

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

Southland Apparels (Pvt.) Ltd.,
No. 80, Hulftsdorp Street,
Colombo 12.

Plaintiff

Vs

Hatton National Bank Plc.,
HNB Tower, Darley Road,
Colombo 10.

Defendant

**SC CHC APPEAL 33/07
CHC 329/2003 – 1**

AND NOW BETWEEN

Hatton National Bank Plc.,
HNB Tower, Darley Road,
Colombo 10.

Defendant Appellant

Vs

Southland Apparels (Pvt.) Ltd.,
80, Hulftsdorp Street,
Colombo 12.

Plaintiff Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.,
PRIYANTHA JAYAWARDENA PCJ., &
L. T. B. DEHIDENIYA J.**

COUNSEL : Shamil Perera PC with Primal Ratwatte,
Duthika Perera, Ms. L. Jayasinghe and Ms.
K.Gunasinghe for the Defendant Appellant
Basheer Ahamed with Laxman Jayekumar and
S. Ahamed for the Plaintiff Respondent.

ARGUED ON : 19.02.2018.

DECIDED ON : 21.03.2018.

S. EVA WANASUNDERA PCJ.

The Plaintiff Respondent Company (hereinafter referred to as the Plaintiff) had sued the Defendant Bank in the Commercial High Court of Colombo claiming damages in a sum of Rs. 5,197,581.56 for the losses incurred by the company on the basis of five alternative causes of action contained in the Plaint dated 23.12.2003. The Defendant Bank filed answer dated 19.05.2004 praying for a dismissal of the Plaint and prayed for judgment against the Plaintiff on the claim in reconvention of 50 million rupees. Thereafter the replication of the Plaintiff was filed on 07.07.2004.

The Plaintiff is a private company which carries on business of exporting garments. It had maintained a foreign currency banking unit account at the Defendant Bank for the purpose of carrying on transactions with its foreign buyers of the garments made in this country by the Plaintiff company through the said account with the Banker. In 1999 December, the Plaintiff had entered into a contract with Prestige Apparel Manufacturing Incorporation of Laredo, Texas, U.S.A. to supply jackets, pants, vests, coveralls and other like items. Then the buyer, Prestige Apparel Manufacturing Inc. opened two irrevocable letters of credit through its banker, International Bank of Commerce, Laredo, Texas naming the Plaintiff as beneficiary. The letters of credit were subject to Uniform Code of

Practice 500. The buyer's banker was International Bank of Commerce, Laredo, Texas, U.S.A.

By letters of credit bearing Nos. CM 100086 dated 03.12.1999 and CM 100195 dated 28.04.2000 issued by the buyer's banker, International Bank of Commerce, Laredo, Texas the Plaintiff was named as beneficiary for US Dollars 110,656.50 and US Dollars 44239.80. The monies on the letters of credit were available with the Defendant Bank in Sri Lanka by draft drawn on the International Bank of Commerce, 30 days after acceptance. The documents required under the said letters of credit included a full set of clean on board ocean/marine Bills of Lading marked freight collect consigned to the Order of the International Bank of Commerce.

By Letters of Credit Nos. CM 100086 dated 03.12.1999 as amended and CM 100195 dated 28.04. 2000 as amended , the Plaintiff was named as the beneficiary for US Dollars 110656.50 and 44329.80 respectively. They were marked as P1 and P2 respectively with the Plaintiff. When shipments were to be done, partial shipments by Air or Sea were allowed. Even transshipments were allowed. The Plaintiff shipped the goods to the buyer and **obtained from Transcargo Pvt. Ltd. of Colombo the agent of the carrier**, the Bills of Lading and Airway Bills made to the Order of the International Bank of Commerce, USA. The particulars of goods shipped to the buyer under the Letters of Credit are set out in the Bills of Lading and Airway Bills referred to in paragraphs 7, 8 and 9 of the Plaintiff dated 23.12.2003. The Defendant Bank had accepted the original documents by memos issued by the Bank to the Plaintiff. The said documents were against both the Letters of Credit issued by the International Bank of Commerce, USA, under No. CM 100195 and No. CM 100086.

By the Bill of Lading bearing No. TC/WICE/NORA/00104 dated 30.08.2000, the said carrier's agent, **Transcargo Pvt. Ltd.** , received from the Plaintiff at the Port of Colombo, 80 cartons containing 960 pieces of Explorer Jackets, 17 cartons containing 398 pieces of Brown Duck Brush Pants and 65 cartons containing 1560 pieces of Jungle Pants, on board the vessel "Oriental Bay V35 – 76" for discharge at Singapore and delivery at Los Angeles to the Order of the International Bank of Commerce in USA. The said Bill of Lading was in respect of Letter of Credit No. CM 100086 dated 03.12.1999. A true non negotiable copy of the said Bill of Lading was marked as P3 and pleaded as part and parcel of the Plaintiff and marked in

evidence also as **P3 subject to proof**. In the same way by some other Bills of Lading bearing different numbers and different dates, which were marked as P4, P5, P6, and P7 the carrier's agent, **Transcargo Pvt. Ltd.** received the goods from the Plaintiff at the Port of Colombo and at the Katunayake Air Port. True non negotiable copies of the said Bills of Lading **P4, P5, P6 and P7** were produced in evidence and marked **subject to proof**.

The Defendant Bank by Memos dated 17.10.2000 and 14.09.2000 acknowledged receipt of the original documents including the Bills of Exchange (drafts), Bills of Lading and Invoices for negotiation against the Letters of Credit Nos. CM 100086 and CM 100195 issued by the International Bank of Commerce, USA. They were marked as **P14 and P15** in evidence **subject to proof**.

The complaint and grievance of the Plaintiff is that the **Defendant Bank** by having **accepted** the said **original documents** as mentioned in the memos issued by the Defendant Bank to the Plaintiff, **was obliged to negotiate** the said documents against the said Letters of Credit issued by the said International Bank of Commerce, USA and **failing negotiation** or acceptance of the Bills of Exchange (drafts) and documents, the **Defendant Bank was obliged to return the original documents to the Plaintiff**.

The Plaintiff had found out that **the carrier had delivered the consignments without** obtaining the **original Bills of Lading and/or Airway Bills** which were made to the order of the International Bank of Commerce, USA ; the exported goods by the Plaintiff to the buyer in USA namely Prestige Apparels Manufacturing Incorporation of Laredo, Texas had taken charge of the consignments of apparels made for them by the Plaintiff; but no money was forthcoming in that regard to the seller, the Plaintiff. Yet, it had been informed to the Plaintiff that the original Bills of Lading and the Airway Bills had been sent back to the issuing Bank, the Defendant.

Then, the Plaintiff had made a complaint **against the carrier's agent in Colombo, Transcargo Pvt. Ltd. to the Criminal Investigations Department**. The CID requested the Plaintiff to submit **the originals of the Bills of Lading** and Airway Bills as well as the connected shipping documents. The Plaintiff had directed the CID to get them from the Defendant Bank. The Bank had not been able to give any such documents to the CID or the Plaintiff. The Plaintiff alleges that the said

documents had been lost/misplaced by the Defendant Bank due to the fault of the Defendant Bank which had wrongfully got the **services of Deutsche Bank AG, Colombo**, to send and receive parcels of the Defendant Bank through 'DHL'. It is so alleged, because the International Bank of Commerce, Texas, U.S.A. had informed the Plaintiff that the original documents had been **returned to the Deutsche Bank** office in Colombo. It was allegedly later found out that they have got misplaced/lost at the office of the Deutsche Bank in Colombo without the same having reached the Defendant Bank. The **CID** had later on informed the Plaintiff that they **cannot look into the complaint made by the Plaintiff against Transcargo Pvt. Ltd.**, the agent of the carrier **without the original documents**. It is only **thereafter** that the Plaintiff had commenced legal action in the case in hand against the Defendant Bank.

According to the Plaintiff, since the buyer in U.S.A. had collected the goods to wit. garments from the carrier, without accepting, paying and collecting the original shipping documents from the International Bank of Commerce, USA, the said International Bank of Commerce had returned the documents to Sri Lanka, to the Deutsche Bank, Colombo. It is obvious that it is the buyer in USA who had done the wrongful act of collecting the garments from the carrier, "without accepting, paying and collecting the original documents" from the Bank of the buyer, the International Bank of Commerce, USA. It is only then, that the buyer's Bank, the **International Bank of Commerce, USA** had decided to send back the documents to the seller's Bank, i.e. the **Hatton National Bank, Colombo**, which is the Defendant Bank in this case. Did the buyer's Bank do it correctly is a question.

The buyer's Bank, International Bank of Commerce should have in fact returned the original documents to the Hatton National Bank. But instead the parcel of documents had been sent to the Deutsche Bank, which got the documents from the courier DHL on a public holiday, on 28th December, 2000. The buyer's Bank, IBC / USA had not taken good care to send it to the seller's Bank, HNB/ Colombo. Deutsche Bank did the service to HNB by having arranged the Courier Service DHL to take the original documents at the very beginning of the business relating to the buyer and seller. DHL carried the documents as courier service to IBC/USA. The Deutsche Bank was the usual arranger of DHL to send the documents. That Bank had nothing to do with the business of the buyer and the seller. It was only a convener of a service to HNB. It is obvious that the buyer's Bank, IBC/USA had

been negligent in **not having identified the proper Bank** to which the originals of documents were to be returned to and acted in a negligent way and had sent the same addressed to the Deutsche Bank which had nothing to do with the business that was going on between the buyer and the seller. Anyway it is a fact that the papers have got lost/misplaced.

The argument of the counsel for the Plaintiff was put down in writing in the written submission in this way. "It is most respectfully and most humbly submitted that if X bank uses or employs Y bank to send valuable original shipping documents to Z bank, surely Z bank will and can return those valuable original shipping documents to X bank, through the Y bank. That is natural and to be expected, that is why the Defendant Bank was silenced by the reply of International Bank of Commerce, USA."

I fail to understand the said argument as a valid argument with regard to the return of the original documents to the Deutsche Bank. The buyer's bank ought to have identified the seller's bank properly as HNB and sent the papers to HNB through courier service very carefully according to the accepted rules of practice in law regarding the Bills of Lading and Letters of Credit in business between customers who place so much of trust in the bankers who deal with the international business totally relying on their banks to do the right thing and taking care to serve their customers without fail. The buyer's bank IBC/USA had come to know that its own customer, Prestige Apparel Manufacturing Incorporated in Laredo, Texas, USA had **collected the goods from the carrier without accepting, paying and collecting the original shipping documents from the buyer's bank, quite wrongfully and illegally** and may be acting in collusion with the carrier or its agent in USA **and then in a hurry wanted to send the original documents back to the seller**, so that the seller could take action to sue the buyer and/or the carrier and its agent to recover the monies due to the seller from the buyer. But the papers have got lost/misplaced due to the fact that it was not addressed to HNB quite wrongfully and not sent through courier service to HNB but to the Deutsche Bank. It is negligence on the part of IBC/USA. In fact the Plaintiff has a cause of action to sue the buyer and the buyer's bank as well as the carrier and the agents of the carrier. None of them are parties to the suite in hand. The Plaintiff has failed to bring proper parties before court to recover the loss.

Once again, the counsel for the Plaintiff has submitted in the written submissions filed in this Court that “ It is most respectfully and humbly submitted that without the duly endorsed original Bills of Lading or Airway Bills, the carrier had no right or authority to deliver the goods to the importer or ‘notify party’ or any other person, except IBC / USA or its order named in the Bills of Lading and Airway Bills.” I find that the Plaintiff by stating thus accepts the fact that the carrier had done the most wrongful and illegal act by having released the goods to the buyer without the original documents and that the cause of action lies against the carrier.

The only contention of the Plaintiff seems to be that the **Plaintiff is unable to file action against the carrier without the original Bills of Lading and Airway Bills** which are the contract documents between the carrier and the Plaintiff due to the Defendant Bank having got the services of the Deutsche Bank which has lost/misplaced the original documents.

The Plaintiff holds the Defendant Bank HNB responsible for the loss of the original documents which got lost in the hands of the Deutsche Bank when the buyer’s bank IBC/USA sent them to the Deutsche Bank. The Plaintiff complains that, the reason for IBC/USA to have returned the documents later to the Deutsche Bank is simply because HNB had , at the very inception of the business which is the subject matter of this case, sent the original documents to IBC/USA through courier service of DHL which was facilitated by the regular services done by the Deutsche Bank to HNB. It is alleged that the HNB had used the Deutsche Bank wrongly by having passed the responsibility of sending the documents through DHL by the said Deutsche Bank and therefore the IBC/USA when it wanted to return the documents later, back to the seller’s bank , had correctly sent it to the said Deutsche Bank. The Plaintiff argues that therefore the HNB is responsible for the loss of the original documents. To my mind this argument does not hold water.

Different Banks in the world have their own methods of dealing with what they are bound to do in handling their part of the deal in the business of their customers. The customer who relies on the bank serving him does not have a hold in how the bank runs its business. The bank can get the services of other banks to do many other things other than what a regular bank is known to be doing in the eyes of the normal regular customers. The practices in the business world by and

between banks in the world is a vast subject matter. The customer cannot expect the bank to do business for the customer in an exact particular way. The bank is duty bound to get what is expected to be done by the customer through the bank. In this instance, HNB got just the **services of Deutsche Bank** to dispatch the documents through DHL to IBC/USA. HNB did not pass any of its responsibilities to the Deutsche Bank. Neither did it pass the burden of carrying the documents to USA. HNB got DHL to carry the documents to USA. The services of DHL was channeled through the Deutsche Bank. Then again when IBC/USA wanted to return the documents, IBC/USA need not get the services of DHL or the Deutsche Bank, just because HNB had used DHL or the Deutsche Bank. It is up to the IBC/USA to use the best courier service of its choice to send the documents to HNB. The Plaintiff cannot be heard to say that IBC/USA sent the papers back to Deutsche Bank **because** HNB had used the Deutsche Bank. This argument sounds awkward and does not make any sense. Moreover, this argument cannot push the responsibility of the documents getting lost/misplaced on the HNB at all. If at all the IBC/USA had been negligent in having not identified the seller's bank correctly.

Yet, it is due to this kind of scenario being expected in this world wide business transactions, that the "Uniform Customs and Practice for Documentary Credits" got born on earth under the auspices of the International Chamber of Commerce.

Article 1 of the ICC Uniform Customs and Practice for Documentary Credits in vogue at present reads as follows:-

" The Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500, shall apply to all Documentary Credits [including to the extent to which they may be applicable, Standby Letter(s) of Credit] where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit."

It is an accepted fact that the Plaintiff and the Defendant Bank are bound by the rules in UCP 500.

Article 16 of the same reads:-

“ Banks assume no liability or responsibility for the consequences arising out of delay and/or **loss in transit of** any message(s) , letter(s) **or document(s)** or for delay.....”

What has happened in this instance is that the documents have got lost in transit from the IBC/USA to the Defendant Bank, HNB. Neither the issuing bank nor the recipient bank can be held liable for the said loss of documents.

However, I do not find any evidence before court to the effect that the parcel of documents supposed to have been received by the Deutsche Bank or sent by the IBC/USA except the Swift Message which is supposed to have stated that the parcel contained the originals of the Bills of Lading and Airway Bills, in fact contained the originals of the said documents. On the other hand, just because the originals have got lost, the Plaintiff cannot be heard to say that the Plaintiff is unable to file action to sue the carrier or its agent or the buyer who has failed to pay the seller and get justice from court because in fact the goods had been released by the carrier fraudulently and the buyer has failed to pay the seller. The Defendant Bank cannot be held liable for the wrongful acts of the buyer and the buyer’s bank. The accusation brought forward that the Defendant Bank is responsible for the loss of the parcel of whatever documents is frivolous.

The learned trial judge has accepted that the parties are bound by the UCP 500 rules and even arrived at the conclusion that the Defendant Bank does not become responsible according to the said rules on a plain reading of the rules. Yet, the learned trial judge has **concluded wrongly** when he stated thus: “ However, as I have explained herein before, the Manager Trade Services of the Defendant Bank himself has admitted that those original shipping documents were sent to the Deutsche Bank AG Colombo by the issuing bank in USA. Therefore, the return of documents to the Deutsche Bank in Colombo by the International Bank of Commerce **can safely be accepted even though no proper proof of the documents P14 and P15 has been established.**” I find that there is nothing but conjecture in this conclusion by the trial judge.

The learned trial judge finally had concluded, while perceiving that many documents marked subject to proof and not having been proved afterwards but ignoring that fact, that ‘ **if the Defendant Bank did not employ the Deutsche Bank** , the issuing bank **could have sent** the documents direct to the Defendant

Bank and then the documents **would not have got lost.**' It is hypothetical. No person can truly state that if any one sends documents to the Deutsche Bank that the documents would invariably get lost or on the other hand if any one sends documents to the HNB directly that they would definitely not get lost but reach the HNB. I find that the Defendant Bank's action in getting the services of the Deutsche Bank to deliver the originals of documents through the courier DHL at an early stage to the IBC/USA is not a factor to be reckoned by the said Bank , IBC/USA to

return the said documents to the Deutsche Bank. It is the duty of the IBC/USA to return the original documents back to the Defendant Bank through any courier service that IBC/USA thinks fit. The Defendant Bank cannot be held liable for the loss of the originals of any documents. No person was called as a witness from the issuing bank.

I find that the learned High Court Judge had failed to identify the basic difference between a Bank carrying on business of banking and a courier carrying on business of courier services. The Banks employ the couriers and never provide the services of a courier. The Defendant Bank could not have straight away made itself to provide courier services without employing the services of a courier. The learned trial judge had made a wrong finding that it is due to the arbitrary decision of the Defendant Bank to have appointed the Deutsche Bank as the courier, that the loss and damage which was caused to the Plaintiff should be borne by the Defendant Bank. It is in fact DHL who was the courier and DHL was only paid by the Deutsche Bank because the Defendant Bank had made use of the services offered by the Deutsche Bank to that effect. It is wrong to conclude that Deutsche Bank was the courier without any basis.

I find that the Plaintiff had totally failed to prove that any cause of action had accrued to the Plaintiff to sue and get relief as prayed for against the Defendant Bank. Then, I find that even though the Defendant Bank had made a claim in reconvention against the Plaintiff, there does not seem to be any proper proof of the same.

I find that the learned Commercial High Court judge had gone wrong in concluding that the Defendant Bank is liable to pay the loss incurred by the Plaintiff.

I do hereby set aside the judgment of the Commercial High Court dated 15.06.2007.

The Appeal is allowed. However I order no costs of suite.

Judge of the Supreme Court

Priyantha Jayawardena PCJ.
I agree.

Judge of the Supreme Court

L.T.B. Dehideniya J.
I agree.

Judge of the Supreme Court