

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

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Date of decision: 15th September, 2016

+ W.P.(C) 5659/2014 & CM No.14015/2014 (for interim directions)

INDUSIND BANK

..... Petitioner

Through: Mr. P.K. Mallick, Ms. Soma Mallick
and Mr. Sebat Kumar Deuria, Advs.

Versus

**EXPORT CREDIT GUARANTEE
CORPORATION OF INDIA LTD.**

..... Respondent

Through: Mr. Ravinder Agarwal and Mr. Girish
Pande, Advs.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 226 of the Constitution of India i) impugns the orders dated 4th July, 2013, 31st December, 2013 and 21st April, 2014 of the respondent Export Credit Guarantee Corporation of India Ltd. (ECGC) rejecting the claim of the petitioner in respect of Packing Credit Export Credit Guarantee (PCECG) No.0500100361; and, (ii) seeks mandamus to the respondent ECGC to make payment to the petitioner in respect of the claim dated 4th December, 2012 in respect of the said PCECG.

2. The petition came up before this Court first on 3rd September, 2014 when notice thereof was issued. Counter affidavit has been filed by the respondent ECGC to which rejoinder has been filed by the petitioner. The counsels for the parties were heard on 17th May, 2016 and judgment reserved.

3. It is the case of the petitioner i) that the petitioner is a scheduled bank; ii) that the respondent ECGC is a public corporation owned by the Government of India and a State within the meaning of Article 12 of the Constitution of India; iii) that the petitioner was approached by Surya Vinayak Industries Ltd. (SVIL) seeking packing credit facilities for export of protein meals, mainly to South-Asian countries; iv) that the lending to SVIL was to be done through a consortium of which the petitioner was member bank; v) the petitioner approached the respondent ECGC for issuance of PCECG against packing credit facilities to be extended to SVIL and PCECG No.0500100361 dated 12th November, 2009 for an amount of Rs.25 crores for the period from 13th August, 2009 to 31st August, 2010 was issued by respondent ECGC subject to payment of premium as mentioned in the schedule attached to the guarantee; vi) the petitioner on the basis of the said guarantee extended packing credit facilities to SVIL; vii) that the

respondent ECGC vide its letter dated 18th March, 2011 renewed the guarantee for the period from 1st September, 2010 to 31st August, 2011 and the amount of the guarantee was increased from Rs.25 crores to Rs.40 crores; viii) that as per the schedule the maximum liability of respondent ECGC on guarantee amount of Rs.40 crores was to be of Rs.26,66,66,666.67p; ix) that though in the renewed guarantee additional term to the effect that advance premium equivalent to one month's premium is to be deposited on the basis of highest amount outstanding / limit sanctioned was added but the respondent ECGC contrary to its normal practice did not highlight the same in the communication dated 18th March, 2011 and thus the same remained to be noticed by the petitioner; x) that the respondent ECGC vide its letter dated 8th November, 2011 renewed the guarantee for the period from 1st September, 2011 to 31st August, 2012; xi) that on 31st July, 2012, there was a default by SVIL to the extent of Rs.26,59,22,771.81p; xii) that the petitioner vide its letter dated 31st July, 2012 raised claim on respondent ECGC invoking the guarantee; xiii) that the respondent ECGC from time to time sought clarifications and other documents from the petitioner and which were furnished by the petitioner; xiv) that on 4th December, 2012 the petitioner lodged Packing Credit

Guarantee Claim Form with the respondent ECGC; xv) that the exporter was indebted to the petitioner to the extent of Rs.26,59,22,771.81p; xvi)that the respondent ECGC from time to time sought further clarifications, inspection of documents, all of which were furnished / given; xvii) that the respondent ECGC vide its letter dated 1st July, 2013 rejected the petitioner's claim on the ground of delayed payment of premium; xviii) that however the respondent ECGC vide its letter dated 4th July, 2013 asked the petitioner to ignore the letter dated 1st July, 2013 and informed the petitioner that its claim had been found to be inadmissible on the ground of non-payment of premium on time and consequently rejected; and, xix) that the petitioner represented but the said representations were also rejected by the respondent ECGC vide its order dated 31st December, 2013 and 21st April, 2014.

4. It is the contention of the petitioner that the rejection by the respondent ECGC of its claim under the guarantee is illegal because i) the respondent ECGC accepted all premiums paid by the petitioner without any demur or objection and therefore it must be deemed that the respondent ECGC waived any objection to acceptance of premium on ground of delay; and, ii) the policy was never cancelled on ground of delay in payment of

premium. Reliance is placed on *United India Insurance Company Ltd. Vs. Laxmamma* (2012) 5 SCC 234.

5. The respondent ECGC has contested the petition pleading i) that the extraordinary jurisdiction under Article 226 of the Constitution of India cannot be invoked to recover money and the appropriate remedy for the petitioner is to file suit for recovery; ii) that the dispute between the parties entails disputed questions of fact which cannot be adjudicated in writ jurisdiction; iii) that though the word 'guarantee' has been mentioned in the cover issued by the respondent ECGC but the same is an insurance cover and the respondent ECGC has since effected the change in terminology; iv) that the policy issued by the respondent ECGC to the petitioner clearly stipulated that time was the essence of the contract and the petitioner undertook to ensure strict compliance with the requirements of the clauses pertaining to timely delivery of monthly statements and payments of the premium; v) that no new condition was inserted while renewing the policy vide letter dated 18th March, 2011; vi) that Clause 9 of the renewal letter merely reiterated that the advance premium is required to be deposited with respondent ECGC on the basis of highest amount outstanding / limit sanctioned; vii) that the petitioner vide e-mail dated 18th October, 2011 also

was subsequently informed that the Export Credit Insurance for Bank Schemes of respondent ECGC are covered by the Insurance Act, 1938 and in terms of Section 64VB of the said Act it is mandatory on the part of the insured to keep sufficient premium in advance with the insurer well before the assumption of risk by the insurer and that “in absence of advance premium no risk will be assumed to be covered even though premium becomes payable on such risks”; viii) that the petitioner has also suppressed from this Court the receipts issued by the respondent ECGC clearly stipulating that it was merely an acknowledgment of money received and created no liability on the respondent ECGC of any kind whatsoever nor shall amount to or mean admission of any fact or circumstances or any liability; ix) that the petitioner in response to the queries made by respondent ECGC from time to time disclosed that credit facilities were granted to SVIL against primary security of stock and book debts which valued around Rs.2976 crores and that in addition to primary security, the petitioner also held as collateral security immovable assets worth Rs.32.33 crores and that the share of the petitioner in the consortium was 1.96% only; x) that thus the petitioner holds security much more than sufficient to cover the losses incurred by the petitioner on account of non-payment by its borrower; xi)

that the petitioner, without first minimizing the losses against the security held, preferred the claim on the respondent ECGC which itself is also contrary to Clause 4 of the policy; and, xii) that the acceptance of the premium by the respondent ECGC is conditional subject to due compliance with the terms and conditions of the policy document.

6. The rejoinder filed by the petitioner is merely a denial of the contents of the counter affidavit and reiteration of the contents of the petition.

7. The petitioner has sought writ remedy for relief *inter alia* of recovery of money for which normally a suit remedy or arbitration remedy is to be invoked, relying upon ***ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.*** (2004) 3 SCC 553.

8. Attention of the counsel for the petitioner however at the outset only was invited to my judgment titled ***KLA India Public Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.*** (2011) 183 DLT 591 dismissing the writ petition as not maintainable and with the liberty to the petitioner therein to avail of alternative remedy. Attention of the counsel for the petitioner was also invited to judgments of the Division Bench of this Court i) ***Chakradar Auto Udyog Pvt. Ltd. Vs. Engineering Export Promotion***

Council 2012 SCC Online Del 4736; ii) *Steel Authority of India Ltd. Vs. Punjab & Sind Bank* 2012 SCC Online Del 6211; iii) *Virender Sharma Vs. Director, Enforcement Directorate* MANU/DE/0546/2012; and, iv) *Santanu Sur Vs. GAIL India Ltd.* 2014 SCC Online Del 4354 all, after considering *ABL International Ltd.* supra and referring to the subsequent dicta of the Supreme Court in *Godavari Sugar Mills Ltd. Vs. State of Maharashtra* (2011) 2 SCC 439, holding writ remedy to be not available for a monetary claim.

9. Attention of the counsel for the petitioner was also invited to the yet subsequent dicta of the Supreme Court in *Joshi Technologies International Inc. Vs. Union of India* (2015) 7 SCC 728 and following which I have in *Playwell Impex (P) Ltd. Vs. United India Insurance Company Ltd.* 2015 SCC Online Del 12965 and in *Twenty First Century Media Private Ltd. Vs. New India Assurance Company Ltd.* (2016) 230 DLT 195 (relying additionally on order dated 18th March, 2015 of the Supreme Court in Civil Appeal No.3053/2015 titled *National Highways Authority of India Vs. MEIL-EDB LLC (JV)*) held insurance claims to be not enforceable by invoking writ jurisdiction.

10. The counsel for the petitioner however contended that ***ABL International Ltd.*** supra holds the field and the claim of the petitioner is squarely covered thereunder and thus the writ petition is to be allowed. Reliance was also placed on ***Laxmamma*** supra holding that where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and the said cheque is dishonoured, the liability of the authorized insurer to indemnify the third parties in respect of the liability which that policy covers subsists and it has to satisfy the award of compensation by reason of Sections 147(5) and 149(1) of Motor Vehicles Act, 1988 unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident.

11. Per contra the counsel for the respondent ECGC in addition to the pleas already contained in the counter affidavit relied on ***Export Credit Guarantee Corporation of India Ltd. Vs. Garg Sons International*** (2014) 1 SCC 686 reiterating that while construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words and that since upon the issuance of an insurance policy, the insurer undertakes to

indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of the liability of the insurer and holding that it is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance and dismissing the claim of insurance and on *New India Assurance Co. Ltd. Vs. Rula* (2000) 3 SCC 195 clarifying that in a contract of insurance under Chapter 11 of the Motor Vehicles Act, 1988, a third party who is not a signatory or a party to the contract of insurance but is, nevertheless, protected by such contract is not concerned and does not come into the picture at all in the matter of payment of premium and argued that the judgments of insurance under the Motor Vehicles Act, 1988 cannot thus be applied to the present situation. Mention was also made of the order dated 30th September, 2014 of a Coordinate Bench of dismissal as withdrawn of a number of writ petitions being W.P.(C) No.4207/2012 titled ENA International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.7161/2013 titled M/s Gurveen International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.7162/2013 titled M/s Gurveen International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.1542/2014 titled M/s Gurveen

International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.1543/2014 titled M/s Paylees International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.2046/2014 titled M/s Payless International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.2047/2014 titled M/s Payless International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.2048/2014 titled M/s Payless International Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.2474/2014 titled M/s GNJ Impex Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.2478/2014 titled GNJ Impex Vs. Export Credit Guarantee Corporation of India, W.P.(C) No.2481/2014 titled GNJ Impex Vs. Export Credit Guarantee Corporation of India and W.P.(C) No.3651/2014 titled M/s ENA International Vs. Export Credit Guarantee Corporation of India filed against the respondent ECGC.

12. The counsel for the petitioner to get over the test laid down in ***Joshi Technologies International Inc.*** supra of a writ petition without a public law element involved being not maintainable also contended that without the insurance provided by the respondent ECGC, banks will hesitate to grant export credit, thereby effecting the exports. It was also argued that as on date of the risk all premium had been paid. It was further argued that if the

petitioner is relegated to the suit remedy, the whole export credit system will collapse.

13. I have considered the rival contentions. Not only am I of the view that for the reasons stated in my judgments aforementioned holding that a writ remedy is not the appropriate remedy for the claim under a policy of insurance but also tend to agree with the counsel for the respondent that the questions which arise for adjudication on the respective pleas of the parties as noted hereinabove cannot be adjudicated without evidence and which cannot be conveniently taken in writ jurisdiction. Before the petitioner can be held to be entitled to the claim under the policy, it will have to be adjudicated a) whether the petitioner was in default of the clauses to remit the advance premium; b) whether the petitioner was in default of submitting monthly declarations with due premium; c) what is the effect of the acceptance of the premium and declaration though delayed by the respondent ECGC; and d) whether the acceptance by the respondent ECGC of the delayed premium and declaration waives the default of the petitioner.

14. I may in this regard notice that the receipts issued by the respondent ECGC of delayed premium contained the following endorsement:

“N.B.:- This receipt is only an acknowledgment of Cash / Cheque received. It creates no liability on the Corporation of any Kind whatsoever, nor shall this receipt amount to or mean admission of any fact or circumstances or any liability under any Credit Insurance Cover issued by the Corporation to any person making the payment or concerned therewith or therein.”

and Section 64VB supra is as under:

“64VB. No risk to be assumed unless premium is received in advance.—

- (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.
- (2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer. Explanation.—Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

- (3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.
- (4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or despatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.
- (5) The Central Government may, by rules, relax the requirements of sub-section (1) in respect of particular categories in insurance policies.
- (6) The Authority may, from time to time, specify, by the regulations made by it, the manner of receipt of premium by the insurer.”

15. The dicta of the Supreme Court in *Laxmamma* supra is in the context of motor vehicle insurance and will have no application to the present controversy.

16. However I refrain from discussing the merits further lest the same prejudices the outcome of the appropriate remedy if availed by the petitioner.

17. Accordingly, the petition is dismissed as not maintainable with liberty to the petitioner to avail of the suit remedy or arbitration remedy if available.

No costs.

SEPTEMBER 15, 2016
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RAJIV SAHAI ENDLAW, J.

