

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ LPA No. 436/2005

Reserved on : September 24th, 2008

% Date of Decision : November 14th, 2008

EXPORT CREDIT & GUARANTEE
CORPORATION & ANR.

..... Appellants

Through: Mr. Sudhir Chandra,
Senior Advocate with
Mr. Bharat Sangal,
Mr. R.R. Kumar and
Ms. Ipsita & Ms. Sanaya,
Advocates

Versus

M/S. ARUN & RAJIVE P. LTD.
& ANR

..... Respondents

Through: Mr. Sandeep Sethi,
Senior Advocate with
Mr. Kamal Mehta,
Advocate.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

J U D G M E N T

MANMOHAN, J

1. The present appeal has been filed by the Appellant for setting aside the judgment and order dated 6th December, 2004 passed by learned Single Judge whereby a Writ of Mandamus

has been issued quashing the Appellant's letters rejecting the Writ Petitioners request for balance claim. The learned Single Judge also issued a direction that the Respondent's claim should be processed in accordance with Circulars No. 19, 44 and 56 dated 2nd July, 2001, 28th June, 2002 and 2nd September, 2002 respectively within a maximum period of two months and in the event of delay in making payment, the Respondent was held entitled to 7% simple interest, for the delayed period of payment.

2. The facts of the present case are that the Respondent being printer and publisher and having ventured for the first time in an export business, got the value of the consignment insured from the Appellant. The export order dated 8th July, 2001 was for printing and supply of various religious books, souvenirs, programme highlight booklets, diaries, calendars etc. for a Festival called Shirdi Sai Baba Utsav of London organized by the devotees of Sai Baba in London on 26th and 27th August, 2001. According to the Respondent, the festival was to be organized on a very large scale where many heads of State were invited.

3. The policy issued by the Appellant was for a coverage sum of Rs. 1.5 Crores for which total premium paid and accepted was Rs. 59,311/-. The Respondent made an application for credit limit

on 17th August, 2001 by depositing the required fee of Rs. 300. The policy dated 23rd August, 2001 was duly issued after full disclosures were made by the Respondent about the consignee, consignment and value thereof, as also the dates when the consignment must reach London in the proposal submitted for issuance of policy. The relevant clauses of the policy issued by the Appellant are reproduced hereinbelow :-

“8. Declarations :

(a) Declarations 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 overdue 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, that payments which remained wholly or partly unpaid for more than 30 days from the due date of payment till the end of the previous month, in respect of shipment 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 over due.....

19. Notwithstanding anything contained elsewhere 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.....

(b) the insured has failed to submit declaration of overdue payments as required by clause 8(b) of the policy, or.....

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

21. *Amount of the credit limit : The amount of Credit Limit on any particular buyer shall be :*

(a) where on an application made by the insured, the corporation has approved and communicated to the insured in writing an amount on specified terms of payment as the credit limit for that particular buyer, the amount so specified.

(b) where no such amount has been specified and communicated by the Corporation then :

(i) If the transaction is on Documents Against payment of Cash Against Documents terms Rs. 10,00,0000 PROVIDED THAT the liability of the corporation to pay claims on credit limits availed under this sub-clause shall be limited to four buyers during the currency of this policy, or

(ii) If the insured has made at least three shipments to that particular buyer during a period of two years immediately proceeding the date of shipment and has received payments on the due date, the highest amount that remained outstanding at any one time on similar payment terms, PROVIDED THAT no credit limit under this sub-clause shall not exceed Rs. 7,50,000 for documents against payment or cash against documents transactions subject to the condition that the aggregate credit limit on any single buyer under this sub-clause shall not exceed Rupees Twenty Lacs.....

28. *Observance of conditions: The due performance and observance of each terms and condition contained herein or in the Proposal or Declaration shall be a condition precedent to any liability of the Corporation hereunder and to the enforcement thereof by the insured."*

4. The Respondent made shipments between 20th to 27th August, 2001 so that the goods reach London in time for the Festival. On 30th August, 2001 the Appellant wrote to the Respondent that the enquiry about determination of the credit limit was still pending. Yet the Appellant unconditionally accepted two premium amounts received on 18th September, 2001 and 2nd November, 2001.

5. However, the risk protection for which the Respondent had taken the policy became a reality when due to continuous heavy downpour in London on the dates when the Festival was scheduled to be held, the Festival collapsed and/or was washed out and the Respondent was not paid for the consignment shipped. Therefore, the Respondent on 10th August, 2002 filed the claim for a sum of Rs. 76,53,227.68 before the Appellant.

6. The Appellant rejected the claim firstly on the ground that no credit limit had been obtained by the Respondent prior to shipment and secondly the failure of Purchaser to pay was not declared by the Respondent to the Appellant within the stipulated time.

7. Subsequently the Appellant vide letter dated 16th October, 2002 decided to condone the lapse, as a special case, and agreed to pay as full and final settlement a sum of Rs. 22.50 Lacs on the basis of so called provisional credit limit of Rs. 25,00,000/- after deducting 10% therefrom. The Respondent vide its own letter dated 16th October, 2002 accepted the said payment and acknowledged it as full discharge of Appellant's liability.

8. However, the Respondent within eight days time by its letter dated 24th October, 2001 claimed the balance amount while treating the payment of Rs. 22.50 Lacs as partial settlement of the claim. The Respondent by this letter disputed the issue of provisional credit limit.

9. Learned Single Judge while allowing the writ petition relied upon the three Circulars issued by the Appellant dated 2nd July, 2001, 28th June, 2002 and 2nd September, 2002. By way of the first Circular the Appellant framed guidelines for condonation of lapses for payment of claims under short-term policies. The lapses were divided into three broad categories; (1) Serious lapses, (2) Major lapses and (3) Minor lapses and deviation. For delay in reporting of overdue in respect of shipment, the breach

fell within the category of Major lapse and if there was a delay of more than two months but less than four months, only 5% was to be reduced in percentage of loss payable.

10. Clause 8 of the Circular dated 28th June, 2002 provided for 90% payment of a claim arising out of commercial risk in respect of a shipment for which no credit limit was available provided such an application had been made but not rejected before the date of shipment and the premium on the shipment had been paid within the prescribed time period. In the present case there is no dispute that the premium had been paid by the Respondent within time.

11. The third Circular dated 2nd September, 2002 provided that a report of non-payment receipt from the exporter's bank or a letter from the exporter to the Appellant stating that it had not received payment for shipment was to be treated as a report of overdue.

12. The relevant portion of the judgment of learned Single Judge while allowing the Respondent's writ petition is reproduced hereinbelow :-

“24. The other plea advanced by learned counsel for the respondent is that the payment which was made to the petitioner was in full and final settlement of his claims. Once such claim was finally settled, the matter cannot be re-agitated unless it is proved that the settlement was made under coercion, undue influence or fraud. Learned counsel referred to the judgment of the Supreme Court in New India Insurance Co. Ltd. v. Sri Venkata Padmavathi R&B Rice Mills, (2000) 10 SCC 334. There is no doubt about the principle that normally such full and final settlement ought not to be re-opened. However, the touchstone on which the same has to be decided in such matters of insurance policy is on the principle of utmost good faith being observed by the respondent. The lack of such good faith is pleaded inasmuch as it is stated that the relevant circulars were not brought to the notice of the petitioner. It is not the case of the respondent that these circulars were brought to the notice of the petitioner or the claims of the petitioner were settled in accordance with the norms laid down in these circulars.

25. There is no doubt that there has been default on the part of the petitioner in respect of declaration of overdue payments. The details of the delay have been mentioned aforesaid. However, the circulars themselves provide for the consequence of such default and must thus be read into the policy itself. It is not a case set up by the respondents that these circulars are not binding. In fact, such a case cannot be set up by the respondents. This aspect has to be considered keeping in view the fact that the respondent No. 1 has been set up with the object of promoting export and to provide guarantee cover to exporters and banks for pre-shipment and post-shipment risks. Thus, various eventualities of defaults have been considered while issuing the guidelines/circulars as also the consequence of this default being clause 19(b) read with clause 28 of the policy.....

This is so since adherence to the circulars and on following the parameters, it shall be deemed that

all the breaches stand condoned. Otherwise, the circulars would have no meaning.

26. Similarly, in respect of obtaining the credit limit.....

27. The consequence of the aforesaid is also provided in Circular 44 dated 28.6.2002 and the said lapse can be condoned with 10% reduction but subject to the condition that the premium on the shipment was made within the prescribed time limit. There is no dispute about the fact that such a payment of premium has been paid within the time limit.

28. The plea of the respondent that the circulars give basic policy guidelines to its officers to relax policy breaches in cases of genuine and bona fide exporters and various parameters have to be seen for the said purpose cannot be accepted. This would give a right to the officer to pick and choose which cannot be permitted once the claim is genuine and bona fide. The policy between the parties is binding. Similarly, the circulars had to be read into the policy and would be binding in all the cases. The fact that the claim of the petitioner has been paid, though on a lesser value of coverage, itself shows that there is no lack of bona fides and the claim is genuine. It is not a case where any mala fide is attributed to the petitioner since undisputedly the lapses have been condoned. The consequences of the condonation of the lapses and the directions to be made in pursuance thereto have been clearly set out in the circulars. Thus, the respondent ought to have processed the claim of the petitioner on the basis of the said circulars.....

30. The respondent failed to disclose to the petitioner the existence of the circulars and failed to process the claim of the petitioner in terms of the circulars. It cannot be said that these circulars are only for internal consumption. The petitioner would have relied on the circulars and agitated its claim and thus would not have accepted the full and final payment in case the circulars had been brought to the notice of the petitioner. It is not the case of the respondents

that these circulars were in fact brought to the notice of the petitioner. Thus, the requirement of uberrima fides was not followed and the respondents held back the circulars which have to be read into the policy. The importance of the requirement of observing the principles of good faith has been recognized and accepted by the Hon'ble Supreme Court in MKI Corporation case (supra) and Pushpalaya Printers case (supra)."

13. Learned Senior Counsel for the Appellant Mr. Sudhir Chandra submitted that though there was no credit limit issued as mandatorily required by Clause 20 of the Policy with regard to the purchaser of the goods, the Respondent made their shipment before the credit limit had even been granted by the Appellant. He contended that the Cover Note dated 24th August, 2001 issued with the Policy clearly stipulated that the Appellant would have no liability for shipment made by the Respondent without obtaining an appropriate credit limit, as in the present case.

14. He further submitted that by virtue of Clause 8(b) of the Policy, the Respondent had to declare within the prescribed period, the default in receiving payment from the purchaser which they failed to do and thus under Clause 19, the Appellants were not liable in regard to such shipment.

15. Mr. Chandra pointed out that while Clause 28 of the Policy requires complete observance of all conditions precedent,

Clause 29 of the Policy provides that none of the terms of the Policy could be deemed to be waived, excused or changed except in writing by the Appellant. Since, in the present case there is no such written waiver or change of Policy's terms and conditions, the Appellants were not liable.

16. Mr. Chandra further submitted that the Circulars dated 2nd July, 2001, 28th June, 2002 and 2nd September, 2002 were never notified by the Appellant to be a part of the insurance contract and, therefore, the said Circulars cannot override the same. He further submitted that the Circulars being part of the internal guidelines for the benefits of officers dealings with the parties, there was neither any requirement in law nor any necessity of informing the exporters of the contents of the said Circulars. According to him there was no duty on the Appellant to circulate the said circulars and, therefore, there was no question of settlement dated 16th October, 2002 being hit by lack of good faith.

17. Mr. Chandra submitted that the Circulars in any event, permitted the Chairman-cum-Managing Director of the Appellant only to consider the claims and allow them to the extent of Rs. 25 Lacs – which had been done in the present case. He submitted

that the observation of learned Single Judge that there is no rationale that the claim should be restricted to Rs. 25 Lacs is erroneous.

18. Mr. Chandra further submitted that once the Respondent accepted the full and final settlement vide their letter dated 16th October, 2002, the Respondents were bound by it and the Courts should not overturn such a settlement. In this context, he relied upon a judgment of the Hon'ble Supreme Court in the case of ***New India Assurance Co. Ltd. Vs. Sri Venkata Padmavathi R&B Rice Mill reported in 2000 (10) SCC 334.***

19. In the alternative, Mr. Chandra submitted that even if this Court was of the view that the discretion vested in the Appellant by the Circulars had not been exercised correctly, it should only have remanded the matter back to the Appellant to exercise the discretion afresh as vested in it by the Circulars and not to decide the claim itself of the Respondent in exercise of its jurisdiction under Article 226 of the Constitution. In this context, Mr. Chandra relied upon judgment of the Apex Court in the case of ***Union of India Vs. S.B. Vohra & Ors. reported in (2004) 2 SCC 150*** wherein it has been held as under :-

52. The High Court, however, should not ordinarily issue a writ of or in the nature of mandamus and ought to refer the matter back to the Central/State Government with suitable directions pointing out the irrelevant factors which are required to be excluded in taking the decision and the relevant factors which are required to be considered therefore. The statutory duties should be allowed to be performed by the statutory authorities at the first instance.

20. Learned Senior Counsel for the Respondent, Mr. Sandeep Sethi, contended that in the present case the Circulars were squarely applicable for the purposes of settlement of claim since on the date of the shipment, the application for credit limit was still pending as per Appellant's own letter dated 30th August, 2001. Consequently, it was submitted that neither provisional credit limit could be fixed nor the limitation of liability clause could be invoked.

21. Mr. Sethi submitted that by making payment of Rs. 22.50 Lacs, the lapses and deficiencies on the part of the Respondent in strictly complying with the policy condition stood condoned. According to him, the limitation contained in the policy was not to apply as evident from the fact that even the payment of Rs. 22.50 Lacs was beyond the amount indicated in the limitation of liability clauses.

22. Mr. Sethi further submitted that the Respondent's acceptance of Rs. 22.50 Lacs would not disentitle the Respondent from claiming the balance claim since the consent was taken by misrepresentation, concealment and/or suppression of facts inasmuch as the Circulars which undoubtedly govern the contract/policy were not disclosed to the Respondent. According to him, the Appellant while condoning the lapses and quantifying the claim of Rs. 22.50 Lacs not only misrepresented by fixing provisional credit limit but also wrongly gave an impression that not more than Rs. 22.50 Lacs was payable in cases where deficiencies and lapses were condoned and, therefore, put the Respondent in 'take it or leave it situation'. He stated that the Respondents on 16th October, 2002 were neither aware nor made aware of the beneficial circulars and/or the power/provision under which the Appellant's lapses had been condoned.

23. After hearing the parties, we are of the opinion that the policy executed between the parties was not only an insurance policy but in the nature of guarantee against risks arising out of non-payment by the purchaser/consignee. The name of the Appellant Corporation itself indicates the aim and objective of its

formation i.e. 'Export Credit and Guarantee Corporation'. Therefore, the aim and/or objective of formation of the Appellant Corporation is to boost exports and to encourage exporters by offering them credit, protection and guarantee against risks involved in such transactions. Consequently, while deciding the present case a liberal approach has to be adopted so that the intent and objective of creating this statutory body is achieved.

24. Admittedly in the present case the Respondent had defaulted on two counts, namely it failed to obtain credit limit prior to shipment and further it had defaulted in notifying the Appellant within the stipulated time of failure of purchaser to pay. But the three Circulars dated 2nd July, 2001, 28th June, 2002 and 2nd September, 2002 provide for condonation of such lapses on reduction of certain percentages of claim. Thus the Appellant had in place a policy to condone lapses/default on part of the insurer. It was the power conferred by these Circulars/policies that were exercised by the Appellant. Consequently, the two defaults on the part of the Respondent stood condoned by the Appellant itself and now the Appellant cannot rely upon the same.

25. Most certainly, the three Circulars relied upon by the Respondent can neither be read into the insurance policy/contract nor do these Circulars override the policy/contract but at the same time they are not '*pieces of waste-paper*'. In our opinion, if the breaches/lapses committed by the consignor are condonable, then the Appellant is bound to give effect to its beneficial circulars/policies. It is well settled that the State and its authorities are bound to follow rules and standards which they themselves have set on pain of their action being invalidated. The Hon'ble Supreme Court in ***A.S. Ahluwalia Vs. State of Punjab reported in (1975) 3 SCR 82 at 89*** has held as under :-

.....The Sweep of articles 14 and 16 is wide and pervasive. These two articles embody the principle of rationality and they are intended to strike against arbitrary and discriminatory action taken by the 'State'. Where the State Government departs from a principle of seniority laid down by it, albeit by administrative instructions, and the departure is without reason and arbitrary, it would directly infringe the guarantee of equality under articles 14 and 16. It is interesting to notice that in the United States it is now well settled that an executive agency must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Vide the judgment of Mr. Justice Frankfurter in Vitaralli V. Seton. This view is of course not based on the equality clause of the United State Constitution and it is evolved as a rule of administrative law. But the principle is the same, namely, that arbitrariness should be eliminated in State action....."

26. In our opinion, the three beneficial Circulars only come into operation and effect only when the consignor has committed a breach of policy. Therefore, we are of the opinion that the three beneficial Circulars issued by the Appellant are binding, applicable and can be relied upon and made use of by the Respondent. In fact, the Appellant having applied the said Circulars cannot now urge that the Circulars are not relevant as the Respondent was admittedly in default of the policy.

27. We are further of the opinion that the Appellant was bound to circulate and disclose its three Circulars as firstly the Appellant is 'State', within the meaning of Article 12 of the Constitution and is expected to act reasonably and fairly. Moreover, the present contract according to the Appellant being an insurance contract, the principle of *uberrima fides* that means the parties must show utmost good faith squarely applies and, therefore, the Appellant was under an obligation to disclose its beneficial circulars to the Respondents.

28. We are not convinced by the Appellant's argument that the Respondents are estopped from resiling from the 'compromise' as they had executed a full and final receipt. In our opinion, the full and final settlement executed by the Respondents was not

based on an 'informed consent' inasmuch as at that stage the Respondents were not made aware of the three beneficial circulars. Had the Respondents known about the beneficial circulars, they would have realised that they were entitled to raise a claim for a much higher compensation from the Appellant than being offered.

29. However, we find substance in the arguments of the Appellant that the Chairman-cum-Managing Director of the Appellant under the three Circulars could only consider and allow claims upto a sum of Rs. 25 Lacs and also that even if the discretion vested in the Appellant had not been exercised properly then the only option to the Court is to remand the matter back to the Appellant to exercise its discretion in accordance with the said Circulars.

30. In view of the observations of the Apex Court in ***Union of India Vs. S.B. Vohra*** (supra), we refer the matter back to the Board of the Appellant Corporation to decide the balance claim of the Respondent in accordance with its three Circulars and the previous decision of the Chairman-cum-Managing Director as well as observations made hereinabove. The Respondents are directed to file a fresh representation for the balance claim (i.e. in

excess of Rupees Twenty Five Lakhs) with the Appellant's Board within a period of four weeks from today and the Board is directed to decide the same within a period of six weeks thereafter. The Board will take into account the undisputed fact that the three Circulars dated 2nd July, 2001, 28th June, 2002 and 2nd September, 2002 were not in the knowledge of the Respondent when it executed the receipt for the sum of Rs. 22.50 Lakhs.

31. With the aforesaid observations, the present appeal is disposed of.

MANMOHAN, J

MUKUL MUDGAL, J

November 14th, 2008
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