

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

W.P.A 1199 of 2023

Tirupati Vessel Private Limited & Anr.

vs.

The Oriental Insurance Company Ltd. & Anr.

For the petitioners	:	Mr. K. Thaker, Adv. Mr. S. Ghosh Dastidar, Adv. Ms. Sneha Singhania, Adv.
For the respondent no. 1	:	Mr. Rajesh Singh. Adv.
For the respondent no. 2	:	Ms. Sweta Gandhi, Adv.
Last Heard on	:	15.05.2023.
Delivered on	:	09.06.2023.

Moushumi Bhattacharya, J.

1. The petitioner no. 1 is the sole owner of the barge "Gal Constructor" and entered into a Time Charterparty agreement with the respondent no. 2, Afcons, on 26.8.2019 under which Afcons hired the vessel. The petitioner no. 1 insured the barge through an Insurance Policy from 22.5.2019 to 20.5.2020 issued by

the respondent no. 1, Oriental Insurance Company. The Insurance Policy was for Rs. 12 crores and was issued for the Hull and Machinery of the vessel. The Policy was renewed till 23.5.2021. Afcons / respondent no. 2 was thereafter made a co-assured in the said Insurance Policy. The petitioner no. 1 also obtained Insurance from the Maritime Mutual Insurance Association (NZ), the P&I Club for loss or damage to the waters/environment in relation to the barge.

2. The barge was however caught in the Cyclone Tauktae on 17.5.2021 and ran aground and was rendered a constructive total loss. The petitioner no. 1, hence, lodged a claim for the full value of Rs. 12 crores with the respondent no. 1 under the Insurance Policy. The wreck was auctioned and the sale was confirmed at Rs. 4.07 crores conveyed through Transocean Marine and General Survey Agencies which were the surveyors appointed by the respondent no. 1. The petitioner received Rs. 4.07 crores in part satisfaction of its claim of Rs. 12 crores.

3. The dispute in the present writ petition is concerned with the disbursement of the balance sum claimed by the petitioner from the respondent no. 1 and on the respondent no. 1 seeking a No Objection Certificate from the respondent no. 2 Afcons and ONGC as a pre-condition for the disbursement of the balance amount. The petitioners hence seek a Mandamus on the respondent no. 1 to release the balance amount of Rs. 8,04,19,227/- without requiring the respondent no. 2 Afcons to furnish the No Objection Certificate.

4. The above facts are not disputed.

5. The objection taken on behalf of the respondents is on the maintainability of the writ petition on the ground that the writ petition involves disputed questions of facts. Learned counsel appearing for both the respondents i.e., the Oriental Insurance Company and Afcons say that a writ court cannot get into questions involving facts which are disputed. It is also argued on behalf of Afcons that Afcons had to pay a substantial amount of money on account of the oil spillage from the capsized vessel and that the petitioners should share the financial burden of the same. It is contended on behalf of the respondent no. 1 that the Charterparty agreement requires written consent of both ONGC and Afcons which supports Oriental's insistence for the NOC from Afcons for releasing the balance amount to the petitioners.

6. The clauses of the Time Charterparty dated 26.8.2019 between the petitioner no. 1 and the respondent no. 2 Afcons which are relevant are 14(f) which imposes a liability on Afcons for pollution caused by carriage of any hazardous or noxious substance; Clause 53(b) which imposes liability on Afcons for loss or damage caused by pollution; and Clause 55 under which the petitioner no. 1 is to obtain Insurance for the vessel incorporating Afcons and ONGC as co-assured. Clause 55 requires the written consent of ONGC and Afcons in respect of insurance claims in which their "interest is involved". The Clause further provides that the insurance shall be in compliance with all requirements of the Director General of Shipping. Clause 55 was incorporated

in the Charterparty under the Mandate of the DG Shipping Guidelines which requires the addition of Charterers in the Insurance Policies of vessels engaged in offshore business. The relevant part of Clause 55 is set out.

“Clause 55

.....

The Insurance Policies should mention the following in Loss Payee Clause:

“In respect of Insurance claims in which ONGC’s & AFCONS’s interest is involved, written consent of ONGC & AFCONS (as the case may be) will be required”

The Insurance policies taken by Owner shall also provide coverage for War Risks, Oil Pollution and Wreck Removal.

The insurance shall be in compliance with all requirements of DG Shipping.”

7. The dispute is at two levels. While respondent no. 1 i.e., Oriental Insurance, has set the pre-condition of a No Objection Certificate from Afcons for disbursement of the balance amount to the petitioner, Afcons has also refused to issue the No Objection Certificate (“NOC”) until the petitioner no. 1 settles Afcons’ claim of Rs. 2.23 crores on account of expenses incurred by Afcons for oil spillage and pollution.

8. Clause 55 of the Charterparty makes it clear that the written consent of ONGC and Afcons is required in respect of insurance claims in which the interest of ONGC and Afcons is involved. The claim of the first petitioner under the Hull and Machinery Insurance Policy is as per the policy issued by the respondent no. 1. Afcons has not lodged any claim under the subject Hull and Machinery Insurance Policy and the affidavit of Afcons does not disclose any interest in the settlement amount to be received by the first petitioner from the

Insurance Company for its claim under the said Policy. The only ground stated in the Afcons' affidavit is that Afcons cannot issue the NOC to the petitioners unless the petitioners release Rs. 2.23 crores spent by Afcons for prevention of oil spillage / pollution.

9. The ground given by Afcons for refusing to issue NOC is an independent claim which Afcons may have against the petitioners and is not part of or covered by the Hull and Machinery Policy issued by the respondent no. 1. Afcons' claim is covered by the Policy issued by the P & I Club which has been referred to in Afcons' affidavit. Admittedly, the P & I Club rejected Afcons' claim. Clause 34 of the Charterparty also makes it clear that the claim now being raised by Afcons against the petitioner no. 1 is to be resolved by arbitration. Therefore, the dispute which Afcons is seeking to raise for the refusal to issue NOC is part of a different Insurance Policy is hence not a dispute which is required to be adjudicated for the purposes of the present writ petition. As stated above, the present writ petition is limited to the pre-condition set by the respondent no. 1 i.e., Oriental Insurance Company for a NOC for releasing of the balance claim settlement amount to the petitioner no. 1.

10. The respondents have relied on certain clauses of the Charterparty which are required to be dealt with. Clause 54 deals with wreck removal and Clause 14(b)(i) deals with damage to property of the petitioner no. 1 and injury or death of crew. Hence, these clauses are not relevant for the present

adjudication. However, Clauses 14(f) and 53(b) impose the liability of prevention of pollution by oil spillage specifically on Afcons. This would also be evident from the notices and correspondences issued by the DG of Shipping to Afcons and disclosed in the affidavit filed by Afcons. Afcons' liability to prevent oil spillage/pollution further arises from Section 356J of the Merchant Shipping Act, 1958.

11. The act of withholding the NOC and the Insurance Company's insistence on the NOC for disbursement of the balance amount to the petitioners is contrary to the Charterparty as well as the Insurance Policy issued by the respondent no. 1. Apart from being arbitrary, it is further evident that Afcons is seeking to coerce the first petitioner to waive the balance Charter hire fee to Rs. 2.46crores which has been withheld by Afcons as a set off to Afcons' claim of Rs. 2.23 crores from the first petitioner.

12. The entire controversy revolves around the Clauses of the Charterparty and Clause 55 thereof restricts obtaining of consent of ONGC and Afcons only in respect of insurance claims in which their interest is involved. There is nothing on record or in the facts placed before the Court to show that the claim of the petitioners from the respondent no. 1 Insurance Company under the Hull and Machinery Policy of the Vessel has any nexus with Afcons. ONGC has already given its NOC and is hence not a material party to the writ petition. Afcons' refusal to give NOC and use of its claim of Rs. 2.23 crores against the petitioner no. 1 for the same are not only contrary to the Charterparty but also

expressly *mala fide*. Even if it is assumed that Afcons has a monetary claim against the petitioners, such claim is under a totally different Policy between the P & I Club and Afcons and the recourse for such claim is through Arbitration under the Charterparty.

13. The objection with regard to maintainability of the writ petition is equally misplaced. There are no disputed questions of fact. The claim settlement amount of the first petitioner and the first petitioner's entitlement to the same is an admitted fact. The fact that Afcons cannot and does not have any interest in the claim settlement under the Hull and Machinery Policy has already been concluded above. Afcons has not made a case in its affidavits for refusing any part of the claim settlement amount which is to be disbursed by the respondent no. 1 under the Hull and Machinery Policy. Afcons' claim, if any, will therefore not be affected by any order passed in the present writ petition. The aforesaid makes it clear that the respondent no. 1, i.e., the Insurance Company cannot insist upon a No Objection Certificate for disbursing the balance amount of Rs. 8,04,19,227/- to the first petitioner after allowing deductibles on account of the salvage and auction costs. Significantly, the Insurance Company did not require the first petitioner to take any NOC from Afcons / ONGC at the time of auction and sale of the wreck as neither Afcons nor ONGC had any interest in the Hull and Machinery of the Vessel; none of them had also lodged any claim under the subject Policy.

14. Hence, this Court sees no valid factual or legal basis for the respondent no. 1 i.e., the Insurance Company to insist upon a NOC from Afcons for settlement of the balance amount which is claimed by the petitioners. Besides the factual aspect, on the issue of maintainability of the writ petition, in *ABL International Ltd. vs. Export Credit Guarantee Corporation of India Ltd.* ; (2004) 3 SCC 553, the Supreme Court held that simply raising a dispute with regard to the writ petition under Article 226 would not be sufficient to relegate the parties to a suit. In that decision, the Supreme Court opined that even oral evidence can be taken in a writ petition if the facts so require and the Supreme Court further held that the claims of the contesting parties stand or fall on the terms of the contract which do not require any external aid of interpretation. *ABL* was referred to in *State of Kerala vs. M.K. Jose*; (2015) 9 SCC 433 where the Supreme Court clarified that there was actually no disputed question of facts at all in *ABL*. The Supreme Court in *M.K. Jose* held that whether a contractual claim could be entertained in the writ petition would depend on the individual facts of each case. In *Shubhas Jain vs. Rajeshwari Shivam*; 2021 SCC OnLine SC 562, the Supreme Court proceeded to adjudicate on the issue of the quantum of monthly rent which was payable by the appellant but held that the High Court under Article 226 cannot adjudicate on hotly disputed questions of facts. *Godrej Sara Lee Ltd. vs. Excise and Taxation Officer*; 2023 SCC OnLine SC 95 relied on *State of Uttar Pradesh vs. Indian Hume Pipe Co. Ltd.*; (1977) 2 SCC 724 to hold that where a pure question of law and investigation into facts becomes unnecessary the High Court could entertain a

writ petition in spite of existence of an alternative remedy. *Poonawalla Fincorp Limited vs. National Insurance Company Limited*; 2022 SCC OnLine Cal 584 has been cited by the Insurance Company also on the restricted scope of Article 226 where disputed questions of fact are involved.

15. Apart from the impossibility of following a straight-jacketed formula for interference / non-interference with disputed questions of facts, the decisions cited on behalf of the respondents involved factual disputes which were certainly outside the domain of writ jurisdiction of the concerned High Courts. For instance, in *Poonawalla Fincorp*, the Division Bench of this Court was of the view that the allegation of the appellant repudiating several of the conditions in the insurance policy required further factual inquiry. In *M.K. Jose* the dispute was with regard to contractual obligations of the parties where certain facts were required to be ascertained and the Supreme Court was of the view that the respondent had invoked the jurisdiction of the High Court of Kerala on various occasions challenging several actions taken by the State Government which were in abuse of the process. The Supreme Court was also of the view that the writ jurisdiction in those cases were extended to cause roving enquiries. *Shubhas Jain* involved conflicting Reports of the technical Advisory Committee / opinions of Architects with regard to the condition of the building and the Supreme Court had hence committed a serious error in directing removal of a wall with the assistance of a group of architects despite conflicting reports.

16. In the present case, this Court does not find the existence of any factual disputes which are outside the jurisdiction of a Writ Court exercising discretionary powers under Article 226 of the Constitution. The only dispute raised is with regard to the clauses of the Charterparty executed between the petitioner and Afcons. The Clauses which have been discussed above are clear in their object and intent. There is no ambiguity in the Clauses of the Charterparty and the Court has not been called upon to interpret the Clauses. The objection to the maintainability of the writ petition on the issue of disputed questions of facts is hence completely misplaced and is rejected.

17. The above facts persuade this Court to allow the writ petition and grant the relief prayed for. WPA 11991 of 2023 is accordingly disposed of with a direction on the respondent no. 1 i.e., Oriental Insurance Company to remit to the petitioners the sum of Rs. 8,04,19,227/- towards settlement of the petitioner's claim without requiring a no-objection from Afcons as a pre-condition for such disbursement. The respondent no. 1 should also release this amount to the petitioner forthwith.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)