IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

First Appeal No. 393 of 2018

In the matter of:

Manager, Sonali Bank Limited, Agargaon Branch, Agargaon, Dhaka.

... Appellant

-Versus-

Mercantile Bank Limited represented by its Managing Director through its authorized person, Mercantile Bank Limited, Head Office, 61, Dilkusha Commercial Area, Police Station- Motijheel, District- Dhaka and others.

...Respondents.

Mr. Shaikh Mohammad Zakir Hossain with
Mr. Faysal Mustafa and
Ms. Raziah Sultana, Advocates

...For the appellant

Mr. Mohammed Mutahar Hossain with
Mr. Rashed Ahmed Rishat and
Mr. Md. Saimun Islam, Advocates

...For the respondent no. 1

Heard on 16.02.2023, 23.02.2023, 11.05.2023, 13.07.2023 and 27.07.2023.
Judgment on 31.08.2023.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J.

At the instance of defendant no. 2 in Artha Rin Suit No. 60 of 2013, this appeal is directed against the judgment and decree dated 23.04.2018 passed by the learned Judge, Artha Rin Adalat No. 2, Dhaka in the said Artha Rin Suit decreeing the suit.

The precise case of the plaintiff so derived from the plaint are:

The present respondent no. 1 as plaintiff originally filed a suit for recovery of money amounting to taka 25,88,60,495/19 impleading the present appellant and others as defendant nos. 1-9.

It has been stated in the plaint that, the defendant no. 3, M/S Shovon Textile on 20.02.2011 opened a current account being No. 011811100009956 with the branch office of the plaintiff-bank, namely, Mercantile Bank Limited, Elephant Road Branch. The defendant no. 2 (herein the appellant-bank) on behalf of its customer opened a letter of credit where the beneficiary of the said letter of credit (precisely, LC) was defendant no. 3 and the said defendant no. 3 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank upon following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance and the defendant no. 2 accepted the said LC documents and confirmed the maturity date for the payment of the LC value. Then on the basis of the said acceptance, the plaintiff-bank then purchased the said documentary bills and the defendant no. 2 paid some bills amount but unfortunately failed to make payment bill amount on maturity. Then the defendant no. 4 on 30.07.2011 opened a current account being no. 011811100010601 with the branch office of the plaintiff-bank, namely, Mercantile Bank Ltd., Elephant Road Branch and the defendant no.

2 on behalf of its customer also opened a letter of credit where the beneficiary of the said LC was the defendant no. 4. The defendant no. 4 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance and the defendant no. 2 accepted the LC documents and confirmed the maturity date for the payment of the LC value and on the basis of the said acceptance, the plaintiff-bank purchased the said documentary bills though the defendant no. 2 paid some bills amount on maturity but unfortunately failed to make payment some bills amount on maturity.

The defendant no. 5 on 02.04.2012 opened a current account being no. 011811100011311 with the branch office of the plaintiff-bank, namely, Mercantile Bank Ltd., Elephant Road Branch and the defendant no. 2 on behalf of its customer also opened a letter of credit where the beneficiary of the said LC was the defendant no. 5 and the defendant no. 5 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance and the defendant no. 2 accepted the LC documents and confirmed the maturity date for the payment of the LC value. On the basis of the acceptance, the plaintiff-bank purchased the said documentary bills and the defendant no. 2 paid some bills amount on maturity but unfortunately failed to make payment some bills amount on maturity. The defendant no. 5 again on 29.11.2011 opened a current account being no. 011911100010815 with the branch office of the plaintiff-bank namely, Mercantile bank Ltd, Motijheel Branch, Dhaka and

the defendant no. 2 on behalf of its customer also opened a LC where the beneficiary of the said LC was the defendant no. 5 and the said defendant no. 5 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance. The defendant no. 2 then accepted the LC documents and confirmed the maturity date for the payment of the LC value. On the basis of the said acceptance, the plaintiff-bank purchased the said documentary bills; that the defendant no. 2 paid some bills amount on maturity but unfortunately failed to make payment some bills amount on maturity.

The defendant no. 6 on 28.02.2008 opened a current account being no. 11100078693 with the branch office of the plaintiff-bank namely, Mercantile Bank Ltd, main branch; that the defendant no. 2 on behalf of its customer also opened a LC where the beneficiary of the said LC was the defendant no. 6; that the defendant no. 6 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance; that the defendant no. 2 accepted the LC documents and confirmed the maturity date for the payment of the LC value. On the basis of the said acceptance, the plaintiff-bank purchased the said documentary bills and the defendant no. 2 paid some bills amount on maturity but unfortunately failed to make payment some bills amount on maturity.

The defendant no. 7 on 11.08.2011 opened a current account being no. 11100084917 with the branch office of the plaintiff-bank namely

Mercantile bank Ltd, main branch. The defendant no. 2 on behalf of its customer also opened a LC where the beneficiary of the said LC was the defendant no. 7 and the said defendant no. 7 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance; that the defendant no. 2 accepted the LC documents and confirmed the maturity date of the payment of the LC value; that on the basis of the said acceptance the plaintiff-bank purchased the said documentary bills; that the defendant no. 2 paid some bills amount on maturity but unfortunately failed to make payment some bills amount on maturity.

The defendant no. 7 on 11.08.2011 opened a current account being no. 11100084917 with the branch office of the plaintiff-bank, namely, Mercantile Bank Ltd., main branch. The defendant no. 2 on behalf of its customer also opened a LC where the beneficiary of the said LC was the defendant no. 7 and the said defendant no. 7 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance; that the defendant no. 2 accepted the LC documents and confirmed the maturity date for the payment of the LC value. On the basis of the said acceptance, the plaintiff-bank purchased the said documentary bills; that the defendant no. 2 paid some bills amount on maturity but unfortunately failed to make payment some bills amount of maturity.

The defendant no. 8 on 08.03.2012 opened a current account being no. CD 010211100025327 with the branch office of the plaintiff-bank, namely, Mercantile Bank Ltd, Dhanmondi Branch. The defendant no. 2 on behalf of its customer also opened a LC where the beneficiary of the said letter of credits was the defendant no. 8 and the defendant no. 8 as per terms and conditions submitted the LC documents before the plaintiff-bank and the plaintiff-bank following the norms and practice submitted the LC documents before the defendant no. 2 for acceptance and the defendant no. 2 accepted the LC documents and confirmed the maturity date for the payment of the LC value and on the basis of the said acceptance, the plaintiff-bank purchased the said documentary bills and the defendant no. 2 paid some bills amount on maturity but unfortunately failed to make payment some bills amount of maturity.

It has further been stated that, in the aforesaid way, the defendant nos. 1 and 2 accepted all the bills unconditionally confirming the payment by inserting maturity dates on the respective bills and as per provision of the law after acceptance of the LC documents by the LC issuing bank it becomes a separate agreements between LC issuing bank and the negotiating bank and as such, the defendant nos. 1 and 2 are legally bound to pay the accepted bills amount along with up to date overdue interest. It has also been stated that, the defendant nos. 3-8 also executed personal guarantee in favour of the plaintiff-bank to repay the amount of loan created against the respective purchased bills amount which were purchased on the basis of the acceptance and confirmation made by the defendant nos. 1 and 2 along with up to date interest. As per the norms,

practice and rules of documentary credit as well as guidelines of the Bangladesh Bank vis-à-vis the existing laws of the country, the defendant nos. 1 and 2 are legally bound to pay the accepted bills amount on maturity with up to date interest. Then, the plaintiff-bank through its various branch offices issued a number of reminder letters to the defendant nos. 1 and 2 requesting them to make payment of the overdue bills they accepted but the defendant nos. 1 and 2 neither replied the letters nor paid any heed to those reminders which proves that, the defendant nos. 1 and 2 would not pay the overdue bills without the intervention of the court. As a result, the liabilities of the defendant nos. 1 and 2 against all the documentary bills stands at taka 25,88,60,495/19 as on 31.03.2013 which the defendant nos. 1 and 2 are legally bound to pay where the defendant nos. 3-8 are the respective guarantors of their respective portion of loan and are also legally bound to pay their respective guaranteed unpaid amount.

The cause of action for filing the suit arose on various dates when the defendant no. 2 on behalf of its customer opened letter of credits and then on various dates, the defendant no. 2 by its letter accepted the documents and confirmed the payment by inserting maturity dates and when the defendant nos. 3-8 executed personal guarantees for their respective liabilities and when the plaintiff-bank through its branches issued reminder letters to the defendant nos. 1and 2 requesting them to make payments of the overdue accepted bills and finally on 27.03.2013 when the plaintiff-bank through its lawyer issued legal notice upon the defendant nos. 1 and 2 requesting them to pay the overdue bills amount and as they did not come forward to repay the amount hence, the suit.

The present appellant as defendant no. 2 along with pro-forma respondent no. 9 as defendant no. 1 jointly contested the suit by filing a written statement denying all the material statement made in the plaint contending *inter alia* that, the suit itself is not maintainable in its present form and the plaintiff is not entitled to any relief adding further that, there has been no cause of action to file the suit as the suit does not disclose any cause of action and as such the suit is liable to be dismissed. It has further been stated that, the suit has been filed with a malafide intention and since the suit has been filed without any basis so, the suit is liable to be dismissed summarily. It has also been stated that, the purported buyer/importer has not been made any party to the suit so it is bad for non-joinder of parties and as such the suit is to be dismissed. It has also been stated that, the plaint is mostly based on facts which are totally misleading, distorted and far from any truth through which real picture of the subject matter has not been reflected and in view of the said panorama, the suit is liable to be dismissed.

It has further been stated that, the claim of the plaintiff against the defendant nos. 1-2 are completely illegal and unsustainable which has got no legal basis and in fact, the disputed LCs have never been issued by these defendants and there is no entry to that effect in any record maintained with the appellant, bank nor any account of the purchaser in operation with the appellant-bank and even, the appellant-bank has no knowledge regarding the disputed transaction and the statements made to that effect in the plaint are completely frivolous, vexations, misleading, motivated, manufactured, concocted and misrepresentations of facts and not tenable in the eye of law

and the defendants are categorically and emphatically denying any transaction through the alleged LCs and the plaintiff with an ill-motive has filed the suit just for illegal gain.

It has finally been stated that, the plaintiff has filed the suit making some false and fabricated story and thus the suit is liable to be dismissed.

In order to adjudicate the suit, the trial court framed as many as five different issues when the plaintiff and the defendant no. 2 examined one witness each and the plaintiff produced a series of documents which were marked as exhibit-'1-21' series though defendants produced none. However, the learned Judge of the trial court on conclusion of the trial, passed the impugned judgment and decree. Being aggrieved by and dissatisfied with the said judgment, the defendant no. 2 alone as appellant preferred this appeal.

Mr. Shaikh Mohammad Zakir Hossain, the learned counsel appearing for the appellant upon taking us to the impugned judgment and all the material documents appended with the paper book at the very outset submits that, the learned Judge of the trial court has failed to consider that there has been no existence of the dispute letter of credits in the appellant-bank nor this appellant, Sonali Bank Limited ever issued alleged 115 LCs and as such, those are all manufactured and created out of prevailing banking norms and practice even though the learned Judge misconstrued the evidence on record to that effect and most erroneously made an observation stating that, *"বিবাদী দাবী প্রমানের নিমিত্তে কোনো দালিলিক সাক্ষ্য অত্রাদালতে উপস্থাপন করতে ব্যার্থ হয়েছেন"* and passed the impugned judgment and decree

without applying her judicial mind vis-à-vis entering into the merit of the suit and as such the impugned judgment is liable to be set aside.

The learned counsel next submits that, the learned judge has failed to consider that the disputed 115 LCs which were shown to have issued by the defendant no. 2-bank is located at Agargaon, Dhaka whereas the negotiating or beneficiary Mercantile Bank, the respondent no. 1 is situated at Elephant Road, Dhaka that is, less than 7(seven) Kilometers away from the alleged LC issuing bank and hence the above transaction cast a serious doubt about its fairness to any ordinary person yet the plaintiff-bank failed to make any inquiry regarding the causes for opening those disputed local LCs but neither in the plaint nor through the evidence the plaintiff has been able to explain the causes for opening the alleged LCs which also casts reasonable doubt on the purpose and honesty of the plaintiff-bank and the learned Judge ought to have considered that the plaintiff-bank had rather fraudulently and with collusion of defendant nos. 3-8 got the alleged documentary bills purchased against the disputed local LCs without any verifications and as such, the learned Judge has passed a faulty judgment and hence the same is liable to be interfered with by this Hon'ble court for the ends of justice.

The learned counsel further submits that, the learned Judge ought to have considered that the defendant-appellant-bank did not have any authority to issue letter of credits at the point of time of its alleged issuance because a LC is usually opened or issued by an Authorized Dealer (AD) branch of a bank when the defendant-appellant-bank was not any AD branch and the learned Judge of the trial court has utterly failed to consider

that, a non-AD branch of a bank even if issues an LC it must take permission from its head office even though no such document relating to taking permission issued by the head office of this appellant-bank could be produced by the plaintiff-bank yet the learned Judge of the trial court has failed to comprehend this vital point and hence the impugned judgment and decree is liable to be set aside.

The learned counsel further contends that, the learned Judge of the trial court ought to have considered that the plaintiff witness no. 1 (shortly, PW-1) in his examination-in-chief has categorically stated that, *"৩নং বিবাদী কর্তৃক গৃহীত ঋনের বিপরিতে ০২/০৪/২০১২ ইং তারিখে personal guarantee (প্রদর্শনী-৮) সম্পাদন করে গৃহীত ঋনের বিপরীতে জামিন্দার হয়েছেন"* and hence the plaintiff-bank who purchased the bills against the disputed LCs by debiting 90% (ninety percent) out of taka 25,88,60,495/19 before the maturity of the alleged LCs where the defendant nos. 3-8 stood guarantors against whom IBP loan was created, yet the learned Judge has failed to comprehend that, this defendant-appellant-bank was neither any guarantor of the IBP loan nor any debtor of the sanctioned loan (IBP) and as such, the plaintiff-respondent-bank has got no cause of action against the defendant appellant nos. 1-2 bank to file Artha Rin Suit and hence, the impugned judgment is liable to be interfered with by this Hon'ble Court on setting aside the same.

The learned counsel next contends that, the learned judge of the trial court was misdirected herself on appreciating the judgment in the case of *Zyta Garments Ltd.-Vs- Union Bank Ltd. and another reported in 55 DLR (AD) 56* where it has been stated in paragraph no. 8 that "*As soon as the letter of credits are established between the issuing bank and the*

negotiating bank, it becomes an independent agreement between the two banks". But it is the definite case of the appellant-bank that, it did not issue the alleged LCs and alternatively had the appellant-bank issued such LCs that would have been created a separate 'bilateral contract' among them and non-payment of LC bills would at best give rise a cause of action for breach of a bilateral contract, where there provides different remedies but the Artha Rin Adalat was not the appropriate forum for any reddressal for any breach of contract and hence the suit itself was not maintainable at all.

The learned counsel further submits that, section 6(5) of the Artha Rin Adalat Ain, 2003 contemplates that, an Artha Rin Suit is to be filed **firstly** against the principal debtor **then** third party mortgagor and **finally**, a guarantor if any, involved with any loan transaction and if such suit is decreed then the decretal amount is to be realized primarily from the principal debtor if not possible then from the third party mortgagor and then from the third party guarantor and hence, the learned Judge has failed to consider that, the appellant is neither any debtor nor mortgagor nor any guarantor and as such the suit filed against the appellant is absolutely barred against the appellant-bank under the said provision of Artha Rin Adalat Ain, 2003 and therefore, the impugned judgment is liable to be set aside.

The learned counsel also contends that, the learned Judge of the trial court has failed to consider that PW-1 could not state in his cross-examination whether the plaintiff-bank had received the alleged LCs and those of the "letters of acceptance" from the defendant-appellant-bank through proper channel and the P.W-1 also could not confirm the **date of**

receipt of the alleged LCs and "the letter of acceptance" in his evidence which casts serious doubts about the genuineness of the LCs yet the learned Judge has wrongly relied upon the evidences of the P. W-1 and held that, *"যেহেতু সোনালী ব্যাংকের acceptance এর উপর ভিত্তি করে সোনালী ব্যাংকের ইস্যুকৃত এল,সির বিপরীতে বাদী ব্যাংক বিল পরিশোধ করেছেন সেহেতু উল্লেখিত বিবাদীপক্ষ, বাদী ব্যাংকের পাওনা পরিশোধে আইনতঃ দায়বদ্ধ"* though it was not based on materials on records available before her to justify her such observation and hence the impugned judgment and decree is liable to be set aside.

The learned counsel next submits that, the learned Judge of the trial court erred in law and facts innot weighing the testimony of P.W-1 who has stated in his cross-examination that, *"প্রদর্শনী ৪/খ-তে থাকা "acceptance" এ সোনালী ব্যাংকের ম্যানেজার এর কোন স্বাক্ষর আছে কি না আমার জানা নাই। প্রদর্শনী ৪/খ তে সোনালী ব্যাংক, আগারগাঁও শাখার ক্ষমতাপ্রাপ্ত প্রতিনিধির স্বাক্ষর আছে কিনা আমার জানা নেই, কারন উক্ত ক্ষমতা প্রাপ্ত প্রতিনিধির স্বাক্ষর আমি চিনিনা"* and as such, the learned Judge has misdirected herself innot appreciating the fact that, the plaintiff-bank did not have any convincing materials in regard to issuing the alleged LCs even though loan was created which was absolutely against the normal banking practice yet the learned Judge has wrongly shifted the burden upon this appellant by erroneously held that, *"তর্কিত এল/সি সমূহে স্বাক্ষরকারী ব্যক্তিদ্বয়ের স্বাক্ষর যে উল্লেখিত ব্যক্তিদ্বয়ের নয় এবং নালিশী ১১৫ টি এল,সির ফরম যে সোনালী ব্যংকের নয় সে সংক্রান্ত ১-২নং বিবাদীপক্ষ হস্তলিপি বিশারদের মাধ্যমে পরীক্ষাপূর্বক কোন প্রতিবেদন আনয়নের পদক্ষেপ গ্রহন করেননি মর্মে নথিদৃষ্টে প্রতীয়মান হয়"* but such observation is against the basic principle of Evidence Act and hence the impugned judgment is liable to be set aside.

The learned counsel further contends that, the learned Judge has failed to consider that the DW-1 who deposed for the defendant-appellant bank in his examination-in-chief has categorically stated that *"বাদী ব্যাংক থেকে ১১৫টি L/C এর মধ্যে একটিও আমার ব্যাংক থেকে ইস্যু করা হয়নি। ইস্যুকৃত L/C গুলো জাল এবং ভূয়া, তৈরীকৃত"* and as such, the learned Judge ought to have considered that the appellant-bank has proved its case on the forged letter of credits and letter of acceptance claiming those to have not signed by their authorized person and as such, the learned Judge has wrongly and erroneously held that *"এমনকি বিবাদীপক্ষ তাদের দাবি প্রমানের নিমিত্তে কোনো দালিলিক সাক্ষ্যও আদালতে উপস্থাপন করতে ব্যার্থ হয়েছেন"* which is devoid of any substance, contrary to the basic principle followed in Evidence Act and therefore, the impugned judgment is liable to be set aside.

The learned counsel also submits that, the learned Judge has clearly misinterpreted the provision of sections 101 and 102 of the Evidence Act, 1872 as the burden to prove the respective case lies on both parties and the appellant-bank has discharged its duty by adducing D.W-1 who has very robustly asserted that the alleged LCs and letter of acceptance were all fake, frivolous and vexatious and then the onus of disproving such claim of the appellant-bank has clearly shifted to the plaintiff-bank to disprove the assertion but it failed to discharge its duties and as such, the learned Judge has wrongly held that, defendant-appellant-bank has failed to prove its case and that being so, the impugned judgment and decree is liable to be set aside.

The learned counsel next submits that, the learned Judge has failed to consider the vital point that a letter of credits is normally opened by a buyer

or importer and an LC issuing bank only issues a letter of credits if it is requested by its customer/buyer and invariably the point-in-issue in adjudicating the case is whether the appellant-bank has issued the alleged letters of credit and the said core issue could not be resolved without the presence of the buyer of the alleged LCs who undoubtedly was a necessary party to the suit but as the buyer was not made a party, the suit itself was bad for defect of parties nevertheless the learned Judge of the trial court in the entire judgment has not bothered to touch upon this vital point even on framing any issue to that effect and passed the impugned judgment and therefore, the same is liable to be interfered with by this Hon'ble court.

The learned counsel further contends that, the learned Judge has also failed to appreciate that the respondent no. 1-bank has very collusively and recklessly sanctioned loan against the bill of 115 LC's in favour of the alleged suppliers, defendant-respondent nos. 3-8 without verifying its authenticity from the branch Manager or any authorized person of the appellant-bank which alternatively proves that either the respondent no. 1-bank had full-knowledge that those LC's were fraudulent or those were issued in collusion of its clients defendant nos. 3-8 who altogether committed such fraudulent practice to gain themselves illegally and therefore, the impugned judgment and decree is not tenable in law.

The learned counsel concludes his submission contending that, on the face of the impugned judgment it manifestly implies that, the learned Judge has passed the same in a very casual manner without applying her judicial mind by taking into account of the veracity of the claim of the

plaintiff and without entering into the merit of the suit in the light of the Artha Rin Adalat Ain, 2003 and as such, the same is liable to be set aside.

However, in support of his submission, the learned counsel has referred a decision reported in 33 DLR (AD) 298 and that of certain guidelines provided in UCP, 600 and finally prays for allowing the appeal.

Per contra, Mr. Mohammed Mutahar Hossain, the learned counsel appearing for the plaintiff-respondent no. 1 very robustly opposes the contention of the learned counsel for the appellant and submits that, there occurs no illegality in the impugned judgment which has been passed basing on evidence and materials on record and hence the same is liable to be sustained.

The learned counsel then submits that, the plaintiff has been able to prove the case by documentary evidences in particular, issuance of 115 LCs by the appellant and subsequent acceptance of the LC documents by it and since those documents to be most relevant in the case have been proved through credible evidence then the appellant-bank has got no scope to evade the responsibility to reimburse the payment under LC and since it failed, this plaintiff rightly filed the suit and got the decree on contest which does not warrant any interference by the Hon'ble court.

The learned counsel further contends that, in support of the claim, the plaintiff produced a slew of documents which were also marked as exhibit nos. '1-21' series without any objection from the appellant's side of their genuineness and custody and the learned Judge of the trial court by assessing those vital documents found the allegation of the appellant

unsustainable and then rightly passed the impugned judgment which is liable to be sustained.

The learned counsel goes on to submit that, the defendant-appellant also holds equal responsibility to prove its own case but it has utterly failed to discharge its duties either proving that, 115 LCs had not been issued from its end nor acceptance was given by it by producing any document failing which the case of this respondent has become proved and therefore, the impugned judgment stands.

Insofar as regards to the genuineness of the LCs, the learned counsel further adds that, since the self-same customer of the appellant-bank had earlier opened LC and the respective negotiating bank got payment out of one LC so available on record and the appellant could not discard the said assertion so there is no reason to make any point on the genuineness of issuing LCs in the instant case and the trial court has thus perfectly passed the impugned order which warrants no interference.

The learned counsel also submits that, by accepting the LC documents, the appellant-bank had shouldered the whole responsibility of the claim as had it not given the acceptance this respondent would not have purchased the bill and provided loan to the defendant nos. 3-8 by creating IBP loan and since the appellant ultimately failed to pay the export proceeds to this respondent within the maturity date, it has rightly claimed the amount and the learned Judge has perfectly passed the impugned judgment which calls for no interference.

The learned counsel next submits that, the defendant-appellant has not produced any scrap of paper as of documentary evidence while this

respondent has produced as many as 21 series of documents which were since marked as exhibits without any objection so, there has been no legal avenue to disbelieve those documents which are all related in accomplishing the business deal arising out of 115 LCs and since no question has been sustained on the genuineness of those exhibited documents, then the appellant-bank is duty bound to reimburse the export proceeds to it and on its failure, this respondent has rightly claim the unpaid amount through filing the Artha Rin Suit and the trial court has rightly passed the impugned judgment.

The learned counsel wrapped up his submission contending that, since the plaintiff has proved its case in toto through the PW-1 whose entire testimony remained unshaken on cross-examination by the defendant no. 2 and since there has been no adverse evidence ever offered that those 115 LCs had not been issued from appellant-bank and since the appellant accepted the LC documents endorsing maturity dates which also remained uncontroverted so, appellant has no way to escape payment against the LC value and the trial court has rightly passed the impugned judgment which is liable to be sustained.

However, to buttress the said assertion, the learned counsel has placed his reliance in the decisions reported in 9 BLC (AD) 262, 52 DLR (AD) 53 and 11 BLD (HCD) 99 and finally prays for dismissing the appeal.

Deliberations

We have heard the submission advanced by the learned counsel for the appellant and that of the respondent no. 1, gone through the impugned

judgment and decree vis-à-vis perused the documents exhibited and appeared in the paper book and compared those kept with the lower court records available before us.

Since the plaintiff filed the Artha Rin Suit for recovery of certain amount of money claiming it to be defaulted loan repayable by the defendant nos. 1-8 so we must confine our discussion and observation within the ambit of relevant provision so laid down in Artha Rin Adalat Ain, 2003. In addition to that, we would examine as to whether the plaintiff has been able to prove its case through evidence adduced and produced by it. Because, it is the settled proposition held by our Appellate Division especially in the case reported in 9 BLT (AD) 66 where it has been propounded that, *"There may be thousands of defects in the documents of the defence as well as their case but that does not entitle, the plaintiff to get a decree. The plaintiff is to prove his case irrespective of the defence version of the case and from the materials on record it appears that the plaintiff failed to prove genuineness of their documents and also their possession. This aspect of the matter escaped the notice of the High Court Division in the aforesaid Second Appeal and in such circumstances the finding of the High Court Division is wrong and cannot be sustained."* The said *ratio* has also been established in the decisions reported in 6 BLC (AD) 41, 39 DLR (AD) 237 and 10 BLC (AD) 58.

So in view of the above, it is incumbent upon the plaintiff to prove its own case without depending upon the weakness of the defendants' case. However, the case of the plaintiff is very plain and simple, that is to say, 6(six) different suppliers who were made as defendant nos. 3-8 in the suit

opened respective current accounts with different branches of the plaintiff-respondent no. 1-bank while a customer (whose name was kept anonymous in the plaint) opened as many as 115 LCs with the defendant no. 2-appellant-bank to purchase materials (though the name of the materials has also unmentioned in the plaint) from those suppliers. Thereafter, the respective suppliers placed the LC documents to the plaintiff-bank who in its turn submitted the same to the defendant no. 2-appellant-bank for acceptance and confirmation. The appellant-bank then accepted the LC documents and confirmed payment by inserting maturity dates. Ultimately, the plaintiff-bank purchased the LC documents/bills providing 90% of the bill amount in loan to the suppliers creating Inland Bill Purchase (IBP) loan against them. The appellant-bank then paid some amount of LC value to the plaintiff but as it failed to reimburse some LC value on repeated reminders, the plaintiff thus compelled to file the suit. The plaintiff through its witness as plaintiff witness no. 1 (shortly, P.W-1) produced series of documents which were marked as exhibits- '1-21' series. Conversely, the case of the defendant no. 1-appellant is of total denial of the averment described in the plaint in particular, issuing of any LCs and that of giving acceptance of the LC documents let alone making payment against those LCs apart from strong negation of the maintainability of the suit.

To begin with, let us examine how far the plaintiff has been able to prove its case by adducing and producing evidence. On going through the plaint, we find that, it is the claim of the plaintiff that as many as 115 LCs were issued by the defendant no. 2-appellant in favour of its customer which were subsequently submitted by the respondent no. 1-bank to the

appellant-bank. On the back of acceptance and confirmation by the appellant-bank of the LC documents, the respondent no. 1 then purchased the documentary bills against those 115 LCs and disbursed 90% in loan of the purchased bills to the defendant nos. 3-8. In support of the said assertion PW-1 came up and produced LC copies, forwarding letters, acceptance letters and reminder letters as of exhibit-'3' series to '10' series, '13' to '14' series and '16' to '17' series. Apart from those, the PW-1 also exhibited account opening form of current account of defendant no. 3 as of exhibit no. 2, personal guarantee executed by defendant no. 3 against the loan it availed from plaintiff-bank as of exhibit no. 8, account opening form of current account by the defendant nos. 4 and 5 with plaintiff as exhibit nos. 9 and 12, legal notice issued by the plaintiff upon the defendant nos. 1-2 dated 27.03.2013 accompanied with statement of account (ব্যাংক হিসাব বিবরণী) showing outstanding loan at taka Twenty-five crore eighty-eight lakh and sixty thousand as on 31.03.2013 as of exhibit-'19' series and those of 11 sets of statement of account as exhibit-'21' series.

Out of those exhibited documents, the involvement of this appellant-bank has only been shown with the issuance of LCs and letters of acceptance that encompasses in some of the exhibits of '3-7' series, '10' series, '13-14 series and '16-17' series. So we feel it expedient to analyse whether this appellant has ever issued the LCs and accepted those LC documents confirming the maturity date for payment. Now let us take a glance to find how the PW-1 has proved the propriety of issuing those LCs by this appellant-bank who in his examination-in-chief (shortly, chief) asserted that, *"সোনালী ব্যাংক, আগারগাওঁ শাখা উক্ত এল সি গুলি acceptance প্রদান*

করেছিল। সোনালী ব্যাংক, আগারগাঁও শাখার ব্যবস্থাপক কত টাকার এল/সির acceptance প্রদান করতে পারে আমি বলতে পারবো না".

In the cross-examination, that PW-1 stated that, *"প্রদর্শনী ৪/খ তে থাকা acceptance এ সোনালী ব্যাংকের ব্রাঞ্চ ম্যানেজারের কোন স্বাক্ষর আছে কিনা আমার জানা নাই। কারণ আমি উক্ত ব্রাঞ্চ ম্যানেজারের স্বাক্ষর চিনি না। প্রদর্শনী ৪/খ তে সোনালী ব্যাংক, আগারগাঁও শাখার ক্ষমতাপ্রাপ্ত প্রতিনিধির স্বাক্ষর আছে কিনা আমার জানা নেই কারণ উক্ত ক্ষমতাপ্রাপ্ত প্রতিনিধির স্বাক্ষর আমি চিনি না".*

On the contrary, it is the definite case of the defendant no. 2-appellant that, it had no authority to issue any LC as it was not any Authorized Dealer (shortly, AD) branch. To fortify the said assertion, the defendant witness no. 1(shortly, DW-1) in his examination-in-chief (precisely, 'chief') stated that, *"আমার ব্যাংক থেকে বাদী ব্যাংক বরাবরে ১১৫টি এল/সি ইস্যু করা হয়েছে, যা সত্য নয়। বাদী বাংক এর ১১৫টি এল/সি এর মধ্যে একটিও আমার ব্যাংক থেকে ইস্যু করা হয় নাই। ইস্যুকৃত এল/সি গুলো জাল এবং ভুয়া তৈরিকৃত।"*

"বাদী ব্যাংক এর দাখিলী LC গুলো বিবাদী ব্যাংক ইস্যু করে নাই।"

"যেহেতু বিবাদী পক্ষ LC ইস্যু করে নাই তাই acceptance করা বিষয়ে জ্ঞান নাই".

In the cross-examination, this witness has very steadfastly denied the suggestion on giving any acceptance in 115 LCs.

In the plaint, it has been emphatically stated that, all the suppliers, that is, defendant nos. 3-8 themselves submitted the LC documents to the plaintiff-bank who then upon following the norms and practice submitted those to this appellant for acceptance when PW-1 asserted that, "আমরা ব্যক্তির মাধ্যমে বা ডাকযোগে প্রাপ্ত হয়েছি" though in this digital era that statement sounds absurd and totally contrary to the long standing practice of transmission of the LC let alone vast contradiction among the version made in the plaint

and the testimony of PW-1 in regard to manner of receiving the alleged LCs by the plaintiff-bank. Further, it is the case made out in the plaint that, this appellant in its turn had just accepted the LC documents forwarded to it by the plaintiff-bank but what has been asserted by the PW-1 both in his chief and cross-examination (precisely, 'cross') quoted hereinabove has rather vitiated its own case.

Also, in order to justify the issuance of the alleged 115 LCs, the plaintiff tried to make out a third case by putting a question to the DW-1 that, it had earlier issued 102 LCs for the same customer out of which the number of one LC was 444041199166 dated 27.11.2011 however, the existence of such LC in the appellant-bank was rejected outright by the DW-1 asserting further that, it was not the subject matter of the suit. We have also gone through the entire plaint but don't find any statement to that effect therein. So with the above, it has abundantly been proved that, the plaintiff has hopelessly failed to prove its case of issuance of alleged LCs and that of acceptance of the LC documents by credible evidence and therefore, no claim has sustained against this appellant.

It is also worth mentioning rather admitted position that, the LC opener that is, the alleged buyer of the business transaction has not been made any party to the suit let alone the name of the goods alleged to have supplied by the suppliers to the buyer have ever mentioned in the entire plaint.

In the written statement it has clearly been asserted that, LC opener was a necessary party in absence of whom the suit is hit by misjoinder of parties which has also been asserted by DW-1 in his chief. During the

midst of hearing, when we pose a question to the learned counsel for the respondent no. 1 to that effect, he then very candidly submitted that, the buyer is not any necessary party to the suit and a suit shall not be dismissed for misjoinder or non-joinder of parties. He went on to assert that, the LC opener is the party involved with the defendant nos. 1-2-bank and only the defendant nos. 3-8 are its necessary parties who have duly been impleaded in the suit. However, such submission is totally devoid of any basis both factually and legally. It alternatively consolidates the suspicion of unholy alliance among the plaintiff and the defendant nos. 3-8 playing with the public money in the name of creating loan in favour of those defendants by keeping the alleged purchaser in the dark even though its (alleged buyer) name and particulars are very much there in all the 115 LCs. Obviously, the purchaser is a necessary and proper party whose presence is of utmost important to prove the case that, it had opened the LCs and received the goods from the defendant nos. 3-8 and got paid. On the legal front, a suit must be dismissed for non-joinder of parties as per order I, rule 9 of the Code of Civil Procedure if objection is raised at the very initial stage and the plaintiff fails to cure such defect. In the instant case, in paragraph no. 6 of the written statement, we find that, this appellant raised the point of non-joinder of parties on the bank of not impleading the buyer in the suit which has also been asserted by the defendant witness no. 1 who in his chief stated that, *"এ মামলাটি সাপ্লাইয়ার বা L/C opener দেরকে পক্ষ করে নাই। L/C opener এ মামলায় necessary ছিল"* yet, the plaintiff has not bothered to rectify such material defect for which the suit is certainly bad for misjoinder of parties.

Then again, in the business transaction initiated through LC which happened in the instant case between the plaintiff and defendant nos. 1-8, we find that, amongst others, only 4 sets of documents that is, copies of LCs, forwarding letters, acceptance letters and reminder letters were only made exhibits being exhibit nos. '3' to '7' series, '10' series, '13' to '14' series, '16' to '17' series. But those cannot be the only documents for accomplishing a business transaction arising out of an LC nor those cannot be said to be complete documents supposed to be considered as of shipping documents. It is the prevailing practice which is followed in the business transaction initiated through LC that, a set of documents namely, shipping documents are submitted which encompasses pro-forma invoice, packing list, delivery *chalan*, bill of lading and so on but those have neither been produced nor made exhibit in the suit. Even we don't find any submission about such lacuna from the learned counsel for the respondent no. 1 and it is also totally absent in the entire plaint. Furthermore, there is also no description as to how the goods under a huge number of LCs (115 LCs in total) had been transported to its buyer's end and that of the mode of such transportation. When we pose a question to that effect, the learned counsel for the respondent no. 1 then took adjournment to file application and ultimately filed an application under order XLI, rule 27 of the Code of Civil Procedure annexing some documents seeking to admit those as of additional evidence. In support of his assertion to treat those annexed documents as of additional evidence, the learned counsel has also relied upon two decisions reported in an online portal ***"Manupatra"*** passed in Civil Petition for Leave to Appeal No. 64 of 1997 dated 07.05.2000 and

CA No. 77 of 1983. However, we don't find any reason to allow the application given the facts that, in the entire plaint and that of the testimony of PW-1, there has been no mention of those documents annexed with the application. So, the respondent no. 1 is not entitled to get any benefit of the provision of order XLI, rule 27 of the Code of Civil Procedure vis-à-vis there is no scope to exert out discretion by allowing the same. More so, if we apply our discretion it will tantamount to extend premium to a party filling up its lacuna- to the predicament to its adversary who by the time acquired right in its favour. We have also gone through the cited decisions and find those to have no manner of application in the facts and circumstances of the case in hand. Hence, the application filed under order XLI, rule 27 of the Code of Civil Procedure stands rejected.

Now let us revert back to the impugned judgment. To justify the claim of the plaintiff, the trial court at one point relied upon two decisions reported in 56 DLR (HCD) 392 and 55 DLR (AD) 56.

First of all, in the case reported in 55 DLR (AD) 56, we find that, it originated from a money suit so initiated by a negotiating bank, namely, Union Bank Ltd. against its LC issuing bank where an application was filed by a third party, Zyta Garments Ltd. under order I, rule 10 of the Code of Civil Procedure which was rejected by the trial court and that rejection order was ultimately upheld by the Appellate Division. So the *ratio* settled in the above decision and reproduced in the impugned judgment that arose out of an interim order has got no manner of application in the facts and circumstances of the instant case as the plaintiff has not filed any money suit against this appellant which has been done in the cited decision. In the

cited decision reported in 56 DLR (HCD) 392, we also find that, the suit was initiated by a seller, Geremini Garments Ltd. against its LC issuing bank, Pubali Bank Ltd. (PBL) and others for declaration and permanent injunction restraining the PBL from paying the LC value to the defendant, Korea Exchange Bank (KEB) who forward shipping documents to the PBL and the suit was decreed and on appeal the decree was affirmed. But curiously enough, the trial court in the impugned judgment has just reproduced a stray observation of that cited decision which has admittedly not even created any *ratio*, to be applicable in the instant case but without taking into account of the nature of claim as well as "the point for determination" to be applicable in the instant suit yet she abruptly put her reliance in the said decisions. So it proves, the learned Judge has very carelessly took resort to those decisions which have got no iota of relevance in the instant case. Still the learned Judge made a very ridiculous observation while accepting those two decision asserting that, *"এখন মহামান্য উচ্চ আদালতের উপরোক্ত সিদ্ধান্ত সমূহের আলোকে অত্রাদালতের নিকট প্রতীয়মান হয় যে, যেহেতু ৩-৮ নং বিবাদীদের আবেদনের প্রেক্ষিতে সোনালী ব্যাংক, আগারগাঁও শাখা হতে এল/সি ইস্যু করা হয়েছে এবং ইস্যুকৃত এল/সির বিপরীতে বিবাদীপক্ষের দাখিলকৃত বিলগুলো সোনালী ব্যাংক, আগারগাঁও শাখা accept করেছেন এবং যেহেতু সোনালী ব্যাংকের acceptance এর উপর ভিত্তি করে সোনালী ব্যাংকের ইস্যুকৃত এল,সির বিপরীতে বাদী ব্যাংক বিল পরিশোধ করেছেন এবং সেহেতু উল্লেখিত বিবাদীপক্ষ বাদী ব্যাংকের পাওনা পরিশোধে আইনতঃ দায়বদ্ধ"*.

Then again, to adjudicate the Artha Rin Suit the trial court framed as many as five different issues out of which point of maintainability, point of limitation and whether the defendants took loan from the plaintiff that is, issues nos. 1, 2 and 3 are found to be important here. We have to bear in

mind that the suit was filed before the Artha Rin Adalat as an Artha Rin Suit so the plaintiff is duty bound to comply the relevant provision of Artha Rin Adalat Ain, 2003 in order to get a decree. So all the issues are relevant and intertwined with each other because if it is not proved that this defendant-appellant did not avail any **loan** from the plaintiff so invariably the suit would not lie against it. Now let us look at the definition of **loan (ঋণ)** provided in section 2 (গ) (১)-(৪) of the Artha Rin Adalat Ain, 2003. For better understanding, we hereinbelow reproduce the definition of loan (ঋণ):

"(গ) "ঋণ" অর্থ-

(১) অগ্রিম, ধার, নগদ ঋণ, ওভার ড্রাফট, ব্যাংকিং ক্রেডিট, বাটাকৃত বা ক্রয়কৃত বিল, ইসলামী শরীয়া মোতাবেক পরিচালিত আর্থিক প্রতিষ্ঠান কর্তৃক বিনিয়োগকৃত অর্থ বা অন্য যে কোন আর্থিক আনুকূল্য বা সুযোগ-সুবিধা, যে নামেই অভিহিত হউক না কেন;

(২) গ্যারান্টি, ইনডেমনিটি, ঋণপত্র বা অন্য কোন আর্থিক বন্দোবস্ত যাহা কোন আর্থিক প্রতিষ্ঠান ঋণ গ্রহীতার পক্ষে প্রদান বা জারী করে বা দায় হিসাবে গ্রহণ করে;

(৩) কোন আর্থিক প্রতিষ্ঠান কর্তৃক উহার কোন কর্মকর্তা বা কর্মচারীকে প্রদত্ত কোন ঋণ; এবং

(৪) পূর্ববর্তী ক্রমিক (১) হইতে (৩) এ উল্লিখিত ঋণ, বা, ক্ষেত্রমত, ইসলামী শরীয়া অনুযায়ী পরিচালিত আর্থিক প্রতিষ্ঠান কর্তৃক বিনিয়োগকৃত অর্থ এর উপর বৈধভাবে আরোপিত সুদ, দন্ড সুদ বা মুনাফা বা ভাড়া".

Out of those different clauses, sub-clause (2) stipulates amongst others, letter of credit or other financial arrangement (ঋণপত্র বা অন্য কোন আর্থিক বন্দোবস্ত) be considered as loan, if any financial institution provides or executes so in favour of any loanee or the creditor takes the liability of such arrangement on behalf its borrower. Admittedly, no such loan was created

in favour of this plaintiff-appellant as per the said provision other than the defendant nos. 3-8 rather the plaintiff only took liability of the defendant nos. 3-8 by purchasing the alleged bills upon creating IBP loan against them who in their turn issued personal guarantee as a security to repay the said loan. But nothing sort of those arrangements have ever been done for the appellant. So, the purported acceptance of LC documents and confirmation to pay the bill on maturity as has been asserted by the plaintiff invariably does not come within the ambit of **"loan"** as we found from the definition of loan and if it is so, then there is no earthly reason to maintain the suit against this appellant classifying it as any **"borrower"**. Though the learned Judge disposed of the said issues in favour of the plaintiff but what she described and found is absolutely beyond the relevant provision of Artha Rin Adalat Ain, 2003 even such claim can never be sustained in view of the section 6(5) of the Artha Rin Adalat Ain, 2003 as well.

Further, on the point of maintainability of the suit and cause of action, this appellant in paragraph no. 1, 3 and 5 has raised vehement objection and then led evidence to that direction through DW-1 who in his chief asserted that, *"বাদী ব্যাংক L/C money recovery এর জন্য এ আদালতে কোন প্রতিকার চাইতে পারে বা বাদী আমার বিরুদ্ধে ডিক্রি পাইতে পারে না। আমি ১ ও ২ নং বিবাদীগণের বিরুদ্ধে এ মামলা খারিজ চাই"* still the trial court has not bothered to take into cognizance of such assertion and most illegally adjudicated the said issues which is not tenable in law.

Since the trial court adjudicates an Artha Rin Suit, it must abide by the relevant provision enshrined therein the Artha Rin Adalat Ain. In respect of "arising cause of action" and point of limitation, there provides

two separate sections being sections 47 and 46 in the Ain. But in the entire plaint nothing has been described to that effect as how and when the alleged claim against the defendants became mature that had compelled the plaintiff-bank to file the suit but the trial court has just observed that, *"অর্থঋণ আদালত আইন, ২০০৩ এর ৪৬ ধারার বিধান মোতাবেক মামলা তামাদিতে বারিত হওয়ার কোন বিধান নেই"* and disposed of the point of limitation in favour of the plaintiff without discussing and considering the point in regard to 'repayment schedule' and 'limit of claim' finding the defendant to have failed to comply and come within the said ambit. We have also gone through the decisions cited for the respondent no. 1 and found the facts described therein is totally distinguishable with the facts, circumstances and relevant law applicable in the case in hand and thus totally inapplicable here.

Last but not the least, from the plaint in particular, in paragraph nos. 16 and 18 thereof, we find that, the plaintiff-bank has made total claim against this appellant by issuing reminders, legal notice and even the very cause of action also shown to have arisen against it that also follows the prayer of the plaint keeping aside the defendant nos. 3-8 from the purview of such claim though fact remains, IBP loan was created only against them and they issued personal guarantee which clearly manifests the vagueness of the claim. Be that as it may, we also in the penultimate paragraph clearly found that suit itself is not maintainable against this appellant and the alleged assertion with regard to claim made in the plaint is also a glaring example of preposterous one to have made against this appellant. But the trial court seems to be totally oblivious on this vital issue and gave a very

perfunctory decision which appear to us as perverse one and not based on law and facts.

Regard being had to the above discussion and observation, we don't find any shred of merit and basis in the impugned judgment.

Resultantly, the appeal is allowed however without any order as to cost.

The judgment and decree dated 23.04.2018 passed by the learned Judge, Artha Rin Adalat No. 2, Dhaka stands set aside.

Since the appeal is allowed, there has been no reason to proceed with the Artha Execution Case No. 772 of 2018 any further.

Let a copy of this judgment along with the lower court records be transmitted to the learned Judge, Artha Rin Adalat No. 2, Dhaka forthwith.

Mohi Uddin Shamim, J.

I agree.

Abdul Kuddus/B.O.