

IN THE HIGH COURT OF SINDH, KARACHI

Present

Muhammad Shafi Siddiqui, J

Suit No.1225 of 2022

[Pakistan Beverage Ltd v. State Bank of Pakistan & Another]

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For the Plaintiff	Mr. Khalid Jawed Khan a/w Mr. Hanif Faisal Alam, Advocates
For Defendant No.1	Mr. Muhammad Zubair Hashmi, Advocate Qazi Ayazuddin Qureshi, Asstt. Attorney General
For Defendant No.2	Mr. Ghulam Ali Khan Advocate
Dates of hearing	08.09.2022, 14.09.2022, 21.09.2022 & 26.09.2022

ORDER

Muhammad Shafi Siddiqui J. - Plaintiff in pursuit of their business activities negotiated with their supplier, KRONES AG, Germany in January-February, 2022 for supply and commission of a 45,000 BPH PET CSD Line @ 1.51 Caroline bottle together with necessary attachments/accessories. It is claimed that draft letter of intent was prepared and sent to supplier on 28.2.2022 which provided details of supply to be made by the supplier with agreed price of Euro 6,790,000 Net C&F, Karachi, which was issued on 2.3.2022. It is claimed that proforma invoice was issued on 22.3.2022 and terms agreed between them were such that payment was to be made via irrevocable letter of credit [L/C] and the schedule claimed to have been agreed between the supplier and the plaintiff is as under:

20% down payment under LC (earlier 90 days before the date of Bill of Lading of 1st shipment against presentation of advance payment invoice)

45% on presentation of shipping documents

25% payable in 90 days from date of Bill of Lading of last shipment.

Balance 10% against signed Acceptance Certificate but not later than 240 days from the date of Bill of Lading of last shipment without presentation of any documents, whichever is earlier. Letter of credit to be established within 4 weeks from date of issuance of PFI.

2. In pursuance of such understanding between two parties, it is claimed by the plaintiff that defendant No.2 being bank of the plaintiff was requested for the opening of L/C in favour of supplier on 24.3.2022 at nil margin. In response to it a draft of the L/C was sent to the plaintiff on 1.4.2022 by bank, which draft was forwarded to the supplier, as claimed. It is further contended that based on the amicable and cordial relation between them even on such un-mature understanding of remittance, the supplier commenced process for manufacturing the Line as ordered by the plaintiff. The supplier responded vide email dated 5.5.2022. While these negotiations were on and defendant No.2 could establish L/C, defendant No.1`s Banking Policy & Regulation Department [BPRD] issued Circular No.09 of 2022 dated 7.4.2022, henceforth referred to as the “Circular” titled as `Margin Restriction` on the import of items. Subsequently, vide EPD Circular 11 of 2022 dated 5.7.2022 import restrictions were introduced and the BPRD Circular No.25 of 2022 dated 5.8.2022 the defendant No.1 prescribed the requirement of 100% cash margin being 1 to 90 days and 25% for 91 to 180 days. Crucial being the first circular of 07.04.2022 above.

3. The plaintiff case as such is hit as almost 70% of their goods are affected as has fallen under such restriction. The bank thus was prevented from opening L/C until the entire amount, that has been contractually agreed to be paid by the plaintiff to supplier, be provided. The plaintiff then informed the supplier about the impugned circulars and the difficulties being faced by them and in order to maintain its business relation and to avoid huge claim of damages they signed an agreement for “cancellation compensation” on 19.5.2022 which in fact

determined the amount of compensation, the plaintiff is required to pay in the event the plaintiff failed to open L/C in favour of the supplier.

4. Learned counsel for the plaintiff raised two-fold arguments that:

(i) BPRD Circular No.09 of 2022 dated 7.4.2022

(ii) EPD Circular 11 of 2022 dated 5.7.2022 and

(iii) BPRD Circular No.25 of 2022 dated 5.8.2022

are without lawful authority, void, ultra vires and unenforceable, whereas in the alternative, it is claimed that it shall not affect all such contracts which are concluded prior to the cutoff date of the Circular i.e. 7.4.2022 before which effectively the contract between the supplier and the importer was concluded.

5. Though defendant No.2`s counsel did not raise serious objection in this regard, however, defendant No.1 did on the count that at the most it is only a case of draft L/C which was shared with the plaintiff on 1.4.2022 by their bank whereas defendant No.1 issued BPRD Circular No.9 of 2022 on 7.4.2022 which essentially put the plaintiff and issuing Bank on terms of 100% cash margin requirement, hence the event cannot be construed to have been given retrospective treatment.

6. I have heard learned counsel and perused the materials available on record.

7. In every contract of sale and purchase, the term which may be define as a nucleus of all, is the consideration and mode and mechanism of payment. The subject sale and purchase is between supplier and importer which are independent entities in two different countries and have agreed to settle their monetary issues of product price by way of an irrevocable letter of credit.

8. Mr. Khalid Jawed Khan`s primary arguments are that these circulars/notifications are void ab initio and ultra vires and be declared accordingly. My response to it is that interlocutory measures could not

be taken by suspending the active legislation^{1,2,3} unless some grave injustice is shown or impugned legislation is in blatant violation of some fundamental right, as guaranteed by the Constitution of Islamic Republic of Pakistan, which is not the case here. While it may take some time to strike them down in the main suit, on the touchstone of impugned circulars being ultra vires if law permits, Mr. Khalid Jawed Khan articulated his next limb of arguments that since plaintiff has a concluded contract with his supplier, the impugned circular should not come in the way though it may be given prospective effect. He has relied upon Al-Samrez case⁴ for a definition of concluded contract. In order to dilate upon the letter of credit, the recent pronouncement of Supreme Court in the case of Messrs Sazco⁵ was relied.

9. Goods can be bought and sold with payment of price in various forms such as cash, cash against delivery of goods, cash against documents, cash against acceptance of bills of exchange, mail or telegraphic transfer etc. International sale in particular, is subject to assured commitments of payment. Such commitments could be via letter of credit which could be visualized under commercial policies devised by the government. So one may commit for payment via any mode but such mode in itself has to come out conclusively and then to be seen independently based and dependent upon policies of government. Such commitment in itself may form an independent contract on its maturity only which may be different and distinguished from sale and purchase contract between buyer and seller. Commitment or assurance of a Bank or any financial entity is a different contract altogether. Since letters of credit by their nature are separate from sale contract, bank are not concerned or bound by such sale contract even if the credits bear

¹ PLD 1989 SC 61 (Federation of Pakistan v/s Aitzaz Ahsan)

² 2016 PTD 1056 (Younus Textile v/s Pakistan)

³ 1993 SCMR 2350 (Aijaz Ali Khan Jatoy v/s Liaqat Ali Khan Jatoy)

⁴ 1986 SCMR 1917 (Al-Samrez Enterprises v/s Federation of Pakistan)

⁵ 2021 SCMR 558 (Sazco (Pvt.) Ltd. v/s Askari Commercial Bank Limited)

reference to such contract terms, so payment under a letter of credit does not depend on the performance of obligation on the part of supplier except those which credit document itself imposes. Bank accepts the documents under letter of credit for what those document purports to be on their face. This uniform policy is ensured by uniformity of interpretation in international trade and ICC has evolved uniform customs and practice for documentary credit and the latest updated version is UCP 500. This clarity is necessary to distinguish both the contracts independently.

10. Local bank may certainly provide services at the doorstep of their customers and could never say no to their elite customers based on their own understanding, however, international commitment of foreign exchange cannot be read isolating trade policies. Thus nothing could turn on the draft L/C which is a bank form and could have been signed anytime anywhere.

11. Mr. Khalid Jawed Khan however has heavily relied upon the correspondence to call it a mature contract of L/C. Let us now see what it is all about.

12. The first document that was heavily relied upon Mr. Khalid Jawed Khan is a proforma application, which is called "Application and agreement for irrevocable documentary credit freely negotiable in beneficiary's country". This form duly filled and even signed by the plaintiff in itself would turn nothing at all, though it is claimed to be signed on 01.04.2022. It is claimed to have been sent on the same day i.e. 01.04.2022 by defendant No.2 (local bank) to plaintiff's representative Mudassir Ahmed Khan. It is also claimed to have been sent by representative of plaintiff Mudassir Ahmed to Ingerl, Johanna, perhaps a representative of KRONES A.G. The draft email suggests that they (supplier) was required to check it and confirm so that they may

proceed further. The next email that is available is from Ingerl, Johanna to Mudassir Ahmed, which is of 14.04.2022, which reads as under:-

“Dear Mudassir,

We are still waiting for the feedback from our banks for LC confirmation. As soon as we have an info we will share it with you.

Sorry for the delay.”

13. Above email of 14.04.2022 is a reply of email dated 08.04.2022, which was sent by Mudassir to Ingerl, Johanna inquiring about the comments on the LC.

14. Email of 05.05.2022 to Mudassir Ahmed shows as under:

“Dear Mudassir,

Finally, we found a bank that was able to confirm the LC despite the long running time. Please find attached the LC draft with “our remarks”, both as PDF and Word file.

We are looking forward to receive the opened LC.”

15. Above negotiations, at the most concluded on 05.05.2022 to the extent of LC terms. As I observed above that LC in itself is an independent contract between issuing bank and advising bank for its onward payment to the supplier, therefore, on the strength of concluded contract between buyer and supplier the commitment for the repayment via LC cannot be said to be a concluded contract by 01.04.2022. We are indeed in the present case searching for concluded contract as far as assurance of remittance by bank is concerned by 01.04.2022 or latest by 06.04.2022 but efforts are in vain.

16. Al-Samrez Enterprise (Supra), which is relied upon by Mr. Khalid Jawed Khan, in paragraph 4 and 8 discussed the issue as under:-

4. Being aggrieved by the aforesaid order passed by the High Court, the appellants came up before this Court and leave was granted to examine whether the High Court was right in reaching the conclusion on the material placed before it, that no authentic document was produced to establish that in fact a binding contract had taken place between the foreign principals and the appellants before the issue of the impugned notification on 11th June, 1977. In this connection notice was taken of the copy of the contract between the parties which was placed before the High Court (page 38 of the printed paper book) as

well as the fact that the appellants had opened a Letter of Credit and obtained the import licence before the crucial date, namely, 11th June, 1977. On the basis of this evidence the question for consideration was whether the impugned notification having been issued after the contract between the appellants and Japanese Exporter, could be given retrospective effect and enhanced customs duty and sales tax on goods booked before the said notification could be legally demanded.

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8. The next question is whether the appellants on the facts of the present case had acquired a vested right to avail of the exemption provided for in the earlier notification. In this behalf the important facts established on the record are that the contract for the purchase of goods between the appellants and the foreign exporter was concluded on 7th June, 1977, as evidenced by memo of even date placed on the record page 38 of the printed record. One of the terms of the contract which has material bearing on the question in consideration is as follows:

"An irrevocable letter of credit shall be established by the Buyers in favour of the Sellers by 15-6-1977 days after the date of Memo, otherwise the Sellers reserve the right to cancel this contract without prejudice and claim for damages thereby incurred."

In pursuance of this contract the appellants instructed their bankers, Messrs Habib Bank Limited, Foreign Exchange, Karachi, on 8th June, 1977, as evidenced by document on page 43 of the printed record. The fees for import of goods and opening of Letter of Credit were deposited with the Chief Controller of Imports and Exports on 10th June, 1977 (page 41 of the printed record). This document shows that the item under which the goods were being imported was on the Free List. All these facts which occurred prior to the date of the amended notification issued on 11th June, 1977, clearly established that the appellants had acquired a vested right to the exemptions under the prior notification applicable at that time. These acts including the contractual commitments made by them were done on the assurance contained in the prior notification extending the exemption from the payment of duty. Indeed it is well-settled that tax exemptions are founded on public policy such as the encouragement of manufacturing and other industries or trades. They are granted on the theory that they will benefit the public generally or are awarded as compensation for services rendered in the performance of some function deemed socially desirable. Therefore, the exemption notification is basically addressed to public at large or in any case to prospective importers. It will be inequitable and unjust to deprive a person who acts upon such assurance of the right to exemption and expose him to unforeseen loss in the business transaction by suddenly withdrawing the exemption after he has made legal commitments. It is in this perspective that a right is created in his favour and a subsequent withdrawal of exemption cannot be given retrospective operation by an executive act to destroy this right. The High Court in its review order did not doubt the genuineness of the assertion made by the appellants that the fee for opening the Letter of Credit was deposited by them on 10th June, 1977, but gave no importance to this fact on the assumption that an import licence was necessary. The item in question being on the free list it was not necessary to obtain an import licence and it was only sufficient to deposit fees for opening the Letter of Credit. Therefore, the fact that the Letters of Credit were opened on 15th June, 1977, is of no significance but in any case the explanation for delay is contained in the letter of the Habib Bank on record. The main ground that prevailed with the High Court to hold that the revised notification which was in force on the date when the Bill of Entry was presented was that under

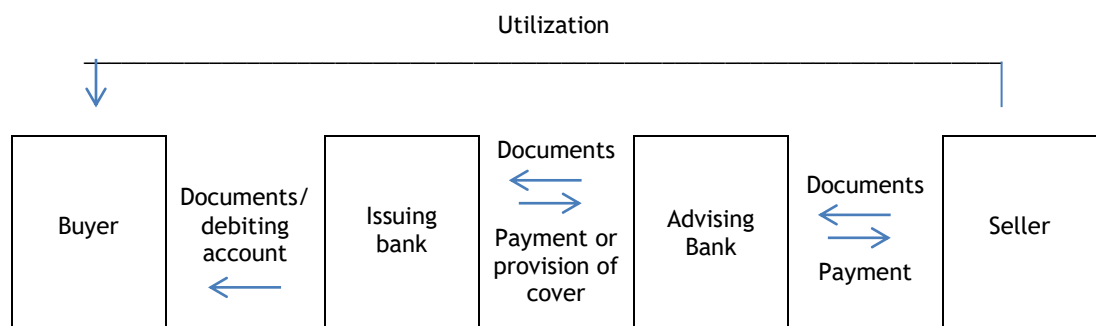
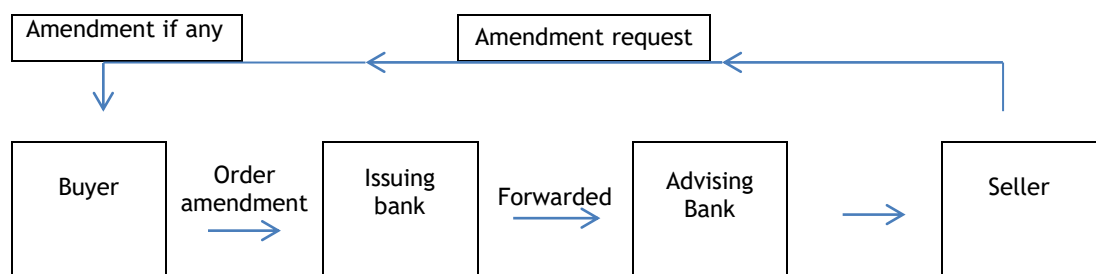
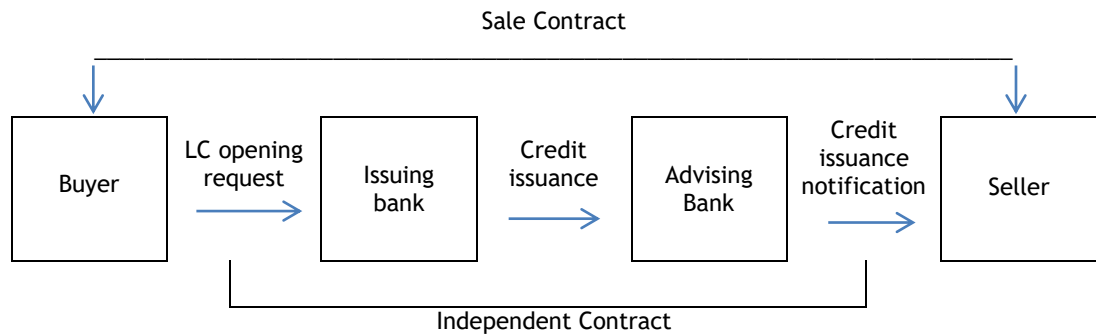
section 30 of the Customs Act the rate of duty applicable with reference to the date of the Bill of Entry was chargeable. However, as discussed above the particular rate of duty was in force is not relevant to the controversy but whether exemption from this rate could be availed by the appellants. Clearly in respect of an item on the free list an importer could make binding and irrevocable commitments with a foreign supplier without obtaining an import licence. We, therefore, do not agree with the view taken by the learned Judges of the High Court that no vested right was created or that the transaction is open to doubt as fraudulent as an attempt to evade the payment of duty. As already observed retrospective operation cannot be given to executive orders so as to destroy contractual rights and obligation already accrued. In the result this appeal succeeds and the constitutional petition of the appellants is accepted. The appeal is allowed with no order as to costs.

17. On the touchstone of above analysis, defendant No.2 could not said to be under any kind of commitment prior to 07.04.2022. As recorded above, by 14.04.2022 the supplier has not replied as they were still in search of feedback as far as terms of LC are concerned whereas on 07.04.2022 “Margin Restriction on Import of Items” was issued by Banking Policy and Regulations Department of State Bank of Pakistan i.e. BPRD Circular No.9 of 2022. Paragraph 2 of it provides that the bank with immediate effect shall obtain 100% cash margin on import of items as listed in the enclosed Annexure ‘A’ and cash margin on these specific items will remain in place till December 31, 2022. So, by this date, no LC was either committed or concluded.

18. It was then followed by EPD Circular No.11 of 2022 of 05.07.2022. The subject matter of it is Import of Goods”. The list of goods attached there suggest that the authorized dealers were required to seek prior permission from the Foreign Exchange Operations Department of State Bank of Pakistan for initiating import transaction. This perhaps is an updated version of earlier one as perhaps some additional goods were included. By 05.08.2022 BPRD Circular No.25 of 2022 of State Bank of Pakistan came, which provides margin restriction on import of items i.e. 25%.

19. In order to understand ongoing transaction of LC for the convenience is summarized graphically as under, which will make us

understand the importance of commitments between issuing bank and advising bank:-



19. In support of above, Article 7 of UCP 500, as up-dated, is very essential, which is reproduced as under:-

Advising Bank's Liability

(a) A Credit may be advised to a Beneficiary through another bank (the "Advising Bank") without engagement on the part of the Advising Bank, but that bank, if it elects to advise the Credit, shall take reasonable care to check the apparent authenticity of the Credit which it advises. If the bank elects not to advise the Credit, it must so inform the Issuing Bank without delay.

b. If the Advising Bank cannot establish such apparent authenticity it must inform, without delay, the bank from which the instructions appear to have been received that it has been unable to establish the authenticity of the Credit and if it elects nonetheless to advise the Credit it must inform the Beneficiary that it has not been able to establish the authenticity of the Credit."

20. So when such terms were not materialized till cut-off date, correspondence did not mature as a payment assurance contract i.e. LC.

21. Upshot of above discussion leads to an inference that plaintiff has not been able to make out a prima facie case for injunction, the balance of inconvenience is also not in its favour and there appears to be no irreparable loss to be caused to the plaintiff as it is a matter of policy in terms of which certain restrictions were introduced on imports.

22. With these facts, I am of the view that no concluded terms of remittance via Letter of Credit were concluded prior to the cut-of date of 07.04.2022 and hence there is no retrospective applicability of Circular dated 07.04.2022 to the contract between supplier and plaintiff and such restrictions, as notified in the impugned circular, shall apply to the case in hand. The application as such is dismissed.

Dated: 12.10.2022

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