

LEX/BDHC/0094/2017

**Equivalent Citation:** 2017 BLD 646, 70 DLR (2018) 104

**IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)**

First Appeal No. 279 of 2016

Decided On: 07.06.2017

**Jeans Care Limited**  
**Vs.**  
**Ginni International Limited and Ors.**

**Hon'ble Judges:**

S.M. Emdadul Hoque and Kashefa Hussain, JJ.

**Counsels:**

For Appellant/Petitioner/Plaintiff: Md. Imam Hasan, Advocate

For Respondents/Defendant: Raghib Rouf Chowdhury, Advocate

**Subject: Corporate Law**

**Subject: Maritime and Shipping Law**

**Catch Words**

**Mentioned IN**

**Acts/Rules/Orders:**

Code of Civil Procedure, 1908 (CPC) - Order VII Rule 11; Code of Civil Procedure, 1908 (CPC) - Order XIV Rule 2; Code of Civil Procedure, 1908 (CPC) - Section 151; Constitution Of The People's Republic Of Bangladesh - Article 11; Specific Relief Act, 1877 - Section 42

**Citing Reference:**

Discussed

1

Mentioned

2

Relied On

2

#### **Case Note:**

**Contract - Maintainability - Appeal was directed against judgment and decree passed by joint district judge dismissing suit - Whether there was any merit in appeal filed by Appellant - Held, it was evident from records that dispute which gave rise to suit arose against non-payment of L/C - It was settled principle that L/C being independent contract between two independent financial institutions payment against amount of L/C from one bank to another was mandatory and could not be evaded or denied whatever dispute may arise between parties - In event of dispute between respective parties, be it buyer and seller, importer and exporter or whatever may be status of commercial etc. relationship between parties, any party or parties aggrieved may seek relief for compensation, damages etc. before appropriate forum - But payment against L/C being separate and independent contract and transaction, therefore such payment was mandatory and could not be avoided under any circumstances - Thus, court observed that trial court correctly dismissed suit in its inception - Fate of suit with regard to payment of L/C was inevitable since suit was not maintainable in limine, being bound by decision of Apex court - Therefore, court did not find any merit in appeal and appeal was liable to be dismissed - Appeal dismissed. [13],[14],[21],[22]**

### **JUDGMENT**

**Kashefa Hussain, J.**

1. This appeal is directed against judgment and decree dated 21.09.2016 (decree signed on 27.09.2016) passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No. 589 of 2016 dismissing the suit.

2. Facts stated in the plaint inter alia is that the plaintiff is a private limited company incorporated under the Companies Act, represented by its Managing Director and performing its business of manufacturing garments and supplying the same to foreign buyers with goodwill and reputation since long time located at 348/B Tejgaon Industrial Area, Dhaka, Bangladesh. The defendant No. 1 is the Back to Back goods supplier/exporter, the Defendant No. 2 is the negotiating bank of defendant No. 1 and the defendant No. 3 is the Back to Back Letter of Credit opening Bank of the plaintiff. IDS Fashions Hong Kong Ltd. RM 1215-1216, 12/F Houston Center, 63 Mody Road, T.S.P., East Kowloon, Hong Kong executed sales contracts with the plaintiff on 03.05.2016 for import of 347990 pes. Men's Pants from Bangladesh. As per nomination of the buyer the plaintiff opened Back to Back L/C No. 155916060047 dated 10.05.2016 for import of 41666 yard Fabrics valued of US\$ 93,748/50 in favour of defendant No. 1. As per L/C and Proforma Invoice the

defendant No. 1 was bound to deliver the 24640 yard fabrics within 24.5.2016 and 17026 yard fabrics within 31.05.2016 at Benapole, Bangladesh. But the defendant No. 1 delivered 19079.18 yards fabrics on 11.06.2016 and 11977.73 yards fabrics on 13.06.2016 and balance 10614.61 yards fabrics on 23.06.2016 at Benapole, Bangladesh. Due to late shipment of the fabrics from the part of the defendant No. 1, the plaintiff had failed to manufacture the garments items in time and also failed to ship the ready made garments as per sales contracts/export L/C and thereby caused huge loss. Due to negligence of the defendant No. 1 the plaintiff shipped the garment items by air at the cost of the plaintiff and due to late shipment the purchaser would deduct 2% upon export value (as per terms of export L/C or Sales Contract). The plaintiff made several representations corresponding through e-mail with the defendant No. 1 requesting to solve the issue amicably, but though the defendant No. 1 assured to solve the matter, yet inspite of repeated requests and reminders the defendant No. 1 did not solve the matter till date. Thereafter, the plaintiff sent a Debit Note to the defendant No. 1 requesting to pay US\$ 82,507/37.

3. Since the defendant No. 1 did not come forward to solve the matter within stipulated time thus the plaintiff have not accepted the shipping documents and the plaintiff by letter dated 31.08.2016 requested the defendant No. 3 to stop the acceptance/payment of the Back to Back L/C amount till amicable settlement of the matter with the defendant No. 1. The defendant No. 1 without solving the dispute creates pressure upon the defendant No. 3 through the defendant No. 2 for making full payment against Back to Back L/C. Due to late shipment of fabrics the plaintiff Company manufactured the garments items by engaging another Factory upon executing a sub contract which caused the plaintiff an additional cost of US\$ 8,237/42 and due to late shipment of the fabrics the plaintiff suffered loss to the amount of US \$82,507/37 (@BDT 65,18,082/23). Due to the violation of the terms of the Proforma Invoice/Letter of Credit and negligence of defendant No. 1 the plaintiff company has sustained loss of huge amount and the same was duly informed to the defendant No. 1.

4. The plaint also stated that the defendant No. 1 is under legal obligation to fulfil terms and conditions of the contract and as a supplier the defendant No. 1 is under legal obligation to ensure the consignment within time. It is also stated in the plaint that the defendant No. 1 caused financial loss and damages of the goodwill of the plaintiff in the international market and that the defendant No. 1 in connivance acted in extremely mala fide manner. The plaintiff company informed the above facts and circumstances to the defendant No. 3 Bank on 31.08.2016 and asked the Bank not to accept the documents and also asked for stopping the payment under the said Letter of Credit to the defendant No. 1 unless and until the dispute between the plaintiff company and the Defendant No. 1 is settled.

5. The matter was taken up by the trial court and was disposed of at a preliminary stage on the ground of maintainability and the Title Suit was dismissed.

6. Being aggrieved by the judgment and decree dated 21.09.2016 passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No. 589 of 2016 dismissing the suit, the plaintiff as

appellant preferred the instant appeal.

7. Learned Advocate Mr. Imam Hasan appeared on behalf of the appellant while the respondents were represented by learned Advocate Mr. Ragib Rouf Chowdhury appeared on behalf of the respondents.

8. Learned Advocate for the appellant submits that the trial court made a serious error of law in dismissing the suit in limine without framing issues on the ground of maintainability. He argues that the trial court upon misinterpretation of the law failed to appreciate that even on the point of maintainability issue on point of law need to be framed under order 14 Rule 2 of the Code of Civil Procedure in disposing the matter. He tries to draw our attention to the fact that in this case the Title Suit was disposed of without even issuing summons, filing of written statement by defendant etc. and which he argues is beyond the scope of the relevant provisions of law including that of the Code of Civil Procedure regarding the matter of L/C. He submits that the issue in this case arises out of payment against back to back L/C and contends that a back to back L.C. is different from a master L/C and further persuades that back to back L/C being different from a master L/C therefore the judgments of our Apex court and this court pertaining to mandatory payment of the L/C amount do not apply in this particular case.

9. The learned Advocate for the appellant further tries to focus upon some factual aspects regarding the late shipment and arrival of the goods and persuades that due to late shipment and arrival of the goods, the appellant suffered huge and irreparable loss in terms of money. Upon query from the bench the learned Advocate for the appellant submits that the tenure of the L.C. was amended and time was extended from 21.02.2016 to 25.06.2016 for facilitating the process for the goods to cross the border, However he mainly thrusts his argument on the point of the matter being erroneously disposed of at preliminary stage without issuing summons or by filing of the written statement and without framing issues etc. He asserts that in this case under the facts and circumstances the trial court cannot invoke its inherent jurisdiction to dispose of the suit under section 151 of the Code of Civil Procedure without framing of issues. In support of his submissions he cited some decisions of our Apex court in the case of Fazlur Rahman Vs. Rajab Ali and others reported in 30 DLR (SC)(1978) 30 and in the case of Aminur Rahman Khan Vs. Trade Aris Insurance reported in 7 BLC (2002) 330. The learned Advocate for the appellant tries to draws analogy from those cases, He concludes his submission upon assertion that the appeal bears merit and ought to be allowed.

10. On the other hand learned Advocate for the respondent opens his submissions upon assertion that the suit was correctly dismissed since subject to the facts and circumstances the trial court may invoke its inherent power provided by statute under section 151 of the Code of Civil Procedure. He takes us to the judgment of the Trial Court wherefrom he points out that the trial court was absolutely correct in its finding that the plaintiff failed to make any prayer regarding the legality or validity of the L/C. He further draws our attention to the finding of the Trial Court that the plaintiff if at all aggrieved could have filed a money suit for compensation and damages upon his

claim of losses in business in terms of money but the instant Suit is not maintainable in its present form at all. He also asserts that the trial court correctly came upon the findings that L/C is an independent contract and is governed by the rules of international financial institutions. In this context he refers to several decisions of our Apex Court including this court on the point of payment against L/C. He particularly cited the decision of our Apex court in the case of Bangladesh Chemical Industries Corporation (BCIC) Vs. M/S. Courageous Shipping and Trading S.A. and others reported in 23 BLT (AD) (2015) 100 wherein our Apex Court held that:

"A Letter of credit under international trade scheme is independent of the contract between the parties. The issuing bank is bound to pay the amount guaranteed in the letter of credit if from the papers produced the same appears to be correct. It has no relation to the short supply or sub-standard of the goods for which the buyer can seek remedy in appropriate forum. It is a settled principle of law that a letter of credit cannot be attached before judgment."

11. He further draws our attention to the 23 BLT (AD) decision wherein our Apex court had further enunciated the principle that the payment against L/C being an independent contract between the bank, consequently it has no relation to the short supplies or substandard of goods, whatever may be the case and for which the petitioner may seek remedy at the appropriate forum. The learned Advocate for the respondent submits that the same principle shall obviously apply in the case before us. He next draws our attention to the prayer portion in the plaint wherefrom he asserts that the suit is barred under section 42 of the Specific Relief Act. For our purpose he takes us to Section 42 of the Specific Relief Act and drawing our attention to the prayer portion of the plaint asserts that the prayer portion itself reveal that the type of relief prayed for is not maintainable and is barred under the provision of Section 42 of the Specific Relief Act. He submits that Section 42 of the Specific Relief Act contemplates a declaration of a right of any person entitled to any legal character. He points out that in this case, conversely, the plaintiff in the prayer portion did not actively pray for any legal right of his own rather he sought for a declaration that the defendant is not entitled to get US\$ 82,507/37 from Back to Back L/C No. 175916060047 dated 10.05.2016 till disposal of the dispute between the plaintiff and defendant No. 1. He further persuades that Section 42 of the Specific Relief Act does not contemplate any declaration of or disentitlement of any other person's right. He argues that therefore the suit is not maintainable in limine and was correctly dismissed by the court on all points. Controverting the submissions of the learned Advocate for the appellant on the point of framing issue under order 14 Rule 2 and regarding dismissal of the suit under section 151 of the Code of Civil Procedure, he argues that the court is statutorily empowered to invoke its power under Section 151 of the Code of Civil Procedure and dismissal of a suit on the threshold under Section 151 of the Code of Civil Procedure is allowed and sustainable subject to the particular facts and circumstances of the case.

12. He continues his arguments upon contention that the trial court correctly disposed of the matter at a preliminary stage to avoid abuse of the process of the court since the primary issue here is pertaining to payment against L/C is a matter decided and settled by our Apex Court including decisions of this Division and which decision and principle all sub-ordinate courts are constitutionally bound to follow under article 11 of the constitution. In support of his submissions

the learned Advocate for the respondent cited some decisions of our Apex court and this court being the decisions in the case of *Burmah Eastern Ltd. Vs. Burmah Eastern Employees Union* and others reported in 18 DLR(AD) (1966) 709 and in the case of *Salahuddin Khan and others Vs. Md. Abdul Hai Bahar and others* reported in 63 DLR (AD)(2011) 138. In the light of his submissions and drawing support from the decisions cited by him, he concludes that the appeal bears no merit and ought to be dismissed.

13. We have heard the learned Advocates from both sides perused the judgment of the Trial court, the cases before us and all other materials on records. It is evident from the records that the dispute which gave rise to the suit arose against non payment of L/C. There is no gainsaying the fact that with regard to payment of the amount of L/C it is by now a settled principle of our Apex Court including this court through several decisions some of which have been cited by the learned Advocate for the respondents including that in the 23 BLT case. It is a settled principle that L/C being an independent contract between two independent financial institutions payment against the amount of L/C from one bank to another is mandatory and cannot be evaded or denied whatever dispute may arise between the parties. In the event of dispute between respective parties, be it buyer and seller, importer and exporter or whatever may be the status of the commercial etc. relationship between the parties, any party or parties aggrieved may seek relief for compensation, damages etc. before the appropriate forum. But payment against an L/C being a separate and independent contract and transaction, therefore such payment is mandatory and cannot be avoided under any circumstances. The cardinal principle propounded in the 23 BLT case is produced hereunder:

"A Letter of credit under international trade scheme is independent of the contract between the parties. The issuing bank is bound to pay the amount guaranteed in the letter of credit if from the papers produced the same appears to be correct. It has no relation to the short supply or substandard of the goods for which the buyer can seek remedy in appropriate forum. It is a settled principle of law that a letter of credit cannot be attached before judgment."

14. Therefore in respectful agreement with the decision of our Apex Court which is binding upon us, we are of the considered view that the trial court correctly dismissed the suit in its inception. The fate of the suit with regard to the payment of L/C is inevitable since the suit is not maintainable in limine, being bound by the decision of our Apex court.

15. Regarding payment of amount against L/C, the learned Advocate for the appellant had tried to impress upon us that without framing issue and in this particular case without attracting the provisions of Order 14 Rule 2 of the Code of Civil Procedure, the Trial Court could not dismiss the suit in its inception. Regrettably the submission of the learned Advocate for the appellant is not acceptable. Since the cause of action in the suit arose out of non payment of amount against L/C and as mentioned elsewhere, in this judgment the principle propounded by our Apex Court is that L/C being an independent contract between banks, the concerned parties are therefore bound to pay, therefore in our considered view the trial court correctly dismissed the suit in limine since the fate of the suit was inevitable from its inception.



16. We have also taken into consideration Section 42 of the Specific Relief Act and upon perusal of which it is clear that Section 42 of the Specific Relief Act does not contemplate any negative declaration or curtailment or disentitlement of any person or person's rights. The language of Section 42 only contemplates a positive declaration of the rights of any person to any legal character and to whatever right he may be entitled to. From our perusal of the prayer portion we find that the prayer itself divulges that the suit is not maintainable under section 42 of the Specific Relief Act. Section 42 of the Specific Relief Act disallows such a negative, and covert prayer. We have also perused the decision laid down before us by the learned Advocates from both sides. In the case of *Burmah Eastern Ltd. Vs. Burmah Eastern Employees Union and others* reported in 18 DLR (1966) 709 this division held principle that:

"In a suit under Section 42 of the Specific Relief Act plaintiff can be thrown out in limine, if not under Order 7 Rule 11, Code of Civil Procedure, then under the courts inherent power."

17. The cited 18 DLR (1966) 709 decision also held that:

"a still-born suit should be properly buried, at its inception, so that no further time is consumed on a fruitless litigation."

18. We are in respectful agreement with the principle laid out in the 18 DLR case. Relying upon the same principle, from the facts and circumstances in this case we are of the considered opinion that the suit if it was allowed to proceed further, would have been a fruitless litigation and abuse of the process of the court only since the fate of the suit was inevitable from its birth. In the case of *Salahuddin Khan and others Vs. Md. Abdul Hai Bahar and others* reported in 63 DLR (AD) (2011) 138 our Apex Court propounded the principle that:

"Provisions of rule 11 are not exhaustive in the matter of rejection of plaintiff and in exceptional situation a plaintiff can be rejected under section 151 of the Code even if it does not come within the mischief of the rule."

19. Learned Advocate for the Appellant had made a submission to the effect that a "Back to Back L/C" and "Master L/C" is distinguishable from each other and the two types of L/Cs stand on a different footing. He tried to contend that in the case before us, the L/C concerned is a "Back to Back L/C" and not a "Master L/C" and in pursuance argued that payment against a "Back to Back" L/C from one bank to another is not mandatory. He however could not cite any decisions before us wherein the genres or types of L/Cs, be it Master L/C or Back to Back L/C against which mandatory payment is required has been distinguished or discussed.

20. Therefore, in our considered view, this submission of the Learned Advocate for the appellant is wrong, given that nowhere in the decision of our Apex Court has any distinction been made as to the type or genre of L/C or L/Cs against which payment must be made. In pursuance, our considered finding is that payment to the bank or banks against all L/Cs are mandatory, be it a "Master L/C" or a "Back to Back L/C" whatsoever and the issue does not require further discussion or consideration.

21. Therefore, under the facts and circumstances and taking into consideration the submissions of the learned Advocates and fortified by the decisions cited before us, we do not find any merit in this appeal and the appeal is liable to be dismissed.

22. In the result, the appeal is dismissed and the judgment and decree dated 21.09.2016 passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No. 589 of 2016 is affirmed.

23. The order of injunction granted earlier by this court is hereby recalled.

24. Send down the lower court records at once.

25. Communicate this judgment and order at once.

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