

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.03.2019
Pronounced on: 10.06.2019
CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

C.S.(Comm. Div.) No.440 of 2012

M/s.Tarapore & Co.,
Dhun Building,
No.827, Anna Salai,
Chennai-600 002.
Rep. by its Partner,
N.Radhakrishnan

... Plaintiff

-vs-

United India Insurance Company Limited,
Rep. by Senior Divisional Manager,
Division-15, Tarapore Towers, 7th Floor,
No.826, Anna Salai,
Chennai-600 002.

... Defendant

Prayer: Plaint filed under Order IV Rule 1 of the O.S. Rules read with Order VII Rule 1 of C.P.C., seeking a) to direct the Defendant to pay the Plaintiff a sum of Rs.1,08,04,597/- together with further interest at 18% p.a. on the Principal Sum of Rs.70,15,972/- from the date of suit till the date of realization and b) to direct the Defendant to pay the cost of the suit.

For Plaintiff : Mr.R.Murari, Senior Counsel
For M/s.Aditi and Mr.K.K.Muralitharan
For Defendant : Mr.Ramachandran
For M/s.Nageswaran and Navichania

J U D G M E N T

This Civil Suit has been filed by the Plaintiff for a direction to the Defendant to pay the Plaintiff a sum of Rs.1,08,04,597/- together with further interest at 18% p.a. on the Principal Sum of Rs.70,15,972/- from the date of suit

till the date of realization, with further direction to the Defendant to pay the cost of the suit.

The case in nutshell is as follows:

2. The Plaintiff-Company (hereinafter referred to as 'the Company') is into the business of execution of large civil and engineering construction work for Government and Private Organizations for the last eight decades and the Company was awarded a contract by M/s.Tata Steel Limited for certain engineering works to be carried out at the Tata Steel Complex at Jamshedpur. For the purpose of execution of the said work, the Company had purchased a Tata Hitachi Heavy Duty Crane (in short 'the Crane'), bearing Sl.No.H1-50-045-0020 (Engine No.25214013, Chassis No.HI-50-045-0020) from M/s.Telco Construction Co. Ltd., Jamshedpur on 17.07.1999 for Rs.3,01,80,509/-;

2.1. It was submitted by the Company that the Company had clearly mentioned in the proposal of insurance that the Crane was proposed to be deployed inside the premises of Tata Steel Ltd., in Jamshedpur and accordingly, the Defendant had issued an Insurance Policy with the title “Miscellaneous and Special Type of Vehicles Package Policy” in the year 1999 with the coverage of accidental damage to the Crane and other incidents set out therein. It was also submitted that the Insurance Policy was also periodically renewed and the Company had paid the premium every now and then for the renewed policy as

stipulated by the Defendant. It was the case of the Company that the Defendant was well aware of the fact that the Crane was going to be deployed within the Tata Steel Company at Jamshedpur and in that regard, there were exchange of several communications between the Company and the Defendant;

2.2. It was the further case of the Company that while so, on 14.06.2007, the Crane met with an accident in the job site and the Company immediately addressed a letter to the Defendant for a spot survey, for which, the Defendant had requested the Company to submit the estimate of repairs and the inspection was done by a Surveyor, namely, Mr.Pramod Yadav. The Company had also submitted a claim for an amount of Rs.70,15,972.38 along with all the supporting documents;

2.3. It was the grievance of the Company that though the Office of the Defendant had further done a re-inspection of the Crane at the site, thereafter, there was no response from the Defendant to the claim made under the Insurance Policy, despite sending two reminders to the Defendant on 07.02.2009 and 20.04.2009, requesting for early settlement of their insurance claim. When such a claim was made by the Company in respect of an Excavator in 1990, the work order was issued and the claim was settled by the Office of the Defendant based on the Note of Agreement of the Surveyor of the Defendant and the

Plaintiff. It was stated that the Defendant was duly appraised of the fact that the Driver of the Company was authorized to drive a Heavy goods vehicle anywhere in India and at the time of accident, he was no longer in service;

2.4. It was the further grievance of the Company that to the shock and surprise of the Company, the Defendant had mischievously sent a predated letter to the Company in response to the Company's letter dated 05.04.2011, stating that since the accident had taken place outside the office premises of the Company, the claim of the Company was rejected in terms of Indian Motor Tariff (IMT) 13 of the policy conditions. It was the claim of the Company that the address furnished in the Policy was only for the purpose of communication and for no other reason and it could not be construed as the place for deployment of the Crane. Since the Policy covers the geographical area of the whole of India, no such restriction could be read into the contract;

2.5. It was stated by the Company that it is trite that a provision of contract must be interpreted in the context of the facts known to the contracting parties and the contract should be read in the light of the surrounding circumstances. Thus, the term as mentioned in IMT 13 "insured's premises" can be read to the context that the equipment can be used within the premises, in which the insured was operating the Crane and no other

interpretation could be given and the same would defeat the very object of the policy;

2.6. It was also stated that the Defendant, having initially accepted the entitlement of the Plaintiff and having deputed its Surveyors for inspection of the Crane inside the work site of the Plaintiff on 29.01.2008 and 30.10.2008 respectively, cannot refuse to accept the claim, quoting IMT 13 after four years of submission of such claim, which is highly untenable and contrary to the reports and the Note of Agreement of the Defendant's own surveyors. Thus, it was submitted that when a similar claim was accepted by the Board of the Defendant and settled, the rejection of the present claim was arbitrary in nature;

2.7. It was the stand of the Company that since the Company's claim falls squarely within the ambit of the Policy Conditions, the rejection of the Claim with a narrow interpretation, was the breach of the terms of the Policy and since no specified period was mentioned in the Policy for initiation of legal proceedings, the period of limitation prescribed under Article 44(b) of the Limitation Act will not be applicable to the present case. Hence, it was prayed that a direction, as stated supra may be issued to the Defendant for early settlement of the claim.

3. The Defendant / Insurance Company had filed its Written Arguments , wherein it has been *inter alia* stated as under:

i) The alleged accident had taken place on 14.06.2007 and the claim of the Company was repudiated by the Defendant on 31.03.2011. The Plaintiff should have initiated action within the period of 12 months from the date of accident / repudiation as per Condition No.7, as the claim was also not a subject matter of any pending action or arbitration during the period of 12 months from the date of occurrence or disclaimer and therefore, the Company had no right whatsoever to make such a claim;

ii) It was reiterated in the Written Arguments that since the Complaint was filed beyond the prescribed period under the Contract, the claim is barred by limitation. Moreover, the suit is bad for non-joinder of necessary parties, as the Banker of the Plaintiff is not a party to the suit proceedings. The Company is bound by the terms and conditions of the Policy, attached therein and upon a detailed assessment and evaluation of the claim in connection with the Policy, the claim of the Company was repudiated as early as on 31.03.2011, as the claim is against the Clause IMT 13;

iii) It was stated by the Defendant that though the Company had taken a plea that the address given in the Policy was for the purpose of communication, the Policy clearly stipulated that it was subject to IMT Endorsements 7, 13, 21, 24, 37, 40 and 47 and there was no request made on the side of the Company for exclusion of IMT Endorsement No.13. The Company also availed reduction in premium under the heading own damage as well as premium in respect of risk of damage by overturning, which is evident from the letter, which was enclosed by the Company with the previous policy for the period between 18.07.2004 and 17.07.2005;

iv) The Company, having used the Crane somewhere else than the premises of the insured, thereby attracting IMT No.13, is not entitled to any relief and the Defendant is not liable to pay any claim whatsoever for breach of warranty / condition. It was further pleaded that mere survey of the Crane at the job site cannot be construed as acceptance of the claim, as the conduct of survey was for assessment and preparation of the loss on account of the accident and thus, it was vehemently argued that the claim of the Company is inflated and the Company is estopped from claiming the suit amount on the basis of the Note of Agreement alone and therefore, the suit is liable to be dismissed on the ground that the Company had failed to establish that they are a registered partnership firm and the person, who has signed and verified the

plaint is competent to do so and that the suit is filed beyond the period stated in the Policy.

4. Learned Senior Counsel for the Company strenuously contended that the communications between the parties vide renewal letters dated 27.08.2005 and 04.09.2005 would speak for itself that the Defendant was aware of the fact that the Crane was going to be deployed at the Tata Steel Complex and therefore, the interpretation given by the Defendant that the machine has to be operated within the "insured's premises" as per IMT 13 will not hold good. In support of his submission, he relied on a judgment of the Hon'ble Bombay High Court in the case of Mumbai Metropolitan Region Development Authority vs. Unity Infraproject Ltd., reported in MANU/MH/0267/2008, in which it has been observed as follows:

"14. The same question of interpretation can be analysed from the perspective of four principles which can usefully be applied to the construction of the contract in this case. These principles are (i) Giving effect to the intention of the parties as found in the words they use; (ii) Repugnancy of an exclusion clause; (iii) The Contra Preferentum Rule; and (iv) Standard form and exclusion clauses.

(i) Intention of parties:

15. In Halsbury's Laws of England (4th edition p. 567) the modern rule of interpreting contracts is regarded as giving effect to the real intention of the parties:

The old rule in respect of deeds was that of the two provisions repugnant to each other, that which came first prevailed. That, however, was provably never a rigid rule and is certainly not so today, nor could it realistically be

applied to a commercial document. The true principle seems to be that effect is to be given to the real intention of the parties. (Halsbury's Law of England, 4th Edition, Pg. 567)

16. The same principle is restated in Chitty on Contracts, Volume 1, 29th Edition, pg 744. "Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect, the real intention of the parties as gathered from that instrument as a whole, and that part which would defeat it must be rejected Walker v. Giles (1848) 6 C.B. 662, 702, Love v. Rowter Steamship Co. Ltd. (1916) 2 A.C. 527, 535, Saban Flour & Feed Mills San Bhd. v. Comfez Ltd. (1988) 2 Llyod's Rep. 18. The old rule was, in such a case, that the earlier clause was to be received and the later rejected; but this rule was a mere rule of thumb, totally was scientific and out of keeping with the modern construction of documents."

Pollock and Mulla on Contracts states the principle thus:

Therefore, in principle, there is no hierarchy among the terms in one contract, and their importance for interpretation of the remaining part of the contract is the same, regardless to the order in which they appear, unless parties themselves expressly provide for a hierarchy among the different provisions or part of the contract" Pollock & Mulla, Indian Contract & Specific Relief Act, 12th Edition, Pg. 267, Volume 1.

The courts may give effect to the intention of parties by...rejecting misnomers or surplusage [Goldsmith Ltd. v. Baxter (1969) 3 All ER 733]...and construing ambiguities to save a document."

5. It was further contended by the learned Senior Counsel for the Company that insofar as a commercial document is concerned, the intention of the parties is of the paramount consideration and in the present case on hand, the Company had purchased the Crane exclusively for the purpose of execution of the contract awarded by M/s.Tata Steel Limited and obviously, the Company is left with no other option, but to deploy the Crane in the work site for execution of the contract. To substantiate his contention, he cited the following

two judgments of the Apex Court as well as the Bombay High Court:

a) *Transmission Corporation of Andhra Pradesh Ltd. and Others vs.*

GMR Vemagiri Power Generation Ltd. and Others, reported in *(2018) 3 SCC*

716;

"24. In the facts and circumstances of the present case, there can be no manner of doubt that the parties by their conduct and dealings right up to the institution of proceedings by the Respondent before the Commission were clear in their understanding that RLNG was not to be included within the term "Natural Gas" under the PPA. The observations in *Gedela Satchidananda Murthy (supra)* are considered apposite in the facts of the present case:

32...The principle on which Miss Rich relies is that formulated by Lord Denning, M.R. in *Amalgamated Investment & Property Co. Ltd. v. Texas-Commerce International Bank Ltd.*, MANU/UKWA/0068/1981 : [1982] 1 QB at p. 121:

'If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it--on the faith of which each of them--to the knowledge of the other--acts and conducts their mutual affairs--they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not--or whether they were mistaken or not--or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.'

25. A commercial document cannot be interpreted in a manner to arrive at a complete variance with

what may originally have been the intendment of the parties. Such a situation can only be contemplated when the implied term can be considered necessary to lend efficacy to the terms of the contract. If the contract is capable of interpretation on its plain meaning with regard to the true intention of the parties it will not be prudent to read implied terms on the understanding of a party, or by the court, with regard to business efficacy as observed in *Satya Jain (D) thr. L.Rs. and Ors. v. Anis Ahmed Rushdie (D) thr. L.Rs. and Ors.*, MANU/SC/1063/2012 : (2013) 8 SCC 131, as follows:

33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Lord Justice Bowen, L.J. in *Moorcock*. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied-the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in the *Moorcock* (supra) sums up the position: (PD p. 68)

...In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to

make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

34. Though in an entirely different context, this Court in *United India Insurance Co. Ltd. v. Manubhai Dharamasinhbhai Gajera and Ors.* had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by Courts in some foreign jurisdictions were noticed by this Court in Para 51 of the report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434)

51. ...'"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!' " *Shirlaw v. Southern Foundries (1926) Ltd.*, KB p. 227.'

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An expressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties

made for themselves. Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board, All ER p. 268a-b.'

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement..."

b) *ICICI Bank Limited and Others vs. United Breweries (Holdings) Limited and Others*, reported in MANU/MH/3589/2015, wherein it was held as

Limited and Others, reported in MANU/MH/3589/2015, wherein it was held as under:

"37...It is a well settled position in law that while reading the contents of commercial documents, intention of the parties has to be taken into consideration. It is also well settled that apart from recitals, the main agreement itself also has to be taken into consideration. Perusal of Recitals will indicate that Recitals (A) and (B) narrate the circumstances under which the earlier agreements viz. Master Debt Recast Agreement, Preference Share Subscription Agreement and Loan Purchase Agreement were entered into between the parties and if Recital (C) is read in its proper perspective, it would indicate that the present agreement was executed for the purpose of securing the entire loan of the Kingfisher Airlines Limited which was to be purchased by Plaintiff No. 1 - UBHL under the Loan Purchase Agreement. It cannot be forgotten that the Loan Purchase Agreement makes clear distinction between the pledged shares and equity shares (CCPS) for the purpose of securing the existing loan (Rs. 403.72 crores). Clauses 4.1 and 4.2 provided for top-up of pledged shares. At the same time, equity shares - CCPS (Rs. 170 crores) also is secured by clauses 9.1 and 10.1 and the Plaintiff No. 1 - UBHL was under an obligation to cover the short-fall, if any, on sale of equity shares. The Non-Disposal Agreement therefore covers both, the pledged shares as well as the short-fall on sale of equity shares - CCPS since Recital (C) speaks about fulfillment of all obligations of Plaintiff No. 1 - UBHL under the Loan Purchase Agreement. The intention of parties, therefore, become very clear from the

Recitals as well as the contents of the clauses of the Non-Disposal Agreement. The contention of Mr. Seervai, the learned Senior Counsel appearing on behalf of Respondent Nos. 1 and 2/original Plaintiff Nos. 1 and 2 that there was novation of contract in respect of Clause No. 4.1 is not correct.

38. The law on construction of commercial document is quite well settled. The House of Lords in *Reardon Smith Line Ltd. v. Yngvar Hansen Tangen* 1 W.L.R. (1976) 989 has observed as under:--

"It is less easy to define what evidence may be used in order to enable a term to be construed. To argue that practices adopted in the shipbuilding industry in Japan, for example as to sub-contracting, are relevant in the interpretation of a charterparty contract between two foreign shipping companies, whether or not these practices are known to the parties, is in my opinion to exceed what is permissible. But it does not follow that, renouncing this evidence, one must be confined within the four corners of the document. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn, presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. I give a few illustration. In *Utica City National Bank v. Gunn* (1918) 118 N.E., 607; 222 N.Y. 204 the New York Court of Appeals had to consider the meaning of "loans and discounts" in a contract of guaranty. The judgment of Cardozo J. contains this passage, at p.608:

"The proper legal meaning, however, is not always the meaning of the parties. Surrounding circumstances may stamp upon a contract a popular or looser meaning. The words 'loans and discounts' are not so clear and certain that

circumstances may not broaden them to include renewals. They often have that meaning in the language of business life. To take the primary or strict meaning is to make the whole transaction futile. To take the secondary or loose meaning, is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice. Wigmore on Evidence, vol. IV, para 2470, Stephen, Digest of Law of Evidence, art. 91, subds. 5 and 6."

Similarly, the House of Lords in Investors Compensation Scheme Ltd. v. West Bromwich Building Society MANU/UKHL/0054/1997 : 1 W.L.R. (1998) 896 has observed as under:--

....."The result has been subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declaration of subjective intent. They are admissible only in an action for

rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* MANU/UKHL/0036/1984 : [1985] A.C. 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

Further, the House of Lords in *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* MANU/UKHL/0004/1997 : 2 W.L.R. (1997) 945 has observed as under:--

"I propose to begin by examining the way we interpret utterances in everyday life. It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying. No one, for example, has any difficulty in understanding Mrs. Malaprop. When she says "She is an obstinate as an allegory on the banks of the Nile", we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute "alligator" by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like "allegory".

Mrs. Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustments when people have made mistake about names or description or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says "And how is Mary?" it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer "Very well, thank you" without drawing attention to his mistake. The message has been unambiguously received and understood.

If one applies that kind of interpretation to the notice in this case, there will also be no ambiguity. The reasonable receipt will see that in purporting to terminate pursuant to clause

7(13) but naming 12 January 1995 as the day upon which he will do so, the tenant has made a mistake. He will reject as

too improbable the possibility that the tenant meant that unless he could terminate on 12 January, he did not want to terminate at all. He will therefore understand the notice to mean that the tenant wants to terminate on the date on which, in accordance with clause 7(13), he may do so, i.e. 13 January."

Similarly, the House of Lords in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* MANU/UKHL/0036/1984 : 1 A.C. (1985) 191 has also observed as under:--

"To the semantic analysis, buttressed by generous citation of judicial authority, which led the arbitrators to the conclusions as to the interpretation of the wording of the withdrawal clause that I have summarised, the arbitrators' added an uncomplicated reason based simply upon business commonsense:

"We always return to the point that the owners' construction is wholly unreasonable, totally uncommercial and in total contradiction to the whole purpose of the N.Y.P.E., time charter form. The owners relied on what they said was 'the literal meaning of the words in the clause.' We would say that if necessary, in a situation such as this, a purposive construction should be given to the clause so as not to defeat the commercial purpose of the contract."

"While depreciating the extension of the use of the expression "purposive construction" from the interpretation of the statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

6. The next contention put forth by the learned Senior Counsel for the Company was that the Company is a registered Partnership Firm and one

Mr.Radhakrishnan, the Partner of the Company had duly signed in the capacity as a Partner in the Company along with the Firm seal and his designation. The Defendant, on being satisfied with the status of the Company and on collection of necessary premium, had issued the Policy in the year 1999 and therefore, the Defendant cannot now raise the issue regarding the registration of the Company. When similar stand was taken by the Defendant in the connected suit in C.S.No.763 of 2004, the plea was negatived both by the Hon'ble Single Judge and also the Hon'ble Division Bench of this Court. For better understanding, the relevant portion of the order passed by the Hon'ble Division Bench of this Court in M/s.Tarapore & Co., Chennai vs. M/s.United India Insurance Co. Ltd., Chennai [OSA No.120 of 2018] decided on 26.07.2018 is extracted hereunder:

"24. We are not in agreement with the finding of the learned single Judge in this regard. Limitation is always a mixed question of fact and law. On a common incident, the appellant was found to be within limitation under one policy and was non suited with regard to the other policy, as beyond limitation. This goes against the very purpose of the law of limitation. In fact, the respondent company cannot get into an advantageous position for their inaction and stoic silence maintained by them. It is very unfortunate that the respondent Insurance Company of such a high repute chose to take advantage of its own inaction and then turn it against the appellant on the ground of limitation. The respondent kept the appellant guessing till the end and made the appellant believe that the claim is under process in both the policies and chose to repudiate the claim under on policy and remain silent under the other policy. This Court will not permit any party to take advantage of his own wrong and defeat the genuine claim made by the other party. The object and purpose of

law of limitation is not to defeat lawful claims. It only ensures that the claimant is vigilant enough to pursue his remedy. It reminds us the maxim "Vigilantibus Et Non Dormientibus Jure Subveniunt" which means that the law assists those that are vigilant with their rights, and not those that sleep there upon. In this case, the appellant company was vigilant enough to follow up the claim with the respondent and the present suit in our considered view is not barred by limitation.

25. The findings of the learned single Judge on the issue of limitation is hereby set aside and we hold that the suit has been filed within limitation."

7. To sum up his submissions, it was argued that even assuming that the suit had to be filed within 12 months from the date of the disclaimer, the Plaintiff had filed the plaint on 04.04.2012 itself, which is well within the prescribed period and the Defendant, having failed to discharge their burden, has been attempting to shift the same on the Company. Finally, it was prayed that since the suit was filed in time, the Company has to be compensated under the Policy for the loss incurred by it.

8. On the contrary, the learned counsel for the Defendant / Insurance Company has submitted that first of all, there is no document to show that the Partnership Firm of the Company is a registered one in compliance of Section 69(2) of the Partnership Act, as the deposition given by P.W.1 / Deputy General Manager (Personnel and Administration) during his Cross Examination (annexed in the typeset of papers at Page No.175) would amply prove the fact that no document was filed along with the suit to disclose that the Company is the

Partnership Firm and the person, who had signed and verified the plaint is the Partner in the Company. The learned counsel for the Defendant also drew the attention of this Court to Section 2(72) of the Companies Act, 2013 to contend that unless there is notification, it cannot be treated as Commercial Suit and a plea was also raised that in terms of Section 28 of the Contract Act, every agreement, in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing its rights, is void. The Company had instituted the suit on 04.04.2012, whereas the repudiation/disclaimer letter was dated 31.03.2011 and thus, it is clear that the suit was filed after twelve calendar months from the date of disclaimer and therefore, it was contended that the suit is barred by limitation.

9. The learned counsel for the Defendant placed strong reliance on the judgment of the Hon'ble Supreme Court in the case of Himachal Pradesh State Forest Company Limited vs. United India Insurance Company Limited, reported in (2009) 2 SCC 252 to urge that if the claim is not made in a law Court within 12 calendar months, it shall be deemed to have been abandoned and would become irrecoverable. For the sake convenience, the relevant Paragraphs of the judgment are hereby reproduced below:

"14.Mr.Sharma has, however, submitted that in view of the observations in some paragraphs in Food Corporation of India's case, the observations in Sujir Nayak's case were liable to reconsideration. We, however, find no merit in this plea for the reason that in Sujir Nayak's case, Food Corporation of India's case (supra) has been

specifically considered and Vulcan Insurance Company's case (*supra*) too had been relied upon.

15. In Sujir Nayak's case, this Court was called upon to consider condition 19 of the policy which was in the following terms:

"5....Condition 19. - In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration.

While construing this provision vis-à-vis Section 28 of the Contract Act and the cases cited above and several other cases, in addition, this is what the Court ultimately concluded:

16. From the case-law referred to above the legal position that emerges is that an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than that prescribed by law would be void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provide for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. This, in brief, seems to be the settled legal

position. We may now apply it to the facts of this case.

19. The clause before this Court in Food Corpn. case extracted hereinbefore can instantly be compared with the clause in the present case. The contract in that case said that the right shall stand extinguished after six months from the termination of the contract. The clause was found valid because it did not proceed to say that to keep the right alive the suit was also required to be filed within six months. Accordingly, it was interpreted to mean that the right was required to be asserted during that period by making a claim to the Insurance Company. It was therefore held that the clause extinguished the right itself and was therefore not hit by Section 28 of the Contract Act. Such clauses are generally found in insurance contracts for the reason that undue delay in preferring a claim may open up possibilities of false claims which may be difficult of verification with reasonable exactitude since memories may have faded by then and even ground situation may have changed. Lapse of time in such cases may prove to be quite costly to the insurer and therefore it would not be surprising that the insurer would insist that if the claim is not made within a stipulated period, the right itself would stand extinguished. Such a clause would not be hit by Section 28 of the Contract Act.

21. Clause 19 in terms said that in no case would the insurer be liable for any loss or damage after the expiration of twelve months from the happening of loss or damage unless the claim is subject of any pending action or arbitration. Here the claim was not subject to any action or arbitration proceedings. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, the Insurance Company shall cease to be liable. There is no dispute that no claim was made nor was any arbitration proceeding pending during the said period of twelve months. The clause therefore has the effect of extinguishing the right itself and consequently the liability also. Notice the facts of the present case. The Insurance Company was informed about the strike by the letter of 28-4-1977 and by letter dated 10-5-1977. The insured was

informed that under the policy it had no liability. This was reiterated by letter dated 22-9- 1977. Even so more than twelve months thereafter on 25-10-1978 the notice of demand was issued and the suit was filed on 2-6-1980. It is precisely to avoid such delays and to discourage such belated claims that such insurance policies contain a clause like Clause 19. That is for the reason that if the claims are preferred with promptitude they can be easily verified and settled but if it is the other way round, we do not think it would be possible for the insurer to verify the same since evidence may not be fully and completely available and memories may have faded. The forfeiture Clause 12 also provides that if the claim is made but rejected, an action or suit must be commenced within three months after such rejection; failing which all benefits under the policy would stand forfeited. So, looked at from any point of view, the suit appears to be filed after the right stood extinguished. That is the reason why in Vulcan Insurance case while interpreting a clause couched in similar terms this Court said: (SCC p. 952, para 23)

'23....It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act....'

Even if the observations made are in the nature of obiter dicta we think they proceed on a correct reading of the clause.

In the light of the fact that Food Corporation's case has been considered in Sujir Nayak's case, no further argument remains in the present matter, as Clause 6(ii) and Condition 19 are, in their essence, *pari materia*.

16. Mr. Sharma has also placed reliance on Muni Lal's case (*supra*). In this case, the primary issue before the Court was as to whether an amendment under Order 6 Rule 17 of the CPC ought to be allowed after the relief which had been sought to be introduced had become time barred. We, therefore, find that no case for interference is made out. The appeal is, accordingly, dismissed. There will be no order as to costs."

10. Finally, it was argued that in the absence any mandatory provisions, warranting the Defendant to accept the claim, there is no justification on the part of the Plaintiff, seeking for a direction to make good the loss incurred by them, especially when the claim was made belatedly beyond 12 calendar months. Hence, the suit filed is a vexatious one and is liable to be dismissed on the ground of devoid of merits.

11. Heard the learned Senior Counsel for the Company, the learned counsel for the Defendant and perused the material documents available on record.

12. The Company, which is an Engineering Contractor, engaged in execution of large scale of construction works both for Government and Private Organizations all over the country, had purchased a Crane worth about Rs.3,01,80,509/- (bearing Engine No.25214013 and Chassis No.HI-50-045-0020) from M/s.Telco Construction Co. Ltd., Jamshedpur on 17.07.1999 for execution of a contract awarded by M/s.Tata Steel Limited in respect of certain engineering works at the Tata Steel Complex at Jamshedpur. It is not in dispute that the said Crane was duly insured with the Defendant / Insurance Company under "Miscellaneous and Special Type of Vehicles Package Policy" in the year 1999. According to the Company, the Insurance Policy was duly renewed then

and there on its expiry and for the period from 06.09.2006 to 05.09.2007, the value of the Crane was declared as Rs.1,10,00,000/- and the Company also remitted the applicable premium charges to the Defendant.

13. In the interregnum period precisely on 14.06.2007, there was an accident to the Crane, which had taken place while erecting a utility pipeline at the job site, as a result of which, there was a huge damage to it. After due assessment with the help of two Surveyors of the Defendant, the Company had claimed a sum of Rs.70,15,972.38 from the Defendant to carry out the repair works to put the machine in working condition. However, the claim was repudiated by the Defendant on the sole ground that the Crane was put into operation outside the Company's office premises in contrary to IMT 13 of the Policy, in lieu of its own premises. Aggrieved by such repudiation, the Company has initiated the present *lis*, stating that when the Crane was exclusively bought for the purpose of execution of the contract, which fact was also duly conveyed to the Defendant, the rejection on the said ground cannot be accepted and the Defendant cannot be permitted to say that the Policy is valid only if the accident occurs inside the premises of the address furnished in the Policy, as the Head Office address was furnished to the Defendant for any further correspondences between the Company and the Defendant.

14. Though the Insurance Policy was in existence on the date of accident, the issue to be decided in this case is as to whether the Company is entitled to insurance claim for the damage happened to the Crane in the third party premises.

15. Before coming to a conclusion, it is worthwhile to refer to India Motor Tariff (IMT) No.13, which endorses the following:

"13. It is hereby understood and agreed that the insurer shall not be liable in respect of the vehicle insured while the vehicle is being used elsewhere than the insured's premises except whether the vehicle is specifically required for a machine to fight a fire."

It is seen that the Tariff Advisory Committee has laid down rules, regulations, rates, advantages, terms and conditions in regard to transaction of motor insurance in India in accordance with the provisions of Part ii (b) of the Insurance Act, 1938. A cursory look at the Insurance Policy, it could be easily understood that the Policy has been taken for claiming the benefits, in case the damage takes place in the premises owned by the Plaintiff and not in the third party place. Admittedly, the accident had taken place in the work site of a third party and there is a cogent evidence to establish the same.

16. It was the stand of the Defendant that the Company, having availed the benefit of discount under the head "for limited to own premises", cannot agitate that the Policy was taken for usage of the Crane at the third party

place, especially when there was an IMT Endorsement No.13 etc. It was also stated by the Defendant that the Company had not taken any efforts to delete IMT No.13 so as to avail the benefit of present claim. The contention of the Defendant has been duly corroborated with the evidence of the Company's witnesses during cross examination, who had admitted the factum of availing discount and IMT Endorsement on the Policy. The relevant portions of the depositions of the Company side witnesses are extracted below:

"At Page 11, Cross Examination of Plaintiff Witness:

Q: Ex.P4 contains the schedule of premium. In the schedule of premium a discount was availed for a sum of Rs.60,993,90 for limited to own premises.

Ans: Yes. Under that discount, we can identify IMT 13 available.

Q: I put it to you, even under the Policy is subject to IMT Endorsement No.13, 21, 47 etc.

Ans: Yes.

Q: Have you informed the Insurance Company prior to the date of accident that you are using the crane other than the address given in the policy?

Ans: No, we did not inform the Insurance Company regarding the usage of crane other than the address given in the Policy schedule."

17. Thus, it is vividly clear that the Crane was insured with the Defendant with an assurance that it would be used in the own premises in order to avoid the payment of higher premium, as the usage of the Crane at the third party

premises would fetch an exorbitant premium and the Company had also availed the benefit of discount based on such assurance and after the accident and on repudiation of the claim by the Defendant, the Company cannot be permitted to make a huge hue and cry, more particularly when it was the own admission of their own witnesses to the effect that no prior intimation was given to the Insurance Company regarding operation of the Crane in the address other than the one mentioned in the Policy. Though there was an exception in IMT No.13, when the service of the vehicle is absolute for a machine to fight a fire, it was not the case of the Company that the Crane was moved to the third party place for the said purpose, whereas it was damaged while loading pipelines.

18. In that regard, the judgment cited by the Defendant in the case of National Insurance Co. Ltd. vs. Ayyadurai and Others, reported in 2003-2-LW(601) is aptly applicable to the present case on hand, which holds that in the absence of payment of additional premium for extra coverage, the insurer is not entitled to claim any benefits thereunder. The Paragraph No.7 of the said judgment of Hon'ble Division Bench reads thus,

"7. When a Policy obtained by an insurer which limits the coverage to that which the provisions of the Motor Vehicles Act require to be covered, one has to look to that Act to ascertain the extent of liability of the insurer. If some thing is not mandatorily required to be covered then the policy cannot be

read as covering such a liability. Of course, it is always open to the insured to obtain additional coverage by paying the additional premium therefore and obtaining an appropriate policy."

19. It was vigorously argued by the learned Senior Counsel for the Company that when one of the Company's Excavators that was used outside the premises of the Company, was involved in an accident, the claim submitted by the Company was accepted by the Board of the Defendant and dues were settled and therefore, the rejection of the present claim was arbitrary in nature. The entire nature of the previous claim was not placed before this Court and even assuming for the sake argument that similar claim was accepted by the Defendant, such unlawful release in respect of that claim cannot be allowed to be perpetuated for ever or taken as a precedent.

20. With regard to limitation, in terms of Section 28 of the Contract Act, the suit has to be initiated within 12 calendar months and according to the Company, the date of filing of the suit was 04.04.2012, which was well within time and the Defendant / Insurance Company had mischievously referred to the predated letter dated 31.03.2011 (which was received at the Company's end on 06.04.2011) in order to escape from its liability of realization of the claim. Once such a stand is taken by the Company, is it not the responsibility of the Company to establish the same before the Law Court by way of oral and documentary evidence? The Company, being a reputed Firm in India, must have maintained a

register in order track details of such important communications, documents, correspondences, etc. and failure to do so instills doubts in the minds of this Court to accept the said submission.

21. The yet another contention raised by the learned counsel for the Defendant that the Company is not a registered partnership firm, as no document has been adduced to that effect, has been rebutted by the learned Senior Counsel for the Company, stating that mere non-filing of document alone will disentitle the Company to get the insurance claim, when the Deed of Partnership had been executed as early as on 23.01.1997 by inducting five persons as Partners of the Company, M/s.Tarapore and Company, out of whom, one Mr.N.Radhakrishnan had been corresponding with the Defendant Insurance Company in respect of the claim.

22. Be that as it may, the question as to whether the Company is a registered Partnership Firm or not need not be gone into at this stage, as admittedly, the Crane was not in operation at the own premise of the Company and the Company, having violated the terms and conditions of the Insurance Policy, is not entitled to any relief.

S.VAIDYANATHAN,J.

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23. In view of what is stated herein-above and for the foregoing observations and discussions, this Court is of the considered opinion that the

claim made by the Company is unsustainable and no relief sought by the Company can be granted in the present suit. Accordingly, the Suit is dismissed as devoid of merits. No costs.

10.06.2019

Index: Yes/No
Internet: Yes/No
Speaking Order: Yes/No
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PRE-DELIVERY ORDER IN
C.S.(Comm. Div.) No.440 of 2012

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