

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 621 / 2017

Plaintiff: Mir Jeeand Badini through Mr. Salahuddin Ahmed along with Mr. Nadeem Ahmed Advocates.

Defendant No. 1: MCC Appraisalment (East) through Ms. Masooda Siraj Advocate.

Defendants No. 2 & 4: Federation of Pakistan and another through Mr. Osman A. Hadi Assistant Attorney General.

Defendant No. 3: State Bank of Pakistan through Mr. Manzoorul Haq Advocate.

Defendant No. 6: Karachi Port Trust through Mr. Muhammad Rizwan Advocate.

Defendant No. 7: MCC Appraisalment (West) through Mr. Kashif Nazeer Advocate.

For hearing of CMA No. 4726/2017.

Date of hearing. 16.05.2019.

Date of order. 05.07.2019.

ORDER

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction and Plaintiff seeks a judgment and decree to the effect that he is entitled to import 200 Dumper Trucks, 100 Transit Mixtures Trucks and 500 Prime Movers, pursuant to a binding Sale Agreement dated 26.10.2015 entered into with the supplier / shipper and opening of a Standby Letter of Credit through Bank Al-Falah. The Plaintiff seeks a further Declaration that refusal to release the same by the Defendants is illegal, void and in complete negation to the Import Policy Order and the guidelines of State Bank of Pakistan. Through listed application, pending final adjudication of this Suit, the Plaintiff seeks release of 27 Dumper Trucks already imported and for which Goods Declaration have been filed and are lying detained at Port.

2. Learned Counsel for the Plaintiff has contended that the Plaintiff entered into a binding contract dated 26.10.2015 and opened a Standby Letter of Credit through Bank Al-Falah for the above mentioned Specialized Vehicles on 30.12.2015 for an amount of UAE Dirham 702,500/- being 5% of the total amount of contract of UAE Dirham 14,050,000/-. According to him at the time of signing of the Contract and opening of the Standby Letter of Credit, import of Vehicles in question i.e. 5 years old was permitted, whereas, subsequently, on 18.04.2016 there was an amendment in the Import Policy Order, and a restriction was imposed that such Vehicles could only be imported if they are not more than 5 years old, whereas, previously no such restrictions was in field. He has contended that the Plaintiff has imported the subject Vehicles as mentioned in listed application on 01.10.2016 and 28.12.2017; however, the contract and Standby Letter of Credit was entered into before the restriction came into field, but the Customs Department has refused clearance on the ground that Standby Letter of Credit is not covered under Para 4 of the Import Policy Order, whereas, subsequently, the Ministry of Commerce also refused to release the same. Per learned Counsel, the imports of the Plaintiff are protected, as a vested right has accrued in his favor in view of the dicta laid down by the Hon'ble Supreme Court in the case reported as ***Al-Samrez Enterprise V. The Federation of Pakistan (1986 S C M R 1917)***. According to him the subsequent restriction would not apply to the contract and Standby Letter of Credit in question as the State Bank of Pakistan has also supported the Plaintiff's case vide Letter dated 22.12.2016. Per learned Counsel for the present purposes the Plaintiff is entitled for an interim injunction to the extent of at least 5% value of the contract i.e. UAE Dirham 702,500/- which has already been paid in respect of the Standby Letter of Credit; hence, the goods already imported for such value are not hit by the restriction placed in field on 18.4.2016, and therefore, the listed application be allowed as prayed.

3. Learned Counsel appearing on behalf of MCC Appraisement (West) has contended that State Bank of Pakistan's Circular No. 33/2007 has already clarified that Standby Letter of Credit cannot be equated with a Letter of Credit and therefore, the Plaintiff has no case. According to him, in case of a Letter of Credit the importer is out of pocket, whereas, the present arrangement in question between the Plaintiff and its supplier is a private arrangement; hence, protection under Para 4 of the Import

Policy Order is not available. He further submits that no vested right has accrued as the Hon'ble Supreme Court in similar circumstances in the case reported as **Hajji Abdul Raziq Khan V. Federation of Pakistan and others (2014 S C M R 1821)** has also declined to grant any such concession on the basis of vested right concept.

4. Counsel appearing on behalf of State Bank of Pakistan has contended that they have already clarified the issue vide Letter dated 16.01.2017 and though the mode of import adopted by the Plaintiff is permitted; but according to him Standby Letter of Credit cannot be equated with a Letter of Credit as they do not have similar legal implications; hence, it is not protected in terms of Para 4 of the Import Policy Order. Learned Assistant Attorney General has also relied upon the comments of Ministry of Commerce and in view of the Circular No. 33/2007 he has contended that no case is made out on behalf of the Plaintiff, as a Standby Letter of Credit cannot be equated with a Letter of Credit.

5. While exercising his right of rebuttal, learned Counsel for the Plaintiff submits that the intent of Para 4 of the Import Policy Order has to be examined as in the present case the Plaintiff is out of pocket at least to the extent of 5% of the amount of the contract and therefore, for such purposes the Plaintiff's case is protected under Para 4 as above.

6. I have heard all the learned Counsel as well as the learned Assistant Attorney General and perused the record. The facts have been discussed hereinabove which reflects that the Plaintiff entered into a Sale Agreement with M/s Kenya and Burki Motors FZCO, UAE, for the import of 800 (different types) of specialized Vehicles for an amount of 14.050 million U.A.E. Dirhams which also provides that a Bank Registration Contract / Standby Letters of Credit / International Performance Bank Guarantee has to be established. It further appears that pursuant to this contract, the Plaintiff has purportedly opened a Standby Letter of Credit for an amount of UAE Dirham 702,500/-. Perusal of the same reflects that it has been opened in the name of the corresponding Bank in UAE and the relevant Para of the same reads as under:-

"TO, KENYA AND BURKI MOTORS FZCO, P.O. BOX 6351, DUCAMZ, RAS AL KHOR IND. ARA
3, UNITED ARAB EMIRATES.
PERFORMANCE GUARANTEE

WHEREAS M/S. MIR CONSTRUCTION COMPANY (MCC) HAVING PLACE OF BUSINESS AT C-63/A, RAILWAY HOUSING SOCIETY QUETTA, PAKISTAN, (HEREINAFTER CALLED AS THE "BUYER") HAS ENTERED INTO A SALE AGREEMENT DATED 16/10/2015 WITH YOU FOR PURCHASE / IMPORT OF 800 SPECIALIZED VEHICLES, MOUNTED MACHINERY, PRIME MOVERS, DUMP TRUCKS, MIXTURE TRUCKS, COMPANY FITTED OR ADOPTED IN GOOD WORKING CONDITION (THE "VEHICLES") AS FULLY DESCRIBED IN THE SALE AGREEMENT AND YOU HAVE AGREED TO SELL THE SAID 800 VEHICLES TO THE BUYER AGAINST TOTAL SALE PRICE OF AED 14,050,000/- **AND WHERE YOU HAVE REQUIRED THE BUYER TO FURNISH YOU A PERFORMANCE GUARANTEE IN THE SUM OF AED 702,500/- (UNITED ARAB EMIRATES DIRHAM SEVEN HUNDRED TWO THOUSAND AND FIVE HUNDRED ONLY) FOR PERFORMANCE OF OBLIGATIONS OF THE BUYER UNDER THE ABOVE SALE AGREEMENT.**

NOW THERE IN CONSIDERATION OF THE AFORESAID AND AT THE REQUEST OF THE ABOVE BUYER, WE AMSHREQ BANK, DUBAI UAE, DO HEREBY GUARANTEE AND UNDERTAKE:

(1) **TO MAKE UNCONDITIONAL PAYMENT OF ANY SUM OR SUMS NOT EXCEEDING AED 702,500/- (UNITED ARAB EMIRATES DIRHAM SEVEN HUNDRED TWO THOUSAND AND FIVE HUNDRED ONLY) TO YOU ON YOUR FIRST WRITTEN DEMAND STATING THEREIN THAT THE BUYER HAS FAILED TO PERFORM HIS OBLIGATION UNDER THE SALE AGREEMENT.**

7. Perusal of the aforesaid clause of the Standby Letter of Credit clearly reflects that it is in fact a Performance Guarantee in the sum of UAE Dirham 702,500/- and not a simple Letter of Credit. It further provides that the Bank has undertaken to pay the amount equivalent to 5% of the Contract to the supplier, if for some reason the Plaintiff fails to make the payment on demand, as per contract, whereas, in a Letter of Credit there is no such undertaking by the Bank for Performance and it is rather, the Bank itself, which upon presentation of the documents as mentioned in the Letter of Credit, makes payment to the supplier / shipper. This is in fact the main difference in both these types of Letters of Credit. In international Trade Practices, in fact for a Performance Guarantee, some parties demand a Standby Letter of Credit, instead of a simple Performance Guarantee, as it is safer and easily enforceable as against a simple Performance Guarantee. Performance Guarantee / Bond is defined as a business agreement between a client and a contractor for the contractor to perform all of their obligations under the contract. A Performance Guarantee might also include a clause to protect the client against losses incurred in case the contractor fails to perform and enforcement action is required or an alternative Contractor Needs to be engaged. <http://www.businessdictionary.com/definition/performance>. A performance bond is issued to one party of a contract as a guarantee against the failure of the other party to meet obligations specified in the contract. It is also referred to as a contract bond. A performance bond is usually provided by a bank or an insurance company to make sure a contractor completes designated projects.

<https://www.investopedia.com/terms/p/performancebond.asp>. Performance Guarantee means any guarantee by any person of the performance of the obligation of another person (other than obligations in respect of payments, indebtedness or other monetary obligation of any kind) under contracts of such other person to design, develop, manufacture, construct or products or production facilities (and related nonmonetary obligations) or to provide services related to any of the foregoing. <https://www.lawinsider.com/dictionary/performance-guarantee>. On the other hand a Letter of Credit is a letter from a Bank guaranteeing that a buyer's payment to a seller will be received on time and for the correct amount. This is a direct payment method in which the issuing bank makes the payments to the beneficiary, whereas, a [standby letter of credit](#) is a secondary payment method in which the bank pays the beneficiary only when the holder cannot. <https://www.investopedia.com/terms/l/letterofcredit.asp>.

8. The above definitions reflect that in fact a Performance Bond within itself is not an instrument; rather it is a form of document which guarantees something in Agreement and Contracts. It can be through a Bank Guarantee or and Insurance Guarantee or for that matter via a Standby Letter of credit. Perusal of the record reflects that pursuant to the Agreement in question, the instrument executed and as required was in the form of a Standby Letter of Credit. On the other hand a Letter of Credit is not an instrument in which the Customer or an Applicant can interfere. It is only dependent on the presentation of documents as mentioned in the credit itself, and if they are in order and as per the credit, the Bank is obliged to honor and pay. There is no ifs and buts attached to this kind of an instrument. Letters of Credits are binding on the all parties thereto unless modified or excluded by the Credit, whereas, Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit, whereas, the undertaking of the Bank to honor and negotiate is not subject to claims or defences by the applicant and the issuing Bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like. Banks deal with documents and not with goods, services or performance to which the documents may relate. A **bank guarantee** is a guarantee given by the bank to the seller, that if the buyer defaults in making payment, the bank will pay to the seller. A letter of credit is a

formal document, which a bank issues on behalf of the buyer to the seller. The document states that the bank will honor the drafts drawn on the buyer, for the goods supplied or services rendered; provided the conditions written on the document are satisfied by the supplier (seller). Letter of Credit is a commitment of buyer's bank to the seller's bank that it will accept the invoices presented by the seller and make payment, subject to certain conditions. A guarantee given by the bank to the beneficiary on behalf of the applicant, to effect payment, if the applicant defaults in payment, is called Bank Guarantee. In a letter of credit, the primary liability lies with the bank only, which collects payment from the client afterwards. On the other hand, in a bank guarantee, the bank assumes liability, **when the client fails to make payment**. When it comes to risk, the letter of credit is more risky for the bank but less for the merchant. As opposed, the bank guarantee is more risky for the merchant but less for the bank. There are five or more parties involved in a letter of credit transaction, an applicant, beneficiary, issuing bank, advising bank, negotiating bank and confirming bank (may or may not be). As opposed, only three parties are involved in a bank guarantee, i.e. applicant, beneficiary and the banker. In a letter of credit, the payment is made by the bank, as it becomes due, such that it does not wait for applicant's default and beneficiary to invoke undertaking. Conversely, a bank guarantee becomes effective, when the applicant defaults in making payment to the beneficiary. A letter of credit ensures that the amount will be paid as long as the services are performed in a defined manner. Unlike, bank guarantee mitigates loss, if the parties to the guarantee, does not satisfy the stipulated conditions. A letter of credit is appropriate for import and export business. In contrast, a bank guarantee suits government contracts¹. This key difference of both these two instruments has been dilated upon to explain that for the present purposes, there is a vast difference in a simple Letter of Credit and a Standby Letter of Credit in hand, which in fact is only a Performance Guarantee backed by a Standby Letter of Credit and does not fulfill the requirement of a simple Letter of Credit as is in vogue in this Country and has been given protection in the Import Policy Order. Even in its letter dated 16.1.2017 State Bank of Pakistan has also stated that a Bank Contract / Guarantee is regulated under Uniform Rules for Demand Guarantee (URDG) 2010 of International Chamber of Commerce, whereas, Letter of Credit is

¹ <https://keydifferences.com/difference-between-letter-of-credit-and-bank-guarantee.html>

governed by Uniform Customs and Practices for Documentary Credit (UCP-600) of ICC.

9. Insofar as protection being claimed in terms of Para 4 of the Import Policy Order is concerned, it would be advantageous to refer to the said provisions which reads as under:-

“4. Import of Goods- Import of all goods is allowed from worldwide sources unless otherwise elsewhere specified to be banned, prohibited or restricted in this Order:

Provided that the amendments brought in this Order from time to time **shall not be applicable to such imports where** Bill of Lading (B/L) or **Letters of Credit (L/C) were issued or established prior to the issuance of amending Order.**”

10. Perusal of the aforesaid proviso clearly reflects that it is only applicable to such imports where Bill of Lading (not relevant in the case in hand as they have been issued subsequently on 1.10.2016 and 28.12.2017) and Letter of Credit are established prior to issuance of the amending order. In the present case admittedly, the Bill of Lading is subsequent in time to the amendment in the Import Policy, whereby, the age limit of the vehicle in question was restricted to five years and it is only on the basis of Standby Letter of Credit that the Plaintiff seeks the present relief. On a plain reading, it is clear from the above that there is no protection to any Standby Letter of Credit; but only to Letters of Credit, whereas, they are dealt with differently in the Banking Industry.

11. How both these types of Letters of Credit are dealt with by the State Bank of Pakistan, can be more conveniently understood when the directions of the State Bank of Pakistan notified through its ***Circular No. 33/2007 dated 29.09.2007*** are examined. The same reads as under:-

“The Presidents/Chief Executives,
All Banks/DFIS.

Dear Sirs/Madam,

**CLARIFICATION IN PRUDENTIAL REGULATIONS
FOR CORPORATE / COMMERCIAL BANKING**

It has come to the notice of State Bank of Pakistan that banks are treating Standby Letter of Credit (SBLC) at par with Letter of Credit (LC).

2- It is clarified that Standby Letter of Credit due to its nature would be treated as Financial Guarantee. As such, 100% of SBLC amount would be taken as exposure, while calculating exposure limits, for the purpose of R-1 of prudential Regulation.

- 3- All the existing exposures against SBLC, under breach and required to be reported to this Department within seven days from issue of this letter. Further, banks are required to regularize their exposure limits by December 31, 2007.
- 4- All other instructions on the subject remain unchanged.
- 5- Please acknowledge the receipt.”

12. Perusal of the aforesaid Circular clearly reflects that according to the State Bank of Pakistan, Banks are treating *Standby Letter of Credit* at par with *Letter of Credit* which is not correct for the reason that the Standby Letter of Credit, due to its nature is to be treated as a Financial Guarantee. It further provides that in these cases if the Standby Letter of Credit is to be treated as Letter of Credit then 100% of the amount would be taken as exposure, while calculating exposure limits of prudential Regulations. Therefore, it is clear that for the present purposes, a Standby Letter of Credit cannot be equated or permitted to be accepted as a Letter of Credit for legal purposes in the prevailing facts and the regulations of the State Bank of Pakistan. The protection available in terms of Para 4 of the Import Policy Order would not be available, and no case for claiming any vested right is made out. It is also noteworthy that the Plaintiff has admittedly opened its Standby Letter of Credit on 30.12.2015, whereas, the amendment in the Import Policy Order was made on 18.4.2016; but despite, this the Plaintiff on its own volition permitted the shipment of Vehicles, on 1.10.2016 and 28.12.2017 i.e. much after the amendment and without seeking any prior permission or clarification. Hence, the question of being protected in these terms even otherwise does not arise.

13. In fact it is only an agreement or a contract between the parties for the shipment of vehicles in question which at best can be said to be supplemented or supported by a Performance Guarantee in the shape of a Standby Letter of Credit and nothing beyond that. In somewhat similar circumstances, the Hon'ble Supreme Court in the case of **Haji Abdul Raziq Khan (Supra)** supra had the occasion to interpret an existing contract of similar nature of Vehicles supported by some Back to Back / Rotating Letters of Credit. In that case also a similar restriction was in place, and the case of the Importer was that a contract for 2000 Vehicles was already entered into and the same was also registered with the Bank for the entire amount and thereafter Letters of Credit of USD 200,000/- each were being opened and the Customs authorities as well as Ministry

of Commerce had refused to grant benefit of Para 4 of the Import Policy Order. The Hon'ble Supreme Court while upholding the decision of the learned Islamabad High Court has repelled this contention in the following terms;

8. Before we dilate upon the question of LC, it may be worthwhile and rather essential to mention here that the exception provision does not mention the document like agreement between the importer and exporter nor does it refer to pro forma invoice of goods to be imported. For interpretation of this provision these two documents apparently have no relevance. Article 4 of the Uniform Customs and Practice for Documentary Credits, 2007 specifically provides that a credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. It is also emphasized that issuing bank should discourage any attempt by the applicant to include as an integral part of credit, copies of the underlying contract, pro forma invoice and the like. It is also provided in the Article 5 that the bank deals with documents and not with goods, services or performance to which documents may relate. Having said so, we would still delve in to understand the facts more clearly and mention clauses 6 and 6(c) of the agreement between the parties, which are as follows:--

(6) Price and payment:

The price for each individual transaction shall be fixed as per price schedule given below, through negotiations between Party B and the buyer, and subject to Party A's final confirmation. Payment shall be made by confirmed, irrevocable L/C opened by the buyer in favor of Party A, which shall reach Party A fifteen days before the date of shipment.

6C. Mode and Schedule of Payment:

The payment shall be made to Party A in US\$ through banking channel for each B/L and invoice of shipment through Meezan Bank, Al-Hilal Society (Old Sabzi Mandi), University Road, Karachi Pakistan to LLC Emirates NBD account No.1014013371301 on the following terms:-

(i) - (vi)

10. It will be seen that LC dated 23-1-2013 for US\$ 200,000 and LC dated 4-2-2013 for US\$ 400,000 were issued or established by Meezan Bank Ltd. prior to coming into effect of IPO-2013 whereas all other LCs were issued or established after IPO-2013 came into effect. Whether petitioner can avail benefit of the proviso to Para 4 of IPO-2013 for the LCs issued or established after IPO-2013 came into effect, the obvious answer to it will be in negative. The reason for this conclusion is that proviso to Para 4 of the IPO-2013 in no uncertain term only excluded those LCs which were issued or established prior to the issuance of amending order. An irrevocable LC by its very nature creates contractual relationship between the issuing bank and the importer as defined in the terms contained in the LC and as between the exporter and the advising bank which renders the advising bank directly liable to the exporter to pay the sum named in the LC on presentation of the documents as specified in the LC itself. By issuing or establishing the LC, the issuing bank takes upon itself obligation to remit the sum specified in the LC to the advising bank, therefore LC cannot be assumed to be in the sum which is beyond the amount actually specified in the LC itself.

14. When the Standby Letter of Credit in question, on which much reliance has been placed on behalf of the Plaintiff is examined it reflects that the said Standby Letter of Credit is not in favour of the supplier; but in the name and in favour of a corresponding Bank in UAE by Bank Al-Falah in Karachi. It further reveals that the arrangement between Plaintiff and its Bank in Karachi is in fact a Performance Guarantee in favour of the supplier to the extent 5% of the total value of the Contract and the said Performance Guarantee is then supported or supplemented by a Standby Letter of Credit in favour of the Bank in UAE with a further request to issue the Performance Guarantee in favour of the supplier of the Plaintiff. Therefore, in essence it is not a Standby Letter of Credit even directly in the name and for the benefit of the supplier. It further appears that in the Contract there are no dates mentioned for shipment, whereas, the Contract is for three years and the purported Standby Letter of Credit is for one year expiring on 28.12.2016. It is an admitted position that the restriction on the import of vehicles in question was issued on 18.4.2016 when none of the shipment in question had been made. Therefore, documents placed on record by the learned Counsel for the Plaintiff it reflects that the vehicles in question were shipped on two different dates i.e. 1.10.2016 and 28.12.2017. The Performance Guarantee or for that matter Standby Letter of Credit provides that in case the Plaintiff fails to make payment of an amount of UAE Dirham 700,2000/- then the Bank would honour such payment. Now if the shipment had not been affected till 18.4.2016 then it is not understandable that why subsequently on 1.10.2016 and 28.12.2017 the shipments were permitted and allowed notwithstanding the fact that the restriction on such imports was already in field. The matter of shipment is a private arrangement in this matter between the Plaintiff and the supplier and once an amendment was in knowledge then there was no need to complete the transaction and the supplier could have been requested not to make any shipment as apparently the first shipment was made on 1.10.2016, as there was enough time to withhold such shipments. In that case there would not have been any occasion to make payment to the supplier and being out of pocket. At the same time, this does not create any vested right which is now being claimed by the Plaintiff. Perusal of the documents further reflects that the Bill of Lading

in question does not involve the Banks in question which is normally a must in shipment affected on the basis of irrevocable Letter of Credits. In this case, it is directly to the order of the Plaintiff and for the benefit of the Plaintiff and no Bank is involved anywhere. Similarly, the Goods Declaration in the column of terms of payment states that it is on collection of documents basis. This again is contrary to the terms of payment which are normally involved in imports through Letter of Credit.

15. In view of hereinabove facts and circumstances of this case, I am of the view that no case for indulgence is made out as Plaintiff does not qualify for the benefit of Para 4 of the Import Policy Order, as claimed. Accordingly, listed application bearing CMA No.4726/2017 being meritless is hereby dismissed.

Dated: 05.07.2019

ARSHAD/

J U D G E