In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No. 2532 of 2022

The West Bengal Power Development Corporation Limited & Anr.
Vs.
The New India Assurance Company Limited

For the petitioner	:	Mr. Suddhasatva Banerjee, Adv. Mr. Chayan Gupta, Adv. Mr. Shoham Sanyal, Adv. Mr. Aviroop Mitra, Adv.
For the respondent	:	Mr. S.N. Ganguly, Adv. Mr. Siddhartha Goswami, Adv. Mr. Vivekananda Das, Adv.
Hearing concluded on	:	22.01.2024
Judgment on	:	29.01.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner no.1, the West Bengal Power Development Corporation Limited, is a Public Sector Undertaking of the Government of West Bengal. One of its main thermal power plants is situated at Bakreswar in Birbhum, West Bengal which was covered by a comprehensive Mega/Industrial All Risk Insurance Policy from the respondent, the New India Assurance Company Limited for a total sum insured of Rs. 73,56,36,46,295/-. In August, 2017, sudden vibration was observed in the machinery. The supplier of the plant and machineries, Bharat Heavy Electricals Limited (BHEL) was

contacted for advice and the operational parameters were transmitted to BHEL. As per the advice of BHEL, the unit was shut down in August, 2018 to facilitate inspection. The Turbo Generator Set was dismantled and inspected when the Generator Rotor was found damaged, the findings of the inspection and recommendations regarding which were drawn in a Minutes of meeting between BHEL and petitioner no.1 on August 19, 2018 which has been annexed to the present writ petition. Ultimately, the petitioner no. 1 lodged an insurance claim with the respondent-insurance company in September 9, 2018 referring to such minutes for damage to the tune of Rs. 32,70,96,000/- by a letter dated September 19, 2018.

2. The respondent appointed a surveyor, Shri Ashok Chopra of Ashok Chopra and Company, Surveyors and Loss Adjusters, who submitted his initial report opining that the loss was not admissible under the terms and conditions of the Policy. However, the gross assessed loss was quantified by him at Rs. 32,53,26,000/-.

3. The petitioners objected in writing, upon which there was correspondence between the parties. Two sets of "Root Cause Analysis" (RCA) Reports were obtained which indicated that the damage to the alternator rotor was sudden and accidental. As such, the petitioner no. 1 requested the respondent to revisit the stand by its Letter dated June 24, 2019.

4. By an e-mail dated August 29, 2019, the respondent informed the petitioner no. 1 that its Competent Authority had agreed to review and reopen the claim and appointed an independent agency, TCR

Advanced Engineering, Vadodara, to investigate the cause of loss. The said independent agency issued its RCA Report on October 25, 2019, concluding that the incident was sudden and accidental. In terms thereof, the respondent asked its Surveyor, Shri Ashok Chopra to review/reassess the loss in reference to the RCA Report, upon which the Surveyor submitted an Addendum Report recommending an amount of Rs. 23,32,00,202/- to be admissible. The admissibility of the claim was not disputed by the Surveyor but the quantum was.

5. To resolve the issue, a meeting was held at the Head Office of the respondent on September 14, 2021 upon which the General Managers of the respondent and the Surveyor, according to the petitioners, agreed with the representation and accordingly on September 15, 2021 the surveyor issued an Addendum Survey Report removing under-insurance applied in his earlier report and recommended a claim settlement of Rs. 30.50 Cr. (net).

6. The respondent by an e-mail dated September 20, 2021 admitted that loss payable is Rs. 30,50,15,562/- in terms of the second Addendum Report of the Surveyor. However, the said amount was not paid. Upon further communication from the end of the petitioner, by a cryptic e-mail dated January 24, 2022, it was intimated from the end of the respondent to the petitioners that despite their best effort, the Competent Authority had decided to maintain the earlier decision for repudiation of the claim.

7. Challenging the said repudiation, the present writ petition has been preferred.

8. Learned counsel for the petitioners argues that the repudiation is arbitrary. After the first Surveyor Report was reopened and an expert appointed, the same Surveyor rectified his report and gave a fresh report. It was settled between the parties that there was loss, on the basis of the second report of the Surveyor. Thus, it is argued that there was no occasion for the respondent to do a *volte face* and turn back to their original repudiation.

9. Learned counsel argues that although a Surveyor's report is not sacrosanct and the insurance company is not bound by the same, the insurance company cannot repudiate the same without any cogent reason. For such proposition, learned counsel cites the following judgments:

i) *(2009) 8 SCC 507 [Sri Venkateswara Syndicate Vs. Oriental Insurance Co. Ltd.];*

ii) *2021 SCC OnLine SC 628 [National Insurance Co. Ltd. Vs. Hareshwar Enterprises Pvt. Ltd. & Ors.];*

iii) *2023 SCC OnLine Sc 648 [National Insurance Co. Ltd. Vs. Vedic Resorts & Hotels Pvt. Ltd.].*

10. It is next argued that whenever the insurance company seeks to repudiate a claim by relying on an exclusion clause, it is for the insurer to establish with cogent evidence that the claim falls within such clause. In case of ambiguity, the interpretation in favour of the insured should be accepted. In support of such proposition, learned counsel cites *National Insurance Co. Ltd. Vs. Vedic Resorts & Hotels Pvt. Ltd.*, reported at *2023 SCC OnLine SC 648*.

11. It is argued that a writ petition under Article 226 of the Constitution is maintainable. Mandamus can be issued directing payment of the insurance claim. For such proposition, learned counsel cites the following judgments:

i) *(2001) 2 SCC 160 [Life Insurance Corpn. of India vs. Asha Goel (Smt.) & Ors.];*

ii) *(2013) 4 CHN 670 [Anindya Dutta vs. The New India Assurance Co. Ltd. & Ors.];*

iii) *MANU/GJ/1760/2021 [Cube Construction Engineering vs. State of Gujarat].*

12. The petitioners contend that Regulations 15(8) and 15(9) of IRDAI, Protection of Policy Holders' Interest Regulations, 2017 also mandates the insurance company, in case of rejection of an insurance claim under a Policy, to record reasons within 30 days from the date of receipt of the final survey/additional information/additional survey report. In case the insurance company admits the claim for a lesser amount, it has to state in writing the basis of settlement. Timely settlement of claim, as per the IRDAI Regulations, is mandatory as evidenced from Regulation 15(10).

13. Learned counsel for the respondent/insurer argues that the Surveyor's report is not binding on the insurer and the insurance company can independently decide on the claim. In the present case, the terms and conditions of the relevant Policy are binding on both the insured and insurer. Further, learned counsel for the respondent contends that the present dispute requires adjudication of facts

involving recording of evidence including cross-examination of the relevant engineers in charge of AMC (Annual Maintenance Contract) of BHEL, the Surveyor, the expert, etc., and, thus, such money claim cannot be decided by way of a writ petition.

14. By referring to the relevant Policy, it is argued that it postulates indemnification of the insured against sudden and accidental break-down of property insured, including physical explosion/implosion, collapse or rapture of boilers and other pressure vessels directly and wholly attributable to any clause, except as thereinafter provided, occurring during the currency of the policy. Again, 'sudden' shall mean accidental and not reasonably foreseen or a gradual occurrence.

15. Learned counsel also places reliance on the four essentials of a contract of insurance, which are (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. The terms of the insurance policy have to be strictly construed to determine extent of liability of the insurer and the endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. It is argued that the court is not expected to venture into extra liberalism that may result in re-writing of the contract or substituting the terms not intended by the parties.

16. Learned counsel for the Insurance Company, by placing reliance on its affidavit-in-opposition, argues at length on the technical issues involved in order to impress upon the court that there were previous similar vibrations over a period of time, which were not taken care of

by the petitioner no. 1. The BHEL had recommended that the Generator Rotor be taken out for inspection and rectification. However, despite similar earlier incidents of higher vibrations in August, 2017, on the advice of BHEL, the annual maintenance service provider of the petitioner no. 1, the insured did not consider it to be a major problem and chose not to attend to it until the unit was shut down on July 27, 2018 for an annual overhaul of boiler, not generator, when the exciter rotor was to be checked.

17. Thus, it is argued that there was no sudden breakdown but there was a systematic and continuous process of cracking and breaking. The Surveyor inferred *inter alia* that breakdown of mechanical or electrical plant is defined as an actual breaking or burning out of any part of the plant while in use from mechanical or electrical defect causing sudden stoppage and necessitating immediate repair or replacement as per insuring clause under Section 1B of the Policy and that there was not actual breakage but only cracks and no sudden stoppage while the STG ran for well over a year before the insured chose to shut down. Thus, it is argued that there was no sudden breakdown but a continuous wear and tear.

18. Learned counsel places reliance on *Milan Krishna Roy Vs. Allahabad Bank and Ors.,* reported at *MANU/WB/0216/2009* with regard to the proposition that disputed questions of fact cannot be entered into by the writ court.

19. Learned counsel for the respondent also cites *Universal Paper Mills Vs. Union of India and other*s, reported at *(1998) 1 CLT 155 (HC)* where a

co-ordinate Bench of this Court had observed while determining a question as to whether for money claimed on account of insurance an amount can be assessed by the writ court. This Court held that it could not have in the facts and circumstances directed the payment of money claimed under the insurance policies and the only remedy available was a regular civil suit.

20. Learned counsel also places reliance on *New India Assurance Company Limited vs. Pradeep Kumar*, reported at *(2009) 7 SCC 787* and *National Insurance Company Limited Vs. Hareshwar*, reported at *(2021) 6 SCJ 632*, in both of which the Supreme Court had held that the surveyor's report is not binding upon the insurer and is not the last and final word. It is not sacrosanct and/or conclusive and can be departed from.

21. Thus, it is argued that the writ petition ought to be dismissed. Learned counsel also relies on *Life Insurance Corporation of India and Ors. vs. Kiran Sinha*, reported at *AIR 1985 SC 1265* for the proposition that a money claim under an insurance policy cannot be decided by a writ petition and the only remedy was for the petitioner to go before a regular Civil Court.

22. While deciding the issues upon hearing learned counsel, it is required to look into the Insurance Regulatory and Development Authority of India Notification dated June 22, 2017, cited by the petitioners. Clause 15 thereof deals with claim procedure in respect of a general insurance policy. Sub-clause (6) provides for an additional report to

be filed if an insurer on the receipt of a survey report finds that it is incomplete in any respect.

23. Sub-clause (7) provides that the Surveyor, on receipt of the communication, shall furnish an additional report.

24. It is relevant to note that in the present case, the first report of the Surveyor was not accepted and a fresh expert was appointed, whereafter the Surveyor was directed to file an additional report which was done.

25. The next sub-clause of Clause 15 provides that on receipt of the final survey report or additional survey report and on receipt of all required information, the insurer shall within the period of 30 days offer a settlement of the claim to the insured/claimant. If the insurer, for any reasons to be recorded in writing and communicated to the insured/claimant, decides to reject a claim under the policy, it shall do so within a period of 30 days of the final survey report and/or additional information/documents or the additional survey report, as the case may be. Here, there was no such repudiation.

26. Sub-clause (9) of Clause 15 stipulates that in case the amount admitted is less than the amount claimed, the insurer shall inform the insured/claimant in writing about the basis of settlement, in particular where the claim is rejected, and shall give reasons for the same in writing, drawing reference to the specific terms and conditions of the policy document. In the event the claim is not settled within 30 days, sub-clause (10) provides for two per cent

interest above the bank rate from the date of receipt of the last relevant and necessary document till the date of actual payment.

27. In the present case, admittedly, the first report of the Surveyor was not accepted by the insurer. After correspondence and discussion between the parties, the respondent/insurance company directed an independent expert to file a report. An elaborate report was filed by the expert, which has also been produced before this Court. The said expert's report took into account metallurgical tests and several other technical aspects of the matter. The said detailed report was subsequently placed before the Surveyor, who accepted the same and gave an Addendum to his initial report, admitting and accepting the claim of the petitioner.

28. The insurance company had in effect repudiated the first report of the Surveyor. Thus, the said chapter cannot be reopened by merely reiterating the same, overlooking the elaborate process of expert opinion and second Surveyor's report which took place thereafter.

29. Importantly, even after the Addendum report being submitted by the same Surveyor subsequent to the expert's report, a meeting was held on September 14, 2021 between the General Managers of the respondent and the Surveyor as well as the petitioners where the said General Managers and the Surveyor agreed with the representation of the petitioner no. 1 and on September 15, 2021, the Surveyor issued Addendum Survey Report removing the under-insurance applied in the earlier report.

30. Again, the respondent-company by its e-mail dated September 20, 2021, annexed as Annexure 'P-9' to the writ petition, intimated the petitioners that the loss assessed by the Surveyor finally was Rs. 30,50,15,562/-.

31. As such, there was no scope of the respondent to resile from such position thereafter. However, by the impugned e-mail communication dated January 24, 2022, which is as cryptic as can be, it was informed that the "Competent Authority" of the insurance company had decided to maintain the earlier decision for repudiation of the said claim.

32. The earlier decision dated June 4, 2019, however, was already a bygone chapter, having been reopened by the act of appointment of an independent expert and asking for an Addendum from the self-same Surveyor. Hence, the reliance on the previous report was palpably without authority and *de hors* the high norms of reasonableness which are required to be followed by State instrumentalities like the respondent-insurer.

33. The effort of the insurance company to provide justification to its repudiation *post facto* by way of the averments made in the affidavit-in-opposition filed in the writ petition is a lame attempt to furnish reasons where none was given in the impugned repudiation dated January 24, 2022. It is well-settled that such subsequent explanation given in the pleadings in connection with the writ petition, whereas none were originally furnished in the impugned repudiation, are not tenable in the eye of law.

34. In any event, there was no application of mind by the respondent/insurance company while repudiating the detailed expert report which had also been accepted by the Surveyor.

35. The judgments noted above undoubtedly say that the Surveyor's report is not binding on the insurer. In *Sri Venkateswara Syndicate (supra)* as well as in *Hareshwar Enterprises (supra)* and *Vedic Resorts (supra)*, it was observed that the Surveyor's report is not sacrosanct and binding on the insurance company. However, in the same breath, the insurance company cannot simply brush aside the same without giving any reason therefor.

36. In *Vedic Resort*'s case, it was clearly held that if the insurance company seeks to rely on an exclusion clause, cogent evidence and reasons have to be given by it for so relying.

37. As to the maintainability of an application under Article 226 of the Constitution of India, undoubtedly it is settled law that detailed questions of law requiring evidence to be adduced cannot be decided by the writ court.

38. The present challenge, however, is on the count of arbitrariness and palpable illegality in repudiating the insurance claim of the petitioner in a cryptic manner, without referring to the subsequent incidents and relevant documents, including the expert's report and Surveyor's report furnished at the behest of the insurance company itself, and going back to the initial Surveyor's report which had been reopened by appointing an independent expert. Thus, the writ petition is very much maintainable on such counts.

39. In view of the above discussions, the impugned repudiation of the petitioners' claim by the respondent-insurance company by its e-mail dated January 24, 2022 cannot stand the scrutiny of law.

40. However, it would be premature for this Court to usurp the jurisdiction of the respondent-insurer by deciding on the veracity of the claim upon considering the technical details of the expert report and the Surveyor's report, without the writ court having any expertise to do so. Hence, while setting aside the impugned repudiation, in the same breath, it is not for the Court but for the insurer to take into consideration the said documents and decide accordingly upon furnishing proper reasons therefor.

41. Thus, WPO No. 2532 of 2022 is allowed partially on contest, thereby setting aside the impugned order repudiating the petitioners' claim and directing the respondent/insurance company to decide afresh the insurance claim of the petitioners under the Policy held by it with the respondent/insurer, taking into account the second Addendum Report given by the Surveyor, Shri Ashok Chopra, in conjunction with the expert report authored by the TCR Advanced Engineering. Such reassessment shall be done in accordance with law, if necessary upon giving an opportunity of hearing to the petitioners, within February 29, 2024 positively. Within a week thereafter, the detailed and reasoned decision of the respondent on such claim, keeping in view the observations hereinabove, shall be communicated in writing to the petitioners.

42. It is made clear that the merits of such fresh consideration are not entered into by this Court and it will be open to the respondent to act in accordance with law and procedure while undertaking such fresh consideration.

43. There will be no order as to costs.

44. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)