CONSTITUTIONAL WRIT

Present:The Hon'ble Mr. Justice Syamal Kanti Chakrabarti

Judgment on : 17.03.2010

W. P. 14731 (W) of 2007
with
CAN 4399 of 2008

International Industrial Gases Limited
Vs
Union of India & Ors.

POINTS:
Blacklisting-----Inclusion of names in Specific Approval List if amounts to blacklisting ----- Petitioner if is required to be heard before the inclusion of his name in the list----- Preparation of Specific Approval List by the insurer in respect of defaulting borrower without notice whether violates the principles of natural justice---- Inclusion of names of defaulting borrower in such Specific Approval List whether amounts to blacklisting------ Fiduciary relationship amongst the insurer, banker and borrower whether exists in course of such export business which forbids amicable bilateral settlement of financial disputes in total disregard, consent and notice of the third party----- Writ application for inclusion of name of the defaulting borrower in the Specific Approval List without notice whether maintainable----Constitution of India, Article 226.

FACTS:
Petitioner exporter applied for credit facility from its bankers who in turn asked the petitioner as to why its name has been included in Specific Approval List(SAL) ,(maintained by the Corporation and circulated among all banks contains names and addresses of the exporters to whom packing credit advance granted by a bank can be covered under WTPCG only if the Corporation has given its approval in writing.), by Export Credit Guarantee Corporation and hence denied credit facility. Petitioner's sister concern earlier settled the export liability with their bankers , UCO bank, without notice to Export Credit Guarantee Corporation. The Petitioner requested the concerned Respondents to delete its name from the list. The Respondent number 2 declined to remove such name from the Approval List unless, the bank paid the entire alleged dues.

HELD:
The Respondent number 2 has formulated Specific Approval List by way of safeguarding their financial interest and apprehended loss in running their business on account of failure of the borrowers who are taking loan from the banks under insurance cover of the respondent no. 2. Obviously such a decision is taken by the Respondent Corporation on the basis of objective satisfaction of the conduct of the borrowers in their dealings with the bank which is granting loan from time to time to them for promoting their export business.

---- PARA 15

The privity of contract lies between ECGC and the bank, when ECGC will take a decision as to whether they would extend any insurance cover to the bank concerned or decline to extend such facility. While interpreting the concept of principle of natural justice there should be a perfect concatenation so as to grant any relief not at the cost of unrecognized sacrifice of the interest of any other individual or groups of persons in course of same commercial transactions amongst interested parties as is done with the insurer in the instant case

PARAS 17&22

The principle of natural justice in its true sense of the term should subserve interest of all the parties involved in any transaction and its application cannot in any way ignore the interest of one party at the cost of benefit of the other party or parties. In the instant case the principle of natural justice has in fact been violated by the creditor bank and the borrower by making an amicable settlement of the outstanding dues at a loss of Rs.9,96,667/- sustained by the insurer respondent No.2 for no fault of its own.

PARA -----21

The precautions and arrangements made by ECGC cannot be termed as arbitrary action. Inclusion of the names of the petitioners in the Specific Approval List does not amount to blacklisting and it is neither arbitrary nor illegal and there is no violation of the principles of natural justice. It is also held that the Court should leave the discretion in favour of the financial institutions to determine whether a unit is viable or otherwise and Court should be extremely slow in forcing the financial institutions to advance public funds to private party on an assumption that the unit would be viable.

PARA-----25

No notice is required for the respondent ECGC to the borrower or its sister concern for the purpose of preparation of SAL which is not a blacklisting and the borrower is at liberty to approach the bank for any loan and the bank is equally competent to grant such loan to the borrower. Preparation of any such SAL without notice to terminal beneficiary does not constitute any breach of the principle of natural justice in absence of any fiduciary or contractual relationship amongst the insurer, banker and the borrower .

PARA ----26

The name of the petitioner being sister concern has rightly been included in their Specific Approval List by respondent No.2 and in doing so they have not exceeded their jurisdiction in exercise of such discretionary power and the Writ Court has nothing to interfere with such policy decision.

PARA--34

CASES CITED:

Writ Appeal No.717 and 718 of1999

Rajaram Dadekar Srigu Mines Pvt. Ltd. and others v. Export Credit and Guarantee Corporation Ltd., and ors. W. P. No.76 of 1988, BOMBAY

Sima Kesu Traders v. Manager Export Trade Corporation of India Limited and ors. Writ Appeal No.767 of 1989, Kerala

M/s. Export Credit Guarantee Corporation of India Limited v. A. Jaya Kumar State Bank of India and Ors.Writ Appeal Nos. 717 and 718 of 1999, Madras

For the Petitioner : Mr. Soumen Dasgupta,
Mr. Tanmoy Chowdhury,
Mr. Arghya Se.
For Respondent No. 2 : Mr. Amitabha Ghosh,
Mr. Soumya Sadhan Bose,
Mr. Soumitra Datta.
THE COURT:

1.In this writ petition the petitioner, International Industrial Gases Limited has sought for a direction upon the respondent no. 2, Export Credit Guarantee Corporation of India Limited and/or its authorised officers and/or each of them to delete the name of the petitioner from the Specific Approval List published by them without reasonable cause and opportunity of being heard in violation of the principles of natural justice.
2. The petitioner contends that it is a limited company engaged in export and import of different industrial gases and industrial generators. In course of its business it got some orders for export of one Acetylene Plant/ Generator to Baharain for which he obtained a letter of credit being No. 06110089 dated 26.10.2006 for an amount of US $ 91117.60 opened with the National Bank of Baharain through Canara Bank, Mumbai and advised through Allahabad Bank. On the basis of such letter of credit the respondent no. 4, The Chief Manager, Allahabad Bank, Alipore Branch issued a bank guarantee being no. 1BC/FBG/03/07 dated 02.02.2007 for an amount of US $ 22779.40 against advance payment made by the customer. In terms of the aforesaid export agreement and the letter of credit, the shipment of the plant had to be ready by 30th April, 2007 and accordingly the petitioner took all necessary steps but due to severe cash crunch from the first week of April, 2007 they ran short of fund to the extent of Rs. 15,00,000/- only. Therefore, the petitioner approached the respondent no. 4 being its banker to arrange an export packing credit assistance of Rs. 15,00,000/- only. In response the respondent no. 4 has intimated in their letter being reference no. AL1/ADV/11GL/07-08 dated 17.04.2007 that the name of the petitioner along with some other companies allegedly associates of the petitioner are appearing in the Specific Approval List of respondent no. 2, Export Credit Guarantee Corporation of India Limited as on 31.07.2006 and so asked them to show reasons for inclusion of the petitioner’s name in the said Specific Approval List.

3. On enquiry the petitioner came to know that the name of the petitioner was identified as a guarantor of its sister concern, respondent no. 6, Silchar Industrial Gases Ltd. On further enquiry it was revealed that the said respondent no. 6 with whom the petitioner had no business transaction at any point of time has failed to liquidate the outstanding amount of the export packing credit loan granted to it in 1990 resulting in inclusion of its name along with the petitioner as a sister concern in the Specific Approval List. However, in their communication dated 23rd May, 2007 the petitioner furnished the factual matrix relating to the payment schedule to the respondent no. 3.

4. It further transpired that subsequently the respondent no. 6 arrived at a settlement with the respondent no. 3 and cleared all outstanding dues amounting to a sum of Rs. 21,28,275/- including interest and accordingly the respondent no. 3 returned all the original documents of the said company which was confirmed in their letter being no. IBB/ADV/0693/02 dated 28.08.2002. Thereafter, the petitioner in their letter dated 17.04.2007 and 19.04.2007 requested the respondent nos. 2 and 3 to take necessary steps from their part for deletion of its name from the said Specific Approval List. The respondent no. 3 also in their letter no. UCO/1BB/ADV/38/07-08 dated 04.05.2007 requested the respondent no. 2 to delete the name of Silchar Industrial Gases Ltd., i.e., the respondent no. 6 herein and the other companies from the Specific Approval List because of its dues from the respondent no. 6 have been paid and settled. Subsequently the petitioner received a letter dated 16.05.2007 from the respondent no. 2 wherein there was clear stipulation that unless the respondent no. 3, i.e., the UCO Bank pay their alleged dues they will not remove the name of the petitioner from the Specific Approval List.

5. In fact the petitioner was not given any opportunity of being heard at the time of inclusion of its name in the said Specific Approval List of the respondent no. 2 and it is not associated in any way with the business affairs of the respondent no. 6, Silchar Industrial Gases Ltd. Therefore, he has approached this Court for suitable direction upon the said respondent no. 2 for removal of its name from the said Specific Approval List. In a separate application being CAN No.4399 of 2008 they have also prayed for a direction upon Respondent No.2 and Allahabad Bank, Respondent No.4, not to give effect to said SAL and to extend bank assistance of Export Credit package to the petitioner.

6. The respondent no. 2 has opposed the move and contended in their affidavit-in-opposition that it is a Government company established for the purpose of promoting export trade and engage in providing credit insurance cover to (a) exporters over their credit risk on overseas buyers and (b) to Banks over their credit risk on export financing to Indian borrowers. The present case relates to those instances where Banks which grant credit facilities to their exporter customers seek insurance cover from the respondent in respect of the risk undertaken by them in granting such facilities to their customers. Therefore, the insurance cover provided by

this respondent is to the Banks and financial institutions and not to exporters under any contract of insurance concluded between the individual Bank and the insurer and not with the exporters. So the beneficiary of the cover is individual Bank and not the exporter.

7. It is their further case that in or about October, 1989 the respondent no. 6 approached the respondent no. 3 for credit facility for the purpose of its export business. Accordingly the respondent no. 3 approved the Export Packaging Credit Limit of Rs. 23,00,000/- on 10th January, 1990 in favour of the respondent no. 6. It was noticed from the sanctioned letter of the respondent no. 3 dated 10th January, 1990 that the name of the Managing Director of the respondent no. 6 is Mr. D. K. Garg who happens to be father of the deponent of the affidavit in support of the writ petitioner, Mr. Nikhilesh Kumar Garg. On or about 29th October, 1992 a report of default was submitted by the respondent no. 3 to the respondent no. 2 having been committed by the respondent no. 6 in repaying the advances granted to them. The respondent no. 3 also lodged its claim with the respondent no. 2 on May 3, 1993. From the said claim it would appear that the petitioner is an associate and/or connected unit of the respondent no. 6. and that the two companies, i.e., the petitioner and the respondent no. 6 have common managerial personnel and are controlled by the same group of persons.

8. Upon submission of claim form dated 18.04.1993 and in terms of agreement between the respondent no. 2 and the respondent no. 3, the respondent no. 2 paid a sum of Rs. 12,86,667/- on November 22, 1993 being 66 2/3 per cent of the loss sustained by the respondent no. 3 due to non-payment by the respondent no. 6 which is an associate concern of the petitioner. In or about August, 2002 the respondent no. 3 without any knowledge and information to respondent no. 2 and without its approval entered into a compromise settlement with the respondent no. 6 at a sum of Rs. 12,86,667/-. Under cover of a letter dated 3rd June, 2003 a sum of Rs. 2,90,000/- was forwarded by the respondent No.3 to the respondent no. 2 being the share of recovery amount which the respondent no. 3 had recovered upon settling its claim with the respondent no. 6. Thus the respondent No.2 has sustained loss of a sum of Rs.9,96,667/-.

9. Further case of this respondent is that mainly they issued two types of guarantee covers, a) Wholeturnover Packing Credit Guarantee and b) Wholeturnover Post Shipment Guarantee. These are the bilateral contracts of insurance between the above respondent and the Bank whereby the respondent insures the Bank, subject to the terms and conditions of the said contract, against their risk of loss in granting advances/ loans to exporters/ finance exports. The subject matter of such insurance is the risk of loss owing to the possible default by or insolvency of the exporter. The exporter is not a party to this bilateral contract and, therefore, has no locus standi to raise any dispute or grievance with regard to the terms and conditions of the contract between the ECGC and the Bank. It is also not

mandatory at all for the Banks to have such insurance cover for their advances. The banks avail of such facilities on their own volition to protect their interest.

10. The respondent maintains the Specific Approval List (SAL) which contains the names of such exporters who, in its opinion required to be looked into in more details before any credit risk on them is accepted by this respondent. It is a list of exporters who are potential borrowers and in respect of whom the respondent should be afforded an opportunity to have a Credit Risk Assessment. The criteria for placing an exporter in the SAL is the existence of such circumstances as would warrant specific consideration of the risk involved while underwriting the advances granted to such exporters. The Bank is required to seek prior approval of the respondent for granting credit to such exporters whose names have been included in the SAL, only if the banks require cover of this respondent for such credit. Therefore, inclusion of the name of a company in SAL never entails denial of any Bank credit. It does not prevent the Banks from advancing any amount they wish to those exporters included in the SAL at their own risk. But as a credit risk insurer this respondent has the unassailable right to assess the credit risk that are offered to it for cover and to decline such risks that are patently uninsurable or found to be bad risk and to accept such risks subject to conditions as may be deemed appropriate. As such no insurer could be asked to or expected to underwrite any risk unless and until an opportunity is afforded to their insurer to evaluate risk. The only purpose of including the names of all such persons in SAL was to indicate to the Banks the names of customers about whom extreme care and action will be taken by this respondent in granting insurance. Under the circumstances they have rightly included the name of the petitioner in the SAL which does not warrant any interference of this Hon'ble Court in exercise of its constitutional writ jurisdiction and as such this petition is liable to be dismissed with cost.

11. Under the circumstances the following points need be considered:

(a) Whether preparation of Specific Approval List by the insurer in respect of defaulting borrower without notice violates the principles of natural justice?

(b) Whether inclusion of names of defaulting borrower in such Specific Approval List amounts to blacklisting?

(c) Is there any fiduciary relationship amongst the insurer, banker and borrower in course of such export business which forbids amicable bilateral settlement of financial disputes in total disregard, consent and notice of the third party?

(d) Is the writ application for inclusion of name of the defaulting borrower in the Specific Approval List without notice maintainable?

12. In considering these points it is relevant to decide the extent of power conferred upon the respondent no. 2 for blacklisting a company or its sister concern.

13. It is submitted by Ld. Lawyer for the respondent that the respondent maintains SAL which contains the names of such exporters who **in the opinion of the respondent** required to be looked into in more detail before any credit risk on them is accepted by the respondent. It is a list of exporters who are potential borrowers and in respect of whom this respondent should be afforded an opportunity for a Credit Risk Assessment. The criteria for placing an exporter in the SAL is the existence of such circumstances as would warrant specific consideration of the risks involved while underwriting the advances granted to such exporters. It is further contended that the bank requires their prior approval for granting credit to such exporters whose names have been included in SAL, only if the banks require cover of the respondents for such credit. It is further averred that inclusion in SAL never entails denial of the bank credit. It does not prevent the banks from advancing any amount they wish to those exporters included in SAL at their own risk.

14. No circular or guidelines to the above effect issued by the respondent no. 2 has been annexed with such averment. But my attention has been drawn to a decision of the Madras High Court in Writ Appeal No.717 and 718 of 1999 which contains a portion of their guideline as quoted below.:-

"11.1. What is SAL? Specific Approval List (SAL) (maintained by the Corporation and circulated among all banks) contains names and addresses of the exporters to whom packing credit advance granted by a bank can be covered under WTPCG only if the Corporation has given its approval in writing. The list provided to banks is an important source of information for identifying exporters who have defaulted. The list is mainly aimed at advising banks to exercise caution while dealing with such exporters.

11,2. Need for placing an export in SAL.

Generally speaking the necessity for placing an exporter in SAL may arise in cases where:

(i) Exporter has defaulted to a bank: This default to a bank may be reflection of the financial difficulties of the exporter or some serious problems in his business.

(ii) A claim has been filed under a guarantee on account of the exporters by any bank: The intention of the Corporation is to avoid undertaking further liability on account of the exporter.

(iii) The exporter is purported to be involved in a fraud: When it comes to the knowledge of the Corporation that an exporter is involved in fraud, he ceases to be a desirable customer and all banks have to be cautioned in regard to the potential danger in dealing with such an exporter.

(iv) The exporter is in financial difficulties: If an exporter is in serious financial difficulties, a close monitoring of his account is called for.

While placing the name of an exporter under SAL, Corporation may also consider including the names of sister concerns as the financial difficulties of the exporter might adversely affect their financial position as well. Names of proprietor/partners and guarantors/directors are also included in SAL with a view to prevent them from obtaining finance in the names of

some other concerns floated by them."
15. What is conceived of is that the respondent no. 2 has formulated such a policy by way of safeguarding their financial interest and apprehended loss in running their business on account of failure of the borrowers who are taking loan from the banks under insurance cover of the respondent no. 2. Obviously such a decision is taken by the respondent corporation on the basis of objective satisfaction of the conduct of the borrowers in their dealings with the bank which is granting loan from time to time to them for promoting their export business. The said policy decision does not provide for any issue of notice to any exporter or potential borrower who intend to avail of loans from the bank, i.e., such type of list is only consulted by the respondent corporation when a bank seeks insurance cover in respect of any borrower from the corporation. Admittedly it is a list of exporters who are potential borrowers irrespective of the fact as to whether it is the principal borrower or any sister concern of such borrower. It is the argument of the respondent no. 2 [paragraph 3(viii) of A.O.] that as a credit risk insurer they have unassailable right to assess risk that are offered to it for cover and to decline such risk that are patently uninsurable or found to be bad risk and to accept such risks subject to the conditions as may be deemed appropriate. It is their assertion that in fact no insurer could be asked to or expected to underwrite any risk unless and until an opportunity is afforded to the insurer to evaluate the risk. So, I hold that it is a policy decision of the corporation based on their objective satisfaction regarding repayment mode of the borrowers who are directly concerned with the banks and not with the insurer.
16. The next relevant point for consideration is to decide whether in the pursuit of such policy decision any notice is required to be served upon borrower for maintaining SAL of the respondent no. 2 and whether failure to do so is a breach of the principle of natural justice.

17. It is submitted by learned lawyer for the petitioner that principle of natural justice demands service of notice and opportunities of being heard if any penalty is imposed or any action is taken affecting any right or benefit enjoyed by a party. In the instant case because of blacklisting of the petitioner his export business has been seriously affected and they are unable to procure any bank loan for their business purposes. Therefore, the unilateral decision of respondent No.2 to include name of the petitioner in SAL without any valid notice to the petitioner is violative of the principle of natural justice and such action should be treated as unlawful and arbitrary. He has cited a ruling reported in (1989) 1 SCC 229 in support of his contention. The ratio in the aforesaid case postulates that blacklisting any person in respect of business ventures has civil consequences for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order.

18. Learned lawyer for respondent No.2 on the other hand has contended that the above principle will not be applicable in the facts and circumstances of this case. It has already been pointed out that only if any bank while granting loan to a borrower seeks insurance cover, the bank in turn may approach ECGC for securing insurance cover. Therefore, the privity of contract lies between ECGC and the bank when ECGC will take a decision as to whether they would extend any insurance cover to the bank concerned or decline to extend such facility. The bank may ask the insurer to show cause for the refusal to extend such benefit. But the borrower who is concerned with the bank cannot claim any equitable right of being heard regarding the policy decision to be taken by ECGC with regard to extension of insurance cover upon request of a bank.

19. It is specific averment of respondent ECGC made in para iii, iv and v of their A.O. that upon submission of the claim form dated 28.04.93 and as per agreement between Respondent No.2 ECGC and respondent No.3 UCO Bank, the respondent No.2 paid a sum of Rs.12,86,667/- on 22.11.93 being 66.23 per cent of the loss suffered by the respondent No.3 UCO Bank due to non-payment of the dues from Respondent No.6, the Silchar International Gases Limited which is an associate concern of the writ petitioner International Industrial Gases Limited. In or about August 2002 UCO Bank, respondent No.3 without any intimation or information to the ECGC, respondent No.2 and without its approval entered into a compromise settlement with the respondent No.6. The claim of the respondent bank was settled for a sum of Rs.12,86,667/-. Under cover of a letter dated 03.06.03 a sum of Rs.2,90,000/- was forwarded to the Respondent No.2 being the share of recovery amount which the respondent bank had recovered upon amicable settlement of its claim with the respondent No.6. Thus, the respondent No.2 ECGC has suffered a loss of Rs.9,96,667/-for such clandestine move of respondent Nos. 3 and 6.

20. Learned lawyer for respondent No.2 has thus tried to argue that under the present system the bank has sought for insurance cover from respondent No.2 and the insurer has paid Rs.12.86,667/- but when the bank amicably settled the issue with the respondent and repaid a sum of Rs.2,90,000/- to the insurer, the insurer respondent No.2 had to suffer a loss of Rs.9,96,667/- without any remedy. This type of compromise has been made by the bank with the borrower without any notice or consent of the insurer. Therefore, the insurer did not get any opportunity of placing on record its views regarding the loss so sustained on account of unilateral decision of the bank to make amicable settlement of its claim with the borrower which has in fact affected the business policy and financial interest of the insurer. There is no control of the insurer over the conduct of the respondent bank or the borrower. Therefore, having no other alternative to protect its interest the insurer respondent No.2 has prepared the Specific Approval List containing the list of the exporters who are potential borrowers and in respect of whom the respondent should be afforded an opportunity for a credit risk assessment so that the bank is

compelled to seek prior approval of the insurer for granting future credit to such exporters whose names have been included in the SAL only if the banks require cover of this respondent for such credit. Therefore, learned lawyer has submitted that the inclusion in SAL is not a denial of the bank credit and it is not preventing the banks to advance any amount to any exporter whose name has appeared in the SAL at their own risk. In fact the insurer is not extending the credit facility. It is the bank which is extending the credit facility and the effect of SAL is confined between the insurer and the creditor bank. It does not in any way affect the right of the borrower to procure loan and as such prior notice is not required to the borrower while the insurer is preparing or maintaining a Specific Approval List to safeguard its business interest including capital investment. Since the right of any exporter to borrow money from any bank is not directly affected because of inclusion of its name in the SAL maintained by the insurer, it cannot be treated as violative of the principle of natural justice for non-issue of any notice to the borrower before enlisting its name in the specific approval list.

21. Principle of natural justice is generally conceived of and applied as a safeguard for protecting rights and interests of a person before withholding or affecting such right. The concept of giving an opportunity of being heard is admittedly based on equitable principle and it is equally applicable in case of all parties interested in a transaction. In the instant case the insurer, the creditor and the borrower are all independent units but each one cannot regulate the conduct of the other in terms of any contract. As a consequence, when the bank amicably settled the matter with the borrower at a reduced rate affecting business interest of the insurer as well as reduction of its capital, bank did not think it prudent to issue any notice or to seek any consent of the insurer to such amicable settlement. The Bank admittedly did not seek any consent of the insurer to such amicable settlement. Similarly the borrower did not undertake any liability to compensate the loss so sustained by the insurer while it settled its claim with the creditor bank at a reduced rate. The principle of natural justice in its true sense of the term should subserve interest of all the parties involved in any transaction and its application cannot in any way ignore the interest of one party at the cost of benefit of the other party or parties. In the instant case the principle of natural justice has in fact been violated by the creditor bank and the borrower by making an amicable settlement of the outstanding dues at a loss of Rs.9,96,667/- sustained by the insurer respondent No.2 for no fault of its own.

22. I conceive that the principle of natural justice has three components. Firstly, it is a principle, secondly, it is natural and thirdly, it is justice. So far as the concept of ‘principle’ is concerned, it is formulation of a public policy for the benefit of all according to social norms and prevailing rules without tilting balance of convenience and inconvenience unnecessarily. No principle can be based on the concept of sadism. So far as the second element is concerned it is ‘natural’ which emanates spontaneously in the

mind of a rational being to be just, equitable and elastic and not static so that through ages and different cases it can mould itself and become susceptible and adaptable to the given situation under changing circumstances of changing society. This is elastic in the sense that it should imbibe within its fold all cases of identical nature as well as follow the binding rules of precedent which may transcend from precedent to precedent through judicial pronouncement. The third and the most vital component is 'justice' which should be based on wisdom, precedent, legislative intent and social norms. While interpreting the concept of principle of natural justice there should be a prefect concatenation amongst all these three elements or components so as to grant any relief not at the cost of unrecognized sacrifice of the interest of any other individual or groups of persons in course of same commercial transactions amongst interested parties as is done with the insurer in the instant case.
23. In the instant case the transaction in question relates to three units i.e., the insurer, the funding bank and the borrower who are all involved in same commercial transaction and as such all of them have equal right to protect their own commercial interest. If two of such units unite together to affect the interest of the other party that other party has equal right to protect its interest and to see that the loss sustained by it does not occur in future in absence of any fiduciary relation or contractual obligation as the case may be.

24. The philosophy and logic of law behind such a concept finds corroboration in determining the similar issue by the Hon'ble High Court of Bombay in Writ Petition No.76 of 1988 (Rajaram Dadekar Srigu Mines Pvt. Ltd. and others v. Export Credit and Guarantee Corporation Ltd., and ors.). In the said case also ECGC issued a communication to the respondent banks and all other nationalized and scheduled banks to the effect that the borrowers of that writ petition had been placed in the "prior approval list" or "caution list" maintained by them and directed them that all, including the respondent banks to discontinue export packing credit facilities which were previously enjoyed by the defaulting writ petitioners in respect of their export business and not to extend any fresh export packing credit facilities to them without prior approval of the ECGC. In doing so ECGC did not issue any notice to the petitioner borrowers who actually were disabled in carrying out their export business on account of such embargo. There is logic of law behind such findings in favour of the ECGC which is a government company carrying on mainly the business of guaranteeing insurance in the export trade. Being so and as an insurance company doing business in export trade it is in the fitness of things that they should necessarily assess in every case the risk which may be involved in loaning funds to a particular exporter or against a particular transaction in which they are directly concerned. Therefore, ECGC is bound as a business organization to consider and ignore the risk which may be involved in the process and ensures proper care and caution in its business dealings. In

this context, the communication was made since the petitioners were default in repaying their loan. The object and purpose of such communication was aimed at minimizing the risk that if the respondents are to be required by the banks to provide them any insurance cover against such advance to be made to the defaulting borrower or its sister concern. It should be necessary that due and proper care of the concerned facilities and transactions be directly assessed. His Lordship the Hon'ble Single Bench relied upon another decision of the Hon'ble Kerala High Court taken in the case of Sima Kesu Traders v. Manager Export Trade Corporation of India Limited and ors. dated 29.09.1989 in Writ Appeal No.767 of 1989. In the said judgment it has been held inter alia that the purpose of including the names of persons in "caution list" is to include the names of the persons about whom extreme care and caution has to be taken for a variety of reasons and that inclusion in the list is for the purpose of the corporation itself in the exercise of its discretion which it has called upon to exercise. Therefore, the prayer for quashing the name of the appellant from the said list falls outside the scope of writ jurisdiction of the court as it is neither for enforcement of any statutory right nor any fundamental right. The Court also observed that when such list is only meant for the guidance of the corporation itself it is difficult to understand as to how a person complains about the conduct of the corporation in deciding before hand that whenever any such case comes up for consideration it should exercise greater care and caution. Therefore, no relief to prevent the corporation from exercising greater care and caution is a permissible. In fact by challenging such communication the petitioners seem to dispute the terms and conditions on which ECGC are granting insurance cover to the banks which manifestly dared not enabled to do so for lack of proper locus standi. It was further held therein that such type of instruction of ECGC to the other banks cannot be disputed and therefore, the petitioners should not make any grievance that the principle of natural justice had been violated by such type of communication (Para – 29).

25. The Hon'ble High Court of Madras also had taken similar view while disposing of Writ Appeal Nos. 717 and 718 of 1999 (M/s. Export Credit Guarantee Corporation of India Limited v. A. Jaya Kumar State Bank of India and Ors.). In the said appeal the order of Single Judge dated 10.03.99 was assailed. By such order the Hon'ble Single Bench decided that inclusion of petitioners' name in the specific approval list (SAL) amounts to blacklisting and in the light of the effect that the petitioners were not given opportunity of being heard before the communication of relevant circular dated 06.05.94. So, he quashed the same and allowed both the writ petitions. Questioning the propriety of said common order, ECGC filed the aforesaid appeal. While allowing such appeal, the Hon'ble Division Bench has observed inter alia that the precautions and arrangements made by ECGC cannot be termed as arbitrary action. Inclusion of the names of the petitioners in the Specific Approval List does

not amount to blacklisting and it is neither arbitrary nor illegal and there is no violation of the principles of natural justice. It is also held that the Court should leave the discretion in favour of the financial institutions to determine whether a unit is viable or otherwise and Court should be extremely slow in forcing the financial institutions to advance public funds to private party on an assumption that the unit would be viable.

26. Considering all these aspects I hold that no notice is required for the respondent ECGC to the borrower or its sister concern for the purpose of preparation of SAL which is not a blacklisting and the borrower is at liberty to approach the bank for any loan and the bank is equally competent to grant such loan to the borrower. But if the bank in its turn intends to secure any insurance cover then and only then they must give ample opportunity to the insurer ECGC to consider the viability of such borrower. In making such communication and without any notice to the borrower who is a terminal beneficiary of the transaction involving insurer and the bank, the insurer does not violate any principle of natural justice. In 1989 (1) SCC 229 the petitioner was a government contractor who was blacklisted without notice as he did not deposit the dak amount being the highest bidder in the auction sale. Such blacklisting ultimately debarred him from participating any tender in future and the impugned order had far reaching civil consequences and as such the same was found to be violative of the principle of natural justice. In the instant case no right of the writ petitioner has been infringed and his ways and means to secure bank loan has also not been directly prohibited by ECGC. Therefore, I hold that the above principle is not applicable in the fact and circumstances of the present case and preparation of any such SAL without notice to terminal beneficiary does not constitute any breach of the principle of natural justice in absence of any fiduciary or contractual relationship amongst the insurer, banker and the borrower.

27. Then comes the question of maintainability of the writ petition under Article 226 of the Constitution of India.

28. Learned lawyer for the respondent No.2 has contended that neither any statutory nor fundamental right of the petitioner has been affected by the impugned communication of ECGC and as such he is not entitled to claim any protection from the Writ Court and his prayer for deleting the name from SAL cannot be entertained. He has relied upon the principle laid down in WA No.767 of 1989 decided by a Division Bench of the Hon’ble High Court of Kerala. In similar situation their Lordships are pleased to hold that prayer for quashing the name of the appellant from the Specific Approval List is one which falls normally outside the scope of the writ jurisdiction of the Court because it is neither for enforcement of a statutory right nor any fundamental right. It is meant only for the guidance of the corporation itself. The relief claimed by the appellant is to prevent the respondent ECGC from exercising greater care and caution but no such relief can be granted to prevent a government company from exercising due care and caution. In these days acting with utmost carelessness is the

order of the day. If some procedure has been established for dealing with certain amount of care and caution their Lordships failed to conceive how the Court can come in the way of such a salutary procedure being followed by a government company. From this point of view their Lordships held that such a prayer is beyond the scope of writ jurisdiction.

29. Learned lawyer for the petitioner on the contrary has drawn my attention to two facts. In support of his contention firstly he has tried to impress upon me the effect of communication being made under No. UCO/IBB/ADV/38/07/08 dated 4.5.07 addressed to the Assistant Manager Export Credit Guarantee Corporation of India Limited. In the said letter the Chief Relationship Manager has stated that M/s. Silchar Industrial Gases Ltd., has repaid their dues under a compromise settlement. There are no dues to their international bank branch of several companies namely Kamrup Industrial Gases Ltd., International Industrial Gases Ltd., International Electrodes (Howrah). Ltd., and Andaman Industrial Gases Ltd. As such ECGC was requested by the bank to remove the names of the Silchar Industrial Gases Ltd., (Respondent No.6) and aforesaid other companies from the SAL. In the same communication the bank further undertook that payment of the share of ECGC in recoveries made by bank is a subject to be settled between ECGC and their branch. Meanwhile, the name of the companies may be removed from SAL in respect of which there is no dues. Needless to say that this segregation of the interest of insurer by the Bank and commitment to settle such dispute separately is another proof of the fact that there is no fiduciary relation amongst the insurer, bank and the borrower.

30. Ld. Lawyer for the petitioner contends that nevertheless, the respondent No.2 ECGC retained the name of respondent No.6 in the SAL which is arbitrary. I do not subscribe to such views rendered by learned lawyer for the petitioner because from such letter it is apparent that the bank has very cleverly avoided to settle the claim of the insurer against the aforesaid defaulting companies which have amicably settled their claim with the bank secretly without consent of the insurer and as a consequence they have sustained loss of Rs.9,96,667/-. Pending settlement of the claims of the insurer the bank cannot insist the insurer to remove the name of the defaulter company from their SAL which is inconsistent and derogatory to the interest of the insurance company and opposed the doctrine of natural justice. Such a stand taken by the Bank (Annexure P-7 of the writ petition) is also opposed to public policy as their conduct in my opinion is not only denial of any fiduciary relation amongst the insurer, bank and the borrower but also a breach of trust reposed upon each other by the parties in same commercial transaction.

31. The second contention of the learned lawyer is that the petitioner International Industrial Gases Limited is an independent unit and it had never any relation with respondent No.6 Silchar Industrial Gases Limited and therefore, on account of default on the part of the respondent No.6 the petitioner’s name cannot be included in the SAL. The respondent No.2 has

averred in para 3 (xi) of the A.O. that the petitioner is an associate/connected unit of respondent No.6 had earlier approached Allahabad Bank (respondent No.4) which is a Bank enjoying pre-approved Indemnity (WTPCG /WTPSG covers) from ECGC in respect of loans made available to exporters for credit facility. The respondent does not know as to how the petitioner's request was dealt with by Respondent No.4. They have also annexed a letter dated 10th January, 1990 (Annexure R-1) to show that M/s. Silchar Industrial Gases Limited is a public Limited Company and Mr. D. K. Garg is the Managing Director of the Company. He has also referred to annexure (R-8 of A.O.) being letter No.1BB/Advocates/365/92 dated 29th October, 1992 issued by the Chief Manager, UCO Bank addressed to the Regional Manager ECGC with which the bank sent a report on default in the prescribed format in respect of packing credit advance. In the said form against item No.2 M/s. Silchar Industrial Gases Ltd., was shown as exporter showing the names of the proprietors /directors as Mr. D. K. Garg, Mr. Himangshu Budhdeo and Miss Hriti Garg against column No.4. The names and addresses of five associate firms were shown as (a) Kamrup Industrial Gases Ltd. (b) International Industrial Gases Ltd. (c) The Industrial Electrodes (Howrah) Pvt. Ltd. (d) The Andul Industrial Gases Ltd. (address of all companies –7 Camack Street, Kolkata-17).

32. Thus it is evident that all those companies were dealing with the commodity namely, Frozan Shrim to Japan. It is also known from the letter dated 10.04.93 of the Chief Manager UCO Bank addressed to Respondent No. 2 that all aforesaid five companies were shown against column No.4 as associate firms and in column No.9 (Page 33 of A.O.) the name of Mr. D. K. Garg, Director appears to be as one of the seven guarantors and shown as the partner of the Calcutta Real Estate all the five sister concerns are the owners of the property mortgaged to them showing their common interest in the export business. The said Mr. D. K. Garg is the father of the Nikhilesh Kumar Garg, Director of International Industrial Gases Limited, who is the present writ petitioner. From the above transaction and sanguinary relationship it is apparent that respondent No.6 is a sister concern of the writ petitioner and the respondent No.2 has rightly included the names of respondent No.6 in their SAL along with the writ petitioner.

33. In this connection learned lawyer for respondent No.2 has drawn my attention to a similar case dealt with by Hon'ble Madras High Court in Writ Appeal No.717 and 718 of 1999. In para 13 of the said judgment the Hon'ble Madras High Court also considered the relationship of the father with a sister concern for which the inclusion of the sister concern in the SAL was seemed to be justified and upheld by their Lordships. In para 14 above extract from the guidelines framed by the respondent No.2 has already been quoted. From proviso to clause 11.2.(iv) it will appear that the insurer, while placing the name of an exporter under SAL, may also

consider inclusion of the names of sister concerns as the financial difficulties of the exporter might adversely affect their financial position as well. Therefore, in following such guidelines conduct of ECGC cannot be treated as illegal, mala fide, arbitrary and violation of the principles of natural justice.

34. Therefore, I hold that in view of their specific provision contained in clause11.2 (iv) on account of default of the respondent No.6 Silchar Industrial Gases Limited, the name of the petitioner being sister concern has rightly been included in their Specific Approval List by respondent No.2 and in doing so they have not exceeded their jurisdiction in exercise of such discretionary power and the Writ Court has nothing to interfere with such policy decision. All the four points as at para 11 above are thus decided in the negative.

35. Considering all these aspects I hold that the instant writ petition is not maintainable at all and there is no merit both in law and in fact in this writ petition which is accordingly dismissed. The CAN being No.4399 of 2008 is thus also disposed of. I make no order as to cost.

36. Urgent photostat certified copy of this judgment be supplied to the party or parties, if applied for.

(Syamal Kanti Chakrabarti, J