

(2011) 04 DEL CK 0034

In the Delhi High Court

Case No : Writ Petition (C) 13522 of 2009 and CMs 15068/09 and 3998 of 2010

Alstom Projects India Ltd. and Another

APPELLANT

Vs

Oriental Insurance Company Limited

RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Insurance Act, 1938 — Section 64VB

Insurance Regulatory and Development Authority Act, 1999 — Section 14(2)

Insurance Regulatory Development Authority (Brokers Regulations), 2002 —
Regulation 21, 3

Citation : (2011) 5 AD 254 : (2011) 179 DLT 538 : (2011) 123 DRJ 536 :
(2011) 3 ILR Delhi 410 : (2011) 6 RCR(Civil) 285

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rajiv Nayar and Sulabh Tewari, for the Appellant; Vishnu Mehra, for the Respondent

Final Decision : Dismissed

Judgement

S. Muralidhar, J.—The Petitioners challenge a demand raised by the Respondent Oriental Insurance Company Ltd. (OICL) on Petitioner No. 1 Alstom Projects India Ltd. (APIL) for an additional premium in the sum of Rs. 1,49,88,732/- and applicable service tax in relation to an Erection All Risk Insurance (EARI) cover policy issued by OICL.

Background facts

2. APIL, having its registered office at Mumbai, is stated to be engaged in the business of design, manufacture, installation and servicing of power generation equipments in India and abroad. Petitioner No. 2 is stated to be a shareholder and Director of APIL. APIL and the Gujarat State Electricity Corporation Ltd. (GSECL) entered into an Agreement dated 27th April, 2007 for Onshore Services under which APIL was required to design, engineer, procure equipment,

materials, supplies and carry out erection, conduct testing and commissioning of a 370 MW combined cycle power plant in Surat, Gujarat. Alstom Switzerland Ltd. (ASL) entered into an agreement on the same date with GSECL for Offshore Equipment and Spare Parts Supply (CIF) under which ASL was required to design, engineer, procure and manufacture, carry out testing, shop assembly, pack, and transport the equipment, materials, supplies on a CIF basis pertaining to the power plant. Work for the power plant commenced on 29th May 2007 and the reliability run at the site was completed on 18th November 2009.

3. APIL invited bids from OICL, M/s. United India Insurance Company Ltd. (UIIL) and M/s. ICICI Lombard General Insurance Company Ltd. (ILGICL) through its insurance broker, M/s. Aon Global Insurance Brokers Pvt. Ltd. ('Aon Global') for taking an EARI cover for covering material damage, third party liability and other add on covers as well as a Marine Insurance cover for the power plant. The requirements of APL were communicated to each of the aforementioned insurance companies by Aon Global by quote slips on 4th October 2007 and invitation for final quotes was sent on 6th November 2007. It is stated that while OICL submitted a quote of Rs. 6,64,88,287/-, UIIL submitted a quote of Rs. 6,13,96,316/- and ILGICL a quote of Rs. 6,82,74,471. OICL by its letter dated 7th November, 2007 offered to provide EARI cover at a premium of Rs. 6,25,42,060/- and Marine Insurance cover at a premium of Rs. 39,46,227/- to be paid in specified installments. APIL states that although OICL's offer was not the lowest, APIL accepted it in view of the long standing relationship between the parties and the representation and assurance of OICL that it would provide the best standards of services under the policy to be concluded between the parties. Upon APIL's acceptance of OICL's offer, OICL issued both a Marine Policy as well as an EARI Policy. OICL was the lead insurer with a share of 50% in the sum insured and in the premium whereas UIIL and ILGICL were the other insurers with a share of 25% each in the sum insured and in the premium. The EARI Policy stipulated in the collective insurance clause that OICL would be responsible for issuing and administering the policy and the remaining insurers agreed to follow OICL on all issues concerning policy interpretation and indemnification. The policy was extended by a further period of three months by way of endorsement dated 12th October, 2009. The EARI Policy was valid till 7th January, 2010. The period of 24 months of extended maintenance cover commenced from 12th November, 2009 and was to be completed on 11th November, 2011.

4. It is stated that APIL paid the requisite premium under the EARI Policy in six agreed installments, the last of which was paid before the due date. The total premium of Rs. 3,54,39,996/- was paid by the Petitioner to OICL excluding the premium paid for extending the EARI Policy of three months. After accounting for the payment made by ASL, the balance premium of Rs. 5,36,381/- and Swiss Francs 99,098 were paid respectively by APIL and ASL on 8th November, 2007.

5. On 6th July 2009 APIL was surprised to receive a notice dated 3rd June, 2009

from the OICL raising a demand in the sum of Rs. 1,49,88,372/- on account of the Comptroller and Auditor General (CAG) having objected to an alleged 'excess discount' over and above the permissible discount of 51.25% that had been given by the OICL to APIL. OICL further demanded that the differential premium amount should be paid at the earliest to enable OICL settle the CAG query and that failure to do so would amount to violation of Section 64VB of the Insurance Act, 1938 and the claims of APIL would not be admissible under the EARI Policy as per the regulations of the Insurance Regulatory and Development Authority (IRDA). Along with the impugned notice, OICL attached a copy of the letter issued to it by the Audit Board II, Ministry of Finance, Department of Financial Services, Government of India. The CAG pointed out that OICL had allowed a discount of more than 51.25% which was the maximum limit permitted by the IRDA. This had resulted in an alleged short collection of the premium amounting to approximately Rs. 1.5 crores. OICL replied to the CAG in May, 2009. However, the CAG found the explanation untenable and observed that non-adherence to the IRDA guidelines/norms would be viewed as a breach of Section 14(2)(i) of the IRDA Act, 1999. APIL claims that at a meeting on 13th August, 2009 when APIL stated that the demand for additional premium had no legal basis, OICL had stated that it would confer internally and revert as to the tenability of its demand for payment of additional premium. However, OICL sent a reminder to APIL on 21st August, 2009 stating that the CAG was pressing hard for immediate compliance and recovery of the differential premium amount. It is stated that on OICL's request, the CAG had extended the deadline till 10th September, 2009. On 9th September, 2009, the OICL sent APIL the calculations that purportedly formed the basis of the impugned notice and reiterated the claim for payment of the differential premium. OICL wrote to APIL on 28th October, 2009 stating that in the event the payment of the differential premium amount was not made before 30th October, 2009 OICL would be "off cover". OICL wrote to APIL on 24th November, 2009 stating that despite its best efforts the CAG query could not be dropped. Accordingly, OICL sent to APIL the impugned notice of cancellation of the EARI Policy in the event that the differential premium amount was not paid by 10th December 2009.

6. On 3rd December 2009, while issuing notice to OICL it was directed by this Court that OICL would not terminate the policy on the ground of non-payment by APIL of the differential premium of Rs. 1,49,88,372/- along with service tax. However, APIL was directed to furnish an undertaking that it would pay the said sum in case the stay application/writ petition was dismissed. Thereafter APIL filed an affidavit of undertaking in the above terms.

Stand of OICL

7. In the counter affidavit it is first submitted that the writ jurisdiction under Article 226 of the Constitution could not be invoked as the disputes have arisen under a policy of insurance which is in effect a contract between the insurer and the insured. It is submitted that an efficacious alternative remedy was available

to the Petitioner. Secondly, it is submitted that under General Condition No. X of the EARI Policy it was permissible for OCIL to cancel the policy at any time by giving 15 days" notice to the insured. Referring to the decision of the Supreme Court in General Assurance Society Ltd. Vs. Chandumull Jain and Another, it is submitted that such a condition was a reasonable one and gave sufficient discretion to OCIL not to continue the EARI policy on the ground of the failure by APIL to make payment of the differential premium. Further the failure on the part of APIL to make payment of the differential premium was a violation of Section 64VB of the Insurance Act, 1938 (as amended).

8. Thirdly it is submitted by OICL that Aon Global was fully conversant with the provisions of the Insurance Regulatory Development Authority (Brokers Regulations) 2002. The negotiations for working out better terms of premium with APIL were going on since March, 2007. It is stated that in the context of the tariff regime which was undergoing constant change from 1st January, 2007 till October, 2007, the movement in the insurance market was closely watched by insurance brokers and through them the insured themselves. By a circular dated 25th June 2007, IRDA announced that "Effective from 1st September, 2007, the control on rates with regard to fire, engineering and workmen"s compensation insurance classes of business shall be totally removed." In circular dated 13th August, 2007 of the IRDA, it was stated that "subject to insurers achieving a satisfactory state of compliance within the month of August, 2007 and filing any revised rates schedules or approach note as applicable, the relaxation of control on pricing can be given effect to from 1 November 2007." It is stated that on 29th October, 2007, the IRDA advised the insurers not to implement the rates fixed by the OICL and to follow rates that were agreed to and communicated by its earlier circular dated 13th March, 2007. It is stated that the differential premium amount became payable on account of the statutory nature of the demand and, therefore, was permissible in law. It is maintained that there was nothing unusual in the letter dated 6th July, 2009 of the OICL calling upon APIL to pay a sum of Rs. 1,49,88,372/- as the differential premium amount.

Submissions of Counsel

9. Mr. Rajiv Nayar, learned senior counsel appearing for the Petitioners submitted that once the insurance policy was issued, it constituted a complete contract incorporating the terms and conditions including the premium amount. It could not be subsequently altered by either party to the contract. None of the conditions spelt out in Clause X of the Insurance Policy were attracted. In other words, the insurance policy could not be cancelled or revoked on account of non-payment of the additional premium, the demand for which was raised after the insurance contract had been concluded. According to him, there is no clause in the EARI policy permitting the raising of such demand for additional premium. He submits that this is a classic case of an arbitrary action on the part of OICL, which was amenable to Article 226 of the Constitution. Relying on the passages in the decision of the Supreme Court in ABL International Ltd. and Another Vs.

Export Credit Guarantee Corporation of India Ltd. and Others, it is submitted that against an arbitrary action under Article 14 of the Constitution, a writ petition would lie, notwithstanding the fact that dispute arose out of a contract. He also places reliance on the judgments of this Court in Pioneer Publicity Corporation v. Delhi Transport Corporation 2003 (2) RAJ 132 and Atlas Interactive (India) Pvt. Ltd. v. Bharat Sanchar Nigam Limited 2005 (40) RAJ 585. He also relied upon the observations in United India Insurance Company Limited Vs. Manubhai Dharmasinhbhai Gajera and Others,

10. Mr. Vishnu Mehra, learned Counsel appearing for the Respondent-OICL submitted that the facts in ABL International Ltd. (supra) were distinguishable. He submitted that the decision of the Supreme Court in General Assurance Society Ltd. (supra) would apply. He also placed reliance on the judgments of this Court in G. Ram Vs. Delhi Development Authority, and Dr. Sanjay Gupta Vs. Dr. Shroff's Charity Eye Hospital, Adverting to Regulation 3 of the IRDA (Brokers Regulations) 2002, Mr. Mehra submitted that Aon Global was fully aware of the possibility of there being an enhanced premium demand and, therefore, APIL could not be said to have been taken by surprise by the demand. He submitted that OICL was constrained to raise the demand only on account of CAG's observations and had no option in the matter. In the circumstances, the impugned demand for additional premium could not be said to be arbitrary or unreasonable.

Maintainability of the petition

11. As regards the maintainability of the writ petition, the decision in ABL International Ltd. is relevant and requires to be referred to at some length. The facts of the said case were that Rassik Woodworth Limited (RWL) entered into a contract with State-owned Corporation of Kazakhstan (Kazakh Corporation) for supply of 3000 MT of tea. The payment for the tea exported was to be made by the Kazakh Corporation by barter of goods mentioned in the schedule to the said agreement within 120 days of the date of delivery by the exporter. The payment was to be guaranteed by the Government of Kazakhstan. As per the amendment to the agreement, it was provided that if the contract of barter of goods could not be finalised for any reason, then the Kazakh Corporation would pay to the exporter for the goods received by it in US dollars within 120 days from the date of the delivery. This amended agreement also provided for a guarantee being given by the Ministry of Foreign Economic Relations of Kazakhstan from prompt payment of such consideration. RWL subsequently assign a part of the said export contract with the Kazakh Corporation in favour of ABL International Ltd. on the same terms. On a direction issued by the Reserve Bank of India to cover the risk arising out of the export of tea made by the Appellants as per the assigned contract, ABL International Ltd. approached Export Credit Guarantee Corporation of India Ltd. (ECGCIL) to insure the risk of payment of consideration that was involved in the said contract of export. Thereafter ECGCIL issued a comprehensive risk policy effect from 23rd September, 1993 to 30th September,

1995. On the failure of the Kazakh Corporation to pay the balance consideration and the Kazakhstan Government to fulfill its guarantee, ABL International Ltd. made a claim on ECGCIL. This claim was repudiated by ECGCIL stating that ABL International Ltd. had changed the terms of the contract without consulting ECGCIL. Thereupon, a writ petition was filed in the Calcutta High Court. After holding the writ petition to be maintainable, the learned Single Judge of the Calcutta High Court issued the directions, as prayed for requiring ECGCIL to honour the claim. A Division Bench of the Calcutta High Court reversed the judgment of the learned Single Judge holding that the petition raised disputed questions of fact and could not have been adjudicated in writ proceedings under Article 226 of the Constitution. The Supreme Court allowed the appeal of ABL International Ltd. On the question of maintainability of the writ petition under Article 226 of the Constitution, after discussing the judgment of the Court in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, and distinguishing the judgment in *VST Industries Ltd. Vs. VST Industries Workers' Union and Another*, the Supreme Court in *ABL International Ltd.* observed as follows (SCC, p. 570):

... once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the Appellants the first Respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first Respondent.

12. The objection raised by OCIL as to maintainability of the present petition is more or less similar to what has been answered in the negative in the above decision. Consequently, this Court rejects the preliminary objection raised by OCIL. However, the question remains whether in the facts of the present case, OICL can be said to have acted arbitrarily.

Is the impugned demand for additional premium arbitrary?

13. General Condition No. X of the EARI policy reads as under:

... This insurance may also at any time be terminated at the option of the Insurer by 15 days notice to that effect being given to the Insured in which case the insurers shall be liable to repay on demand a rateable proportion of the premium for the unexpired term from the date of cancellation.

14. As rightly pointed out by the learned Counsel for the Respondent, such a condition is legally valid and binding. In *General Assurance Society Ltd.*, it was held that a condition in an insurance policy giving mutual rights to parties to terminate the insurance at any time is a common condition and must be accepted as reasonable. It was emphasized that "the right to terminate at will, cannot, by reason of the circumstances be read as a right to terminate for a

reasonable cause." It was explained in para 19 of the said judgment that "the reason of the rule appears to be that where parties agree upon certain terms which are to regulate their relationship, it is not for the court to make a new contract, however reasonable, if the parties have not made it for themselves." It was further observed in para 20 that "the cancellation was done at time when no one could say with any degree of certainty that the houses were in such danger that the loss had commenced or become inevitable..... The assurers were, therefore, within their rights under condition 10 of the policy to cancel it. As the policy was not ready, they were justified in executing it and cancelling it. The right of the Plaintiff to the policy and to enforce it was lost by the legal action of cancellation."

15. The decision in United India Insurance Company Limited is distinguishable on facts. The facts in the said case were not disputed and in those circumstances it was held that a judicial review of the impugned action of the insurance companies was permissible. The insurance companies were held bound by the terms of the Mediclaim Insurance. However, there, the insured persons had already undergone the risk and their subsequent claims were rejected. In the instant case the demand for additional premium has been raised by OICL prior to any claim by APIL. The case in hand is more or less similar to the facts in General Assurance Society Ltd.

16. The question, therefore, really boils down to this: whether in making a demand for additional premium and in seeking to cancel the policy on account of non-payment of such premium, the Respondent has acted arbitrarily and unreasonably. The demand for additional premium was not raised immediately upon the CAG pointing out to OICL that the maximum discount which could be offered would not be higher than 51.25% in terms of the IRDA's norms. It is in this context that the provision of Section 64VB of the Insurance Act, 1938 is relevant.

17. The OICL was undoubtedly required to function in terms of the statutory framework. The IRDA Brokers Regulations and the Code of Conduct under Regulation 21 applied to Aon Global the insurance broker which negotiated the EARI policy on behalf of APIL. Equally, the IRDA Regulations were binding on the OICL. How much of a risk can be covered by the insurance company and how much discount it can offer are obviously circumscribed by the IRDA Regulations and norms announced from time to time. During the price control regime, which was in force till 31st October 2007, OICL did not have any option but to comply with such guidelines and circulars.

18. The correspondence between the parties shows that OICL itself took up the matter of dropping the CAG query. The letter dated 24th November 2009 from OICL to APIL acknowledges this. It states "However we regret to state that this being a CAG query, we have not been able to get it dropped in spite of our best efforts and would thus request you to please remit the additional premium to us." This was also acknowledged earlier by APIL in a letter dated 30th October,

2009 to OICL stating "We understand that pursuant to our request in respect of withdrawal of demand for additional premium, the senior officials from Oriental are pursuing the matter with the Ministry of Finance for considering the tenability of the demand and its withdrawal." The action of OICL in raising the demand for additional premium was during the period when the de-tariff regime had not come into existence. The Petitioner could not be said to be unaware of statutory regime and the statutory constraints under which the OICL had to work. In the above circumstances, it is not possible for this Court to conclude that in raising the demand for additional premium, which was necessitated on account of the note of the CAG, OICL acted unreasonably or arbitrarily.

19. Consequently, this Court does not find any merit in the writ petition and it is dismissed as such. All the pending applications stand disposed of.

20. In terms of the affidavit of undertaking filed by the Petitioner in this Court, it shall make payment of the impugned demand of Rs. 1,49,88,372/- along with service tax to the OICL within a period of two weeks from today. The said amount will be paid together with simple interest at the rate of 9% per annum for the period 10th November, 2009 till the date of payment.