

(1969) 09 BOM CK 0005

In the Bombay High Court

Case No : Comp. Petition No. 98 of 1969

In Re: British India General Insurance Co. Ltd.

Date of Decision : 10-09-1969

Acts Referred:

Companies Act, 1956 — Section 433, 434, 434(1), 435(1)
Contract Act, 1872 — Section 124

Citation : AIR 1971 Bom 102

Hon'ble Judges : Kantawala, J

Bench : Single Bench

Advocate : F.S. Nariman, instructed by Mulla and Mulla and Craigie Blunt and Caroe, S.J. Sorabjee and I.M. Chagal, instructed by Gagrath and Co, for the Appellant;

Judgement

1. This petition is filed for winding up of the British India General Insurance Company Ltd. (hereinafter referred to as "the Company") on the ground that it is unable to pay its debt. The company carried on business of insurance. The petitioner used to carry on the business inter alia of producing and distributing brochures entitled "Cricket's in The Air" during the visits of foreign cricketing teams in India. This business was carried on by him in the name and style of Messrs. Engisports, Bombay. In or about the year 1966. the petitioner had taken out what he described a special contingency policy to cover the risk of non-production and/or non-distribution of his brochures during the tour of the West Indies Cricket Team in the year 1966-67. In or about October 1968 it was reported that the M. C. C. Cricket Team was likely to tour India during December 1968 or January-February 1969. Upon payment of a premium of Rs. 800/- the petitioner took from the Company a special contingency policy being policy No. SC-A-82812 dated October 15, 1968 with a view to insure himself against the risk of non-publication and/or non-production of his proposed brochure during the test match to be played by the M. C. C. Cricket Team. The insurance was to be effective from October 11, 1968 and was to continue till the date of the distribution of the said brochure at the test match but not later than the end of February 1969. It is the petitioner's case that upon a true construction of the

policy, it constitutes a contract between the petitioner and the Company inter alia to pay a sum of Rs. 65,000/- in the event of the happening or materialisation of any of the contingencies specified in the said policy and in particular in the event of the proposed MCC Test Match not taking place in Bombay for any reason whatsoever. After obtaining this policy, according to the petitioner, by about November 12, 1968 he collected confirmed advertisement orders in a sum of Rs. 62,400/- and was awaiting the receipt of further advertisement orders aggregating to about Rs. 23900/- from persons who had regularly advertised in the petitioner's past brochures. In or about the third week of November 1968 it was announced that the proposed cricket tour of the M. C. C. Cricket team was cancelled for want of sanction of foreign exchange by the Central Government. It is the case of the petitioner that upon the cancellation of the said M. C. C. Test Match in Bombay, the contingency specified in the said policy materialised and consequently there became due and payable by the company to the petitioner a sum of Rs. 65,000/- as provided by the said policy. By his letter dated November 25, 1968 the petitioner called upon the Company to pay the said sum of Rupees 65,000 as a consequential loss. The Company by its manager's letter dated November 30, 1968 required the petitioner to produce the relevant books of accounts and papers before Messrs. Mehta and Padamsy, who were appointed by the Company as independent professional surveyors. Messrs. Mehta and Padamsy by their letter dated December 7, 1968 acknowledged that the petitioner had produced before them the lists (1) of confirmed booking of advertisements of Rs. 62,400/- and (2) of regular clients' advertisements of Rs. 23,950/-. By the said letter Messrs. Mehta and Padamsy required the petitioner to produce various documents therein specified in order to enable them to assess and certify the loss. By his letter dated December 10, 1968 the petitioner adopted the attitude that his claim for Rs. 65,000/- was pursuant to the policy taken by him and it was unnecessary for him to produce any proof or evidence of the consequential loss suffered by him. Thereupon further correspondence ensued between the petitioner and the Company. Ultimately by his Attorney's letter dated January 21, 1969 the petitioner gave a notice calling upon the Company to pay the loss in the sum of Rs. 65,000/ within three weeks of the receipt of the said notice. This notice was treated by him as a statutory notice under the provisions of the Companies Act, 1956. By the said notice, the attorneys of the petitioner informed the Company that in the event of the non-payment of the petitioner's dues he would adopt appropriate proceedings for liquidation of the Company. By its attorney's letter dated February 5, 1969 the Company resisted the claim that was made by the petitioner. In this letter, the Company pointed out that the policy of insurance was issued relying upon certain representations made by the petitioner which are specified in this letter. They also contended that the risk covered by the policy was a loss of the cost of getting the advertisements printed which loss was estimated by the petitioner in anticipation at Rs. 65,000/-. By this letter, the Company pointed out that the threat of adopting winding up proceedings against the company was unjustified, that it was an attempt to terrorise the company to accept and pay the claim

which was not justified at all; that a winding up petition was not a way of seeking to enforce a payment which was bona fide disputed. Thereupon further correspondence ensued between the petitioner and the company but the company was unwilling to comply with the request of the petitioner to pay Rupees 65,000/-. On August 8, 1969 the petitioner presented to this Court a petition for winding up of the Company on the ground that the Company had neglected to pay the debts in spite of a statutory notice being served upon the Company. It was alleged that the company was unable to pay the debts and was in insolvent circumstances.

2. This petition was accepted by this Court on August 8, 1969 and a notice was directed to be issued to the Company asking it to show cause why the winding up petition should not be admitted.

3. Pursuant to this notice, the Company appeared and filed an affidavit in reply showing cause against the admission of this petition. It was inter alia pointed out by the Company in its affidavit that apart from collecting the advertisement orders in the sum of Rs. 62,400/- the petitioner did not take any steps whatsoever towards the printing or publication of the M. C. C. brochure. The Company denied that the petitioner was entitled to the sum of Rs. 65,000/-. It was contended on behalf of the Company that the petitioner had incurred no loss with regard to the cost of printing the advertisements. It was also urged that the Policy of Insurance provided for a disputed claim to be referred to arbitration; that the petition was filed only to bring pressure to bear upon the Company to allow and pay the claim made by the petitioner, without his having justified it by requisite documentary evidence. The company contended that the petitioner had not expended any amount whatsoever towards the printing of the advertisements and nothing was due and payable to the petitioner by the company under the policy.

4. The petition has now reached hearing to consider the question whether it should be admitted and directions be given thereon, Mr. Sorabji on behalf of the petitioner contended that the policy taken by the petitioner from the Company was a special contingency policy; that it was not a contract of indemnity; that upon the happening of the event specified in the policy, it was obligatory upon the Company to pay the sum of Rs. 65,000/- without inquiring into the question of actual loss suffered by him. It was also urged by him that it was a valued policy and the Company was liable to pay the sum of Rs. 65,000/- to the petitioner in the events that have happened. According to him, as the claim of the petitioner was not satisfied in spite of service of a statutory notice dated January 21, 1969, the Company must be deemed to be unable to pay its debts in accordance with the provisions of Section 434(1)(a) of the Companies Act, 1956. He, therefore, submitted that this is a fit case where the winding up petition should be admitted and consequential directions be given by the Court

5. On the other hand, Mr. Nari-man on behalf of the Company contended that the policy merely contained a contract of indemnity; that it was not a consequential

loss policy which specifically insured profits. He urged that the present policy was issued in favour of the petitioner relying upon the various representations which are set out in the Company's attorney's letter dated February 5, 1969 addressed to the petitioner's attorneys. He submitted that the policy was not, what is normally called in Insurance Law a valued policy, that having regard to the terms and conditions of the policy, the petitioner was only entitled to claim a loss that may be suffered by him by reason of cost of advertisements being incurred by him; that the sum of Rs. 65,000/- mentioned in the policy was the maximum amount that could, be claimed by way of loss under the policy. He also pointed out that having regard to the terms and conditions of the policy, there was an arbitration clause and an award of the arbitrators as therein specified was a condition precedent to any effective claim being made by the petitioner. His submission is that there is a bona fide dispute as regards the existence of the liability of the Company under the Policy and the quantum of the amount that can be claimed by the petitioner as the insured. His submission is that when such is the position, the petition for winding up is an abuse of the process of the Court

6. Though it is alleged in the petition that the Company is insolvent, at the hearing Mr. Sorabji fairly conceded that it is not the case of the petitioner that the Company is commercially Insolvent. In fact as pointed out by Mr. Nariman on behalf of the Company, there are cash amount lying to the credit of the Company in its banking accounts to the tune of Rs. 78 lacs. The only ground on which the petition is pressed at this stage is whether the company can be deemed to be unable to pay its debts by reason of its failure or neglect to pay the amount in spite of the service of the statutory notice u/s 435(1)(a) of the Companies Act, 1956.

7. u/s 433 of the Companies Act, a company may be wound up by the Court inter alia on the ground that it is unable to pay its debts. Section 434 enumerates the circumstances where a company may be deemed unable to pay its debts. We are only concerned in the present case with the provisions of Sub-section (1) (a) of Section 434. Under that provision, a Company shall be deemed to be unable to pay its debts if a creditor or assignee or otherwise to whom the Company is indebted in a sum exceeding Rs. 500 then due, has served on the company by causing it to be delivered at its registered office by registered post or otherwise a demand under his hand requiring the Company to pay the sum so due and the Company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor,

8. Under this provision, a company can be wound up on a petition of a creditor only if it is unable to pay its Just debts. The inability is indicated by its neglect to pay after a proper demand and the lapse of three weeks. Such neglect must be judged by the facts of each case. Where the defence is that the debt is disputed all that the Court first has to see is whether the dispute on the face of it is genuine or merely a cloak for the Company's real inability to pay just debts. See *Tulsidas Lallubhai Vs. The Bharatkhand Cotton Mills Co. Ltd.* ,

9. Circumstances relating to inability of the Company to pay its debts are now well settled. It is unnecessary to refer to the various cases on this point. It will be enough if reference is made to the decision of the Supreme Court in *Amalgamated Commercial Traders (P.) Ltd. Vs. A.C.K. Krishnaswami and Another*, wherein the Supreme Court has approved of the law laid down in *Buckley* on the Companies Acts. 13th Edition, p. 451. It is there observed: "It is well settled that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the Court. At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order."

10. The claim is made by the petitioner under a policy of insurance Issued by the Company. The policy is headed "Special Contingency Policy." The operative part of this policy is as under:

"Now this policy witnesseth that during the period or during the continuance of this policy by renewal and subject to the terms, conditions and provisos contained herein or endorsed here-on the Company shall indemnify the Insured against :--

Loss or damage by fire and/or lightning and/or burglary, housebreak-ing and theft to the undermentioned property not exceeding in respect of each or any of the several items hereunder the sum set opposite thereto respectively and not exceeding in the whole the total sum insured and not exceeding in any case the amount of insurable interest therein of the Insured at the time of the happening of the insured peril.

Blocks in trust Rs. 5,000/- . Printing charges Rs. 10,000/- . _____
Total sum insured. Rs. 15,000/-

The insurance further covers consequential loss in an amount of Rupees 65,000/- being the cost of the various advertisements such loss arising from fire, and/or lightning and/or burglary, house breaking and theft and/or non-production and non-distribution of the Borchure CRICKET'S IN THE AIR" and/or due to the proposed M. C. C. Test Match not taking place in Bombay for any reason Whatsoever."

11. It is not disputed in the present case that the M. C. C, Test Match did not take place in Bombay as the visit of the M. C. C. team was cancelled for non-availability of the foreign exchange. It is the petitioner's case that before the announcement of the news about the cancellation of the visit of the M. C. C. team to this country, he had secured confirmed orders to the tune of Rs.

62,400/- particulars of which are given in Ex. B to the petition. Besides these orders, he also expected to get further orders to the extent of Rs. 23,950/- from the usual customers whose names are also mentioned in the latter part of Ex. B to the petition. Apart from securing these orders, no further costs were incurred by him towards the costs of advertisement.

12. The first question that arises in this petition is whether the Policy contains a contract of indemnity or whether it is a special contingency policy as shown by the heading thereof. The operative part of the policy is in the form. "The Company shall indemnify the insured against" it is now well settled that the essence of any indemnity clause is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the insurers until the assured has been found liable and so sustained a loss. Sometimes it may happen that the policy may be a pure and simple contingency insurance. When such is the case, ordinarily in general terms, it may be denominated as an insurance which provides for the making of a payment in the event of specified event occurring, the payment representing either the loss or the possibility of loss which that event entails. Having regard to the heading of the policy and the terms thereof, it will be one of the questions to be decided whether it contains a mere contract of indemnity or whether it is a simple contingency insurance under which consequential loss has been specifically insured without further inquiring into the actual amount of loss sustained by the insured. Further, it is the case of the Company that this policy was issued relying upon certain representations that were made by the petitioner at the time when he approached the Company for issue of the policy. It is the case of the Company that he represented to the Company that he intended to collect advertisements from various business houses for being printed in the brochure which he proposed to bring out at the time of the M. C. C. Test Match in Bombay; that he wished to be protected inter alia against any loss which he might suffer in the course of having the advertisements printed, if the said brochure is not produced or distributed or the said proposed test match did not take place in Bombay; that the petitioner further represented that the cost of his having the advertisements printed would amount to Rs. 65,000/- and that he wished to be protected against losing that amount, if after he expended the sum, the brochure was not produced and/or not distributed for any reason whatsoever including the test match not taking place in Bombay.

13. That such representations were made was sought to be made out on behalf of the Company having regard to the wording of the preamble part of the policy of insurance. It is there stated: "Whereas P. C. Engineer, Esq., Prop; Messrs. Engisports, Bombay, has delivered to the British India General Insurance Company Limited..... certain information and particulars for the insurance hereinafter contained" A further question also arises in this petition whether the policy relied upon by the petitioner is what is commonly called a valued policy whereunder the parties agreed beforehand in estimating the value of the subject assured by way of liquidated damages or whether the

sum of Rs. 65,000/- mentioned in the policy is the maximum sum for which the insurer accepts liability. Further the policy is issued subject to the terms and conditions printed on the reverse thereof. One of the conditions therein specified, being condition No. 8, provides for reference to arbitration in respect of differences arising out of the policy. This condition inter alia contains a stipulation that it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award of such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained." The contention on behalf of the company is that as under this term, an award is made a condition precedent to any right of action or suit, it is not permissible to the petitioner to give a statutory notice u/s 434 because he has no cause of action until he has first secured the award as therein provided. These are amongst others the several complex questions and the petitioner insists upon their determination under pressure or threat of a winding up petition. This is not a case where the Company has denied its liability on frivolous or vexatious ground. The denial of liability by the Company is based upon substantial grounds. When such is the case, it cannot be said that the Company has neglected to pay the debt within the meaning of Section 434(1)(a) of the Companies Act. To permit the petitioner to agitate all the questions by resorting to a winding up petition will be an abuse of the process of the Court. The only ground on which the inability to pay the debts is pleaded is the neglect to pay within the meaning of Section 434(1)(a) of the Companies Act. It is not the case of the petitioner that the Company is commercially insolvent or is in insolvent circumstances.

14. In the result, the petition is dismissed. The costs of this petition are quantified at Rs. 500/-. Such costs will be the costs in the arbitration proceedings or in a suit, if such arbitration proceedings are commenced or suit is instituted within a period of 12 weeks from today. If no such arbitration proceedings are commenced or the suit is filed within 12 weeks from today, the petitioner shall pay the costs of the Company of this petition which are fixed at Rs. 500/-

15. Petition dismissed.