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

Gamini Ranasinghe,
No. 27, Kandawala Road,
Ratmalana.

PLAINTIFF - APPELLANT

-Vs-

SC (CHC) Appeal No. 29/2003
HC (Civil) Case No. 154/96(1)

Commercial Bank of Ceylon Limited,
No. 21, Bristol Street,
Colombo 01.

DEFENDANT - RESPONDENT

BEFORE	**:**	Hon. Saleem Marsoof, P.C. J, Hon. Priyasath Dep, P.C. J, and Hon. Rohini Marasinghe, J.
COUNSEL	**:**	G. Alagaratnam, P.C. with Suren Fernando and Mrs. M.A.S.J. Nayeem for Plaintiff-Appellant. S.A. Parathalingam, P.C. with N. Parathalingam for Defendant-Respondent**.**
Argued On	**:**	03.10.2013
Written Submissions On	**:**	23. 09.2013 (Defendant-Respondent) 31.10.2013 (Plaintiff-Appellant)
Decided On	**:**	17.12.2014

SALEEM MARSOOF, P.C. J,

This is an appeal filed in terms of Section 6 of the High Court of the Provinces (Special Provisions) Act No 10 of 1996, against the judgment of the High Court of the Western Province exercising commercial jurisdiction (hereinafter referred to as "the Commercial High Court") holden in Colombo dated 3rd October 2003. By the said judgment, the Commercial High Court dismissed the action filed by the Plaintiff-Appellant (hereinafter referred to as "the Appellant") against the Defendant-Respondent (hereinafter referred to as "the Respondent") seeking certain declarations regarding the alleged right of the Respondent to debit the Resident Foreign Currency Account bearing No. 9495285501 held by the Appellant in the Respondent Bank, a permanent injunction to restrain the said Respondent from debiting the said account and an order directing the Respondent bank to release the moneys that were deposited by the Appellant in the said account to him or his order.

Though the Appellant has in his petition of appeal based his appeal on several grounds, at the hearing of this appeal, the learned President's Counsel for the Appellant confined his submissions to two issues, namely, (a) the alleged discrepancies in the shipping documents presented to the Respondent bank for negotiation and (b) the alleged delay in presenting the said documents for negotiation. At the request of Court, the learned President's Counsel also made submissions on the question of the burden of proof. Before considering the submissions of the learned President's Counsel for the Appellant and the Respondent with respect to the aforesaid matters in detail, it will be useful to set out briefly the material factual circumstances that give rise to this appeal.

The Factual Matrix

Acting on behalf of his business, Malindu Timber Stores, a sole proprietorship, the Appellant placed an order on or about 8th June 1993 with Zenith Corporation SDN Berhad of Kuala Lumpur, Malaysia, for the purchase of certain quantities of sawn timber of mixed hard wood (100% tualang) in assorted sizes to the value of Singapore $161,245.11, and received a Proforma Invoice bearing No. 001/PRO/01/93 dated 8th June 1993 for the said amount. Thereafter, on the instructions of the Appellant, the Respondent Bank opened a Letter of Credit bearing No. 06/9305362 (P1A) for the said amount of Singapore $ 161,245.00 in favour of the said Zenith Corporation SDN Berhad.

It is important to note that for the purpose of persuading the Respondent Bank to open the aforesaid letter of credit, the Appellant issued a letter of set-off dated 10th June 1993 (V2). By the said letter of set-off, the Appellant consented, *inter alia* to the setting off by the Respondent Bank of all monies that may become due in connection with the opening of the said letter of credit and other banking charges against all monies lying to the credit of the Appellant in any current, fixed deposit, savings or other accounts including the funds available in a Resident Foreign Currency (RFC) Singapore Dollar Savings Account bearing No. 9495285501, which was opened by the Appellant on or about 31st May 1993 with an initial deposit of Singapore Dollars 132,247.44.

On the basis of an arrangement that had been agreed upon by all the relevant parties, the timber was eventually shipped by Shri Arvind Timber Sdn Bhd of Kuala Lumpur, Malaysia, which is a sister company of Zenith Corporation SDN Berhad, and which had been substituted as the beneficiary to the aforesaid Letter of credit with the knowledge and consent of the Appellant. The relevant shipping documents were presented to the Respondent Bank for negotiation in September 1993, and the Respondent accepted the said documents and made payment on the said Letter of Credit to the value of Singapore Dollars 161,245.00. Upon making payment on the aforesaid Letter of Credit, the Respondent, acting on the said letter of set-off dated 10th June 1993, purported to debit accounts of the Appellant in the Respondent Bank including the said RFC Singapore Dollar Savings Account No. 9495285501 with the amount purportedly paid by the Bank to honour the said letter of credit, and banking charges.

According to the Appellant, he had by his fax dated 25th August 1993 (P4) warned the Respondent Bank of certain "special conditions" relating to quantity and sizes of timber, and insisted that the proforma invoice and the certificate of inspection issued by the Malaysian Timber Board should be thoroughly checked before releasing payment on the letter of credit. It is the position of the Appellant

that no sooner he learnt that despite the fact that the quantity of timber ordered by him was wroth Rs. 5 million, only 5 containers consisting of 256 metric tons in 154 bundles worth Rs. 1 million had been shipped, he instructed the Respondent Bank by fax dated 14th September 1993 (P5) to reject the said documents.

It is evident that the Appellant visited the Respondent Bank on 14th September 1993 with a view of obtaining copies of the shipping documents, but got copies of the relevant bill of lading, commercial invoice, certificate of insurance and the certificate of the Malaysian Timber Industry Board only the following day. On 15th September 1993, he requested the Respondent Bank not to make payments upon the said Letter of credit until the Appellant checked all the relevant documents. Thereafter, having checked the said documents, the appellant instructed the Respondent by letter dated 16th September 1993 (P10) to reject the said documents and not to make any payment on the said Letter of credit because *inter alia "*the description of the goods in the Bill of lading differs from the Letter of credit as well as the Invoice".

The Respondent Bank, by its letters dated 17th September 1993 (P13) and 22nd September 1993 (P14) addressed to the Appellant, denied that there was any discrepancy in the documents that would justify the rejection of the documents, and went on to honour and make payment on the letter of credit. However, the Appellant, who has consistently taken up the position that the shipping documents did not comply with the instructions in the Letter of Credit, by his letter dated 13th October 1993(P16) addressed to the Respondent Bank, adverted to 5 discrepancies in the shipping documents, and contended that:-

(1) In terms of the said Letter of credit, the bill of lading should have been made out to order and endorsed to the Respondent Bank, instead of which the bill of lading was made directly to the order of the Bank;

(2) The goods described in the bill of lading differs from that of the said letter of credit.

(3) The said Letter of credit requires the insurance amount to be specified which condition has not been complied with in the Certificate of Insurance.

(4) Although the dated in the Certificate of Insurance has been altered, it has not been counter-signed by the authorized signatory; and

(5) The documents were not presented within the stipulated time in accordance with the stipulations in the said L/C.

The Trial and the decision of the Commercial High Court

The action instituted by the Appellant in the Commercial High Court was taken up for trial on the 23rd July 1997 on 22 issues raised on behalf of the Appellant of which issues 8,9 and 10, which are important for this appeal are reproduced below:-

8) As set out in paras. 13 & 14 of the Plaint, did the Plaintiff inform the Defendant of discrepancies in the documents and request the Defendant to reject the documents and not pay on the Letter of credit No. 06/9305362?

9) Nevertheless, did the Defendant pay the beneficiary on the said Letter of Credit No. 06/9305362?

10) If so, was such payment in violation of the Defendants duties and/or the provisions of the UCP?

The Respondent Bank raised 16 issues of which issue 25 was substantial, and is reproduced below:-

> "25) Are the alleged discrepancies set out in X16 (letter dated 13th October 1993 marked in evidence at the trial as P16), not discrepancies within the meaning of the Uniform Customs & Practices for Documentary Credits (ICC No. 400)?"

The Appellant testified on his own behalf and also called in evidence Mallika Senanayake, Investigator in the Bank Supervision Department of the Central Bank, Punchi Nilame Balasuriya, Senior Investigator in the Bank Supervision Department of the Central Bank and Patrick Valentine Kalendra Alahakoon, Deputy Controller of Exchange, gave evidence for the appellant, and the Appellant closed his case marking in evidence documents P1 to P18. The Respondent Bank did not lead evidence at the trial, except for marking documents V1-V3 in cross-examination.

In his impugned judgment dated 3rd October 2003, the learned Judge of the Commercial High Court has observed that the evidence of the 3 witnesses called on behalf of the Appellant is irrelevant to the matters in issue as "any decision of the Central Bank is not relevant to this case". He has also adverted to alleged discrepancies (1), (3) and (4) referred to by the Appellant in his letter dated 13th October 1993 ("P16"), were not pursued by the Appellant at the trial and accordingly, restricted his decision to alleged discrepancies (2) and (5).

In regard to the second discrepancy, which is that the goods described in the Bill of lading differs from that of the said Letter of credit, the Learned Judge concluded that there was "no discrepancy at all between the Bill of Lading and the Letter of Credit". With regard to the fifth discrepancy, which is that the documents were not presented within the stipulated time according to the stipulations in the Letter of credit, the learned Judge has held that that the appellant "has failed to prove that the documents were not forwarded on time".

On this basis, the learned Judge concluded that "the plaintiff has failed to prove that the defendant bank has made payments on the said Letter of Credit wrongfully". Moreover, relying on the case of *Indica Traders (Pvt) Ltd v Seoul Lanka Construction (Pvt) Ltd et al* [1994] 3 Sri LR 392, the learned Judge has concluded that "an irrevoceable Letter of Credit is an absolute undertaking by the bank to pay, and must pay according to the terms of the Letter of Credit, unless it has notice of clear fraud committed by the beneficiary. In the instant case, the plaintiff has failed to establish any fraud on the part of the beneficiary".

Submissions of Counsel at the Hearing of this Appeal

At the hearing of this appeal, learned President's Counsel for the Appellant argued that in terms of the Letter of credit, documents must be presented for negotiation within 16 days after shipment, and as this had not been complied with, the Respondent Bank was duty bound in terms of UCP 400 to reject the said documents. He further argued that in any event, there were serious discrepancies between the Letter of Credit and the Bill of Lading and the Respondent Bank could not have made payment on the Letter of Credit. Accordingly, the set-off of money allegedly due in respect of the said Letter of Credit from the Appellants accounts was wrongful and unlawful. Learned President's Counsel also stressed that the learned trial Judge has misinterpreted and misapplied the case of *Indica Traders (Pvt.) Ltd v Seoul Lanka Construction (Pvt.) Ltd, supra*.

Learned President's Counsel for the Respondent Bank submitted that it duly and properly paid the monies on the Letter of Credit as it was obliged as banker to do. The Respondent states that the Appellant was required to place funds in the bank with a letters of set off and indemnity as a condition for the bank to open the letter of credit and that the Respondent gave such letters of set off and indemnity, authority and indemnity *vide* documents A4a and A4b in the answer. Adverting to the decision of this Court in *Indica Traders (Pvt.) Ltd v Seoul Lanka Construction (Pvt.) Ltd, supra,* learned President's Counsel submitted that the learned trial Judge has correctly interpreted and applied the decision.

The main question that arises for decision in this appeal is whether the Respondent Bank had wrongfully made payments upon the said Letter of Credit and thereafter wrongfully set-off the amount paid on the said Letter of Credit from the funds in the Appellants RFC Account No. 9495285501. It is relevant to note that in the course of the testimony of the Appellant, he has admitted that he would not press the discrepancies listed in his letter addressed to the Respondent dated 13th October 1993 (P16) as items (1), (3) and (4), which left the Trial Judge as well as well as this Court to decide only on discrepancies (2) and (5), which related respectively to the discrepancy in describing the goods in the Letter of Credit and the question whether the presentation of the documents had been made to the Respondent Bank out of time.

Discrepancy in the Description of the Goods

With respect to the alleged discrepancy in the description of the goods shipped, the issue that arises is to what extent the principle of strict compliance may be applied in the circumstances of this case. It is noteworthy that documents relating to the underlying contract between the Appellant and the Malaysian supplier including the Proforma Invoice bearing No. 001/PRO/01/93 dated 08.06.1993 had not been put in evidence in this case. However, it appears from the Letter of Credit marked P1A and the contract of Marine Insurance marked P6 that the goods alleged to have been shipped to the Appellant was described as follows:-

Description of goods

MIXED HARDWOOD [100 PER CENT TUALANG] STANDARD AND BETTER GRADE,
2 INCHES X 4 INCHES TO 1 1/4 INCHES X 12 INCHES
C.I.F COLOMBO

However, in the Bill of Lading marked P7 the goods were described in the following manner:-

Description of goods

154 BDLS	MIXED HARDWOOD [100 PER CENT TUALANG] STANDARD AND BETTER GRADE, 2 INCHES X 4 INCHES TO 1 1/4 INCHES 12 INCHES C.I.F COLOMBO

Learned Presidents Counsel for the Appellant has contended forcefully that the absence of a multiplication mark (x) between "4 INCHES TO 1 1/4 INCHES" and "12 INCHES" in the bill of lading constitutes a material discrepancy which should have resulted in the documents being rejected by the Respondent Bank on the basis of non-conformity of documents. However, Learned Presidents Counsel for the Respondent has contended with great vigour that the absence of a multiplication mark (x) in the circumstances of this case does not give rise to a material discrepancy to justify the rejection of the goods.

It was admitted at the commencement of the trial that the Letter of Credit is governed by UCP 400. Article 15 of the UCP 400 states as follows:-

> "Article 15: Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit."

Admittedly, the description of the goods in the Letter of Credit marked P1a differs from the description of the goods in the Bill of Lading marked P7. The question is whether the absence of a multiplication mark (x) between 1 ¼ inches and 12 inches, and the fact that '12 inches' appears on the line below '2 inches x 4 inches to 1 ¼ inches' is sufficiently material to justify this Court applying the doctrine of strict compliance in the circumstances of this case.

The Negotiation of Documents

In any transaction involving a Letter of credit, the terms of the Letter of credit relating to the negotiation of documents become crucial. Before considering the terms of negotiation embodied in the Letter of credit marked P1A, it might be useful to refer to the following *dictum* of Lord Diplock in the decision of the House of Lords in *United City Merchants* v *Royal Bank of Canada* [1982] 2 WLR 1039:-

> "It is trite law that there are four autonomous though interconnected contractual relationships involved:-
>
> (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller;

(2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursements the stipulated documents, if they included a document of title such as a bill of lading, constitute a security available to the issuing bank;

(3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit;

(4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents."

The dispute between the Appellant and the Respondent arises from the contractual relationship which is adverted to by Lord Diplock in paragraph (2) of the above quoted *dictum* where the Appellant as the buyer has agreed to reimburse the Respondent as the issuing bank, for payment made under the credit against presentation of stipulated documents. The material stipulations in the Letter of credit marked P1A are noted below:-

"DOCUMENTS REQUIRED:-

1. MANUALLY SIGNED INVOICES QUADDUPLICATE - ORIGINAL INVOICE AND A COPY TO ACCOMPANY ORIGINAL SET OUT DOCUMENTS.
2. BENEFICIARIES DRAFTS AT SIGHT IN DUPLICATE DRAWN ON THE APPLICANTS.
3. FULL SET OF NOT LESS THAN TWO CLEAN ON-BOARD OCEAN BILLS OF LADING MARKED "FRIEGHT PAID" AND MADE OUT TO ORDER AND ENDORSED TO OUR ORDER, SHOWING NAME AND ADDRESS OF APPLICANT AS NOTIFYING PARTY. SHORT FORM BILLS OF LADING ARE NOT ACCEPTABLE.
4. TWO COPIES ON NON NEGOTIABLE BILLS OF LADING [ONE COPY TO ACCOMPANY ORIGINAL DOCUMENTS].
5. INSURANCE POLICIES OR CERTIFICATES IN DUPLICATE ENDORSED IN BLANK COVERTING MARINE INSTITUTE CARGO CLAUSES "A" [1.1.82], INSTITUTE STRIKE CLAUSES CARGO [1.1.82], INSTITUTE WAR CLAUSES CARGO [1.1.82] FOR CIF INVOICE VALUE PLUS TEN PER CENT. INSURANCE TO COVER FROM BENEFICIARY'S WAREHOUSE TO CONSIGNEE'S WAREHOUSE.

ADDITIONAL DOCUMENTS [as amended by P3];

1. CERTIFICATE FROM THE MALAYSIAN TIMBER INDUSTRY BOARD CERTIFYING THAT THE SHIPMENT IS IN ACCORDANCE WITH PRO FORMA NO.001/PRO/01/93 OF 08/06/1993."

Doctrine of Strict Compliance

The doctrine of strict compliance requires that tendered documents must strictly comply with the terms of the credit. Sealy and Hooley, *Commercial Law - Text, Cases and Materials*, (3rd Edition, London: LexisNexis Butterworths, 2003) at page 827-828 explains that the doctrine of strict compliance may be justified on the following grounds:-

> "First, the banks involved in checking the documents can only be expected to be familiar with banking practices and not the commercial practices and terminology of the parties to the underlying contract which may be reflected in terms of the credit itself. The bank cannot take the responsibility to decide which documents fulfill the underlying commercial purpose of the parties and which do not. Secondly, the banks act (at least in part) as agents of the applicant and must remain within the terms of their principal's mandate to be sure of reimbursement. In summary, for the protection of the issuing (or confirming) bank and the applicant, the bank is only obliged to pay against strictly conforming documents, and it is only entitled to reimbursement if the terms of the credit have been strictly complied with."

In the case of Viscount Sumner in *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Law Rep 49, the credit called for payment against certain documents including:-

> "… a certificate of quality to be issued by experts".

The seller tendered a certificate of quality issued by a single expert. The seller was paid. When the issuing bank tendered the certificate to the buyers, they refused to pay on grounds of non-compliance with the credit. The House of Lords ruled in favour of the buyers stating, at page 52 that:-

> "There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk."

Similarly, in the case of *Moralice (London) Ltd v ED and F Man* [1954] 2 Lloyd's Law Rep 526, the seller tendered documents to the bank showing shipment of 499.7 metric tons of sugar. The credit called for documents showing shipment of 500 metric tons. The Court held that the bank was entitled to reject the documents. Similarly, in the case of *Beyene v Irving Trust Co Ltd* (1985) 762 Fed Rep 2d 4, United States Court of Appeal for the Second Circuit held the bank entitled to reject a bill of lading which described the notify party as 'Mohammed Soran' when the credit required 'Mohammed Sofan'. The Court Observed that:-

> "First, this is not a case where the name intended is unmistakably clear despite what is obviously a typographical error, as might be the case if, for example, "Smith" were misspelled "Smithh." Nor have appellants claimed that in the Middle East "Soran" would obviously be recognized as an inadvertent misspelling of the surname "Sofan." Second, "Sofan" was not a

> name that was inconsequential to the document, for Sofan was the person to whom the shipper was to give notice of the arrival of the goods, and the misspelling of his name could well have resulted in his non-receipt of the goods and his justifiable refusal to reimburse Irving for the credit."

The wording of the credit is of paramount importance. Even an apparently trivial discrepancy will justify rejection of the documents if the credit is specific as to that requirement. Hence, in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236, a confirmed irrevocable credit stipulated that all documents presented to the bank should bear the letter of credit number and the buyer's name. The seller presented documents to the advising bank and claimed payment. The advising bank refused to pay on the basis that one of the documents did not carry the letter of credit number and the buyer's name. The Court of Appeal refused to inquire as to the reason for this requirement, but held that the Court cannot ignore it. In the course of his judgment at page 240, Lloyd J observed:-

> "I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires. I would not, I think, help to attempt to define the sort of discrepancy which can properly be regarded as trivial. But one might take, by way of example, *Bankers Trust Co v state Bank of India* [1991] 2 Lloyd's Rep 443, where one of the documents gave the buyer's telex number as 931310 instead of 981310. The discrepancy in the present case is not of that order."

However, the decision of the Court of Appeal was later reversed by the House of Lords on some other procedural ground, and after protracted litigation, the question of the discrepancy along with the issue as to the mode of communication of a rejection of documents, came up before Tucker J. in the Commercial Court, and on appeal from the decision of that Court in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36, the Court Appeal arrived at the same conclusion with respect to the discrepancy, with Sir Christopher Staughton making the following observation at page 38 of his judgment:-

> "We would add that the discrepancies in the documents do not appear to be of any great significance. But that is neither here nor there. It is hornbook law for bankers that the documents must appear on their face to be precisely in accordance with the terms of the credit."

Of course, it is acknowledged that, as argued by the Respondent Bank, courts are willing to overlook a trivial defect in the tendered documents when there is a patent typographical error, or other obvious slip or omission. In *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35 the Supreme Court of Hong Kong held that there had been a patent typographical error, and no discrepancy, when a document tendered to the issuing bank by the beneficiary gave the name of the applicant for the credit as 'Cheergoal Industrial Limited', when it should have been 'Cheergoal Industries Limited'. It is clear from this decision that the requirement of strict compliance is "not equivalent to a test of exact literal compliance in all circumstances and as regards all documents" (*Kredietbank Antwerp v Midland Bank plc* [1999] 1 All ER (Comm) 801) and the strict compliance rule cannot be applied in a mechanical or robotic way. How far a court can move from the strict compliance rule will depend on the precise

wording of the credit, whether a discrepancy is patently a typographical error or other obvious slip or omission and the consequentiality of the relevant discrepancy, such as, whether the discrepancy is inconsequential in nature and relates to a less important aspect of the document, eg: the buyers telex number, or whether the discrepancy relates to the goods themselves.

Prof. Lakshman Marasinghe, considers in his work *Principles of International Trade Law* (3rd Edition, 2013) at page 527 as to where the line can be drawn between a trivial discrepancy and one which is substantial, and makes the following pertinent observation:-

> "Whether a discrepancy is trivial or substantial is indeed a question of fact. There is an abundance of judicial pronouncements distinguishing those two extremes. A thin line that runs through those decisions is that where the discrepancy found in the documents *were to affect core elements of the contract* for which the credit was established, then such discrepancy is not trivial but substantial". (*emphasis added*)

In the present circumstances, the discrepancy relates to the description of the goods. Thus the discrepancy is not inconsequential. Further, it is not patently obvious that the error is a mere typographical error or obvious omission. The Appellant has argued that the error in description would have permitted the supply of tiny pieces of wood of even 2 inches x 1 ¼ inches. I do not necessarily agree with this interpretation. However, it is common knowledge that any timber would consist of 3 dimensions and is generally measured by reference to length, width and height, as it is done in this case. Thus, the description of the goods in the bill of lading could mean timber that is 2 inches x 4 inches x 1 ¼ inches or timber that is 2 inches x 4 inches x 1 ¼ inches to 12 inches, wherein a range is possible. The description is clearly ambiguous, and I observe that there is sufficient doubt in the description of goods found in the bill of lading which is of a substantial and not trivial nature which affects a core element of the contract.

I therefore hold that the omission of 'x' (multiplication sign) in the bill of lading and "12 inches" being relegated to the next line gives rise to material discrepancies, making it incumbent on the issuing bank to reject the documents.

Delay in Presentation of Documents for Negotiation

In terms of the Letter of Credit (P1A), documents "must be presented for negotiation within 16 days after shipment". This is in accordance with Articles 46 and 48 a. of UCP 400, which are quoted below:-

> "Article 46:-
>
> a. All credits must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation.
> b. Except as provided in Article 48(a), documents must be presented on or before such expiry date.
> c. If an issuing bank states that the credit is to be available 'for one month', 'for six months' or the like, but does not specify the date from which the time is to run, the date of issuance of the credit by the issuing bank will be deemed to be the first day from which

such time is to run. Banks should discourage indication of the expiry date of the credit in this manner.

Article 48:-

a. If the expiry date of the credit and/or the last day of the period of time after the date of issuance of the transport document(s) for presentation of documents stipulated by the credit or applicable by virtue of Article 47 falls on a day on which the bank to which presentation has to be made is closed for reasons other than those referred to in article 19, the stipulated expiry date and/or the last day of the period of time after the issuance of the transport document(s) for presentation of documents, as the case may be, shall be deemed to be extended to the first following business day on which such bank is open."

Thus in terms of the UCP 400, the bank is duty bound to reject documents which have been presented for negotiation after the date specified in the letter of credit. In this regard, It is pertinent to note the wording of the Letter of Credit, which is quoted below:-

"SHIPMENT BY STEAMER FROM: MALAYSIA OR SINGAPORE TO COLOMBO, SRI LANKA.
SHIPMENT NOT LATER THAN : 1993 AUGUST 25
DATE AND PLACE OF EXPIRY : 1993, September 10 AT COUNTRY OF BENEFICIARY
DOCUMENTS MUST BE PRESENTED FOR NEGOTIATION WITHIN 16 DAYS AFTER SHIPMENT.
PARTIAL SHIPMENT : ALLOWED
TRANSHIPMENT : NOT ALLOWED
ALL BANK CHARGES OUTSIDE SRI LANKA FOR ACCOUNT OF OPENERS.
IMPORT LICENCE NO : SIL
B.T.N. NO. 4407.21.09

SHIPMENT PRIOR TO THE DATE OF THE LETTER OF CREDIT IS PROHIBITED.
ALL DOCUMENTS SHOULD BE DATED ON OR AFTER DATE OF LETTER OF CREDIT.
NO MAIL CONFIRMATION WILL FOLLOW.
CREDIT AVAILABLE AGAINST PRESENTATION OF DOCUMENTS DETAILED HEREIN."

It is noteworthy that the Letter of credit expressly stipulated that the "documents must be presented for negotiation within 16 days after shipment". The Appellant has not been able to elicit clear evidence as to the date of shipment, the dates on which the shipping documents were presented for negotiation to the Respondent bank or the date on which payment was made on the letter of credit. This position is aggravated by the fact that no attempt was made by the Respondent bank to lead any evidence at the trial, except for marking some documents in cross-examination of the Appellant's witness, it appears from a stamp on the Bill of Lading marked P7 that the goods were shipped on board on 15th of August 1993. However, it would appear from the certificate issued by the Malaysian Timber Industry Board that the timber had been inspected while on board on 21st August 1993. There is no evidence, documentary or otherwise, as to the actual date of shipment. But I note that in terms of the Letter of Credit marked P1A, shipment has to be not later than 25th August 1993. Since it is also stipulated in the letter of credit that the document must be presented for negotiation within 16 days after shipment, the final date for negotiation of documents would be 10th September 1993 or earlier

depending on the actual date of shipment. In its letter dated 24th September 1993 (P14) the Respondent has stated that "payment under this letter of credit has been effected to the negotiating bank in accordance with the reimbursement instructions, in due course". While it is clear from this letter that by 24th September 1993, payment under the letter of credit had been made, the actual date on which the Respondent in fact effected payment on the letter of credit and set-off the amount due on the Letter of credit from the Appellant's Resident Foreign Currency Account is shrouded in mystery. It is left to Court to speculate as to whether the negotiation of documents took place before or after 10th September 1993, and whether the negotiation of documents took place before the date specified in the letter of credit for negotiation or thereafter.

The Appellant has alleged that the presentation of documents to the Respondent Bank took place after the expiry of the stipulated period. No clear evidence exists with respect to the actual date of presentation of the documents at the issuing bank for negotiation. The Respondent Bank was very vague in responding to the allegation in the Appellant's letter dated 13th October 1993 that the documents had not been presented for negotiation in time, and in its letter dated 15th October 1993 at paragraph 5 has stated as follows:-

> "We deny that the documents had not been presented in accordance with the Letter of Credit. The date of presentation is not evident in the face of the document".

However, at paragraph 15 of the Respondent's written submissions in the Commercial High Court, the Respondent states that the bank has produced documents marked වි2 and වි3 and the date stamp on the said documents show clearly that the documents were presented within time. The documents marked as වි2 and වි3 are respectively the letters of set-off and indemnity. These documents have no relevance to the Appellant's allegation that the documents were not presented for negotiation within the time limit stipulated in the Letter of credit. Further, the shipping documents, namely, the Bill of lading, commercial invoice, marine insurance and certification by the Malaysian Timber Industry Board, copies of which were provided to the Appellant by the Respondent Bank on 15th September 1993, faintly bear a stamp with the words "Commercial Bank of Ceylon Ltd, Colombo-1". However, there is no date stamp on these documents.

It is trite as set out in Section 101 of the Evidence Ordinance No 14 of 1895, as amended that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Accordingly, the General Rule is that when a person is bound to prove the existence of any fact, the burden of proof lies on that person. E.R.S.R. Coomaraswamy, in his work *The Law of Evidence* Volume II, Book 01, at page 250, commenting on Section 101 of the Evidence Ordinance states that:-

> "A party asks for judgment on the basis of a legal right or liability. The substantive law lays down the requirements of that right or liability. He must prove the existence of all facts which bring him within the substantive law of the subject. The burden of proof lies on him. Thus, the legal burden of proving all acts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings."

In this context the question arises as to whether the burden of proof which would otherwise rest on the Appellant as the plaintiff in the action, would in any way be reduced due to his ignorance of what transpired within the four walls of the Respondent Bank when the documents were presented for payment.

Section 106 of the Evidence Ordinance enacts that:-

> "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Explaining this provision, E.R.S.R. Coomaraswamy, in his work *The Law of Evidence* Volume II, Book 01 at page 262 observes as follows:-

> "The rule stated in section 106 is regarded in English Law as one of two exceptions to the rule that the burden of proof rests on the party substantially asserting the affirmative, the other exception being, the existence of a rebuttable presumption of law, or a *prima facie* case in his favour. Best says in reference to this rule:
>
> > "… the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant."
>
> He adds that the reason for the rule is that such party could at once put an end to litigation by producing that evidence, while requiring his adversary to do so would, if not amounting to injustice, at least be productive of expense and delay".

As Coomaraswamy observes at pages 262 to 263, in this context:-

> "The true object to be achieved by a court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attached to it. The story can then be subjected in all its particulars to cross-examination."

Section 106 came up for consideration in *Sanitary Inspector, Mirigama v Nadar* 55 NLR 302, and Nagalingam A.C.J. made the following pertinent observation at page 305:-

> "When the section refers to a fact as being especially within the knowledge of a party, the term "especially" there means "almost exclusively" if not "altogether exclusively" within the knowledge of a party, and not that the fact is one within the knowledge of the one party as well as of the other."

It is common knowledge that when documents are presented at the desk of the issuing bank for negotiation, the said bank will, after examining the documents and if satisfied the documents are in order, make prompt payment on the letter of credit. When making such payment, the records available in the bank, whether electronic or otherwise, will show the date of presentation and the date

of payment in terms of the letter of credit, which invariably would be the same date. In the instant case, in view of the fact that the Appellant has issued a letter of set-off and indemnity, the bank would have made one or more debit entry in the Appellant's Singapore Dollar RFC account bearing No. 9495285501, as well as in his current and other accounts. These records are within the exclusive knowledge and control of the issuing bank which, in this instance, is the Respondent to this appeal. In those circumstances, it is clear that the burden of placing evidence in the Commercial High Court in regard to the date of presentation and payment, which is especially within the knowledge of the Respondent Bank, rested on the said bank.

It is evident that the burden of proving facts essential to the establishment of his claims normally vests upon the plaintiff in a civil suit. However, I agree with the Appellant that the exact details regarding the date of shipment, the date on which the documents were presented for negotiation and the date of payment of letter of credit, are facts that are especially within the knowledge of the Respondent Bank, and it is significant that the Respondent Bank did not seek to produce any evidence in regard to these matters. In these circumstances, I am compelled to draw a presumption adverse to the Respondent Bank, and hold that the presentation of the documents for negotiation to the Respondent Bank took place after 10th September 1993, and was therefore outside the period stipulated in the letter of credit. In my opinion the Respondent Bank should have rejected the documents, and therefore, in my opinion, the setting-off of the amount paid on the letter of credit from the Appellants Resident Foreign Currency Account was clearly wrongful.

Conclusions

For all these reasons, I hold that the Commercial High Court has seriously erred in its impugned judgment dated 3rd October 2003, which is hereby set aside. I specifically hold that the Defendant-Respondent had no right or reason to set off and indemnify any money under the letters of set off and indemnity dated 10th June 1993 marked V2 and V3.

I accordingly enter Judgment in favour of the Plaintiff-Appellant as prayed for in prayers (a), (f) and (g) of the plaint dated 29th March 1994, so however that the scope of the judgment would be restricted to the amount of money that was set off and indemnified under the letters of set off and indemnity marked V2 and V3 from and out of the Resident Foreign Currency Account bearing No. 9495285501 held by the Appellant in the Respondent Bank, with interest due up to the time the said amount of money is credited to the said Resident Foreign Currency Account, or is released to the Appellant.

I also award the Plaintiff-Appellant costs of this appeal in a sum of Rs. 75,000.00 payable by the Defendant-Respondent.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

ROHINI MARASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT