SUPREME COURT OF INDIA

M/s. Rahee Industries Ltd.

Vs.

Export Credit Guarantee Corpn. of India Ltd.

Civil Appeal No.6145/2008 arising out of S.L.P. (C) No. 17369 of 2007

(S.H. Kapadia and B. Sudershan Reddy)

17/10/2008

JUDGMENT

S. H. KAPADIA, J.

1. Leave granted.

2. This civil appeal by grant of special leave petition is filed against judgment and order dated 17.8.07 passed by the Division Bench of the Calcutta High Court in APD No.302/2003 in Suit No.340 of 1992 whereby the Division Bench allowed the appeal preferred by respondent no.1 Corporation (insurer) and set aside the judgment and decree dated 4.4.03 passed by the learned Single judge of the High Court in Suit No.340 of 1992.

3. The short question which arises for determination in this civil appeal and which revolves around interpretation of clause 16 of the Specific Shipments (Political Risks) Policy dated 27.1.87 is: where the loss, for which the Exporter (insured) has been indemnified by the insurer, is quantified and a fixed sum is set out in the insurer's policy, being the total liability of the insurance company to the insured, would the insurer be entitled to receive anything more than what has been paid by it to the insured or would it (insurer) be also entitled to share the increased recovery that the insured may, at the future date, make from the original contract, to which the insurer is not a party?

FACTS

4. On 8.10.85 M/s. Ramchander Heeralal (predecessor of the present appellant) entered into an agreement with the Egyptian National Railways (foreign buyer) for supply of 20 lakhs clips bolts for a total value of US$.6,15,200, FOB Calcutta. Under the said contract 20% of the total value of the contract was payable as advance against presentation of a letter of guarantee covering the same amount and 80% of the total contract value had to be financed for 3 years, to be paid in six equal semi-annual consecutive instalments with fixed interest at 9% p.a., the first instalment to be paid after six months from the date of each shipment. Initially the Exporter got 20% of the invoice value as advance. The goods were exported on credit for the balance price of 80% which was covered to the extent of 90% by Specific Shipments Policy No.14499/1987 (`Policy', for short). The consignee duly received the goods and paid the entire consideration price by depositing the same with its banker(s) at Egypt who was supposed to transfer the same to respondent no.2- HSBC Bank in India. However, because of embargo imposed by the Egyptian Government the banker(s) of the consignee could not transfer the moneys to HSBC Bank. Since the Exporter did not get the balance price within time from its consignee they applied to the Export Credit Guarantee Corporation ("Corporation", for short) under the said Policy to pay for the risk (cause) covered being 90% of the balance price which was duly paid by the Corporation. Subsequently, after the embargo came to be lifted, the Egyptian Bank transferred the money to HSBC in India. Disputes then started as to who would be entitled to the said sum and to what extent. Disputes arose because of fluctuation in the exchange value. The price was received in US Dollar by HSBC. By the time it reached India the same got appreciated. The exchange rate of US Dollar resulted in increased recovery. The Exporter filed the suit. During the pendency of the suit HSBC disbursed whatever sum recovered after converting the same in Indian Rupee to the concerned parties in the ratio of 90:10 between Corporation and Exporter. The Exporter contended that the Corporation should pay the full increased recovery to it whereas Corporation contended that the same should be apportioned in the ratio of 90:10 in terms of Clause 16 of the said policy. The learned Single Judge decreed the suit in favour of the Exporter against which the Corporation went in appeal by filing APD No.302 of 2003. By the impugned judgment dated 17.8.07, the Division Bench held that the Corporation was entitled to 90% of the increased recovery against which this civil appeal is filed by the Exporter.

ISSUE

5. The short question which arises for determination in this civil appeal is : whether the insurer (Corporation) was entitled to 90% of the increased recovery as claimed under the said 1987 Policy?

Relevant clauses of the Policy

6. To answer the above question we quote hereinbelow relevant clauses of the Policy dated 27.1.87 which are as follows:

"Form No.91A Export Credit & Guarantee Specific Shipments Corpn.Ltd. (Political Risks) Policy and whereas the Exporter has made a proposal dated the 23rd day of December, 1985 (hereinafter called the "proposal') requesting the Corporation to insure the Exporter against a percentage of loss which he may sustain by reason of certain risks involved in the shipment of goods to Egypt under the said contract.

Now, Therefore, in consideration of the premium of Rs.81,891/- (Rupees eighty one thousand eight hundred ninety one only) paid by the Exporter to the Corporation (receipt of which is hereby acknowledge), the corporation herby insures the Exporter in accordance with the terms and subject to the conditions hereto against a percentage of the amount of any loss as hereinafter defined which may be sustained by the Exporter in respect of shipment of goods from India made under the above contract due to the following causes (hereinafter called the `Risks insured').

7. Percentage of loss payable: The percentage of the amount of any loss which the Corporation hereby agrees to pay shall be 90.

8. Amount of loss : The amount of loss shall be in all other cases

(a) in regards goods delivered to and accepted by the buyer, be the gross invoice value of those goods less

(i) the amount which on the date at which the loss is ascertained the buyer would have been entitled to take into account by way of payment, credit, set off or counter claim or which the exporter is entitled to appropriate in whole or in part payment of the price of the goods; and

(ii) any expenses saved by the non-payment of agent's commission or otherwise; and

(b) as regards goods not delivered to the buyer, the gross invoice value thereof, less

(i) any expenses saved by the non-fulfilment of the contract for the sale of those goods.

(ii) any sums which, at the date at which the loss is ascertained, the Exporter has recovered from any sources including realization of any security, resale of any goods or materials and any sums of credits in his possession which the Exporter is entitled to appropriate as or towards payment of the purchase price, or any part thereof provided that the sums so recovered or realized by any security or resale of any goods or materials shall be the sum less all expenses of recovery, realization or resale, the godown charges and brokerages and commissions if any.

9. Time for Ascertainment of loss: Subject to the submission by the Exporter of a claim supported by evidence which in the opinion of the Corporation, is sufficient and by a verification of the cause of loss, the Corporation will pay to the Exporter at Bombay the amount of loss hereby insured immediately after the loss has been ascertained and such loss shall be ascertained.

(a) where the loss is due to the prevention of or delay in the transfer of payments from the buyer's country to India in circumstances outside the control of both the Exporter and for the buyer, four months after the due date of payment by the buyer provided an irrevocable deposit is made by the buyer within 30 days from the due date:

10. Payment of loss: The Exporter shall, as a condition precedent to the payment of the amount of a percentage of any loss as herein defined procure and deliver to the corporation a writing from the Bank which holds the Documents pertaining to the shipment concerned acknowledging and agreeing (i) that the bank holds the same in trust for the corporation (ii) that the Bank shall, upon demand by the corporation, deliver them upto the Corporation and (iii) that if the Bank shall receive any payments against such documents the Bank shall make payments thereof according to the directions of the Corporation in writing.

11. Rate of Exchange: All payments under this policy shall be made in Indian Rupee at the Head Office of the Corporation and for the purpose of payment of premiums and losses, the gross invoice value of shipments invoiced in a foreign currency shall be converted into Indian Rupees at the Bank

buying rate of exchange at Bombay on the date of the relative shipment.

12. Provided that, if devaluation of the currency in which the buyer has to pay takes place before the claim is paid, the amount claimed in Indian currency shall be based on the devalued rate.

13. The total liability of the Corporation under this policy shall be limited to Rs.64,08,846/-

RECOVERIES

14. Action after payment of claim : Upon payment by the Corporation of the amount due hereunder to the Exporter, the Exporter shall:

(a) Take all steps which may be necessary or expedient or which the Corporation may at any time require to effect recoveries whether from the buyer or any other source from whom such recoveries may be made.

(b) upon request assign and transfer to the Corporation his rights under the contract in respect of which such payment has been made including his right to receive any monies payable under such contract or his right to damages from any breach thereof;

(c) upon request deliver up to the Corporation any goods in respect of which such payment has been made and any documents relating thereto and assign and transfer to the Corporation his right and interest in any such goods and documents;

(d) upon request assign, deliver up or otherwise transfer to the Corporation any negotiable instruments, guarantees or other securities relating to such goods or contracts.

16. Recoveries: Any sums recovered by the Exporter or the Corporation in respect of loss to which this policy applies after the date on which the loss is ascertained from the buyer or any other source shall be divided between the Corporation and the Exporter in the proportion of 90 and 10.

The exporter shall pay all sums so recovered to the Corporation forthwith upon their being received by him or any person on his behalf, the Exporter hereby acknowledging and declaring that until such payment is made to the Corporation he receives and holds such sums in trust for the Corporation."

7. Apart from the relevant clauses, a Schedule giving particulars of shipment covered was also annexed to the said Policy which reads as under:

"THE EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD.

BOMBAY

To

Schedule attached to the Specific shipments/Political Risks) Policy No.14499/87 issued to M/s. Ramchander Heeralall, 138, Biplabi Rash Behari Basu Road, Calcutta - 700 001

PARTICULARS OF SHIPMENT COVERED

1. Name and address of the Buyer Egyptian national Railways, Over Shoubra Subway, Shoubra, Cairo, Egypt

2. Description of the contract Supply of clip bolts to Egypt

3. Date of contract 8.10.1985

4. Gross invoice value Rs.76,90,000/-

5. Amount covered Rs.71,20,940/-

6. Shipment period Upto July, 1987 Extended upto 31.10.1987

7. Terms of payment 20% advance payment 80% Deferred payment in 6 half yearly instalments

8. Security Guarantee from National Bank of Egypt

9. Maximum liability Rs.64,08,846/-

10. Premium Rs.81,891/- Dated this 27th day of January, 1987 Sd/-

For Chairman cum Managing Director"

CONTENTIONS

8. According to Shri G.E. Vahanvati, Solicitor General of India, appearing on behalf of the Corporation, the words "in respect of loss" mentioned in Clause 16 are descriptive. According to learned counsel the said expression "in respect of loss" identifies the amounts recoverable under the Policy. According to learned counsel, Clause 14 refers to Exporter's taking steps to affect recoveries from the buyer whereas Clause 14(b) talks about the Corporation taking steps as assignee to recover moneys payable under the contract. According to learned counsel, in this case Clauses 14(a) and 14(b) do not apply because in this case Clause 16 alone applies. According to learned counsel, Clause 16 refers to recoveries made by the Exporter or the Corporation. According to learned counsel, Clause 14 refers to steps to be taken by the Corporation or the Exporter for enforcement of rights under the contract against the foreign buyer whereas Clause 16 comes in only in cases where the sum stands recovered. In other words, according to learned counsel, once a recovery is made Clause 16 comes into play. That clause provides for a formula of apportionment/ratio of division of any sum being recovered between the Corporation and the Exporter in the ratio of 90:10.

9. Shri Uday U. Lalit, learned senior counsel, appearing on behalf of the Exporter, on the other hand, contended that every word in Clause 16 must be given its due weightage. According to learned counsel, Clause 16 specifically stands confined to sums recovered "in respect of loss to which the Policy applies" and consequently it cannot be said that the said words "in respect of loss to which the Policy applies" should be read as descriptive. According to learned counsel, the words "any sums recovered" in Clause 16 should be read in juxtaposition with the words "any sums recovered in respect of a loss to which the Policy applies" and if so read the word "loss" in Clause 16 would stand restricted to the words "any sums recovered". In support of his above contention learned counsel placed his reliance on the judgment of the House of Lords in the case of L. Lucas Ltd. (supra).

Rules of Interpretation as applicable to Policy of Insurance

10. In this case the entire controversy revolves around interpretation of Clause 16 of the Policy. It is well-settled rule of construction that words in a contract (Policy herein) are to be understood in their ordinary meaning. However, this ordinary meaning will not prevail in two cases, namely, where a word has technical or legal meaning and secondly where the context requires otherwise. It is not disputed that in a contract of insurance, parties may introduce express terms which are at variance from or in conflict with the ordinary principles of subrogation. Hence, the correct approach is to consider the policy of insurance by reference to its terms. If, however, there is some doubt or ambiguity in the construction of the policy only then it would be correct to invoke the principles of subrogation as a guide or a controlling authority. Therefore, at the outset, what we propose to do is to consider whether the Policy, in this case on its own express terms, provides for the allocation of the moneys between the Exporter and the Corporation.

11. One more principle is required to be kept in mind in a matter of this type in which we are concerned with the value of Rupee in terms of US Dollar. If debt in a foreign currency is sued for, the judgment must be in terms of Rupee and the rate of exchange (subject to express contractual provisions to the contrary) will be the rate of exchange between Rupee and the foreign currency prevailing at the date when the debt becomes payable [See: Forasol v. Oil and Natural Gas Commission ◆ 1984 (Supp.) SCC 263] i.e. immediately on the US Dollar having been received in India.

INTERPRETATION OF CLAUSE 16

12. Keeping in mind the above two principles we are now required to interpret Clause 16 of the said Policy.

13. As stated above, Clause 16 of the Policy begins with a head note titled "Recoveries". Three words/expressions are required to be interpreted, namely, "any sums recovered", "loss" and the expression "amount of loss" which finds place in Clause 9 of the Policy. On reading the Policy in its entirety, we find that there is a dichotomy in it. The subject-Policy in this civil appeal is a contract. By nature it is an indemnity. The contract is in two major parts. The first part which commences from Clause 1 to Clause 13 contemplates an indemnity against a percentage of a loss whereas the second part of the contract commencing from Clause 14 to Clause 16 contains provisions enabling recoupment of that loss.

14. In this case the invoice value as on 8.10.85 was US$ 6,15,200/-. Out of which 20% was paid by the Egyptian buyer upfront. Therefore, amount due from the Egyptian buyer was US$ 5,59,696.14 (80% of US$ 6,15,200). The equivalent of US$ 5,59,696.14 was Rs.71,20,940/- which got increased within 5 years to Rs.1,57,82,876/-. This was on account of the fall in the external value of the Indian Rupee as against US Dollar.

15. The question before us is : whether Clause 16 of the Policy entitles the Corporation to retain 90% of the Recoveries.

16. On a bare reading of Clause 16 on its own terms, we find that the said clause falls under a separate chapter of "Recoveries". That chapter deals with recoupment of the loss. Clause 16 unequivocally states that any sums recovered from the buyer after the date on which the loss is ascertained shall be divided between the Corporation and the Exporter in the proportion of 90:10. As stated above, the outstanding receivable was US$ 5,59,696.14 equivalent to Rs.71,20,940/-. However, on account of belated payment and fall in the value of Rupee against US Dollar the value of US$ 5,59,696.14 stood increased to Rs.1,57,82,876/- resulting in increased recovery. Clause 16, in our view, refers to sums recovered from the buyer. That recovery can only be on the date when the foreign currency entered India. The foreign currency entered India only after the loss stood ascertained in terms of Clause 9 which refers to the "amount of loss". Therefore, in our view, the dollars paid belatedly would fall within the words "any sums recovered" from the buyer after ascertainment of the amount of loss under Clause 9. Clause 16, however, refers to the words "any sums recovered in respect of loss to which the Policy applies". According to the Exporter, the words "in respect of loss" restrict the first three words of Clause 16, namely, "any sums recovered". According to the Exporter, if so read, the words "any sums recovered" would cover an amount of only Rs.64,08,846/- and not Rs.1,57,82,876/-. We do not find any merit in this argument advanced on behalf of the Exporter. As stated above, the policy is in two distinct parts. The first part deals with indemnification against a percentage of loss. In that part we have Clause 11 which refers to "rate of exchange". It states that all payments shall be made in Rupee terms at the head office of the Corporation and for the purpose of

payment of premium and losses the gross invoice value of shipments invoiced in a foreign currency shall be converted into Rupee at the bank's buying rate of exchange. However, such rule of conversion or exchange rate is not made applicable in case of "Recoveries" under Clause 16. Clause 16 refers to "any sums recovered" which covered dollars paid belatedly. It is important to note that under the Policy there is a difference between currency of account and currency of payment. The currency of account is in US Dollar whereas the currency of payment of loss and premium is in Indian currency applying the conversion formula in Clause 11 of the Policy. Such conversion rate is not there in Clause 16 which refers to "Recoveries". Therefore, there is a difference between currency of account, currency of payment and currency of recovery. Clause 16 refers only to "any sums recovered". That is how the dichotomy, as stated above, comes in. Further, the expressions "any sums recovered" and "in respect of loss to which the Policy applies" if read together meant that the sums recovered must be in respect of loss which arises from the subject-matter of the contract. If loss arises dehors such contract any sums recovered in that regard would not fall in Clause 16. In our view, in view of the ordinary use of language used in Clause 16 the US dollars paid belatedly would certainly fall within the expression "any sums recovered in respect of loss to which the Policy applies".

17. One more aspect needs to be mentioned. Clause 16 provides for a formula of apportionment in the ratio of 90:10 between the Corporation and the Exporter. If one reads the Policy in its entirety and even if one is to go by contextual interpretation of the Policy one finds a reason for this ratio of division between the Corporation and the Exporter. The extent of sharing the amount recovered from the buyer has a direct nexus with the ratio of loss agreed to be borne between the Corporation and the Exporter. In other words, the ratio of division of Recoveries contemplated in Clause 16 has a direct nexus with the ratio of division of losses agreed to be shared between the Corporation and the Exporter under Clause 7 of the Policy. This is one more reason for saying that "any amount recovered from the buyer in respect of loss to which the Policy applies". In our view, the words "any sums recovered" in Clause 16 would mean all sums recovered from the buyer to be divided in the proportion of 90:10 between the Corporation and the Exporter. Judgments of English Courts

18. In L. Lucas Ltd. and another v. Export Credits Guarantee Department - (1974) 2 All ER 889, an exporter entered into a contract of guarantee under which the guarantor indemnified the exporter upto 90% of the loss arising out of failed payments for export shipments. The contract also provided that any sums

recovered by the exporter/guarantor "in respect of a loss to which the guarantee applies" would be divided between the parties in the ratio 90:10. A loss occurred. The guarantor indemnified the exporter. The exporter later on succeeded in recouping the payment but in the mean time almost two years elapsed and during those two years changes in the exchange rates resulted in the payment in terms of pound sterling became significantly larger on conversion. The guarantor contended that it was entitled to 90% of the increased recovery while the exporter contended that the guarantor was only entitled to what it had paid out as indemnified. The Court of Appeal recognized the contract as one of indemnity and treated it like a policy of insurance. Before the Court of Appeal, the exporter contended that if

there is recovery in a subrogated claim higher than the amount of the loss, the excess goes to the insured and, therefore, the guarantor is not entitled to recover out of the proceeds more than it had paid out. The Court of Appeal ruled that the correct approach was to consider the contract by reference to its terms and, only if some real doubt or ambiguity in its construction was evident only then it would be proper to invoke the general principles of Subrogation as a guide or controlling authority.Going by the contract and the words used in Clause 17 the Court of Appeal held that the guarantor was entitled to 90% of the increased recovery as Clause 17 of that contract so provided. This decision of the Court of Appeal was reversed by House of Lords in the same case. It may be noted that the Court of Appeal's analysis of the interplay between Subrogation Principles and contractual provisions was, however, not disturbed by the House of Lords in its judgment in the same case. In that matter the ground for overruling the decision of the Court of Appeal by House of Lords was quite different. The Court was concerned with the contract of guarantee. One of the arguments advanced was regarding the nature of the contract. According to House of Lords, in the contract of guarantee in that case there was no provision made entitling the guarantor to 90% of the increased recovery which was described as fortuitous profit. It was held in that case by House of Lords that the subject-policy was a contract of guarantee which never intended that the guarantor would be entitled to 90% of fortuitous profit. According to House of Lords, if the contract intended to give this benefit to the guarantor it would have explicitly said so. According to the said judgment, if the contract would have provided for 90% of the fortuitous profits to be given to the guarantor then the nature of the contract of guarantee in that case would have ceased to be one of indemnity against a percentage of loss and in that event it would become a profit sharing contract. This observation has been made by Viscount Dilhorne at page 898 of the report. However, as stated above, the analysis, made by the Court of Appeal in the said case, of the interplay between subrogation principles and contractual provisions with which we are concerned, has not been disturbed by the judgment of House of Lords in the said case of L. Lucas Ltd. (supra). In our present case we are not concerned with the contract of guarantee. In the present case we are concerned with the Policy of insurance dated 27.1.87. By its very nature it was a contract of indemnity. In the present case, the nature of the contract is not in issue. It was in issue in the case of L. Lucas Ltd. (supra). In the circumstances, we do not wish to express any opinion on the correctness of the judgment of the House of Lords in L. Lucas Ltd. (supra).

19. For the aforestated reasons, this civil appeal filed by the Exporter stands accordingly dismissed with no order as to costs.