

Japson International and another v. State Bank of India and  
another (D. V. Sehgal, J.)

Before D. V. Sehgal, J.

JAPSON INTERNATIONAL AND ANOTHER,—Petitioners.

versus

STATE BANK OF INDIA AND ANOTHER,—Respondents.

Civil Revision No. 664 of 1987

October 12, 1988.

*Code of Civil Procedure (V of 1908)—O. 39, Rls. 1 and 2—Seller supplying goods against letter of credit—Letter of credit not confirmed—Seller endorsing documents for negotiation at his risk and responsibility—Bank crediting amount 'under reserve'—Prima facie case—Existence of.*

*Held, that the payment was made against negotiated documents by the plaintiff bank 'under reserve' on the basis of the endorsement of the vendor that the documents should be negotiated at its risk and responsibility backed by an indemnity bond. Prima facie, in my view in such a situation when the plaintiff Bank is not in a position to realise the proceed of the documents negotiated from Riyadh Bank it can fall back upon the above undertaking and indemnity of the vendor and recall the payment made by it 'under reserve'. A payment 'under reserve' is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. (Para 14).*

*Petition under section 115 of the Civil Procedure Code for the revision of the order of the Court of Shri Hari Ram District Judge, Ambala, dated 30th October, 1986 affirming that of Shri Jai Bhagwan, Sharma, Additional Senior Sub Judge, Ambala Cantt., dated 29th January, 1985 passing ad interim injunction and the defendants are restrained from negotiating the F.D.Rs. mentioned in application dated 27th September, 1982 and 5th November, 1983 and also restraining them from withdrawing any amount from the said accounts, and directing to defendants to file their written statement on 28th August, 1985, failing which their defence shall be struck off. (District Judge, Ambala,—vide orders dated 30th October, 1986 directed the parties through their counsel to appear before the learned trial court on 10th November, 1986 and also directed the learned trial court to take effective steps for the early disposal of the case).*

M. S. Jain, Sr. Advocate with Sanjeev Sharma, Advocate, for the  
Petitioners.

R. K. Chhibbar, Advocate with Mohan Lal Gupta, Advocate, for  
the Respondents.

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**JUDGMENT**

*D. S. Sehgal, J.*

This judgment shall dispose of Civil Revision Nos. 663 and 664 of 1987. Both these revision petitions arise out of common order dated 30th October, 1986 passed by the learned District Judge-Ambala. The facts of both the cases are similar and the points of law involved are identical. Therefore, it is convenient to dispose of both the petitions together by this judgment. The reference to the parties and the facts besides documents shall, unless otherwise specifically mentioned, be, however, made from those giving rise to Civil Revision No. 664 of 1987.

(2) M/s Japson International, Ambala, defendant No. 1 in the suit (for short 'the vendor') is constituted of four partners impleaded as defendant Nos. 2 to 5 in the suit. They entered into a contract for sale by way of export of scientific goods with Riyadh House Establishment, Riyadh, Saudi Arabia (for short 'the buyers'). The buyers opened a letter of credit dated 6th August, 1980 through the National Commercial Bank, Riyadh (for short 'the Riyadh Bank') in favour of the vendor. It was sent to the Overseas Branch of the State Bank of India at Bombay (for short 'the plaintiff Bank'). The said Branch of the plaintiff Bank sent the letter of credit to its Branch situated at Mall Road, Ambala Cantt for its onwards transmission to the vendor which was the beneficiary under the letter of credit. The vendor opened a current account with the plaintiff Bank at its aforesaid Branch at Ambala Cantt on 5th September, 1980. It sent its first consignment of goods,—*vide* invoice dated 12th October, 1980 and the bill of lading dated 31st October, 1980 representing C.I.F. value of Rs. 1,63,864.20 and drew a bill of exchange which was treated by the plaintiff Bank as Indian Demand Draft No. 7/109. When these documents were handed over by the vendor along with its letter of request to negotiate them and credit the proceeds to its current account, the plaintiff Bank informed the vendor that there were various discrepancies in the documents handed over to the Bank. Their particulars did not conform to those given in the letter of credit.

(3) The vendor thereupon made an endorsement on its letter of request for negotiation dated 13th November, 1980 to the following effect :

"Please negotiate documents as per the terms of the letter of credit and at our risk and responsibility in case of any discrepancy therein."

**Japson International and another v. State Bank of India and another (D. V. Sehgal, J.)**

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The above letter was signed by defendant No. 2 a partner of the vendor. The plaintiff Bank negotiated the documents on 15th November, 1980 and credited the amount of Rs. 1,63,864.29 to the current account of the vendor. The documents were, however, negotiated by the plaintiff Bank "under reserve" at the cost and responsibility of the vendor. Some Bank charges were also debited to the account of the vendor. To support its above endorsement on the letter dated 13th November, 1980 the vendor also executed an indemnity bond dated 9th January, 1981 in favour of the plaintiff Bank for Rs. 1,63,864.29.

(4) The vendor thereafter sent the second consignment,—*vide* invoice dated 22nd November, 1980. The documents were similarly deposited with the plaintiff Bank; the discrepancies were once again pointed out as in the case of the first consignment; the documents were likewise negotiated at the risk and responsibility of the beneficiaries on their executing indemnity bond. Thereafter, third and fourth consignments were sent by the vendor,—*vide* invoice dated 15th December, 1980 and 22nd December, 1980 respectively which were deposited with the plaintiff Bank and were negotiated by it "under reserve" at the cost and risk of the vendor.

(5) When the consignments reached Riyadh, Saudi Arabia, the buyer refused to take delivery of the goods and to honour the document on account of discrepancies. It was alleged that the description of the goods did not conform to what was given in the letter of credit. The plaintiff Bank informed the vendor accordingly and requested it to deposit the entire amount of the bills with the incidental charges incurred by the plaintiff Bank but the vendor failed to do so. After serving a legal notice on the vendor the plaintiff Bank filed the instant suit for recovery of Rs. 7,22,049.75 along with interest at the rate of 19.5 per cent per annum.

(6) Simultaneous with the institution of the suit an application dated 27th September, 1982 was filed by the plaintiff Bank under Order 38 Rule 5 read with Order 39 Rules 1 and 2 Code of Civil Procedure (for short 'the Code'). The plaintiff Bank alleged that the vendor and its partners were trying to conceal their assets and move them from the jurisdiction of the Civil Court at Ambala with a view to delay and defeat the execution of the decree which might ultimately be passed against them. The detail of the properties, machinery and Fixed Deposit Receipts (F.D.Rs.) was set out in the

application. It was alleged that the vendor and its partners were trying to dispose of the same with a view to avoid payment to the plaintiff Bank. It was underlined that the suit amount is quite heavy and in case the defendants were able to dispose of the movable and immovable property, the plaintiff Bank would not be able to execute the decree. A prayer was made that the moveable and immovable property of the vendor and its partners mentioned therein should be attached before judgment or they should be directed to furnish adequate security. Notice of this application was given to the defendants who filed their reply refuting the allegations contained therein.

(7) In the meantime the plaintiff Bank made yet another application dated 5th November, 1983 under Order 38 Rule 5 read with Order 39 Rules 1 and 2 of the Code. It was mentioned therein that M/s Jambu Parshad and Sons is a partnership firm. Its partners are Sarvshri Gian Chand Jain, Nem Chand Jain, Anil Jain and Lalit Jain. The details of the F.D.Rs. besides current account of this firm were also given. It was stated that Shri Gian Chand Jain is one of the defendants in the suit. Anil Jain is a partner of the sister concern M/s Union Scientific against which a similar suit for recovery had been filed and he had been impleaded as defendant No. 2 to that suit. Shri Gian Chand Jain being a borrower in that suit had been impleaded as defendant No. 5. It was stated that while the instant suit is for recovery of over rupees seven lacs the other one was for recovery of more than rupees ten lacs. It was further mentioned that Japson International (the vendor) M/s Union Scientific (the defendant in the other suit) and M/s Jambu Parshad and Sons are sister concerns owned by one family where either the sons, their wives or defendant Nos. 2 to 5 themselves were the partners. It was alleged that the defendants were trying to withdraw the amount to the credit of M/s Jambu Parshad & Sons. They are also trying to encash the F.D.Rs. A prayer was also made that the F.D.Rs. and the bank accounts of these firms should also be attached or in the meantime the defendants should be restrained from withdrawing the F.D.Rs. and the amount lying in the current accounts. Reply to this application was also filed by the defendants who contended that M/s Jambu Parshad and Sons is an independent firm having a separate legal entity. Its assets could neither be attached nor could be made the subject matter of restraint. The application was also opposed on the ground that the plaintiff Bank had no case whatsoever on merits and the suits filed were fraudulent.

Japson International and another v. State Bank of India and  
another (D. V. Sehgal, J.)

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(8) The learned trial Court originally declined to grant the prayer made in these two applications for attachment of the properties before judgment. Its order became the subject-matter of appeal when it was reversed and the matter was remanded to the trial Court for fresh decision. The plaintiff Bank preferred a revision petition in this Court wherein a direction was made that its prayer under Order 39 Rules 1 and 2 of the Code should be considered and decided. It is also to be noticed that in this interregnum the plaintiff Bank made another application dated 16th April, 1985 for amendment of the application under Order 39 Rules 1 and 2 of the Code. It was averred therein that some clerical mistakes had crept in para 11 of the application which should be corrected and then the application should be disposed of.

(9) All the applications so filed by the plaintiff Bank were ultimately decided by the learned Additional Senior Subordinate Judge, Ambala.—*vide* his order dated 29th July, 1985. He held that the plaintiff Bank has been able to make out a *prima facie* case in its favour and that the balance of convenience lay in issuing the *ad interim* injunction. It, therefore, restrained them from negotiating the F.D.Rs. and from withdrawing any amount from the accounts mentioned in the applications dated 27th September, 1982 and 5th November, 1983. It was observed that no irreparable loss would be caused to the defendants if the F.D.Rs. were kept in the custody of the Bank because the amount of the same would fetch interest and if the plaintiff Bank did not succeed in the suit, the principal amount as also the interest shall be paid to the defendants. It, however, declined the prayer of the plaintiff Bank for restraining the defendants from alienating their immovable properties. It was observed that it would be in the fitness of things that the immovable property should be kept beyond the purview of the *ad interim* injunction order as direction of any restraint against the immovable properties would hamper the business activities of the defendants.

(10) The plaintiff Bank as also the vendor firm and its partners besides the partners of M/s Jambu Parshad and Sons who are without doubt family members of the partners of the vendor filed their respective appeals against the order of the learned trial Court dated 29th July, 1985. After a detailed discussion the appeals of both the contending parties were dismissed by the learned District Judge,—*vide* his judgment dated 30th October, 1986. This is how the petitioner who are the vendors and Shri Gian Chand Jain, son of Shri

Jambu Parshad Jain one of its partners have filed the instant revision petitions in this Court. It may be noticed that the plaintiff Bank filed Cross-objections No. 6—CII of 1987 but the same were dismissed by S. P. Goyal, J.,—*vide* order dated May 13, 1987. It was held that no cross-objections are competent in a revision petition against an interim order.

(11) There being a concurrent finding record by the two Courts below that there is a *prima facie* case in favour of the plaintiff Bank, the balance of convenience lies with it and no irreparable injury would be caused to the vendor and its partners by the grant of the *ad interim* injunction, in the normal course, there is no scope for interference with the orders of the Courts below under Section 115 of the Code. Since, however, the learned counsel for the parties addressed detailed arguments before me for and against the view that there is a *prima facie* case in favour of the plaintiff Bank, it shall be unfair to them if I do not discuss the same, may be in brief. It is, however, made clear that any observation which might be made by me is limited to the question of there being a *prima facie* case in favour of the plaintiff Bank and shall not prejudice the case of the vendor in the course of the final decision of the suits.

(12) Learned counsel for the vendor pointed out by reference to the various documents that at the instance of the buyer Riyadh Bank opened the letter of credit in favour of the vendor with a request to the Overseas Branch of the plaintiff Bank at Bombay to confirm the same. He invited my attention to a copy of the letter of credit which contains embossed stamps to the effect that the same had been confirmed by the said Bombay branch of the plaintiff Bank. He submits that it was then that the letter of credit was sent to its Branch at Mall Road, Ambala Cantt and was thus transmitted to the vendor. He strongly relied on *M/s Tarapore and Co. Madras vs. M/s V/O Tractor export Moscow and another*, (1) and contended that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which impose upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are upto contract or not. A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price. If the buyer has an enforce-

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(1) AIR 1970 S.C. 891.

**Japson International and another v. State Bank of India and  
another (D. V. Sehgal, J.)**

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able claim that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer. The letter of credit is independent of an unqualified transaction. The autonomy of an irrevocable letter of credit is entitled to protection.

(13) There can hardly be any dispute with this proposition. The case of the plaintiff Bank, however, is that the letter of credit sent by Riyadh Bank was not confirmed by it. Its counsel invited my attention to its instructions on Foreign Exchange Business Volume V, Article 34 and submitted that for purpose of confirmation of a letter of credit commission is to be paid either by the authorising Bank or by the beneficiary (the vendor in this case) at the rate specified. In case where the increase confirmation commission has to be collected from the beneficiary the advising branch is to incorporate the following paragraph in the relevant forwarding letter and put the Bank's confirmation only after the remittance of commission which is to be in the following words :—

“We have received instructions from the opening bank to put our confirmation to this credit against payment of our commission by you. We are prepared at our option to add our confirmation on receipt of your remittance of ...  
.....”.

He also invited my attention to Article 35 which prescribes the wording of endorsement of confirmation on the face of the original letter of credit which is to be signed by the Branch Manager/Manager of a division and it is in the following words:—

“This credit bears our confirmation.

Sd/-

For State Bank of India,  
Branch Manager.”

He submits that what is embossed on the letter of credit dated 6th August, 1980 does not answer the above requirement and thus the same could not be treated as a confirmed letter of credit and was in fact not so treated either by the Mall Road, Ambala Cantt Branch of the plaintiff Bank or by the vendor. This according to me is evident from the fact that as and when each of the four invoices

and the bills of lading were sought to be negotiated by the vendor through the plaintiff Bank it pointed out the discrepancies which existed in the description of goods as mentioned in the documents in comparison to those given in the letter of credit. It was on realisation of this position that the vendor made an endorsement every time to the effect that the documents should be negotiated at its risk and responsibility in case of any discrepancy therein and further supported the same by indemnity bond. Yet again the payment was made or the amount was credited to the current account of the vendor by the plaintiff Bank "under reserve" and at the cost and risk of the vendor. He thus submits that the letter of credit aforesaid was not a confirmed divisible irrevocable letter to credit. The plaintiff Bank had every right to invoke the letter of indemnity and to recall the payment of the Bank to the vendor "under reserve" when the documents had been dishonoured by the buyer and Riyadh Bank.

(14) Despite the hot contest on both the sides on the question whether or not the letter of credit is a confirmed letter of credit I do not consider it either expedient or advisable to return a definite finding on this question. What has, however, to be seen is that the payment was made against negotiated documents by the plaintiff Bank 'under reserve' on the basis of the endorsement of the vendor that the documents should be negotiated at its risk and responsibility backed by an indemnity bond. *Prima facie*, in my view, in such a situation when the plaintiff Bank is not in a position to realise the proceed of the documents negotiated from Riyadh Bank it can fall back upon the above undertaking and indemnity of the vendor and recall the payment made by it "under reserve". I find support for this view from *United Commercial Bank v. Bank of India and others*, (2). A payment "under reserve" is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward.

(15) Otherwise also the dispute here is between the vendor and the banker. It has been held in *United Commercial Banks' case* (Supra) that the opening of a confirmed letter of credit constitutes a bargain between the bankers and the seller of the goods which

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(2) A.I.R. 1981 S.C. 1426.



Ajit Kaur v. Mandir Jhok Hari Har and others (G. R. Majithia, J.)

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imposes on the banker an absolute obligation to pay. However, the banker is not bound or entitled to honour the bills of exchange drawn by the seller unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutinised with meticulous care.

(16) To say at this stage that the plaintiff Bank has no *prima facie* case and not to allow it to keep with it as security the F.D.Rs. and balance in the bank accounts of the vendor and to allow the said amount to slip away from its hands would be putting the plaintiff Bank to a great disadvantage. It is well known that the Banks when they transact business simply deal with the money which belonged to different parties. The Banks simply charge commission for the business transacted. When the plaintiff parted with the amount by making payment "under reserve" to the vendor and it does not get payment in turn from the buyer it should be allowed to recall the amount from the vendor or to keep its securities and balances which can satisfy its claim against the vendor.

(17) The banks and their customers should normally be allowed to enforce their respective obligations under the established banking system. It is only in exceptional cases that the Court should interfere with the machinery of mutual obligations assumed by them. They must be allowed to be honoured, free from interference by the Courts.

(18) In the light of the above discussion agreeing with the Courts below that there is a *prima facie* case in favour of the plaintiff Bank, I find no force in these revisions petitions which are dismissed. I, however, leave the parties to bear their own costs.

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S.C.K.

Before G. R. Majithia, J.

AJIT KAUR,—Petitioner.

versus

MANDIR JHOK HARI HAR AND OTHERS,—Respondents.

Civil Revision No. 1664 of 1980.

October 14, 1988.

Civil Procedure Code (V of 1908)—S. 47—Decree for possession—  
Symbolic possession delivered in execution—Execution application.