
(1996) 09 CAL CK 0032
In the Calcutta High Court
Case No : C.O. No. 10444 (W) of 1990

Mohit Kumar Saha

APPELLANT

Vs

New India Assurance Co. Ltd. and others

RESPONDENT

Date of Decision : 06-09-1996

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226
Contract Act, 1872 — Section 124
Insurance Act, 1938 — Section 46, 60(2), 68
Penal Code, 1860 (IPC) — Section 307, 326, 34, 379

Citation : (1997) ACJ 1170 : AIR 1997 Cal 179

Hon'ble Judges : Sujit Kumar Sinha, J

Bench : Single Bench

Advocate : Nigam Chakraborty, Sanjib Mishra and Mrs. Puspita Saha, for the Appellant; Biswajit Chowdhury and P.K. Paher, for the Respondent

Judgement

1. By this writ application under Article 226 of the Constitution of India the petitioner seeks inter alia a direction upon the respondent No. 1. The New India Assurance Company Ltd. ("the respondent company") for short) and its officer the 2nd, 3rd, 4th & 5th respondents "to meet fully and completely (the) petitioners claim against the insurance policy (No. 4355601460 and endorsement No. 4355630037) ("the said insurance policy" for short) referred to in the petition for the loss of the insured" truck registration No. WGB 5531 and to pay interest thereon at the rate of 18 per cent per annum as well as a direction upon the manager of the Bank of Boroda, Kharagpur Branch to adjust its dues in the loan account of the petitioner "with the amount so receivable from the respondent" company and to further forbear from proceeding against the petitioner or the guarantors or against any property belonging to them for the recovery of the dues of the Bank of Boroda in the aforesaid loan account and for other consequential reliefs. The facts leading to this writ application may briefly be stated.

2. The petitioner took out an insurance policy in respect of the aforesaid truck for

Rs. 2 lacs from the respondent company. The said insurance policy for Rs. 2 lacs was valid from 25th September, 1987 to 24th September, 1988. The said insurance policy is at annexure "A" to the writ petition.

3. During the subsistence of the aforesaid insurance policy, the said truck with its load offish-feed was stolen by the driver of the said truck with the help of an Khalasi by assaulting the father of the petitioner who was in the said truck. It is stated that the father of the petitioner sustained stabbing injuries on 19th October, 1987. The First Information Report was thereupon lodged on 20th October, 1987 with the Kotwali Police Station and a case under Sections 326/307/379/34 of the Indian Penal Code was registered by the police. The First Information Report is an annexure to the writ petition at page 48.

4. On 23rd October, 1987 the petitioner informed the Assistant Branch Manager of the respondent company at Kharagpur of the aforesaid theft (Paragraph 9 of the writ Petition).

5. It also appears from the aforesaid paragraph that similar information was also sent by the petitioner to the manager of the Bank of Baroda, Kharagpur Branch. It is record that the petitioner obtained loan of Rs. 1,49,000/- from the said bank for purchase of the said truck "for plying the same on hire for earning his livelihood from the said business" (paragraph 4 of the writ petition).

6. The petitioner lodged his claim with the respondent company for loss of his "" aforesaid truck under the said insurance policy.

7. On 14th April, 1989 the police submitted charge-sheet against Joy Prakash Chand, the driver of the said truck under Sections 326/307/379 of the Indian Penal Code. It is stated in the said charge-sheet that the said driver was absconding. A copy of the said charge-sheet is an annexure to the writ petition at pp. 60-6.

8. However by his letter dated 12th May, 1989, the Senior Divisional Manager of ther respondent company while admitting receipt of the copies of aforesaid charge-sheet intimated the respondent No. 7 as follows:--

"Since they (the police) have made specific charge against an accused person we cannot waive the possibility of recovery of the vehicle during the course of investigation..... Please note, mere disappearance of the vehicle by hizaking (hijacking) does not lead to a valid claim. Until and unless it is declared "lost" within the meaning of the insurance policy we cannot take any decision about this claim. Under this circumstance submission of final police report is "must" to substantiate the claim which can only help us to proceed further in this claim. So please bear with us and have patience for completion of police investigation and subsequently production of final report."

The aforesaid letter is at page 67 of the writ petition.

9. The aforesaid stand was reiterated by the Senior Divisional Manager of the

respondent company as mentioned in the letter dated 9th August, 1989 of the 7th respondent addressed to the petitioner. The said letter of the 7th respondent is at page 77 of the writ petition. The material portion of the said letter reads as follows:--

"We refer to the above and advise that the Senior Divisional Manager, the New India Assurance Co. Ltd. has informed us that unless they get the final police report, duly authenticated by the S.D.J.M. they will not settle the above mentioned claim."

10. The learned counsel for the petitioner is right in his submission that in taking the aforesaid stand the respondent company was labouring under a misapprehension. It cannot be disputed that the charge-sheet is indeed the final report by the police. The loss of the insured truck to the petitioner cannot also be disputed. The loss was indeed a constructive total loss which resulted in the petitioner being deprived of the possession of the insured vehicle and the same was a risk, insured against under the aforesaid insurance policy.

11. It appears that by his subsequent letter dated 17th May, 1989 the Senior Divisional Manager of the respondent company engaged one Shri Shaymal Kumar Bhadra licensed surveyor to carry out an investigation of "hijacked vehicle". The said letter is at page 68 of the writ petition. The said Shri Bhadra is the 6th respondent herein. It appears from the records produced by the respondent company pursuant to the direction of this Court that the 6th respondent by his report dated 13th July, 1989 to the respondent company stated as follows:--

"11.0 Loss Payable: The sum insured was Rs. 2 lacs. We recommend settlement of the claim at Rs. 1,87,492/- subject to the terms and condition of the policy. There is no breach of warranty. Although the chance of recovery of the vehicle is remote for the time being the insurer may pay 90% of the assessed loss" against indemnity bond from the bank and the final payment should be made after receipt of the final police report."

12. It is the case of the petitioner that on 25th September, 1989 the Senior Divisional Manager of the respondent company obtained from him a blank letter of subrogation and that the petitioner was verbally informed by him that the 6th respondent has assessed the amount of loss at Rs. 1,87,000/-.

13. However, by his letter dated 25th January, 1990 the Assistant Administrative Officer of the respondent company informed " the 7th respondent with copy of the petitioner that the Head Office of the respondent company had approved the settlement of the claim of the petitioner in the sum of Rs. 1,33,819/- and that it had further directed the respondent company to pay 75% of the said amount in the sum of Rs. 1,00,739/- "as on account payment of the approved claim amount only after receiving consent letter duly discharged by the insured & financier (the bank) as a token of acceptance of approved claim amount Rs. 1,33,819/-. The balance Rs. 33,080 can only be released after production of final police report.

So, we are sending you the loss voucher for Rupees 1,00,789/- which may please be returned to us after duly discharged by the insured & yourself along with the consent letter enabling us to take further steps in the matter".

14. The aforesaid offer of the respondent company was not acceptable on the petitioner. In the premises, the petitioner caused letter dated 5th March, 1990 to be addressed by his advocate to the respondent company demanding justice. The said letter is an annexure to the writ petition at pp. 86-94. A copy of the said letter was also endorsed to the 7th respondent. Thereafter, the 7th respondent by his notice, addressed to the petitioner dated 24th March, 1990 called back the loan. The said notice is an annexure to the writ petition at pp. 95-96. The petitioner thereafter on 25th April, 1990, filed this writ petition in Court. This writ petition was moved upon notice to the parties before U.C."Banerjee, J., when the learned Judge directed that the aforesaid amount which had been offered to the petitioner "may be withdrawn and deposited" with the Bank of Baroda without prejudice to the rights and contentions of the petitioner. It appears that the aforesaid amount of Rs. 1,00,789/- has since been paid by the respondent company to the Bank of-Baroda, Kharagpur Branch.

15. The short question involved in this writ application is as to what amount the respondent company is liable to pay to the petitioner under its said insurance policy. Is it the amount assessed by the 6th respondent on account of the loss of the insured truck in the sum of Rs. 1,87,492 or 90% of the said amount as recommended by the said respondent dent or Rs. 1,33,819/- offered by the respondent company by its aforesaid letter dated-25th January, 1990?

16. The other question relates to the-liability of the petitioner to pay the dues of the Bank of Baroda in respect of the loan advanced by the latter to the petitioner. I shall deal with the aforesaid questions after I have completed narration of the facts. The 7th respondent did not appear at the hearing of this application nor has he filed any affidavit-in-opposition despite service on him of a copy" of this writ application.

17. The prayers in this writ application in so far as they relate to the Bank of Baroda ("the said bank" for short) are for a direction upon the said bank to adjust the loan account of the petitioner by crediting the same with the amount to be received from the said respondent company and to forbear from proceeding against the petitioner or the guarantors or against any property belonging to them for the recovery of its dues and for other consequential orders. The petitioner has also made an interim application dated 27th April, 1993 seeking an order of injunction restraining the said bank and its officers from taking recourse to any legal proceedings in enforcement of its alleged dues in the loan account and also for a direction upon the said respondent company and its officers to make payment of the outstanding dues in the petitioners loan account due to accumulation of interest from the date of loss of the insured truck. No affidavit-in-opposition has been filed by said bank or the respondent company to the aforesaid interim application of the petitioner.

18. It is stated by the petitioner in his said interim application that the said bank has adjusted his fixed deposit of Rs. 25,807.50 P. against its dues and that it has further received by aforesaid sum of Rs. 1,00,739/- pursuant to the aforesaid order of U.C. Banerjee, J. from the respondent company and that upon taking the said sums into account there should have been a credit balance of Rs. 17,513.35 P. in his loan account with the said bank. It is the further case of the petitioner that his liability on account of interest in the said loan account would not have accrued had the respondent company made payment under the aforesaid policy to the said bank in time. It is further stated that due to accrual of interest the alleged sum of Rs. 88,609.50 P. is shown by the said bank to be due and payable by him in the said loan account upto March 1993.

19. The aforesaid grievance of the petitioner appears to me to be legitimate.

20. It is stated that subsequent to the aforesaid interim application the said bank has instituted a suit against the petitioner and the guarantors in enforcement of its dues in the said loan account and that the said suit is still pending.

21. At the hearing, the learned counsel for the petitioner initially submitted that the petitioner is entitled to the full amount of the said insurance policy i.e. Rs. 2 lacs from the respondent company on account of the loan sustained by him being one of the perils insured against. During the course of hearing however it was submitted by him that, the petitioner is entitled to be paid the full amount of his claim as assessed by the licensed surveyor of the respondent company. The learned counsel also submitted that an appropriate order should be passed restraining the said bank from proceeding with its

22. The learned counsel appearing for the respondent company and its officers being the respondents Nos. 2 to 5 however took a preliminary objection that the present writ application is not maintainable on the following grounds : --

(a) As the aforesaid insurance policy was a contract between the respondent company and the petitioner the same is not amenable to the writ jurisdiction of this Court;

(b) As a corollary to the aforesaid, it cannot be said that in the instant case the respondent company or its said officers was, under any statutory duty or obligation which can be corrected by writ; .

In support of his aforesaid submissions the learned counsel cited several decisions of the Supreme Court as well as of this Court which it is not necessary to deal with in detail. It is well-settled that a Court ordinarily refrains from exercising its writ jurisdiction in the realm of private contracts as a matter of self-restraint. However, in a given case the Court may exercise its writ jurisdiction under Article 226 of the Constitution of India having regard to the special circumstances. These considerations are ordinarily relevant at the threshold when the writ petition comes to be admitted. However, as in this case, where once the writ petition is admitted by a Learned Judge it is not proper for another

Learned Judge to reject the same at the final hearing only on the ground that its subject-matter relates to a private contract.

See in this connection:--

(i) L. Hirday Narain Vs. Income Tax Officer, Bareilly,

(ii) "Dilip Kumar Ghosh v. New India Assurance Co. Ltd. (1990) 2CHN 94.

The question with regard to statutory duties and obligations is relevant in a case of a private body or person on whom such duties and obligations are cast by a statute. However it cannot be disputed that an instrumentality and/or agency of the Central Government such as the said respondent company with is a "State" within the meaning of Article 12 of the Constitution of India and its officers are perse amenable to the writ jurisdiction of this Court.

(c) Lastly, that Section 46 of the Insurance Act, 1938, does not confer any right on the petitioner as a policy-holder to invoke the writ jurisdiction of this Court. With respect, the aforesaid contention proceeds on a misconception. The short answer is that it is the Constitution of India that confers on the petitioner as a citizen such right.

23. As a matter of record in the affidavit-in-opposition filed on behalf of the respondent company and of its officers, they have specifically denied that a blank letter of subrogation was required to be filed by the petitioner or that any information of the amount assessed by the licensed surveyor was given to him.

24. Before dealing with the respective contentions of the learned counsel for the petitioner and of the said respondent company on merits it is necessary to examine the terms of the aforesaid insurance policy as well as the nature of loss suffered by the petitioner. The said insurance policy is described as "Commercial Vehicles Comprehensives Policy (India)".

25. In the schedule to the said insurance policy, forming its part, the carrying capacity of the insured truck as well as the premium paid by the petitioner is stated. Further the "insured's estimated value of vehicle" ("the estimated value" for short) in the sum of Rs. 200.000/- is also mentioned. The learned counsel for the respondent company is right in his submission that the said insurance policy is not a "valued policy". It is really in the nature of an "unvalued policy" by reason of the said estimated value. The terms "valued policy" and "unvalued policy" have been explained in the Marine Insurance Act, 1963 ("the said Act" for short).

26. In England the Courts as a matter of practice have applied the provisions of the English Marine Insurance Act to cases such as the present case for the purpose ascertaining the extent of liability of an insurer under its policy of insurance wherever the "same can be made applicable. I find no reason to depart from the aforesaid English practice in applying the provisions of the said Act to the instant case in so far as they can be made applicable for the ascertainment

of the liability of the said respondent company under its said insurance policy.

27. In the case of unvalued policy such as the said insurance policy "the measure of indemnity is the insurable value of the subject-matter insured", in the case of total loss (see Section 68 of the said Act). It is well-settled that the insurable value of the subject-matter insured such as the said truck is its market value less depreciation.

28. In the survey report submitted by the 6th respondent the aforesaid factors have been duly taken into account in assessing the insurable value of the said insured truck and the same has accordingly been determined by him in the sum of Rs. 1,87,492/-.

29. With regard to the nature of the loss sustained by the petitioner, it is quite clear that it is a constructive total loss as the petitioner has been deprived of the possession of the said insured truck by a peril insured against and it is unlikely that he can recover the same (see in this connection Section 60(2) of the said Act).

30. Admittedly, a letter of subrogation has been given by the petitioner to the said respondent company enabling the said respondent company to step into the shoes of the petitioner and thereby having the effect of the petitioner abandoning the said insured truck to the said respondent company. The said subrogation will however take effect upon payment by the respondent company of the claim of the petitioner.

31. In the circumstances it can be said that the aforesaid constructive total loss of the insured truck is being treated as an actual total loss by the parties to the said insurance policy. Indeed, the 6th respondent as it appears from his said survey report has proceeded on the basis that the loss of the said insured truck is a total loss (at page 2 of the survey report-item No. 5).

32. In the premises "the measure of indemnity" under the said insurance policy is the aforesaid sum of Rs. 1,87,492/-.

33. The learned counsel for the respondent company has however submitted that the respondent company is liable to pay only the aforesaid sum of Rs. 1,33,819/- at which the claim of the petitioner is purported to have been settled by the head office of the respondent company. He disputed the liability of the said respondent company to pay any amount in excess of the said sum and for this purpose he relied on paragraph 18 of the affidavit-in-opposition. The material portion of the said paragraph reads as follows:--

"18. I say that the claim was assessed at Rs. 1,79,092/- and due to Overloading, 75% of the said, assessed amount became Rs. 1,34,319/- (as stated in paragraphs 7 and 8 hereinbefore) out of which Rs. 500/- being the special Exclusion in terms of Endorsement No. IMT 26 of the policy was also deducted, whereby the amount payable became Rs. 1,33,819/-.....".

34. The aforesaid Endorsement No. IMT 26 does not appear by its terms to apply to this case.

35. I find the aforesaid stand taken by the said respondent company to be unacceptable. The question of overloading could only arise had there been any damage to the insured truck; but the same cannot by any stretch of imagination have any bearing on the theft of the insured truck as in the present case. Further, the claim of the petitioner has been assessed by the 6th respondent in the sum of Rs. 1,87,492/- and not at the sum of Rs. 1,79,092/- as alleged.

36. The further submission of the learned-counsel for the respondent company is that as the aforesaid sum of Rs. 1,33,819/- is not acceptable to the petitioner there exists a dispute between the parties which is referable to arbitration in terms of the arbitration clause contained in the said insurance policy. I am not impressed by the aforesaid submission, in view of my aforesaid finding that the stand taken by the respondent company is unacceptable. The said stand in my judgment is further arbitrary and unjustified. For an arbitration clause to operate, there must exist a dispute. In this case, there does not appear to be any such dispute having regard to what has been stated hereinabove.

37. In view of the aforesaid I consider that the said respondent company is liable to pay to the petitioner the sum of Rs. 1,87,492/- as assessed by the 6th respondent under the said insurance policy.

38. As regards the question of payment of interest it was submitted by learned counsel for the respondent company that the same is not provided for by the said insurance policy.

39. I am similarly not impressed by the aforesaid submission. As stated hereinabove the respondent company has maintained that it is not liable to settle the claim of the petitioner on the ground that no final report had been submitted by the police. It was fairly conceded by the learned counsel for the respondent company that the filing of the charge-sheet by the police on 14th April 1989 amounts to final report by the police. The refusal on the part of the respondent company to settle the claim of the petitioner under its said insurance policy even after 14th April, 1989 appears to me to be wrongful and unjustified. It is well-settled that the award of interest in such cases as and by way of damages is justified. Even otherwise notice has been given by the petitioner to the respondent company that he is entitled to payment of interest by his Advocate's letter dated 5th March 1990 (supra).

40. The other question relates to the rate at which interest is payable by the respondent company.

41. The learned counsel for the petitioner has submitted that the petitioner is entitled to interest at the rate of 18 per cent per annum. In support of his said submission, he has relied on the following decisions of the Supreme Court:-

(a) Life Insurance Corporation of India v. Gangadhar Viswanath Ranade (dead)

by Lrs., AIR 1990 SC 185;

(b) R. Kapur Vs. Director of Inspection (Painting and Publication) Income Tax and Another, .

42. I consider that the award of interest at the rate of 18 per cent per annum as claimed by the petitioner is justified having regard to the present conditions.

43. I am also not impressed by the submission of the learned counsel of the respondent company that no writ of mandamus can lie against the respondent company direction payment of the claim of the petitioner,

44. In my judgment, the conduct of the respondent company and its officers has neither been open nor transparent. Their conduct has been arbitrary and irrational and the same is therefore violative of Article 14 of the Constitution of India.

45. Indeed, the Supreme Court has approved the issue of Writ of and/or Order and/or Direction in the nature of Mandamus in appropriate cases by High Court -- See in this connection the case of "the Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another, , where the Supreme Court has observed (in paragraph 20 of the Report) as follows: --

"In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions" to compel the performance in a proper and lawful manner in order to prevent injustice resulting to the concerned parties....."

46. In my judgment therefore the writ of and/or Order and/ or Direction in the nature of mandamus against the respondent company is appropriate and it is further just and " proper.

47. The only question that survives for determination is as to whether the Bank of Baroda, Kharagpur Branch, is entitled to charge interest in the loan account, during the period the petitioner had been pursuing its claim under the said insurance policy against the respondent company. I have not had the advantage of considering the submissions on behalf of the said bank as none appear on its behalf at the hearing nor was any affidavit-in-opposition filed on its behalf to the main writ application or to the interim application of the petitioner. The liability of the petitioner to pay interest on the loan advanced by the said bank cannot be disputed.

48. However, in the peculiar facts and circumstances of this case I consider that it is just and proper that upon receipt of the balance of the claim amount from the respondent company, the said bank should accept the same in full and final settlement of its dues in the said loan account.

49. With regard to the question of waiver of interest by the said bank I leave the

same to be agitated by the petitioner in the suit filed by the said bank.

50. At the conclusion of hearing, the learned counsel for the petitioner and for the respondent company submitted their respective written notes of argument and the same are directed to be kept with the records of this case.

51. For the foregoing reasons I consider that it is just and proper that the following order should be made:--

(A) The respondent, The New India Assurance Co. Ltd. is directed to pay to the Bank of Baroda, Kharagpur Branch, the balance sum of Rs. S6.753/- (being the difference between the amount assessed by the 6th respondent and the amount paid by the respondent company to the Bank of Baroda in terms of the ad interim order of U.C. Banerjee, J.) under its said policy of insurance No. 4355601460;

(B) The aforesaid sum shall carry simple interest at the rate of 18 per cent per annum on and from 15th April, 1989 until payment to the said Bank of Baroda as aforesaid;

(C) The said Bank of Baroda shall accept the aforesaid payment from the respondent. The New India Assurance Co. Ltd. in full and final settlement of its claim in its loan account;

(D) The respondent, The New India Assurance Co. Ltd. shall pay to the petitioner the costs of this application assessed at Rs. 5,000/-.

52. This application is accordingly disposed of.

53. If certified copy of this order is applied for that will be given to the parties as expeditiously as possible.

54. Order accordingly.