NEW INDIA ASSURANCE COMPANY LIMITED

v.

RAJESHWAR SHARMA AND ORS.

(Civil Appeal No. 11885 of 2018)

DECEMBER 07, 2018

[DR. DHANANJAYA Y CHANDRACHUD AND M. R. SHAH, JJ.]

Consumer Protection – Insurance Policy – Exclusion clause exempting the insurer from liability – When attracted – Municipal Corporation demolished the front portion of the building owned by the insured – Claim of the insured that it was carrying on the business of sanitaryware in the premises and as a result of the demolition, it suffered damage of Rs.19.55 lacs – Insurer contested the claim on a policy of insurance obtained by the insured which contained exclusion exempting the insurer from liability for loss arising from the destruction of property caused "by order of the government or any lawful authority" – Claim allowed by the State Commission – Affirmed by the High Court – On appeal, held: Clause V of the insurance policy contains an exclusion, where the destruction of the property has been caused "by order of the government or any lawfully constituted authority" – Expression "by order of" means under the authority of government or of a lawfully constituted authority – Municipal Corporation is indeed a lawfully constituted authority, being a statutory authority under the 2000 Act – There is no dispute that the demolition was carried out by the Municipal Corporation – Hence the basis on which the claim was allowed was fundamentally flawed – Since, the destruction was by order of lawfully constituted authority, thus, exclusion under the policy of insurance was attracted – Impugned judgment of the High Court set aside – Complaint filed by the insured before the State Commission stands dismissed – Jammu and Kashmir Municipal Corporation Act 2000 – s.229.

Disposing of the appeals, the Court

HELD: 1.1 There was no dispute about the fact that the demolition was carried out under the authority of the Municipal

Corporation. As the averments in the consumer complaint indicate, the insured proceeded on the basis that the Municipal Corporation had carried out the work of demolition. There could be no dispute about the factual position since, as a matter of fact, the insured instituted a suit for diverse reliefs including a challenge to the action of the Municipal Corporation. Hence the basis on which the claim was allowed is fundamentally flawed. [Para 11][1187-E-F]

1.2 Clause V of the insurance policy contains an exclusion, where the destruction of the property has been caused "by order of the government or any lawfully constituted authority". The expression "by order of" means under the authority of government or of a lawfully constituted authority. There can be no dispute about the position that the Municipal Corporation is indeed a lawfully constituted authority, being a statutory authority under the Jammu and Kashmir Municipal Corporation Act, 2000. From the records as well as from the pleadings before the State Commission, there is no dispute about the fundamental position that the demolition was carried out by the Municipal Corporation. The destruction was hence by order of a lawfully constituted authority. Once this be the position, there can be no manner of doubt that the exclusion under the policy of insurance was attracted. [Paras 14][1188-E-G]

1.3 Both the State Commission and the High Court were in error in allowing the claim under the policy of insurance. The impugned judgment of the High Court which has affirmed the decision of the State Consumer Disputes Redressal Commission is set aside. The complaint filed by the insured before the State Commission stands dismissed. [Para 16][1191-B-D]

National Insurance Company v. Irshad **(2007) 4 SCC 105 : [2007] 2 SCR 1014 – referred to.**

Cornish v. Accident Insurance Co Ltd **(1889) 23 Q.B.D. 453, 456 ;** *Impact Funding Solutions Ltd v. Barrington Support Services Ltd* **[2016] UKSC 57 ;** *Crowden and Crowden v. QBE Insurance (Europe) Ltd* **QC : [2017] EWHC 2597 (Comm) – referred to.**

AW Baker Welford : *The Law Relating to Accidental Insurance* **(Butterworth & Co., 1923) at page 126 – referred to.**

Case Law Reference

[2007] 2 SCR1014 referred to Para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 11885 of 2018.

From the Judgment and Order dated 28.07.2016 of the High Court of J & K at Jammu in CIMA No. 249 of 2015.

With

Civil Appeal No. 11886 of 2018.

Manoj K. Mishra, Ms. Awantika Manohar, Prashant Kumar and Ms. Parul Pradhan, Advs. for the Appellant.

Jayant Bhushan, Sr. Adv., Jagdev Singh, Manoj K. Mishra, Jyoti Mishra, Sukumar, Umesh Dubey, Sachin Saini, Manoj K. Mishra, M. Shoeb Alam, Ujjwal Singh and Mojahid Karim Khan, Advs. for the Respondent.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

1. Delay condoned in Civil Appeal @ SLP(C)@CC 5127 of 2017.

2. These appeals arise from a judgment of a Division Bench of the High Court of Jammu and Kashmir dated 28 July 2016. The High Court has affirmed the decision of the Jammu and Kashmir Consumer Disputes Redressal Commission[1] by which an insurance claim was allowed in the amount of Rs. 17.28 lacs. New India Assurance Company Limited, the insurer, failed in its challenge to the decision of the State Commission before the High Court. Cross-objections filed before the High Court by the insured for the grant of interest were also rejected. Hence, there are two appeals: one by the insurer and the second by the insured, against the judgment of the High Court.

3. The claim of the insured before the State Commission was that it owns a building known as Patel House which is situated at Akhnoor road, Jammu. The insured claimed that the building was constructed in

[1]"The State Commission"

A 1984 with due permission of the municipality. In 1993, additional construction was raised, it is alleged, with the permission of the municipality. According to the insured, on a notice issued under Section 229 of the Jammu and Kashmir Municipal Corporation Act 2000, he had approached the Jammu and Kashmir Special Tribunal which compounded the infraction in 1996. The Municipal Corporation initiated a demolition
B drive. Apprehending action against his property, the insured instituted a suit in the Court of the First Civil Subordinate Judge, Municipal Magistrate, Jammu where an ad-interim injunction was granted, restraining the Corporation from proceeding, except in accordance with law. The Municipal Corporation demolished the front portion of the building. The
C insured was carrying on a business of sanitary ware in the premises. As a result of the demolition, the insured claimed that it suffered damage in the amount of Rs.19.55 lacs.

4. The claim before the State Commission was founded on a policy of insurance which was obtained by the insured. The insurance policy
D contained the following exclusion:

> "V. Riot, Strike, Malicious and Terrorism Damage Loss of or visible physical damage or destruction by external violent means directly caused to the property insured but excluding those caused by:-
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> E
>
> a) xxxx
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> b) Permanent or temporary dispossession resulting from confiscation, commandeering, requisition or destruction by order of the Government or any lawfully constituted Authority."

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Relying on the aforesaid exclusion, the insurer repudiated the claim on the ground that the action of demolition was carried out by the municipal authorities and was hence by order of a lawfully constituted authority.

G 5. The State Commission allowed the claim under the insurance policy in the amount of Rs.17.28 lacs. Litigation costs of Rs.10,000/- were awarded. The State Commission opined that the order of demolition passed by the Municipal Corporation had not been brought on the record and, in its absence, the exclusion would not operate. In appeal, the High Court affirmed the view of the State Commission, holding that it was

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incumbent on the insurer to establish that the exclusion contained in the policy of insurance was attracted by placing on record the orders of a lawfully constituted authority by which demolition was ordered. While affirming the view of the State Commission, the High Court held that in the absence of such an order being produced on the record, the insurer was liable to indemnify the loss sustained by the insured.

6. The principal basis on which the complaint was allowed by the State Commission has been called into question in these proceedings. The insurer has submitted that it was not in dispute that the demolition was caused by the Municipal Corporation. To substantiate this submission, the insurer relies upon the averments contained in the consumer complaint which are extracted below:

> "5) That after the constitution of the Municipal Corporation, Municipal Corporation had started demolition drive to remove the encroachment and illegal constructions.
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> 6) …..
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> 7) That the Municipal Corporation in spite of the injunction issued by the Court, demolished the front portion of the building which was duly compounded by the Appellate Court, on 18.04.2003, in violation of the Court order and also in violation of the order already passed compounding the constructions.
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> 8) …..
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> 9) …..
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> 10) That the Municipal Commissioner, Jammu without any authority and taking law into his own hands in violation of the Court order dated 10.04.2003 demolished the front portion of the building and totally damaged the Cabin fitting, display items electric systems etc without any notice to the complainants thereby causing a loss of Rs. 19,55,946/- which estimate was prepared after due inspection by Sh. K R Sharma, Retired Executive Engineer and valuator. The building and the material including Furniture and Fixture etc. were insured by the respondent for an amount of Rs. 1,23,50,000/- for which insurance covers were issued by the respondent vide policy no. 350700/11/02/00119 for the period 03.05.2002 to midnight 02.05.2003. Copy of the estimate is enclosed.

A 11) That the Commissioner, Municipality and Executive Officer to show their loyalty towards the Government in violation of Court order and fully well knowing that the complainants are owners of the land demolished the front portion of the building causing total loss of Rs. 19,55,846/- on 18.04.2003. Besides this, due to the damage to the building, the basement has been rendered useless and has to be dismantled which is going to cause a further loss of Rs. 6,15,422/- to the complainants and the complainants reserve their right to claim the said amount as and when the basement is dismantled."

C 7. In his counter affidavit filed in these proceedings, the Commissioner of the Jammu Municipal Corporation has stated that in order to remove encroachments/projections over public premises including over footpaths, streets and drains, the Municipal Corporation issued a public notice on 25 January 2003 in the daily editions of 'Kashmir Times' and 'Daily Excelsior'. The notice made an appeal for the removal of D projections, platforms and encroachments which were not in conformity with the building line provided by the Jammu Master Plan and Prevention of Ribbon Development Act 1953. After the period stipulated in the public notice ended on 31 January 2013 demarcations were carried out in areas where there were encroachments and the encroachers including the E private respondents were directed to remove the encroachment. In the meantime, a suit was filed by the insured, Rajeshwar Sharma, before the First Civil Subordinate Judge, Jammu in which the following ad interim order was passed on 11 March 2003:

F "…Issue notice to the defendants to file objections to this application on or before next date of hearing and in the meanwhile subject to objections and till next date of hearing the parties shall maintain status quo on spot. However, in case any violation has been committed by the Plaintiff in the said building the defendants shall take action in accordance with the provisions of law…"

G 8. The above order permitted the municipal authorities to take action in accordance with the provisions of law. The Municipal Corporation claims that it removed the new construction raised in the present case on 18 April 2003 which was found to encroach on public land and was causing an inconvenience to the free flow of traffic on Akhnoor road. According to the Municipal Corporation, it had not razed any part of the construction which was carried out in 1985 and 1993 but H

only "the new illegal construction". The Municipal Corporation has also submitted that the building which has been constructed still exists in violation of the Master Plan 1974-1994 and the Master Plan 2021.

9. We must make it clear at the outset, that we are not in these proceedings entering upon the validity of the action which was adopted by the municipal authorities. A suit is pending before the civil court questioning the legality of the action whereas the counter affidavit indicates, relief for the restoration of the work which was removed has been sought. The issue in the present case is confined to whether the exclusion under the policy of insurance was attracted.

10. Both the State Commission as well as the High Court were of the view that the exclusion was not attracted having due regard to the judgment of this Court in **National Insurance Company** v **Irshad[2].** This Court has held that where there is an exclusionary clause in an insurance policy, the burden lies on the insurer to establish that the exclusion is attracted. Any ambiguity must be construed in favour of the insured. Purporting to apply this principle, the State Commission and the High Court held that the insurer had failed to establish that there was an order of the Municipal Corporation for carrying out demolition and hence the exclusion was not attracted.

11. On this aspect, we find merit in the submission of the insurer that there was no dispute about the fact that the demolition was carried out under the authority of the Municipal Corporation. As the averments in the consumer complaint indicate, the insured proceeded on the basis that the Municipal Corporation had carried out the work of demolition. There could be no dispute about the factual position since, as a matter of fact, the insured has instituted a suit for diverse reliefs including a challenge to the action of the Municipal Corporation. Hence the basis on which the claim was allowed is fundamentally flawed.

12. The essential aspect which needs to be considered is whether the exclusion was attracted. Mr Jayant Bhushan, learned senior counsel appearing on behalf of the insured submits that Clause V postulates that there must be a "destruction by order of the government or any lawfully constituted authority". Learned counsel submits that the exclusion postulates that there must be an action in accordance with law. Action according to law, in the submission of counsel, requires that the action of the municipal authority or governmental authority (in the present case)

[2](2007) 4 SCC 105

A should conform to the Jammu and Kashmir Municipal Corporation Act 2000. In this submission, an act of illegal demolition by the Municipal Corporation will not fall within the purview of the exclusion. Hence, it has been urged, that the judgment of the State Commission, as affirmed by the High Court, is correct.

B 13. On the other hand, Ms.Awantika Manohar, learned counsel appearing on behalf of the insurer has submitted that the demolition was carried out by the Municipal Corporation. This action clearly falls within the ambit of the expression "destruction by order of any lawfully constituted authority". Learned counsel submitted that the validity of the action of the municipal authority is the subject matter of a pending suit.
C In determining as to whether the exclusion is attracted, what the Court must assess is whether the demolition was carried out by order of any lawfully constituted authority. The grounds of challenge in the suit are distinct from the claim under the insurance policy. Hence, once it is found that the demolition was by the order of the Municipal Corporation
D which is a lawfully constituted authority under the Jammu and Kashmir Municipal Corporation Act 2000, the exclusion is attracted.

14. We find considerable merit in the submission which has been urged on behalf of the insurer. Clause V of the insurance policy contains an exclusion, where the destruction of the property has been caused "by
E order of the government or any lawfully constituted authority". The expression "by order of" means under the authority of government or of a lawfully constituted authority. There can be no dispute about the position that the Municipal Corporation is indeed a lawfully constituted authority, being a statutory authority under the Jammu and Kashmir Municipal Corporation Act 2000. From the records as well as from the pleadings
F before the State Commission, there is no dispute about the fundamental position that the demolition was carried out by the Municipal Corporation. The destruction was hence by order of a lawfully constituted authority. Once this be the position, there can be no manner of doubt that the exclusion under the policy of insurance was attracted.

G 15. The position of the common law with respect to the interpretation of exclusionary clauses in insurance policies is no different. In **Cornish** v **Accident Insurance Co Ltd**[3], the Court of Appeal emphasized the duty of the insurer to except their liability in clear and unambiguous terms. The Court of Appeal held that:

H [3]Queen's Division Bench as per Lord Lindley L.J. (1889) 23 Q.B.D. 453, 456

> "… in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty."

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According to **The Law Relating to Accidental Insurance**[4], insurers are exempt from any liability where the loss is attributable to an excepted cause which is inserted *ex abundanti cautela* to make it quite clear to the assured that the policy is not intended to cover such losses. The position is elucidated below:

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> "The object of the exceptions is to define with greater precision the scope of the policy by making clear what is intended to be excluded and contrasting it with what is intended to be included.
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> Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost strictness and it is the duty of the insurers to except their liability in clear and unambiguous terms. The onus of proving that the loss falls within an exception lies upon the insurers, unless by proving the language of the exception the assured is expressly required to prove that, in the circumstances, the exception does not apply."

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In 2016, the UK Supreme Court dealt with the interpretation of an exclusion clause in a solicitors' professional indemnity insurance policy in **Impact Funding Solutions Ltd** v **Barrington Support Services Ltd**[5].

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Dealing with the construction of insurance exclusions, Lord Toulson JSC observed thus:

> "35. The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be

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[4]AW Baker Welford : *The Law Relating to Accidental Insurance* (Butterworth & Co., 1923) at page 126

[5]Supreme Court as per Lord Toulson JSC (with whom Lord Mance, Lord Sumption and Lord Hodge JJSC agreed) [2016] UKSC 57

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A read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a
B reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed… This applies not only where the words of exception remove a remedy for breach, but where they seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the
C purpose of the contract to provide. The vice of a clause of that kind is that it can have a propensity to mislead, unless its language is sufficiently plain. All that said, words of exception may be simply a way of delineating the scope of the primary obligation."

The principles for construing insurance exclusions as laid down in
D **Impact Funding Solutions Ltd** v **Barrington Support Services Ltd**[6] were relied upon by the England and Wales High Court (Commercial Court) in the case of **Crowden and Crowden** v **QBE Insurance (Europe) Ltd**[7].

While dealing with the question of construction of insurance
E exclusions, Judge Peter MacDonald Eggers QC observed:

"65. … the Court must adopt an approach to the interpretation of insurance exclusions which is sensitive to their purpose and place in the insurance contract. The Court should not adopt principles of construction which are appropriate to exemption clauses -
F i.e. provisions which are designed to relieve a party otherwise liable for breach of contract or in tort of that liability - to the interpretation of insurance exclusions, because insurance exclusions are designed to define the scope of cover which the insurance policy is intended to afford. To this end, the Court should not automatically apply a *contra proferentem* approach to
G construction. That said, there may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect

[6]Supreme Court as per Lord Toulson JSC (with whom Lord Mance, Lord Sumption and Lord Hodge JJSC agreed) [2016] UKSC 57

[7] England and Wales High Court (Commercial Court) as per Peter MacDonald Eggers
H QC :[2017] EWHC 2597 (Comm)

of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the Court would be entitled to opt for the narrower construction…" A

In the present case, there is no ambiguity in Clause V of the insurance policy. The exclusion was clear in exempting the insurer from liability for a loss arising from the destruction of property caused "by order of the government or any lawful authority." B

16. For the above reasons, we are of the view that both the State Commission and the High Court were in error in allowing the claim under the policy of insurance. We would, accordingly, have to allow the appeal filed by the insurer, which we do by setting aside the impugned judgment of the High Court which has affirmed the decision of the State Consumer Disputes Redressal Commission. In consequence, the complaint filed by the insured before the State Commission (CC 2628/ 2004) shall stand dismissed. C

17. Before concluding, we clarify that since these proceedings are confined to the claim of the insured under the insurance policy, nothing contained in this judgment shall affect the merits of the suit which has been instituted by the insured against the Municipal Corporation. The appeal filed by the insurer is allowed. The appeal filed by the insured shall stand dismissed. There shall be no order as to costs. D

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Divya Pandey Appeals disposed of.