



WEB COPY



W.P.Nos.16053 and 9913 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.06.2024

DELIVERED ON : 05.07.2024

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.Nos.16053 and 9913 of 2021
and W.M.P.No.10527 of 2021

W.P.No.16053 of 2021:-

M/s Akshaya Textiles,
represented by its Proprietor,
K.Sakthivel,
No.18-A, Sengunthapuram, 8th Cross,
Karur – 639 002.

...Petitioner

-Vs-

1. The Insurance Ombudsman
(Tamil Nadu and Puducherry),
Fathima Akhtar Court, 4th Floor,
453, Anna Salai,
Teynampet,
Chennai – 600 018.
2. ECGC Limited,
represented by its Zonal Manager,
Southern Zonal Office – I,
Spencer Tower,
VII Floor,
778 Anna Salai,
Chennai – 600 002.

...Respondents

Prayer : Writ Petition filed under Article 226 of Constitution of India praying



W.P.Nos.16053 and 9913 of 2021

for the issuance of a Writ of Certiorari, calling for the records relating to the impugned Award passed by the first respondent in Award No.IO/CHN/A/GI/0042/2020 - 2021 dated 06.01.2021 and quash the same as illegal and arbitrary so far as it relates to the dismissal of Claim No.2 against Invoice No.AT - 009 is concerned and allow the claim of the petitioner.

For Petitioner : Mr.K.Suresh

For R1 : Mr.M.B.Raghavan
for M/s M.B.Gopalan Associates

For R2 : Ms.Pooja Jain
for M/s Giridhar and Sai

W.P.No.9913 of 2021:-

ECGC Limited,
represented by Yashwant Breed (Zonal Manager),
Southern Zonal Office – I,
Spencer Tower,
VII Floor,
778 Anna Salai,
Chennai – 600 002.

...Petitioner

-Vs-

1. The Insurance Ombudsman
(Tamil Nadu and Puducherry),
Fathima Akhtar Court, 4th Floor,
453, Anna Salai,
Teynampet,
Chennai – 600 018.
2. M/s Akshaya Textiles,
represented by its Proprietor,
K.Sakthivel,
18-A, Sengunthapuram, 8th Cross,
Karur – 639 002.

...Respondents

Prayer : Writ Petition filed under Article 226 of Constitution of India praying for the issuance of a Writ of Certiorari, calling for the records relating to Award



W.P.Nos.16053 and 9913 of 2021

No.IO/CHN/A/GI/0042/2020 -2021 dated 06.01.2021 passed by the respondent

No.1, quash the same.

For Petitioner : Ms.Pooja Jain
for M/s Giridhar and Sai

For R1 : Mr.M.B.Raghavan
for M/s M.B.Gopalan Associates

For R2 : Mr.K.Suresh

COMMON ORDER

W.P.No.16053 of 2021 has been filed for the issuance of Writ of Certiorari, calling for the records relating to the impugned Award passed by the first respondent in Award No.IO/CHN/A/GI/0042/2020 - 2021 dated 06.01.2021 and quash the same as illegal and arbitrary so far as it relates to the dismissal of Claim No.2 against Invoice No.AT - 009 is concerned and allow the claim of the petitioner.

2. W.P.No.9913 of 2021 has been filed for the issuance of Writ of Certiorari, calling for the records relating to Award No.IO/CHN/A/GI/0042/2020 -2021 dated 06.01.2021 passed by the respondent No.1 and to quash the same.

3. Heard the learned counsel on either side and perused the materials available on record.



W.P.Nos.16053 and 9913 of 2021

WEB COPY

4. The petitioner in W.P.No.16053 of 2021 is the second respondent in W.P.No.9913 of 2021 (herein after called as “insured”). The petitioner in W.P.No.9913 of 2021 is the second respondent in W.P.No.16053 of 2021 (herein after called as “insurer”).

5. The insured is engaged in the business of manufacturing and exporting fabrics, made-ups and home furnishings. It is involved in export business. The insured approached the insurer on 22.02.2017 and had taken Shipment Comprehensive Risk Policy (herein after called as “Policy”) for a period from 01.03.2017 to 28.02.2018 for maximum liability of Rs.3 Crores with a cover percentage of 90% under the policy. It covers the commercial risks and political risks. As per Policy, the insured made payment towards premium as and when shipments are made to various countries. While being so, the insured had transactions with NIDICO Group INC of United States of America. As per Policy, only after credit limit approval, the insured is entitled for claim, in case of any loss subject to the approval limit of the insurer. Accordingly, the insurer approved the credit limit to the tune of Rs.60,00,000/- for exports on Documents Against Acceptance (herein after called as “DA”), 60 days terms for the buyer with effect from 10.05.2017. The buyer placed purchase order with



W.P.Nos.16053 and 9913 of 2021

the insured, on 05.04.2017 vide P.O.No.002382-0 for supply of 100% cotton white waffle kitchen towel and white huck kitchen towel to the tune of USD 25,200. It was placed with the terms of DA 60 days payment. Accordingly, the payment will be made by the buyer only after 60 days of shipment. Accordingly, the insured made air shipment of goods for the value of USD 4320 under Invoice No.AT-002 dated 10.05.2017 and also made another sea shipment of the remaining goods for the value of USD 20,880 under Invoice No.AT-003 dated 24.05.2017. Insofar as the air shipment is concerned, the buyer has made payment to the insured and had taken delivery of the goods in respect of both the shipments. Under Invoice No.AT-003, the buyer did not make any payment. Therefore, the insured lodged claim before insurer and the same was repudiated. Therefore, the insured lodged a complaint before the first respondent and the same was allowed. Aggrieved by the same, the insurer filed a writ petition in W.P.No.9913 of 2021.

6. Further, the buyer had placed another purchase order dated 18.05.2017 under P.O.No.002436 for supply of 100% cotton white huck dust cloth and 100% cotton white waffle dust cloth with DA net 30 days terms and the same has been shipped by the insured under Invoice No.AT-009 dated 12.07.2017 to



W.P.Nos.16053 and 9913 of 2021

the tune of USD 29,524.80 upon Free on Board terms (herein after called as “FOB”). FOB means when goods were loaded on the ship, the responsibility of the seller viz., the insured ceases and responsibility of the buyer starts. The goods were shipped on 24.07.2017 under bill of Lading No.MFS/US/004884 of Matrix Freight Systems Private Limited. At the time of shipment of goods, the buyer is not a defaulter as his payment was due only on 10.08.2017 under Invoice No.AT-003. The said shipment arrived at the destination port at New York on 21.08.2017. Though the goods reached the destination, the buyer did not take delivery of the goods for the reason best known to him.

7. While being so, the buyer had sent an E-mail dated 29.08.2017, thereby directed the insured to issue telex release on container, then the buyer will pick up the container and pay after 30 days if the goods are in good condition. In fact, the insured had sent all the original documents viz., bill of lading, invoice and other documents to the buyer's bank. Even then, the buyer directed the insured to issue telex for release of goods. Of course, the buyer can always raise any quality issue after receipt of goods. The trade practice is that the telex surrender can be issued by the seller only against 100% cash payment. Therefore, the insured did not send any telex message to release the container. The Last Free Day for clearing the consignment, without charges, lapsed as



W.P.Nos.16053 and 9913 of 2021

early as on 25.08.2017. Therefore, the charges started to accumulate on account of demurrage and other charges. It was duly informed to the insurer about not taking delivery of goods and also non-payment of earlier invoice and subsequent claim made on 06.09.2017. The insured also had taken steps to minimize the loss as the demurrage charges are accumulating. Though two alternate buyers had approached for the shipment, later, they have not turned up. In the meanwhile, the freight forwarder, who was nominated by the buyer under the FOB contract, had raised an invoice dated 19.10.2017 for USD 17,708 towards demurrage, freight and other charges upon the cargo. Therefore, the insured submitted an application to the insurer for abandonment of the case of the buyer. Further, the certificate was also issued by the Freight Forwarder on 05.09.2018. Hence, the insured made a claim for Rs.18,74,824/- towards loss on account of Invoice No.AT-009 and another claim under Invoice No.AT-003. On receipt of the claim, the insurer sought for clarifications in order to pursue the claim. Both the claims were rejected by the insurer. Therefore, the insured made a claim before the first respondent. After considering the case of the insured, the first respondent allowed the claim under Invoice No.AT-003 and rejected the claim under Invoice No.AT-009. Hence, this writ petition.

8. The learned counsel for the insured would submit that after shipment,



W.P.Nos.16053 and 9913 of 2021

under Invoice No.AT-009, the insured had sent the original bill of lading, invoice and other documents to the buyer's bank, which is customary and normal business practice especially in cases where credit period has been given to the buyer. There is an ample proof of delivery of documents to the buyer. However, the buyer had sent an E-mail to the insured to issue telex release on container. It was further assured that the payment will be made after 30 days, if the goods are in good condition. The buyer did not even take delivery of the goods and as such, it cannot be said that the goods are not in good quality. Even according to the buyer, after receipt of the goods, the payment will be made within 30 days, if the goods are in good condition. The insured also had taken steps to minimize the demurrage charges by searching other buyers. Though two buyers came forward to buy the goods, they did not turn up. Therefore, clause 2(d) of the Policy is not at all attracted. Further, if the buyer made 100% cash payment, then only the insured can telex to release the goods as demanded by the buyer.

9. The learned counsel for the insurer submitted that the buyer had already made payment in respect of the Invoice No.AT-003, since the buyer remitted an amount of USD 36,460.42 towards payment of the earlier Invoice No.AT-034 dated 02.03.2017 for USD 11,734.60 resulting in excess remittance



W.P.Nos.16053 and 9913 of 2021

of USD 24,725.82. Therefore, once the payment is received, there is no credit risk involved in the transaction, thus no cover is required or available under the Policy. Though the insured had returned the excess amount to the buyer, it was not through the buyer. Further, the insured had also failed to produce any documents to show that the said amount was returned to the buyer. The first shipment was made on 10.06.2017 and the payment due was on 09.07.2017. The second shipment was effected on 24.07.2017 without prior approval of the insurer when payment for the earlier shipment was overdue. With regard to the refund of excess amount made through TCF Bank, the buyer had informed that TCF is not their banker and refund amount has not been received by them. Therefore, the loss is beyond the purview of the policy cover. The first shipment was declared in wrong term payment of 60 days instead of 30 days. If the insured had initiated action immediately, it would minimize the loss with regard to the shipment dated 24.07.2017. Even then, the first respondent allowed the claim in respect of shipment under Invoice No.AT-003 dated 24.05.2017 filed by the insurer.

10. The learned counsel for the insurer relied upon the Judgment of the Hon'ble Supreme Court of India in the case of ***Export Credit Guarantee Corpn. Of India Ltd. Vs M/s Garg Sons International*** in ***Civil Appeal No.1557 of***



2004, in which the Hon'ble Supreme Court of India held as follows:-

WEB COPY

“ 8. It is settled legal proposition 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. It is also well settled, that since upon 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 in order to determine the extent of the liability of the insurer. Therefore, the endeavour of the Court should always be to interpret the words used in the contract in the manner that will best express the intention of the parties (vide: **M/s Suraj Mal Ram Niwas Oil Mills (P) Ltd. Vs. United India Insurance Co.Ltd., (2010) 10 SCC 567**)

9. The insured cannot claim anything more than what is covered by the insurance policy. “... the terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely.” The clauses of an insurance policy have to be read as they are... Consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon.

(Vide : **Oriental Insurance Co.Ltd. v. Sony Cheriyan AIR 1999 SC 3252; Polymat India P.Ltd. v. National Insurance Co.Ltd., AIR 2005 SC 286; M/s Sumitomo Heavy Industries Ltd., v. Oil & Natural Gas Company, AIR 2010 SC 3400; and Rashtriya Ispat Nigam Ltd. v. M/s Dewan Chand Ram Saran AIR 2012 SC 2829**).

.....

11. Thus, 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. No



W.P.Nos.16053 and 9913 of 2021

exceptions can be made on the ground of equity. The liberal attitude adopted by the court, by way of which it interferes in the terms of an insurance agreement, is not permitted. The same must certainly not be extended to the extent of substituting words that were never intended to form a part of the agreement.”

11. She also relied upon Judgment of the Hon'ble Division Bench of this Court in ***Original Side Appeal No.17 of 2018*** in the case of ***Export Credit Guarantee Corpn. Of India Ltd and another Vs Zoro Arments Private Ltd.,*** in which the Hon'ble Division Bench of this Court held as follows:-

“6.14. In so far as Issue No.4 in the points for consideration, the learned Single Judge was not right in holding that since the first defendant has been made aware of the shipment even before the bills of lading was issued by the plaintiff, the claim of the first defendant that the declaration was not made as per the stipulation in the terms and conditions of the policy is purely technical and has no significance in a court of law. We have already held that compliance with the terms and conditions of the policy by the insured is mandatory and is the basis for the claim and therefore to dilute the same will go against the basic tenets of Insurance law.”

12. In the light of the dictum laid down by the Hon'ble Supreme Court of India and the Hon'ble Division Bench of this Court, it is clear 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. No exceptions can be made on the ground of equity. The liberal attitude adopted by the Court, by way of which it interferes in the terms of an insurance agreement,



W.P.Nos.16053 and 9913 of 2021

is not permitted. In the case on hand, no terms of insurance policy are violated by the insured. Therefore, the grounds raised by the first respondent for refusal of claim of the insured are not amounting to violation of any policy condition. Therefore, the above Judgments are not applicable to the case on hand.

13. Insofar as the claim under Invoice No.AT-009 dated 12.07.2017 to the tune of USD 29,524.80 is concerned, it was rejected on the ground that the buyer had raised quality issue and buyer had sent an E-mail to issue telex release and the payment will be made after 30 days, if the goods are in good condition. Therefore, in purview of clause 2(d) of the Policy, the claim of the insured was rejected. Admittedly, the buyer did not take the goods. Without even issuing the goods, it cannot be said that the goods are not in good condition.

14. It is relevant to extract Clause 2(d) of the Policy condition as follows:-

Clause 2(d):- *Exclusions to the risks insured:*

“ECGC shall not be liable to the insured in respect of any loss the insured may suffer, the proximate cause for which is a risk other than any of those specifically listed under the 'Risks insured' herein above. Without limiting the generality of the aforesaid, losses arising out of any of the following causes are specifically excluded from the purview of



cover under this policy, i.e., any loss that arises from-

(d) *Failure or refusal on the part of the buyer to accept the goods and / or to pay for the whole or any of it due to his claim that -*

(i) *he is justified in withholding payment of the contract price or the gross invoice value or any part thereof by reason of any payment, credit, set-off or counterclaim and / or that*

(ii) *he is excused from performing his obligations under the contract including his obligation to pay, for any reason whatsoever, including but not limited to disputes or allegations relating to the quality, quantity, specifications, delivery schedule, etc., of the goods supplied to him by the insured whether or not such disputes relate to past or current shipments;*

unless the insured has, for the amount of his loss, obtained a final judgment enforceable against the buyer from a competent court of law in the buyer's country provided however that ECGC may, at its sole discretion and on being satisfied that the allegations or claim or the dispute raised by the buyer as aforesaid is not tenable or justified in the light of information gathered by or made available to it, agree in writing to waive this exclusion,"

15. The above exclusions are not applicable, since the buyer did not even receive the goods. Further, the buyer never made any counter claim as against the insured for the excess payment made by the buyer. In fact, it is an admitted fact that the insured had returned the excess payment through TCF Bank, USA, routed through Wells Fargo Bank, USA to account beneficiary M/s. Cordelia Tomaka Nidico Group Inc., USA. The goods were sent by the insured on FOB terms and as such, the ultimate liability is only on the part of the buyer. The



W.P.Nos.16053 and 9913 of 2021

insured need not take any steps to deliver the goods to the buyer or to find out alternate buyers.

16. Admittedly, the insured had made shipment under Invoice No.AT-009 dated 12.07.2017, for supply of 100% cotton white huck dust cloth and 100% cotton white waffle dust cloth with DA net 30 days, under P.O.No.002436 dated 18.05.2017 to the value of USD 29,524.80. As per the FOB, once the goods were loaded on the ship, the responsibility of the insured ceased and the responsibility of the buyer starts. That apart, the payment due under Invoice No. AT-003 was only on 10.08.2017. Therefore, nearly one month before the due date under Invoice No.AT-009 dated 12.07.2017, the goods were sent to the buyer.

17. Therefore, the reasons stated by the first respondent for rejecting the claim under Invoice No.AT-009 cannot be sustained and is liable to be quashed. Accordingly, the Award passed by the first respondent in Award No.IO/CHN/A/GI/0042/2020 - 2021 dated 06.01.2021, insofar as it relates to the dismissal of Claim No.2 against Invoice No.AT - 009 is hereby quashed. The claim made by the insured is allowed. The insurer is directed to disburse the claim amount with interest at the rate of 6% per annum, within a period of four



W.P.Nos.16053 and 9913 of 2021

weeks from the date of receipt of a copy of this order.

WEB COPY



W.P.Nos.16053 and 9913 of 2021

WEB COPY

18. The writ petition in W.P.No.9913 of 2021 has been filed as against the Award passed by the first respondent is not at all maintainable.

19. In this regard, the High Court of Calcutta in the case of ***Life Insurance Corporation of India -vs- The Insurance Ombudsman*** (Order dated 22.03.2017 in W.P.No.2299 (W) of 2016) held that in order to approach a writ court, an Insurance Company has to have a cause of action. A cause of action will arise if any right of the Insurance Company stands violated. An award passed by an Insurance Ombudsman cannot be construed to violate any right of the Insurance Company. Therefore, they cannot approach a writ Court as a party aggrieved by the award of the Insurance Ombudsman. The Insurance Ombudsman is appointed by the Insurance Companies. The Rules laid down are that the Insurance Ombudsman is set out to decide on the complaint relating to the insurance lodged with the highest of the complainant. Therefore, the Writ Petition itself is not maintainable to challenge the award passed by the Ombudsman.

20. The above said order passed by the learned Single Judge of the High



W.P.Nos.16053 and 9913 of 2021

Court of Calcutta was also confirmed by the Division Bench of the High Court

of Calcutta in *Life Insurance Corporation of India -vs- The Insurance Ombudsman* (Order dated 15.09.2017 in M.A.T 645 of 2017 + CAN 6245 of 2017) and it was held that if the complainant accepts the decision, which has been done in the instant case, the insurer has to comply with the award of the Ombudsman as stipulated by Rule 16(6) of the Rules. The binding character of the recommendation or as the case may be, of an award of the Ombudsman arises only when the complainant has accepted the decision. Further, there has been a fundamental fallacy in the approach of the petitioner to the recommendation of the award of the second respondent. Once the nominees of the deceased has unequivocally accepted the award, the petitioner ought to have treated the said award of the Ombudsman as a binding edict and any attempt on their part to wriggle out of the same, would be derogatory to the scheme framed by themselves and would tantamount to procrastination of the statutory mandate. Therefore, the Writ Petition itself is not maintainable and it is liable to be dismissed.

21. Accordingly, W.P.No.16053 of 2021 is allowed. W.P.No.9913 of 2021 is dismissed. Consequently, connected Miscellaneous petition is closed.



W.P.Nos.16053 and 9913 of 2021

No costs.

WEB COPY

05.07.2024

Internet: Yes

Index : Yes/No

Neutral Citation: Yes/No

Speaking/Non Speaking order
mn



WEB COPY



W.P.Nos.16053 and 9913 of 2021

To

1. The Insurance Ombudsman
(Tamil Nadu and Puducherry),
Fathima Akhtar Court, 4th Floor,
453, Anna Salai,
Teynampet,
Chennai – 600 018.
2. The Zonal Manager,
ECGC Limited,
Southern Zonal Office – I,
Spencer Tower,
VII Floor,
778 Anna Salai,
Chennai – 600 002.
3. The Proprietor,
M/s Akshaya Textiles,
K.Sakthivel,
18-A, Sengunthapuram, 8th Cross,
Karur – 639 002.



WEB COPY



W.P.Nos.16053 and 9913 of 2021

G.K.ILANTHIRAIYAN. J.

mn

Pre-Delivery Order made in
W.P.Nos.16053 and 9913 of 2021

05.07.2024