
(2012) 07 DEL CK 0010

In the Delhi High Court

Case No : Writ Petition (C) No. 7525 of 2005

M/s. Jalpac India Ltd.

APPELLANT

Vs

United India Insurance Company Limited

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19(1)(g), 226

Marine Insurance Act, 1963 — Section 10, 18, 18(3), 19, 34

Citation : (2012) 07 DEL CK 0010

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Rajiv Tyagi and Mr. Ajay Kumar, for the Appellant; A.K. De and Mr. Devabrata Kumar, for the Respondent

Judgement

Anil Kumar, J.—The petitioner has sought quashing of the letter No. DO:XXIV:GA:485:04 dated 7th October, 2004 issued by the respondent, partially repudiating the claim of the petitioner under the Marine Policy No. 042400/21/03/00111 and has also sought directions to the respondent, to forthwith settle the claim of the petitioner as per the petitioner's letter of claim dated 23rd February, 2004 and direct the respondent to pay the amount due to the petitioner. The petitioner is a limited company, engaged in the manufacture and sale of metalized and coated films and papers. On 13th May, 2002 the petitioner agreed to purchase one vacuum metallizer (Machinery) from M/s Valmet General Limited, England for a total value of GBP 644,575. The consideration was payable in installments duly covered under irrevocable bank guarantees/letter of credit. Twenty per cent of the value of the machinery was paid by the petitioner as down payment, after which 12 installments of GBP 25,783 were paid by 5th June, 2006 and 8 more installments were payable for GBP 25,783 till 25th May, 2008. According to the petitioner he stood in the capacity of a borrower qua the State Bank of India and has discharged all his liabilities towards the foreign seller.

2. The machinery purchased by the petitioner was to be installed at the petitioner's Plant at Haldwani and in order to ensure, secured and safe delivery, the petitioner took a marine cargo (Specific Voyage Policy) bearing Policy No. 042400/21/03/00111 dated 23rd July, 2003 for a total assured sum of Rs. 5,50,91,864/- from the respondent against any loss/damage occurring to the machinery during transit from Port to Haldwani. The petitioner paid the insurance premium of Rs. 1,24,949/- on 23rd July, 2003. The premium of Rs. 1,24,949/- had been paid and another premium had been paid on the same machinery for another insurance policy, namely, Storage cum Erection Insurance Policy. According to the petitioner a total sum of Rs. 2,88,343/- was paid as premium on the Marine Cargo (Specific Voyage policy) and the Storage cum Erection Insurance Policy.

3. The machinery had arrived at Mumbai Port on 5th August, 2003 in good condition, which was duly established on inspection by the Insurance Surveyors of M/s A.S. Sheikh and Company. The inspection report dated 5th August, 2003 of M/s Sheikh and Company has been produced as Annexure P-2 by the petitioner. The survey of the boxes of the machinery did not reveal any damage to the machinery except that four of the boxes were lying in the open whereas two other boxes were at the appropriate place.

4. The machinery was delivered at the petitioner's warehouse at Haldwani on 11th August, 2003. However, on opening the packed cases, it transpired that the machinery had got damaged during the course of transit from Mumbai Port to Haldwani. Both the diffusion pumps of the vacuum metallizer had cracked and the elbow of one of the pumps had bent and was damaged beyond repair. Consequently, on 14th August, 2003 the Divisional Manager of the respondent was informed about the damage and also sought for conducting a survey for assessment of loss estimated at Rs. 50 lakhs..

5. The respondent, also deputed a Surveyor, namely Mr. J.C. Joshi, who made a survey and gave a preliminary survey report dated 16th August, 2003 and estimated the loss at Rs. 50 lakhs. Thereafter, the petitioner, lodged a claim by letter dated 23rd February, 2004 for the replacement of the damaged machinery valued at Rs. 32,45,758/- plus Custom Duty. Subsequently, the respondent appointed another Insurance Surveyor and Loss Assessor, M/s. V.K. Kharbanda & Associates, to assess the petitioner's claim for the loss or damage caused due to road or rail transit. The said loss assessor by its report dated 10th March, 2004 assessed the loss at Rs. 17,52,592/- taking into account the Custom Duty of 5% excluding the cost of nozzle assembly valued at Rs. 7,60,052/- by the petitioner, as it was not determined at the time. The said surveyor had also given an alternative loss assessment at Rs. 21,60,274/- based on the actual custom duty, and by again excluding the cost of the nozzle assembly.

6. The respondent by Order bearing No. DO:XXIV:GA:485:04 dated 7th October, 2004, however, approved only a sum of Rs. 2,26,652/- from the claim of Rs. 32,45,758/-, based on the import papers provided by the petitioner including the

Transit Insurance Certificate No. G 5502443 and G5502442. The letter dated 7th October, 2004 of the respondent is as under:

7th October, 2004

DO:XXIV:GA:485:04 Date; M/s Jalpac India Ltd. 903/911, Tolstoy House, 15, Tolstoy Marg, NEW DELHI-110001

Sub: Your Claim No. 042400/21/03/0014 UNDER MARINE POLICY NO.042400/21/03/0011

The above claim was approved by the Competent Authority for Rs. 2,26,652/ and a cheque No. 2265 dt. 1/10/04 drawn on Citi Bank was paid to you for full and final settlement of the claim. Besides the survey fee amount to Rs. 50502/ was paid to you vide cheque No. 2280/- dated 6/10/04 drawn on Citi Bank, New Delhi. As against your claim bills for Rs. 32,45,758/- the claim amount was approved for Rs. 2,26,652/- based on the import papers provided by you including the transit insurance certificates No. G5502443 and G 5502442 taken by the foreign supplier namely Valmot General Ltd. from Norwish Union. It was observed that the foreign insurer has granted insurance coverage from the beneficiary's warehouse to Openers Warehouse i.e. the transit from foreign warehouse up to final warehouse is Haldwani is covered with the other insurer also. Therefore, the liability of our company is limited only to the extent of proportionate sum insured in excess of CIF+10% of Sum Insured in our policy. In other words we are not liable to pay any amount to the extent it is covered under CIF policy of the foreign insurer. Since, the foreign insurer had given policy for CIF value only whereas we had given policy for CIF+10% of the Performa Invoice, the admissible claim under our policy works out to Rs. 2,26,652/- plus survey fees as per the calculation sheet attached.

Thanking you

Yours faithfully

(Ravi Rai)

Sr. Divl.Manager

7. The petitioner has challenged the partial repudiation of his claim in the present writ petition inter alia on the grounds that respondent has not assigned any legal and justifiable reason for restricting the claim under the policy to Rs. 2,26,652/- and proceeded on an erroneous basis that the foreign insurer had granted the insurance coverage from the seller's warehouse to the purchaser's warehouse, and therefore the respondent is not liable to pay claimed amount to the extent it was covered under the policy of the foreign insurer. The action of the respondent was contended to be contrary to Section 34 of the Marine Insurance Act, 1963 which deals with the issue of double insurance and confers certain rights upon the insured. Section 34 of the said Act contemplates that where two or more policies are affected by or on behalf of the assured on the same goods and the

sum insured exceeds the indemnity allowed then the assured is said to be over-insured by double insurance. Section 34 of the Marine Insurance Act, 1963 is as under:-

34. Double Insurance:- (1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over insured by double insurance.

(2) Where the assured is over-insured by double insurance-

(a) the assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation, for any sum received by him under any other policy, without regard to the actual value of the subject-matter insured;

(c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

8. The petitioner impugned the action of the respondent on the ground that u/s 18(3) of the Marine Insurance Act, 1963, he is entitled to receive insurable value equivalent to the prime cost of the machinery insured plus the expenses of and incidental to shipping and the charges of insurance upon the whole, whereas, the respondent without any rationale and arbitrarily has worked out the restricted liability equivalent to only 10 per cent of the Cost Insurance and Freight value (CIF value) rather than the CIF value itself of the machine damaged.

9. According to petitioner, the loss by damage to the machinery ought to have been settled by the respondents in terms of the surveyor's assessment, who were appointed by the respondent itself. The assertion of the petitioner is that his entitlement for reimbursement of the entire loss suffered and covered under the policy of marine insurance was never in doubt and u/s 10 of Marine Insurance Act, 1963 a person having a partial interest to take a policy of insurance for coverage of risks, is entitled to claim made for the entire loss suffered and it could not be repudiated in excess of 10 per cent of the CIF value. It is contended that in any case the entire sale consideration was received by the seller when he discounted the letter of credit on 14th July, 2003 and the aggregate contract prize of GBP 644,575 was realized.

10. According to the petitioner, the arbitrary, illegal and partial repudiation by the

respondent has affected the petitioner's right enshrined under Article 19 (1) (g) of the Constitution of India and is therefore, liable to be quashed. It is contended that the respondent is amenable as a "State" under Article 12 of the Constitution of India and that this Court can exercise jurisdiction even in contractual matters under Article 226 of the Constitution of India. It is urged that the respondent is liable to honor the claim of the petitioner and settle it as per the petitioner's letter of claim dated 23rd February, 2004.

11. The petitioner relied on *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, to buttress his contention that once the State or the instrumentality of a State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably. It was asserted that though the remedy by way of suit lies, however, in view of arbitrary and unreasonable conduct of the respondent and as there are no disputed questions of facts, the only efficacious remedy available to the petitioner is by way of the present writ petition.

12. The petitioner has also produced the certificate of insurance dated 11th June, 2003 taken with M/s Valmet General Limited, U.K. which covers the transit risk from U.K. to Mumbai port and has urged that the policy did not cover the loss, up to the petitioner's warehouse at Haldwani and, therefore, the journey between Mumbai to Haldwani was not covered under the Foreign Insurer's Policy and thus there was no double insurance.

13. According to the petitioner no factual disputes are involved as the admitted facts are:

- i. The goods got damaged during the road journey to Haldwani;
- ii. The respondent insurance company had insured the risk during the entire transit from U.K. to Haldwani;
- iii. The contract between M/s Valmet/seller and the petitioner had been disclosed and a copy along with all relevant documents were supplied to the respondent who agreed to cover the risk of the entire value of the machinery and issued the policy for Rs. 5,50,91,864/- despite the petitioner having then paid only 20 per cent of the value of machinery, though before the claim was raised the entire sale consideration had been realized by the seller;
- iv. The respondent was aware that M/s Valmet/seller retained the title to the machinery at the time when the respondent insured the machinery on behalf of the petitioner;
- v. The respondent was all along aware that the foreign insurance company had only covered the transit risk from UK to Mumbai port;
- vi. Petitioner's partial interest as defined in Section 10 of the Marine Insurance Act, 1963 is insurable and in any case the entire sale consideration had been

paid and the title of goods had passed to the petitioner when the claim was raised by the petitioner on the respondent;

vii. The quantum of loss/damage as determined by the respondent's surveyor is not disputed by the petitioner.

viii. The petitioner has issued several irrevocable L/C's in favor of M/s Valmet/seller which have been honored by the issuing banks - State Bank of India on their respective dates of presentations;

ix. The principle of rateable proportion is not disputed by the petitioner, however, its applicability is disputed.

14. The learned counsel for the petitioner also relied on ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, and Meerut Development Authority Vs. Association of Management Studies and Another, for contending that the authorities owe a duty to act fairly and they must act reasonably and within the limits of fair dealing". It was contended that the powers of public authorities are essentially different from those of private persons in as much as though a private person has an absolute power to allow whom he likes to use his land, to release a debtor or, where the law permits to evict a tenant, regardless of his motives, however, a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The counsel further contended that a writ of mandamus can be issued if there exists a legal right in the writ petition, as well as, a corresponding legal duty on the part of the state and if any action on the part of the state is unfair or arbitrary, by placing reliance on Karnataka State Forest Industries Corporation Vs. Indian Rocks, . Reliance was also placed on M.D., H.S.I.D.C. and Others Vs. Hari Om Enterprises and Another, United India Insurance Company Limited Vs. Manubhai Dharmasinhbhai Gajera and Others, & Food Corporation of India and Another Vs. SEIL Ltd. and Others, to contend that contractual disputes involving public law elements are amenable to writ jurisdiction. It is contended that once the State or an instrumentality of the State is a party to 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. Relying on ABL International Ltd (supra) it was further contended that a writ petition will be maintainable even if it involves some disputed questions of fact, or an alternative remedy as no decision lays down an absolute rule. That in cases involving disputed questions of fact, the party should be relegated to a Civil Court. It was contended that contractual matters are not beyond the realm of judicial review though the Courts may on its own impose certain restrictions in the exercise of this power.

15. The learned counsel for the respondents has contended that there is no dispute regarding the principle that in contractual disputes, where there is no serious disputed question of facts, writ jurisdiction can be invoked and in this regard he referred to and relied on ABL International Ltd (Supra) and Mrs.

Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd., According to the learned counsel for the respondent, however, a writ petition involving disputed questions of facts is not to be entertained by the High Court under Article 226 and in order to buttress his submission, learned counsel relied on State of Jammu and Kashmir Vs. Ghulam Mohd. Dar and Another,

16. The respondent in order to rebut the pleas and contentions of the petitioner contended that in the present case there are disputed questions of fact, as to whether the foreign supplier had invoked the insurance policy taken at their end. It is further contended that in the facts and circumstances and considering the law and practice involved, the affidavit of Thomas McComb could not be relied upon to grant relief to the petitioner as he had no insurable interest over the consignment at the time of the loss. According to the respondents, the petition involves the following points:

- a) The principle and effect of double insurance under English law;
- b) The rateable proportion of the liability of the respondent insurance company in the event of double insurance;
- c) The provisions of Sections 19, 18 and 34 of the Marine Insurance Act, 1963
- d) since the same transaction has been covered by two insurance policies, the petitioner will be required to prove that no claim has been made by the foreign seller, viz. Valmet General Insurance Limited from its insurance company; Norwich Insurance Company-else this would lead to case of unjust enrichment on the part of the petitioner, In this case the petitioner would be required to lead evidence, and submit documentation
- e) The petitioner would also need to prove by evidence and documentation that after claiming the full insurance from the respondent company that he has no right to recourse against the foreign party, for if that is the case, the respondent company on payment of full insurance as the right to subrogate itself in the place of petitioner;
- f) The petitioner would also need to prove (being a party with limited interest, since the ownership had not passed to him as per the contract between him and the foreign seller), that he has not received the full benefits of the insurance effected by the supplier/owner to full amount of his insurable interest, as then he can recover nothing from the respondent company;
- g) Similarly, the petitioner would also need to prove that in his capacity of limited interest, whether he has also insured the interest of the supplier/owner of the goods as well as his own, in which case he will not be entitled to the proportion of the policy which reflects the interest of the owner/supplier.

17. The respondent also emphasized that the part of the transit journey in question i.e. Mumbai port to Haldwani had also been covered by the foreign policy taken out by the seller, as this policy also covers the entire journey from

the foreign supplier up to "The opener's warehouse" as per the contract effected between the said parties, and, therefore, considering the facts and circumstances, the respondent has approved the claim of Rs. 2,26,652 on the basis of "pro rata rateable proportion" of the sum insured to be paid by each of the insurance companies, in the case of double insurance,. In the circumstances, it is contended that the petitioner is not entitled for any relief and the only relief which can be granted to the petitioner is the differential between the two policies. Since the policy issued by the foreign insurance Company was CIF value, and the policy issued by the respondent company was for CIF+10% of the proforma invoice, the differential between the two policies was paid to the petitioner on 1st October, 2004 by cheque no. 2265 drawn up on Citibank.

18. Regarding the claim of interest by the petitioners, the respondent has contended that it is a settled principle that the interest can be granted as may be deemed appropriate by the Court.

19. This Court has heard the counsel for the parties in detail and has also perused the documents relied on by the parties. In the facts and circumstances as detailed hereinbefore whether the present petition shall be maintainable or not, is to be considered first. The learned counsel for the respondent in the written submission filed by him has categorically stated that there is no dispute in the principle that in contractual disputes, where there is no serious disputed question of facts, writ jurisdiction can be invoked. The learned counsel for the respondent has also referred to ABL International Ltd (supra) and Sanjana M Wig(supra) in this regard, which were also relied upon by the counsel for the petitioner.

20. In "ABL International Ltd. & Anr.", one person (the fourth respondent) had entered into a contract with a State owned Corporation of Kazakhstan for the supply of 3000 metric tons of tea. Under the said agreement, payment of the goods, was to be made by the Kazak Corporation by barter of goods mentioned in the schedule to the agreement in question. The payment by barter of goods was guaranteed by the Government of Kazakhstan. Clause 6 of the agreement, which contemplated the mode of payment by barter of goods, was subsequently amended by an addendum on the same day when the original agreement was executed. By amendment it was specifically provided that if the contract for barter of goods would not be finalized for any reason, then the Kazak Corporation was to pay to the exporter, for the goods received by it in US dollars within 120 days from the date of delivery. On failure of the Kazakhstan government to fulfill its guarantee, a claim was made on the insurance which had covered the said risk by compensating the loss suffered on account of non-payment of consideration amount which was repudiated on the ground that the terms of the contract of payment were changed without consulting the insurance company. In these circumstances, it was held that a writ petition involving serious disputed questions of facts which require consideration of evidence, which is not on record, will not normally be entertained by a court in exercise of its jurisdiction

under Article 226 of the Constitution, but there is no absolute rule that in all cases involving disputed questions of fact the party should be relegated to a civil suit. In these circumstances, it was held that in appropriate cases, the writ Court will have jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation.

21. In "ABL International Ltd. (Supra)", it was further held that merely because the amending of a clause of the insurance contract was disputed, it does not become a disputed fact and if such objection as disputed questions or interpretation is raised in writ petition the Court can very well go into the same and decide that objection, if the facts permits. In this case, the only fact that was disputed was the obligation of the first respondent to cover the risk of non-payment of consideration in cash in US currency on the ground that the risk covered by first respondent was a risk arising out of non supply of goods by the barter method only. It was held that the limited area of dispute could be settled by looking into the terms of the contract of insurance as well as the export contract, and the same does not require consideration of any oral evidence or any other documentary evidence other than what is already on record, as the claim of the contesting parties was based on the interpretation of terms of the contract which do not require any external aid.

22. In the present writ petition, the insurance cover for marine insurance policy for purchase of vacuum metallizer was valid from UK port to Haldwani where the factory of the petitioner is situated. The Insurance covered the loss/damage to the machinery during transit by rail/road journey to the petitioner's warehouse inclusive of all risks attached with the journey. The goods arrived at Mumbai port where the machinery was inspected by the respondent's surveyor M/s A.S. Shaikh & Company and it was found to be without damage. Thereafter, it is apparent that the goods got damaged during the road journey from Mumbai port to Haldwani. The Insurance company was asked to depute a surveyor for assessment of the loss and the petitioner had raised a claim for an amount of Rs. 32,45,758/-. Surveyor Mr. J.C.. Joshi deputed by the respondent insurance company assessed the loss at Rs. 50,00,000/-. However, thereafter, the M/s. V.K. Kharbanda & Associates, Surveyor and Loss Assessors were also appointed by the respondent and they assessed the loss at Rs. 17,52,592/- based on custom duty of 5% excluding the cost of Nozzle assembly at Rs. 7,60,052/-. The same surveyor also assessed the loss at Rs. 21,60,274/- on the basis of actual custom duty, excluding the cost of the Nozzle assembly.

23 The insurance company/respondent, however, by order dated 7th October, 2004 repudiated his full liability under the insurance policy and contended that the liability of the insurance company was limited only to the extent of proportionate sum insured in excess of CIF+10% of the sum insured in their policy and therefore, agreed to pay the amount of only Rs. 2,66,652/- plus survey fees to the petitioner against the loss claimed at Rs. 32,45,458/-.

24. The disputes which have been raised by the respondent insurance company, are that the petitioner has no insurable interest in the goods as the petitioner had only paid a part of the price of machinery and that the principle of rateable proportionate compensation applies due to double insurance and thus, the Indian insurer is liable to pay only to the extent of the ownership of the petitioner, while the ownership of the machinery lies with M/s Valmet General Ltd., U.K. The respondent insurance company has invoked the principle of rateable proportion, as the goods were over insured and the foreign seller of the goods was also liable to claim the loss from his insurer as the foreign seller was the owner of the machinery

25. These disputes raised by the respondent repudiating the claim of the petitioner do not require extensive evidence and can be decided on the basis of the documents already on record which have not been denied by the respondent. The respondent has however, contended that these disputes cannot be decided in the present writ petition and therefore, on this ground the writ petition is liable to be dismissed.

26. Perusal of the certificate of the insurance policy dated 11th June, 2003 by the foreign seller which has been filed with the rejoinder by the petitioner reveals that the policy covered only the transit risk from UK to Mumbai port and not up to the petitioner's warehouse at Haldwani, whereas, the respondent/insurer had insured the goods during the transit from Port to Haldwani. In these circumstances, the double insurance would arise only if the goods were damaged on transfer from United Kingdom to Mumbai Port. However, it appears from the report of the surveyor M/s A.S. Shaikh & Company, which is not denied by any of the parties that the machinery was inspected and it was not damaged till Mumbai port except that some of the boxes were found lying in the open exposed to rain. According to the respondent insurance company, the foreign insurance company had insured the goods till New Delhi. Therefore, if the goods were damaged between Mumbai and New Delhi, then it will be a case of double insurance and the liability of the respondent will be proportionate to their limited liability in view of the liability of the foreign insurance company. The respondent, however, did not deny the cover note of the foreign insurance company produced by the petitioner with the rejoinder. A reply to the rejoinder was filed by the respondent on 24th February, 2010 in which the documents produced by the petitioner with their rejoinder were not denied. From the perusal of insurance cover it is apparent that the marine goods were discharged at Mumbai port and thus the foreign insurer had insured the goods till the port of discharge, i.e Mumbai Port. The final destination of good has been mentioned as New Delhi whereas the fact is that the final destination of the goods was warehouse of the petitioner at Haldwani. Therefore, the plea of the respondent that the foreign insurer had insured the goods till New Delhi is contrary to the certificate of insurance which has not been denied by the respondent and the plea of the respondent to the contrary is repelled and cannot be accepted.

27. According to the learned counsel for the petitioner, Thomas McComb, Financial Controller of Valmet General Limited has categorically deposed in his affidavit dated 26th June, 2006 that in terms of the contract dated 13th May, 2002 entered with the petitioner, he had to pay 20% of the contract value as down payment and the balance in 20 quarterly installments. The petitioner also had to issue an effective letter of credit for 80% of the contract price from the State Bank of India. The said financial controller of the seller, Valmet General Limited deposed on affidavit that the petitioner in fact had submitted an irrevocable letter of credit from the State Bank of India in favor of the seller which was discounted on 14th July, 2003 and the aggregate contract price of GBP 644,575 was realized and after realizing the said amount, no amount is payable by the petitioner towards the contract value to the Valmet General Limited. It is contended that after realization of the aggregate contract price the entire value has been realized by the seller and it has no interest, right, title or property in the Vacuum Metallizer which had been sold under the contract dated 13th May, 2002 and the petitioner is the absolute owner of the Vacuum Metallizer.

28. These facts have not been refuted and in fact cannot be refuted by the respondent. The petitioner had raised its claim for damages of 2 diffusion pumps on 23rd February, 2004 and as per the affidavit of Thomas McComb the entire amount was realized when the letter of credit was discounted on 14th July, 2003 that is much prior to the date when the claim for the bill for damages was raised by the petitioner on the respondent. In the circumstances, the respondent cannot contend and succeed on the ground that the petitioner is not the owner of the goods and, therefore, is not entitled to the claim nor can the respondent contend that the ownership of the goods had not passed to the petitioner in accordance with the contract between the petitioner and the seller.

29. Since the entire contract price was realized by the seller which is apparent from the facts disclosed by the Financial Controller of the seller, Mr. Thomas McComb in his affidavit dated 26th June, 2006 which deposition has not been denied by the respondent in its reply affidavit dated 24th February, 2010. It has been rather asserted without denying the deposition of Thomas McComb that the ownership of goods had not passed on to the petitioner, however, the fact that the petitioner had paid the entire price of goods which was realized by the seller has not been denied. In the circumstances, the respondent cannot contend that the petitioner is not the owner of the goods and the petitioner had only partial insurable interest. The plea of the respondent in this respect cannot be accepted and it has to be held that the ownership of the goods had passed to the petitioner on 14th July, 2003 when the letter of credit was discounted and the aggregate contract price of GBP 644, 575 was realized by the seller.

30. The emphasis of the learned counsel for the respondent is that it is a case of double insurance and, therefore, the liability of the respondent is proportionate to the amount insured by the respondent. Refuting this plea the learned counsel for the petitioner has relied on and referred to Section 10, 34 and Section 80 of

the Marine Insurance Act, 1963. Section 10 of the said Act contemplates that a partial interest of any nature is insurable. Consequently, even if the petitioner had a partial interest, the respondent cannot deny that the goods were insured by the petitioner with the respondent. It has also been held that when the claim was raised by the petitioner the ownership of the goods had already passed to the petitioner and the entire sale consideration had been paid by the petitioner to the seller.

31. The learned counsel for the petitioner has also contended that even if the goods of the petitioner were doubly insured which fact is not admitted by the petitioner, as the goods were insured by the seller only upto Mumbai port and not upto the petitioner's warehouse in Haldwani, whereas, the goods had been insured by the respondent from the port to Haldwani and the damage had been caused to the goods between Mumbai and Haldwani. Therefore, it cannot be held to be a case of double insurance. The learned counsel contended that even if it is a case of double insurance u/s 80 of the Marine Insurance Act, 1963 the respondent can claim the said amount exceeding the liability of the respondent from the insurer of the seller and the respondent cannot refuse to pay the amount claimed by the petitioner on account of double insurance. Section 80 of the Marine Insurance Act, 1963 is as under:-

80. Right of contribution:- (1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute ratably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain a suit for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

32. According to the petitioner, it is in any case not a case of double insurance. He has contended that "double insurance" in the true sense exists only where two or more policies are effected by or on behalf of the same insured in respect of the same interest and the total of sums insured exceeds what is required to be secured to the insured, i.e. the full indemnity. It was contended that generally, the existence of double insurance is important only in so far as it may affect the amount recoverable under a particular policy in the case of indemnity insurance and it does not necessarily invalidate any of the policies concerned. Relying on *Rex v. Bishop's Hatfield*, 1 BURR 422 it was contended that where two different policies were taken by two different persons, it would not be a case of double insurance because to call it so would only confirm the term. It was held that two persons may insure two different interests each, to the whole value; as to the master, for wages; the owner, for freight etc. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of having made two insurances upon the same goods or the same ship.

33. Considering the facts and circumstances and the facts of this case, it is apparent that in the case of petitioner it will not be case of double insurance as the certificate of insurance dated 11th June, 2003 obtained by Valmet General Limited in respect of machinery categorically stipulates the port of discharge as Mumbai port and admittedly the damage was caused to the goods on transportation between Mumbai and Haldwani, which transit has been insured by the respondent. In the certificate of Insurance of the foreign seller, the destination referred to as New Delhi will not in the facts and circumstances make the insurance obtained by the foreign seller apply to New Delhi.

34. The learned counsel for the petitioner had disclosed that the Head office of the petitioner is at Haldwani and the goods also had to be installed at Haldwani and the certificate of insurance in any way covered the risk upto Haldwani and in the circumstances, if the port of discharge as stated in the certificate dated 11th June, 2003 is Mumbai port, then the only inference that can be drawn is that the goods were insured by the foreign seller till Mumbai port and not thereafter. The insurance obtained by the petitioner from the respondent on the contrary was from the port to the warehouse of the petitioner at Haldwani and since the loss or damage to the goods was caused between Mumbai port and Haldwani, so it cannot be held that the goods were doubly insured.

35. Though the learned counsel for the respondent has tried to contend that the goods may have been damaged before the Mumbai port by relying on the report of Surveyor M/s.A.S.Shaikh & Co. dated 5th August, 2003 where against the column of number of cases stipulating 6 cases, it is mentioned that 4 cases were lying at Dock open yard exposed to rain and 2 cases were found in shed No. 16, Indira dock M.B.P.T Mumbai. Merely because the 4 cases were lying in open, from this fact alone it cannot be inferred that the goods were damaged at the time on account of rain. In case of any damage to the goods the assessor would have stipulated the same in his report, however, the statement that 4 cases were lying in the open does not imply that the good in the said boxes were damaged. In fact the assessor has not even stipulated as to what were contained in the said 4 boxes, so as to ascertain if it held the parts that were later found to be damaged by the subsequent assessors. The contention that even if the cases were closed and merely because they were lying in the rain, it could be inferred that it was the reason for the damage of the good cannot be accepted by this Court, as there is no documentary proof substantiating the same, and this Court cannot accept the said contentions based solely on the surmises and conjectures made on behalf of the respondent.

36. The goods which were imported by the petitioner are also not such which could be damaged on account of some of their cases lying in open at the port. In any case the damage caused to diffusion pumps and to the nozzle was not account of rain. Rather the survey report of the other surveyor, namely Sh. J.C. Joshi in its report dated 16th August, 2003 reveals that the body of both the diffusion pumps i.e Leybold Diffusion Pump and Nozzle Assembly were found

pressed/cracked condition and the elbow of pump No. 22402-20900479430 was found in bent condition. The said surveyor of the respondent also stated that the supplier of the machinery had opined that the diffusion pumps are not useable and require complete replacement and therefore, he had assessed the valuation of the diffusion pumps to be Rs. 50 lakhs. There is no mention in the entire survey report of the surveyor of the respondent that the damage to the Diffusion Pump and Nozzle Assembly, which was in a pressed/cracked condition, could have been on account of machinery being exposed to rain.

37. The petitioner had raised a claim dated 23rd February, 2004 for a total sum of Rs. 32,45,758/-. While declining the claim of the petitioner by letter dated 7th October, 2004 the cost of Leybold Diffusion Pump, Air Freight paid, custom duty paid and demurrage charges amounting to Rs. 20,90,637/- was not disputed nor were the expenses paid against repair/servicing amounting to Rs. 53,052/- and installation charges with 10% incidental charges amounting to Rs. 2,95,069/- disputed. Rather the respondent had disputed the claim on the ground of its liability limited to the extent of the proportionate sum insured in excess of CIF + 10% of the sum insured in the policy of the respondent and had therefore agreed to reimburse a loss of Rs. 2,26,652/- plus survey fees as per the calculation sheet attached with the said letter. The respondent had paid an amount of Rs. 2,26,652/- by cheque No. 2265 dated 1st October, 2004 drawn on Citibank besides an amount of Rs. 50,502/- was paid by cheque No. 2265 dated 1st October, 2004 drawn on Citibank, New Delhi.

38. The surveyor of the respondent had admitted the case of Leybold Diffusion Pump along with air freight, custom duty and demurrage charges, however, did not admit the cost of Nozzle Assembly alleged to be Euro 8500/- at the exchange rate of Rs. 60/- amounting to Rs. 5,10,000/- and a custom duty of Rs. 1,02,000/- and air freight of Rs. 45,000/- and demurrage etc of Rs. 50,000/-. In the circumstances, if it is not a case of double insurance as has been held by this Court, the respondent could only deny the total amount of Rs. 7,60,052/- to the petitioner which the petitioner would be entitled to recover by establishing the facts pertaining to the cost of Nozzle Assembly in accordance with law, as this fact, has been disputed by the respondent, on account of the report of the assessor V.K. Kharbanda & Associate dated 10th March, 2004 stipulating that the actual costs of the jet nozzle assembly could not be determined, whereas, the other amounts claimed by the petitioner by its claim dated 23rd February, 2004 has not been disputed by the respondent.

39. The petitioner has claimed a total amount of Rs. 32,45,758/- and the facts disputed are in respect of the cost of Nozzle Assembly, custom duty, air freight and demurrage, etc. and repair/servicing on it amounting to Rs. 7,60,052/-. Thus the respondent cannot contend that there is dispute regarding the balance amount of Rs. 25,85,706/-(32,45,758-7,60,052) which the respondent is liable to pay to the petitioner.

40. The learned counsel for the respondent when left with no option to deny the

liability of the petitioner to the extent as stated hereinabove contended that the contract between the petitioner and the foreign seller was a wagering contract and the goods insured by the petitioner could not be insured and with regard to the said contention relied on Sections 6 & 7 of the Marine Insurance Act, 1963. Sections 6 & 7 of the Marine Insurance Act, 1963 are as under:-

6. Avoidance of wagering contracts:- Every contract of marine insurance by way of wagering is void.

(2) A contract of marine insurance is deemed to be a wagering contract-

(a) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) where the policy is made "interest or no interest", or "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer", or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer".

7. Insurable interest defined:- (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

41. The plea of the learned counsel for the respondent is not sustainable in the facts and circumstances and in law. A contract of Marine Insurance will be a wagering contract only when an assured has no insurable interest. As already held the petitioner as a purchaser of the goods had paid 20% of the amount and before the loss/damage was caused to the goods/machinery and the claim was raised, the foreign seller had recovered the entire sale consideration from the petitioner which is apparent from the written deposition in the form of an affidavit of Thomas McComb, Financial Controller of Valmet General Limited, who has categorically deposed that the letter of credit given by the petitioner had been discounted by the foreign seller and the contract price of GBP 644,575 was realized on 14th July, 2003, whereas, the claim was raised by the petitioner on 23rd February, 2004 which was partly repudiated by the respondent on 7th October, 2004 only on the basis of double insurance. The fact that part of the claim of the petitioner was accepted belie the plea of the respondent that the agreement between the petitioner and his seller was a wagering contract. In the circumstances, the plea of the learned counsel for the respondent that it was a wagering contract in accordance with Section 6 of the Marine Insurance Act, 1963 is not sustainable and has to be repelled. The claim of the petitioner cannot be denied even u/s 7 of the Marine Insurance Act, 1963 as Section 7

contemplates insurable interest. The said section contemplates that when a person is interested in a marine adventure and he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which, he may benefit by due arrival of insurable property and may incur insurable interest. In the circumstances it cannot be denied by the respondent that the petitioner did not have any insurable interest.

42. In any case while declining the claim raised by the petitioner, the respondent by letter dated 7th October, 2004 partly accepted the claim. The entire claim of the petitioner had not been rejected on the ground that it was a wagering contract or that the petitioner did not have insurable interest. The only plea taken by the respondent was that the goods imported by the petitioner were doubly insured and, therefore, the rateable liability of the respondent works out to be Rs. 2,26,652/- plus survey fees only.

43. This is not disputed by the learned counsel for the petitioner that the petitioner had insured the goods for Rs. 5,50,91,864/- from the port till Haldwani. The goods insured by the foreign seller for which the certificate of insurance No. G 5502442 was issued for 538864.70 GBP. If that be so then how the proportionate liability of the respondent will only be worked out to be Rs. 2,26,652/- has not been explained by the learned counsel for the respondent. In any case as far as denying the liability of the petitioner on the ground that it was a wagering contract and that the petitioner did not have an insurable interest is concerned, it is apparent that the pleas which were not taken by the respondent while partly rejecting the claim of the petitioner cannot be allowed to be raised now. The Apex Court in case of Mohinder Singh Gill(supra) in para 8 at page 417 had held as under:

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Commissioner of Police, Bombay Vs. Gordhandas Bhanji,

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting's and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

The pleas which were not taken by the respondent while repudiating the claim of the petitioner cannot be allowed to be taken now by the respondent.

44. If the contract between the petitioner and the foreign seller was a wagering

contract or if the petitioner did not have insurable interest, the respondent ought to have not even allowed part of the claim of Rs. 2,26,652/- to the petitioner. Consequently, the pleas of the respondent in this regard are rejected.

45. In the totality of facts and circumstances and for the foregoing reasons the respondent is unable to raise any disputed questions of fact as far as their liability for Rs. 25,85,706/- (Rupees twenty five lakhs eighty five thousand, seven hundred and six) is concerned, which cannot be denied and the respondent is therefore liable to pay the said amount to the petitioner after deducting the amounts, if any, already paid by the respondent to the petitioner. Therefore the writ petition is partly allowed. The letter No. DO:XXIV:GA:485:04 dated 7th October, 2004 issued by the respondent, partially repudiating the claim of the petitioner under the Marine Policy No. 042400/21/03/00111 is quashed and as per the petitioner's letter of claim dated 23rd February, 2004, the respondent is directed to pay the said amount of Rs. 25,85,706 (Rupees twenty five lakhs eighty five thousand, seven hundred and six) to the petitioner after deducting the amounts, if any, already paid to the petitioner, within eight weeks. The petitioner shall also be entitled for simple interest on the amount payable by the respondent to the petitioner at the rate of 9% per annum. As far as the balance amount of Rs. 7,60,052/- claimed by the petitioner, as the disputed question of fact has been raised by the respondent regarding the price of the Nozzle Assembly etc, the petitioner shall be entitled to file appropriate proceedings in accordance with law to recover the said amount on establishing the same in accordance with law. Considering the facts and circumstances, a sum of Rs. 20,000/- as cost is also awarded to the petitioner against the respondent. With these directions, the writ petition is partly allowed.