contention for vacating the interim order of status quo that despite discrepancies raised by the appellant, by its communication dated 3rd October, 2006, the appellant had agreed to accept the documents with discrepancy and make payments in respect of the goods for which disputes were raised by the appellant regarding the quality of such goods. It was further the case of the respondent that the defective quality of goods in respect of which order of injunction of the Letter of Credit was sought could not also be the reason for grant of injunction as it was related to a payment dated 29th May, 2006 which was also the subject matter of an arbitration proceeding and the claim, if any, could be recovered in the said arbitration proceeding. According to the respondent, since the Letter of Credit was an independent contract and the appellant could not satisfy any breach of the terms of the Letter of Credit, no order of injunction could be passed by the court for stopping the respondent from realizing the payment relating to the price of the goods supplied. The respondent further stated that the appellant could not make out any case of fraud for which an order of injunction restraining the respondent from realizing the payment by encashing the Letter of Credit could be granted and therefore the application for injunction must be rejected.

8. As noted herein earlier, the order of status quo was passed by the learned Single Judge of the High Court on the application for injunction filed under Section 9 of the Act at the instance of the appellant on 9th April, 2007, and by the said order, the interim order of status quo was granted till 30th April, 2007 and the same was extended from time to time from 23rd April 2007 till 17th May, 2007. Thereafter the matter was directed to appear on 16th May, 2007 and heard by the learned Single Judge on 17th May, 2007 and interim order of status quo was extended till 25th June, 2007. As noted herein earlier, the learned Single Judge by order dated 5th June, 2007 vacated the interim order of status quo granted earlier against which an appeal was preferred by the appellant before a Division Bench of the High Court of Calcutta which dismissed the appeal and affirmed the order of the learned Single Judge vacating the interim order of status quo.

9. We have heard the learned counsel for the parties and carefully examined the orders of the learned Single Judge as well as that of the Division Bench. We have also examined in detail the application for injunction, the original contract, the Letter of Credit as amended and the other documents on record. Having noted salient facts and materials on record, let us now consider whether the Division Bench was justified in affirming the order of the learned Single Judge vacating

the interim order of status quo in the matter of stopping the payment in terms of the Letter of Credit. But before dealing with this aspect of the matter, let us consider the principles for grant or refusal to grant injunction in the matter of release of payment in terms of a Letter of Credit or a Bank Guarantee.

10. The law relating to grant or refusal to grant injunction in the matter of invocation of a Bank Guarantee or a Letter of Credit is now well settled by a plethora of decisions not only of this court but also of the different High Courts in India. In U.P. State Sugar Corporation Vs. Sumac International Ltd. [(1997) 1 SCC 568], this court considered its various earlier decisions. In this decision, the principle that has been laid down clearly on the enforcement of a Bank guarantee or a Letter of Credit is that in respect of a Bank Guarantee or a Letter of Credit which is sought to be encashed by a beneficiary, the bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Accordingly this Court held that the courts should be slow in granting an order of injunction to restrain the realization of such a Bank Guarantee. It has also been held by this court in that decision that the existence of any dispute between the parties to the contract is not a ground to restrain the enforcement of Bank guarantees or Letters of Credit. However this court made two exceptions for grant of an order of injunction to restrain the enforcement of a Bank Guarantee or a Letter of Credit. (i) Fraud committed in the notice of the bank which would vitiate the very foundation of guarantee; (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself.

11. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a Bank Guarantee or a Letter of Credit. So far as the first exception is concerned, i.e. of fraud, one has to satisfy the court that the fraud in connection with the Bank Guarantee or Letter of Credit would vitiate the very foundation of such a Bank Guarantee or Letter of Credit. So far as the second exception is concerned, this court has held in that decision that it relates to cases where allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. While dealing with the case of fraud, this court in the case of U.P. Coop. Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd. (1988) 1 SCC 174 held as follows:

The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. While coming to a conclusion as to what constitutes fraud, this court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA V/s. Chase Manhattan Bank (1984) 1 All ER 351 at p. 352 which is as follows, The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent.

But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's Credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged. (Emphasis supplied)

12. In Svenska Handelsbanken Vs. Indian Charge Chrome [(1994) 1 SCC 502], it has also been held that a confirmed Bank Guarantee/irrevocable Letter of Credit cannot be interfered with unless there is established fraud or irretrievable injustice involved in the case. In fact, on the question of fraud, this decision approved the observations made by this court in the case of U.P. Coop. Federation Ltd Vs. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174].

13. So far as the second exception is concerned, this court in U.P. State Sugar Corporation Vs. Sumac International Ltd. [(1997) 1 SCC as considered herein earlier, at para 14 on page 575 observed as follows :

On the question of irretrievable injury which is the second exception to the rule against granting of injunctions when unconditional bank guarantees are sought to be realized the court said in the above case that the irretrievable injury must be of the kind which was the subject matter of the decision in the Itek Corpn. Case (566 Fed Supp 1210). In that case an exporter in USA entered into an agreement with the Imperial government of Iran and sought an order terminating its liability on stand by letter of credit issued by an American Bank in favour of an Iranian Bank as part of the contract. The relief was sought on account of the situation created after the Iranian revolution when the American Government cancelled the export licences in relation to Iran and the Iranian government had forcibly taken 52 American citizens as hostages. The US Government had blocked all Iranian assets under the jurisdiction of United States and had cancelled the export contract. The court upheld the contention of the exporter that any claim for damages against the purchaser if decreed by the American courts would not be executable in Iran under these circumstances and realization of the bank guarantee/letters of credit would cause irreparable harm to the Plaintiff. This contention was upheld. To avail of this exception, therefore, exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough. In Itek case, there was certainty on this issue. Secondly, there was good reason, in that case for the Court to be prima facie satisfied that the guarantors i.e. the bank and its customer would be found entitled to receive the amount paid under the guarantee. (Emphasis supplied)

14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.

(iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned.

15. Keeping these principles in mind and applying the same on the facts of this case, we can only draw this conclusion that no good ground has been made out by the appellant to interfere with the impugned order. As noted herein above, there are two exceptions when courts can grant an order of injunction in favour of an aggrieved party in the matter of encashment of a Bank Guarantee or a Letter of credit. Condition Nos. (v) and (vi), as noted herein above, are two such exceptions. For this reason, let us first deal with the case of fraud pleaded by the appellant in their application for injunction. The particulars of fraud have been pleaded in paragraph 45 of the application for injunction filed by the appellant in the High Court. From a close scrutiny of the facts pleaded in the said paragraph of the application for injunction, in our view, it cannot be held that such facts have constituted fraud for which an order of injunction in the matter of encashment of Letter of Credit could be passed by the courts. The facts pleaded in paragraph 45 of the application for injunction would only show that although the respondent had agreed to remove the defects in the goods by saying that it shall take steps to reduce the ash content of the goods to 0.3 % before the payment date of the Letter of Credit as extended, but they deliberately and with ulterior motive had not fulfilled their intention to do so. It is not in dispute that the particulars of the fraud prima facie were restricted to 10,000 metric tones of the goods supplied by the respondent in respect of which documents were not negotiated by the appellant. The entire consignment which was admittedly shipped by M.V.Iran Takhti was 12,503 metric tones out of which 2503 metric tones were negotiated and payments released by the Central Bank of India. Admittedly, as noted herein above, a case of fraud was alleged only in respect of a part of the consignment of the second shipment. It has been rightly held by the High Court that this could not constitute fraud as fraud must be in respect of the whole consignment and not in respect of a part of the same. In this view of the matter, we are, therefore, in agreement with the High Court that the pleadings made relating to fraud in paragraph 45 of the application for injunction were not sufficient nor any strong prima facie case of fraud could be made out in the petition which would warrant a continuance of the order of status quo.

16. That apart, as noted herein earlier, in the matter of invocation of a Bank Guarantee or a Letter of Credit, it is not open for the bank to rely upon the terms of the underlying contract between the parties.

17. In view of the discussions made herein above and in view of the admitted fact that in respect of 2503 metric tones of goods out of 12503 metric tones of goods in the second consignment, documents were admittedly negotiated and payments were released and further in view of the communication dated 3rd October, 2006 by the appellant to the banker that it had agreed to accept the discrepancies raised in respect of the goods and also agreed to make payment of the same, we are not satisfied that a case of fraud even prima facie has been made out by the appellant for grant of injunction. It is difficult to conceive that the appellant having accepted a part of the second consignment and having directed to release payments in respect of the same, would be defrauded by the respondent in respect of the balance quantity of goods which had arrived at Calcutta in the second shipment. In any view of the matter, in our view, the defective quality of goods in respect of which an order of injunction of the encashment of the Letter of credit was sought could at all be a reasonable ground for grant of injunction as it was related to payment dated 29th May, 2006 which was the subject matter of the arbitration proceeding and the claim, if any, can be recovered in the said arbitration proceeding.

18. Let us now consider the other exception, namely, case where allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in an irretrievable harm or injustice to one of the parties concerned. In our view, irretrievable injury was not caused to the appellant by a refusal to grant an order of injunction restraining the encashment of the Letter of Credit for two reasons :-

(i) Exceptional circumstances have not been made out by the appellant which would make it impossible for the Guarantor to reimburse himself if he ultimately succeeds.

Only a case of apprehension has been shown in the application for injunction to the extent that if ultimately, the application for injunction is allowed, it would be impossible to recover the amount encashed on the basis of the Letter of Credit because the respondent is a Foreign Company in Iran which has no assets in India. In our view, this cannot come within the second exception indicated above.

(ii) Admittedly in this case, the appellant has already filed an Admiralty Suit No. 14 of 2006 in the original side of the Calcutta High Court claiming damages in respect of the same set of goods. In the said suit filed in the month of November 2006, the respondent was given liberty to furnish a Bank Guarantee for a sum of Rs. 21,86,68,540/- being the sum claimed by the appellant on account of damages to the credit of the said suit and a Bank Guarantee to the extent of this amount has already been furnished by the respondent. Such being the position, the question of irretrievable injury even prima facie which would lead to injustice and harm the appellant cannot at all be conceived of since the appellant has been duly protected by the furnishing of Bank Guarantee. In our view, only because the respondent has no assets in India would not lead us to hold that the appellant was entitled to an injunction on the ground that he would suffer an irretrievable injury. In this view of

the matter, we echo the finding of the High Court in refusing to grant an order of injunction in favour of the appellant and hold that the High Court was fully justified in doing so.

19. For the reasons aforesaid, we do not find any merit in this appeal. The appeal is thus dismissed. We may, however, make it clear that whatever findings have been arrived at by us in this appeal or by the High Court while dealing with the prayer for grant of an interim order of injunction, shall not be taken to be final as to the disposal of the application for injunction by the High Court. There will be no order as to costs.