

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 2150 of 2018

Plaintiff: M/S. Allied Plastic Industries (Pvt.) Ltd.
Through Mr. Qazi Umair Ali, Advocate.

Defendants No.1 & 2: M/s. ICC Chemical Corporation &
M/s. Unitex Trading Corporation
Through Mr. Omair Nisar,
Advocate.

For hearing of CMA No. 16383/2018.

Dates of hearing: 17.10.2019, 07.11.2019 & 12.12.2019.

Date of Order: 09.01.2020

ORDER

Muhammad Junaid Ghaffar J. This is a Suit for Declaration, Injunction and Damages, whereas, through listed application, the Plaintiff seeks a restraining order against Defendant No.3 from honoring the Letter of Credit and releasing the amount of US \$98,820/- in favour of Defendant No.1 pending adjudication of this Suit.

2. The precise facts, as stated, appear to be that Plaintiff was approached by Defendant No.2 as an agent of Defendant No.1 for supply of a product namely **PVC RESIN GRADE 225P** manufactured by a well-known and established company in the United States known as **OXYVINYLS** and after negotiations, a Letter of Credit dated 19.04.2018 was established for US \$98,820/- through Defendant No.3 in favour of Defendant No.1. Thereafter, the goods were shipped, arrived at Port, and were cleared after payment of duties and taxes and when they reached

the warehouse, it was noticed and alleged that instead of the contracted goods; some other Polyvinyl Chloride of low quality had been shipped under the packing of Defendant No.1; hence instant Suit.

3. Learned Counsel for the Plaintiff has contended that the Contract entered into was in respect of a branded / specialized PVC Resin Grade viz. **Oxyvinyls 225P**, whereas defective goods of a low quality in defendant No.1's own packing, has been shipped and supplied, which is violation of the Contract including Section 15 of the Contract Act, 1872; that until the goods reached the warehouse of the Plaintiff, no opportunity to inspect the same was available; that there is also some weight issue as goods shipped are less in quantity; that in terms of Section 41 of the Sale of Goods Act, 1930, the Plaintiff's right to examine the goods is always there; that though ordinarily Letters of Credits are to be honored; but there is an exception to this Rule as well, as per various precedents of the Courts; hence the Plaintiff is entitled for an injunctive relief as otherwise the Defendant No.1, which is a Company outside Pakistan would run away if the Letter of Credit is allowed to be honored. In support of his contention he has relied upon the cases reported as **AIR 1959 Madras 112 (National Traders v Hindustan Soap Works)**, **AIR 1954 Saurashtra 79 (Jormal Kasturchand, owner of the firm trading in the name of Vardhman & Co. Rajkot v. Vora Hassanalli Khanbhai, trading in the name of Vora Khanbhai Jiawabhai, PLD 1990 Karachi 395 (Pan Ocean Enterprises (Pvt.) Limited v. Thai Rayon Company Limited and 5 others) and PLD 1997 Karachi 553 (Messrs U.D.L. Industries Ltd. v. Hongguang Electron Tube Plant and others).**

4. Learned Counsel for the Defendants has, at the very outset, argued that the Plaintiff has misstated the facts in its plaint as on the one hand, they have claimed to be manufacturers, and on the other, they have pleaded that these goods could not be sold by them; that the goods have been shipped according to the Contract, whereas, Defendant No.1 has never represented itself to be an agent or supplier of *Oxyvinyls*; that the Plaintiff never approached any approved Inspection Company for establishing the fact that any defective goods have been supplied; that mode and manner of packing was never part of the Contract and it was only supposed to be in 25 kg per bag; that Plaintiff has utilized the product and sold it off in the market; that Section 15 of the Sale of Goods Act 1930, is not applicable; that no fraud has been committed as the documents and goods are according to the Contract and Letter of Credit; that it is a case where Section 22 of the Contract Act 1872, applies; that it is settled law that Letter of Credits must be honored and in support thereof he has referred Articles 4 & 5 of the Uniform Customs and Practice for Documentary Credits, 2007 Revision ("**UCP 600**"); that the Plaintiff has already sued the defendants for damages; hence no case for injunctive relief is otherwise made out; that merchantability and marketability are two different things and in support he has referred to the 9th Edition of Black's Law Dictionary. In support he has relied upon the cases reported as **PLD 1973 SC 222** (*West Pakistan Industrial Development Corporation, Karachi v. Aziz Qureshi*, **2019 SCMR 812** (*Abdul Ghaffar Adamjee and others v. National Investment Trust Limited and another*), and **PLD 2003 SC 191** (*Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd.*)

5. I have heard both the learned Counsel and perused the record. Insofar as the present issue as raised through listed application is concerned, record reflects that some email correspondence was exchanged in February 2018 and the Plaintiff Company was approached by Defendant No.2 offering 300 M. Tons of OXY 225p/Formolon 622 buyer option Packing 25kg bags in 40' container price at US\$ 990 CIF Karachi, payment through Letter of Credit 80 days from Bill of Lading date and Shipment in March 2018. Thereafter a Proforma Invoice was issued by Defendant No.1 on 17.04.2018, wherein, the product was mentioned as PVC RESIN GRADE OXYVINYL 225P against Letter of Credit on 180 days from the date of Bill of Lading at the rate of US \$915 per M. Ton for a total quantity of 108 M. Tons. The Plaintiff pursuant to the Proforma Invoice, opened a Letter of Credit on 18.04.2018 through Defendant No.3 in favour of Defendant No.1, wherein, again the description of the goods was mentioned as PVC RESIN GRADE OXYVINYL 225P, QTY ABOUT 108 MT, pursuant to which Commercial Invoice was issued along with Bill of Lading and again the description was mentioned as 108.000 MT PVC RESIN GRADE OXYVINYL 225P. After the arrival of goods, the Plaintiff filed a Goods Declaration, wherein, again the description was mentioned as PVC RESIN GRADE OXYVINYL 225P; however, it is the case of the Plaintiff that when the goods reached their warehouse, the packing of the goods reflected that it is marked with only "PVC RESIN", whereas, the wording "OXYVINYL 225P" was missing and not mentioned on such packing. In support, the Plaintiff has annexed photographs of the imported and supplied product at page-49 onwards and on perusal and a cursory look of the same supports the contention of the Plaintiff that at least the description

mentioned on all the import documents including Letter of Credit, the Proforma Invoice and Bill of Lading is **“PVC RESIN GRADE OXYVINYLS 225P”** and should have been mentioned on the goods (outer packing at-least) as well; however, it is not done so admittedly. The Plaintiff, to further support its case, has also annexed certain commercial documents of their earlier imports of **OXYVINYLS** Product including photographs, which supports their case. In response to such objection, the Defendant No.1 has also placed reliance on certain documents from DHL, whereby, an attempt has been made to make out a case that they purchased the goods directly from the OXYVINYLS manufacturer in USA, which is then repacked in their packing and for the present shipment as well, the same exercise was carried out and according to them, the goods in question are **PVC RESIN GRADE OXYVINYLS 225P**. To that it may be observed that insofar as any repacking or direct purchase from the manufacturer and then its shipment to the Plaintiff is concerned, at the present stage, it is difficult for the Court to accept this stance until the Defendants lead its evidence in support thereof. Mere reliance on certain documents of DHL would not at present suffice, when DHL is not even a party. But it cannot be disputed; rather appears to be an admitted position that the packing of the goods shipped to the Plaintiff does not state or describe the word **“OXYVINYLS 225P”**, which apparently is part of the Contract and the Letter of Credit as well as all other shipping documents. To this, it can be easily said that the goods in question are not what they have been described in the Letter of Credit and the shipping documents; hence, for the present purposes, Plaintiff has made out a case for an injunction.

6. Insofar as the argument that under the International business transaction, especially in respect of the banks and after introduction of UCP 600, Letter of Credit(s) are not to be dishonored is concerned, I am of the view that to that there is no cavil to such proposition as it is a transaction between two Banks dependent on the documents and the words in the Contract as well as Letter of Credit, whereas, if the documents are in order and as per the Letter of Credit, the corresponding Bank is obligated in law to honor the commitment and make payment to the supplier / beneficiary, notwithstanding the fact that any defective goods have been shipped. It is settled law that Banks deal with documents and not goods. However, at the same time it is also to be noted that in this case on the very first date, when this Suit was brought before the Court, honoring of the Letter of Credit was not stopped or disturbed; rather as an ad-interim measure, the Defendant No.3 was directed to honor and encash the Letter of Credit; but instead of paying it to Defendant No.1, deposit the same with the Nazir of this Court and such order has been complied with and thereafter the amount available with the Nazir has been retained by him in his US \$ Account for the ultimate beneficiary whosoever may be. Therefore, objection of the Defendant No.1's Counsel to the effect that any order passed by this Court would be against the terms of UCP 600 and International commitments is not valid inasmuch as the banking transaction has been completed and now the dispute is between the Plaintiff and Defendant No.1 i.e. two private contracting parties.

7. At the same time it also needs to be taken care of, that if the letter of credit(s) are always honored in this manner and the foreign suppliers / shippers are paid, notwithstanding prima facie

supply of goods other than the contracted goods; then how the ultimate fate of the Suit would be decided and executed. In this case the shipper has no permanent establishment within the territorial jurisdiction of this Court, whereas, the Plaintiff has approached this Court immediately and before honoring of the letter of credit by the bank, then in such circumstances, when the amount has already been secured before the Nazir of this Court, there appears to be no reason to dismiss the injunction application. Reliance in this regard may be placed on the case reported as ***Pan Ocean Enterprises (Pvt.) Limited v Thai Rayon Company Limited*** (PLD 1990 Karachi 395). The law settled in this regard is that the goods should answer the description and the buyer should get what he contracted for, and that it would not be proper performance of the contract to give the goods not answering the description given in the contract.

8. In the case reported as AIR 1959 Madras 112 (***National Traders v Hindustan Soap Works***), it has been observed as follows by the Madras High Court;

“(7) The sale being thus of specific goods by description which the buyer had no inspection before he entered into the contract of sale, the point as to the respective rights of the parties then arises for consideration. In *Jones v. Just*, 1868-3 QB 197, it was held that in every contract to supply goods of a specified description, which the buyer had no opportunity to inspect, the goods must not only answer the description but must be saleable or merchantable under that description. Those two conditions namely (1) answering the description in the contract, and (2) merchantable quality are embodied in Ss. 15 and 16 of the Indian Sale of Goods Act.”

9. As to the ground of the Defendant’s Counsel that the letter of credit must not be dishonored in terms of UCP 600, in addition to what has been stated hereinabove, reliance may also be placed on the case reported as PLD 1997 Karachi 553 (***Messrs U.D.L.***

Industries Ltd. v. Hongguang Electron Tube Plant and others)

wherein a learned Single Judge of this Court has been pleased to state the exception to this rule and it has been observed as follows;

7. Adverting to the contention advanced on behalf of the plaintiff that there was a concluded contract between the parties for the sale of goods within the meaning of section 5 of the Sale of Goods Act which even recognizes an oral contract or a contract partly written and partly oral and which may even be implied from the conduct of the parties, it may be observed section 16-A of the aforesaid Act postulates an obligation on the part of the vendor to inform the vendee of any defect in the goods sold. The fact of the matter is that in law Letters of Credit are invariably irrevocable in nature and established in order to ensure the payment of the goods sold to a vendor without any reference to the buyer. In effect and essentially it is a contract between two banks one of them issuing the Letters of Credit on the other Bank authorizing the release of payment on production of appropriate documents evidencing to shipment or goods by the seller without any reference to the buyer. Such contracts in most of the cases are of International character and in the absence of any violation of the terms of Letters of Credit or for the breach of the contract on the part of a vendor if the encashment of such negotiable instruments is restrained it may create serious complications, hardships and anomalies in the International trade. Besides an injunction to restrain the encashment of a Letter of Credit may possibly shatter the confidence of the traders in the International Banking System and practice which might collapse if such transactions are too frequently interfered with by process of law through the intervention of the Courts: Needless to observe the only exception to the rule that I have been able to discern is an act of fraud, mischief or injustice in relation to the documents of shipment evidencing the shipment of goods to the knowledge of the Bank. In the circumstances of the present case, it would appear that the fraud, mischief and breach of contract is purportedly attributed to the act of the vendor rather than the Bank at the opening end or the Bank at the receiving end. There is no gainsaying that the Letter of Credit is primarily a contract between two Banks and the encashment of the sale proceeds has hardly any nexus with the dispute between an exporter and an importer or for that matter between a vendor and a vendee. To my mind, obligations arising under a Letter of Credit lay down an absolute and unconditional obligation on the Bank to pay irrespective of any dispute between the parties on the question whether they had performed their part of the contract or there was a breach in the discharge of their respective obligations. It is well settled that the Bank guarantees, performance bonds and Letter' of Credits are the species of bankers' commercial credit variously described as a "new type of commercial credit" or a "new business transaction" or a "new creatures"

10. In view of hereinabove facts and circumstances of this case, I am of the view that the Plaintiff has made out a case for an injunctive relief and balance of convenience also lies in its favour, whereas, if the injunction is refused, the Plaintiff would suffer irreparable loss and injury as admittedly the Defendant No.1 does

not reside within the territorial jurisdiction of this Court and if the amount of Letter of Credit is released to Defendant No.1, then ultimately if the Suit is decreed in favour of the Plaintiff, the execution would be an exercise in futility. Accordingly, the application is allowed by confirming the ad-interim order passed on 16.11.2018. However, if the Defendant No.1 wants to get the amount of US \$ available with the Nazir for its investment in any profitable scheme, they may approach the Nazir's office for conversion of the amount in Rupees and then its investment into any Government Rupee Profit Bearing Scheme. At the same time, the Plaintiff shall also execute through its Chief Executive, a Personal Bond to the effect that, if ultimately, the Suit is dismissed, they would be liable to any losses, which may have occurred to Defendant No.1, as presently the goods in question are lying with them as against Defendant No.1, who is out of pocket with money as well as goods in question.

11. The Application stands allowed / disposed of in the above terms.

Dated: 09.01.2020

J U D G E

Ayaz.