

১২/৭/৩৬
১২/৭/৩৬



০৭/৮/৯২ ২৮/৮/৯২ ২৮/৮/৯২ ২০/৭/৯২ - ২৬/৭/৯২

IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION, DHAKA.

(CIVIL APPELLATE JURISDICTION)

Dated the 18th February, 2002.

Present:

Mr. Justice A.B.M. Khairul Haque.

and

Mr. Justice Khondker Musa Khaled.

Appeal From Original Decree No. 202 of 1993.

with

Appeal From Original Decree No. 204 of 1993.

Appeal From Original Decree No. 202 of 1993.

Appeal preferred against the Judgment and decree dated 24.5.1993 and 22.6.1993 respectively passed by Subordinate Judge and Commercial Court-II, Dhaka in Money Suit No. 108 of 1990.

And in the matter of:

National Bank Limited, Appellant.

-Versus-

Habib Bank Limited, Respondent.

Appeal From Original Decree No. 204 of 1993.

Appeal preferred against the Judgment and decree dated 31.5.93 and 5.8.93 respectively passed by Subordinate Judge, and Commercial Court- I, Dhaka in Title Suit No. 56 of 1987.

And in the matter of:

National Bank Limited, Appellant.

-Versus-

Mr. Salauddin and others, Respondents.



- 2 -

Dr.M.Zahir,Senior Advocate with

Mr.M.Hassan,Advocate

Mr.A.B.M.Mizanur Rahman,Advocate,. For the Appellant.

Syed Ishtiaq Ahmed,Senior Advocate with

Syed Refat Ahmed,.

Ms.Hihad Kabir,Advocates,. . .For the Respondent.

(In First Appeal No.202 of 1993)

Dr.M.Zahir,Senior Advocate with

Mr.M.Hassan

Mr.A.B.M.Mizanur Rahman,Advocates,.For the Appellant.

Dr.Rafiqur Rahman,Senior Advocate with

Mr.Sirajur Rahman,

Mr.Emad Uddin Chowdhury,Advocates,. . . .For the Respondent No.1

Mr.Manzur-ur-Rahim,Senior Advocate with

Mr.H.M.Mushfiqur Rahman,

Mrs.Afreen Mohiuddin,Advocates,. For the Respondent No.3

No one appear, For the Respondent Nos.2,4-6.

(In First Appeal No.204 of 1993)

Heard on:The 5th & 19th January,2002.

the 5th,6th ~~February~~ & 16th February,2002.

Judgment on : The 18th February,2002.

Conted.....P/3

1207



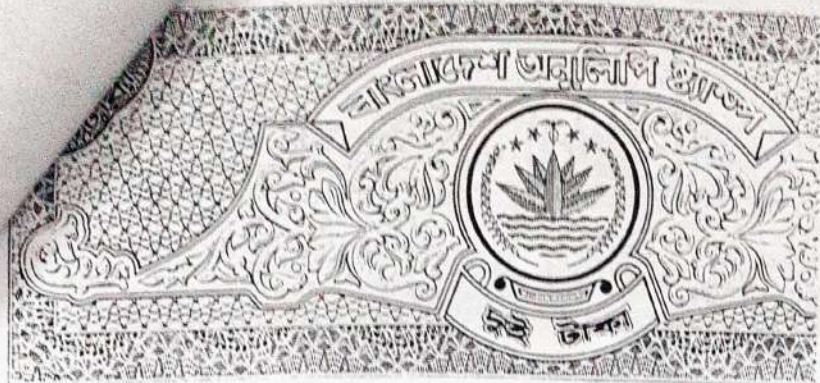
- 3 -

A.B.M.Khairul Haque, J:

67 The First Appeal No.202 of 1993 and First Appeal No.204 of 1993 are taken up together for hearing because both the appeals arose from the same transaction although there are two separate judgments First Appeal No.202 of 1993 arose out of Money Suit No.65 of 1989 filed by Habib Bank Ltd.Deira,Dubai Branch,United Arab Amirat,against National Bank Ltd,Head Office,Dilkusha Commercial Area,Dhaka, claiming US\$ 3.58,577 equivalent to Tk.1,18,112.15¹⁵ paisa in the First Commercial Court,Dhaka.~~This suit was transferred in the Second Commercial Court,Dhaka.~~ This suit was transferred in the Second Commercial Court,by order of the District Judge on 10.7.1990 and was re-numbered as Money Suit No.108 of 1990.This suit was decreed on 24.5.1993. First Appeal No.204 of 1993 arises out of Title Suit No.56 of 1987, filed by one Mr.Salauddin against National bank Ltd.and others claiming Tk.92,72,400/-.This suit was decreed on 31.5.1993 against National Bank Ltd.,defendant No.1,defendant Nos.4,5 and 6 on contest: The National Bank Ltd,filed both the appeals,

The facts leading to the filing of the above noted two suits, one by Mr.Md.Salauddin ,the plaintiff in TITLE Suit No.56 of 1987 and the other one filed by Habib Bank Ltd ('HBL' for short) are that

Conted..P/4.



- 4 -

that on the request of one Md.Salauddin (the plaintiff in Title suit No.56 of 1987) the National Bank Ltd.,Khulna Branch,Khulna,(NBL' for short) opened a letter of credit being No.07.9.86 dated 3rd March,1986 for US\$ 2,79,500,in favour of Navegadora Panocenica S.A. (the defendant no.5 in T.S.No.56 of 1987),in order to import 6500 metric tons of cement made in Indonesia on the basis of Indent no.22 of 1985 dated 30.9.1985 issued by Acqua Marine Ltd.(the defendant No.4 in T. S.No.56 of 1987) on the basis of C & F to Chalna Port.The Bank of Credit and Commerce International Overseas Ltd.,Deira,Dubai Branch, (the defendant no.2,in T.S.No.56 of 1987) was the advising bank on the said letter of credit.The letter of credit contains terms and conditions inter alia,that the bill of lading of the said goods must be issued not later than 15th March,1986 and the bill of exchange must be negotiated within 21 days from the date of shipment.The plaintiff of Title Suit No.56 of 1987 deposited Tk.35,00,000/- by way of margin against the said letter of credit on 3.3.1986 in favour of National Bank Ltd.Khulna Branch (Defendant No.1 in both the suits).In due course,7(seven) bills of lading all dated 13th March, 1986,in respect of shipment of 6200 metric tons of cement,were issued on behalf of the Vessel,M.V.Del Santiago,owned by Shuwa Kaisha Ltd.

Conted..P/5

Handwritten signature or initials at the bottom left corner.



- 5 -

(the defendant no.6 in T.S.No.56 of 1987), at the port at Padang in Indonesia. On

14th March, 1986, the said ship sailed for Chalna Port with the aforesaid cargo of cement from Padang Port. The seller of the

aforesaid 6200 M.T. of cements, Navegadora Pamocnica S.A., has its banking transactions with the Habib Bank Ltd, Deira, Dubai Branch, in United Arab Amirat, the plaintiff in Money Suit 65 of 1989 in the First Commercial Court, Dhaka. The said seller presented all his shipping documents along with the bill of exchange, for US\$ 2,66,600/-

with the said Habib Bank Ltd, Dubai Branch, since there was no discrepancy in all those documents the Habib Bank Ltd, duly negotiated those documents presented by the seller and thereafter in accordance with the terms and conditions of the letter of the credit, sent a telex message on 18th March, 1986, on its New York Branch, for realization of the bill amount of US\$ 2,66,600/- from the account of the National Bank Ltd, Khulna, maintained with American Express International Banking Corporation, New York ('AMEX' for short). The Habib Bank, Dubai Branch, also informed the NBL, Khulna Branch, by its telex dated 20.3.1986 about their such demand of payment from AMEX, New York. In the meantime, the plaintiff of T.S.No.56 of 1987 came to learn from Acqua Marine Ltd. on the 20th March, 1986, that the vessel M.V. Del Santiago carrying the cargo of cement for him in Bangladesh sank on 18th March



- 6 -

18th March, 1986 about 30 miles off Mias Island, as such, he instructed the National Bank Ltd. Khulna, to stop payment on the concerned bill of exchange drawn on behalf of the seller. Accordingly, the NBL, Khulna immediately revoked their authorization in favour of AMEX, for payment in favour of the Habib Bank Ltd, New York Branch, and they by their telex dated 28th March, 1986, informed the Habib Bank, N.Y. Branch, about such cancellation of authorization of payment. The Habib Bank, Dubai Branch, continued to demand their claim on the aforesaid bill of exchange and also forwarded the original set of all shipping documents on 19th May, 1986 in favour of the NBL, Khulna. They also sent the duplicate copies of the documents to them through ordinary air mail. But the defendant National Bank Ltd, by its Telex dated 20th August, 1986 rejected their such claim.

On this dispute, telexes on different dates were exchanged between the National Bank Ltd. Khulna Branch and the Habib Bank Ltd, Dubai Branch, but ultimately when the National Bank Ltd. did not pay the amount of bill of exchange, the Habib Bank Ltd, filed a suit being Money Suit No. 65 of 1989 against them on 18th March, 1989, praying, inter alia, for a decree for US\$ 3,58,577/- equivalent to Tk 18.15, 112. 15 with interest at the rate of 15% per annum till realization, in the First Commercial Court, Dhaka.

Conted..P/7



- 7 -

Meanwhile the importer on whose instance the letter of credit for importing 6500 metric tons of cement was opened also filed a ~~xx~~ suit on 19th January, 1987, being Title Suit No.56 of 1987 also in the aforesaid First Commercial Court, Dhaka, against the National Bank & Ltd, and others praying for a decree for a declaration that the said seller, the defendant no.5, is not entitled to any amount against the letter of credit No.07.9.86 and the defendant no.1 is not entitled to debit any account of the plaintiff, in respect of the said letter of credit and a decree for Tk.35,00 Lacs against the defendant no.1 with interest thereon with effect from 20.3.1986 till realization and in the alternative prayed for a decree for Tk.92,72,400/- with interest thereon till realization.

The Money Suit No.65 of 1989 was duly contested by the defendant National Bank Ltd. by filing a written statement denying all material allegations and praying for dismissal of the suit. The main contention of the defendant in this suit is that the plaintiff Habib Bank Ltd, neither paid any money nor negotiated the concerned shipping documents of the seller Navegadora Panocenica S.A. and that is the reason they sent the original shipping documents to National Bank Ltd. more than two months latter on the 19th May, 2001. The further ~~xx~~ contention of the defendant is that the alleged negotiation



- 8 -

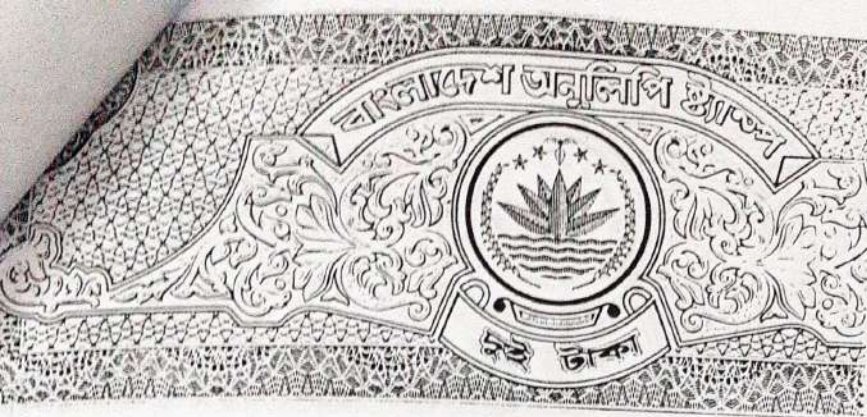
was not made within the stipulated period of negotiation on 6th April, 1986, but was antedated and made back dated to match the date on which the ship was caught in distress on 18th March, 1986, as such, they prayed for dismissal of the suit. The learned Judge framed the following issues:

1. Is the suit maintainable ?
2. Is the suit barred by law of limitation ?
3. Is the plaintiff entitled to the decree as prayed for
4. Is the plaintiff entitled to any other relief ?

On behalf of the plaintiff Habib Bank Ltd, Deira, Dubai Branch its Manager deposed as P.W.1. He stated in his examination-in-chief that the National Bank Ltd, Khulna Branch, opened an irrevocable letter of credit in favour of M/S Navegadora Panocenica S.A. Dubai. The Letter of credit was for importing 6500 metric tons of cement for US\$ 2,79,500/-. There was no restriction for negotiating the documents under the letter of credit. The last date of shipment was 15th March, 1986, the documents were to be negotiated within 21 days. This witness stated that all the documents were found correct. Finding no discrepancy in the document they lodged their claim with the American Express International Corporation, New York on 18th March,

Conted...P/9

March, 1986 and claimed reimbursement from them. On 20th March, 1986, they also requested their New York Branch as to whether they received the said amount. They sent another telex on the same day to the National Bank Ltd, Khulna, informing them that they submitted their claim for reimbursement. The Habib Bank Ltd, N.Y. informed them by a telex that AMEX refused to pay, that the cancellation of the L.C. was illegal because it was irrevocable, that they sent telexes dated 4.6.1986, 12.6.1986, 19.6.1986, 9.7.1986, 17.7.1986, (Ext. 11 Series) etc. to National Bank Ltd, Khulna, in this matter but to no effect. On 25.8.1986, the defendant sent a telex stating that no payment can be made as the shipper did not fulfill the conditions under the L.C. This witness further stated that the defendant had no right to refuse payment because the bank deals with the documents and not with the goods, that by telex dated 26.8.1986 they informed the National Bank Ltd, Khulna that they having forwarded all the documents stipulated in the letter of credit they were entitled to the payment, that the National Bank Ltd, Khulna, by its telex dated 8.6.1987 informed the Head Office of the Habib Bank Ltd, that since the negotiation was antedated, payment was not made, that in fact the negotiation was not antedated and it was within time as stipulated, that all the documents required under the L.C. were dispatched to

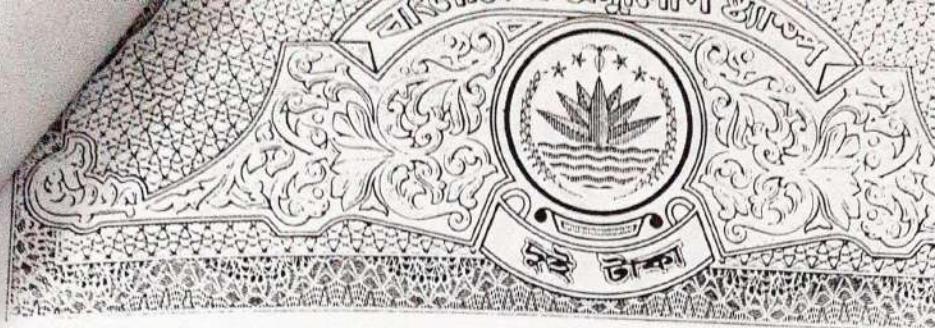


- 10 -

the defendant, that there was no discrepancy in any of the documents, that they did never intimate them that they were holding the documents at the disposal of the plaintiff, that if the issuing bank refuses payment under the letter of credit they are either to return the documents or intimate the beneficiary that they are holding the documents at the disposal of the negotiating bank within a reasonable time, that this was the practice of the bank and this was uniform commercial practice. This witness further stated that the reasonable time in banking practice was 72 hours after receipt of the documents. This witness denied that the documents were not negotiated on 18.3.1986 or that the documents were discrepant or that no opportunity was given to the defendant to see the documents and that the documents were supposed to be sent on collection basis because the letter of credit was freely negotiable. He further denied that they have negotiated the documents malafide or that they were merely collecting agent of the supplier.

In his cross-examination this witness stated that he is in the service of the plaintiff since 1976 and he represents Habib Bank, Dubai, and that all the documents in their possession were filed in Court. He further stated that their prayers were for reimbursement

Contd...P/11.

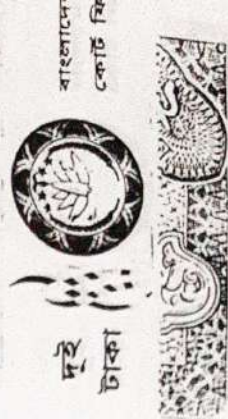


सूचना विभाग
1986

- 11 -

against the letter of credit but he admitted that other than the bill of exchange they did not file any document showing payment to the supplier, that the bill of exchange is the order by the supplier on the importer to pay a certain sum of money to a certain person to cover the value of the goods exported, that he did not remember whether in the plaint he stated the fact of payment to the supplier. He also admitted that they did not submit any document to show actual payment and that by payment he meant bill of exchange,

This witness further stated in his cross-examination that all the documents required under the L.C. were sent on 19.5.1986 as asked by their Head-Office. This witness admitted in his cross-examination that both the expiry date and the negotiation date in the letter of credit were 6th April, 1986. The bill of exchange mentioned in the L.C. was from the beneficiary to the applicant and beneficiary meant Navegadora and the applicant meant Mr. M.A. Chowdhury. The bill of exchange (Ext. 15(1)) was drawn by the beneficiary on the applicant and made to the order of Habib Bank. This witness categorically stated that by negotiation he meant receiving the documents, scrutinizing the same, finding them with conformity with the L.C. pay the amount to the parties and reimbursement. He could not say how they paid the party, that he did not remember the date of payment but it was immediately after negotiation, that N



- 12 -

- ১) immediately after negotiation, that Navegador is their regular client and they maintained their account with them, that they had the statement of account to show payment but they did not adduce it, that he would not say that the plaintiff-bank was a collecting bank. He further stated that he could not remember as to whether he mentioned the date and place of payment made to the party in the plaint. He denied that they did not pay. He further stated that before 8.6.1987 they did not know that the ship sank. They asked from AMEX without sending the documents but certified that they negotiated the documents. This witness identified the envelope cover (Annexure-C)
- ২) in which the documents were sent. He stated that they did not send the documents in time because they did not get the money in time. He further denied that he sent the documents after the expiry of the date with mala fide intention. He denied that they did not negotiate the documents on 18.3.1986 or on any other date.

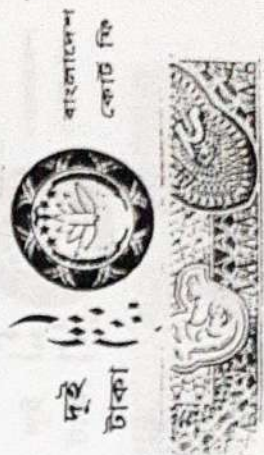
On behalf of the defendant one Binoy Kumar Sikder deposed as D.W.1. He stated in his examination-in-chief that he tooks after the matter relating to foreign exchange and letters of credit of the Khulna Branch of the defendant bank. He stated that one M.A. Chowdhury applied in writing for opening a letter of credit US\$ 2,79,500 to import 6500 metric tons of cement from abroad. On his appli

application they opened the letter of credit in favour of Navegodora Panocenica S.A. It was stipulated in the said letter of credit that the bill of leading must be dated not latter than 15.3.1986 and bill of exchange must be negotiated within 21 days from the date of shipment. The expiry date of L.C. was 6.4.1986. It was also stipulated in the letter of credit that it was the responsibility of the supplier to send the cargo to Mongla Port at Bangladesh but the ship was in distress within 30 miles after it sailed from the port at Padang, Indonesia and latter on he came to learn from the indenter about the sinking of the ship. At that time the importer instructed them not to make payments till the ship reaches Bangladesh. There was another condition in the letter of credit that the beneficiary would furnish a certificate in respect of sinking or loss of the ship, that they got the said certificate on 22.5.1986. This witness further stated that the beneficiary sent those documents on 19.5.1986 and on receipt of those documents on 22.5.1986 they did not pay any money on the letter of credit. They informed them that they were not paying the money because of non fulfillment of the terms and conditions of the letter of credit and latter they informed them that they were not bound to pay the money on the letter of credit because in delaying to sent



- 14 -

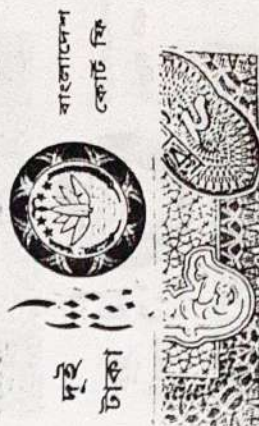
send the documents, the terms and conditions of the letter of credit were not fulfilled. This witness further stated that according to Article 45 of the UCP the documents have to be forwarded before the expiry date for presentation of the documents have to be forwarded before the expiry date for presentation of the documents, that they were not bound to pay the plaintiff in accordance with the UCP rules that the plaintiff did not negotiate the documents in clean hands, that Habib Bank did not pay any money to the supplier as far as they knew. The witness in his cross-examination stated that he was all through aware of the transactions in connection with the letter of credit between the plaintiff and the defendant, that he is in the service of the defendant since 1984, that the certificate of the supplier in respect of sending of the goods to Bangladesh in its responsibility was not furnished within the stipulated period, that the letter of credit was negotiable, that the certificate in respect of sending the goods safely was forwarded to them with other shipping documents 62 days latter. The American Express Bank, New York Branch was the paying bank of the letter of credit. This witness admitted that they sent a telex to the said paying bank revoking the authorization on being informed by the importer about the sinking of the ship. The authorization was cancelled on the instructions of the importer. He further stated that the documents sent by the Habib Bank



- 15 -

Bank was discrepant and was also fraudulent. They came to learn about about the discrepancy about the documents on 22.5.1986, that they were not aware of the discrepancy in the L.C. when the authorization was cancelled because they did not receive the documents till then, In reply how the documents were discrepant this witness stated that the documents were discrepant because those documents were forwarded to them 62 days after the expiry date of the letter of credit according to him that was the discrepancy. This witness further stated that they did not return the documents received by them from the Habib Bank on 22.5.1986 but informed them that they were holding the documents in their risk, that they by their telex dated 25.8.1986, 10.6.1986, 2.7.1987 and other telexes informed them that they were holding the documents at their disposal, that it was not necessary to return the discrepant documents at once but they should be informed about the fact of the discrepancy. This witness admitted that if the documents are discrepant it should be returned within a reasonable time. He denied that it is incorrect that Habib Bank in collusion with the exporter negotiated the documents by giving back date.

The learned judge on consideration of the evidence on record found that the documents marked Exts. 2, 4, 5, 6 and 9 filed by the



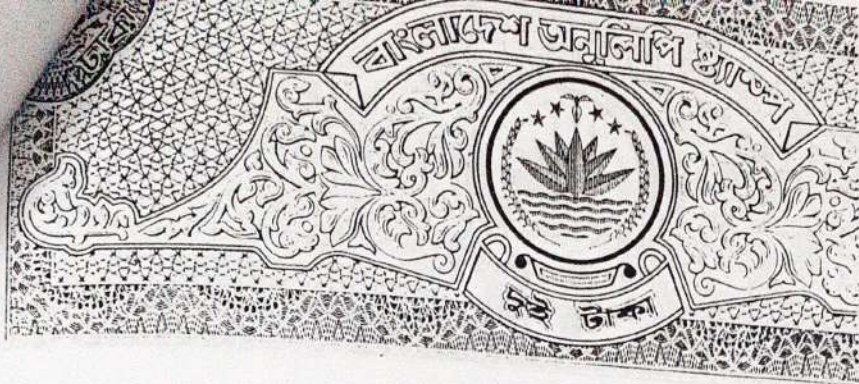
- 16 -

by the plaintiff in proof of negotiation of the concerned letter of credit were not disproved or denied by the D.W.I. He found that the documents were sent to the defendant on 19.5.1986 but since there was no provision in the letter of credit ~~was~~ as to when the documents were to be sent to the defendant, he held that the plea of delay raised by the defendant in sending the documents was not that much material. He further held that since the payment was refused much before sending of the documents on some other grounds, the so called delay can not out do or vitiate the plaintiff's claim for payment. On the question raised by the defendant that the concerned letter of credit was on collection basis the learned judge held that they failed to produce any evidence to prove that the concerned letter of credit was on ~~one~~ collection basis. The learned Judge further found that the letter of credit being an irrecoverable one, according to Article 10 of the UCP, it means a definite undertaking by the issuing bank to the effect that they would pay without recourse provided the stipulated documents are presented and the terms and conditions are complied with and the credit provides for negotiation. He also found that the concerned letter of credit was opened for negotiation and the bank gave the necessary undertaking that the terms of the credit would be honoured on due presentation. In reply to the contention



- 17 -

of the defendant that they were not afforded an opportunity to examine the documents before the plaintiff hurriedly negotiated those, the learned Judge held that there was no such stipulation that the negotiation can not be made before the documents does not bear any connection with negotiation. On the question of refusal to make reimbursement on the plea of sinking of the ship the learned Judge held that in view of Article 21 of the UCP the issuing bank is not relieved from its obligations from making reimbursement and that the plaintiff had nothing to do either with the actual transportation or with the safe arrival of the goods to its destination, because the bank deals with the documents and not with the goods. On the contention made on behalf of the defendant that in view of article 46 of UCP the concerned shipping documents ought to have been presented to the defendant within the specific date, the learned Judge held that there is no such terms in the letter of credit that the issuing bank must receive the documents from the negotiated bank within the specified period. As such, he held that the contention of delay in sending the documents was fruitless and further held that there was no discrepancy in the documents. On the above noted findings the learned Judge decreed the suit for US\$ 3,58,577/- with interest at the rate of 15% there on. Being aggrieved the defendant filed the instant appeal.



- 18 -

Dr.M.Zahir, Senior Advocate, appears with Mr.M.Hassan and Mr. A.B.M.Golam Mostafa, Advocates, on behalf of the appellant while Mr. Syed Ishtiaq Ahmed, Senior Advocate, appears with Mr.Syed Refat Ahmed and Ms.Nihad Kabir, Advocates, for the respondent in F.A.No.202 of 1993.

Dr.M.Zahir, the learned Advocate appearing on behalf of the appellant, National Bank Ltd, firstly submits that the documents including the bill of exchange according to the terms and conditions of the letter of credit ought to have been negotiated within 6th April, 1986, that those documents not having been forwarded to the National Bank, Ltd, Khulna, within the said period there was no negotiation within the meaning of the terms and conditions of the letter of credit. As such there was no proper negotiation. Besides, he submits that the plaintiff Habib Bank Limited never made any payment to the beneficiary- seller on receipt of the bill of exchange and other documents without which there cannot be any negotiation in the eye of law. In this connection, he refers to Sections 46-48 of the Negotiable Instrument Act and submits that without physical delivery of the instruments there cannot be any negotiation and since in this case there was no physical delivery of the documents in favour of the National Bank Ltd., the question of payment on 18th March, 1986 or thereafter.

120



- 19 -

thereafter in any case, before 22nd May, 1986, does not arise. He further submits that the Habib Bank Ltd, is not even entitled to any payment even after 22nd May, 1986, because of the day delay in sending the documents to National Bank Ltd, which is itself a discrepancy. Besides, he submits, Rule 46 of the ICC Rules 400 requires that the documents must be sent to the issuing bank for payment before the expiry date as mentioned in the letter of credit, since in this case the documents were not even posted by the last date of expiry on 6th April, 1986, the NBL rightly refused payment.

On the other hand, Mr. Syed Ishtiaq Ahmed, the learned Advocate appearing on behalf of the plaintiff-respondent, submits that in accordance with the terms and conditions of the letter of credit, the bill of lading was issued on 13th March, 1986 and the ship sailed on 14th March, 1986, and since the letter of credit was freely negotiable by any bank, immediately thereafter on 15th March, 1986 the plaintiff Habib Bank Limited negotiated the documents from the seller beneficiary. He submits that immediately thereafter, in accordance with the terms and conditions of the letter of credit and in accordance with the practice and customs of the international trade, the plaintiff-bank by its telex dated 18th March, 1986 (Ext. 2) asked for reimbursement of the negotiated amount from the AMEX N.Y. through its New York Branch of the Habib Bank Ltd. but after exchange of some



- 20 -

some telexes, the AMEX, N.Y. by its telex dated 28th March, 1986 [Ext. 9] informed them that the National Bank Ltd, had already revoked authorization of payment on the documents negotiated by the Habib Bank Ltd, Dubai. The learned Counsel, after referring to a number of telexes (Ext. 11-series) submits that the reason given out in the belated telex of National Bank Ltd, dated 20th August, 1986 (Ext. 12), was absolutely illegal and violative of ICC Rules and international trade practise and customs. In this context, the learned Advocate firstly submits that the letter of credit being a freely negotiable one was legally negotiated by the Habibi Bank Ltd. Dubai, and the National Bank Ltd, had no right or authority to revoke authorization causing non-payment to them. The learned Advocate refuted the contentions of Dr. M. Zahir that negotiation would only be completed on handing the documents to the L.C. issuing bank but strenuously contends that the question of negotiation is between the seller on one hand and the negotiating bank on the other and it does not mean handing over the documents by the negotiating bank to the L.C. issuing bank. In this connection, he explains the meaning of the word 'negotiation' by referring to Article 10(b)(11) of the ICC Rules, 500, as revised in 1993 and submits that although the word 'negotiation' was not defined in ICC Rules 1984 but it was correctly defined in the revised ICC Rules 500. He submits that the said definition

2/2

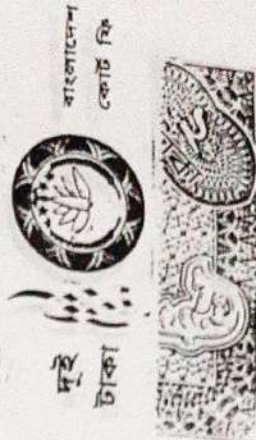
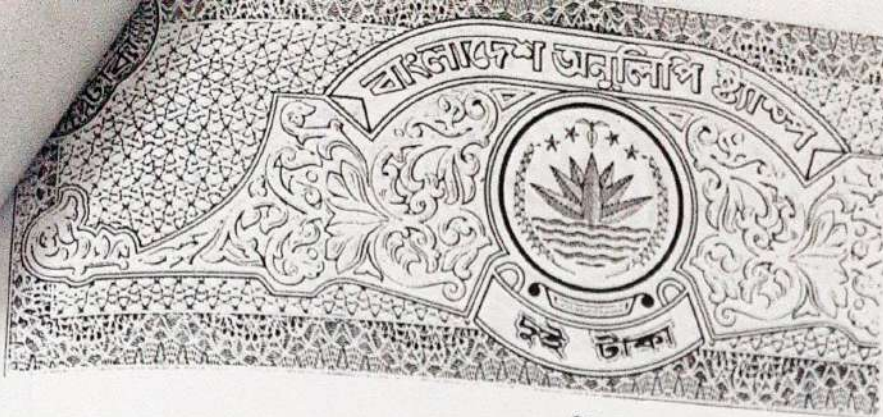


- 21 -

④ definition should also be equally applicable to any transaction prior to 1994. As such, he submits that since the Habib Bank Ltd. On 18 18th March, 1986 negotiated the documents and having completed such negotaiti~~on~~ for value, they were entitled to reimbursement from the NBL and the revocation of authorization by the National Bank Ltd. Khulna, was illegal.

We have heard the learned Advocates of both the sides and gone through the different documents adduced on behalf of both the parties

The facts of this case raise important points in international trade. On the application of one Mr. M. A. Chowdhury, Station Road, Khulna, the Khulna, the Khulna Branch, of National Bank Ltd, (NBL) issued a letter of credit for US\$ 2,79,500.00. It was issued on 3rd March, 1986, to the Bank of Credit and Commerce International Overseas Ltd. Deira ('BCCI') in short & in favour of Navegadora Panoceanica S.A. PO Box 9097 Dubai. The letter of credit stipulated that the said amount was available by negotiation of the beneficiary's draft on the applicant at sight without recourse to drawer for full invoice value covering the shipment, that the expiry date for negotiation was April 06, 1986 that the bill of lading must be dated March 15, 1986, that the bill of exchange must be negotiated within 21 (twenty one) days from the date of shipment. In this case, Mr. M. A. Chowdhury was the applicant, the NBL was the iss



- 22 -

was the issuing bank, the BCCI was the advising bank at Dubai and Navegadora Panocanica SA is the seller of 6,200 metric tons of cement. The letter of credit (LC for short) was an irrevocable credit but not a confirmed credit. This document was exhibited by both Habib Bank Ltd, the plaintiff as Ext.1 and National Bank Ltd, the defendant as Ext.D and D-1. This is a so important a document that we would set out most of it:

"Fm(from) National Bank Ltd, Khulna, Bangladesh
to bank of credit and commerce Deira, Dubai test
1953 dt March, 1986 fr(for) usd-279500-with out Dill-
kusha br (branch).

⑥ Advise NAVEGADORA PANOCENICA S A Po Box 9997
Dubai we opn(opened) irrevocable L/C no.07-9-86 dt.
March 3, 1986 applicant M.A. Chowdhry, Station Road,
Khulna. Bangladesh amt usd 279500,- (US Dollar two
hundred seventy nine thousand five hundred) only onf
to Chalna expirty for negotiation April 06, 1986 avail-
-able by negotiation of beneficiary's draft on appli-
cant at sight without recourse to drawer for full
invoice value convering shipment of 6500 m/tons
indonestan origin buffalo head brand ordinary grey
portland cement confirming to bss-12/1978 at the



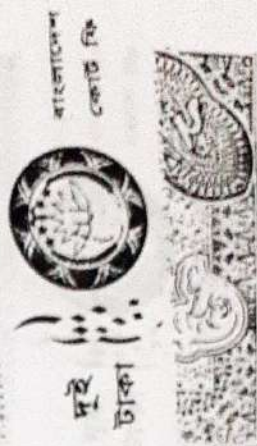
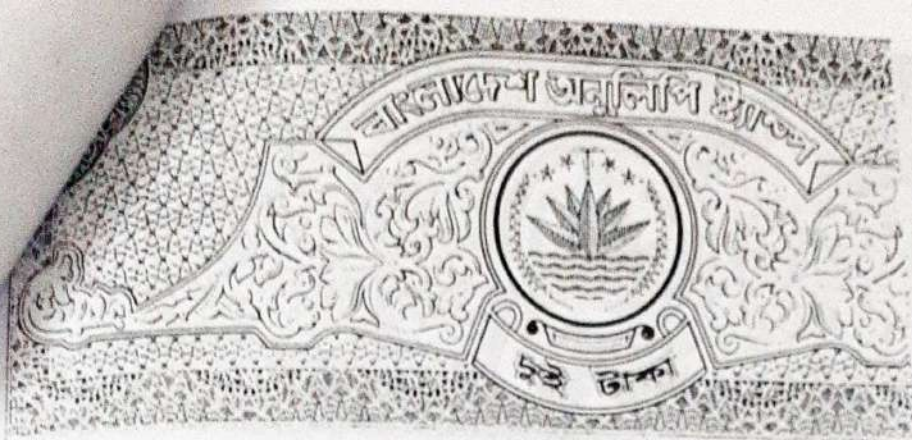
the rate of USD 43-per m/ton enf of Chalna packed in 6 ply brown sack paper bag of 50 kg net wet as per indent no.22/85 dt.30.9.85 of Aquanmarine Limited Chittagong by following documents(.)

- (A) Beneficiary's signed commercial invoice in octuplicate cetifying merchandise Indonesia origin.
- (B) Full set clean shipped on board bill of lading drawn or endorsed to the order of National Bank Ltd.,Khulna showing freight prepaid and marked notify applicant and us giving full name and address.
- C)
- (D) Bill of lading evidencing shipments from any Indonesian port to Chalna by sea Vsls(Vessel),
- ✓ (D) Bill of lading must be dated not later march 15, 15,1986.Bill of exchange must be negotiation within 21 days from the date of shipment.
- (E) Packing list in duplicate.
- (F) Certificate of origin by supplier acceptable.
- partial shipment allowed transshipment prohibited.

OTHER TERMS:

- X) Documents evidencing shipment must not be dated

15



- 24 -

dated earlier than the date of opening of this credit.

X)

X) Invoice should indicate "imports under wage earner scheme" and importers fire No.B-40355 and L/C authorization Form No.07905.

X) Short form 'Bill of lading' not acceptable.

.....

X) Invoice to indicate indentors name and their registration No.B-21319.

x) Immdte(immediate) upon shipment,beneficiary shall inform the name of the vsl(Vessel) nd (and) date of shipment quoting reference of our L/C No.to National Bank Ltd.international divn(division), Dhaka over tlx/cable(Tlx No.642791 BJJ ho bj and cable nation bank) copy of such cable /tlx ~~must~~ must be included along with other shipping documents.

x)

X) Supplier will airmail 3 sets of non-negotiable documents either direct to ~~by~~ buyer or/and sellers local agent Aquamarine Ltd,58,Agrabad Po Box 748 Chittagong.

x)



- 25 -

X) Cargo discharging terms:

Pully at openers risk 1000 m/t pwwd friday/holid-
ay excluded even used and demurrge/dispatch money
as per gecon chater party agreement.

X)

Shipment to be made thru(through) Vsl(vessel) MVD
Delsantiago.

x)

X)

x) Beneficiary shall issue certificate to the ~~beneficiary~~
effeert that in case the vessel disappears or is
arrested or detained for any reason the benefici-
ary shall take immediate and all actions to
ensure the tracing/release of the vessel at t
their cost and will also ensure safe arrival of
the ship at the port of destination i.e.Chalna
Bangladesh and such certificate by the beneficiary
should accompany with the documents for negotia-
tion.

Conted....P/26



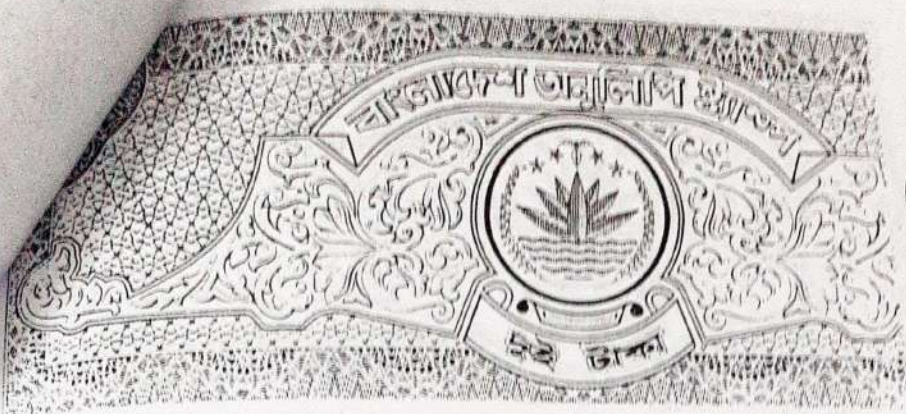
- 26 -

Draft must be marked "drawn under national Bank Ltd. credit 07-9-86 dt. 3.3.86" (.) we hereby agree with drawers, endorsers and bonafide holders of draft drawn under and in compliance with the terms of this credit shall be honoured on due presentation.

INSTRUCTION PR(POR) THE NEGOTIATING BANK.

- x) Amt(amount) of draft negotiated should be endorsed on the reverse of the credit.
- x) Yr(your) advising and other charges will be on account of beneficiary.
- x) In reimbursement please draw/claim on our H.Q.A/C with American Express Int'l (Banking Corpn. New York, U.S.A.
- x) Six copies of invoice to be sent with original set of documents by registered airmail and two copies of invoice with duplicate set by subsequent air mail.

This credit is subject to uniform customs and practice for documentary credit 1983 revision ICC publication no.400. This is operative instrument No. Mail confirmation follows stop.



- 27 -

Rgds/Px Dept.

(Words in brackets are supplied).

On 15th March, 1986, the ship, namely, M.V. Del Santiago sailed with 6,200 metric tons of cement from the port at Padang, Indonesia, towards the port at Chalna, Bangladesh. In the mean time on 18th March, 1986, as it appears, only 30(thirty) miles off from the port, the ship was either on the verge of sinking or was in great distress. The whereabouts of the consignment of cement was also not known. These facts with regard to the goods are not, however, relevant for our purpose because the bank deals with the documents and not with the goods. It is stated only to understand the background of the next events.

On the 18th March, 1986, the HBL, sent a telex (Ext.2) to its Branch at New York claiming reimbursement from the New York Branch of the American Express International Banking Corporation ('AMEX' for short.)

Conted...P/28.



- 28 -

"Ext.no.2:-Telex.

=45430 Habib k em

226656 Habib ur.

Dtd 1813

Habib Bank

New York.

69.541 we hav(have) negotiated doc(documents) for usd 2,66,600
-against L.C.No.7-9-86 of National Bank Ltd,Khulna Bangladesh
pls(Please) claim on our behalf USD.2,66,600.Pm(from)their
head office acctt(account) with AmericanExpress Intl Banking
Corporation New York and credit our acctt(account) with you
under tested tlx(telex) efmm(confirm) to us our fbp.

97812011

tested usd 266600-dtd 1813

Habib bank Dubai

(words in brackets are supplied)

From this telex it appears that the HBL.Dubai,negotiated the docu-
ment for US\$2,66,600 against the L.C.No.7-9-86 of NEL,Khulna.The
HBL,N.Y. immediately on the same day got it touch with the New York
Branch ofAMEX by a telex(Ext.3)and claimed reimbursement.Thereafter,
there were exchange of telexes between the two branches of HBL over
the above issue and ultimately the AMEX,N.Y.by its telex dated M



dated March, 28, 1986 (Ext. 9) informed HBL, N.Y. about cancellation of authorization for reimbursement by them and advised them to contact NBL, direct.

The papers on record show that the HBL, Dubai, did not contact NBL before June, 4, 1986, for the reasons best known to them. Why they choose to keep silence for the next more than 2 (two) months is not understood specially when they were so eager to get the reimbursement on 18th March, 1986, till they were informed about the cancellation of authorization on 28th March, 1986. The HBL, Dubai, however, in the meantime sent the concerned documents in original, by registered post on 19th May, 1986 while the duplicate copy, by ordinary air-mail (Paragraph-8x-8 of the plaint), as such, there was a delay of about 6 (six) weeks in sending the documents to the issuing bank which definitely violates Art, 46 of the ICC no 400. Art 46 reads as follows:

- "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.

The L.C. issued by the NBL, Khulna, the defendant stipulated sending of the original set of documents by registered Air mail and the duplicate set by airmail and that the expiry date as

as 21(twenty one) days after the date of shipment. The HBL, the plaintiff, itself understood in the same manner. The P.W.1 in his deposition admits so:

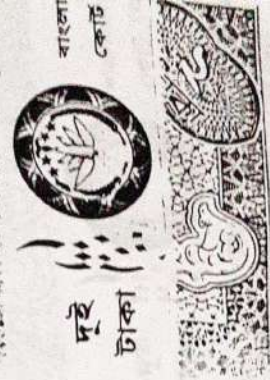
"Both expiry date and negotiation date in the L.C. are 6th April/86" As such, the last date of sending the documents was 6th April, 1986 instead, they posted it on 19th May, 1986, in clear violation Article 46 of ICC no. 400.

P.W.1 in his cross-examination explains the reason for such delay thus:

"We did not send the documents in time because we got no money in time".

This statement may be the plain truth but is no explanation for the delay.

The learned Counsel for the plaintiff also could not offer any reason or justification for such delay in sending the said documents to the defendant. He however submits in this respect, firstly, that there was no limitation of time for sending the documents since the plaintiff was not a collecting bank but a negotiating bank. This contention of the learned counsel is not correct. The bank who is holding the documents whether in its ~~any~~ capacity as a collecting bank or a negotiating bank must send the the concerned C



- 31 -

concerned documents to the L.C.issuing bank within the period as stipulated in the L.C.and even if the L.C.is silent in respect of the period of time,the bank must return those documents within a reasonable time which may be one week to 10(ten) days at the most depending on the circumstances,but it cannot be more than that period .Besides,without the said documents the applicant who is the importer will not be able even to release his goods from the port, One reason,however,is suggested by the learned Counsel for the defendant that all concerned including the two banks,the plaintiff as well as the defendant,knew very well that the cargo being lost,nobody had any interest in the documents any more.That might be the case, no doubt,but the bank deals with the documents and not with the goods.It is however,needless to point out and presumed that the L.C.issuing bank is obliged to reimburse the negotiating bank immediately on negotiation and in case of the collecting bank,within the stipulated period,on receipt of the documents.

Thelearned Counsel for the plaintiff submits secondly,that even if there was a delay in sending those documents,such delay was a mere technical discrepancy and the defendant having failed to raise such objection of discrepancy within a reasonable time,they

they are not entitled to raise such objection of discrepancy subsequently at their trial. The learned Counsel strenuously argues that unless such objection is not raised within 3 (three) days or even within a reasonable period, L.C. issuing bank cannot subsequently raise such objection of discrepancy in the document, however genuine or serious those may be. In support of his contention he refers to the decision in the case of Bankers Trust Co. Vs. State Bank of India (1991) 2 Loyd's Report 443 and the case of Hing Yip Hing Pat Co. Ltd. Vs. The Diawa Bank Ltd, of Hong Kong High Court (Photo-stat copy supplied).

Article 16(c) of the ICC no. 400 provides that the issuing bank shall have a reasonable time in which to examine the documents and to determine whether to take up or refuse the documents. Bankers Trust case considers among others, the reasonable time necessary for examining the documents. It found on the facts of the said case that eight working days taken for examining the documents were excessive while Hing Yip Hing Pat's case found six working days a reasonable time for such a purpose in case of a bank in Hong Kong.

Article 14(d)(1) of ICC no. 500, effective from January 1, 1994 revises the earlier provision and now provides for giving notice



- 33 -

notice for refusal of documents within seven banking days.

The case of Hing Yip Hing Pat Co.Ltd.Vs.Daiwa Bank Ltd. considered, among others, on the basis of article 16(e) of the ICC no.400, the question as to whether a bank can subsequently rely upon the discrepancy which were not specified in the original advise of discrepancies. Kaplan, J. at the first instance, analyses the position in the following manner:

" To say as Mr. Bunting does that the bank only has to specify grounds relied on at the time of rejection is to introduce an element of unreality and uncertainty. On this basis, a bank could reject on 3 completely spurious grounds. It is then used and possibly months after rejection it puts in a defence admitting that these 3 grounds were spurious and relying upon a 4th arguable ground. Now, in these circumstances, can it be said that the bank has acted without delay in stating the discrepancies in respect of which it genuinely refuses the documents ? The whole purpose of behind Article 16 seemed to me to be that the beneficiary should know precisely what his position is at the earliest opportunity."

And he held :

"Under Article 16 the issuing bank has to "state the discrepancies in respect of which the issuing bank refuses the



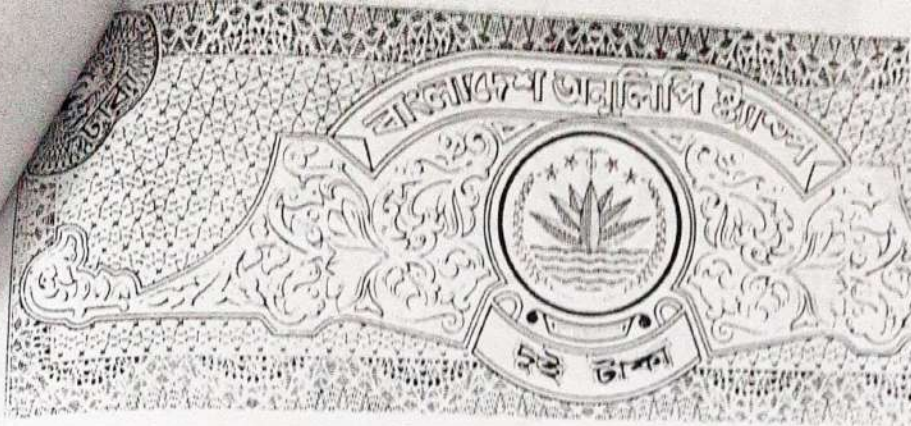
- 34 -

refuses the documents. "Daiwa did that on 14th September 1988. They were asked in March 1989 to confirm the position which they did. It is only in their defence that they seek to rely upon the "Industrial" point. Thus they did not act in accordance with Article 16(d) and I do not see how they can now contend that they are not precluded from claiming that the documents are not in accordance with the terms and conditions of the credit. In my judgment to find otherwise would be to ignore the clear meaning of Article 16(c) when read with Article 16(d)."

The revised ICC 500 makes even all these problems clearer. Now under Article 14(d)(i), if the concerned bank decides to refuse the documents it must do so within seventh banking day and under Article 14(d)(ii), such notice must state all discrepancies in respect of which the bank refuses the documents.

In the instant case, it appears from the papers on record, that on receipt of the news of cancellation of authorization on 28th March, 1986, the HBL, Dubai, the plaintiff, kept quiet for more than two months for reasons best known to them and sent a telex on 4th June, 1986 (Ext. 11) to NBL, Khulna informing them that US\$ 2,66,600 against their L.C. no 07-9-86 had not yet been credited in their

Conted....P/35



- 35 -

their branch at New York, with a request to check as to when the the said amount was debited by the AMEX, N.Y. This telex was followed by a series of telexes (Ext. 11 Series) from the plaintiff bank but without any response from the defendant bank. This conduct on the part of the defendant bank is deplorable and is not expected from a bank in dealing with its documentary credits. On receipt of the documents on 22nd May, 1986, they ought to have informed the plaintiff bank as to whether they were going to accept the documents or not. If they decide not to accept the documents, they ought to have informed their reasons for such non-acceptance promptly and immediately and at least within seven days. They also owed an immediate explanation about their cancellation of authorization to AMEX, N.Y. Instead they kept mum till 20th August, 1986, for reasons best known to them. But whatever might be their reasons, their such conduct was deplorable and not expected in international banking community.

The defendant bank sent a telex on 20th August, 1986 (Ext. 12) almost two months after cancellation of authorization of payment by the AMEX, N.Y. in favour of the plaintiff-bank. In the meantime they got the documents from the plaintiff-bank on 22nd May, 1986. In their telex dated 20th August, 1986 (Ext. 12), the defendant bank referred to a telex dated 18.6.1986 sent by the opener of the

of the L.C. in which they communicated non-compliance of the L.C. terms by the beneficiary of the L.C. and the reason of non-reimbursement of the claims in favour of the plaintiff bank. In the said telex (Ext. 12), the defendant bank while acknowledging receipt of the undertaking furnished by the beneficiary, raised objection as to ~~in~~ their failure to bring the ship physically to the port of destination. According to them the terms and conditions of the L.C. required that the beneficiary would ensure actual safe arrival of the ship and mere furnishing of the certificate to that effect would not do. But a bank deals with the documents and not with the goods, as such, this ~~x~~ is no discrepancy at all and this plea raised by the defendant-bank, as an excuse for refusing reimbursement was not only illegal but preposterous. Besides, in the said telex, some kind of reason was given, as to why they termed them as a collecting bank and an agent of the beneficiary. The defendant bank sent another telex on 25th ~~Aug~~ August, 1986, (Ext. A) repeating the same worthless excuses. The plaintiff-bank, however, reiterated its claim by their another telex dated 5th October, 1986 (Ext. 13).

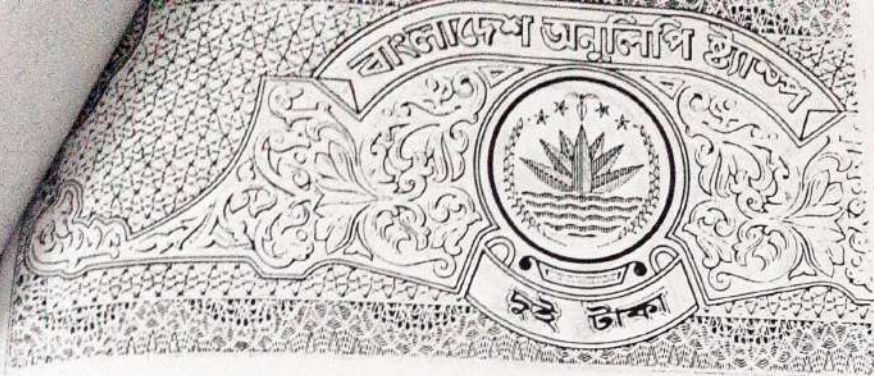
However, in reply to another telex issued by the plaintiff



- 37 -

plaintiff bank on 17th May, 1987, the defendant -bank by its telex dated 8th June, 1987 (Ext. 14) raised objection for the first time to the effect that the negotiation of the documents on 18th March, 2 1986, as alleged by the plaintiff-bank, was actually done much, later, beyond the period of the date of expiry of the date of negotiation on 6th April, 1986, giving a back dated on 18.3.1986. This is a serious allegation no doubt but the reasons for such allegation was not put forward by the defendant-bank save and that the documents were posted on 19th May, 1986.

It appears from the above discussion of the evidence on record that the defendant -bank never raised the plea of discrepancy on the ground of delay in sending the concerned documents to them long after the expiry date of the L.C. on 6th April, 1986. According to the provisions of the Article 16(d) and Article 16(e) of the revised ICC no. 400 and the case law discussed above, the defendant-bank ought to have raised such objection within a reasonable period which, in any case, cannot be more than ten banking days. The defendant-bank did not even raise such objection in their written statement ~~filed~~ filed on 21.10.1989. Only their wit-



- 38 -

Only their witness in his cross-examination given as late as on 1.2.1993, raised for the first time their objection as to the delay of sixty two days in sending those documents to them as a discrepancy itself in the following manner.

" কি Discrepancy ছিল প্রত্যেক উত্তরে প্রার্থী বালন নলসি
১৯৭১
২২/১২/৮৬ তারিখে Discrepancy প্রমাণিত ২২/১২/৮৬
২২/১২/৮৬ তারিখে Discrepancy প্রমাণিত ২২/১২/৮৬

Although the defendant-bank raised the question of delay in sending the documents to them on many occasions but this objection with regard to discrepancy of documents because of delay, was never specifically raised anywhere any time, as such, would not now of much help. The contention of the learned Counsel for the respondent that this piece of evidence is inadmissible not being raised anywhere in the four corners of their written statement, is however, not correct, because the witness so divulged, in his cross-examination, but not in his examination-in-chief.

In this case, what the parties were expected to do is that ~~plaintiff~~ the plaintiff-bank immediately on negotiation of the documents ought not only have sent the telex on 18th March, 1986,

claiming reimbursement of the bill amount from AMEX, N.Y. but also ought to have sent the original set of documents to the defendant bank in Khulna, on the same day or immediately thereafter. The defendant-bank on the other hand, ought to have allowed reimbursement as spelt out in the Letter of Credit. If there was any discrepancy in the documents, the defendant-bank could always reclaim the reimbursed amount and the plaintiff-bank was obliged to repay the entire amount with interest from the date of reimbursement. This would have been an ideal transaction as envisaged under the provisions of the ICC Rules, But it did not happen in that way.

On receipt of the news of the sinking of the ship (at least that was the initial news) on 18th March, 1986, every thing went haywire. The plaintiff-bank claimed reimbursement at once but did not send the documents to the defendant-bank. The defendant-bank could not show any discrepancy in the documents but cancelled authorization to the AMEX, N.Y. presumably for no plausible reason. They, of course, consistently alleged that on receipt of the news of the loss of the ship and also the cargo, the plaintiff bank on only in order to help the beneficiary, who is their customer,

customer, demandee reimbursement without making any payment to the beneficiary, consequently there was no negotiation, as such, the demand of reimbursement by the plaintiff-bank was made fraudulently. This allegation, however, could not be substantiated by the defendant -bank by any evidence save and except the fact of sending the documents more than two months later as a circumstance to show that when the plaintiff-bank demanded reimbursement on 18th March, 1986, there was no document in existence. Those documents were subsequently prepared and antedated, made in collusion with the beneficiary. This is a possibility no doubt, but nothing more.

In this case, the HBL, Dubai, the plaintiff, by its telex dated 18th March, 1986, (Ext. 2), instructed its New York Branch, to claim reimbursement of US\$ 2,66,600.00 from AMEX, N.Y. on their behalf as they had negotiated the document for the said amount against the L..C.no.7.9.86 of NBL, Khulna, Bangladesh. Their such claim is of negotiation was thereafter repeated in dozens of subsequent telexes. The plaintiff stated so in its plaint also but nowhere it elaborated as to how they negotiated the documents. Did the representatives of the plaintiff-bank and the beneficiary only winked their eyes, kissed each others cheek, nodded their heads and shook



- 41 -

shook their hands or did they perform any thing else and/or was there any other requirements to be performed to complete their 'negotiation' ?

Under the circumstances, the plaintiff-bank has to show on evidence that it negotiated the documents from the beneficiary, Firstly, because it itself claimed so since 18th March, 1986, secondly, negotiation was the basis of its claim as the negotiating bank, and thirdly, the plaintiff cannot succeed only on the weakness of the defendant's case, it has to prove its own case on preponderance of evidence.

Necessarily this brings us to find out the meaning of the word 'negotiation'.

In Gutteridge and Magrah, The Law of Bankers' Bankers' Commercial Credits, 7th ed., at page 11, negotiation credit is described in this manner:

"A 'negotiation' credit, for instance, is, strictly speaking, one which authorizes the beneficiary to draw on the issuing bank or sometime on the buyer and to negotiate the draft with the intermediary bank advising the credit or with his own or some other bank."



- 42 -

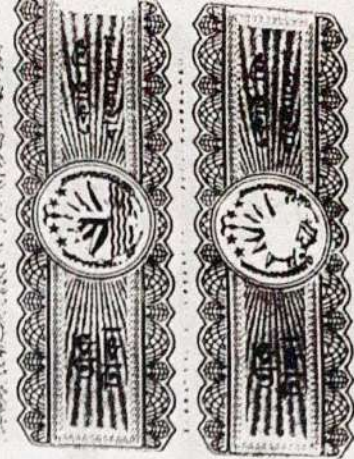
This treatise further explains the position at pages 92-93 in this way:

"A negotiation credit is one calling for drafts on the issuing bank or the buyer and is an invitation to any bank to act on it. It carries the issuer's promise or engagement that drafts properly drawn in accordance with the terms of the credit will be honoured".

Raymond Jack, Documentary Credits, Second Edition, at paragraph 2.

22. deals with the concept of negotiation in the following manner.

"With a negotiation credit the undertakings are directed to any bank, or to any bank of a description stated in the credit, which becomes a bona fide holder of any bill of exchange and the other documents which are stipulated by the credit. The purpose of making a credit a negotiation credit is that enables a bank to negotiate (or buy) the documents from the beneficiary and then to present them under the credit and to receive payment in due course. In this way the beneficiary gets his money immediately from the negotiating bank, and the negotiating bank



- 43 -

bank has the undertakings given by the credit available to it, and will present the documents under the credit as the party entitled in due course to payment"(underlinings are mine).

The same treatise further explains the position at paragraph 7.5 (1) in this way :

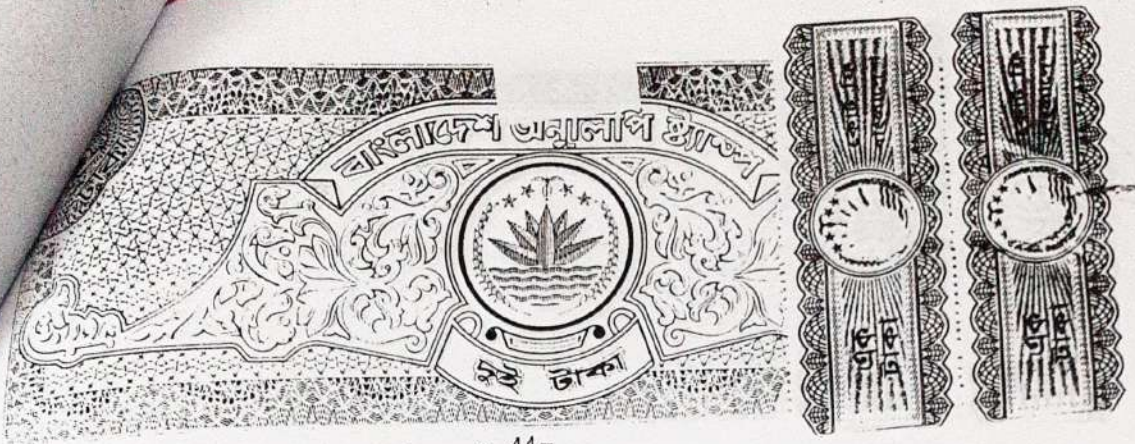
"B.Negotiation Banks.

7.5(1)General The term is here used to refer to a bank which acquires documents in its own right to be presented by it as a principal under a letter of credit which is a negotiation credit

In short a negotiation credit in this sense is one where the undertaking given by the credit is addressed to all bona fide holders of the documents,or to banks generally or to banks of a particular description.It is open to such parties to negotiate, that is,to buy,the documents and to present them under the credit in their own right

A bank which purchases the documents under a negotiation credit may be called a negotiation bank".

(under linings are mine)."



- 44 -

From the above it would appear that negotiation, in the context of documentary credits do not merely mean nodding of heads between the bank and the seller who hands over his draft and other documents to them but definitely means something more, something tangible. In order to complete the negotiation, the concerned bank must make the necessary payment against the draft and/or the documents. This incident of payment makes the bank which received the documents a negotiating bank, without which the said bank would not be a negotiating bank but may be a collecting bank to collect the payment from the issuing bank as an agent of the seller.

This legal position in respect of negotiation was also formally recognized in the revised I.C.C. no 500. Article 10(b)ii reads as follows:

"11. Negotiation means the giving of value for Draft(s) and/or documents(s) by the bank authorised to negotiate, Mere examination of the documents without giving of value does not constitute a negotiation."

This provision, however, is not a new law but only condenses the existing legal position.

Now let us see how the plaintiff bank itself understands and comprehends by the term negotiation. The witness on behalf of the



- 45 -

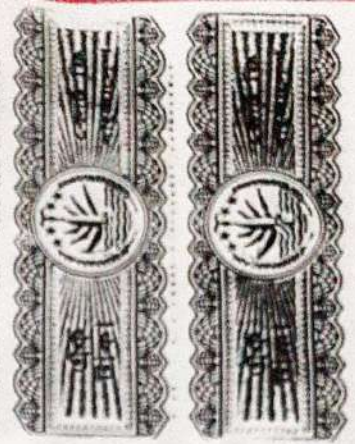
of the plaintiff in his cross-examination, explains negotiation thus:

"By negotiation I mean receiving the documents, scrutinizing the same, finding them with conformity with the L.C. pay the amount to the party and reimbursement."

From this discussion it would appear that the word 'negotiation' clearly envisages the purchase of draft and documents by the concerned bank, even a promise to pay, at a later date, would not do, there must a corresponding payment to the beneficiary on receipt of the draft and the documents by the concerned bank, to make it a 'negotiating bank.'

Now let us examine the evidence in this regard. But this is a surprise to us that the HBL, Dubai, the plaintiff, although claimed since 18th March, 1986, to have negotiated the documents, choose not produce any evidence of payment to the beneficiary.

The learned counsel for the plaintiff-respondent initially contends that there was no such need for the plaintiff-bank to prove payment to the beneficiary, that it was in between them and that the bank might even received the documents from the beneficiary without making any payments but then realizing that such a

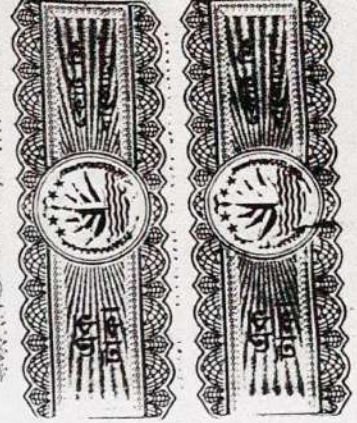
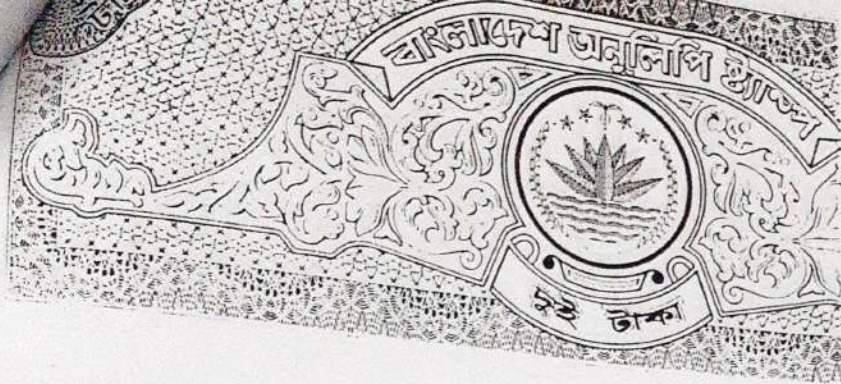


- 46 -

a transaction would make the plaintiff -bank a mere collecting bank, he resiled from his such argument.

The learned Counsel for the plaintiff-respondent firstly refers to the Bill of Exchange (Ext.15(1) as a proof for payment. We have ourselves examined this instrument from the records. It is a photo-stat copy of a typed copy. This Bill was purported to be drawn under NBL, credit No.07.9.86 dated 3.3.86 issued for and on behalf of Navegadora Panocenica S.A. (the seller) upon M.A. Chowdhury, station Road, Khulna, (the buyer) to ~~pay~~ ~~xxxxx~~ pay to the order of HBL, Dubai, (the plaintiff) an amount of US\$ 2,66,600/-

Although this bill states that value of the bill was received by the seller but the instrument itself (Ext-15(1) was unsigned. The learned counsel tries to explain that this paper is obviously a photo-stat copy of the original bill which was sent to the defendant-bank on 19th May, 1986. The said original bill was also produced in the trial court on behalf of the defendant and was marked as exhibit ~~xx~~ as Ext.P. When both the exhibits Ext.15 (1) and Ext.P are put together side by side, it becomes all very apparent that Ext.15(1) is definitely not the photo-stat copy of the Ext.P. Since all concerned admit the distinguishing features of both the instruments, we refrain from doing so here all over



- 47 -

over again as it is accepted that Ext. 15(1) is not the photo copy or the original bill Ext. F. Since Ext. 15(1) is a photo-stat copy of an instrument without any signature and the whereabouts of the original being unknown, it is inadmissible in evidence. The learned Counsel, however, points out that no objection was raised in respect of Ext. 15-(1) in the trial Court. But an omission to objection in respect of an ~~an~~ inadmissible evidence, would ~~not~~ not make it admissible. Reliance in this regard may be made to the decision in the case of Miller vs. Babu Madhu Das 231.A.100. The learned counsel further contends that this piece of paper (Ext. 15(1)) might be the photo-stat copy of their office copy. It does not, however, look that way. Because, in that case the said office-copy ~~is~~ ought to have been produced before the Court. In any event it does not even bear the endorsement on its reverse side as Ext. F has.

Let us see what what the witness on behalf of the plaintiff-bank states about the said document (Ext. 15(1)). The P.W. 1, in his examination - in-chief, did not make any attempt to prove the bill Ext. 15(1) specifically although that was a vital piece of evidence to prove payment. He only mentioned in omnibus manner thus:

"Ext. 15-15(78), There was no discrepancy in any document,"



- 48 -

In his cross-examination he stated thus:

"Ext. 15(i), the bill of exchange drawn on the
~~applicant~~ applicant by Navegadora, bill of ex-
change is drawn by the beneficiary on the application
made by the order of Habib Bank."

Clearly this statement in respect of Ext. 15(i) is wrong and incorrect although stated on oath by a person no less than the Manager of the Dubai branch of HBL, the plaintiff. He was the concerned Manager of the HBL, Dubai, at the relevant time, as such, is expected to know the relevant documents and the ins and outs of the concerned transaction. The original bill (Ext. F) was admittedly with the defendant bank since 22nd May, 1986. It is not understood as to why instead of calling for the said original instrument from the possession of the defendant-bank the P.W.1 chooses to make a wrong statement in Court.

Now let us consider, the Bill of Exchange bearing date March 15 1986 (Ext. F). The learned Counsel for the plaintiff-respondent invites us to hold that this document proves payment by the HBL, Dubai, in favour of Navegadora Panocenica S.A. This is a standard form bill of exchange for US \$ 2,66,600/- drawn under NBL credit No. 07.9.86, to the order of HBL, Dubai, drawn by the seller without recourse to the drawer upon the buyer. The instrument was also duly endorsed



- 49 -

endorsed on the reverse by the HBL to the order of NBL, Khulna but without any date. This is a bill no doubt but it is not understood how it can evidence a payment in favour of the beneficiary. The endorsement on the reverse, made by HBL, Dubai, was mere discharge of the bill in favour of the NBL, Khulna. It does not mean payment by the plaintiff-bank in favour of any body. As such, we are unable to accept the contention of the learned Counsel that the bill (Ext.F) itself is an evidence of payment.

Rather, the stipulated endorsement on the back of the L.C. although not conclusive on its own, would have gone a long way to prove such a payment. The letter of Credit (Ext.1 and Ext.D.D.-1) embodies a number of terms and conditions, Under the heading Instructions for the negotiating bank it reads as follows:

"Amt (amount of draft negotiated should be endorsed on the reverse of the credit."

But the letter of credit produced by the plaintiff-bank (Ext.1) nor those (Ext.D.D.-1) produced by the defendant-bank shows any endorsement on the reverse side. The learned Counsel for the plaintiff-bank strenuously argues that this lapse on their part is no doubt a discrepancy but since it was never raised before, it cannot now be raised.



অনুলিপি প্রাপ্ত পরামর্শ করিবার তারিখ	সংযোজিত সাক্ষ্যক ইচ্ছা এবং ফেলিও প্রমাণ করিবার নির্দিষ্ট তারিখ	সংযোজিত সাক্ষ্যক ইচ্ছা এবং ফেলিও বিলি করিবার তারিখ	সে কারিবে অনুলিপি বিলি করিবার অন্য তথ্যসহ বিল	পরামর্শকারীকে অনুলিপি সেবার তারিখ
- 50 -				

True it is that as a discrepancy this cannot be raised now at this belated stage in appeal but it had another very important purpose. Had there been an endorsement on the back of the L.C. showing the amount, it would evidence showing payment. But now lapse of such a serious nature on the part of the HBL would cast a serious doubt about their claim of payment to the beneficiary which was being consistently doubted by the defendant-bank.

So far, we are unable to find any documentary evidence showing payment. Let us now consider the oral evidence in this respect.

The P.W.1 in his examination-in-chief did not state any thing about payment, he however stated that the price of 5200 tons of cement came to US \$ 24,65,500/- for which the bill was negotiated. In his cross-examination on the question of payment he stated as follows:

"I cannot say how we paid the party, I do not remember the date of payment but it is immediately after negotiation.

Navegador our regular client. We maintain their account with us. We have the statement of account to show payment.

But we have not adduced it."

This witness is the Manager of the HBL, Dubai, the plaintiff-bank, at the relevant time. He himself stated in his cross-examination that by negotiation I mean receiving the document, scrutinizing the same finding them with conformity with L.C. pay the amount to the party and reimbursement. Still, he made no endeavour to prove payment



অনুলিপি প্রদান করা
তারিখ

প্রয়োজনীয় সংখ্যক ট্যাম্প এবং
ফোলিও প্রদান করার নির্দিষ্ট তারিখ

প্রয়োজনীয় সংখ্যক ট্যাম্প এবং
ফোলিও বিলি করার তারিখ

সে তারিখে অনুলিপি বিলি করার
অন্য তৈয়ারী ছিল

সরকারী কর্মসূচি
সেবার তারিখ

- 51 -

payment to the beneficiary, either in the plaint or in his examination -in-chief.

Besides, his deposition was completed on 17.11.1990 and the deposition of the witness on behalf of the defendant started on 6.5.1992 and was closed on 1.2.1993. During all these period the plaintiff bank could produce the concerned bank statement or any other document to prove payment to the beneficiary constituting completion of negotiation although this is the very allegation raised on behalf of the defendant-bank in its written statement as well as in the deposition adduced on their behalf.

It is well established principle that the plaintiff has to prove its own case on preponderance of evidence but from this discussions made above it would be too apparent that the plaintiff-bank although fully aware of the requirement of payment to effect negotiation, did not take any step to prove so, as such, they should also be prepared for the inevitable legal consequence for such lapse on their part.

The learned Counsel for the plaintiff respondent lastly contends that the learned Judge in the trial Court found the negotiation to be proved.

It appears, that the learned Judge at the first instance, accepted the documents marked Ext.2,4,5,6 and 9 as proof of negotiation and claiming reimbursement. We have also gone through those documents. The telexes Ext.2 and Ext.4 were from HBL, Dubai to HBL



অনুলিপি অন্য দরখাস্ত করিবার তারিখ	প্রয়োজনীয় সংখ্যক স্টাম্প এবং ফোলিও জমা করিবার নির্দিষ্ট তারিখ	প্রয়োজনীয় সংখ্যক স্টাম্প এবং ফোলিও বিলি করিবার তারিখ	যে তারিখে অনুলিপি বিলি করিবার জন্য তৈয়ারী হিল	দরখাস্তকারীকে অনুলিপি দেওয়ার তারিখ
-----------------------------------	---	--	--	-------------------------------------

- 52 -

HLB,N.Y.The telex Ext.3 was from HBL.N.Y. to AMEX,N.Y.the telex Ext. 5 was from HBL.N.Y.to HBL,Dubai,the telex Ext.6 was from HBL,Dubai to NBL,Khulna,the telex Ext.9 was from AMex,N.Y,to HBL,N.Y.These telexes were exchanged in connection with the reimbursement claim of the plaintiff bank but had nothing to do with negotiation.As a matter of fact although the learned judge framed certain questions in this regard but completely over looked these all important questions in its proper perspective as to what constitutes a negotiation-on,whether the ingredients or incidents of negotiation were established in this case and whether the plaintiff -bank at all comes within the description of negotiable bank.

Since,the plaintiff-respondent failed to prove payment to the beneficiary,their claim of negotiation of the draft and the document to the beneficiary,their claim of negotiation of the draft and the documents failed and they are not entitled to the decree as prayed for.Their suit is liable to be dismissed.

Under the circumstances,the decree in the Money Suit No.108 of 1990,in the Court of Subordinate Judge,Second Commercial Court,Dhaka Dhaka, is set aside and the suit is dismissed.

The First Appeal No.204 of 1993 arises out of the Title Suit No.56 of 1987.The suit was decreed on contest against the defendant no.1(NBL,Khulna),defendant no.4(Aquamarine Ltd),defendant no.5(Navegadora Panocenica S.A.)and defendant no.5(Shuwa Kaiun Kaisha Ltd.).

It was declared that the defendant no.5 is not entitled to get

অনুলিপি প্রাপ্ত পরামর্শ করিবাব তারিখ	অনুলিপি প্রাপ্ত পরামর্শ করিবাব তারিখ	অনুলিপি প্রাপ্ত পরামর্শ করিবাব তারিখ	অনুলিপি প্রাপ্ত পরামর্শ করিবাব তারিখ	অনুলিপি প্রাপ্ত পরামর্শ করিবাব তারিখ
- 53 -				

Get their claimed amount from the plaintiff in respect of the letter of credit, and that the defendant no.1 would not pay any amount in respect of L.C.No.07.9.86 dated 3.3.1986, in favour of the defendant no.5 or their banker or representative. The defendant no.1 was further directed to repay the plaintiff the rest of the money paid by him earlier to the defendant no.1, after deduction of interest from the date of opening of the L.C. till the plaintiff instructed the defendant no.1 to stop payment on the L.C. Only the defendant no.1 (NBL, Khulna) filed the appeal.

In this appeal, Dr. M. Zahir, the learned Advocate on behalf of the appellant, frankly submits that the NBL, Khulna, held-up the margin money of Tk. 35,00 Lacs only because of their apprehension that in case, the claims of the HBL, Dubai, is allowed, which according to them, they were not entitled to, they will have to pay them the said entire claimed amount which includes the aforesaid margin money, as such, they resisted the claims of the plaintiff. But, the learned Advocate candidly concedes that if the claims of the HBL, Dubai, is not allowed, then of course, the NBL, Khulna, has no right to the said margin money.

We have already held in P.A.No.202 of 1993 that the HBL, Dubai, is not entitled to the decree in the Money Suit No.108 of 1990, based on the LCNo.07.9.1986 dated 3.3.1986, as such, the NBL, Khulna, the said LC. issuing bank, can no longer hold Tk. 35,00 Lacs received from the plaintiff in Title Suit No.56 of 1987, at the time of



অনুলিপি প্রদান করিবার তারিখ	প্রয়োজনীয় সংখ্যক স্ট্যাম্প এবং ফোলিও জমা করিবার নির্দিষ্ট তারিখ	প্রয়োজনীয় সংখ্যক স্ট্যাম্প এবং ফোলিও বিলি করিবার তারিখ	যে তারিখে অনুলিপি বিলি করিবার জন্য তৈয়ারী হিল	সরকারীকৃত অনুলিপি সেওয়ার তারিখ
		- 54 -		

of opening of the aforesaid letter of credit as margin money. This will, apart from every thing else, will be unjust enrichment on the part of the defendant no.1. This is also conceded to by Dr. M. Zahir, Under such circumstances, the appeal is liable to be dismissed.

In the result, the P.A.No.202 of 1993 is allowed while the P.A.No.204 of 1993 is dismissed.

In the circumstances, there shall be no order of costs in any of the appeals.

Send down the lower Court records forthwith.

A.B.M. Khairul Haque.

Khondker Musa Khaled, J.

I agree.

Khondker Musa Khaled,

T. Rahman/3.6.2002.

Read by: *[Signature]*

Examd. by: *[Signature]*

অনুমোদিত অফিস প্রতিলিপি

[Signature]
 মহাপরিচালক
 বাংলাদেশ মুদ্রার স্ট্যাম্প হাইকোর্ট বিভাগ
 (১৯২ ই সনের ১ম আইন)
 কার্যক্রমে প্রকৃত প্রায়

[Signature] ২৬/৭/০২