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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 04.02.2016

Pronounced on: 04.03.2016

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+ LPA 716/2012

JALPAC INDIA LTD

..... Appellant

Through

Mr. Manish K. Bishnoi, Advocate

Versus

UNITED INDIA INSURANCE COMPANY LTD Respondent

Through

Mr. Abhishek Kumar & Mr. C.K.

Gola, Advocates

+ LPA 722/2012

UNITED INDIA INSURANCE COMPANY LTD. Appellant

Through

Mr. Abhishek Kumar & Mr. C.K.

Gola, Advocates

Versus

JALPAC INDIA LIMITED

..... Respondent

Through

Mr. Manish K. Bishnoi, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (JUDGMENT)

1. These appeals are filed by both the parties seeking to impugn the order of the learned Single Judge dated 2.7.2012. By the impugned order the Court partly allowed the Writ Petition filed by M/s.Jalpac India Limited (hereinafter referred to as 'Jalpac') and quashed the letter dated 7.10.2004 issued by the respondent in the writ petition i.e. United India Insurance

Company Ltd. (hereinafter referred to as 'The Insurance Company') by which letter the insurance company partially repudiated the claim of Jalpac under the Marine Insurance Policy. The impugned order directs the insurance company to pay a sum of Rs.25,85,706/- to Jalpac after deducting amounts already paid. Simple interest on the amount was held payable to Jalpac @9% per annum. Regarding the balance claim of Jalpac of Rs.7,60,052/-, the court held that there are disputed questions of fact and that Jalpac would be entitled to file appropriate proceedings in accordance with law to recover the said balance amount.

2. LPA 722/2012 is filed by the insurance company seeking to set aside the impugned order dated 02.07.2012. LPA 716/2012 is filed by Jalpac seeking to set aside the directions in the impugned order dated 2.7.2012 in so far as it relegates Jalpac to avail alternate remedy in regard to its balance claim of Rs.7,60,052/- towards reimbursement of the cost of the Nozzle Assembly and with a consequential prayer that the entire claim as sought for by Jalpac in the writ petition be allowed.

3. The facts as stated in the Writ Petition filed by Jalpac are that on 13.05.2002 Jalpac entered into an agreement to purchase vacuum metallizer (Machinery) from M/s.Valmet General Limited for a total value of GBP 644,575. The machinery was to be installed at the plant of Jalpac in Haldwani. To secure its machinery from damage during transit by road from Mumbai to Haldwani Jalpac took an insurance policy dated 23.7.2003 for a total assured sum of Rs.5,50,91,864/- from the insurance company against

loss/damage occurring in the machinery during the transit. The insurance premium of 1,24,949/- was paid on 23.7.2003.

4. The machinery arrived at the Mumbai Port on 5.8.2003. Jalpac intimated the insurance company to inspect the goods and their condition since they had come in transit by sea. It is the contention of Jalpac that the Insurance Company did not carry out any inspection. However, Jalpac had the machinery inspected from Insurance Surveyors M/s. A.S.Sheikh and Company who vide their inspection report dated 5.8.2003 confirmed that the machinery had arrived in good and sound condition.

5. However, when the machinery was delivered on 11.08.2003 at Jalpac's plant at Haldwani, on opening of the packed goods it was found that the machinery had got damaged during 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. On 14.8.2003, Jalpac informed the insurance company orally and notified about the damage to the machinery. A claim was lodged for replacement of the damaged machinery valued at Rs.32,45,758/- plus Customs Duty.

6. On 14.08.2013 Mr.J.C.Joshi, Insurance Surveyor and Loss Assessor was appointed by the insurance company and under its instructions inspected the damaged machinery. Report dated 16.8.2003 was submitted by the said surveyor assessing the loss at Rs.50 lacs. Thereafter the insurance company appointed another Insurance Surveyor and Loss Assessor M/s.V.K.Kharbanda & Associates to assess the loss/damage due to road/rail transit. The said Surveyor and Loss Assessor submitted his report dated

10.03.2004 where the maximum loss was assessed to Jalpac at Rs.21,60,274/- on the basis of actual custom duty paid. No assessment was made for repair of the Jet Nozzle i.e. one of the damaged items.

7. Jalpac is stated to have followed up with the insurance company for its claim. However, on 7.10.2004 the insurance company informed Jalpac that its claim had been approved for an amount of Rs.2,26,652/- plus surveyor fees inasmuch as the liability of the insurance company was limited to the extent of proportionate sum insured in excess of CIF + 10% sum insured as against the Jalpac's total claim of Rs.32,45,758/- plus customs duty. The reason for allowing only a part of the claim has been stated by the insurance company in the said communication and the relevant portion reads as follows:-

“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 upto final warehouse in 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.”

Jalpac had a legal notice served on 9.2.2005 on the insurance company but to no effect. Hence the present Writ Petition was filed.

8. The insurance company in the counter-affidavit urged various objections to the Writ Petition. A preliminary objection was raised that the petition is not maintainable as it involves complicated questions of fact and law and this Court ought not to exercise its writ jurisdiction under Article 226 of the Constitution of India. On merits it was urged that the insurance company had found that the journey in question from Mumbai to Haldwani had also been covered by a foreign insurance policy taken out by the Foreign supplier of the machinery. Hence, it was stated that this was a case of double insurance. Accordingly, the insurance company stated that applying the settled principles of calculating a “ratable proportion” of liability between the two insurance companies, it had approved the claim of Jalpac for the sum of Rs.2,26,652/-. It was urged that any other procedure would result in unjust enrichment to Jalpac.

9. In rejoinder affidavit, Jalpac denied that it was a case of double insurance from port of discharge that is from Mumbai to Haldwani. It is stated that the action of the insurance company is contrary to the provisions of Section 34 of The Marine Insurance Act 1963. Further alongwith the rejoinder affidavit an affidavit of the Financial Controller of the foreign supplier M/s. Valmet General Limited, United Kingdom was also placed on record confirming that the foreign supplier did not prefer any claim of its own or on behalf of Jalpac in respect of the damaged part of the machinery with its insurers. It was also confirmed that the foreign supplier realized the full value of the machinery by discounting the letter of credit on 14.7.2003 i.e. before the goods reached Mumbai Port.

10. The impugned order of the learned Single Judge relied on ***ABL International Limited and another vs. Export Credit Guarantee Corporation of India Limited and Others, (2004) 3 SCC 553*** and held that the disputes raised by the insurance company repudiating the claim of Jalpac does not require extensive evidence and can be decided on the basis of documents already on record which have not been denied by the insurance company. The impugned order also held that in the facts and circumstances of this case, this was not a case of double insurance as the certificate of insurance dated 11.6.2003 obtained by the foreign supplier M/s.Valmet General Limited, England correctly stipulates the port of discharge as Mumbai port whereas admittedly the damage was caused to the goods between Mumbai and Haldwani, the transit which had been insured by the insurance company. The impugned order noted the report of the second Surveyor V.K.Kharbanda and Associates and that the said report had granted damages for replacement of the damaged diffusion pump but had not granted damages for repair of the Jet Nozzle Assembly which is yet to be replaced and the cost of repair is yet to be determined. As Jalpac had claimed a total damage of Rs.32,45,758/- which included a sum of Rs.7,60,052/- for repair of the Jet Nozzle Assembly which had not been quantified by the Surveyor, the learned Single Judge after deducting the said sum of Rs.7,60,052/- for repair of the Jet Nozzle Assembly allowed the claim of Rs.25,85,706 i.e. (32,45,758-7,60,052) (there appears to be a calculation mistake as this figure would be 24,85,706/-) The writ was accordingly allowed.

11. When the appeal of the insurance company LPA 722/2012 came up for hearing, this Court on 6.11.2012 directed stay of the impugned order

subject to the insurance company depositing the actual amount as per the impugned judgment with the Registrar General of this Court within four weeks. On 21.1.2013, this Court had noted the submission of Jalpac that in case the submissions of the insurance company are accepted, then based on the Surveyor's Report Jalpac would be entitled to 50% of the amount assessed by the Surveyor. Hence, the court directed that Jalpac would presently be entitled to a sum of Rs.8,50,000/- together with interest which amount was directed to be released from the deposited amount. This order was subsequently modified on 19.2.2013 as Jalpac had already received from the insurance company a sum of Rs.2,26,652/-. Hence, the Registrar General of the Court was directed to release a sum of Rs.6,23,348/- instead of Rs.8,50,000/-.

When this matter came up for hearing on 30.6.2015 and 13.7.2015 it transpired that Jalpac had been wound up in Company Petition No. 4/2012 which is now pending before the Uttarakhand High Court. Notice was accordingly issued to the Official Liquidator of Uttarakhand High Court who entered appearance on behalf of Jalpac.

12. We have heard learned counsel for the parties and perused the record. Learned counsel appearing for Jalpac/Official Liquidator has reiterated the submissions made in the Writ Petition. He has stressed that there is no dispute that the Nozzle Assembly was damaged. Hence, to relegate Jalpac to an alternate remedy to recover the cost of the nozzle assembly is an erroneous direction in the impugned order and the relief ought to have been granted.

Learned counsel appearing for the insurance company has stressed that the policy taken by the foreign supplier notes the final destination of goods as New Delhi which he states appears to be a typographical error inasmuch as the same should have been Haldwani. Hence, he submits that the goods were insured from the godown of the foreign supplier till Haldawani. It is further urged that the foreign Insurance Policy states that the coverage is upto openers warehouse which in this case was Haldwani. Hence this was a case of double insurance and the insurance company has followed the correct procedure of payment in such an eventuality.

13. The dispute which has been argued before this Court essentially centers around as to whether Jalpac had a double insurance for the goods during transit from Mumbai to Haldwani and, if so, its impact on the claim of Jalpac.

14. We may look at the meaning of the term “double insurance”. Reference may be had to the Marine Insurance Act, 1963 (hereinafter referred to as “the Act”). Section 34 of the Act defines double insurance and reads as follows:

“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.”

15. Section 80 of the Act which is relied upon by the Insurance Company reads as follows:-

“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.”

Double insurance takes place where two or more policies are effected by or on behalf of the assured on the same adventure and interest.

16. In this context, it is useful to look at MACGILLIVRAY ON INSURANCE LAW (10th Edition) which describes double insurance as follows:

“Double insurance occurs when the assured insures the same risk on the same interest in the same property with two or more independent insurers. Over-insurance occurs when the aggregate of all the insurances is more than the total value of the assured’s interest. Apart from express condition, both double insurance and over-insurance are perfectly lawful; one may insure with as many insurers as one pleases and up to the full amount of one’s interest with each one. If a loss occurs, the assured may, in the absence of a *pro rata* contribution clause, select any one or more insurers and recover from him or them the total amount of the loss. If he fails to recover his whole loss from those against whom he has proceeded in the first instance, he may recover the balance from any one or more of the others. But in no event is he entitled to recover more than his loss because each contract is a contract of indemnity only, and, therefore, when he has recovered his total loss from some one or more of his insurers his claims against the others abate. The right to sue his insurers in any order is a valuable right for the assured, for it protects him against loss in the event of one or more of his insurers becoming insolvent; but as it would have been a considerable hardship on the insurers that one alone of several co-insurers should bear the whole loss, the doctrine of contribution was evolved, apparently by Lord Mansfield, who held that in marine insurance an insurer who paid more than his rateable proportion of the loss should have a right to recover the excess from his co-insurers, who had paid less than their rateable proportion. The same general principles of liability and contribution have been held to apply to fire insurance and, liability insurance. As a rule, however, insurers are not content

to leave their liability on this basis, and have accordingly inserted conditions in their policies to protect themselves as far as possible against fraudulent over-insurances, and at the same time to obtain the maximum benefit from the contributory liability of co-insurers.”

17. We may look at the insurance policy taken out by the foreign supplier to see whether a case of double insurance is made out. The relevant clauses read as follows:-

Vessel &/or Conveyance	Site of Loading IMMINGHAM
Port of Discharge <u>MUMBAI PORT</u>	Final Destination NEW DELHI-110001
Marks Nos. Container No. Description of Goods JALPAC INDIA LTD NEW DELHI <u>MUMBAI PORT</u> LC NO.07502031X000211	No. and kind of Packages ONE VACUUM METALLIZER MODEL-EIIF4-2450 SHIPMENT TERMS-CIF PACKED IN SIX (6) WOODEN CASES TOTAL CARE268,478CILM TOTAL GROSS WEIGHT.

(Emphasis added)

Special Policy Conditions

RISK SUBJECT TO INSTITUTE CARGO CLAUSES (A 1.1.82 IRRESPECTIVE OF PERCENTAGE INCLUDING INSTITUTE, THEFT, PILFERAGE AND NONDELIVERY (1.V) CLAUSES AND INSTITUTE WAR CLAUSES (CARGO) AND INSTITUTE STRIKE CLAUSES (CARGO) INCLUDING RISK OF TRANSSHIPMENT IF ANY, INSURANCE CLAIMS PAYABLE IN INDIA. COVER-BENEFICIARY'S WAREHOUSE TO OPENER'S WAREHOUSE.

18. On interpretation of the terms used in the insurance policy, reference may be had to the judgment of the Supreme Court in the case of ***United India Insurance Co. Ltd. v. Great Eastern Shipping Co. Ltd., AIR (2007) SC 2556***, wherein the Supreme Court on construction of the terms of the policy stated as follows:

“17. After considering the ratio with regard to the construction of the terms of the policy it transpires that while interpreting the policy the courts should keep in view the intention of the parties as well as the words used in the policy. If the intention of the parties subserves the expression used therein then the expression used in that context should be given its full and extended meaning.”

19. The contention of the insurance company is that the insurance policy taken by the foreign supplier provides insurance coverage from the “beneficiary’s warehouse to opener’s warehouse”. The “opener’s warehouse” is said to be Haldwani and hence the goods were also insured upto Haldwani and a case of double insurance is made out.

20. The above argument ignores that the policy taken by the foreign supplier as noted above nowhere states the destination/opener’s warehouse as Haldwani. It states the site of loading as Immingham i.e. the foreign port. The “port of discharge” is shown as Mumbai Port. Further the policy describes Jalpac’s Location as “New Delhi-110001; Mumbai Port”. It is noteworthy that “Haldawani” is not mentioned in the entire policy, copy of which is filed by the insurance company before us. The policy cannot provide insurance coverage to an undefined town. In contrast there is repeated reference in the policy to Mumbai Port stating it to be the port of

discharge. The words used in the policy show an intention to insure only till Mumbai. Clearly “opener’s warehouse” meant Mumbai Port. The policy covered transit only till Mumbai Port. Hence, it cannot be said that there is any double insurance involved as claimed by the insurance company.

21. Even if, we presume a case of double insurance is made out, as alleged by the insurance company, then as per Section 34 (2)(a) of the Act in the absence of any clause to the contrary in the policy, assured can claim payment from any insurer in such order as he may think fit. The only limitation is that he is not entitled to receive any sum in excess of the indemnity allowed by the Act. The insurance company has not based its defence on any clause in the insurance policy but sought to rely upon the provisions of the Act. Hence, in view of Section 34(2)(a) of the Act, the Jalpac would be entitled to place a valid claim on the insurance company. Section 80 of the Act, relied upon by the insurance company does not help it as it only gives liberty to the insurance company to maintain a suit against other insurers, if an insurer pays more than his proportion. It does not modify the rights of an assured under Section 34 of the Act.

22. In our opinion, even if there was a case of double insurance though we have already concluded that on facts there is no case of double insurance, then the insurance company would still be liable to compensate Jalpac for the loss sustained during the transaction.

23. Further we may also note that the stand of the insurance company is contradictory. We may note some of the submissions made by the insurance

company in his counter-affidavit to the Writ Petition. The relevant portion reads as follows:-

“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 Limited from its insurance Company, Norwich Insurance- 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, 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 it that is the case, the Respondent Company on payment of the full insurance has the right to subrogate itself in the place of the Petitioner. (This principle has been laid down in the case of North British & Mercantile Insurance Company v. London Liverpool & Globe (1877) 5 Ch D 569.)

f. The Petitioner would also need to prove that (being a party with limited interest, since 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 the full amount of his insurable interest, as then he can recover nothing from the Respondent Company (This principle is laid down in the case of Brown v. London Mutual Fire Insurance Company (1914) 29 WLR 711).”

24. Hence, the contentions raised by the insurance company in the counter affidavit were that if the transaction is covered by two insurances then Jalpac

would have to prove that no claim has been made by the foreign seller from his insurance company. Otherwise this would lead to unjust enrichment. It is further stated that Jalpac would have to prove that after receiving the full insurance claim from the insurance company, it would have no right to recourse against the foreign insurance company inasmuch as the insurance company on payment of the full insurance amount would have the right to subrogate itself in place of Jalpac.

25. The above stand of the insurance company essentially seeks proof from the Jalpac that it or the foreign supplier has not received any amount from the foreign insurer. Admittedly, Jalpac has placed on record an affidavit of Mr. Thomas McCom, Financial Controller of M/s Valmet General Limited. As already stated above, he has stated on oath in the affidavit that the entire price money had been received by the foreign supplier under letter of credit discounted on 14.7.2003 i.e. before the goods reached Bombay. On the claim against its insurer the affidavit states as follows:-

“8. I say that Valmet had taken the policy of the insurance covering the transit of the Vacuum Metallizer from the United Kingdom to India (Mumbai seaport) and I state and affirm that Valmet did not prefer any claim of its own or on behalf of Jalpac in respect of the damaged parts with its Insurers.”

26. There is no dispute about the averments in the affidavit which show that the foreign supplier has received no payment whatsoever from its insurance cover. The insurance company cannot now be permitted to take a stand contrary to its counter affidavit where the only precaution sought was that Jalpac should not have had received any payment from the foreign

insurance company. As factually no such payment has been received, the insurance company cannot continue to stick to its stand and reject the claim of Jalpac as sought to be done.

27. Coming to the relief granted to Jalpac. In our opinion the impugned order has awarded amounts as payable to Jalpac which are at variance with the report of the surveyor. V.K.Kharbanda and Associates in their report dated 10.3.2004 had given two assessments of loss. On account of replacement of the diffusion pump the first assessment is of Rs.17,52,592/- based on custom duty of 5%. The second assessment is based on the actual custom duty paid which is stated to be Rs.21,60,274/-. At best, this is the undisputed amount payable to Jalpac and this would be a sum of Rs.21,60,274/- as assessed by the Surveyor based on actual duty paid. Any directions for payment above the sum of Rs.21,60,274/- would be contrary to the report of the Assessor and Surveyor. No doubt, a higher amount has been claimed by Jalpac but this has neither been accepted by the Surveyor nor by the insurance company. The higher amount being a disputed amount, has been erroneously awarded in this writ petition.

28. In the light of these facts, we modify the directions in the impugned order and direct the insurance company to pay Jalpac a sum of Rs.21,60,274/-. All other directions in the impugned order shall remain unchanged including direction regarding payment of interest and costs. It is clarified that Jalpac/official liquidator would be entitled to file appropriate proceedings in accordance with law to recover their balance claims. The appeals are disposed off, as above.

29. It is clarified that the amount as payable to Jalpac in terms of our order would be paid/released by the Registrar General of the High Court in favour of the Official Liquidator of Uttarakhand. The balance amount lying deposited in this Court in terms of the interim order dated 06.11.2012 of this Court shall be refunded to the insurance company.

**(JAYANT NATH)
JUDGE**

(CHIEF JUSTICE)

MARCH 04, 2016/n

