Marshal Export Corporation Vs Indian Overseas Bank and Export Credit Guarantee Corporation of India Ltd.
Marshal Tex Vs Canara Bank and Export Credit Guarantee Corporation of India Ltd.

Court: Madras High Court

Date of Decision: Dec. 2, 2010

Acts Referred: Constitution of India, 1950 â€" Article 14, 19(1)

Hon'ble Judges: R. Sudhakar, J

Bench: Single Bench

Advocate: T. Ramesh, in Both Appeals, for the Appellant; F.B. Benjamin George, For 1st Respondent in W.P. No. 27490 of 2007 Krishna Srinivas, for Ramasubramaniam Associates for 2nd Respondent in W.P. Nos. 27490 and 27491 of 2007 V. Adhivarahan, for 1st Respondent in W.P. No. 27491 of 2007, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R. Sudhakar, J.
Both the Writ Petitions are filed praying to issue a Writ of Certiorarified Mandamus, calling for the records of the case in

impugned letter in TPR/REC/SAL/16638/2007 dated 5.6.2007 of the second Respondent and to quash the same and consequently direct the

second Respondent to remove the name of the respective Petitioner from the list of defaulters/Specific Approval List.

2. The prayer in both the writ petitions are one and the same and have been filed challenging the order of the second Respondent dated 5.6.2007.

By consent of both parties, both the writ petitions are taken up together and disposed of by this common order.

3. Heard Mr. T. Ramesh, learned Counsel appearing for the Petitioner in both writ petitions; Mr. F.B. Benjamin George, learned Counsel

appearing for the first Respondent in W.P. No. 27490 of 2007; Mr. V. Adhivarahan, learned Counsel appearing for the first Respondent in W.P.

No. 27491 of 2007 and Mr. Krishna Srinivas, learned Counsel appearing for the second Respondent in both writ petitions.

4. Petitioners in both the cases are exporters of Hosiery Garments. They were operating under the Export Promotion Credit Guarantee Scheme, in

short EPCG Scheme, in terms of the Export and Import Policy applicable. For the purpose of export, Petitioners availed Secured Packing Credit

Facility and Duty Draw Back Loan from the first Respondent bank in each case.

5. The first Respondent bank in each case on its part approached the second Respondent, viz., Export Credit Guarantee Corporation of India

Limited to cover its risk for the loans advanced to the Petitioner in both the cases. The first Respondent bank entered into an insurance cover

contract with the second Respondent as per the ECGC Scheme. Under the ECGC Policy, more particularly, in respect of Packing Credit

Guarantee Scheme, a proposal was given by the first Respondent bank in each case to the ECGC to cover the advances made by the first

Respondent bank in each case to its customer exporter on limits applicable. In this regard, the first Respondent bank in each case is required to

pay the premium applicable for the amount advanced by the second Respondent. The scheme provides that the lending bank will be entitled to

claim 66.2/3% of its loss from the ECGC if the entire amount due from customer is not recovered within the time specified. The one other

condition is as follows:-

The claims are payable if ECGC is satisfied that the bank had conducted the account with normal banking prudence and has also complied with

the terms and conditions of the Guarantee. Any amount that is recovered by the bank after the settlement of the claim has to be shared between the

Corporation and the bank in the same ratio in which the loss was originally borne by them.

The second Respondent also provides whole-turnover Packing Credit Guarantee. The Petitioner in each case availed loan from the first

Respondent bank as below and defaulted:-

(a) Secured Credit Packing Facility,

(b) Bank Guarantee Facility and

(c) Duty Draw Back loan

On default, M/s. Indian Overseas Bank and M/s. Canara Bank, the first Respondent in both the cases filed proceedings before the Debt Recovery

Tribunal in short DRT and when the matter was pending adjudication, Petitioner in each case submitted a proposal for settlement of the due by

way of One Time Settlement (in short OTS). It is not in dispute that the first Respondent banks sought the concurrence of the second Respondent

ECGC to accept the OTS proposal. The concurrence was in fact given by the second Respondent ECGC and the first Respondent banks

thereafter accepted the OTS proposal made by the Petitioner in both the cases and certain amount was paid and shared proportionately by the

first and the second Respondent. Consequently, the proceedings filed by the first Respondent banks before the DRT were closed.

6. After concluding these proceedings on 9.12.2006, Petitioner in both the cases requested the first Respondent bank to remove their names from

the defaulter list of ECGC which list as per the second Respondent is called Specific Approval List. This letter was replied on 16.12.2006 by the

Indian Oversees Bank stating that some amount is due by the bank to the ECGC on account of transaction of the Petitioner and therefore, they are

unable to consider the Petitioner''s request. The letter of the Indian Oversees Bank reads as follows:

We acknowledge receipt of your letter dated 08.12.2006. The credit facilities availed by you were settled under one time settlement scheme by

accepting Rs. 1,54,06,235/-. The OTS was permitted taking into account your financial difficulties and your intention to stop the export activities.

The OTS had involved sacrifice/write off to the tune of about Rs. 82 Lacs from the bank''s side. So the advance was not settled in toto as claimed

by you. We had paid only the proportionate share of our recovery towards claim settled by ECGC and a balance amount of Rs. 58,65,779/-is still

due to them besides our dues of Rs. 82 lac.

Hence we regret to convey our inability to consider your request.

Insofar as the Canara Bank is concerned, it has been stated in the counter as follows:

It is now claiming that but for securing its future business prospect, it would not have repaid any amounts that it had borrowed. We have remitted

to ECGC, its pro rata dues since, as against the book balance of Rs. 1,22,84,233/-, the Petitioner had paid only a sum of Rs. 66 lakhs to this

Bank under the OTS. For this Respondent bank to pay to ECGC the entire amounts under the Guarantee to enable removal of the Petitioner''s

name from Specific Approval List, the Petitioner ought to pay the entire dues, that is, including the Written Off amount of Rs. 56,84,233/-

Thereafter, both the Petitioners by letter dated 18.5.2007 requested the second Respondent to remove the Petitioners name from the defaulters list

(i.e.) Specific Approval List stating that all dues have been settled. The second Respondent sent two separate reply letters to both Petitioners

dated 5.6.2007 which are impugned in the present writ petitions. The letter sent to the Petitioner in W.P. No. 27490 of 2007 reads as follows:-

Reg: Removal of name from Specific Approval List.

We acknowledge receipt of your letter dated 18.05.2007 requesting us to remove the name of the company from our Specific Approval List.

In this regard, we would like to draw your kind attention to Indian Overseas Bank letter dated 16.12.2006 addressed to you, with a copy to us

(enclosed for your reference), wherein they have clearly mentioned their sacrifice made to settle the liabilities. Since we have not received the entire

claim paid amount under the guarantee, as a matter of policy we are not in a position to remove the names of company/partner/director/guarantor

from SAL.

The letter sent to the Petitioner in W.P. No. 27491 of 2007 reads as follows:-

Reg: Removal of name from Specific Approval List.

We acknowledge receipt of your letter dated 18.05.2007 requesting us to remove the name of the company from our Specific Approval List.

In this regard, we would like to inform you that we have considered claim for Canara Bank and we have not received the entire claim paid amount

under the guarantee. Hence we are not in a position to remove the names of company/partner/director/guarantor from SAL.

Challenging the above said letters dated 5.6.2007 present writ petitions have been filed.

7. The contentions of the learned Counsel for the Petitioner in both the writ petitions are as follows:-

(i) Entire amount borrowed from the individual banks has been repaid by way of one time settlement and this was done with the consent of the

second Respondent ECGC. Therefore, the second Respondent ECGC should delete the Petitioners'' name from the defaulter list (i.e.) Specific

Approval List. There is no default after settlement of due.

(ii) The Specific Approval List circulated to the banks is causing great prejudice to the Petitioners. Petitioners'' export contract is affected as the

Petitioners'' name is found in the Specific Approval List and the buyers are reluctant to negotiate new contracts. Therefore, the names of the

Petitioners in the defaulter list affects the fundamental right of the Petitioners and it violates Articles 14 and 19(1)(g) of the Constitution of India.

8. Shri Krishna Srinivas, learned Counsel appearing for the second Respondent submitted as follows:

(i) The Export Credit Guarantee Scheme is a policy which provides a cover to the banks which advances loans to individual exporters. The banks,

in order to cover their loss, enter into a contract of agreement with the second Respondent on certain terms. The ECGC issues guarantee on

certain terms in favour of the banks to cover the advances made by banks to the individual exporter. Therefore, when there is a default by one or

other exporter to the lending bank, the second Respondent makes good the loss to the banks as per the scheme. This is no way different in a case

of one time settlement as well. As could be seen from the letter dated 16.12.2006 of M/s. Indian Oversees Bank and the counter-affidavit filed by

M/s. Canara Bank, it is clear that on default by one or other exporter, the second Respondent is liable to make good the loss suffered by the

banks as per the scheme. In such view of the matter, the second Respondent, when it considers any proposal by a bank, will keep in mind, the

past transactions insofar as the specific customer is concerned with regard to default in repayment so as to ensure that while considering the

insurance cover under ECGC Scheme by individual bank, the antecedence of the exporters is properly assessed. In this regard, the Specific

Approval List has been published to keep a track on exporters who have defaulted.

(ii) The name of the Petitioner in the Specific Approval Listdoes not in any way restrain the individual banks from extending any type loan and this

has been emphasized in paragraph 11(IV) of the counter affidavits filed by the second Respondent in both the cases. It has been clearly stated that

the bank is at liberty to extend all facility to the Petitioner/exporter at its own risk.

(iii) Thereis no privity of contract between the Petitioner and the second Respondent. The contract is between the first Respondent bank in each

case and the second Respondent ECGC. When the individual bank(the first Respondent) seeks insurance cover from the ECGC in respect of the

loan granted to any individual exporter, the second Respondent ECGC as a measure of prudence and care is entitled to refer to the list and assess

the case on merits so as to avoid potential risks. He relied upon the Division Bench decision of this Court to support the plea that inclusion of the

name in the Specific Approval List does not amount to blacklisting of an exporter.

9. Having considered the rival submissions, this Court is unable to accept the plea of the Petitioner in both the cases for the following reasons:

(i) In respect of the plea that inclusion of the name of the Petitioner in both the cases in the Specific Approval List, is affecting their export business,

is based on no material. It is a hypothetical argument and therefore, has no merit.

(ii) What is contained in the Specific Approval List is names of persons who have defaulted earlier for one or other reasons and those names are

required for the purpose of assessing when a claim is made by a bank for insurance cover. Therefore, the Specific Approval List does not bar the

exporter from borrowing loan from the bank. Even if the amount has been settled by the individual concern under one time settlement scheme, the

Petitioner has not pointed out before this Court the provision of Law or Rule in the ECGC policy which provides for deletion of names from

Specific Approval List on settlement of the dues to the bank under one time settlement scheme. Therefore, when the ECGC policy does not

provide any such specific provision, the Petitioners are not entitled to seek the deletion of their names as a matter of right.

10. The similar issue arose in the case of Export Credit Guarantee Corporation of India Ltd., represented by its Export Credit Guarantee

Corporation of India Ltd. Vs. A. Jaya Kumar, State Bank of India and Canara Bank, , a Division Bench of this Court presided over by

P.SATHASIVAM.J. as He then was, held in para 28 as follows:-

28. The perusal of the impugned order shows that the learned Judge proceeded on the footing that the inclusion of the Petitioners names in the

Specific Approval List would amount to blacklisting and without further discussion by referring the judgment in Southern Painters v. Fertilizers and

Chemicals Travancore Ltd.(supra), set aside the circular dated 6.5.1994 and allowed the writ petition. In view of our discussion in the earlier

paragraphs, we are unable to accept the reasonings of the learned Judge. In addition to the above mentioned reasons, we are also satisfied that by

putting the Petitioners on the Specific Approval List, the Appellant/ECGC had not disentitled them from obtaining export related advances from

their bankers and their bankers could still extend export related advances to the Petitioners either after obtaining the specific approval of Appellant

Corporation or the bank could still extend the export related advances to the Petitioners without obtaining the guarantee from the Appellant

Corporation. As pointed out earlier, the ECGC has not branded the writ Petitioners as defaulters. As rightly pointed out, the inclusion of their

names in the Specific Approval List only indicates that there are prima facie circumstances that warrants the collection of additional information

before the risk could be accepted for cover. As discussed earlier, when the Petitioners approached the second Respondent bank for assistance

and when the second Respondent in turn sought for risk cover, the ECGC had to necessarily assess the credit risk factors and the list of exporters,

i.e., potential operators with whom ECGC would like to be more cautious and hence, it cannot be equated to blacklisting. As said earlier, ECGC

is a Government of India Enterprise established to provide insurance covers to exporters and cover their credit risk on overseas buyers and to their

Bankers over their credit risk on export financing to Indian exporters, has to necessarily have a system to assess the credit risks that are offered to

them for cover and where it is prima facie a bad risk, it will not be proper for them to accept such risk and no insurance on the face of it would

underwrite such bad risks. The precautions and arrangements made by ECGC cannot be termed as arbitrary action. We hold that the inclusion of

the name of the Petitioners in the Specific Approval List does not amount to blacklisting and it is nether arbitrary, nor illegal and there is no

violation of the principles of natural justice.

The above decision of a Division Bench of this Court, squarely covers the issue raised in the present writ petitions.

11. One other plea that was raised by the Petitioner in both the cases is that the names of the defaulters present and past are found in the website

of the second Respondent and therefore, it is affecting Petitioners international business. In this regard Shri Krishna Srinivas, learned Counsel

appearing for the second Respondent, placed reliance on the note issued by the second Respondent which gives the details as to the mode of

circulation of the Specific Approval List. It reads as follows:-

SAL is not a Publicly Circulated List. It is neither published nor is otherwise available in public domain. Though the list is placed on the web-site of

the Corporation, the same is exclusively available for the insured/customers (banks and financial institutions) for limited purpose and the access to

this list is restricted with user id and password provided by the Corporation to the insured/customers. A detailed snapshot of the process to access

SAL is attached. What is conceived of this process is that ECGC has formulated such a policy for safeguarding its own financial interests by way

of assessing the risks before they are underwritten and avoiding loss that could be on account of failure of the borrowers who are availing credit

facilities from the banking system under insurance cover of the ECGC i.e., Export Credit Insurance to Banks (ECIB). Obviously such a decision is

taken by the Corporation with the object of having satisfaction about the conduct of the borrowers in their dealings with the bank(s) who are

providing credit facilities from time to time to their exporter clients relating to their exports.

It has been emphasized time and again by the second Respondent that inclusion of the Petitioners name in the Specific Approval List, the bank

need not deny the credit facility to the Petitioners. It is always open to the bank to advance any amount to its customer even if the name finds place

in the Specific Approval List. It is for the bank to decide to give or not to give. The second Respondent has no role to play in this process.

12. Since there is no privity of contract between the Petitioners and the second Respondent which is conceded in the writ affidavit itself. The

Petitioners have no right to seek a mandamus as against the second Respondent for deletion of their names from the Specific Approval List.

13. With regard to the deletion of the names of the defaulter exporters from the Specific Approval List, the claim of similarly placed persons have

been rejected by several High Courts, viz.,

(1) Bombay High Court (Rajaram Bandekar (Sirigao) Mines Pvt. Ltd., and others - v. -Export Credit and Guarantee Corporation Ltd., and Ors.

reported in 1995 (82) CC 470;

(2) Kerala High Court (W.A. No. 767 of 1989 Seema Cashew Traders; Thadicadu P.O. Anchal, Quilon District represented by its Proprietrix

Annie Thomas - v. -The Manager, Export Credit Guarantee Corporation of India Limited, Darbar Hall Road, Ernakulam, Cochin-16 and others);

(3) Calcutta High Court (International Industrial Gases Limited Vs. Union of India (UOI) and Others ;

(4) Madurai Bench of Madras High Court (M/s. Sekar Exports represented by its Partner Mr. V.S. Chandrasekaran v. Export Credit Guarantee

Corporation of India Ltd., (Madurai Branch) Raja Muthaiah Mandram, 2nd Floor, Dr. Ambedkar Road, Madurai 625 020 and another -W.P.

(MD) No. 4081 of 2005)

(5) Madras High Court (V. Manikandan, Partner M/s. Vamadev Exports, Tirupur v. The Export Credit Guarantee Corporation of India Ltd.,

Coimbatore and others - W.P. No. 19462 of 1999) The Petitioners have not made out a case in law for removal of their names from the Specific

Approval List.

14. While declining the relief sought for by the Petitioner in both the cases, the Court, however, would like to point out that in a case of this nature,

viz., an exporter who earns foreign exchange to the country and defaults at one time and repays or settles thereafter, should be considered for

benefits as applicable based on their track record in course of time. The first and the second Respondents should keep in mind that due to market

fluctuations and that of commodity, bullion and currency in world market and in view of the various trade agreements between member countries of

the World Trade Organizations, the business prospects of an individual exporter may go up and down depending upon the condition prevailing

from time to time. It is quite possible that an exporter may suffer huge loss at one point of time and may regain subsequently. If the exporter is able

to show by material that they improved their business for the better with considerably good performance in earning foreign exchange to the country

coupled with source of employment for a large number of people, the banks and other agency should keep the same in mind and such persons

should be encouraged by re-evaluating their credibility. Their performance should be re-evaluated based on facts. It is always open to the second

Respondent to reconsider the issue on its own merits. It is made clear that the letter impugned in the writ petition does not deserve to be quashed.

No mandamus can be granted as prayed for.

15. Both the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.