
(2004) 03 NCDRC CK 0153

In the National Consumer Disputes Redressal Commission

RANE APPARELS

APPELLANT

Vs

EXPORT CREDIT GUARANTEE CORPORATION

RESPONDENT

Date of Decision : 01-03-2004

Acts Referred:

Citation : 2004 1 CPC 596 : 2004 1 CPR 94 : 2006 4 CPJ 388

Hon'ble Judges : K.S.Gupta , Rajyalakshmi Rao , B.K.Taimni J.

Final Decision : Complaint dismissed

Judgement

1. THE complainant in this case M/s. Rane Apparels of Tirupur, Tamil Nadu, is a exporter of cotton knitted hosiery garments. THE opposite party Export Credit Guarantee Corporation of India Ltd. (hereinafter called ECGC is a body set up by the Government of India to help export, trade by providing guarantee for export credit against political and commercial risks.

2. THE issue involved in this case is whether the Export Credit Guarantee Corporation which issued a shipment comprehensive risk policy committed a deficiency in service in refusing to reimburse the loss suffered by an exporter, due to a fraud committed by the buyer in collusion with the Bank employee. THE facts are as follows: "In 1993, the World Trade as well as the Indian Trade in South Africa which were still then banned, opened up and Government of India was keen that the exporters explore this new market." The partner of Rane Apparels Mr. N. Prakash visited South Africa in July, 1994 and was there till at least the 1st August, 1994 to explore export possibilities and it appears that he got in touch with certain parties allegedly representing a Company known as M/s. Afro Asian Commodity. The said M/s. Afro Asian Commodity (hereinafter referred to as AAC) gave two letters dated 1.8.1994 to N. Prakash indicating that they are willing to purchase upto 3 million pieces of T. Shirts worth US \$ 4.20 million. The terms of payment were ""D.P. 90 days after Bill of Lading date" signifying documents against payment.

Before this, on 30.5.1994, the Complainant obtained a "shipment comprehensive risks policy" (also known as standard policy) from Export Credit Guarantee

Corporation. The policy is meant to cover all shipments that may be made by the complainant from 1.4.1994 to 31.6.1996. The maximum liability of the Corporation was Rs. 2 crores. This limit was subsequently got increased to Rs. 20 crores on 22nd September, 1994 but w.e.f. 24.8.1994.

3. AFTER obtaining the purchase order from M/s. AAC as stated above, the complainant on 5.9.1994 applied to ECGC for sanction of credit limit of Rs. 13.50 crores on the buyer M/s. AAC. In this application the complainant indicated that bankers of M/s. AAC are the Standard Bank of South Africa ECGC, however, sanctioned a credit limit of Rs. 3 crores on 30.9.1994 which was subsequently enhanced to Rs. 7 crores on 8.11.1994. In fulfilment of the above purchase order of M/s. AAC the complainant made certain shipments of T. Shirts worth US \$ 2.3 million (Rs. 7.35 crores) to South Africa during the period of 6.9.1994 to 24.10.1994. The Complainant's local Banker is a State Bank of Travancore. The complainant inter alia produced a copy of a Fax message dated 13.10.1994 from one S. Makaketa of the Standard Bank of South Africa to the authorities of the State Bank of Travancore confirming the above terms of payment. The State Bank of Travancore, however, sent a SWIFT message to the Standard Bank of South Africa on 18.10.1994 asking them to confirm the contents of the Fax message. The State Bank of Travancore's SWIFT message reads as follows: "Please confirm that you are guaranteeing to honour the bills drawn on M/s. Afro Asia Commodities valued overall US \$ 4.20 million under D.P. 90 days, on the 90th day if otherwise in order. Please reply by return tested fax message. Quote a reference. Rane."

4. ON receipt of the State Bank's message of 19th October, 1994, the Standard Bank of South Africa started immediate inquiry since it had no employee by the name S. Mataketa. Inquiries revealed that there is no company known as M/s. Afro Asia Commodities nor its alleged partner/Director G.J. Bentley. Their inquiries revealed that on August 10, 1994, a bank account , was opened in their bank by one Syed Alamdur Hussain Shah in the name of M/s. Afro Asia Commodities. The Bank's inquiries also revealed that the shipping documents sent by the State Bank of Travancore were unauthorizedly got released from the Standard Bank of South Africa in connivance with an employee of the said bank without any payment actually being made to the Bank. Investigations also revealed that on the basis of such unauthorisedly released documents, shipments received were cleared by the shipping agents purportedly acting for M/s. Afro Asia Commodities and/or M/s. Okavango of Botswana to whom (M/s. Afro Asia Commodities is supposed to have sold the goods while on the high seas). The Standard Bank of South Africa, through a Swift Message dated 24th October, 1994 replied to the State Bank of Travancore that it had not sent any Fax on 13th October, 1994 and that it does not accept any responsibility towards payment of US \$ 4.2 million in terms of payment D.P. This message was received by the State Bank of Travancore at 1.00 p.m. on 25th October, 1994. The Standard Bank of South Africa also immediately approached the Supreme Court of South Africa on 3rd November, 1994 and obtained the Supreme Court's orders

interdicting the parties and preventing the disposal of the goods. The complainant avers that he came to know about this fraud on 26th October, 1995 from his Shipping agents at Tuticorin and immediately rushed to South Africa and in coordination with the Standard Bank of South Africa took all the necessary steps to secure the exported goods, finally he sold part of the goods in South Africa and part of them were re-shipped to India and sold in India. The complainant avers that the facts about the fraud played on him, was brought to the notice of ECGC orally by his lawyer on 24.11.1994 and subsequently by a letter dated 30.11.1994. The complainant avers that because of the distress sale of goods, he could only realize Rs. 3.5. crores as against the value of Rs. 7.31 crores. The reasons for less realisation are that there were no ready buyers for goods custom manufactured to specific requirements of the original buyer and that the market knew that the complainant was sitting on the huge stocks of unsold/returned goods.

5. THE complainant preferred on December 1, 1995 a claim of Rs. 4,26,95,180 on the ECGC which was rejected by the ECGC by a letter dated 27.3.1996 for reasons reproduced below: 1. Shipments declared late and after confirmation about the fraudulent nature of the transaction; 2. Information about the buyer and the documents provided by the complainant to the opposite party turned out to be untrue; and 3. Information at the relative and material time was not disclosed to the opposite party.

6. BEING aggrieved by the rejection of his claim by ECGC, the complainant approached this Commission for redressal of his grievance that there is deficiency of service on the part of ECGC. The complainant's plea is that he himself is the victim of fraud played on him by certain unscrupulous persons from South Africa and that it is not the case of the ECGC that he is a party to the fraud. The complainant argues that he could not give information about the fraud to the ECGC for a month after he knew about it, because he rushed to South Africa and his main concern was to secure the goods so that major losses could be averted. He argued that he took all reasonable steps like- (a) stopping further shipments; (b) preventing delivery of the consignments to the buyer; (c) taking steps to recover exported goods; (d) selling them to the local buyers to the extent possible at the best price; (e) bringing back the rest of the goods to India; and (f) selling them at the best price available.

His argument is that ECGC which is a body created to cover risks of the exporters has unfairly dealt with a victim of fraud and refused the claim on flimsy grounds. Elaborating the reasons for rejection of the claim, referring to Item I of para 7 above, ECGC argued that the policy requires (Clause 8 (a) reproduced below) that the complainant file declaration of shipments on or before the 5th day of each calendar month in Form 203 regarding all shipments made by him during the previous month and also tender the premium that was due thereon. "Clause 8-Declaration: (a) Declaration of shipments.-On or before the 15th day of each calendar month, the Insured shall deliver to the corporation a

declaration, in the form prescribed by the Corporation, of all shipments made by him during the previous month. If no shipment has been made during a month, a "Nil" declaration shall nevertheless be submitted. (b) Declaration of over due payments.-The insured shall also deliver to the Corporation, on or before the 15th of every month, a declaration in the form prescribed by the Corporation, of all payments which remained wholly or partly unpaid for more than 30 days from the due date of payment in respect of shipments made during the policy period and such declaration shall continue to be delivered to the Corporation even after the expiry of the policy period so long as any such payment remains overdue."

It is argued by the ECGC that the complainant filed the declaration and paid the premium on the value of the shipments made in the month of September, 1994 only on 26th October, 1994 after a delay of 11 days. Similarly, for the shipment made in October, 1994, the declaration was filed and premium cheque enclosed on 25th November, 1994 (after a delay of 6 days). It is argued that according to the terms of the policy any delay in filing of the returns can only be waived by ECGC in writing and that ECGC had given no such waiver. It is further argued that in addition to both the declarations having been filed late, declaration for October was made after the fraud was known to the complainant. ECGC also pointed out Clause 8(b) above, according to which moneys remaining unpaid by the buyers for more than 30 days are required to be made known to ECGC and that the complainant has failed in this mandatory requirement.

7. ON this issue the complainant on his part argued that by its own action, ECGC have waived delay in filing of the declarations of shipments. In the past also they had accepted delayed filing of the declarations. As regards the declaration made on 21st November, 1994, ECGC refused to accept the premium for shipment made to M/s. AAC and not for the shipments made as regards other parties. This itself shows that they have been following double standards and this is a frivolous objection. As regards to the second reason of para 10 above, regarding rejection, ECGC's argument is that the credit limits of M/s. AAC was sanctioned by it on the basis of documents and information furnished by the complainant and all that information turned out to be untrue and based on false or fabricated documents. In this connection, they relied on various Fax messages allegedly sent by the Standard Bank of South Africa to the complainant and complainant's Bank Manager which in turn were produced by the complainant and its bank before the ECGC for getting the credit limit. Subsequent investigation revealed all these documents to be bogus. ECGC further points out that the complainant's application dated 5.9.1994 for sanction of credit limit wherein he has described M/s. AAC as "sound and big buyers". They further argued that the complainant's partner N. Prakash himself was the one who secured the purchase order by visiting South Africa. He appointed one Mr. M. Pillai of Kitchen Delite Corporation of South Africa as the complainant's sole selling agent by an agency agreement dated 5th August, 1994. The said Pillai is alleged to have introduced N. Prakash to one Shaffee, representing M/s. AAC. Nothing is known about the antecedents or credibility of these persons-Mr. Pillai or Mr. Shaffee. The buyer is one G.J.

Bentley. However his name does not come anywhere on the record except for the purchase order letter issued on 1.8.1994 - this is most unusual. The purchase orders were, in fact communicated to the other partners of the complainant's firm by Prakash from South Africa itself. It is argued that one is not very clear about the role of N. Prakash. In any case it is very clear that he did not exercise due diligence in checking the credibility of purported buyer.

8. FURTHER ECGC have argued that the complainant has brought lot of pressure on ECGC through the federation of Tirupur Exporters Association and Federation of Indian Exports Organisations to sanction the credit limit in a hurry. The complainant went on alleging delay on the part of ECGC in enhancing the credit limits and persistently pressured ECGC to sanction the limits in a short time. ECGC, in particular, pointed out to a letter written as late as on 7.10.1994 to the complainant by complainant's agent M/s. African Continent, South Africa, mentioning that the consignments are getting delayed because of problems in convincing ECGC that the buyers are credit-worthy and due to the procedure laid down by the ECGC, the complainant is likely to loose another likely order from M/s. AAC worth another US \$ 4.5. Extending this argument further, it is pleaded that the credit limits were got sanctioned by supplying wrong information and hence the original sanction of credit limits itself became void or voidable by ECGC. ECGC has done exactly the same and cancelled the credit limits on 23.11.1994 as soon as they came to know about the fraudulent documents based on which the credit limit was sanctioned. Therefore the question of reimbursement of losses under Clauses (i) to (iii) of the Insurance Policy does not arise. ECGC's main case is that a fraud per se - whether it is committed by the complainant or with the knowledge and connivance of the complainant's buying agents in South Africa, or even if the complainant was innocent and the fraud was committed on him, is not covered by the "risks insured" under the policy. In reply, the complainant argued that ECGC itself failed in fulfilling its role in verifying the creditworthiness of the buyer and tried to push the entire blame on to the complainant. The complainant relied on the relevant portion of the ECGC's brochure which reads as follows: "On the basis of its own judgment of the creditworthiness of the buyer, as ascertained from credit reports obtained from Banks and specialized agencies abroad, the Corporation will approve credit limit which is the claim up to which it will pay a claim on account of losses arising from commercial risk."

The complainant further argued that at Item No. 9 of the credit limit application made by them on 5.9.1994, to the query, "Have you made any inquiry regarding financial standing and creditworthiness of the buyer? If yes, please give your views on reverse side", the complainant has clearly answered with a "No". Similarly in the box on "information on the buyer", in reply to the queries, "capital employed"; "annual turnover"; and "other exporters in India dealing with this buyer", they have got all places replied "Not known". Under these circumstances, it is for the ECGC to have checked up the creditworthiness of the buyer on whom they were sanctioning credit limits, especially when the details of

the buyer's bank in South Africa, its address and telephone number and the account number of the buyer's bank account were furnished by the complainant. For this purpose of obtaining an urgent report about the creditworthiness from an authorized Credit Information Agency, the complainant paid an amount of Rs. 750 to ECGC. In regard to reason 3 of para (10) of the argument of Export Credit Guarantee Corporation, is that the complainant came to know about the fraud on 25th October, 1994 (and not on the 26th October as argued by the complainant) but still for over a month he did not keep the ECGC informed of the fraud. ECGC first came to know about the fraud from the complainant's Bank, the State Bank of Travancore. In reply to the plea taken by N. Prakash that he was busy in South Africa at the relevant time, it is argued that there were many other partners in India who could have informed ECGC in time.

9. ECGC have argued that the commercial risks insured under Clause (i), (ii) or (iii) are limited to the credit limits prescribed. Since the credit limits prescribed in this case are void because of false information submitted no reimbursement is claimable under Clause (i) (ii) or (iii). The argument of the complainant is that his case is covered not under Clause (i), (ii) or (iii) but under Clause (x). As such it is argued that the question of credit limit does not apply to his case. ECGC counters this by arguing that Clause (x) cannot be read in isolation but has to be read ejusdem generis with the preceding clauses contained in "Risks Insured".

10. It is, therefore, necessary to examine in detail the relevant clauses of the Insurance Policy. The "Risks Insured" by the policy are listed on the first page of the policy at Items (i) to (x). Clauses (i) to (ix) are commonly known as "commercial risks". Clauses (iv) to (x) are commonly referred to as "political risks", Clause (xi) refers to cases where a foreign buyer is a Government or a contract is guaranteed by such a Government and is not relevant in our case. Clauses (i) to (iii) and Clause (x) which are relevant to the matter before us are reproduced below: "Risk 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; or (iii) Failure or refusal on the part of the buyer to accept goods which have already been exported from India, where any such failure or refusal is not excused by and does not arise from, or in connection with any other cause within his control, provided that the Corporation is satisfied that no good purpose would be served by institution of legal proceedings against the buyer in respect of his said failure or refusal; or... (x) any other cause, not being inherent in the nature of the good and not being within the control of the Insured and/or of the buyer, which arises from an event occurring outside India; or Condition 20 of the Terms and Conditions which places limit on the liability of the Corporation reads as follows:

"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 risks described in Sub-clause (i), (ii) or (iii) of "the Risks Insured" under this

policy shall be limited to the amount hereinafter defined as amount of Credit Limit for the buyer."

ECGC also raised an argument that the credit limits were sanctioned in the name of M/s. AAC and that such a company does not exist and no sales has been made to that company. Therefore the question of covering any risks relating to such a non-existent transaction does not arise. The complainant argued that the policy contemplates situations where the goods are not delivered. ECGC have also argued that the complainant has not pointed out as to what exactly is the deficiency in service rendered by the ECGC. We have carefully gone through the records and considered all the arguments. It is necessary to recapitulate the sequence of events to arrive at a correct decision. The shipment Comprehensive Risk Policy No. 00141 was issued by ECGC on 30.5.1994. According to that policy the political risk is covered right from the date namely 30.5.1994. The complainant received the purchase order from the African buyer on 1st August, 1994 when he (complainant) was in South Africa seeking business. This purchase order is addressed to the complainant M/s. Rane Apparels and also to M/s. African Continent (Mr. Pillai), the latter purportedly being the sales agent of M/s. Rane Apparels. The application for credit limit was made only on 5.9.1994 i.e. 35 days after the orders from the buyer were received. Along with the application a cheque dated 5.9.1994 for Rs. 750 towards cable charges for ECGC to obtain urgent report on creditworthiness was enclosed. The commercial risk would be covered under the policy, only if the credit limit of the buyer is sanctioned. This is evident from the following narration in the letter dated 16.9.1994 addressed to the complainant by ECGC; "Availability of commercial risk cover is subject to approval of credit limit on the above buyer by our Head Office at Mumbai. We are expecting the credit limit on your application from our Head Office shortly and shall convey it to you as soon as possible."

While the application for sanction of credit limit upto Rs. 3.50 crores was under consideration of ECGC, on 9th September, 1994, the complainant received a report from S. Makaketa of the Standard Bank of South Africa that the buyer company is creditworthy upto US \$ 2.8 million. This letter (Annexure VII) is reproduced below: On 29th September an Administrative Manager of the said Standard Bank of South Africa issued a clarification to M/s. Rane Apparels explaining the meaning of Bank code C. This letter is addressed to M/s. Kitchen Delite, M/s. Rane Apparels and ECGC. On the same day, the complainant forwards this letter of the Standard Bank of South Africa to ECGC asking them to sanction credit limit immediately by return post. ECGC approved the credit limit on the next day i.e. 30th September, 1994. On 30th September, 1994, the complainant once again receives another letter from S. Makaketa of the Standard Bank of South Africa saying that the buyer is a very good risk for trading for a value of upto US \$ 4.5 million. The complainant sends this letter on 5th October, 1994 to ECGC asking them to raise the credit limit to Rs. 13.50 crores. This letter (Annexure XI) reads as follows: "To ECGC Ref: Our credit limit application on M/s. Afro Asian Commodities, South Africa for Rs. 13.50 crores. Kindly find

enclosed with this letter from the Standard Bank of South Africa. In our considered opinion, this letter is extremely good one and would go a long way in facilitating expeditious sanction." The credit limit was enhanced to Rs. 7 crores on 8.11.1994. However, the credit limit was cancelled ab initio by ECGC on 23.11.1994 on knowing from State Bank of Travancore (Complainant's Bank) about the fraud. Meanwhile it may be noted that the actual shipment started on 6.9.1994 i.e. one day after making the application for credit limit.

11. THE fraud was reported to ECGC by the complainant in writing only on 30.11.1994. THE complainant however argues that the facts were brought to the notice of the ECGC by his Lawyer orally on 24.11.1994. Whatever be the truth, even prior to these dates, namely on 23.11.1994 itself, ECGC informed the complainant that his liability is not attracted as regards the two shipments made on 16.10.1994 and 26.10.1994 for a total value of Rs. 4,10,50,556 because of delay on the part of the complainant in reporting the shipments on time. ECGC also returned the complainant's cheque towards the payment of premium for the above shipments. Similarly, ECGC cancelled the credit limit ab initio on 23.11.1994 itself. Even though the purchase orders were secured on 1.8.1994, the complainant applied for credit limit only on 5.9.1994 i.e. after over a month and one day before the actual shipment started. After making the application, he went on bombarding the ECGC with various letters purportedly written to him on behalf of Standard Chartered Bank of South Africa giving glowing accounts of creditworthiness of the buyer company which ultimately turned out to be non-existent. Further, the transactions with M/s. AAC were routed through M/s. Kitchen Delite and M/s. African Continent. The status of both these parties and key personnel associated with these are within the knowledge of the complainant since Mr. Prakash (a partner) personally struck these deals. No information has been brought on record regarding their role in the transaction. The alleged proprietor of M/s. AAC, Mr. Bentley has not been brought in the picture. Prima facie it seems that the complainant has not come to us with clean hands. The most charitable thing that can be said about the complainants, that he has completely failed in ascertaining the antecedents and sending of the purported buyer.

12. WE find that the three reasons given by ECGC (see para 10 above) for repudiating the claim are perfectly valid. It is abundantly clear that the information about the buyer and the document provided by the complainant to the opposite party are all fictitious. The shipments were declared late in breach of the conditions of the policy which provide that any waiver by ECGC have to be given in writing, which has not happened in this case. Thirdly, the fraud was reported over a month after the complainant came to know about it. Further we hold that a fraud cannot be covered under the term "commercial risks". The only ground that the complainant has against the ECGC is that ECGC has not itself checked up the antecedents and creditworthiness of the buyer even though an amount of Rs. 750 was paid for this purpose. Assuming for a minute that ECGC made inquiries on its own and found the creditworthiness of the buyer, it does

not follow that ECGC should pay the insurance even if the fraud is committed by such a solvent dealer. In view of the above discussion the complaint dismissed. Complaint dismissed.