
(2007) 08 AHC CK 0023
In the Allahabad High Court

National Overseas and Another	APPELLANT
Vs	
Export Credit Guarantee Corpn. of India Ltd. and Others	RESPONDENT

Date of Decision : 17-08-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2008 All 18

Hon'ble Judges : Rajes Kumar, J;B.S. Chauhan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rajes Kumar, J.—By means of the present writ petition under Article 226 of the Constitution of India, the petitioners are seeking the following reliefs.

(a) To issue a writ, order or direction in the nature of certiorari quashing the impugned letters dated 22-9-2004 and 8-8-2001, the true copies of which are contained as Annexure Nos. 29 and 5 respectively to the writ petition.

(b) To issue a writ, order or direction in the nature of mandamus commanding the opposite parties to allow the claim of the petitioners in view of the claim form submitted by them, the true copy of which is contained as Annexure No. 25 to the writ petition as per the valid policy, the true copy of which is contained as Annexure No. 1 to the writ petition.

(c) To allow the writ petition with cost of this writ petition in favour of the petitioners.

(d) To issue any other writ, order or direction in the nature and manner which this Hon'ble Court may deem fit and proper in the circumstances of the case.

2. The facts giving rise to the present petition are that the petitioner No. 1 is the proprietorship concern of petitioner No. 1 (hereinafter referred to as "the petitioner") and is engaged in the business of Wooden Artistic handicraft. To ensure the payment and to indemnify any loss, the petitioner has taken a

comprehensive risk policy (SC) from Export Credit Guarantee Corporation of India Limited (hereinafter referred to as the "Company"), a Government of India Enterprises having its registered office at Express Tower 10th Floor, Nariman Point. Mumbai and Branch office at Panipat, State of Haryana A policy certificate bearing policy No. SCR 0100149 dated 7-6-2001 has been issued by the Panipat Branch of the Company. In the petition, it is stated that the memorandum of association of the company provides that it is wholly Government owned company and it discharges the functions of the Government and acts as. an agent of the Government which gives guarantees and takes responsibilities to discharge such functions in the national interest. It includes the grant of credits and guarantees in foreign country for the purpose of facilitating the import of raw materials and some finished goods for manufactured or processed goods for export. The above policy was issued to the petitioner for Rs. 50 lacs after completion of all formalities. It was valid up to 30-6-2003. After the issuance of the shipment policy, the petitioner moved an applications for issuance of credit limit for credit of Rs. 80 lacs against the buyer, M/s Gift and Arts Imports Unit No. 8 Walt Hamstow Business Centre, Clifford Road, London, U. K. on 6-6-2001. On 14-6-2001, the office issued credit limit certificate of Rs. 30 lacs against the aforesaid shipment policy bearing No. ST/493-1-329710/001000470/01011647/2001. In the certificate, the terms of the payment was mentioned as D. P. means "Delivery on Payment". After the issuance of shipment policy, the petitioner deposited a sum of Rs. 10,000/- as advance premium on 6-6-2001, while making their application for credit limit of Rs. 30 Lacs.

3. On 10-8-2001, the petitioner dispatched first consignment from Saharanpur amounting to Rs. 10,3,299/- 15480 GBP (Great Britain Pound). After the dispatch of the aforesaid consignment on 10-8-2001. the petitioner received a letter from the Company on 18-8-2001 bearing the date as 8-8-2001 stating therein that due to some adverse information received by the Company, which warrants further investigation, until further orders, the credit limit approved on buyer stands cancelled. After the receipt of the aforesaid letter dated 8-8-2001 which was received by the petitioner on 18-8-2001, the petitioner wrote a letter dated 20-8-2001 immediately informing that the petitioner has already sent first consignment on 10-8-2001 before the receipt of your letter. Thereafter, the petitioner received a letter dated 22-8-2001 from the Company Branch Office informing that the matter is being taken in the Head Office at Mumbai and the petitioner has been requested to inform the due date of the next shipment, the due date of bill and any further orders pending for export etc. As per item slip No. 8 of the policy, the petitioner submitted the declaration of shipment in Form No. 203. The premium amount for the first shipment was Rs. 3,099.87 which has been adjusted with the advance premium amount paid at Rs. 10,000/- on 6-6-2001 and the balance premium remained at Rs. 6,900/-.

4. In paragraph 16 of the petition, it is stated that when the petitioner submitted the information on 3-9-2001 that their second shipment is ready for despatch on 5-9-2001, Smt. Vasantha Srinivas, Branch Manager, ECGC, Panipat Branch

assured the petitioner that the petitioner may send their second shipment also and she will very soon withdraw the impugned letter dated 8-8-2001. On the assurance being given by the officer of the Company, the petitioner sent their second shipment on 6-9-2001 for Rs. 16,59,489/-. In paragraph 16 of the counter affidavit, the aforesaid averments have been denied and said to be absolutely false.

5. It is alleged that the declaration of the second shipment was submitted on 15-10-2001. The premium of Rs. 1161.64 of the second shipment has also been deducted from the advance premium. It is stated that both the consignments reached at the destination of the buyer, but the buyer did not receive it. It may be mentioned here that the consignments were sent through Indian Overseas Bank. On 20-12-2001, the Indian Overseas Bank wrote a letter to the petitioner that the consignments sent by the petitioner are still pending and the buyers' Bank (MRC Cook) has also advised the Indian Overseas Bank not to take any action regarding insurance or warehousing of goods. The petitioner was informed to contact the buyer. Having received the aforesaid information that the buyer has failed to accept the goods, the petitioner asked the company to provide Form No. 205 for declaring the non-payment by the buyer and after receiving the Form No. 205, the petitioner submitted the declaration Form No. 205 at the Branch Office of the Company informing that the amount in respect of shipment declared against the policy of the petitioner have remained outstanding for more than one month of due date i.e. 10-9-2001 and in regard to which no payments have been received till date. The Company is disputing the receipt such declaration Form 205 claimed to have been submitted in the month of January, 2001.

6. On 18-8-2001, the cargo i.e. Container Movement (Mumbai) Transport Pvt. Ltd. wrote a letter to the petitioner that the shipment is lying at Felixtowe and H. M. Customs, U. K. has seized the shipment and the cargo might be auctioned. The petitioner was requested to contact the consignee. Thereafter, by letter dated 6th February, 2002, the company has been asked to ascertain the reasons for non-payments by getting the bill rioted and protested through a buyer and inform us the reason. It is further instructed that further shipment should not be made till the earlier payments are realized. It has also been directed to negotiate with the buyer and in case if the negotiation fails, locate an alternative buyer and resell the goods with our prior approval. It was further directed that if re-import is a better option, you may bring back the goods with our prior approval. In the said letter it has also been informed that there was no valid credit limit on the date of shipment. The credit limit of buyer was cancelled vide letter dated 8-8-2001 and the shipment was declared with the delay of 9 days i.e. after non-payment by the buyer. The overdue declaration was submitted with a delay of four months. Thereafter the petitioner filed the abandonment Form for the clearance of the claim as per policy on 8th April, 2002. Vide letter dated 15-4-2002, the Company asked certain queries which have been replied in the month of May, 2002. Vide letter dated 14-8-2002, it has been informed that the approval of the petitioner for abandonment has not been considered by the Head

Office and the petitioner has been requested to approach the Corporations for the claim in the enclosed format duly filled in together with the necessary documents to be attached with details mentioned therein. The petitioner submitted the claim form as required by the aforesaid letter in the prescribed format on 4-3-2003. Thereafter, the company has written the impugned letter dated 22-9-2004 stating therein that they have not received any claims form of the above buyer. However, there was a request from you for seeking permission to abandon the goods shipped to the subject buyer for Rs. 10,33,290/-. We had called for certain documents/information for entertaining your request vide our letter dated 14-8-2002, but there was no response from your end. As the matter is about more than two years old, we are not in a position to extend any assistance in the matter at this stage and it has also become time barred. The petitioner filed the present writ petition claiming the aforesaid reliefs at this stage.

Counter and rejoinder affidavits have been exchanged".

7. Heard Sri L.P. Mishra, Advocate along with Sri. D.M. Tripathi, Advocate appearing on behalf of the petitioners and Sri Arvind Kumar appearing on behalf of the respondents.

8. Learned Counsel for the petitioner submitted that the company has no right to cancel the policy unilaterally. He submitted that the letter of cancellation dated 18-8-2001 was received to the petitioner on 18-8-2001 when the first consignment had already been dispatched on 10-8-2001. He submitted that the second consignment has also been dispatched on 6-9-2001 after the assurance being given by the Branch Manager to revoke the letter dated 8-8-2001. He submitted that the premium due on the aforesaid two consignments have been adjusted with the advance premium paid by the petitioner. He further submitted that after the reply of the letter dated 8-8-2001 vide letter dated 20-8-2001 the company has never instructed the petitioner not to go for shipment and detain the shipment. He further submitted that vide subsequent letters, the company had asked the petitioner to give the details about the two consignments and even asked the petitioner to negotiate with the buyer and search alternative buyer or if possible re-import the goods. These communications clearly show that the policy has not been treated as cancelled by the company and the company was processing the claim of loss and trying to minimize it through the petitioner. He submitted that the petitioner is entitled to be indemnified for the losses by the company.

9. Sri Arvind Kumar, learned Counsel for the respondents submitted that as per Clause 6 of the policy, the corporation had a right to cancel the policy from the date of the notice at any time. He submitted that the first consignment was dispatched on 10-8-2001 from Saharanpur while the date of shipment was 22-8-2001 and the petitioner has received the letter dated 8-8-2001 before the shipment. He submitted that after the receipt of the letter dated 8-8-2001, on 18-8-2001, the petitioner has not taken any steps to avoid shipment on

22-8-2001. Thus, the shipment being after the cancellation of the policy cover does not entail the company to indemnify the loss. He submitted that the petitioner has also not discharged its obligation as required under Clause 7 of the policy. He further submitted that under the policy risk insured was in case of failure of the buyer to pay to the insured, within four months after the due date of payment the gross invoice value of the goods delivered to and accepted by the buyer. He submitted that in the present case, the goods have not been delivered and accepted by the buyer, therefore, as per the policy, such risk was not insured and the loss could not be indemnified.

10. For adjudication of the issue, it is necessary to refer some of the relevant parts of the policy.

Policy issued by the Export Credit Guarantee Corporation of India Ltd. (hereinafter referred to as "the Corporation") to the Exporter (hereinafter referred to as the insured") named in Schedule I attached hereto, at the place and on the date of first herein above mentioned.

WHEREAS the insured has made Proposal (hereinafter referred to as "the proposal") on the date specified in Schedule I requesting the Corporation to insure him against a proportion of any loss which he may sustain by reason of certain risks involved in the export of goods from India.

AND WHEREAS the insured has agreed that the proposal shall be the basis of the Policy.

AND WHEREAS the insured has paid the Corporation (the receipt of which is hereby acknowledged by the Corporation the amount mentioned in Schedule-I hereto towards "Minimum Premium" for issue of the Policy.

NOW, THEREFORE, in consideration of the said Minimum Premium paid by the insured and any further premium that may become payable by him in terms of Clause 10 of this Policy, the Corporation hereby insures the insured, in accordance with the terms and subject to the conditions hereof, against a percentage of the amount of any loss as hereinafter defined, which may be sustained by the insured in respect of goods shipped by him out of India, due to the following causes (hereinafter referred to as "the Risks insured").

RISKS INSURED

(i) insolvency of the buyer as hereinafter defined; or

(ii) failure of the buyer to pay to the insured, within four months after the due date of payment the gross invoice value of the goods delivered to and accepted by the buyer.

TERMS AND CONDITIONS

REPRESENTATIONS AND DISCLOSURES BY THE INSURED:

1. Proposal and Declaration. The proposal and the declaration therein shall be the

basis of his Policy and shall form part thereof and if any of the statements contained in the Proposal or the Declaration be untrue or incorrect in any respect, this Policy shall be void but the Corporation may retain any premium that has been paid.

6. Withdrawal of Cover: The Corporation shall be at liberty at any time to give written notice to the insured that as from such date (not being earlier than the date of the notice) as may be specified in the notice, this policy shall not apply to any shipment that may be made on or after that date to a buyer specified in the notice, or to all buyers in a country specified in the notice, notwithstanding that the country in which the said buyer is, or the said buyers are resident or carrying on business is specified in Schedule-II hereto.

(Note: Despatch of notice means a notice sent by ordinary post to the latest address registered with the Corporation).

DUTIES OF THE INSURED.

7. Obligations of the insured: The insured shall:

(a) use all reasonable and usual care, skill and forethought and take all practicable measures, including any measures which may be required by the Corporation (including if so required the institution of legal proceedings) to prevent or minimize loss.

(b) notify to the Corporation in writing of the occurrence of any event likely to cause a loss without delay but in no case later than 30 days of his becoming aware of any such occurrence.

(c) exercise his right to stop the goods in transit from being delivered and stop shipment of further consignments unless the Corporation consents in writing to his refraining from doing so if, during the course of transit of goods, it should come to the insured's knowledge that a country,

(i) has banned the import of goods contracted for or

(ii) has ordered confiscation of the goods, or

(iii) has any circumstances existing in it which may lead to any loss.

LIMITATION OF CORPORATION'S LIABILITY

Limitation of Liability: The Corporation shall not be liable for loss:

(a) in respect of a shipment if all or any part of the gross invoice value thereof receivable by the insured has been assigned without full recourse to the buyer, unless the prior approval in writing of the Corporation thereto has been obtained; or

(b) in respect of a debt as to which the insured has extended the period for payment, or has accepted a composition arrangement with the buyer without the

prior approval in writing of the Corporation; or

(c) in respect of any contract in respect of which the relevant authority to import the goods and to pay for them is made subject to condition as to the export of other goods from any country or to conditions as to the payment for such other goods when so exported.

19. Exclusion of Liability: Notwithstanding anything to the contrary contained in this Policy, unless otherwise agreed to by the Corporation in writing, the Corporation shall cease to have any liability in respect of the gross invoice value of any shipment or part thereof, if:

(a) the insured has failed to declare, without any omission, all the shipments required to be declared in terms of Clause 8 (a) of the policy and to pay premium in terms of Clause 10 of the policy;

(b) the insured has failed to submit declarations of overdue payment as required by Clause 8 (b) of the policy, or

(c) in cases where payment terms are cash against documents, documentary sight draft or documents against payment, the insured has authorized release of the documents and/or the goods to the buyers, either on any other terms of payment or against a deposit in the currency of the buyer's country.

20. Credit Limit: The liability of the Corporation under this policy for losses sustained by the insured in respect of shipments made to any one buyer due to risk described in Sub-clause (i), (ii) or (iii) of the Risks Insured under this policy shall be limited to the amount hereinafter defined as the amount of Credit Limit for the buyer.

22. Maximum Liability: The total liability of the Corporation under this Policy shall be limited to the amount specified in the Schedule I hereof as the Maximum Liability of such other total sum as may be agreed to from time to time in writing between the insured and the Corporation.

DEFINITIONS

32. Due Date of Payment: The words "due date of payment" appearing in Risks Insured under this Policy and Clauses 8 and 15 of this Policy shall be deemed to include, where the time for payment has been extended by the insured with the consent in writing of the Corporation, the date to which the time has been so extended.

11. Having heard the learned Counsel for the parties, we have perused the record and given our anxious consideration to the rival submissions.

12. The question for consideration is that whether on the facts and circumstances, the respondent is liable to indemnify the losses suffered by the petitioner for non-taking the delivery of the goods and non-payment of the price by the foreign buyer M/s. Gift and Arts Imports Unit No. 8 Walt Hamstow

Business Centre, Clifford Road, London, U. K. against the policy certificate No. SCR 0100149 dated 7-6-2001 and the Credit Limit Certificate No. ST/4931.3297/10/ 00100047/2001 for Rs. 30 lacs.

13. We do not find any substance in the submission of the learned Counsel for the petitioner that the company had no right to cancel the policy unilaterally. Clause 6 of the policy refers to the withdrawal of cover, which says, that the Corporation shall be at liberty at any time to give written notice to the insured that as from such date (not being earlier than the date of the notice) as may be specified in the notice shall not apply to any shipment. Therefore, the issue of notice dated 8-8-2001 received by the petitioner on 18-8-2001 cannot be said to be without jurisdiction or issued without any competence.

14. Under Clause 6, the corporation has a right to give notice to the insured that from such date as may be specified in the notice of the policy shall not apply to any shipment, such date shall not be earlier date than the date of notice. The question is whether the notice dated 8-8-2001 which has been received by the petitioner on 18-8-2001 applies to the consignment which has been dispatched from the Saharanpur Factory on 10-8-2001, but admittedly put on shipment on 22-8-2001 and to the other consignment, the shipment of which was made on 6-9-2001.

15. In our view, the petitioner is not entitled to be indemnified for both the shipment for the reasons stated below:

(A) Under the policy the risk insured was for the policy of the buyer to pay to the insured without four months after the due date of the payment gross invoice value of the goods are delivered and accepted by the buyer. This clause is applicable in a situation where the goods are delivered and accepted by the buyer. It does not apply to a case where the goods are not delivered and accepted by the buyer. In the present case, admittedly the goods have not been delivered to the buyer and the buyer has not accepted the goods. In the circumstances, the ownership of the goods remained with the petitioner. In the case of *The Commissioner of Income Tax, Madhya Pradesh and Bhopal, Nagpur Vs. Bhopal Textiles Ltd., Bhopal*, the Apex Court observed that:

Railway receipt is a document of title of goods and for all purpose represents the goods that the railway receipt is handed over to the consignee on payment the property in goods is transferred. In this case, it is a matter of probable doubt whether the property in goods can be said to be passed to the buyers by the mere fact of the railway receipt being in the name of the consignees as has been held by the High Court.

The aforesaid decision of the Apex Court has been relied upon by the Apex Court in a subsequent decision in the case of *Bharat and Co. v. Trade Tax Officer and Ors.* reported in 2005 NTN (28) 123.

(B) Under Clause 7 of the policy the duties of the insured are provided. Sub-

clause (c) provides that the insured shall exercise his right to stop the goods in transit from being delivered and stop shipment of further consignments unless the Corporation consents in writing to his refraining from doing so, if during the course of transit of goods, it should come to the insured's knowledge that a country has any circumstances existing in it which may lead to any loss. Admittedly, by the letter dated 8-8-2001 received by the petitioner on 18-8-2001, the petitioner came to know that the Company has received some adverse information about the buyer on account of which the credit limit has been cancelled. Thus, the petitioners should have immediately took the steps and withheld the shipment which was admittedly made on 22-8-2001 much after the receipt of the letter having knowledge about some adverse information. Nothing has been shown that any effort had been made by the petitioner in this regard. Thus, the petitioner has not discharged its obligation as provided under Clause 7 (c) of the policy.

(C) In the policy under the heading "Limitation of Corporation's Liability" it is provided that the Corporation shall not be liable for loss in respect of shipment if all or any part of the gross invoice value thereof receivable by the insured has been assigned without full recourse to the buyer unless the prior approval in writing of the Corporation thereto has been obtained. In the present case, after having received the letter dated 8-8-2001 on 18-8-2001, the petitioner has consigned the shipment on 22-8-2001 without full recourse to the buyer and without prior approval in writing of the Corporation.

16. In view of the above, it is absolutely clear that the petitioner had consigned both the shipments to the buyer at its own risk without resorting to the terms of the policy.

In the result, writ petition fails and is, accordingly, dismissed.