

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE YAHYA AFRIDI

CIVIL APPEALS NO. 870 AND 871 OF 2012

(On appeal against the judgment dated 17.01.2011 of the Peshawar High Court, Peshawar in F.A.B. No. 50 and 51 of 2009)

M/S Sazco (Pvt.) Ltd.

... **Appellant**
(in both cases)

Versus

Askari Commercial Bank Limited

... **Respondents**
(in both cases)

For the Appellant : Mr. Sahzib Masud, ASC
(in both cases)

For the Respondents : Mr. Iqbal Javed, ASC
(in both cases)

Date of Hearing : 19.10.2020

JUDGMENT

YAHYA AFRIDI, J.- The present two appeals ("**Appeal No. 870/2012 and Appeal No. 871/2012**"), with leave of the Court, impugn the common judgment dated 17.01.2011 passed by the High Court of Peshawar in F.A.B. Nos. 50 and 51/2009 filed by the present appellant.

2. The issue in hand relates to a dispute between M/s Sazco (Pvt.) Ltd ("**appellant-company**") and M/s Askari Commercial Bank

Ltd. ("**respondent-bank**") relating to an irrevocable documentary letter of credit ("**credit**") availed by the former from the latter to finance an international sale transaction.

3. The appellant-company, a private limited company incorporated under the Companies Ordinance 1984, having its registered office at 83 Shahreh-e-Quaid-e-Azam, Lahore and its manufacturing unit at Industrial Estate Gadoon Amazai, Tehsil and District Swabi, Pakistan entered into an agreement with M/s Alpha International Trading and Enterprise Services, a company having its registered office at 20 Kingsway Avenue WestPoint, Manchester, M192 DH United Kingdom ("**supplier-company**") for the supply of Acrylic Dyed Tow Semi Dull 3D ("**imported goods**") vide Invoice No. 902 dated 14.08.1998 and Invoice No. 1050 dated 26.08.1998 ("**main contract**"). To facilitate and finance the payment of the imported goods under the main contract, the appellant-company approached the respondent-bank at Peshawar. The request of the appellant-company was accepted by the respondent-bank, and two irrevocable Letters of Credit were opened; Letter of Credit No.014-LC-315-98 dated 02.09.1998 (**Exhibit-PW1/3**) and Letter of Credit No.014-LC-327-98 dated 16.09.1998 (**Exhibit-PW1/4**) ("**L.C.s**"). Under the L.C.s, the respondent-bank ("**Issuing-bank**") nominated National Westminster Bank located at Lawry House, 17 Marble Street, Manchester, United Kingdom as its nominated bank ("**Nominated-bank**") to make the due payments to the supplier-company ("**beneficiary**") on presentation of the requisite documents stated in the respective L.C.s. Further to the terms of the L.C.s, the supplier-company tendered the requisite documents, including the

two Bills of Ladings No.1014 dated 23.10.1998 (**Exhibit-DW1/X-1**) and No.1018 dated 03.11.1998 (**Exhibit-DW1/X-2**) ("**Bills of Lading**") to the Nominated-bank, which it found to conform with the terms of the L.C.s. Accordingly, the Nominated-bank paid the supplier-company/beneficiary for the imported goods in terms of the L.C.s. The appellant-company *vide* letter dated 27.01.1999 requested the respondent-bank to pay the import duty and taxes in order to release the imported goods from the port at Karachi. This request of the appellant-company was complied with by the respondent-bank. However, the imported goods shipped under the Bills of Lading on arrival at the port at Karachi, on enquiry, were found to have been released to M/s. Crescent Chemical Co., 131-Circular Road, Lahore and Mr. Pino Khan, 4-Alam Zar, Sam Sunny Road, Canal View, Lahore. This information was duly conveyed by the respondent-bank to the appellant-company *vide* letter dated 30.01.1999. The appellant-company despite knowledge of the said release of the consignments of the imported goods to two other parties, acknowledged its liability under the L.C.s *vide* its letter dated 01.03.1999, and in fact, paid off the entire outstanding liability under L.C. No.014-LC-315-98, and partially cleared its liability under L.C. No.014-LC-327-98. However, with time, the relations between the parties became strained, and they were unable to resolve their disputes, leading the appellant-company and respondent-bank to file their respective suits for recovery against each other before the Banking Court II, Peshawar ("**Banking Court**").

4. The Banking Court granted leave to defend to both parties, thereafter, consolidated the two suits, and framed twelve issues. This was followed by the parties to produce their respective evidence. The Banking Court *vide* its common judgment dated 24.04.2009, dismissed the suit of the appellant-company, and accepted the one filed by the respondent-bank, granting it a decree of Rs.567,111/- against the appellant-company, which on appeal was maintained by the High Court. Hence, the present appeals by leave of this Court *vide* order dated 12.09.2012.

5. The worthy counsel for the appellant-company vehemently contended that: the two courts below have erred by not appreciating the fraud committed by the supplier-company by tendering forged Bills of Lading to the Nominated Bank; and that the Bills of Lading presented were discrepant to the terms of the L.C.s and thus violated the Uniform Customs and Practice for Documentary Credits 500 (1993 Revision) ("**UCP 500**"). The worthy counsel for the respondent-bank contended otherwise and emphasized that the two courts below had correctly appreciated the factual and legal aspect of the case in rendering the impugned judgments.

6. Valuable arguments of the worthy counsel for the parties have been heard.

7. Before we consider the above submissions of the worthy counsel for the appellant-company, we must appreciate that the subject matter of his challenge relates to an international sale transaction. Thus, we deem it appropriate to first understand the

legal dynamics of such transactions; the parties thereto, the law applicable, and the judicial recognition and development thereon.

Historical background to Documentary Credits - L.C.

8. International trade and commerce have over time, grown excrementally, exposing the contracting parties to the uncertainty of enforcing the terms of the agreement, and in particular, the risk of non-payment of the consideration for the goods, under the international law and the varying municipal laws of the contracting parties. Thus, there was a dire need to bring legal certainty to ensure prompt payments and safe delivery of goods under the international sale of goods taking place across the globe. To this end, the International Chamber of Commerce ("**Chamber**") took the initiative to introduce standardized regulations relating to Commercial Documentary Credits. In this regard, a committee of the Chamber in 1929, submitted to the Amsterdam Congress of that body its report, titled: "Uniform Regulations for Commercial Documentary Credits". Over time, the said regulations have been revised, and the one relevant to the present case is UCP 500.¹

Meaning and scope of L.C.

9. Modern documentary credits, in particular Letters of credit, are essentially a mode of prompt payment to a contracting supplier of goods in another country. The payment under the said facility is assured to the party selling the goods, even before the consignment reaches the agreed destination under the underlying contract. The opening of a letter of credit constitutes a contract, *inter alia*, between the bank and the seller of the goods and imposes upon

¹ The last revision was finalized in 2007 and known as ICC Uniform Customs and Practice for Documentary Credits UCP 600

the bank an absolute obligation to pay the seller.² Paul R. Verkuil³

aptly describes L.C. in terms that:

"The letter of credit is a contract. The issuing authority usually a bank—promises to pay the 'beneficiary'—traditionally a seller of goods—on demand if the beneficiary presents whatever documents may be required by the letter. There are normally the only two parties involved in the contract. The bank which issues a letter of credit acts as a principal, not as an agent for its customer, and engages its own credit. The letter of credit thus evidence—irrevocable obligation to honour the draft presented by the beneficiary upon compliance with the terms of the credit."

Indeed, it has now rightly been described as "the lifeblood of international commerce".⁴

10. The scope of documentary credits, the parties involved, and the extent of their relationship *inter-se*, has been explained in Halsbury's 'Laws of England' in terms that:

"It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to accept drafts drawn upon it for the price of the goods, against tender by the seller of the shipping documents. The contractual relationship between the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued; and as between the seller and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract, thus, created, between the seller and the bank is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the bank's undertaking to the seller, which is absolute. Thus, the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefore; and, conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of credit if the goods are defective".⁵

(emphasis provided)

² Hamzeh Malas and Sons v. British Imex Industries Ltd. 1958 (2) Q.B. 127; Abdul Kadir Jangda v. My Bank Ltd. 2007 CLD 349.

³ Bank Solvency and Guaranty Letters of Credit, Stanford Law Review V. 25 (1972 at p. 719)

⁴ R D Harbottle Limited v. National Westminster Bank (1977) 2 All ER 862.

⁵ Vol. 34, Paragraph 319 at page 185

Salient Features of L.C.

11. There are two fundamental principles on which the entire edifice of documentary credit rests: first, the *independence-autonomy principle*; and second, *strict performance principle*.

The Independence - Autonomy Principle:

12. As highlighted in the caption quoted above (Para. 10), documentary credit is separate and independent from the underlying sales contract or other transaction between the commercially contracting parties.⁶ This autonomy of the credit has been expressly addressed in various provisions of UCP 500, and in particular in Articles 3 and 4 of the UCP 500, which reads:

Article 3. Credits v. Contracts

a. Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.

b. A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank.

Article 4. Documents v. Goods/Services/Performances

In Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate.

The careful reading of the above provisions of UCP 500, highlights the intent of its drafters; to insulate the compliance of the terms of credit by the paying bank from any provision of the underlying contract between the applicant/buyer and beneficiary/seller. The paying bank is only to deal with the documents 'alone'⁷. More importantly, the paying bank is to ensure that as long as the

⁶ Article 3a of UCP 500, *Hamzeh Malas v. British Imex Industries Limited* (1958) 2QB 127; *Ward Petroleum Corp. v. Federal Deposit Ins. Corp.* 903 F.2d 1297; *OGDCL v. Excel Techno Solutions FZE, U.A.E.* 2017 CLD 1274.

⁷ Article 14 (b.) UCP 500

documents tendered by or on behalf of the seller are, on the face of it, in accordance with the terms of credit, it is under an obligation to make the payment regardless of any dispute between the seller and the buyer, may it be the quality of the goods or otherwise.⁸ One must appreciate that while reviewing documents under credits, the banks are to deal with documents and not goods.⁹ This view was resounded in **Blonder & Co. v. Citibank, N.A. (supra)**, where the New York Supreme Court, while dilating upon the extent of care required by a bank to examine the tendered documents under the credit, opined that:

"It is fundamental that courts enforce contracts, not rewrite them.....The UCP requires that banks must examine documents "with reasonable care" in order to determine whether the documents "on their face" appear to comply with the letter of credit".

The principle of autonomy has also been ardently noted by this Court in its earlier decision in the case of **Haral Textiles Limited v Banque Indosuez Belgium**¹⁰ in terms that:

"[T]he 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.

⁸ *Hamzeh Malas and Sons v. British Imex Industries Ltd.* 1958 (2) Q.B. 127; *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1983] 1 AC 168; *S. A. Hameed v. Allied Bank of Pakistan Limited* 2004 CLD 1620; *Haral Textiles Limited v. Banque Indosuez Belgium, S.A.* 1999 SCMR 591; *Power Curber International Ltd. v. National Bank of Kuwait* (1981) 3 All ELR 607; *Haroon Rashid Chaudhri v. Muslim Commercial Bank* 2006 CLD 1140.

⁹ Article 4 of UCP 500; *Blonder & Co. v. Citibank N.A.* 28 A.D.3d 180; *Allied Plastic Industries (Pvt.) Limited v. ICC Chemical Corporation* 2020 CLD 720.

¹⁰ 1999 SCMR 591

The Exception to the rule of autonomy - fraud

13. The rule of autonomy is, however, not absolute. It has an exception, when fraud is alleged and established. Halsbury's Law of England has dealt with this exception in terms that:

"408. **Forged documents.** Payment against forged documents in good faith does not affect the paying banker's right to reimbursement¹¹. The person tendering does not warrant the genuineness of documents¹². The buyer cannot be held to have authorized payment against false documents¹³; nor can a banker be forced to pay against documents he knows to be false, though, if he has given his acceptance, he is liable to a holder in due course¹⁴." ¹⁵

14. One of the early leading cases in the United States of America, where fraud was recognized as an exception to the rule of autonomy is the case of **Sztejn v. J Henry Schroder Banking Corp.**¹⁶ In this case, an Indian company selling to an American company "bristles" had shipped "cow hair and other worthless material". The New York Supreme Court in its ruling on the obligation of the bank, stated that it '[is] only required to see that the documents are in order', and further that:

"[W]here the seller's fraud has been called to the Bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the Bank's obligation under the Letter of Credit should not be extended to protect the unscrupulous seller."

15. In a later case, **Blonder & Co. v. Citibank**¹⁷, where the buyer brought a motion claiming, *inter alia*, that defendant, the issuing bank, improperly paid \$540,225/- under the credit covering a shipment of nickel scrap from Nicaragua to the Netherlands, which was never received in Rotterdam; that the supporting documents

¹¹ Ulster Bank v. Synnott (1871), I.R. 5 Eq. 595; Woods V. Thiedemann (1862), I.H. & C.478; Basse and Selve v. Bank of Australasia (1904), 90 L.T. 618.

¹² Guaranty Trust Co. of New York v. Hannay & Co., (1918) 2 K.B. 623, C.A.

¹³ Re Salomon & Co. and Naudszus (1899), 81 L.T. 325

¹⁴ Robinson v. Reynolds (1841), 2 Q.B. 196; Thiedemann v. Goldschmidt (1859), 1 De G. F. & J. 4.

¹⁵ Third Edition, Volume 2, Pages 220-221

¹⁶ 1941 31 NYS 2d 631

¹⁷ N.A. 28 A.D.3d 180.

were fake; and that bank failed to examine the documents presented "with reasonable care", to ensure that they complied with the terms and conditions of the credit. The matter finally came up in appeal before the New York Supreme Court, where it was held that:

"a court cannot impose upon the parties to a letter of credit any conditions not contained in the letter", "UCP requires that banks must examine documents 'with reasonable care' in order to determine whether the documents 'on their face' appear to comply with the letter of credit..... issuing bank is not required to ascertain whether the documents are false or whether the goods were delivered, only that the documents substantially comply with the letter of credit on their face."

(emphasis provided)

16. Similarly, the courts in England have also recognized fraud as an exception to the rule of autonomy. Some of the leading cases on the matter are **Hamzeh Milas and Sons v. British Imex Industries Ltd.**¹⁸, **R.D. Harbottle (Mercantile) Ltd. and another v. National Westminster Bank Ltd.**¹⁹, **Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.**²⁰, **UCM (Investment) v. Royal Bank of India.**²¹ Lord Diplock speaking for the House of Lords, in the last case cited above, explained the general principle of autonomy, and the exception of fraud, in terms that:

"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods and that does not permit of the dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment. To this general statement, of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any such case in which this exception has been applied, it is well established in the American

¹⁸ (1958 (2) QBD 127)

¹⁹ 1977 (2) All ER 862

²⁰ 1978 (1) All ER 976

²¹ 1982 (2) All ER 720

cases, of which the leading or 'landmark' case is *Sztejn v. J. Henry Schroder Banking Corporation*.²².....The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application to the maxim *ex trupi cause non oriture actio* or if plain English is to be preferred, 'fraud unravels all', the courts will not allow their process to be used by a dishonest person to carry out a fraud'."

(emphasis provided)

17. In an earlier case, **Gian Singh & Co Ltd v Banque de l'Indochine**²³, Lord Diplock, while dilating upon the extent of "reasonable care" to be taken by the paying bank in reviewing the alleged forged documents tendered by or on behalf of the supplier/seller, opined that:

"The fact that a document presented by the beneficiary under a documentary credit, which otherwise conforms to the requirements of the credit, is in fact a forgery does not, of itself, prevent the issuing bank from recovering from its customer money paid under the credit..... The bank is under no duty to take any further steps to investigate the genuineness of a signature which, on the face of it, purports to be the signature of the person named or described in the letter of credit."

(emphasis provided)

18. Sir John Donaldson, M.R. in **Bolivinter Oil SA v. Chase Manhattan Bank**²⁴ dilating on the extent of proof of fraud required to be placed before the court for the grant of a positive injunctive relief against payment under the credit observed that:

"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 provided)

19. In **United Trading Corpn SA v Allied Arab Bank Ltd**²⁵ the court, while discussing the critical time when knowledge of fraud has to

²² 1941 31 NYS 2d 631

²³ [1974] 2 All ER 754.

²⁴ (1984) 1 All ER 351

²⁵ [1985] 2 Lloyd's Rep 554

be communicated to the bank, for it to be under an obligation to refuse payment, observed that:

"It seems to us clear that, where payment has in fact been made, the bank's knowledge that the demand made by the beneficiary on the performance bond was fraudulent must exist prior to the actual payment to the beneficiary and that its knowledge at that date must be proved. Accordingly, if all a plaintiff can establish is such knowledge after payment, then he has failed to establish his cause of action. The bank would not have been in breach of any duty in making the payment without the requisite knowledge. We doubt that this is really open to contest."

(emphasis provided)

20. Similarly, in **Turkiye Is Bankasi AS v Bank of China**²⁶, Waller J commenting on the issue, said:

"It is simply not for a bank to make enquiries about the allegations that are being made by one side against the other. If one side wishes to establish that a demand is fraudulent it must put irrefutable evidence in front of the bank. It must not simply make allegations and expect the bank to check whether those allegations are founded or not".

(emphasis provided)

21. In India also, there is judicial recognition to the rule of autonomy and the exception thereto in cases of fraud. One of the leading case on the matter is **Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company**²⁷, where the court relying on its previous decisions in **U.P. State Sugar Corporation v. Sumac International Ltd.**²⁸, and **U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.**²⁹, **Svenska Handelsbanken v. Indian Charge Chrome**³⁰, **U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.**³¹, and **U.P. State Sugar Corporation v. Sumac International Ltd.**³² concluded that the principles to be considered, while deciding upon the matter of

²⁶ [1998] 1 Lloyd's Rep 250

²⁷ AIR 2007 SC 2798

²⁸ AIR1997SC1644

²⁹ [1988]1SCR1124

³⁰ AIR1994SC626

³¹ [1988]1SCR1124

³² (1997) 1 SCC.

granting an injunction to restrain the encashment of a bank guarantee or a letter of credit were the following:

"(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."

The Doctrine of Strict Performance

22. The other principle governing documentary credit - doctrine of strict compliance, posits the bank to stringently follow the terms of credit, while examining the documents tendered by the seller thereunder. This rule has its strong roots dating back a century, when the application of the principle was adjudged as "common sense"³³ and "elementary"³⁴. The judicial opinion since then has had no room for documents, which were 'almost the same', or which would 'do just as well'.³⁵ This principle was highlighted in **J H. Rayner & Co Ltd v Hambro's Bank Ltd**,³⁶ wherein, the credit called for documents covering the shipment of 'coromandel groundnuts',

³³ Equitable Trust Co of New York v Dawson Partners Ltd (1926) 27 L1 L Rep 49 at 52.

³⁴ English, Scottish and Australian Bank Ltd v Bank of South Africa (1922) 13 L1 L Rep 21 at 24.

³⁵ Equitable Trust Co of New York v Dawson Partners Ltd (1927) 27 LI L Rep 49, at 52.

³⁶ [1943] KB 37.

but the bill of lading tendered referred to 'machine-shelled groundnut kernels'. Both terms were regarded as synonym in the trade. Nevertheless, the bank's refusal to pay was upheld by the court on appeal, in terms that:

".... it is quite impossible to suggest that a banker is to be affected with knowledge of the customs and customary terms of every one of the thousands of trades for whose dealings he may issue letters of credit."³⁷

23. Later, in the case of **Gian Singh & Co Ltd v Banque de l'Indochine**³⁸, the Privy Council also confirmed the principle of strict performance by endorsing that the terms of the credit were to be strictly followed in examining the documents presented thereunder. What is crucial to note is that the paying bank, while examining the documents under the credit, is only obliged to examine, whether the same appear to conform to the language of the terms of the credit. The bank is not under a duty to carry out an enquiry during the said scrutiny. More so, the actions or inaction of the bank during the examination of documents under the credit should not be seen to suggest an attempt to either accept discrepant or reject conforming documents.

24. Over time, there has been a judicial realisation that in certain cases, the principle of strict performance should not be followed in a literal and robotic manner. It was in **Bankers Trust Co v State Bank of India**³⁹, where one of the tendered documents under the credit gave the buyer's telex number as 931310 instead of

³⁷ Per Mackinnon LJ at 41. The learned judge went on to give the 'homely illustration' of tender of a bill of lading showing shipment of copies of *The White Book* when the credit called for documents covering *The Annual Practice* (now *The Supreme Court Practice*), the former being a synonym in common use by practitioners.

³⁸ [1974] 2 All ER 754.

³⁹ [1991] 2 Lloyd's Rep 443

981310. This discrepancy was not considered sufficient for rejecting payment to the seller. While on the other hand, in **Seaconsar Far East Ltd v Bank Markazi Jomhuri Islami Iran**⁴⁰, the absence of letter of credit number or the buyer's name in the presented documents under the credit was not regarded as 'trivial', and held to be justifiably relevant for rejecting payment. Similarly, in **Beyene v Irving Trust Co.**⁴¹ the name of the vessel 'Sofan' was misspelled as 'Soran', and this misspelling was held to be a justifiable reason for rejecting payment under the documentary credit. It was explained that "this is not a case where name intended is unmistakably clear despite what is a typographical error, as might be the case if, for example, "Smith" was misspelled "Smithh". This misspelling or typing error that does not affect the meaning of the word or the sentence in which it occurs does not make the document discrepant and, in such typing, errors should not be considered grounds for rejecting payment".⁴²

25. We also note that the judicial opinion on the doctrine of strict performance has not only been recognised but expressly provided for in Articles 13 and 14(b) of UCP 500 in terms that:

Article 13. Standard for Examination of Documents

a. Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.

⁴⁰ [1993] 1 Lloyd's Rep 236

⁴¹ 762 Fed 4 (US Ct of Apps (2nd Cir) (1985)

⁴² International Standard Banking Practice for the examination of documents under documentary credit (2003)

Documents not stipulated in the Credit will not be examined by banks. If they receive such documents, they shall return them to the presenter or pass them on without responsibility.

b. The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

Article 14. Discrepant Documents and Notice

b. Upon receipt of the documents the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, must determine on the basis of the documents **alone** whether or not they appear on their face to be in compliance with the terms and conditions of the Credit. If the documents appear on their face not to be in compliance with the terms and conditions of the Credit, such banks may refuse to take up the documents.

(emphasis provided)

A careful reading of the above provisions highlights that the strict obligation of the bank to make the payment under the credit is made conditional upon the supplier or any person on its behalf tendering to the paying bank all the documents stated in the credit, which are to conform to the terms of the credit. In case, the documents so tendered by the seller/beneficiary fail to conform with the terms of the credit, the payment by the bank to the beneficiary/seller is to be refused.⁴³

26. To sum up the above discussion regarding documentary credits, relevant to the case in hand, we may note as under:

- I. All documents stipulated in the credit are to be tendered by or on behalf of the seller/beneficiary to the bank for seeking payment under the credit.
- II. When the requisite documents are presented by or on behalf of the seller, the same are to be examined by the bank "with reasonable care", to ascertain whether or not, the documents

⁴³ OGDCL v. Excel Techno Solutions FZE, U.A.E. 2017 CLD 1274.

so tendered, on the face of it, comply with the terms and conditions of credit.

- III. The doctrine of strict performance of the terms of the credit be observed and construed with such rigidity, so as to preserve the legitimacy of documentary credits subject to the facts and circumstances of each case.
- IV. The rule of autonomy mandates bank to make the payment on the tender of conforming documents, irrespective of any dispute between the parties in respect of the underlying contract.
- V. The rule of autonomy is, however, not absolute. It has an exception, when there is a clear fraud, of which the paying bank has notice before the payment is made to the seller/beneficiary, and the evidence of the fraud is clear and convincing.

27. Now that we have dilated upon the elements of the legal principles governing the documentary credit to finance international sale transactions, it would be appropriate to move on to the essentials of the challenge made by the appellant-company to the release of payment to the seller-beneficiary under the L.C.s.

28. In essence, the claim of the appellant-company against the respondent-bank was twofold: first, bills of lading tendered were discrepant, which were wrongly accepted by the respondent-bank in derogation of the terms of L.C.s. UCP 500 and the law; second, that fraud had been committed by the supplier by presenting forged Bills of Lading. Thus, according to appellant-company, the respondent-bank was not entitled to any payment from the

appellant-company under the L.C.s. and the amount so received from the appellant-company was to be reimbursed to it. These serious allegations were addressed by the Banking Court, when it framed the issues of the consolidated two suits:

"7. Whether the plaintiff in the connected suit (Askari Commercial Bank Ltd) has acted with gross negligence and lack of exercise of prudence and caution in accepting the forged shipping documents from its foreign correspondent (National Westminster Bank)? If so its effect?

8. Whether the plaintiff in the connected suit (Askari Commercial Bank) is entitled to claim any amount from the defendants on the basis of admittedly forged documents?"

29. Before considering the above two issues, it would be pertinent to determine: firstly, whether the appellant-company could have any cause of action against the Issuing bank/respondent bank in Pakistan for the illegal acceptance of discrepant documents by the Nominated bank in Manchester, U.K.; secondly, whether the facts and circumstances asserted by the appellant-company regarding the tendered documents being discrepant to the terms of L.C.s. and also being forged, constituted a violation of the provision of the UCP 500, warranting a positive relief to the appellant-company.

Jurisdictional Maintainability – Cause of Action

30. The law is by now settled that there is a contractual relationship between the applicant of a credit (appellant-company) with the bank issuing the credit (Issuing Bank/respondent-bank), and also with the nominated bank, which is to make the payment under the credit on presentation of the documents. It is also a settled principle that the nominated bank, which is to make the

payment under the credit, acts as an agent of the Issuing bank. This being so, the Issuing bank would then be bound and responsible for the actions or inactions of its agent carried out under the said agency. The rationale behind the recognition of these legal relationships, which are established with the opening of documentary credit, is to bring certainty in the performance of obligations and payment of consideration of international sales transactions across the globe. Thus, the appellant-company registered in Pakistan would have a cause of action against the Issuing bank/respondent-bank, as a principal, for the actions or inactions of its agent/Nominated-bank in Manchester, U.K. Besides thereto, we also note that the respondent-bank had received from the Nominated bank, the documents presented by the supplier-company, and was thus also obligated to examine "with reasonable care" the said documents. In case the Issuing bank had found the documents, so presented to be discrepant, the payment to the supplier-company could have been refused, within the seven days of receipt thereof, as provided under Article 13(b) of the UCP 500. In the present case, no such response was rendered by the respondent-bank, and thereby it impliedly accepted the documents for conforming with the terms of L.C.s.

31. Given the above, the appellant-company had on both counts valid cause of action against the Issuing bank/respondent bank; firstly, as a principal, for the acts or omissions of its agent-Nominated bank; and secondly, as an Issuing bank, on receipt of documents transmitted by the Nominated bank. Accordingly, the

claim of the appellant-company is maintainable against the Issuing bank/respondent bank.

32. The main thrust of the challenge made by the appellant company was that the two bills of lading were forged, and thus the same did not conform to the terms of L.C.s. To appreciate the contention of the appellant company, one must focus on the Bills of Lading, and that too, in the perspective of international commercial transactions.

33. The term 'bill of lading' has not been defined in the UCP 500. However, the term generally refers to a written acknowledgement of the carrier of goods by sea to the person from whom he has received goods to be shipped to a distinct destination for an agreed consideration, commonly referred to as freight. As for the dictionary meaning of the different categories of bills of lading mentioned in the L.C.s, we note the following:

Bill of Lading

"A document of title acknowledging the receipt of goods by a carrier or by the shipper's agent; a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods."⁴⁴

"A bill of lading is a document issued by or on behalf of a carrier of goods by sea to that person (usually known as the shipper) with whom he has contracted for the carriage of the goods. Its basic features are that it contains promises by the carrier to carry the goods to the agreed destination subject to the terms of the document, and to deliver them there, in accordance with those terms; and a promise by the shipper to pay the agreed remuneration, known as the freight."⁴⁵

Clean bill of lading:

"A bill of lading containing no clause or notations qualifying the bill's terms. *Maritime law*. A bill of lading that, by not providing for storage of goods on a ship's deck, implies that the goods are to be stowed below decks."⁴⁶

⁴⁴ Black's Law Dictionary, 8th Edn.

⁴⁵ Carver on Bills of Lading, (Fourth Edition 2017), Sir Guenter Treitel and F.M.B Reynolds.

⁴⁶ (ibid no.42)

Short-form bill of lading

A bill of lading that does not expressly contain all the terms of the transportation contract, but incorporates them by reference to another document.⁴⁷

Bill of Lading – scope and extent

34. The scope of a bill of lading, the parties involved, and the extent of their relationship *inter-se*, has been described briefly, yet with exactness in **Scrutton on Charter parties**⁴⁸, in terms that:

"After goods are shipped, a document called a bill of lading is issued, which serves as a receipt by the shipowner, acknowledging that the goods have been delivered to him for carriage. Besides acting as a receipt for the goods, the bill of lading serves also as:

(1) Evidence of the contract of affreightment between the shipper and the carrier.

(2) A document of title, by the indorsement of which the property in the goods for which it is a receipt may be transferred, or the goods pledged or mortgaged as security for an advance.'

The three characteristics of a bill of lading are there (1) as a receipt, (2) as a contract of carriage, and (3) as a document of title."

Bill of lading - Signature of authentication

35. The requisite requirement for ensuring the authentication of bill of lading has been provided under Article 23(a)(i), UCP 500, which stipulates that:

"Article 23. Marine/Ocean Bill of Lading

a. If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

i) appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

- the carrier or a named agent for or on behalf of the carrier, or

- the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting,"

(emphasis provided)

A careful reading of the above provision of UCP 500, clarifies the position of authentication or signature on a bill of lading. It

⁴⁷ (ibid no.42)

⁴⁸ (21st edn) p 2, cited in its earlier edition by Sasson.

provides for the same to be signed or otherwise authenticated by the carrier or master of the vessel carrying the goods. A named agent for or on behalf of the master or carrier can also do the needful. However, where the signature or authentication is by an agent, the agent must indicate the name and capacity of the party (carrier or master) on whose behalf he is acting.

Factual position in the present case

36. In the present case, we note that there were three essential common stipulations relating to the bills of lading provided in the L.C.s. The same were as under:

- i) Full set of clean shipped on board, marine bill(s) of lading made or endorsed to our order showing freight prepaid and marked notify the applicant and us.
- ii) Stale short form B/L, Blank Back B/L and or B/L issued prior to date of this LC not acceptable.
- iii) Third-party B/L acceptable.

When we review the Bills of Lading, we note that the goods described therein were in accord with the terms of the L.C.s. Also, there were express markings thereon, stating: "Third-Party Bills of Lading"; the freight of the consignments had been "Prepaid"; and that the goods "shipped". We also noted that the Bills of Lading provided complete particulars relating to the transportation of the goods: name of the shipper (M/s Alpha Shipping & Forwarding Services, Manchester, U.K.), the assignee (the respondent-bank) and the applicant (appellant-company), the date on which the goods were shipped, the period of loading and its destination. This being so, the Bills of Lading were "clean", and not "Stale short form B/L, Blank Back B/L and or B/L issued prior to date of this LC", as all the terms of

the transportation were stated therein, and it did not refer to the same by reference to another document.

37. On closer review of the Bills of Lading, we also note that M/s Alpha Shipping & Forwarding Services, Manchester, U.K., was marked as the agent of the carrier. This fact was also brought to the notice of the Issuing bank by the Nominated bank *vide* its letter dated 09.06.1999 (Exhibit-DW1/11) specifying that:

"I would like to draw your attention to UCP 500 Article 23a(i). This article states that a Bill of Lading can be signed by a named agent on behalf of the carrier. This means that the Bills of Lading presented under the Letter of Credit are acceptable as they have been signed by Alpha Shipping as agent for P&O. Bills of Lading in this format are acceptable under UCP 500 and NatWest was correct to accept the Bills of Lading, as presented, under the L/C."

38. It would be pertinent to note that no evidence, whatsoever, was produced by the appellant company to even suggest that M/s Alpha Shipping & Forwarding Services, Manchester, U.K., was not the agent of the carrier. Needless to state, under the general legal dispensation, the onus to prove an assertion stated in the plaint falls on the person making it.⁴⁹ And, the failure of the plaintiff to discharge the said onus would negate its said claim.

39. Viewed from the perspective of the rights and obligations of the parties to an international commercial transaction, we note that the position in the present case is as under:

- I. The respondent bank had to set up a *prima facie* case based on what "appears on the face" of the documents tendered to be in accord with the underlying credit before making payment to the seller, which it had before the Banking Court.

⁴⁹ Article 126 of the Qanoon-e-Shahadat Order, 1984.

- II. The appellant-company had to establish fraud by the seller relating to the documents so presented, and that too, before the payment was made to the seller, which it failed to do before the Banking Court. A mere bald unsubstantiated allegation would not legally suffice for the paying bank to deny the payment to the seller under the credit.

Allegation and proof of Fraud

40. It is trite law that fraud vitiates the most solemn of transactions. But to prove fraud requires strict proof. And the onus to prove fraud remains on the asserter. Moreover, not only is the fraudster to be named and impleaded as a party to the suit, but the particulars of the fraud are also to be pleaded with clarity and certainty.⁵⁰

41. In the present case, we have noted that the essential legal requirements required to assert fraud have not been met by the appellant company. In the plaint of the appellant company, neither has the fraudster been named in the memo. nor has he been impleaded as a party to the suit. Even the oral testimony of Mr. Shiraz Taqi (PW-1) and Muhammad Aslam Hayat (PW-2) are devoid of particularity and certainty regarding the claimed fraud. We also note that Mr. Shiraz Taqi (PW-1) during his cross-examination admitted that there was a possibility of his agent Muhammad Hussain with the connivance of the supplier-company to have designed the fraud. This admission on the part of Mr. Shiraz Taqi further dilutes the claim of forgery/fraud asserted in the plaint.

⁵⁰ Ghulam Rasul v. Muhammad Akram (1988 SCMR 1080), Muhammad Ishfaq v. Chouhdri Muhammad Nawaz (2008 SCMR 1095), Haji Abdul Ghafoor through legal heirs v. Ghulam Sadiq through legal heirs (PLD 2007 SC 43) and Muhammad Saleem v. Muhammad Tariq (2009 CLC 1295).

However, any findings recorded in the present decision ought not to prejudice the appellant-company, if it decides to seek its rightful remedy before an appropriate legal forum, against the seller, the shipper or any other person, with reference to the performance of the main contract.

Conclusion

42. Canvassing the evidence produced by the parties, it would be fair to state that the appellant-company failed to discharge its onus under the law to prove its claim regarding the tendered Bills of Lading being forged, or that the documents so produced were discrepant to the terms of the L.C.s, and thus violated the provisions of UCP 500. Consequently, we find that the two courts below have correctly appreciated the factual and legal aspect of the case, warranting no interference of this Court.

43. Accordingly, for the reasons stated above, Civil Appeal Nos. 870 & 871 of 2012 being bereft of merit are dismissed.

Judge

Judge

Judge

Islamabad

19.10.2020

Approved for reporting.

Arif