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A.S.(CAD)No.11 of 2023

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 12.01.2024	Delivered on 31.01.2024
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CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE R.SAKTHIVEL

A.S.(CAD)No.11 of 2023
and
C.M.P.No.13727 of 2023

Renaissance RTW Asia Private Limited
No.1, Thennampalayam,
Tiruppur – 641 604
Represented by its Director,
C.Anandhakumar

...Appellant

Vs.

ECGC Limited,
Tiruppur Exporters Branch,
Represented by its Senior Manager,
G.Arthanarieaswara Moorthy
having its Regional Office at:
3rd Floor, Overseas Towers, Anna Salai,
Chennai – 600 002 having branch office at
GG Complex, Kumaran Road,
Tiruppur Town, Tiruppur – 641 602.

...Respondent



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Prayer: Appeal filed under Section 13(1)(A) of the Commercial Court Act praying to set aside the judgment and decree of the Principal District Judge, Tiruppur dated 06.02.2023 made in C.O.S.No.22 of 2021.

For Appellant : Mr.T.Gowthaman,
Senior Counsel
for Mr.Muthuchharan Sundresh

For Respondent : Mr.P.V.S.Giridhar,
Senior Counsel,
for M/s.P.V.S.Giridhar & Sai

J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The defendant in C.O.S.No.22 of 2021, a commercial suit for recovery of a sum of Rs.5,57,41,861/- being the principal of Rs.2,70,75,000/- with interest at 18% per annum from 20.03.2015 till date of recovery is the appellant.

2. The plaintiff, the Export Credit Guarantee Corporation Limited had sued for recovery of the said sum of Rs.5,57,41,861/- claiming that it is entitled to the said sum as per the undertaking executed by the defendant on 27.04.2015 undertaking to repay a sum of Rs.2,70,75,000/- along with interest in the event of its failure in recovery action instituted by it in the



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United States.

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3. The brief facts as set out in the plaint are as follows:-

The plaintiff is a Public Sector Undertaking owned by the Central Government established to provide for export credit insurance and trade related services. The object of the plaintiff is to support and protect Indian Exporters by providing cost effective insurance schemes and other trade related services.

4. The defendant, who is a manufacturer and exporter of knitted ready-made garments approached the plaintiff seeking a Single Buyer Exposure Policy to cover the risk of non-payment by its buyer M/s. Academy Limited, United States of America. The policy was renewed upto 31.03.2013 based on the renewal proposal dated 09.04.2012. Another proposal was submitted seeking Multi Buyer Exposure Policy for a period of twelve months from 01.04.2011 to 31.03.2013 and the risk covered was about Rs.3,50,00,000/- per buyer. The premium for the Multi Buyer Exposure Policy was remitted till 01.01.2013.



5. On 12.12.2012, the defendant submitted a Report of Default by the buyer M/s. Academy Limited, United States of America against 24 shipments that were made between 26.09.2012 to 16.11.2012. The premium for the third quarter of the Multi Buyer Exposure Policy was paid with a delay of 17 days. The two claims that were launched for a sum of Rs.46,70,051/- under the Single Buyer Exposure Policy and for a sum of Rs.4,05,55,914/- for the Multiple Buyer Exposure Policy. Since the defendant did not submit the necessary documents, the plaintiff had required the defendant to submit necessary documents. In the meanwhile, one Janet Militello representing the buyer M/s. Academy Limited, by the letter dated 26.09.2013 disputed the liability by attributing corrupt practices to the defendant.

6. The plaintiff would claim that as per Clause 13(e)(ii) of the policy, the buyer viz., the defendant herein has to initiate recovery proceedings in the United States and if they are able to recover the monies from the purchaser the same should be reimbursed. It is also claimed that the plaintiff's liabilities are not attracted unless the defendant receives a favourable judgment in the action taken for recovery.



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7. On 04.06.2013, the defendant sought for payment of the insured amount to enable them to initiate recovery action. Since initiation of recovery action is the pre-condition for processing the claims under the policies, the plaintiff, on 08.07.2014 repudiated the claim of the defendant. Thereafter, the defendant entered into an agreement with M/s.MAH International Corporation, a Debt Collection Agency on 09.07.2014 and forwarded the same for consideration along with the representation dated 12.07.2014. The plaintiff was also informed by the Debt Collection Agency that the fact that the buyer disputed its liability as early as on 26.11.2012 was suppressed by the defendant during the policy period and while preferring the claim with the plaintiff. The Debt Collection Agency informed the plaintiff that amicable settlement was not possible and a law suit would only be a remedy.

8. The representation of the defendant dated 19.09.2014 seeking payment of the sum insured was rejected by the plaintiff in view of the fact that the buyer has disputed its liability and unless suitable legal action is



However, on 09.12.2014 the defendant submitted the representation to the plaintiff informing that the defendant had initiated legal proceeding against the buyer in the District Court, Harris County, Texas and consequently sought for consideration of its claim. Since the buyer had disputed the liability, the plaintiff informed the defendant that it would be able to settle the claim amount only subject to the undertaking by the defendant to repay the sum insured, if it is not successful in the law suit that has been initiated in the United States.

9. The defendant submitted the required undertaking and the Form 'A' on 27.03.2015 and on receipt of the same, the sum of Rs.2,70,75,000/- was paid to the defendant. However, without proceeding with the law suit, the defendant informed the plaintiff on 19.12.2017 that the cost of continuing the law suit was very high and therefore it was not inclined to pursue the same. The defendant however required the plaintiff to make additional payments to cover the additional costs of the law suit which the plaintiff was not inclined to do. The defendant having received the payment of the sum



insured upon furnishing the undertaking has not prosecuted the law suit to its logical conclusion and by allowing it to be terminated midway, it is liable to repay the sum insured as per the undertaking given by them. On the above contentions, the plaintiff sought for payment of a sum of Rs.2,70,75,000/- with interest at 18% per annum.

10. The defence as set out in the written statement is as follows:-

The suit is barred by limitation. Once the suit is based on the undertaking dated 27.04.2015 the suit filed on 13.07.2021 beyond three years period cannot be said to be within time. It was also contended that the undertaking does not amount to acknowledgment of the liability by the defendant. The defendant had claimed that it had taken steps to recover, but, it was unable to pursue the same due to serious working capital deficits.

11. It was also claimed that the settlement was an unconditional full and final settlement and therefore the plaintiff cannot seek recovery. It was also claimed that the defendant had intimated the plaintiff that it is not in a position to prosecute the suit filed in United States due to the prohibitive costs of the litigation. It was also contended that the promise to pay was not



absolute and it was dependent on the outcome of the litigation and there was no compulsion on the part of the defendant to continue to prosecute the suit.

12. On the above pleadings, the learned trial Judge framed the following issues:

1. Whether the suit filed in 2021 based on the undertaking given by the defendant in 2015 is in time?

2. Whether it is true that the suit is barred by limitation as the undertaking is surplusage?

3. Whether the undertaking given by the defendant Company is valid?

4. Whether the plaintiff is entitled for the suit claim?

5. To what relief the plaintiff is entitled to?

13. At trial one Mr.Mohanraj was examined on the side of the plaintiff and Exs.A1 to A69 were marked. One Mr.Suresh was examined on the side of the defendant as DW1 and Exs.B1 to B15 were marked.

14. Upon consideration of the evidence on record, the learned trial Judge found that the defendant was obliged to act as per the undertaking and having undertaken to pay the amount if the suit for recovery fails, the



defendant cannot now contend that the undertaking is not binding on it.

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15. On the issue of limitation the learned trial Judge found that the cause of action for the suit would commence only from the date of refusal of the defendant to pay as per the undertaking and therefore it cannot be said that the suit laid in 2021 is barred by limitation. The learned trial Judge also found that for the first time the defendant had denied its liability to pay only on 14.02.2019. Therefore, the suit filed on 13.07.2021 would be within time.

16. On the undertaking the learned trial Judge found that once the defendant was bound to prosecute the suit to its logical conclusion and in the even of its failure to recover the money, it was bound to repay the monies to the plaintiff. On the above conclusions, the learned trial Judge decreed the suit.

17. We have heard Mr.T.Gowthaman, learned Senior Counsel for M/s.Muthuchharan Sundresh, learned counsel for the appellant and Mr.P.V.S.Giridhar, learned Senior Counsel for M/s.P.V.S.Giridhar & Sai, learned counsel for the respondent.



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18. Mr.T.Gowthaman, learned Senior Counsel appearing for the appellant would vehemently contend that the very concept of the insurance is defeated if these kind of actions by the Export Credit Guarantee Corporation Limited are allowed. The learned Senior Counsel would point out that the very purpose of the insurance is to cover the risk of loss due to non-payment by the foreign buyers. He would also submit that the policy conditions required the exporter to take action for recovery against the purchaser and if it succeeds it has to pay back the money to the plaintiff and even if it losses, it has to pay back the money to the Insurance Company under the policy. Terming this as an impracticable contract Mr.T.Gowthaman, learned Senior Counsel would submit that there is no service provided by the plaintiff for the premium it had received.

19. The learned Senior Counsel would also further submit that the undertaking itself was obtained while the defendant was in economic duress and therefore the same cannot be treated as binding. He would also point out that the payments were made in full and final settlement of the claim and therefore the undertaking is not binding on it. Referring to the date of 10/20



undertaking, the learned Senior Counsel would submit that the undertaking was obtained after payment and therefore the payment was not subject to the undertaking.

20. Contending contra Mr.P.V.S.Giridhar, learned Senior Counsel appearing for the respondent Corporation would submit that the object of insurance is only to protect the exporters from un-expected losses. In the case on hand, the buyer/ importer had denied the liability on the ground that the exporter has adopted certain corrupt practices. It is therefore the Corporation had honored its commitment in the policy subject to the undertaking that the defendant must institute a legal proceeding and if it loses the legal proceeding, it has to repay the money received by it from the Corporation under the policy of the Insurance.

21. According to the learned Senior Counsel, the payment was made only to enable the defendant to initiate appropriate legal action and prosecute it further, at the request of the defendant on the undertaking that it will prosecute the suit and if it loses, it would repay the money received from the plaintiff. Having received the money, the defendant neglected the



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suit and did not prosecute it further. Hence, there is a failure on the part of the defendant to abide by the undertaking. Therefore, according to the learned Senior Counsel, the trial Court was justified in concluding that the defendant is liable to pay the suit claim.

22. We have considered the rival submissions.

23. The only point that arises for consideration in this appeal on the submission of the learned counsel on either side is :

Whether the defendant is bound by the undertaking dated 27.04.2015?

24. The fact that the defendant had exported textile goods to M/s.Academy Limited at United States of America is not in dispute. The fact that M/s. Academy Limited withheld payments for several supplies made by the defendant is also not in dispute. The reasons for withholding is stated to be corrupt practice adopted by the defendant which had led to



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M/s.Academy Limited agreeing to pay the higher price for the goods that were supplied by the defendant.

25. We are not, for a moment, concerned with the dispute between the defendant and the M/s.Academy Limited. On reporting non-payment, the defendant sought for payment under the insurance policy, which it had admittedly taken from the plaintiff. The plaintiff however refused payment on the ground that unless the defendant initiates action in the Courts in United States or through a credit recovery agent, it will not honor the policy, since the policy condition stipulates action to be initiated for recovery as a pre-condition for payment.

26. Thereafter, the defendant agreed and launched proceedings for recovery by engaging the credit recovery agent. The defendant had entered into a debt collection service agreement on 09.07.2014 and it had also forwarded the agreement and the trail of E-mails between it and recovery agent M/s.MAH International Corporation. Based on that, the plaintiff had sent Form 'A' and on 20.03.2015 it had also informed the defendant that the

13/20



claim is being admitted in view of the undertaking given to the effect that the monies will be repaid if the defendant should fail in the suit in the United States. The undertaking itself has been marked as Ex.A40 and Clause (d) of the undertaking which is relevant reads as follows:-

“d. That the Company shall refund to ECGC the settled claim amount of Rs.27075000.00 (in words Two Crores Seventy Lacs and Seventy Five Thousand Only) immediately with applicable interest on the prevailing bank rate from the date of settlement of claim till the date of actual refund, in case the judgment in the above suit does not come in favour of the Company and failing which, ECGC shall be at its liberty to initiate any other action.”

27. While the plaintiff bases its claim on the undertaking, the defendant would contend that this undertaking was obtained when it was under economic duress and therefore it is not binding on it. Economic duress is something which has to be established by means of cogent and convincing evidence. We have the entire correspondence between the parties before us and it is seen that the buyer viz., M/s. Academy Limited had disputed its liability on certain grounds. On the basis of such dispute, the



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plaintiff has rejected the claim of the defendant under the policy of insurance. However, in view of the persistent request made by the defendant and on the undertaking given by the defendant, the plaintiff had released the monies.

28. The defendant which had entered into a recovery agreement with the debt collection agent had initiated proceeding in the Courts in United States had not chosen to follow it up and abandoned it half way through, which led to the plaintiff seeking refund of the monies paid by it under the policy. It is only thereafter the defendant claims that the undertaking was obtained under economic duress and therefore it is not binding on it. We are unable to accept the said submission. The policy of insurance was taken only to avoid losses and policy provides that it shall be duty of the insured to take appropriate recovery action against the buyer and the liability under the policy would depend on the success or failure of such action.

29. No doubt, the submission of Mr.T.Gowthaman, learned Senior Counsel to the effect that the policy provides that if the recovery is made it should be paid over to the Corporation and the Corporation takes an



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undertaking that if the defendant would fail in the suit it should pay back the money would amount to there being no insurance at all is very attractive at the first blush. If we are to look at the transaction dispassionately we could cull out that the plaintiff has agreed to pay the insured amount only subject to the condition that the defendant would repay the same if it fails in the legal action.

30. In deciding the correctness of the action of the plaintiff in taking such an undertaking from the defendant we will have to necessarily look at the surrounding circumstances. The relationship between the defendant and the foreign buyer viz., M/s. Academy Limited spanned over for a considerably long period and the buyer has been honoring all commitments thus far. It however stopped payments for 24 shipments amounting to Rs.4,52,25,965/-. It was claimed that the stoppage or withholding of the amount due was due to the misconduct on the part of the defendant. Taking note of all these factors, the Corporation initially rejected the claim of the defendant. The Corporation also rejected the request of the defendant to pay without proof of legal proceeding on 07.07.2014. However subsequently the defendant agreed to enter into a debt collection service agreement with



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the debt collection agent and required the plaintiff to pay based on the said agreement. It is in these circumstances the plaintiff took an undertaking from the defendant and honored the commitment under the policy.

31. However the defendant did not pursue the litigation as per the undertaking and intimated its failure to pursue the litigation to its logical conclusion. It is by its mail dated 19.12.2017 marked as Ex.A50 the defendant informed the plaintiff that the status of the case remains the same and the cost of the litigation is prohibitive. The defendant also chose to blame its bankers for its situation. Finally by its letter dated 14.02.2019 the defendant wrote to the plaintiff stating that it is unable to pay legal fees. Thereafter, the plaintiff sought for repayment of the money as per the undertaking which was disputed by the defendant vide its letter dated 13.08.2019, which led to the filing of the suit.

32. From the above narratives it is very clear that the defendant had undertaken to repay the monies received by it, if it is not successful in the litigation in the United States. Having given such an undertaking, the defendant is obliged to prosecute the suit to its logical conclusion. Fact



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remains that the defendant did not prosecute the suit to its logical conclusion and abandoned it midway. Therefore, the plaintiff had sued for enforcing the undertaking.

33. The learned trial Judge has considered the evidence and the fact that the very approval of the claim on 30.03.2015 under Ex.A46 was made subject to the undertaking. He found that the defendant is liable to honor the undertaking and pay the suit claim. In the absence of any proof regarding economic duress, we are unable to sustain the contention of the learned counsel on economic duress. We also find that the policy conditions particularly Clause 13(e)(ii) absolve the Corporation of any liability, if the buyer claims that he is entitled to withhold payment for the default of the exporter. However, the Corporation chose to honor the claim subject to the undertaking only with a view to assist the defendant / the exporter to recover the monies. Unfortunately, the defendant failed to prosecute the suit instead abandoned the suit without resorting to recovery. This action in our considered opinion would make the defendant liable to make good the money as per the undertaking given by it.



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34. We therefore see no reason to interfere with the judgment of the trial Court. The appeal fails and it is accordingly **dismissed**. However, there shall be no order as to costs in this appeal. Consequently, the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.)

(R.SAKTHIVEL, J.)

31.01.2024

dsa

Index : No

Internet : Yes

Neutral Citation : No

Speaking order

To

The Principal District Judge,
Tiruppur.



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