

A EXPORT CREDIT GUARANTEE CORPN.OF INDIA
 LTD. & ANR.

v.

M.S. CREATIONS & ANR.

B (Civil Appeal No.2987of2019)

MARCH 13, 2019

**[DR DHANANJAYA Y CHANDRACHUD AND
HEMANT GUPTA, JJ.]**

- C *Insurance— Shipments Policy— First Respondent obtained Shipments (Comprehensive Risk) Policy from the appellant-ECGC – First respondent obtained purchase order for handloom goods, worth about Rs 64 lakhs, from one Society Ivoirienne De Commerce ET DE Representation (SICOREP) situated in the Ivory Coast – First respondent made shipments to SICOREP – SICOREP sought change*
- D *in the name of its bank under the contract from Credit Lyonnais to Banqyue De 'L' Habitat De Cote D'Ivoire (BHCI)– BHCI allegedly released the documents without receiving any acceptance from SICOREP – First respondent was unable to make payment to its own banker, Punjab National Bank (PNB)-second respondent – PNB*
- E *made application for provisional payment of its claim under the policy called 'Whole Turn Over Post Shipment Export Credit Guarantee' (WTPSG Policy) issued to it by ECGC – ECGC paid Rs. 6 lakhs to PNB – First respondent submitted two claims of Rs.22.87 lakhs to ECGC against the overdue amounts from SICOREP – ECGC called upon the first respondent to submit various documents*
- F *together with its claim forms – First respondent invoked the intervention of the Indian Embassy in the Ivory Coast in order to produce the necessary documents – Indian Embassy informed that according to BHCI it did not have SICOREP as client at all and that the possibility of the documents being forged could not be excluded – ECGC rejected the claim of the first respondent inter alia invoking exclusionary provision – First respondent's complaint allowed by the State Commission – National Commission confirmed the order – On appeal, held: First respondent was unable to produce the relevant documents as required by ECGC – Further, ECGC raised the exclusion contained in the insurance policy, in terms whereof*
- G *H*

the insurer was not to be held liable for any loss from any act or default on the part of the collecting bank – Evidently, BHCI handed over the original documents to a person representing SICOREP without acceptance – There was clear default on the part of BHCI – State Commission and the National Commission held against ECGC inter alia on the ground that by honoring its commitment to PNB under WTPSG Policy, ECGC had in turn admitted its liability to the first respondent – Guarantee which ECGC furnished to PNB, similar to those it furnishes to other bankers, was to secure their exposure against the risks involved in the advances which the bank had made in respect of export contracts to its constituent – This guarantee would not conclude the issue as to whether the claim made by the first respondent under a distinct insurance policy was sustainable – Basis on which the State Commission and National Commission held against ECGC was erroneous– However, order passed by the State Commission was duly executed and in compliance, the amount due and payable has been paid over by ECGC to the first respondent – There is no allegation that the first respondent was in any way connected with or colluded with SICOREP – First respondent was itself a victim of SICOREP having retired the documents without making payment for the export consignments – No recoveries be made from the first respondent – Judgment of the National Commission set aside – Constitution of India – Art.142.

The First Respondent obtained Shipments (Comprehensive Risk) Policy from the appellant-ECGC. ECGC also issues policy called ‘Whole Turn Over Post Shipment Export Credit Guarantee’ (WTPSG Policy) to various banks. First respondent obtained purchase order for handloom goods, worth about Rs 64 lakhs, from a buyer named Society Ivoirienne De Commerce ET DE Representation (SICOREP) situated in the Ivory Coast. First respondent entered into sales contract with SICOREP and made shipments to SICOREP. SICOREP sought change in the name of its bank under the contract from Credit Lyonnais to Banqyue De ‘L’ Habitat De Cote D’Ivoire (BHCI). BHCI allegedly released the documents without receiving any acceptance from SICOREP. First respondent was unable to make payment to its own banker, Punjab National Bank (PNB)-second respondent. PNB made application for provisional payment of its claim under

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- A its own WTPSG Policy. ECGC paid Rs. 6 lakhs to PNB as provisional payment. First respondent submitted two claims of Rs.22.87 lakhs to ECGC against the overdue amounts from SICOREP. ECGC rejected the claim of the first respondent. Complaint filed by the first respondent before the State Commission, which was allowed. National Commission confirmed the said order. Hence, the present appeal.

Allowing the appeal, the Court

HELD: 1.1 The first respondent was unable to produce the relevant documents or to indicate that there was an acceptance of the documents, in terms as required under the approval of the sales contract by ECGC. It was in this background that ECGC rejected the claim of the first respondent on 3 October 2002. [Para 22, 23] [492-E-F]

- 1.2 In terms of the exclusion contained in the insurance policy, the insurer was not to be held liable for any loss from any act or default on the part of the collecting bank. Evidently, the collecting bank, as its communication dated 22 November 2002 indicates, handed over the original documents, but then sought to justify its action by contending that the bank was in the housing sector and could not accept the shipment for payment. If this was the position, there was no reason or justification on the part of the collecting bank to hand over the original documents to a person representing SICOREP without acceptance. There was, therefore, clearly a default on the part of the collecting bank. The State Commission and the National Commission held against ECGC *inter alia* on the ground that by honoring its commitment to PNB under WTPSG Policy, ECGC had in turn admitted its liability to the first respondent. There is a fallacy in this hypothesis. The guarantee which ECGC furnished to PNB, similar to those it furnishes to other bankers, was to secure their exposure against the risks involved in the advances which the bank had made in respect of export contracts to its constituent. This guarantee which ECGC issued to PNB would not conclude the issue as to whether the claim made by the first respondent under a distinct insurance policy was sustainable. Consequently, the basis on which the State Commission and National Commission held against the appellant is erroneous. [Paras 25-26] [493-A-E]

1.3 The order passed by the State Commission was duly executed and in compliance, the amount due and payable has been paid over by ECGC to the first respondent. There is no allegation that the first respondent was in any way connected with or colluded with SICOREP. From the record, it appears that the first respondent was itself a victim of SICOREP having retired the documents without making payment for the export consignments. No submission has been urged on behalf of ECGC to indicate the complicity of the first respondent. In the exercise of our jurisdiction under Article 142 of the Constitution, it is directed that no recoveries should be made from the first respondent. [Para 27] [493-F-H]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2987 of 2019

From the Judgment and Order dated 13.12.2013 of the National Consumers Disputes Redressal Commission, New Delhi in FA No. 282 of 2008.

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Bharat Sangal, Ms. Laiman R. Bano, Ms. Babita Kushwaha, Advs. for the Appellants.

Anil Kumar Tandale, M. T George, Subhash Chandra, Ms. Kavitha K.T., A. N. Arora, Himanshu Gupta, Advs. for the Respondents.

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The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J.

1. Leave granted.

2. A claim based on a policy of insurance issued by the Export Credit Guarantee Corporation of India Ltd.¹ was allowed by the Haryana State Consumer Disputes Redressal Commission². The appellant was directed to pay 90 per cent of the claim amounting to Rs. 9.25 lakhs and Rs. 13.61 lakhs after deducting an amount of Rs. 6 lakhs already received by the respondent along with interest at 9 per cent per annum.

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3. This order has been affirmed in appeal by the National Consumer Disputes Redressal Commission³ on 13 December 2013. The ECGC is in appeal.

¹“ECGC”

²“State Commission”

³“National Commission”

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- A 4. On 27 July 2000, the respondent obtained a Shipments (Comprehensive Risk) Policy⁴ which was valid upto 31 July 2002. On 31 July 2000, the ECGC forwarded the policy to the first respondent with a cover note highlighting important terms and conditions of the policy. Apart from the Shipments Policy which was issued to the first respondent, the appellant also issues another policy, amongst others, called the ‘Whole Turn Over Post Shipment Export Credit Guarantee’⁵ to various banks which make advances to exporters. The policy is designed to protect banks against the risks towards the exposure undertaken by them.
 - B 5. On 6 October 2001, the first respondent obtained a purchase order for handloom goods from a buyer situated in the Ivory Coast by the name of Society Ivoirienne De Commerce ET DE Representation⁶ worth about Rs 64 lakhs.
 - C 6. In pursuance of the purchase order, the first respondent entered into a sales contract with SICOREP on 18 October 2001. In pursuance of the Shipments Policy, the first respondent applied for the approval of ECGC for covering the shipments to SICOREP under the above purchase order. ECGC granted a specific approval on 7 November 2001 to the extent of Rs 64.86 lakhs, subject to the term of payment being DA⁷ 90 days.
 - E 7. The first respondent made its first shipment to SICOREP on 16 November 2001, in pursuance of which it filed a declaration under Clause 8(a) of the policy to ECGC on 19 December 2001. On 21 November 2001, SICOREP issued a second contract to the first respondent. On 7 January 2002, the first respondent made its second shipment to SICOREP, which was also declared to ECGC on 18 January 2002.
 - F 8. Under the sales contract, SICOREP’s bank, as originally notified, was Credit Lyonnais Agency 965⁸, Agence International Boulevard Des Italiens, 75 Paris Zeme France. On 18 January 2002, SICOREP sought a change in the name of the bank to Banqyue De ‘L’ Habitat De Cote D’Ivoire⁹, Seige Social 22, Avenue Joseph Anoma 01 BP 2325 Abidjan
- G ⁴“Shipments Policy”
- H ⁵ “WTPSG Policy”
- I ⁶ “SICOREP”
- J ⁷*Documents against Acceptance (DA) is an arrangement in which someone has the right to collect imported goods only after they have signed an agreement at a bank to pay for the goods and have shown proof of having signed it.*
- K ⁸ “Credit Lyonnais”
- L ⁹ “BHCI”

01 Ivory Coast. In view of the request by SICOREP, the first respondent by its letter dated 21 January 2002 sought the permission of ECGC for a change in the name of the bank and in terms of the payment.

9. BHCI, the newly notified bank in the Ivory Coast, is alleged to have released the documents without receiving any acceptance from the consignee. Since no payment was forthcoming, the first respondent was unable to make payment to its own banker, Punjab National Bank¹⁰. Consequently, PNB, the second respondent to these proceedings, made an application for provisional payment of its claim under its own WTPSG Policy on 12 February 2002. On 14 March 2002, the appellant made a payment of Rs. 6 lakhs to PNB, as and by way of a provisional payment.

10. On 16 March 2002, ECGC sought further information from the first respondent in regard to its overdue payment from SICOREP. Subsequently, on 28 May 2002, the first respondent submitted two claims in the aggregate value of Rs. 22.87 lakhs to ECGC against the overdue amounts from two shipments. Thereafter, on 25 June 2002, ECGC called upon the first respondent to submit necessary documents together with its claim forms.

11. In order to produce the necessary documents, the first respondent invoked the intervention of the Indian Embassy in the Ivory Coast in July 2002. However, on 2 July 2002, the first respondent expressed its inability to ECGC to produce the documents which were sought by them. The Indian Embassy, which had attempted to intervene on behalf of the first respondent, informed the latter on 19 August 2002 that according to BHCI it did not have SICOREP as a client at all. The Indian Embassy also opined that the possibility of the documents being forged could not be excluded. By its letter dated 3 October 2002, ECGC informed the first respondent that it was not accepting its claim in view of its failure to produce the requisite documents.

12. It appears that PNB also addressed a communication to BHCI to inform it about the shipments and the documents. BHCI, by a facsimile message on 22 November 2002, informed PNB that the original documents had been made over to a person by the name M. Reda Ali. BHCI indicated that it had refused to accept the documents for payment for the shipments since it did not conduct such transactions, being a bank in the housing sector.

¹⁰"PNB"

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- A 13. The first respondent, being aggrieved by the rejection of its claim, instituted a consumer complaint before the State Commission. The complaint was allowed on 23 April 2008.
- B 14. ECGC contested the matter before the National Commission in appeal which has resulted in the confirmation of the order of the State Commission allowing the complaint.
- C 15. On behalf of the appellant, it has been submitted by Mr Bharat Sangal, learned counsel that the Shipments Policy which was obtained by the first respondent was a comprehensive policy covering shipment risks. However, there was a specific exclusion in the policy of a situation involving an act or default on the part of the collecting bank. In the present case, it was submitted that ECGC agreed to the change in the nomination of the buyer's bank from Credit Lyonnais to BHCI in good faith, with a view to facilitate the export transaction. The sales contract envisaged that the payment terms were to be, through the bank, 60 days D/A from the date of the Bill of Lading. Learned counsel submitted that in breach of these conditions, BHCI informed PNB by its communication dated 22 November 2002 that the original documents of the two shipments had been handed over to the foreign party. At the same time, BHCI stated that it could not accept the shipment for payment and that it had not conducted any transaction with or made any payment to PNB. On this basis, it was sought to be urged that there was a clear default on the part of the collecting bank which would result in the applicability of the exclusionary provision.
- F 16. The next submission which was urged on behalf of the appellant is that the State Commission and National Commission were in error in coming to the conclusion that because the appellant had made a payment to PNB against the WTPSG Policy, it amounted to an admission of liability to the first respondent. It was also urged that the guarantee which was issued to the bank was to protect the risk of its exposure to a client in respect of a foreign transaction. The Shipments Policy which was issued to the first respondent was separate from the WTPSG Policy which was issued to the bank. Hence, it was submitted that the mere fact that ECGC honoured the guarantee to PNB would not lead to the conclusion that there was an admission of liability to the first respondent.
- H 17. On the other hand, the learned counsel appearing on behalf of the first respondent submits that the claim fell within the terms of the

Shipments Policy. Learned counsel submitted that this was a case where there was a failure on the part of the buyer to pay for the goods within the stipulated period. The first respondent having sustained the loss, was entitled to seek an indemnification from the insurer under the terms of the Shipments Policy. Moreover, it was urged that the change in the nomination of the bank from Credit Lyonnais to BHCI had been effected with the consent and approval of ECGC. Consequently, the failure, if any on the part of SICOREP, to retire the documents and to perform its obligation to pay for the goods would not exclude the liability of ECGC under the terms of the insurance policy.

18. The policy document dated 27 July 2000 executed by ECGC in favour of the first respondent defines the risks which were insured. Among them, Clauses (ii), (iii) and (iv) provide as follows:

“(ii) failure of the buyer to pay to the insured, within four months after the due date of payment the gross invoice value of the goods delivered to and accepted by the buyer; or

(iii) the failure of the buyer to pay to the Exporter within four months after the date of payment the gross invoice value of goods delivered to and accepted by the buyer, or

(iv) failure or refusal on the part of the buyer to accept goods which have already been exported from India, where any such failure or refusal is not excused by and does not arise from or in connection with any breach of condition or warranty on the part of the Exporter or from any other cause within his control; and provided also that the Corporation is satisfied that no good purpose would be served by the institution of legal proceedings against the buyer in respect of his said failure or refusal,”

The relevant exclusion, proviso (b) to Clause (xii) of the policy, upon which the controversy in the present case has turned, provides as follows:

“PROVIDED ALWAYS that the Corporation shall not be liable for loss:

(a) ...

(b) which arises from the insolvency of any agent of the Exporter or the insolvency of a collecting bank or from any act or default on the part of such agent or collecting bank;”

- A 19. The sales contract between the first respondent and SICOREP envisaged that the payment terms, through the bank, would be 60 days' DA from the date of the Bill of Lading. The first respondent by its communication dated 1 November 2001 to ECGC, declared that it would conduct business on 60 days' DA basis from the date of the Bill of Lading and only with the acceptance of Credit Lyonnais. It was to this document that the specific approval of the ECGC was obtained on 7 November 2001 with reference to the export contract with SICOREP.
- B 20. When SICOREP indicated to the first respondent that it was suggesting a change in the nomination of the foreign bank to BHCI, the first respondent in turn applied for and obtained the approval of ECGC on 7 February 2002, subject to the terms and conditions set out in the earlier approval.
- C 21. After the first respondent submitted a claim to ECGC, a communication was addressed on 25 June 2002 requiring the first respondent to arrange for: (i) the originals of the unpaid bills of exchange; (ii) Advices of non-payment by the foreign correspondent bank; (iii) Advice of the acceptance of documents by the foreign bank, among other documents.
- D 22. ECGC indicated that unless those documents were produced, it would be unable to proceed further in the matter. As the correspondence on the record indicates, the first respondent was unable to produce the relevant documents or to indicate that there was an acceptance of the documents, in terms as required under the approval of the sales contract by ECGC.
- E 23. It was in this background that ECGC rejected the claim of the first respondent on 3 October 2002. The facsimile message dated 22 November 2002 of BHCI to PNB indicates that the original documents of the two shipments had been handed over to M Reda Ali. The communication, however, indicates that the bank could not accept the shipment for payment and that it had not either made any transaction with or effected any payment to PNB.
- F 24. ECGC took up the matter with PNB which in turn corresponded with BHCI. The correspondence was evidently fruitless since there was nothing to indicate that the documents had been duly accepted in terms of the conditions governing the sales contract.
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25. Now, it is in this background that ECGC had sought to raise the exclusion contained in the insurance policy. In terms of the proviso (b) extracted above, the insurer was not to be held liable for any loss from any act or default on the part of the collecting bank. Evidently, the collecting bank, as its communication dated 22 November 2002 indicates, handed over the original documents, but then sought to justify its action by contending that the bank was in the housing sector and could not accept the shipment for payment. If this was the position, there was no reason or justification on the part of the collecting bank to hand over the original documents to a person representing SICOREP without acceptance. There was, therefore, clearly a default on the part of the collecting bank.

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26. The State Commission and the National Commission held against ECGC *inter alia* on the ground that by honoring its commitment to PNB under WTPSG Policy, ECGC had in turn admitted its liability to the first respondent. There is a fallacy in this hypothesis. The guarantee which ECGC furnished to PNB, similar to those it furnishes to other bankers, was to secure their exposure against the risks involved in the advances which the bank had made in respect of export contracts to its constituent. This guarantee which ECGC issued to PNB would not conclude the issue as to whether the claim made by the first respondent under a distinct insurance policy was sustainable. Consequently, the basis on which the State Commission and National Commission held against the appellant is erroneous.

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27. During the course of the hearing of these proceedings, the Court has been apprised of the fact that the order which was passed by the State Commission was duly executed and in compliance, the amount due and payable has been paid over by ECGC to the first respondent. There is no allegation that the first respondent was in any way connected with or colluded with SICOREP. From the record, it appears that the first respondent was itself a victim of SICOREP having retired the documents without making payment for the export consignments. No submission has been urged on behalf of ECGC to indicate the complicity of the first respondent. In the circumstances, we are of the view that the loss must, in the present case, lie where it falls. In the exercise of our jurisdiction under Article 142 of the Constitution, we direct that no recoveries should be made from the first respondent.

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- A 28. However, since the appellant has been concerned with the position of law as set down in the judgments of the State Commission and National Commission, we have clarified the position in terms of the present judgment.
- B 29. Subject to the directions under Article 142 issued above, we allow the appeal and set aside the impugned judgment and order of the National Commission. There shall be no order as to costs.

Divya Pandey

Appeal allowed.