IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
03.04.2023	21.04.2023

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO. 24264 OF 2018
AND
W.M.P. NOS. 28286 & 28287 OF 2018

Estra Enterprises Pvt. Ltd.
(Formerly Roverco Apparel Co. Ltd.
Now merged with Estra Enterprises Pvt. Ltd.)
Rep. by its Authorised Signatory
Kumaraswamy Babu, S/o Kumaraswamyh
6th Floor, Tower-C, Tex Meadows
No.15, Rajiv Gandhi Salai (OMR)
Sholinganallur, Chennai 600 119. .. Petitioner

- Vs -

1. The Regional Manager
Oriental Insurance Co. Ltd.
PB No.1877, U.I.L Building, IV Floor
No.4, Esplanade, Chennai 600 108.

2. The Deputy General Manager
The Oriental Insurance Co. Ltd.
Oriental House, P.B. No.7037
A-25/27, Asaf Ali Road
New Delhi 110 002. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the records pertaining to the impugned proceedings dated 8.12.2016 in Policy Nos.412292/11/2015/6, 7 & 8 and records pertaining to the impugned proceedings dated 9.7.2018 in Policy Nos.412292/11/2015/6, 7 & 8 issued by the first respondent and quash the same and direct the respondents to pay Rs.5,03,31,800/- with interest at the rate of 18% per annum to the petitioner.

For Petitioner	: Mr. Jayanth Muthuraj, SC For M/s.Naveenkumar Murthi
For Respondent	: Mr. N.Vijayaraghavan, for M/s. M.B.Gopalan Associates

ORDER

The rejection of the claim of the petitioner, for the loss suffered by it due to floods, which stood covered under the insurance policies covered by the respondent, is put in issue before this Court in the present petition.

2. It is the case of the petitioner that it is engaged in the business of garments and the premises in which the business was functioning was

carrying substantial stock and machinery of high value, the petitioner had insured the same with the respondent vide Policy Nos.412292/11/2015/6, 7, & and Policy Nos.412292/48/2015/38, 39 & 40 dated 27.2.2015. The scope of the policies included a Standard Fire & Special Perils insurance in which Storm, Tempest, Flood, Inundation, Hurricane, Cyclone, Typhoon & Tornado (for short 'STFI') was covered. The period of policy was from 27.2.2015 to 26.2.2016 and that the coverage was for a sum of Rs.50 Crores on stocks. It is the further case of the petitioner that the petitioner is paying a yearly premium of Rs.3,09,878/-.

3. It is the further case of the petitioner that in December, 2015, the city of Chennai witnessed unprecedented floods, which damaged substantial amount of properties of individuals and companies like the petitioner and the whole city was inundated with water and that substantial assets and properties worth several crores of rupees belonging to the petitioner were damaged beyond recovery.

4. It is the further case of the petitioner that the petitioner's factory, situated at No.300, Thiruneermalai Road, Parvathipuram, Chrompet, Chennai was affected by flood and several crores worth of properties were damaged inspite of the best efforts taken by the petitioner and its staff. The damage and loss was immediately communicated by the petitioner orally to the respondent on 2.12.2015 and by mail on 4.12.2015.

5. It is the further case of the petitioner that the policy subscribed by the petitioner, viz., Policy Nos.412292/11/2015/6, 7 & 8 dated 27.2.2015 covered for STFI damage carrying a premium of Rs.3,09,878/= as yearly premium. It is the further case of the petitioner that vide communication by mail, the petitioner informed that one V.Nagarajan, Surveyor was deputed to carry out the survey of the petitioner's premises affected by the floods and the petitioner, vide its communication informed the respondent that the estimated loss towards floods in the petitioner's factory is valued at Rs.4,99,39,000/=.

6. It is the further case of the petitioner that survey was made of the petitioner's premises and the requisite documents sought for by the surveyor were provided and the petitioner submitted his claim to the tune of Rs.5,03,31,800/- under Policy Nos.412292/11/2015/6, 7 & 8. It is the further averment of the petitioner that the claim under Policy No.412292/11/2015/8 was admitted on 26.12.2015 and allotted Claim No.410011/11/2016/030235. However, no action having been taken by the respondent on the said claim, the petitioner addressed the grievance cell of the respondent on 29.1.2016. It is the further averment of the petitioner that after a lapse of four months, vide letter dated 4.5.2016, the petitioner was informed that the petitioner had not availed flood risk and, therefore, the claim could not be entertained.

7. It is the further case of the petitioner that the response of the respondent is in clear contravention of the terms of the policy taken by the petitioner and, therefore, the petitioner made representation dated 5.5.2016 pointing to the STFI cover included in the policy, which covers flood as well and upon receipt of the said representation the respondent appointed

M/s.Meticulous Surveyors Pvt. Ltd. To conduct survey of the petitioner's premises and the said surveyor surveyed the petitioner's premises on several dates and made enquiries for assessing the value of the claim.

8. It is the further case of the petitioner that after conclusion of the said survey, there was no response from the respondent for over six months and, thereafter, vide communication dated 8.12.2016, the petitioner was informed that as per warranties and clauses attached to the policies, STFI peril is not covered under the above policies. Inspite of repeated representation, the petitioner was informed vide letter dated 9.7.2018 by the respondents that cause of lass does not fall within the ambit of Policy Nos.412292/11/2015/7 & 8.

9. It is the further case of the petitioner that inspite of paying high premium, the claim of the petitioner being rejected is wholly unreasonable, arbitrary and unsustainable as the policy includes the STFI cover and showing a mere exclusion of STFI perils in the general conditions cannot be the basis to reject the claim of the petitioner. It is the further case of the petitioner that

after multiple surveys conducted the respondent at the petitioner's premises and the loss having been quantified by the petitioner, the respondent cannot repudiate the claim of the petitioner citing non-inclusion of STFI cover in the policy, when the policy schedule clearly mandates inclusion of STFI cover.

10. It is the further averment of the petitioner that when the policy schedule clearly includes STFI cover, any general exclusion cannot have an overriding effect over the inclusion of STFI cover and that ambiguity, if any, should be resultantly be in favour of the petitioner. However, the act of the respondent in denying the claim of the petitioner clearly demonstrates non-application of mind and arbitrary act on the part of the respondent.

11. Learned senior counsel appearing for the petitioner submits that the policy schedule has clearly included STFI cover in the policy. Such being the case, the rejection of the claim of the petitioner by adverting to the general conditions, which show exclusion of STFI cover is wholly impermissible. In this regard, it is the submission of the learned senior counsel that when two interpretations are possible, the one beneficial to the

insured should be accepted consistent with the purpose for which the policy is taken, viz., the to cover the risk on the happening of a certain event. It is therefore the submission of the learned senior counsel that when inclusion of STFI cover is shown in the schedule, which is excluded in the general conditions, necessarily the policy schedule, which shows the cover should be taken in favour of the petitioner and the general conditions cannot be the basis to reject the case of the petitioner.

12. It is the further submission of the learned senior counsel that when the policy schedule clearly shows that premium has been shown and collected towards STFI cover, the exclusion shown in the general clause cannot go against the specific clause in the contract. It is the further submission of the learned senior counsel that STFI cover is included in the policy schedule and once the respondent has committed to the STFI cover, without any written agreement between the parties, viz., the petitioner and the respondent, the respondent cannot exclude any cover from the policy, more so when premium has been collected from the petitioner. Learned senior counsel, elaborating his arguments further, submitted that contracts

are to be construed in the case of ambiguity *contra proferentem* against the insurer so long as the requirement of *uberrima fides*, i.e., the good faith on the part of the insured stood established. Therefore, it is submitted that the general exclusion cannot override the specific inclusion and the ambiguity should be held in favour of the petitioner.

13. It is the further submission of the learned senior counsel that not once, but twice, based on the claim made by the petitioner, surveyors were appointed to survey the damage caused and to assess the loss. If it is the case of the respondent that STFI cover is not included in the policy, even on the very claim made by the petitioner, the claim could have been rejected *in limine* without resorting to any survey. The fact that survey had been conducted twice clearly shows that STFI cover stood covered else there was no necessity for the respondent to once again conduct a survey. Further, even the very first survey conducted by the respondent clearly show the inclusion of STFI cover, as non-inclusion of STFI cover in the policy would definitely have made the respondent not to survey even at the earliest point of time when the claim petition was presented.

14. It is the further submission of the learned senior counsel that STFI cover stood included in the policy, as would be evident from the policy document, which speaks in unambiguous terms the coverwise details and the amount covered under each cover. Such being the case, showing an exclusion, which is provided in the general clause, when specific clause includes the cover, cannot be the basis for the respondent to repudiate the claim of the petitioner.

15. In support of his submissions, learned senior counsel for the petitioner placed reliance on the following decisions :-

i) *Bholenath Cold Storage – Vs – National Insurance Co. Ltd. (1991 SCC OnLine Cal 181);*

ii) *LIC of India & Ors. – Vs – Asha Goel & Anr. (2001 (2) SCC 160);*

iii) *Biman Krishna Bose – Vs – United India Insurance Co. Ltd. & Anr. (2001 (6) SCC 477);*

iv) *United India Insurance Co. Ltd. – Vs – Pushpalaya Printers (2004 (3) SCC 694);*

v) *Usha International Ltd. – Vs – United India Insurance Co. Ltd. (2005 (84) DRJ 6);*

vi) United India Insurance Co. Ltd. – Vs – Manubhai dharmasinhbhai Gajera & Ors. (2008 (10) SCC 404);

vii) Anindya Datta – Vs – The New India Assurance Co. Ltd. & Ors. (2012 SCC OnLine Cal 10273);

viii) Galada Power & Telecommunication Ltd. – Vs – United India Insurance Co. Ltd. & Anr. (2016 (14) SCC 161);

ix) Jasmine Ebenezer Arthur – Vs – HDFC Ergo General Insurance Co. Ltd. & Ors. (W.P. No.22234 of 2016);

x) Dr. Shanthi Rengarajan – Vs – The Oriental Insurance Co. Ltd. & Anr. (W.P. No.43202 of 2016);

xi) HDFC Ergo General Insurance Co. Ltd. – Vs – Jasmine Ebenezer Arthur & Ors. (W.A. No.4035 of 2019); and

xii) Sushilaben Indravadan Gandhi & Anr. – Vs – New India Assurance Co. Ltd. (2021 (7) SCC 151)

16. Per contra, learned counsel appearing for the respondent submits that there is specific exclusion with regard to STFI cover in the insurance policy, as is shown in the general clauses, which contains the warranties. It is the further submission of the learned counsel that there is no reference in the policy schedule with regard to the amount that has been charged under individual heads of cover, such as fire, STFI, etc. Such being the case, the stand of the petitioner that STFI cover is included for which the petitioner has

paid premium is wholly misconceived. It is the further submission of the learned counsel that the policy schedule merely states the total amount that has been paid towards premium and there is no break-up with regard to the premium for the various covers. It is the further submission of the learned counsel that the stand of the petitioner that it has paid premium towards STFI cover is disputed by the respondent, as would be evident from the various communications which has emanated from the respondent for the representation submitted by the petitioner and the dispute with regard to such payment cannot be determined by this Court under Article 226 of the Constitution and the matter has to be placed before the appropriate forum for being adjudicated by adducing evidence. When the issue in the present case involves disputed questions of fact, necessarily this Court has to relegate the parties to move before the appropriate forum and the disputed facts cannot be gone into by this Court.

17. It is the further submission of the learned counsel that when cover of STFI is categorically excluded under the policy, the mere break-up in amount given for the various covers in the policy cannot be taken to mean

that STFI cover stood included in the policy, as the additive value of all the amounts does not reflect in the premium that is collected from the petitioner, which clearly goes to show that what is covered under the policy has to be adjudicated only by adducing evidence and it cannot be determined on the basis of pleadings by the parties. In this regard, learned counsel for the petitioner drew the attention of this Court to the decision of the Apex Court in ***Shree Ambica Medical Stores & Ors. – Vs – The Surat People's Co-operative Bank Ltd. & Ors. (2020 (13) SCC 564)***.

18. It is the further submission of the learned counsel that the appointment of surveyor is a matter of routine, initiated as a fact finding exercise, as once a claim is received, subject to final decision taken on the basis of all the information and documents received, the survey is conducted to ascertain the veracity of the claim. The mere fact that a survey has been undertaken alone cannot confer any right on the petitioner to contend that STFI is covered under the policy and the claim is admitted by the respondent.

19. It is the further submission of the learned counsel that inspite of the fact that the surveyor had assessed the loss, however, the same was not paid to the petitioner due to the fact that the policy specifically excluded STFI perils and, therefore, the claim was not entitled for being processed. In view of the specific exclusion, the petitioner is not entitled for any claim under the head STFI cover under the policy.

20. In the light of the aforestated facts, there being disputed questions of facts involved in the present petition, this Court shall not deal with the same and the parties ought to be sent before the appropriate forum to establish their case and, accordingly, prays for dismissal of the present petition.

21. In addition to the aforesaid decision, learned counsel also relied on the following decisions to substantiate his case :-

i) *Oriental Insurance Co. Ltd. – Vs – Sony Cheriyan (1999 (6) SCC 451);*

ii) *Polymat India (P) Ltd. & anr. – Vs – National Insurance Co. Ltd. & Ors. (2005 (9) SCC 174);*

iii) *Deokar Exports Pvt. Ltd. – Vs – New India Assurance Co. Ltd. (2008 (14) SCC 598);*

iv) *Vikram Greentech India Ltd. & Anr. – Vs – New India Assurance Co. Ltd. (2009 (5) SCC 599);*

v) *Export Credit Guarantee Corporation of India Ltd. – Vs – Garg Sons International (2014 (1) SCC 686);*

vi) *Industrial Promotion & Investment Corporation of Orissa Ltd. – Vs – New India Assurance Co. Ltd. & Anr. (2016 (15) SCC 315);*

vii) *United India Insurance Co. Ltd. – Vs – Orient Treasures Pvt. Ltd. (2016 (3) SCC 49);*

viii) *New India Assurance Co. Ltd. – Vs – Rajeshwar Sharma & Ors. (2019 (2) SCC 671); and*

ix) *Sonell Clocks & Gifts Ltd. – Vs – New India Assurance Co. Ltd. (2018 (9) SCC 784)*

22. Countering the submission with regard to the power of this Court to deal with disputed questions of fact in a writ petition, learned senior counsel for the petitioner drew the attention of this Court to the decision of the Apex Court in ***ABL International Ltd. & Anr. – Vs – Export Credit Guarantee Corporation of India Ltd. & Ors. (2004 (3) SCC 553)*** and submitted that the power of this Court to deal with disputed questions of fact is not foreclosed under Article 226 of the Constitution and if facts require, oral

evidence can be taken if the disputed questions relate to interpretation/meaning of the documents or parts thereof. It is therefore the submission of the learned senior counsel that cover of STFI, whether included or excluded under the policy would be evident from the policy document and it is only interpretation of the policy document that needs to be given by this Court and, therefore, the doors of justice under Article 226 does not stand closed and it is open to the Court to adjudicate the issue.

23. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record.

24. The issue of maintainability of a writ petition in the event of there being disputed questions of fact, is the pivotal submission, which has been canvassed by either side, one for and the other against. In this regard, the fulcrum of the issue regarding maintainability in respect of disputed questions of fact has since been settled by the Apex Court in *ABL International case (supra)*, wherein the Apex Court held as under :-

“16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of Smt. Gunwant Kaur & Ors. vs. Municipal Committee, Bhatinda and Ors. [1969 (3) SCC 769] where dealing with such a situation of disputed questions of fact in a writ petition this Court held :

> *"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial*

principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the *present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit in reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit."*

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19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Smt.Gunwant Kaur (supra), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and or involves some disputed questions of fact.

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

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of facts arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

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

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See: Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [1998 (8) SCC 1]. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."

25. From the above, it is manifestly clear that while this Court has the discretion to entertain a writ petition on disputed questions of fact, even to the exclusion of other available remedies, however, it is only when action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14.

26. Keeping the above principles of law, enunciated above, this Court will now consider the facts of the present case to find out whether this petition could be entertained at all and whether any relief could be granted to the petitioner.

27. The sum and substance of the argument advanced on behalf of the petitioner is that the cover of STFI is provided by virtue of the special clause under the policy schedule and, therefore, the general clause, in and by which exclusion is shown cannot be pressed into service and the ambiguity, if any between the two clauses should be inferred in favour of the petitioner. Towards this end, learned senior counsel for the petitioner placed reliance on

the decision in *Sushilaben's case (supra)*, wherein, the Apex Court held as under :-

"37. Even otherwise, it is well-settled that exemption of liability clauses in insurance contracts are to be construed in the case of ambiguity contra proferentum. Thus, in General Assurance Society Ltd. v. Chandumull Jain, this Court held:

"11. A contract of insurance is a species of commercial transactions and there is a well-established commercial practice to send cover notes even prior to the completion of a proper proposal or while the proposal is being considered or a policy is in preparation for delivery... In other respects there is no difference between a contract of insurance and any other contract except that in a contract of insurance there is a requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem that is against the company in case of ambiguity or doubt."

38. This judgment in Chandramull Jain has been cited with approval in United India Insurance Co. Ltd. v. Pushpalaya Printers (2004 (3) SCC 694) as follows:

"6. The only point that arises for consideration is whether the word "impact" contained in Clause 5 of the insurance policy covers the damage caused to the building and machinery due to driving of the bulldozer on the road close to the building. It is evident from the terms of the insurance policy that the property was insured as against

destruction or damage to whole or part. The Appellant Company agreed to pay towards destruction or damage to the property insured to the extent of its liability on account of various happenings. In the present case both the parties relied on Clause 5 of the insurance policy. Clause 5 is also subject to exclusions contained in the insurance policy. That a damage caused to the building or machinery on account of driving of vehicle on the road close to the building is not excluded. Clause 5 speaks of "impact" by any rail/road vehicle or animal. If the Appellant Company wanted to exclude any damage or destruction caused on account of driving of vehicle on the road close to the building, it could have expressly excluded it. The insured possibly did not understand and expect that the destruction and damage to the building and machinery is confined only to a direct collision by vehicle moving on the road with the building or machinery. In the ordinary course, the question of a vehicle directly dashing into the building or the machinery inside the building does not arise. Further, "impact" by road vehicle found in the company of other words in the same Clause 5 normally indicates that damage caused to the building on account of vibration by driving of vehicle close to the road is also included. In order to interpret this clause, it is also necessary to gather the intention of the parties from the words used in the policy. If the word "impact" is interpreted narrowly, the question of impact by any rail would not arise as the question of a rail forcibly coming to the contact of a *building or machinery would not arise. In the absence of specific exclusion and the word "impact" having more meanings in the context, it cannot be confined to forcible contact alone when it includes the meanings "to drive close", "effective action of one thing upon another" and "the effect of such action", it is reasonable and fair to hold in the context that the word "impact" contained in Clause 5 of the insurance policy covers the case of the Respondent to say that damage caused to the building and machinery on account of the bulldozer moving closely on the road was on account of its "impact". It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations, one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although there is no ambiguity in the expression "impact", even otherwise applying the Rule of contra preferentem, the use of the word "impact" in Clause 5 in the instant policy must be construed against the Appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This Rule applies to contracts of insurance and Clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in General Assurance Society Ltd. v. Chandmull Jain has expressed that :*

"11. ..... in a contract of insurance there is requirement of uberrima fides i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem, that is, against the company in case of ambiguity or doubt."

39. Likewise, in Export Credit Guarantee Corporation of India Ltd. v. Garg Sons International (2014 (1) SCC 686), this Court held:

"11. The insured cannot claim anything more than what is covered by the insurance policy. "The terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are. Consequently, the terms of the insurance policy, that fix the responsibility of the insurance company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonise the terms thereof, keeping in mind that the Rule of contra proferentem does not apply in case of commercial contract, for the reason that a Clause in a commercial contract is bilateral and has mutually been agreed upon. (Vide Oriental Insurance Co. Ltd. v. Sony Cheriyan [MANU/SC/0495/1999 : (1999) 6 SCC 451], Polymat India (P) Ltd. v. National Insurance Co. Ltd. [MANU/SC/1019/2004 : (2005) 9 SCC 174 : AIR 2005 SC 286], Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [MANU/SC/0540/2010 : (2010) 11 SCC 296: (2010) 4 SCC

(Civ) 459 : AIR 2010 SC 3400] and Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [MANU/SC/0327/2012 : (2012) 5 SCC 306 : AIR 2012 SC 2829].)"

40. Likewise, in BHS Industries v. Export Credit Guarantee Corpn. Ltd. (2015 (9) SCC 414), this Court held:

"31. As has been held in Chandumull Jain by the Constitution Bench that in a contract of insurance, there is a requirement of good faith on the part of the insured and in case of ambiguity, it has to be construed against the company. As per other authorities, the insurance policy has to be strictly construed and it has to be read as a whole and nothing should be added or subtracted. That apart, as has been held in Polymat India (P) Ltd. (2005) 9 SCC 174], it is the duty of the Court to interpret the document as is understood between the parties and regard being had to the reference to the stipulations contained in it.

35. The terms of the policy are to be strictly construed. There can be no cavil about the proposition of law that in case of ambiguity, the construction has to be made in favour of the insured."

41. In United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd. (2016 (3) SCC 49), this Court quoted Halsbury's Laws of England as follows:

"37. In Halsbury's Laws of England (5th Edn., Vol. 60, Para 105) principle of contra proferentem Rule is stated thus:

‘Contra proferentem rule.-Where there is ambiguity in the policy the court will apply the contra proferentem rule. Where a policy is produced by the insurers, it is their business to see that precision and clarity are attained and, if they fail to do so, the ambiguity will be resolved by adopting the construction favourable to the insured. Similarly, as regards language which emanates from the insured, such as the language used in answer to questions in the proposal or in a slip, a construction favourable to the insurers will prevail if the insured has created any ambiguity. This rule, however, only becomes operative where the words are truly ambiguous; it is a Rule for resolving ambiguity and it cannot be invoked with a view to creating a doubt. Therefore, where the words used are free from ambiguity in the sense that, fairly and reasonably construed, they admit of only one meaning, the Rule has no application.’”

42. In Industrial Promotion & Investment Corpn. of Orissa Ltd. v. New India Assurance Co. Ltd. MANU/SC/0920/2016 : (2016) 15 SCC 315, this Court referred to the contra proferentum Rule as follows:

“10. We proceed to deal with the submission made by the counsel for the Appellant regarding the Rule of contra proferentem. The Common Law Rule of construction "verba chartarum fortius accipiuntur contra proferentem" means that ambiguity in the wording of the policy is to be resolved against the party who prepared it. MacGillivray on

Insurance Law [Legh-Jones, Longmore et al (Eds.), MacGillivray on Insurance Law (9th Edn., Sweet and Maxwell, London 1997) at p. 280.] deals with the Rule of contra proferentem as follows:

> *The contra proferentem Rule of construction arises only where there is a wording employed by those drafting the Clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. 'One must not use the Rule to create the ambiguity - one must find the ambiguity first.' The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances.*

11. Colinvaux's Law of Insurance [Robert and Merkin (Eds.), Colinvaux's Law of Insurance (6th Edn., 1990) at p. 42.] propounds the contra proferentem Rule as under:

Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases the Rule is that the policy, being drafted in language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentem, against those who offer it. In a doubtful case the turn of the scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to *express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under given circumstances, they must use words admitting of no possible doubt.*

But a Clause is only to be contra proferentem in cases of real ambiguity. One must not use the Rule to create an ambiguity. One must find the ambiguity first. Even where a Clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine. So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly."

28. From the ratio laid down above by the Apex Court, it is abundantly clear that where there is an ambiguity in the clauses of the contract, so long as the insured had acted in good faith, the clauses in the contract have to be interpreted in favour of the insured and against the insurer. This Court is in respectful agreement with the said proposition and in fact, there is no quarrel with regard to the same by either side, as the decisions, which have been relied on by the respondent is covered in the abovesaid decision of the Apex

Court. Therefore, this Court need not multiply on any decisions relied on by the respondent in support of their contention.

29. In the above backdrop, the only issue that requires determination by this Court is whether there is any ambiguity with regard to the clauses and if so, whether the same being disputed would have to be adjudicated before the appropriate forum or could it be gone into by this Court under Article 226 of the Constitution.

30. It is the stand of the petitioner that for three policies, the petitioner has paid a sum of about Rs.3.09 Lakhs towards premium and the said policy covers STFI perils in addition to Fire. The three policies held by the petitioner are 412292/11/2016/6, 7 and 8. Of this 412292/11/2016/7 and 8 are floater policies, whereas 412292/11/2016/6 is not a floater policy. The above said fact is not disputed by either side. The premium paid by the petitioner towards the individual policies are as under :

S. No.	Policy No.	Premium Amount
1	412292/11/2016/6	Rs. 41,292.00
2	412292/11/2016/6	Rs.1,83,287.00
3	412292/11/2016/6	Rs.11,867.00

31. In all the aforesaid policies, the premium amount includes Service Tax and the said factum is also admitted, which is also borne out by record. This Court is mainly concerned with Policy No.412292/11/2016/6, which is for a sum insured of Rs.5 Crores on which much thrust is laid by the petitioner, as the said policy covers certain premises, and this Court is concerned with the premises located at No.300, Thiruneermalai Main Road, Parvathipuram, Chennai.

32. Insofar as the aforesaid premises is concerned, the coverwise details and the premium relating to the respective covers, as shown in the policy document, are as under :-

Coverwise Details	Premium
STFI Cover	Rs.6,251.00
Fire Basic Cover	Rs.87,518.00
Earth Quake Cover	Rs.2,501.00
Terrorism Cover	Rs.11,502.00

33. Certain other premises are also covered under the aforesaid policy and likewise, similar to the above, coverwise details have been provided in respect of the said premises as well. Totally three premises are covered

under the aforesaid policy. The total premium collected which is reflected in the schedule of premium is as under :-

Schedule of Premium	
Total Premium	Rs.36,750.00
Add : Service Tax	Rs.4,542.00
Stamp Duty	Rs.0.50
Total Amount	Rs.41,292.00

34. The total premium paid by the petitioner towards the cover for the aforesaid premises is Rs.36,750/-, which is shown under the schedule of premium. However, there is no clarity as to whether the premium collected is with regard to coverage for all the three premises. However, this Court is not deliberating any further on the said aspect. There is no break-up with regard to the different covers, which is provided to the aforesaid premises in the said policy document. This is the factum of dispute raised by the respondent, in that, it is the case of the respondent that had the coverwise premium been charged, including STFI cover, the premium towards the cover for the aforesaid premises would be more than a lakh of rupees and the lesser premium clearly shows that all the covers have not been provided. The

respondent, therefore, contends that the premium is for specific cover and not all the cover, for which premium is quoted.

35. Further, it is also to be noted that the general clauses provide a clear exclusion of cover for STFI perils and the relevant portion of the clause is extracted hereunder :-

> *"The Insurance under this policy is subject to warranties & Clauses otherwise stated herein :*
>
> ** * * * * **
>
> *12. STFI perils are excluded from The Scope of Cover"*

36. The ambiguity, which the petitioner stresses is that the coverwise details for which premium is quoted is an inclusion in the policy and the lower premium and the general exclusion clause cannot deny the petitioner the cover, more particularly the STFI cover, which has otherwise been specifically mentioned in the policy for which premium is quoted.

37. This Court is not oblivious to the special clause carrying more weight over the general clause. However, what strikes more at the root of

the issue is the fact that in the very same general clause there are categorical endorsements insofar as certain other covers are concerned and for better appreciation of the case, the relevant clauses are quoted hereunder :-

> *"7. Endorsement – Earthquake (Fire and Shock) – Add on Cover*
>
> *8. Terrorism Damage Cover Endorsement*
>
> *9. Terrorism Cancellation Clause*
>
> *10. Terrorism Additional Exclusions"*

38. In this background, on a careful perusal of the coverwise details, it is seen that premium amount for various covers is quoted, which has been extracted supra; while there is endorsement relating to certain aspects in the general clause, there is no endorsement with regard to STFI cover. In fact, as pointed out by the respondent, there is a specific exclusion insofar as STFI Perils are concerned. However, this Court is not for a moment suggesting that there is no inclusion of STFI in the policy, as premium is quoted for STFI cover as well. However, while there are specific inclusion in the general clause with regard to certain other covers, there is an endorsement with regard to STFI cover and there is a specific exclusion of STFI cover. However, the premium collected from the petitioner by the respondent does not in any

way relate to the premium for the different covers, which is offered by the respondent. In such a scenario, necessarily oral and documentary evidence have to be adduced to show as to how the amount is arrived at and the covers for which premium is charged which aspect cannot be decided by this Court under Article 226 of the Constitution.

39. The decision in *ABL International case*, which has been pressed into service by the petitioner to submit that a writ petition is maintainable under Article 226 of the Constitution will not be in any way helpful to the case of the petitioner, as there is a clear mandate by the Supreme Court that the High Courts could take up the petition only on the face of any arbitrariness or perversity shown in the order passed. However, in the case on hand, there is no arbitrariness or perversity in the order passed by the respondent.

40. Further, one other factor, that stares writ large on the face of the record, which has not been brought to the notice of this Court by either side at the time of argument, but is evidenced through the counter of the respondent is that the policy, which has been taken by the petitioner with the

respondent is a policy, which was initially carried on by the petitioner with another insurer. Thereafter, the policy was migrated to the respondent under the same terms as was existing with the earlier insurer. It is the specific case of the respondent in the counter that the earlier policy with United India Insurance Co. Ltd., was a policy on which there was no coverage for STFI Perils. The earlier policy with United India Insurance Co. Ltd., has been renewed with the respondent through policy migration and, therefore, what was provided for by the earlier insurer was carried on with the respondent.

41. On the above counter of the respondent, the petitioner has filed a rejoinder stating that the claim of the respondent with regard to the earlier insurance cover not carrying STFI cover is a wild claim and is not substantiated either by production of the above document or by referencing the same in the policy document issued by the respondent. In effect, the petitioner has also disputed the very contention of the respondent with regard to the earlier policy. But equally it should be noted that this is also a dispute, and the petitioner has also not submitted a copy of the earlier policy to show that STFI Perils were covered in the earlier policy. However, the

communications, which forms part of the typed set of documents, reveal that the respondent allege that only Terrorism is covered. Therefore, in such a backdrop, the respondent has negatived the claim of the petitioner, which act cannot be said to be arbitrary or perverse. The said act may not be in consonance with the terms of the contract, which is known only to the parties to the *lis* and the same is not known to the Court, but definitely there is no perversity or arbitrariness in the order passed by the respondent. In such a scenario, necessarily the above facets of the case have to be established only before the appropriate forum by the parties by adducing proper oral and documentary evidence and this Court cannot make a roving enquiry by admitting evidence, when there is no perversity or arbitrariness in the order.

42. In this regard, learned counsel for the respondent placed reliance on the decision of the apex Court in *Ambica Medical Stores case*, wherein, the Supreme Court has held as under :-

> *"22 Section 64(VB) of the Insurance Act 1938 provides as follows:*
>
> *"64VB. No risk to be assumed unless premium is received in advance.—(1) No insurer shall assume any risk in India in respect of any insurance business on which*

premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation. —Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or dispatch by post to, the insurer, the premium so collected in full without deduction of his commission within

twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules, relax the requirements of sub-section (1) in respect of particular categories in insurance policies.

(6) The Authority may, from time to time, specify, by the regulations made by it, the manner of receipt of premium by the insurer."

23. The above provision states that no risk can be assumed by the insurer unless the premium payable is received in advance. Sub-Section (3) of Section 64 (VB) provides for refund of the premium amount to the insured in case of cancellation or alteration of the terms and conditions of the policy. In the present case, the premium of Rs 992 to cover STFI perils was refunded by the insurer to the bank and the amount was deposited in the insured's account. The proposal does not conclude the contract. A contract postulates an agreement between the parties. In the present case, the insurer while issuing the new policy at a fresh location specifically excluded STFI perils and refunded the premium. The insured at the time when the loss occurred was covered by a policy that excluded STFI perils. Therefore, the insurer cannot be held to be liable. To hold to the contrary would be rewriting the agreement between the parties and creating a fresh contract to which the parties had not agreed."

43. In the case on hand, it is the specific case of the respondent that no premium has been collected towards STFI Perils. Though it is the stand of the

petitioner that STFI Perils is included in the policy and amount towards premium have been paid, but the said fact has to be established in the manner known to law. But for mere assertion, there is no material, barring the material noted above in the policy document, which shows the premium chargeable towards the various covers, however, as aforesaid, the premium paid does not tally with the premium which is alleged to be chargeable. In such a backdrop, this Court cannot come to any definitive conclusion with regard to the payment of premium or otherwise and it is for the parties to establish their case with regard to the payment of premium or otherwise. Further, the take over of the policy of one insurer by the respondent upon migration, which policy, according to the respondent, did not carry STFI cover has also to be equally established. In such a scenario, it would not be prudent for this Court to enter into the realm of adjudicating a disputed question under Article 226, which has been frowned upon, except on the ratio laid down in *ABL International case.*

44. In the above backdrop, the contention on behalf of the respondent that the details as to the covers, which have been provided to the petitioner

cannot be gone into by this Court without adducing oral and documentary evidence and, therefore, this Court may not embark upon recording any evidence, as has been held in *ABL International case* and it is best to relegate the parties to approach the appropriate forum, where the issue could be agitated in the manner known to law, carries greater conviction and the submission on behalf of the petitioner, touching upon the legal issue alone cannot determine the outcome of the case in favour of either party.

45. Though other contentions have also been raised on behalf of the petitioner touching upon the legality of the order passed by the respondent, however, in view of the fact that this Court has desisted from giving any definitive view by opining that the matter pertains to disputed questions of fact, which cannot be gone into by this Court for the reasons aforementioned, this Court is not deliberating on the said contentions and leaves open all the contentions to be advanced before the appropriate forum.

46. In such view of the matter, this Court is of the considered view that the present petition cannot be adjudicated by this Court under Article 226 of

the Constitution and, accordingly, the same deserves to be dismissed. For the reasons aforesaid, the writ petition fails and the same is dismissed. However, it is open to the petitioner to agitate his rights with regard to the repudiated claim before the appropriate forum in the manner known to law. There shall be no order as to costs. Consequently, connected MPs are closed.

21.04.2023

Index : Yes / No

GLN

To

1. The Regional Manager
Oriental Insurance Co. Ltd.
PB No.1877, U.I.L Building, IV Floor
No.4, Esplanade, Chennai 600 108.

2. The Deputy General Manager
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A-25/27, Asaf Ali Road
New Delhi 110 002.

M.DHANDAPANI, J.

GLN

PRE-DELIVERY ORDER IN
W.P. NO.24264 OF 2018

Pronounced on

21.04.2023