BEFORE THE DEBTS RECOVERY APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 186/2013

Between

UCO Bank … Appellant/s

V/s.

Yes Bank Ltd. …Respondent/s

Mr. Pankaj Vijayan along with Mr Fenil Sangoi, i/b M/s. Intralegal, Advocate for Appellant.

Senior Counsel Mr. J. P. Sen along with Mr. Arun S., Ms. Priyanka & Mr. Karan K. i/b M/s Cyril Amarchand Mangaldas, advocate for Respondent.

-: Order dated: 22/08/2023:-

UCO Bank is the Appellant in appeal impugning the judgment dated 23.10.2012 of the Debts Recovery Tribunal No.-II, Mumbai (D.R.T.) dismissing Original Application (O.A.) No. 3 of 2011 filed by it under Sec. 19 of the Recovery of Debts Due to Banks & Financial Institutions Act ('RDDB&FI Act', for short). The Respondent is also a bank named Yes Bank Ltd.

2. The O.A. was filed by the Appellant claiming a sum of ₹47,60,05,072 with interest @16.25% per annum from the Respondent bank. A dispute arose on the account of an invocation of the Stand-by Letter of Credit dated 22.08.2008 issued by the Respondent to the Appellant to secure unpaid indebtedness due or owed to the Appellant arising out of the Letter of Credit facility granted by the Appellant to a company named Zoom Developer Pvt.

Ltd. ("Zoom" for short). In the year 2008, Zoom entered into an agreement for the import of equipment from Project Engineering Management Services (PEMS) for its integrated steel project at Jamshedpur. It approached the Respondent for funding the import by issuing a Foreign Letter of Credit (FLC) to PEMS for 720 days which the Respondent agreed. The Respondent's FLC was not acceptable in the international market and hence, Zoom approached the Appellant to establish the FLC which was to be backed by a Stand-by Letter of Credit (SBLC) to be issued by the Respondent to the Appellant. Accordingly, the Respondent accepting the request established SBLC No. 001LM02082340001 dated 22.08.2008 in favour of the Appellant up to an aggregate principal amount of ₹45 crores agreeing to unconditionally honour all demands made and presented by the Appellant as long as such demands conformed with the terms of the SBLC subject to the laws of India and the 2007 Revision of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce Publication No. 600 (UCP600) valid up to 11.08.2010. The FLC favouring PEMS at the request of Zoom was to be in Swiss Franc (CHF). Thereafter, Zoom requested a change of currency to US Dollars (USD). The Respondent was informed, and the Appellant was required to issue a fresh FLC. The Respondent gave its confirmation on 26.08.2008. Accordingly, fresh FLC No. 190808FOLU0069 was issued in favour of PEMS valid up to 20.09.2008. During March 2009, the Appellant issued three Letters of Undertaking(LOU) dated 06.03.2009, 09.06.2009 and 07.12.2009 in favour of the foreign lender i.e. UCO Bank, Singapore Branch for

buyers' credit facility provided by the said Bank to Zoom.

3. By June 2009, Zoom had to pay the Appellant a sum of ₹1,38,72,739/- towards the interest which was defaulted. The Appellant invoked the SBLC dated 01.07.2009 and called upon the Respondent to pay the amount. However, on 02.07.2009 it was informed by Zoom that it was making good the default and requested the Respondent not to make payment under the SBLC to the Appellant. It is alleged that in a meeting between the Appellant, the Respondent and Zoom held on 09.07.2009, the Respondent raised a contention that the claimed interest payable by the rollover of the credit was not covered by SBLC. Since the payment was received, the Appellant did not lodge any formal protest despite the Respondent's contention being false. The Respondent was informed vide letter dated 14.12.2009 by the Appellant that the money under the facility extended to Zoom based on the SBLC would fall due for payment on 04.06.2010. The Respondent sent a reply on 08.02.2010 reiterating that the extension was not covered by the SBLC. Thereafter, vide letter dated 05.06.2010, the Appellant called upon the Respondent to pay ₹47,60,05,078/- together with interest on invoking the SBLC. Vide reply dated 08.06.2010, the Respondent refused to pay. An advocate notice was issued on behalf of the Appellant calling upon the Respondent to honour its commitment under the SBLC to which the Respondent again sent a reply through its advocate on 06.07.2010 persisting in wrongful repudiation of its liability. It is contended for the Appellant that the only document required to be produced for recovery of payment under SBLC was the Appellant's default

certificate in the form set out in the SBLC, which the Appellant claims to have done.

4. The Respondent contested the claim by putting forth various contentions. It is pointed out that the dispute between the parties arises on account of wrongful invocation of the SBLC dated 22.08.2008 issued by the Respondent to the Appellant to secure unpaid indebtedness due or owed to the Appellant arising out of the Letter of Credit facility granted by the Appellant to Zoom. It is stated that around March 2009, the Appellant had voluntarily, independently and unilaterally decided to issue three Letters of Undertaking (LOU). This decision of the Appellant in favour of a foreign lender was independent and has no connection whatsoever with the Appellant's decision to roll over the facility for further duration. Specific concurrence from the Respondent which is mandatory under the special instructions of the aforesaid SBLC was not obtained before the LOUs were issued. It is pointed out that the annexure appended to the SBLC mandates irrevocably and unconditionally that any change in the terms of the FLC ought to be pre-approved by the Respondent in writing in the template appended as an annexure to the SBLC. The Appellant had lodged a claim vide letter dated 01.07.2009 purportedly under the SBLC for ₹1,38,72,739/- towards the outstanding interest amount due and payable by Zoom under the FLC. However, a letter was received from Zoom on the very next date inter alia informing that it was in the process of clearing the interest claimed by the Appellant and to keep the claim abeyance. The Respondent received a letter on 14.12.2009 informing for the first time that Zoom had

arranged BC to meet the obligation and that the Appellant had issued LOU to the foreign lender. To that letter, the Respondent responded on 08.02.2010 bringing it to the notice of the Appellant that the issuance of LOUs was not contemplated under the terms of SBLC and that any liability or claim that may arise in respect of the transaction would fall outside the terms of the SBLC for which the Respondent would not be liable. Despite such information being given, the Appellant issued a lawyer notice which was responded to by the Respondent through their lawyer making it explicit that the BC and its rollover, in law, is a distinct and separate transaction unconnected with the SBLC. The Respondent contends that its obligation under the SBLC was only to honour the obligations, if any, of the Appellant under the FLC and not under the BC arrangement. No prior written consent from the Respondent was obtained before making any modification or variance in the terms of the FLC. There is no error in the impugned judgment dismissing the O.A. and hence, the Respondent submits that no interference is required in the appeal.

5. Heard the arguments of Mr Pankaj Vijayan, the Ld. Counsel appearing for the Appellant and Mr. J. P. Sen, the Ld. Senior Counsel for the Respondent.

6. Mr Vijayan points out that the question that arises for consideration is whether the issuing Bank can dishonour the SBLC sitting on judgment over the default claim of the beneficiary. According to him, there is no scope for the Respondent to dishonour the payment on the ground that there was no unpaid indebtedness arising out of the banking facilities. The Ld. Counsel points out that

the terms of the SBLC are similar to a bank guarantee that conditions are incorporated in the bank guarantee deed whereas SBLC is in tune with the Uniform Customs Practice for Documentary Credits- ICC 600. Being unconditional and irrevocable upon being informed by the beneficiary about the default by the customer, the issuer shall make payment under the SBLC. It is pointed out that the SBLC is an independent contract not based on any underlying contract and default being the prerogative of the beneficiary, the issuer is not expected to sit on judgment concerning the default and shall unconditionally and irrevocably comply with a default certificate being issued. It is stated that the dispute between the buyer and the seller shall have no bearing on the liability of the issuing bank. The beneficiary should not be pushed to prove unpaid indebtedness on the account of banking facilities to receive the amount. The Ld. Counsel points out that Article 14 sub-clause(h) of the UPC600 stipulates that if the SBLC contains a condition without stipulating documents to indicate compliance with the condition, the bank shall deem that the condition is not stated and may disregard it. It is also argued that the variation of the contract is not a defence to dishonour SBLC as the issuing bank has no business to investigate whether there has been any violation of the underlying contract by the beneficiary. In case, a customer is aggrieved by the wrongful invocation by the beneficiary, he is entitled to legally proceed against the beneficiary and no fault can be attributed to the bank for making payment under the SBLC. In the instant case, there is no dispute between the Appellant and Zoom who unilaterally agree the payment should be made by the Respondent.

Hence, it is an irony that the issuing bank has a dispute, argues the Ld. Counsel for the Appellant. It is also submitted by the Ld. Counsel that no confirmation from the Respondent is required because the SBLC is for 720 days and payment can be refused only if there is an allegation of fraud. The SBLC states that the payment has to be made within 24 hours of raising the demand through a default certificate. The Ld. Counsel points out that the D.R.T. has committed an error by comparing the FLC with the Buyer's Credit. The issue should be whether the SBLC can be dishonoured because there is a variation of the underlying contract. There is no need for the production of any documents as in the case of an LC. A mere information is sufficient for invoking the SBLC, submits Mr Vijayan. The Ld. Counsel further points out that if Zoom cannot restrain the Appellant from invoking the SBLC on the ground that there is a variation of the underlying contract, its banker also cannot do so. The Ld. Counsel relies on the decision of the Hon'ble High Court Bombay in *Drive India Enterprise Solutions Ltd vs. Haier Telecom (India)Pvt. Ltd. & Ors 2011 Legal Eagle 3269* in support of his argument that SBLCs, as much as bank guarantees, are required to be honoured as per their terms and no Court may interfere with due compliance thereof except in the case of egregious fraud or irretrievable loss, harm and injustice. Referring to UCP600, the Hon'ble Division Bench has observed that if a credit contains a condition without stipulating the documents to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it. The Ld. Counsel further relies on the decision of the Hon'ble Supreme Court in *U.P. State Sugar Corporation*

Ltd. vs. M/s Sumac International Ltd. 1996 Legal Eagle 2000 wherein it was held that a bank issuing a guarantee is not concerned with the underlying contracts between the parties to the contract. The duty of the bank under the performance guarantee is created by the document itself. Once the documents are in order the bank giving the guarantee must honour the same and make payment ordinarily unless there is an allegation of fraud or the like. The courts will not interfere directly or indirectly to withhold payment, otherwise, trust in commerce internal and international would be irreparably damaged. It is also pointed out that the remedy arising ex-contractual is not barred and the cause of action for the same is independent of the enforcement of the guarantee. The Ld. Counsel also relies on several other decisions such as *Standard Chartered Bank vs. A. B. Engineering Corporation Ltd. & Ano. 1996 (5) SCC 450, NCC Ltd & Ors vs. Sembcorp Gayatri Power Ltd. & Ano. 2017 Legal Eagle (AP) 278* and *DLF Industries Ltd. vs. Hong Kong and Shanghai Banking Corporation Ltd. 1999 LawSuit (Del) 80* in support of the argument regarding the SBLC being similar to the bank guarantee, needs to be honoured without going through the underlying contract.

7. Per contra, Mr Sen, the Ld. Senior Counsel appearing on behalf of the Respondent Bank vehemently argues that under the SBLC, the Respondent Bank is liable to pay only if the claim was made in terms of the SBLC. The Respondent had agreed to unconditionally honour all demands made and presented by the Appellant as long as such demands were in conformity with the terms of the SBLC which was subject to and governed by the laws of the Republic of India and

UCP600. At the behest of Zoom, which was desirous of arranging for Buyer's Credit to meet its obligation under the FLC for making payment to the foreign supplier i.e. PEMS, the Appellant voluntarily, unilaterally and independently issued a LOU in favour of the foreign lender. This unilateral and independent act of the Appellant was in replacement of its obligations under the FLC. The Appellant issued three LOUs in favour of the foreign lender. Neither Zoom nor the Appellant had informed the Respondent about the said decision. The Ld. Senior Counsel argues that the concurrence of the Respondent was mandatory under the terms of the SBLC. Hence, there is a departure from the agreed terms of the SBLC and therefore, the Respondent is not liable to pay any amount to the Appellant. The claim of the Appellant arises under the LOUs issued by it independently and without the knowledge and concurrence of the Respondent, and therefore, the Respondent, stood discharged of its obligation under SBLC, submits the Ld. Senior Counsel. It is further submitted that an FLC and LOU are necessarily two different facilities/ transactions, legally as well as from a regulatory perspective and the contracting parties under the FLC/SBLC and the buyer's credit/LOU are different and distinct. The Ld. Sr. Counsel also points out that the terms and conditions under the SBLC must be observed strictly and, in the event they are not observed, the bank issuing the said SBLC would be well within its right to refuse to honour the SBLC and no cause of action would arise against the bank.

8. Reliance is placed by the Ld. Sr. Counsel on a judgment of the Hon'ble Supreme Court in *United Commercial Bank vs. Bank of India*

(1981) 2 SCC 766 wherein it is held thus:

> "38. *In Bank Melli Iran vs. Barclays Bank [(1951) 2 LI L Rep 367]* the documents evidencing a shipment of "100 new, good, Chevrolet trucks" were held not to be a good tender under a credit calling for "new" trucks. McNair, J. held that all the documents tendered and accepted by the defendants were defective and consequently, the defendants were not entitled to debit the plaintiff with the amount paid against these documents, although the defendants succeeded on the ground that the plaintiffs had by their conduct ratified the defendant's action in accepting the documents. The dicta in American cases are to the same effect. In *Lamborn vs Lake Shore Banking Co. [(1921) 196 Appl Div 504, 507: 188 NYS 162, 164]* Smith, J. said:
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> "A party who is entitled to draw against a letter of credit must strictly observe the terms and conditions under which the credit is to become available, and, if he does not, and the bank refuses to honour his draft, he has no cause of action against the bank."
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> Again Hiscock, C.J. in *Laudisi vs. American Exchange National Bank [(1924) 239 NY 234: 146 NE 347, 348]* said:
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> "The bank has the power and is subject to the limitations which are given and imposed by (the customer's) authority. If it keeps within the powers conferred it is protected in the payment of draft. If it transgresses those limitations, it pays at its peril."
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> Lord Justice Denning, speaking for the Court of Appeal in *Pavia & Co., S.P.A. vs. Thurmann- Nielsen, (1952) 2 Q.B.84 held* thus:
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> "The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller, and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. This credit

> is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise, the seller would not be entitled to draw on it."

9. Yet another decision relied upon by the Ld. Sr. Counsel is that of the Division Bench of the Hon'ble Calcutta High Court, in *United Bank of India Ltd. vs. Nederlandsche Standard Bank, 1961 SCC OnLine Cal 44* where it was held thus:

> "25. It is well settled law in connection with letter of credit that a person seeking to rely on a credit must act strictly within the terms and limitations of such letter of credit. The authority for that proposition may be found in the House of Lords' decision in *Equitable Trust Company of New York vs. Dawson Partners, Ltd. (1927) 27, Lloyd's List LR 49*, laying down the proposition that a person who seeks to rely on a letter of credit must do so in exact compliance with its terms and it is also elementary that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accordance with the credit as opened. Viscount Sumner at page 55 of this report said in that case:
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> "It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents, strictly observed. There is no room for documents which are almost the same or which will do just as well."

10. The only question that arises for determination in this appeal is whether there has been any infringement or excess on the part of the Appellant in invoking the SBLC. Transactions involving banks have sanctity and need to be respected. Zoom is the party for which the Respondent has stood guarantee. The Appellant bank had agreed to accept the SBLC executed by the Respondent bank in favour of the transactions of Zoom since the instrument of the Respondent bank

was not acceptable abroad. The bank issuing a guarantee is not concerned with the underlying contracts between the parties to the contract. The duty of the bank under the performance guarantee is created by the document itself. The issuance of LOU by the Appellant cannot be termed as a breach of the agreed terms as contended by the Respondent. The issuing bank cannot sit on judgment as to whether the construction is as per the mandate or not. It has to pay the movement the customer invokes the SBLC which is unconditional and therefore, it cannot be insisted that a further specific concurrence is to be obtained. In the instant case, the SBLC states that it is unconditional and irrevocable. I do not think that it was proper and appropriate on the part of the Respondent to have set up the variation of contract as a defence to dishonour the SBLC. In fact, the issuing bank cannot investigate whether there has been any violation by the beneficiary of the underlying contract. SBLC or a bank guarantee stand on a different footing and cannot be compared with an ordinary contract where the variation of the terms may be a valid defence for a guarantor or a mortgagor. SBLC is irrevocable and unconditional. The only option available to the bank in case of improper invocation is to proceed against the beneficiary and not against the bank that makes the payment. There is no allegation of any fraud in the instant case which would enable the Respondent to refuse payment. It is pertinent to note that the SBLC in the instant case is for 720 days and the invocation was within the period stipulated. The dismissal of the O.A. appears to be improper and therefore, calls for interference in appeal.

Resultantly, the appeal is allowed and the impugned judgment and

order in O.A. No. 03 of 2011 on the files of the D.R.T.-II, Mumbai is set aside and the O.A. is allowed directing the Respondent /Defendant to pay a sum of ₹47,60,05,072/- together with interest at the rate of 16.25% per annum with effect from 06.06.2010 till the date of filing of the O.A. and further interest on the said principal amount at the rate of 7% per annum with effect from the date of filing the appeal till realisation.

Sd/-
Chairperson

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