

HYDERABAD INDUSTRIES LTD.
v.
IDAC TRADING (PVT) LTD., AND TWO OTHERS

COURT OF APPEAL.
S. N. SILVA, J. (P/CA)
R. RANARAJA, J.
C.A. 64/95
C.A./LA 2/95
D.C. 3990/SPL.
JUNE 07, 1995.

Irrevocable or Confirmed Letter of Credit – Bill of Lading – Goods supplied not in conformity – Enjoining Order – Interim Injunction – Irreparable damage – Damages quantified – Contract of Indemnity – Fraud.

The 1st Respondent (Buyer) instituted action against the Petitioner (Supplier), the 2nd Respondent (Shipping Company) and the 3rd Respondent (Bank), stating that it imported 19 container loads of corrugated asbestos roofing sheets from the Petitioner for which purpose the Petitioner opened a irrevocable Letter of Credit with the 3rd Respondent. This letter of Credit was amended, to include a condition that a certificate of the C.I.S.I.R. certifying that the goods conform to S.L.S. 9 of Part II, should be provided. The goods were inspected by the CISIR and they certified that the goods were not in conformity with SLS 9 (ii). The 1st Respondent also issued a Letter of indemnity to the 2nd Respondent endorsed by the 3rd Respondent. It was pleaded that due to the failure of the Petitioner to duly sell and deliver goods to the 1st Respondent it had suffered damages in a sum of Rs. 3.6 million. The 1st Respondent also averred that it would suffer irreparable loss and damage if the 3rd Respondent made payments on the Letters of Credit/Indemnity to the Petitioner and the 2nd Respondent. The 1st Respondent obtained an Enjoining Order ex Parte (i) preventing the 3rd Respondent (Bank) paying or causing to be paid any money to the Petitioner and/or the 2nd Respondent (Shipping Company) (ii) preventing the Petitioner and/or the 2nd Respondent from receiving any money upon the Letter of Credit/Indemnity (iii) preventing the Petitioner from receiving or claiming any money from the 2nd Respondent and the 2nd Respondent from paying any Money to the Petitioner upon and/or in terms of the Letter of Indemnity. The District Court after inquiry granted an interim injunction.

Held:

(1) The Bills of Lading show that the goods were shipped on 19.10.93. The irrevocable Letter of Credit required a certificate of inspection issued by the Indian Export Council stating that the goods conform to SLS 9. (ii) except with regard to width to be produced before it could be honoured. On 10.11.93 this condition was unilaterally amended by the 1st Respondent requiring a Certificate

from CISIR, certifying that the goods conform to SLS 9 part 2 including width. Since the cargo was on Board ship as at that date the Petitioner could not in any way fulfil that condition. Thus it shows that the said condition was included in Bad faith.

(2) The 1st Respondent subsequently took delivery of the goods and sold them in the open Market. This was done without any attempt on its part to repudiate the contract and return the goods to the Petitioner. Therefore it is difficult to fathom how then the 1st Respondent could suffer irreparable damage.

Per Ranaraja, J.

"A fundamental rule of the law on injunction is that where the damages or loss caused to a party seeking injunctive relief is quantified in damages on a *prima facie* balance of convenience. Courts should refrain from granting injunctive relief."

(3) As in the case of an irrevocable or confirmed Letter of Credit, a Letter of Indemnity obliges the 3rd Respondent Bank to pay the 2nd Respondent – Shipping Company on it irrespective of any dispute between the Petitioner and the 1st Respondent on the contract regarding the goods. It is an irrevocable obligation with which courts will not interfere with except when there is fraud, by one of the parties to the underlying contract and the Bank had Notice of that fraud.

(4) The system of financing these operations would break down completely if a dispute between the Vendor and the purchaser were to have the effect of "freezing" the sum in respect of which the Letter of Credit was opened.

The Courts jurisdiction to grant injunctions is wide, but this is not a case in which in the exercise of the Courts discretion it ought to grant an injunction.

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Jinadasa v. Weerasinghe* 31 NLR 33.
2. *Amerasekera v. Mitsui & Co. Ltd., and Others* 1993 1 SLR 22.
3. *Malas v. British Imex Industries Ltd.*, 1959 1 AER 262 at 263.
4. *Harbottle (Mercantile) Ltd., and Another v. National Westminster Bank Ltd.*, 1977 2 AER 862.
5. *Edward Owen Engineers Ltd., v. Barclays Bank International Ltd.*, 1978 1 AER 976.

Faiz Musthapha P.C., with *Kushan de Alwis* for Petitioner.
Romesh de Silva, P.C., with *Dinal Phillips* for 1st Respondent.
S. A. Parathalingam for 3rd Respondent.

June 29, 1995.

RANARAJA, J.

The 1st respondent (buyer of goods), instituted action against the petitioner (supplier of goods), the 2nd respondent (shipping Co.), and the 3rd respondent (Bank issuing the letters of credit/indemnity) stating that it imported 18 container loads of corrugated asbestos roofing sheets (goods), from the petitioner for which purpose the petitioner opened an irrevocable letter of credit (X6) with the 3rd respondent. The letter of credit was amended (X7) on 10.11.93, including a condition that a certificate of the C.I.S.I.R. certifying that the goods should conform to SLS 9 of Part II. The 1st respondent also issued letters of indemnity to the 2nd respondent indorsed by the 3rd respondent (X8A to X8E). The goods were inspected by the C.I.S.I.R. and certified that they were not in conformity with SLS 9 part 11. In the circumstances, the 1st respondent pleaded that due to the failure of the petitioner to duly sell and deliver goods to the 1st respondent, it had suffered damages in a sum of Rs. 3,600,000/-. The 1st respondent also averred that it would suffer irreparable loss and damage if the 3rd respondent made payments on the letters of credit/indemnity to the petitioner and 2nd respondent respectively. The 1st respondent therefore applied for and obtained *ex parte* an enjoining order,

(a) preventing the 3rd respondent paying and/or causing to be paid any money to the petitioner and/or the 2nd respondent in terms of the letters of credit/indemnity,

(b) preventing the petitioner and/or the 2nd respondent from receiving any money upon the letters of credit/indemnity and,

(c) preventing the petitioner from receiving or claiming any money from the 2nd respondent and the 2nd respondent from paying any money to the petitioner upon and/or in terms of the letter of indemnity,

and also applied for an interim injunction in the same terms.

The petitioner and the 3rd respondent filed objections praying that the enjoining order be vacated and the application for the interim injunction be dismissed. The 2nd respondent prayed that the application for an interim injunction be refused. After the parties filed written submissions and documents Court made order on 16.12.94 granting the interim injunction as prayed. These applications are to have that order set aside.

The Learned District Judge has based his order purportedly on the irreparable damage that the 1st respondent would suffer if payment by the 3rd respondent on the irrevocable letter of credit/indemnity to the petitioner and the 2nd respondent respectively is not restrained, because the 1st respondent would be unable to market the goods due to their inferior quality.

The Bills of lading X1 to X5 show that the goods were shipped on board on 19.10.93. The irrevocable letter of credit X6 dated 22.9.93 required *inter alia*, a certificate of inspection issued by the Indian Export Council stating that the goods conform to SLS 9 part II, except with regard to width, which is 1.05 metres, to be produced before it could be honoured. On 10.11.93, this condition was unilaterally amended by the 1st respondent requiring a certificate from C.I.S.I.R. certifying that the goods conform to SLS 9 part 2, including width. Since the cargo was on board ship, as at that date the petitioner could not in any way fulfil that condition. There is therefore substance in the submission made by learned President counsel for the petitioner that the condition was included in the amended letter of credit by the 1st respondent in bad faith. The District Judge had failed to consider this matter in its proper light. He has also wrongly concluded that the petitioner had acquiesced in the amendment.

It is to be noted that the 1st respondent subsequently took delivery of the goods and sold them in the open market. It has done so without any attempt on its part to repudiate the contract and return the goods to the petitioner. It is difficult to fathom how then the 1st respondent could suffer irreparable damage. Yet he has claimed a sum of Rs. 3,600,000/- in damages from the petitioner. A fundamental rule of the law on injunctions is that where the damages or loss

caused to a party seeking injunctive relief is quantified in damages, on a *prima facie* balance of convenience, Courts should refrain from granting injunctive relief. *Jinadasa v. Weerasinghe* ⁽¹⁾. The District Judge has not observed this rule. If he had considered the matters referred to, he may have been less confident in accepting the 1st respondent's contention that it had a *prima facie* arguable case and a reasonable chance of success in the light of the defences raised in the pleadings objections, documents filed and submissions of counsel. *Amerassekera v. Mitsui & Co. Ltd., and Others* ⁽²⁾.

There is a more substantial reason why the interim injunction should not have been granted. As Jenkins L.J. expressed clearly in *Malas v. British Imex Industries Ltd.* ⁽³⁾

"A confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay irrespective of any dispute which there may be between the parties on the question whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that banker's confirmed credits are of that character and it would be wrong for Court to interfere with that established practice. The system of financing these operations would breakdown completely if a dispute between the vendor and the purchaser were to have the effect of "freezing" the sum in respect of which the letter of credit was opened. The courts jurisdiction to grant injunctions is wide, but this is not a case in which in the exercise of the Court's discretion it ought to grant an injunction."

Similar views have been expressed in *Harbottle (Mercantile) Ltd. and Another v. National Westminster Bank Ltd.* ⁽⁴⁾.

Although the 2nd respondent was not represented at the hearing of this application, the facts that concern it are briefly; when the goods arrived at the Port of Colombo the 1st respondent requested the 2nd respondent to deliver the cargo without the tender of the Bills of Lading. The 2nd respondent agreed to deliver the cargo on production of an acceptable letter of indemnity. The 1st respondent then issued letter of indemnity XBA to XBE indorsed by the 3rd respondent bank and took possession of the goods.

A contract of indemnity is a contract express or implied, to keep a person who has entered into or who is about to enter into a contract or incur any other liability, indemnified against loss, independent of the question whether a 3rd person makes default (Halsbury's Laws of England). The letters of indemnity issued by the 1st respondent to the 2nd respondent as carrier of the cargo guaranteed by the 3rd respondent is independent of the contract between the petitioner and the 1st respondent.

As in the case of an irrevocable or confirmed letter of credit, a letter of indemnity obliges the 3rd respondent bank to pay the 2nd respondent on it irrespective of any dispute between the petitioner and the 1st respondent on the contract regarding the goods. It is an irrevocable obligation with which Courts will not interfere with except when there is fraud by one of the parties to the underlying contract and the bank had notice of that fraud. *Edward Owen Engineers Ltd. v. Barclay's Bank International Ltd.* ⁽⁵⁾. In the instant case, though there is an allegation of fraud on the part of the petitioner there is no *prima facie* evidence that the 3rd respondent bank was aware of any such fraud. Fraud must be clearly proved.

On a consideration of the principles laid down in the judgments cited, it is clear the Learned District Judge has misled himself in granting an interim injunction as prayed for by the 1st respondent. Accordingly the order of the District Judge dated 16.12.94 is set aside. The applications of the petitioner in revision is allowed with costs.

This order will bind the parties in CALA 2/95.

S. N. SILVA, J. – I agree.

Application allowed.