

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 9th October, 2015

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W.P.(C) No. 9625/2015

PLAYWELL IMPEX (P) LTD.

..... Petitioner

Through: Mr. Sachin Datta, Sr. Adv. with Mr.
Dinesh Sharma, Ms. Ritika Jhurani &
Ms. Prity Sharma, Advs.

Versus

UNITED INDIA INSURANCE CO. LTD.

..... Respondent

Through: None.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

CM No.22818/2015 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

W.P.(C) No. 9625/2015

3. The petition impugns the communication dated 17th September, 2015 of the respondent Insurance Company intimating the petitioner that its grievance complaint for repudiation of its claim for loss due to fire had been examined and the entire matter had been reviewed by the Grievance Review Committee of the respondent Insurance Company and the decision of repudiation of the claim was upheld. Axiomatically, the petitioner seeks

mandamus to the respondent Insurance Company to release the insurance claim assessed by the surveyor.

4. The petitioner made a claim for loss of its goods by fire under a policy issued by the respondent Insurance Company. The respondent Insurance Company vide its communication dated 17th October, 2014 to the petitioner as under:

“This is in reference to your aforesaid claim in respect of reported fire loss at your basement godown situated at 160, Chitra Vihar, Vikas Marg, New Delhi-92. As per the policy records the situation in question stands covered for Ground Floor & First Floor at 160, Chitra Vihar, Vikas Marg since the inception of insurance from our office i.e. 25.8.2010 and further renewed timely without any change in address and situations. The reported fire loss had occurred in the basement of the situation address on 9.4.2013. When the surveyor visited the effected premises it was noticed that the loss has occurred in the basement area which as per the policy was not mentioned in the policy schedule and that too it was never pointed out by you, the difference in the situations address covered.

As per your request / clarifications vide letter no.nil dated 24.6.2014 the case was put up to the competent authority for allowing us to consider your case, the competent authority has not considered the case and stated that the claim is not tenable as the General Insurance Contract is an annual contract and any ignorance of rules on the part of insured cannot be interpreted, otherwise the wordings of the policy and in this particular case there is gross ignorance on the part of Insured and since the policy was issued in 2010 with the situations mentioned and you never pointed difference of situation mentioned in the policy schedule, as such on these grounds your claim is repudiated by the competent authority and the claim is not maintainable under the contract of insurance, which please note”.

repudiated the said claim of the petitioner.

5. The petitioner as aforesaid made a complaint to the Grievance Review Committee of the respondent Insurance Company and which has vide impugned communication dated 17th September, 2015 stated as under:

“Re: Grievance complaint for repudiation of Fire Claim no.040801/11/13/13/900001 under policy no.040801/11/12/12/0000157, Insured – M/s Playwell Impex Pvt. Ltd.

Date of loss : 09.04.2013

We have received the above complaint from you complaining against the decision of the Branch Office Aakashdeep New Delhi for denial of your claim on the ground that the location where the loss took place was not covered under the policy. We have called on the entire underwriting record of the policies and the matter was reviewed by the Grievance Review Committee and observed that the post loss endorsement to correct the address of the above location cannot be considered at this moment. We upheld the decision taken by the Branch Office”.

6. The repudiation by the respondent Insurance Company of the claim of the petitioner under the policy is *inter alia* on the ground that though the insurance policy obtained by the petitioner was with respect to the goods stored on the ground and first floors of property No.160, Chitra Vihar, Vikas Marg, Delhi, the goods with respect to loss of which the claim was made were stored in the basement of the said property.

7. The senior counsel for the petitioner contends that the reference in the insurance policy to the first floor of the property is a typographical error and ‘mistake’ on the part of the respondent Insurance Company. It is argued that the petitioner had sought insurance policy with respect to the goods stored in the basement and the ground floor and not in the ground floor and the first floor. It is contended that the respondent Insurance Company on account of its own mistake which was discovered only when claim was made, in the policy issued mentioned the place of storage of goods as ground and first floor. It is further contended that the respondent Insurance Company, for its own mistake is not entitled to repudiate the insurance claim.

8. In support thereof attention is drawn to the letter dated 20th August, 2010 claimed to have been written by the petitioner to the respondent Insurance Company seeking the said insurance as well as the copy of the proposal form for insurance stated to have been submitted by the petitioner prior to issuance of the insurance policy. It is shown from the copy of the letter dated 20th August, 2010 that the petitioner had claimed the insurance with respect to the ground floor and the basement. Reliance in this regard is also placed on another insurance policy against burglary obtained by the petitioner on the same day and on the basis of same forwarding letter and

proposal form and which is with respect to the ground floor and the basement.

9. The claim of the petitioner in the writ petition is based on the contract of insurance between the petitioner and the respondent Insurance Company and is essentially a money claim. Attention of the senior counsel for the petitioner is invited to the dicta of the Supreme Court in ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728 where the Supreme Court, after review of host of earlier judgments on the subject, *inter alia* held as under:

“68. The Court thereafter summarized the legal position in the following manner: (***ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.*** (2004) 3 SCC 553 paras 27-28)

“27. From the above discussion of ours, following legal principles emerge as to the maintainability of a writ petition:

- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: *Whirlpool Corporation Vs. Registrar of Trade Marks*, [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."
69. The position thus summarized in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, can refuse to

exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

- 69.1. The Court may not examine the issue unless the action has some public law character attached to it.
- 69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
- 69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.
- 69.4. Money claims *per se* particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.
70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarized as under:
 - 70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.
 - 70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.
 - 70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation

of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

- 70.4. Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.
- 70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.
- 70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.
- 70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action

could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitutional of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract. This Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but

failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.”

(emphasis added)

10. I am informed that the insurance policy also contains an arbitration clause though the senior counsel for the petitioner states that it is a limited one. The Supreme Court, in dicta aforesaid has clearly held that in such cases, writ petitions are not to be entertained. Not only so, the issue arising for adjudication has no public law character attached to it. In fact the senior counsel for the petitioner has not even attempted to argue so. Further, the claim in the writ petition is but a monetary claim arising from contractual obligations on the allegation of the respondent Insurance Company being in breach thereof. The contract between the parties is strictly in the realm of private law.

11. The senior counsel for the petitioner has of course pegged his case on *ABL International Ltd.* supra. However, the Supreme Court in *Joshi*

Technologies International Inc. supra has further laid down as to how the position summarized in *ABL International Ltd.* supra is to be understood in the context of the earlier judgments of the Supreme Court.

12. The senior counsel for the petitioner has contended that the alternative remedy of a suit would be a 'longer' remedy and the petitioner should not be relegated thereto.

13. In my opinion, the aforesaid is also based on a misconception about the civil suits, at least as far as the city of Delhi is concerned. People, on a wrong premise that the disposal of suits takes longer, whenever have a claim or grievance against an entity or body which qualifies as a 'State', instead of resorting to the civil suit or to arbitration, have started filing writ petitions and which has resulted in multiplying manifold the number of writ petitions and consequently the time taken in disposal thereof. Writ petitions, remaining pending in the High Courts for four to five years, are not uncommon. On the contrary suits, diligently followed and pursued by the counsels, are found to be disposed of within a year or in slightly more than a year. Owing to the practice which has developed, of preferring the writ petition instead of civil / arbitration remedies, the writ Courts are left with no time to adjudicate the matters required to be adjudicated in such

jurisdiction expeditiously or to bestow on them the attention which they deserve.

14. There is yet another aspect of the matter. The respondent Insurance Company has repudiated the insurance claim of the petitioner owing to the loss suffered being not at the place insured. According to the petitioner, the wrong place got mentioned in the insurance policy owing to a mistake of the respondent Insurance Company. The question, whether a contract suffers from a mistake or not and whether the contract is to be ordered to be corrected, is in my opinion not open for adjudication in a writ jurisdiction. A plea of mistake is a plea of fact which can be adjudicated only in a suit or in an arbitration, if applicable. Without the examination and cross examination of the representatives of the petitioner and the respondent Insurance Company, no definite finding in that regard can be given. Else, under Section 20 of the Indian Contract Act, 1872, a contract which suffers from a mistake of matter of fact, which is essential to the contract / agreement, is void. At this stage, we do not know whether the respondent Insurance Company was willing to give a policy for insurance against fire with respect to a basement or not. We do not also know what were the parameters insisted upon by the respondent Insurance Company for insuring

the goods against fire. On enquiry, the senior counsel for the petitioner, on instruction, states that the first floor of the property is also with the petitioner.

15. What the petitioner is in effect seeking is amendment / rectification of the contract of insurance entered into with the respondent Insurance Company. The petitioner, though admittedly in receipt of insurance policy, soon after it was issued by respondent Insurance Company and deemed to be in know of contents thereof, before the incident of fire, did not object to contents thereof. A question would also arise whether the Court can order a contract entered into between the parties to be rectified / amended. The said aspect has also been dealt in *Joshi Technologies International Inc.* supra as under:-

“54. As noted above, the contention of the Respondent is that PSCs are in the nature of a contract agreed to between the two independent contracting parties. It is also mentioned that before the signing of the PSCs, the approval of Cabinet is obtained which reflects that the PSC as submitted to the Cabinet has the approval of one of the contracting parties, namely, Government of India in this case. When it is signed by the other party it means that it has the approval of both the parties. Therefore, a contracting party cannot claim to be oblivious of the provisions of the law or the contents of the contract at the time of signing and, therefore, later on cannot seek retrospective amendment as a matter

of right when no such right is conferred under the contract. Even the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of the State and not in the exercise of contractual obligation and issues arising out of contractual matters are to be decided on the basis of law of contract and not on the basis of the administrative law. No doubt, under certain situations, even in respect of contract with the State relief can be granted Under Article 226. We would, thus, be dealing with this aspect in some detail.

55. Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters extraordinary remedy of writ Under Article 226 or Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-Government contracting party is able to demonstrate that its a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simpliciter under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

72. As pointed out earlier as well, the contract in question was signed after the approval of the Cabinet was obtained. In the said contract, there was no clause pertaining to Section 42 of the Act. The Appellant is presumed to have knowledge of the legal provision, namely, in the absence of such a clause, special allowances under Section 42 would be impermissible. Still it signed the contract without such a clause, with open eyes. No doubt, the Appellant claimed these deductions in its income tax returns and it was even allowed these deductions by the Income Tax Authorities. Further, no doubt, on this premise, it shared the profits with the Government as well. However, this conduct of the appellant or even the respondents, was outside the scope of the contract

and that by itself may not give any right to the appellant to claim a relief in the nature of mandamus to direct the Government to incorporate such a clause in the contract, in the face of the specific provisions in the contract to the contrary as noted above, particularly, Article 32 thereof. It was purely a contractual matter with no element of public law involved thereunder.”

(emphasis added)

16. On request of the senior counsel for the petitioner, the matter was passed over to enable him to consider.

17. The senior counsel for the petitioner after passover has drawn attention to the dicta of the Supreme Court in *State of Kerala Vs. M.K. Jose* 2015 SCC OnLine SC 726 where, in the context of maintainability of writ petitions in contractual matters, reference was made to an old judgment in *Gunwant Kaur Vs. Municipal Committee, Bhatinda* (1969) 3 SCC 769 *inter alia* holding that the question, whether the matter entails disputed questions of fact or not can only be examined after calling for a counter affidavit and thereafter examining the same to find out how much of the claim is admitted and how much disputed. On the basis thereof it is contended that at least notice of this petition be issued and if from counter affidavit it is found that the petitioner's claim is disputed, the petition be then dismissed.

18. However in the present case, the battle line between the parties have already been drawn. The petitioner, after repudiation of its claim as far back as on 17th October, 2014, availed of the opportunity of making the complaint before the Grievance Review Committee of the respondent Insurance Company, making the same contentions as are being made before this Court and the respondent Insurance Company after reviewing the matter has upheld the repudiation. In this view of the matter, merely issuing notice of the petition and which may result in the petition remaining pending for a long period of time owing to the heavy board of this Court, does not serve the purpose. In fact in a number of cases, this Court is compelled to, after the period of limitation for approaching the Civil Court has expired owing to the petition remaining pending for several years in the High Court, to make the respondent agree not to take the defence of limitation in the event of the civil Court being approached and / or to direct that the civil claim will not be dismissed for the reason of limitation. I am therefore of the opinion that when it can be known from the happenings preceding the filing of the petition that the respondent Insurance Company is disputing the claim and raising factual disputes, the formality of issuing a notice of the petition, as the senior counsel for the petitioner seeks, need not be adhered to. I may in

this regard notice that there is a sea change in the dockets of the Court from the year 1969 when it was held that the decision, whether the claim is disputed, be taken after calling for counter affidavit. What may have been a good practice to follow nearly half a century ago, in todays time, is not found practicable. I may also mention that the Supreme Court, in ***M.K. Jose*** supra also, held the writ petition to be not maintainable.

19. Mention may also be made of order dated 18th March, 2015 of the Supreme Court in Civil Appeal No.3053/2015 arising out of SLP (C) no.15689/2011 titled ***National Highways Authority of India Vs. MEIL-EDB LLC (JV)*** and wherein the view taken by the Division Bench of this Court in judgment dated 10th March, 2011 in W.P.(C) No.8418/2010 titled ***M/s. Madhucon Projects Ltd Vs. National Highways Authority of India*** was for consideration. The Division Bench of this Court, in writ jurisdiction, had interfered with the action of the National Highways Authority of India (NHAI) of forfeiture of Bid Security reasoning that such forfeiture by way of damages, by invocation of Bank Guarantee, could not be effected without the NHAI proving the damages. The Supreme Court held:-

“We are confronted with a situation when there is a contract between the parties, duly signed by the Respondent which restricts forfeiture of 5% of the value of the Bid Security ostensibly not by way of a penalty. Of course, as is to be expected, the Respondent disagrees and on the contrary submits that the deduction / forfeiture is in terrorem and is punitive in nature. A Writ Court may at least as a temporary or preliminary view decide whether the damages imposed by an Authority amenable to writ jurisdiction such as NHAI indubitably are punitive or not, but it should abjure from going into the minute calculation. That controversy should be left to the Civil Court to decide, i.e. whether the deduction / forfeiture, in the present instance of 5% of the value of the Bid Security is punitive or otherwise. We think that the course that commends itself to us is to relegate the parties to the Civil Courts to determine whether any damages had been suffered by the National Highways Authority of India and if so whether the deduction of 5% was a fair pre-estimate or was punitive in nature. Since the parties have been bona fide prosecuting writ proceedings in the event of the plaintiff seeks enlargement / extension of time for filing of a Suit, the Courts in seisin will keep all the circumstances in view before passing an order.”

20. From the aforesaid also it follows that a final decision with respect to the contractual rights of the parties is not permissible in writ jurisdiction.

21. I, therefore, do not find any merit in the petition which is dismissed as not maintainable with liberty of course to the petitioner to avail of the appropriate remedies under the general civil laws.

22. It is however clarified that in the event of the petitioner adverting to the civil remedies, none of the observations contained herein which have been made only in the context of maintainability, would influence the decision of the said proceedings.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 09, 2015

‘gsr’ ..

(corrected & released on 17th October, 2015)