IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGEMENT RESERVED ON : 15..10..2019

JUDGEMENT PRONOUNCED ON : 18..11..2019

CORAM

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

WRIT PETITION NO.28226 OF 2008

Texel Industries,
Rep. by its Sole Proprietrix,
No.1, Third Cross Street,
2nd Floor, CIT Colony,
Mylapore, Chennai 600004. ... Petitioner

-Versus-

M/s.Export Credit Guarantee Corporation
of India Limited, Chennai Exporters Branch,
Spencer Towers, 7th Floor, 770-A, Anna Salai,
Chennai 600 002. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the order of the respondent in reference: CEB:POL:CLM:2006 dated 29.11.2006 as reiterated in reference: CEB:POL:CLM:2006 dated 26.03.2007 and quash the same and consequently direct the respondent to settle the claim of Rs.62,72,049.00 along with interest @ 12% p.a. from 11.07.2006, the date of making claim, within a time limit to be stipulated by this court.

For Petitioner : Mr.Vijay Narayanan, Senior Counsel for Mr.R.Parthiban

For Respondent : Mr.Krishna Srinivasan for M/s.Ramasubramanian Associates

ORDER

This writ petition challenges the orders dated 29.11.2006 and 26.03.2007 passed by the respondent repudiating the insurance claim of the petitioner.

2. The brief facts leading to the filing of the writ petition are as follows: The petitioner is a sole proprietorship firm represented by its proprietrix Mrs.Valli Palaniappan. The firm is engaged in the Export of Textiles and Textile Products to several foreign countries. The petitioner has taken out a Shipments (Comprehensive Risks) Policy issued by the respondent for a liability of Rs.2.50 Crores. That was valid up to 30.06.2006.

3. The policy taken out by the petitioner covers various risks which were set out in clause (1) of the policy conditions. Likewise, some of the risks were also excluded under clause (2) of the policy conditions. The petitioner exported goods to two foreign buyer viz., (i) Portofino Studio, U.K. and (ii) M/s.CGG Home Fashions, U.S.A. So fas as the shipments to USA buyer is concerned, according to the petitioner, shipments were done in accordance with the contract and the buyer also cleared the merchandise from the port and the bills of exchange were also duly accepted by the importer in respect of three shipments. Thereafter, the importer did not honour and pay the bills on due dates, however, sent number of communications that he would make full payment as soon as possible and also gave excuses for having caused inconvenience in making payment. That apart, the importer had also given a schedule for payment of outstanding dues and also made a part payment of 20000 US$ as against the total outstanding of Rs. 169514.61 US$. All the communications sent by the importer would clearly show that there was no dispute between the parties and the importer constantly assured the petitioner that payment would be made and also sought for apologies for the delay in making payment. However, after some time, for no reason, the importer took a diametrically opposite stand and started raising dispute that there were some delay in the delivery of goods. According to the petitioner, the above dispute was raised only to avoid his obligation under the agreement to pay. The alleged disputes are totally trumped up and fictitious disputes and were made only in order to wriggle out of his financial obligations. The importer had no intention to settle the claim and the petitioner was therefore constrained to approach the respondent to settle his claim as the claim is covered under the insurance policy.

4. It is further stated by the petitioner that in similar situation, in respect of a claim made by the petitioner with respect to a UK importer viz., M/s.Portofino Studio, UK, the respondent had accepted the claim of the petitioner and settled 80% of the value. But, in the instant case, the respondent repudiated the claim of the petitioner on two grounds (i) non-declaration of certain shipments and (ii) non payment of additional premium in respect of some shipments, without considering the fact that the dispute raised by the importer was

not genuine and it was only a fictitious ground raised to avoid payment to the petitioner.

5. According to the petitioner, while rejecting her claim, the respondent has failed to examine the merits of the case and find out whether the dispute raised by the importer was genuine or not. The order was passed without giving an opportunity of hearing to the petitioner in an arbitrary manner. Further, while rejecting the claim the petitioner invoking the exclusion clause 2(d) of the policy, the respondent has failed to exercise its discretion fairly and judiciously and without even satisfying that the allegations in the dispute raised by the importer is untenable and unjustifiable. Hence, this writ petition.

6. The respondent filed counter affidavit raising preliminary objection with regard to the maintainability of the writ petition and inter alia contended that the dispute involved in the instant case relates to a contractual matter in respect of credit insurance cover issued by the respondent and it involves a disputed question of fact which can be proved only by giving evidence both oral and documentary. Hence, the petitioner cannot invoke the jurisdiction of this court under Article 226 of Constitution of India against the respondents for its contractual obligations.

7. It is further stated by the respondent that the comprehensive risk policy issued to the petitioner is to protect exports from the loss that might be incurred due to non receipt of payment on account of commercial and political reasons as set out in the policy conditions. The liability of the respondent in case of claim is determined in accordance with clauses 13 and 14 r/w 18, 19 and 20 and it is further subject to clauses 28 and 29 of the policy. In case of loss due to any of the insured commercial risks enumerated in sub-clauses (i) (ii) and (iii) of Clause (1) of the policy conditions- 'Risks Insured', the respondent would indemnify the insured to an extent of 90% of the loss and the insured would get indemnified for the loss owning to the default committed by the buyer. In case the buyer is disputing his liability to pay to the insured policy holder, no liability could be therefore fastened on the buyer. In the instant case, as no default, said to have been committed by the buyer, indemnification for the same by the respondent does not at all arise. In the interest of the insured and to protect his interests in cases of false or frivolous disputes raised by the buyer clause 2(d) of the Policy provides that in case of dispute raised by buyer, the insured has to obtain a final judgement in his favour from a competent court of law in buyer's contrary, however, the above condition of obtaining final judgement from the competent court from the buyer's country is waived off by the respondent where it is satisfied that the allegations or

claim or dispute raised by the buyer are not tenable or justified. In the instant case, this condition can not be waived off and the petitioner was also not able to obtain a final judgement against the buyer as provided under clause 2(d) of the Policy. The impugned order has been passed after collecting all necessary information from the petitioner and after due application of mind. On a further representation from the petitioner, the issue was re-examined by the highest level of hierarchy in the respondent corporation and the claim was again repudiated by letter dated 26.03.2007. Since a dispute was raised by the ultimate buyer over shipments in question as against the exporter with regard quality and quantity, it is not open to the petitioner to challenge the discretion of the respondent in invoking the provision in respect of the waiver getting of the judgement in their favour from the court of buyer's country.

8. Further, it is also stated by the respondent that though the petitioner had obligations to declare all the shipments made during the policy period, there is a systematic failure on the part of the petitioner to inform the respondent corporation regarding the shipments made by them and to remit the premium in time in respect of shipments to an extent of 13.87 lakhs was not informed to the respondent which resulted in premium shortage of Rs.7,964/-. In view of the above shortage of payment of premium, the claim of the petitioner is not tenable and justified. The writ petition deserves only to be dismissed.

9. Mr.Vijay Narayanan, the learned senior counsel appearing for the petitioner would contend that the dispute raised by the buyer is a not genuine dispute and it is only a fictitious one and all such allegations were made by the buyer only in order to to escape from his liability to pay the amounts due to the petitioner. The learned senior counsel took this court through various communications sent by the buyer to the petitioner and in one such communications, the buyer had accepted the receipt of the goods and discharged 20% of the bill amount and assured to pay the remaining amount in short time. In all such communications the buyer had constantly acknowledged the outstanding amount towards supply of goods and their liability until 16.12.2005. For the first time, on 29.12.2005, the buyer had raised a frivolous dispute alleging delay in delivering goods. Such frivolous dispute cannot be put against the petitioner and the respondent cannot escape from their liability to indemnify the petitioner. The respondent, without even considering the nature of the dispute raised by the buyer and the materials placed by the petitioner, has passed the impugned order repudiating the claim of the petitioner in an arbitrary manner without exercising its discretionary power as provided in clause 2(d) of the Policy and the impugned order has been passed

in total violation of Article 14 of the Constitution of India.

10. So far as the maintainability of the writ petition is concerned, the learned senior counsel would contend that the respondent is a company wholly owned by the Government of India and 100% of the share holdings of the company is owned by the Government. The respondent is discharging the public duties and acting as an agent of the Government and therefore, it falls within the ambit of State under Article 12 of the Constitution of India. Thus, the respondent cannot escape from its liability by simply saying that dispute falls within the realm of contract, especially, when the respondent has an obligation to examine the claim of the petitioner objectively. The power of discretion conferred on the respondent has been exercised arbitrarily. Thus, the order impugned in the writ petition is violative of Article 14 of the Constitution of India. Hence, the writ petition is maintainable. In support of his contention, the learned senior counsel placed reliance upon the judgement of the Hon'ble Supreme Court in ABL International Limited v. Export Credit Guarantee Corporation of India Limited, [(2004) 3 SCC 553] and a judgement of a learned single Judge of this Court in Jasmine Ebenezer Arthur v. HDFC ERGO General Insurance Company Limited and others (W.P.No.22234 of 2016 dated 06.06.2019).

11. Per contra, Mr.Krishna Srinivasan, the learned counsel appearing for the respondent would vehemently contend that the writ petition itself is not maintainable for enforcing a contractual obligation and the dispute raised falls within the realm of private law and there is no element of public law involved in the issue. Thus, the petitioner cannot invoke the writ jurisdiction of this court under Article 226 of the Constitution of India to enforce a contractual obligation. That apart, whether the dispute raised by the buyer is genuine or frivolous is a disputed question of fact which cannot be resolved in a writ petition. It is a matter of evidence, therefore, the appropriate remedy available to the petitioner is only to approach the jurisdictional civil court of the buyer and obtain a judgement in his favour as per clause 2(d) of the policy.

12. The learned counsel would further submit that under clause 2(d) of terms conditions of the policy, when any dispute is raised with regard to supply of goods, the petitioner must obtain a enforceable judgement against the buyer from the competent court of law in the buyer's country and only after obtaining a final judgement from the buyer's country, he can approach the respondent for insurance claim. That apart, the discretion conferred on the respondent has been properly exercised and after having considered all the materials produced by the petitioner, the respondent had come to a conclusion that

the dispute raised by the buyer was genuine In the above circumstances, the respondent had held the only remedy available to the petitioner was to get an enforceable decree against the buyer. Subsequently, on a request made by the petitioner, the issue was re-examined by the competent authority and after due application of mind, the request of the petitioner has been again rejected. Therefore, now, it is not open to the petitioner to contend that the order impugned int his writ petition has been passed in an arbitrary manner.

13. The learned counsel for the respondent would further contend that the petitioner also violated the policy conditions and had failed to inform the authorities regarding shipments made by them to an extent of Rs.13.87lakhs and did not pay premium to the tune of Rs.7,964/-. When there is a policy violation, the petitioner is not entitled get insurance claim as requested by him.

14. I have considered the rival submissions carefully.

15. The questions that arise for consideration in the instant case are (1) whether the writ petition to enforce a contractual obligation is maintainable and (2) Whether the order impugned in the writ petition suffers illegality, arbitrariness and is violative of Article 14 of the Constitution?

16. Question Nos. 1 and 2 :- The preliminary objection raised by the respondent regarding the maintainability of the writ petition was mainly on the ground that the claim of the petitioner arising out of the terms and conditions of the contract and such a contractual rights or obligations cannot be enforced in a proceeding under Article 226 of the Constitution of India.

17. Admittedly, the respondent is a company owned by the Government of India and it functions under the administrative control of the Ministry of Commerce, being managed by the board of directors. The object of the respondent company is to under take such functions as may be entrusted to it by Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export and to act as an agent of the Government, or with the sanction of the Government on its own account, to provide insurance and to give guarantees, undertake such responsibilities and discharge such functions as are considered necessary by the Government as necessary in the national interest. In the above circumstances, it can be safely held that the respondent is discharging a public function and it is a State within the meaning of Article 12 of the Constitution of India.

18. The next question is as to whether the instant writ petition under Article 226 of the Constitution of India to enforce a contractual obligation is maintainable? The Hon'ble Supreme court in a catena of decisions has held that if the State acts in an arbitrary manner, even in the matter of contract, a writ petition is maintainable under Article 226 of the Constitution of India.

19. In ABL International Limited v. Export Credit Guarantee Corporation of India Limited, (2004) 3 SCC 553 has held as follows:

> "10.It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief."

20. In Gujarat State Financial Corporation v. Lotus Hotels (P) Ltd, (1983) 3 SCC 379, the Hon'ble Supreme Court has held as follows:-

> "The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporations Act, falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under Article 226.

21. In Joshi Technologies International Inc. v. Union of India, (2015) 7 SCC 728, which has been relied on by the learned counsel for the respondent with regard to the issue of maintainability of writ petition in a contractual matter, the Hon'ble Supreme Court has held as follows:

"69.The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion."

22. In the very same judgement, the Hon'ble Supreme Court has dealt with the scope of judicial review in the matter relating to a contract entered into by the Instrumentalities of the State with a private party and has held at para 70 as follows:-

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1.At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2.State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3.Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4.Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5.Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6.Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7.Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice. [Italic supplied]

70.8.If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction."

23. In the light of the law laid down by the Hon'ble Supreme Court on the subject, let me now consider as to whether the order impugned in this writ petition has been passed by the respondent in an arbitrary manner and in violation of Article 14 of the Constitution of India and the controversy involves a public element.

24. The petitioner made a claim on the ground that the buyer had even though acknowledged his liability and sought for apologies for the delay in making payment and also sought time to settle the entire dues, at a latter point of time, deliberately raised a frivolous dispute only in order to avoid payment. Even though clause 2 (d) of the terms and conditions of the Policy provides for the exclusion of the risks insured, a discretion is conferred on the respondent to find out whether the dispute raised by the buyer is tenable or justified. Under the above said clause, if any dispute is raised by the buyer including his obligation to pay for any allegations relating to the quality, quantity, specifications, delivery schedule, etc., of the goods supplied to him by the insured. then the insured has to necessarily obtain an enforceable judgment against the buyer from the court of law in the buyer's country. However, such discretion is available to the respondent only to find out the fact as to whether the dispute raised by the buyer is tenable or justified based on the materials available before the respondent and once the respondent satisfied that the dispute is not tenable or justified, then, the respondent can waive the above said exclusion clause.

25. In the instant case, the petitioner submitted number of correspondences to show that initially the buyer was willing to pay the amount and he had only sought for time to settle the dues. From those communications relied on by the petitioner it could be seen that the buyer did not raise any dispute at the initially point of time regarding the delay in supply of goods until 15.12.2005. It appears that for the first time, on 16.12.2005 the buyer sent a communication to the petitioner raising a dispute that there were delay in supplying the goods and also the commission amount payable on the earlier shipments. It is contended by the petitioner that subsequent denial of the liability to pay alleging delay in supply of goods was only to escape from the legal liability to pay the dues on supply bills and the dispute was not genuine one. In fact, the petitioner had produced all those materials before the respondent. When a discretion is conferred on the respondent to find out the fact whether the dispute raised by the buyer is tenable and justified, it is the duty of the respondent to look into the information available before him and he should satisfy himself that the dispute is justified and tenable and if he is not satisfied then, the respondent can waive the exclusion clause.

But, from careful a perusal of the impugned order, it could be seen that none of the information furnished by the petitioner were considered by the respondent. Even before repudiating the claim of the petitioner not even an opportunity of hearing was afforded to him. Thus, this court is of the considered view that the respondent had taken a decision to reject the claim of the petitioner in an arbitrary manner and passed the impugned order in total violation of principles of natural justice.

26. Coming to the maintainability of the writ petition, since the policy has been issued to protect the petitioner firm against the risk of loss at post shipment stage and to protect the Indian firm against the payment risk involving export, it involves a public element. In such view of the matter, this writ petition is maintainable.

27. As already held, the respondent has passed the impugned order in an arbitrary manner without considering the materials available on record and without giving a rational finding over the dispute raised by the buyer. The respondent has not at all taken into consideration the communications sent by the buyer acknowledging his liability to pay the amount due on supply bills. Moreover, as already concluded, before passing the impugned order, the respondent had not even given an opportunity of hearing to the petitioner. Thus, the impugned order not only suffers from arbitrariness but also suffers from violation of principles of natural justice.

28. For the foregoing discussions, the impugned order is liable to be set aside and remitted back to the respondent for consideration afresh. This writ petition succeeds accordingly.

29. In the result, this Writ Petition is allowed. The impugned order passed by the respondent is set aside and the matter is remitted back to the respondent. The respondent is directed to consider the materials placed on record by the petitioner and pass orders afresh on merits and in accordance with law after giving opportunity of personal hearing to the petitioner. The above said exercise shall be completed within a period of twelve weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

kmk

To

M/s.Export Credit Guarantee Corporation
of India Limited, Chennai Exporters Branch,
Spencer Towers, 7th Floor, 770-A, Anna Salai,
Chennai 600 002.

Copy To
The Section Officer,
ER Section, High Court,
Madras-104.

+1cc to Mr.R.Parthiban, Advocate, S.R.No.95844

Writ Petition No.28226 of 2008

VBA(CO)
CS/18/12/2019