$~3

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

\+ LPA 649/2016

INDUSIND BANK ..... Appellant

Through : Sh. P.K. Mullick, Ms. Soma Mullick and Ms. S.K. Deuria, Advocates.

versus

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

Through : Sh. Girish Pande and Sh. Ravinder Agarwal, Advocates, for ECGC.

**CORAM:**
**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**
**HON'BLE MR. JUSTICE A. K. CHAWLA**

**O R D E R**

**% 12.04.2018**

1. The appellant is aggrieved by the learned Single Judge's order rejecting its writ petition.

2. The appellant challenged the order/communication of the Export Credit Guarantee Corporation of India (ECGC), rejecting its claim against the Packing Credit Export made by it. The appellant, which is a scheduled bank, granted packing credit facilities to a private exporter. At the same time, it approached the ECGC for issuance of packing credit guarantee, which the ECGC claims, is nothing but an insurance policy against the facilities to be granted to the borrower. The appellant contends that payments of *premia* in accordance with the agreement entered into with the ECGC were made regularly and periodically and that when a claim was alleged, on account of default in the payment by the exporter/borrower, the ECGC refused to honour

the demand under the guarantee. The appellant, therefore, approached this Court under Article 226 of the Constitution, contending that the ECGC is a State Authority and, therefore, being bound by Article 14 of the Constitution of India, could not have unreasonably rejected the claim under the guarantee/insurance policy. It relied upon the correspondence between the parties to contend that the payments towards monthly *premia* were never refused and rather that ECGC kept quiet and even renewed the guarantee. The appellant relied upon Section 64VB(2) of the *Insurance Act, 1938* and also the judgment of the Supreme Court in *ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.* 2004 (3) SCC 533.

3. Learned Single Judge considered the facts of the case as well as the judgments of the Division Bench of this Court, and a subsequent judgment in *Godavari Sugar Mills Ltd. v. State of Maharashtra* 2011 (2) SCC 439 as well as *Joshi Technologies International Inc. v. Union of India* 2015 (7) SCC 728 and ruled that the dispute had to be properly resolved in civil proceedings.

4. The impugned judgment, *inter alia,* reads as follows:

> *" 8. Attention of the counsel for the petitioner however at the outset only was invited to my judgment titled* ***KLA India Public Ltd. Vs. E.xport 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 62II; 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 1 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.*

*XXXXXX XXXXXXX XXXX*

*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 lime, 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."*

5. Sh. P.K. Mullick, learned counsel for the appellant urged that

the learned Single Judge fell into error in not appreciating the true import of *ABL (supra)* as well as the subsequent judgment in *United India Insurance Company Ltd. v. Laxmamma* 2012 (5) SCC 234. He highlighted that there was no disputed fact because all circumstances were to be found in the documentary material placed on the record in the writ petition. It was not as if any disputed documents or evidence was involved. On the other hand, ECGC is a government-owned 100% monopoly enterprise enjoined by law to indemnify the losses in the course of export transactions. Having regard to its peculiar nature, the Supreme Court in *ABL (supra)* recognized that its functioning did contain substantial public elements that could be characterised as "public duties". The material on record which the appellant produced include copies of the policy, the renewals, extensive correspondence between the parties and the renewals made, of the policy, from time to time. The dispute in this case is with respect to the ECGC's insistence that non-timely or belated payments made by the petitioner towards many of its *premia* disentitled it to the losses claimed, as insurance events covered by the policy. The correspondence also is to the effect that in the absence of timely payment, the ECGC apparently treated the lapse as one, going into the root of the matter, entitling it to refuse payment. The appellant had urged that in the absence of refusal to accept *premia* payment though belatedly, the implied acceptance had to be deemed.

6. This Court is of the opinion that the circumstances of the case are such that though the documents may be admitted, the allegations

of the appellant *vis-a-vis* ECGC's conduct and the latter's defence required proper trial before the civil Court – or in the alternative, if the policy contains an arbitration clause, resort to alternate dispute redressal mechanism of that kind.

7. In these circumstances, the impugned order of the learned Single Judge, holding that the elements of the dispute in the present case need to be resolved in civil court cannot be faulted. This Court is conscious of the fact that the petitioner agitated its remedy by filing a writ petition in 2014; that was disposed of by the impugned judgment of 15.05.2016 after which it approached this Court in time.

8. In these circumstances, there is bound to be some delay if the appellant were to approach the civil Court with an original claim for a decree. In the circumstances, even while granting liberty to the petitioner to agitate its grievance before the appropriate forum in accordance with law, including filing a civil suit, the time spent in the prosecution of the writ petition and this appeal shall be excluded for the purpose of Section 14 of the *Limitation Act, 1963*. The concerned Civil Court shall proceed to hear the parties and shall entertain the suit and decide it on its merits.

9. Subject to the above liberty, the appeal is dismissed.

**S. RAVINDRA BHAT, J**

**A. K. CHAWLA, J**

**APRIL 12, 2018/ajk**