

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 44 of 2009

For Plaintiff Mr. Abdul Haleem Siddiqui, Advocate

For Defendant No.2 Mr. Umar Peerzada, Advocate

For Defendant No.3 Ms. Naheed A. Shahid, Advocate.

Date of hearing : 01.3.2016.

Date of announcement: : 26.04.2016.

O R D E R

SALAHUDDIN PANHWAR, J. Through this order, I decide the CMA No.257 of 2009 (U/O 39 Rules 1 & 2 CPC R/w Sec. 151 CPC), filed by the plaintiff that:-

“...plaintiff is purchasing 150,000.00 Kgs of Super Kernal Basmati Rice from defendant No.1 and in this regard the defendant No.1 requested the plaintiff to establish Letter of Credit as such the plaintiff established the Letter of Credit bearing No.CLT/LCU/4888/08 on dated August 15, 2008 with the defendant No.2 for an amount of Rs.150,00,000.00 (Rupees Fifteen Million). It is further submitted that the defendant No.1 was required to supply the Rice as per terms and conditions of LC but the defendant No.1 failed to supply the same despite of repeated requests made by the plaintiff. The defendant No.1 with malafide intentions and ulterior motives has submitted discrepant documents such as fake invoices and Bilities with the defendant No.2 and trying to withdraw the said L.C amount illegally, unlawfully.

It is therefore, humbly prayed that this Hon'ble Court may be pleased to restrain the defendant No.2 their Agent (s), Servant (s), Employee (s), and Person(s) acting through or under them from releasing the payment of LC to the defendant No.1 or its Bank known as Allied Bank Ltd. Ghalla Mandi Branch, Nanankan Sahib, till..."

2. Before giving a brief picture of facts, it is necessary to mention that *originally* suit was filed against defendant Nos.1 and 2 wherein it was pleaded that plaintiff, being a limited company, used to purchase rice from defendant No.1 on cash payment but at request of defendant No.1, plaintiff established Local Letter of Credit (LC) for purchase of 150,000 Kgs rice from defendant No.1 valuing Rs.15,000,000.00; per LC documents all shipments were to be insured and paper must be forwarded accordingly for compliance of shipment but despite repeated requests the defendant No.1 failed to supply rice *on one or other pretext*, including one of rice to be damped due to heavy rain and needs drying up. It was further claimed that defendant No.1 on basis of LC discounted amount from bank; defendant No.2 provided manipulated, fabricated, forged documents such as invoices and Bilties of transporters and even some of the invoices were claimed to be prior to date of LC in contravention of terms and conditions of said LC while other not in conformity with bilties. Plaintiff also requested defendant No.2 to stop payment of LC as defendant No.1 failed to supply rice.

3. In above back ground, the plaintiff as per amended plaint, sought following relief (s):-

- A) To direct the defendant No.1 to perform part of his contract as per the LC and supply 150,000.00 Kgs of Super Kernal Basmati Rice in accordance with description mentioned in the heading of '**description of Merchandize**' in LC; alternatively in the case the defendant No.1 fails to perform his part as per the terms and conditions of the LC, the LC bearing No.CLT/LCU/4088/08 dated August 15, 2008 is liable to be cancelled.
- B) To declare the alleged documents i.e. six in number insurance cover notes bearing Nos.079264, 079265, 079266, 079267, 079268 and 079269 all dated September 12, 2009 issued by M/s. East West Insurance Co. Ltd., alleged letters bearing reference No.NKS/FAZ/2K8/2423 dated September 13, 2008, letter No.Nil dated September 17, 2008 (Annexure "D" and "E" of the written statement of defendant No.2) as well as all the invoices bearing No.AR/010/2008, AR/009/2008 and AR/011/2008 all dated August 26, 2008 respectively, AR/012/2008, AR/013/2008 and AR/014/2008 all dated May 29, 2008 respectively, and bilties Nos.2177 dated August 16, 2008, 2178 dated August 16, 2006, 2179 dated August 18, 2008, 2180 dated August 18, 2008, 2184 dated August 19, 2008 and 2185 dated August 19, 2008 respectively are forged, manipulated, managed by the defendants with the collusion and connivance with each other to usurp the amount of the LC.
- C) To issue permanent injunction against the defendant No.2 his agent (s), employee (s), associate (s) and / or any other person (s) acting through or under them from releasing the amount of LC bearing No.CLT/LCU/4888/08 dated August 15, 2008 to the beneficiary of LC (defendant No.1) or its advising Bank i.e Allied Bank Limited, Ghalla Mandi, Nankana Sahib (defendant No.3) till the decision of this suit;
- D) To direct the defendant No.1 to pay an amount of Rs.500,000,000.00 towards damages to the plaintiff as mentioned in plaint in para-12 of the this plaint and markup @ 0.62 paisa per thousand per day till realization of said amount;
- E) The cost of the Suit may also please be awarded to the plaintiff;
- F) Any other relief (s) as deemed fit and appropriate by this Hon'ble Court may also be awarded to the plaintiff;

4. The perusal of the record shows that during proceedings, defendant No.3 came forward and was joined as defendant No.3 through course of Order 1 Rule 10 CPC; defendant No.3 also filed a suit No.B-6/2012, therefore, plaintiff filed amended plaint wherein added that documents (Annexure D-1 to D-8 of written statement of defendant No.1) are forged, managed and manipulated one. On January 13, 2009 one of directors of plaintiff visited to defendant No.2 enquiring about action for stopping payment of LC but it was stated that payment has to be made by January 15, 2009. It is also claimed that plaintiff served legal notices through its counsel to proprietor of transport companies which were replied to provide copies of premium payment slips. Plaintiff also claimed that defendant No.1 failed to perform his part of contract in terms of LC due to which plaintiff financial loss.

5. The learned counsel for the plaintiff while arguing referred to documents and terms and conditions of LC so also invoices while claiming same to be forged. It was argued that plaintiff deposited amount of Rs.15,000,000.00 and established LC for delivery of 150000 KGs Super Karnal Baspati rice but defendants in collusion and connivance with each other trying to usurp said amount. Defendant No.2 with malafide intent issued letter of acceptance of discrepant document without bringing into knowledge of plaintiff and defendant No.3 accepted / received the same hence *advising Bank* failed to abide by terms and conditions of LC and ulres of UCP-600 hence, *per plaintiff's counsel* , prima facie case is in favour of plaintiff. For balance of convenience, it is argued that plaintiff has not

received rice nor he has any money hence amount, *lying with defendant No.2*, if disbursed will cause greater inconvenience to plaintiff. For irreparable loss / injury, it is pleaded that if injunction is not granted the plaintiff will suffer irreparable loss / injury that cannot be compensated with any cost. In support of arguments, the reliance is placed on the case reported as PLD 1990 Karachi 395; 1984 CLC 381 Karachi; PLD 1990 Karachi 1; PLD 1983 SC 387; PLD 1996 67(W.P) Lahore; 2006 CLD 1140 Lahore; 1992 SCMR 2184; 1999 SCMR 591.

6. The counsel for the defendant No.2, *at his turn*, argued that plaintiff approached defendant No.2 with request for grant of LC of Rs.15,000,000/- for purchase of 150,000 KGs of Super Kernal Basmati rice from defendant No.1; as per Bank's practice said application was treated as an *irrevocable agreement* documentary credit freely negotiable in beneficiary's country. Defendant No.2 sanctioned LC facility and at request of plaintiff opened LC in favour of defendant No.1's bank i.e defendant No.3; defendant No.2 received presentation advice from *Advising Bank* for acceptance along with invoices and Bilities wherein defendant No.2 found some discrepancies which were conveyed to plaintiff who accepted the documents on 17.9.2008 and instructed defendant No.2 to release the LC amount. The plaintiff kept quite for 4 months *almost* . It was argued that suit and stay application of plaintiff are based on malafide intention; plaintiff failed to establish *prima facie* , *balance of convenience* and even *irreparable injury* if injunction is refused hence it was concluded that injunction application be dismissed.

7. On the other hand, defendant No.3 argued that LC was issued by defendant No.2 (*issuing bank*) on request of plaintiff and in such transaction the defendant No.3 was '*advising bank*' ; defendant No.3 on receipt of all documents sent a letter to defendant No.2 which discounted the bills and made payment of Rs.15,000,000/- hence *prima facie* plaintiff accepted the documents as no complaint was made by plaintiff. It is claimed that plaintiff and defendant in collusion with each other trying to deprive defendant No.3 from its legal right to receive proceeds from defendant No.2. While referring to UCP's terms the defendant No.3 argued that defendant No.3 is legally entitled for payment of the proceeds and defendant No.2 is bound to pay hence grant of stay shall cause serious prejudice and irreparable injury to defendant No.3.

8. I have heard the respective sides and have also gone through the available material. Before going any further on merits of the instant applications, it would be just, proper and necessary to mention that an injunction is not to be granted where the party, claiming injunction, fails in establishing co-existence of all three required ingredients for grant of injunction which are '*prima facie case, balance of inconvenience and irreparable loss / injury*' . It is always necessary to give due meaning and weight to each ingredient because each is not simply a word but a circumstance showing existence of some fact to a prudent mind. It is not the claimed rights, convenience of a party or investment and even an apprehension of some loss or injury but what shall make one entitled for grant of injunction is:-

- (i) **Prima facie case is existence of legal right** which should appear to a prudent mind with a probability of success at the end of the day;
- (ii) **Balance of inconvenience is existence of circumstance(s)** through which the plaintiff establishes that his inconvenience shall be greater than that of opposite party if injunction is not granted;
- (iii) **Irreparable loss / injury** do not refer to a damage or loss which can be ascertained or compensated but to such an injury which cannot be adequately compensated.

It should always be kept in mind that plaintiff has to establish co-existence of all said ingredients through pleading, documents attached therewith and affidavit, so sworn in support of the injunction application. Through discretionary powers, including Under Order XXXIX Rules 1 and 2 C.P.C. the Court is bound to protect legal rights, their infringements, malafide exercise of jurisdiction by an authority but such discretion should always be used in aid of justice, equity and fair play but not in aid of a prima facie illegality or improper relief.

9. Having said so, now I would revert to examine the co-existence of required ingredients with reference to the pleadings (plaint), pertinent to mention that while examining the prima facie case (cause of action) only the averments of the plaint or undisputed documents/facts are to be taken into consideration. In the instant matter, it is not a matter of dispute that originally the LC, in question, was result of an initiation by the plaintiff himself for a transaction with the defendant No.1 i.e *delivery*

of rice which (delivery of rice) *per plaintiff* is not received while *per defendant No.1* is delivered through certain invoices and Bilities. This *prima facie* leaves nothing to argue *any more* that dispute is in between plaintiff and defendant No.1 *over* delivery of rice. Such dispute is *purely* between the plaintiff and defendant No.1 which is evident from the prayer clause (a) of the plaintiff *even* i.e :

‘To direct the defendant No.1 to perform part of his contract as per the LC and supply 150,000.00 Kgs of Super Kernal Basmati Rice in accordance with description mentioned in the heading of ‘**description of Merchandize**’ in LC, alternatively in the case the defendant No.1 fails to perform his part as per the terms and conditions of the LC, the LC bearing No.CLT/LCU/4088/08 dated August 15, 2008 is liable to be cancelled.”

Such relief, if granted shall satisfy the plaintiff’s claim hence *prima facie* no inconvenience or irreparable loss / injury is likely to be suffered by the plaintiff. Be that as it may, it is also a matter of record that all the defendants claim the invoices and Bilities to be genuine or *least* accepted so by the plaintiff despite knowledge and notice for a considerable period of four (4) months. The perusal of the reliefs, sought by the plaintiff through instant suit, would make it clear that plaintiff has not sought *any* direct relief against the defendant Nos.2 and 3 rather the plaintiff has included a relief of *damages* against the defendant No.1 to extent of Rs.500,000,000.00 for his (*defendant No.2’s*) act of fabricating, forging and manipulating invoices and Bilities of delivery of rice. Inclusion of such prayer clause is *even* sufficient for declining a relief of injunction within meaning of Section 54 of the Specific Relief Act which *prima facie* insists exercise of discretionary relief of ‘*interim injunction*’ where :

(a) ...;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief;

(d) where it is probable that pecuniary compensation cannot be got for the invasion;

(e) where the injunction is necessary to prevent a *multiplicity of judicial proceedings*.

In the instant matter, the plaintiff not only has sought specific performance of contract *i.e* delivery of rice but has also claimed specific amount of *damages* for alleged breach of *contract*, therefore, it would be *quite* safe to say that sub-clauses (b) to (e) of Section 54 of Specific Relief Act are not available in favour of the plaintiff.

10. Further, a reference to Article 4 of UCP 600 would make position further clear hence is referred hereunder:-

'a. Credit by its nature is separate transaction from the sale or other contract on which it may be based bank and based bank are in no way concerned with or bound by such contract even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of bank to honour, to negotiate or to fulfill any other obligation under the credit is not subject to claims or defense by the applicant. Resulting from its relationship with the issuing bank or the beneficiary.

The meaning is accepted by the plaintiff because he has not sought any relief against issuing bank or advising bank (defendant Nos.2 and 3) hence *balance of inconvenience* is not with the plaintiff because he (*plaintiff*) can well be compensated at the end of the day but it would not be in the fairness or equity to keep those suffering who are not direct beneficiaries

even parties to transaction between plaintiff and defendant No.1 regarding contract of rice.

11. The defendant No.2 (*issuing bank*) also has denied the claim of *ignorance* of plaintiff about claimed discrepancies towards invoices and Bilities, submitted by defendant No.1; defendant Nos.2 and 3 claim to have followed the required procedure in *discounting* the LC therefore mere words of the plaintiff would not be sufficient to keep such person (*defendant No. 3*) suffering for no *actual* fault on its part. The claimed breach of commitments by defendant No.1 should not *normally* result consequences upon strangers nor influence the independent proceedings/ acts because this will not be within spirit of *administration of justice*. The position, *being so*, also doubts existence of *prima facie* case in favour of the plaintiff for relief of injunction.

12. The case law relied by the plaintiff is not advancing the case of the plaintiff for grant of injunction. It is pertinent to mention that defendant No.1 is not a foreign company hence there is no apprehension that if plaintiff succeeds in establishing his case for *Specific Performance & damages* it (*plaintiff*) would have any problem in enforcement of determined rights (*decree*). Accordingly, I am of the *firm* view that plaintiff has failed to make out a case for grant of injunction in its *plaintiff's* favour. In consequences thereof, the injunction application is hereby dismissed.

JUDGE