M/S. Sonell Clocks And Gifts Ltd. vs The New India Assurance Co. Ltd. on 21 August, 2018

Equivalent citations: AIR 2018 SUPREME COURT 4146, 2018 (6) ABR 127, (2018) 4 CIVILCOURTC 702, (2018) 4 JCR 237 (SC), AIRONLINE 2018 SC 136

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Bench: D.Y. Chandrachud, A.M. Khanwilkar, Dipak Misra

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.1217-1218 OF 2017

M/s. Sonell Clocks and Gifts Ltd. ....Appellant(s)

:Versus:

The New India Assurance Co. Ltd. ....Respondent(s)

JUDGMENT

A.M. Khanwilkar, J.

1. The appellant filed a complaint before the National Consumer Disputes Redressal Commission, New Delhi being Consumer Complaint No.20 of 2006, asserting that it had taken an Insurance Policy from the respondent (Insurance Company) for a period of one year from 19th July, 2004 to 18th July, 2005, in respect of its building, plant and machinery at plot No.70/3, B.K. Textile Compound, Dan Udyog Sangh Ltd., Piparia, Silvassa, Dadra Nagar, Haveli, for a sum assured of Rs.2,87,00,000/- (Two Crore Eighty Seven Lakh Only) on reinstatement value basis. Due to torrential rains and floods in the entire area, the water gushed into the factory premises causing damage to the machinery as well as raw material lying therein. This event occurred on 4th August, 2004. Intimation of the loss was given to the respondent after a gap of 3 months 25 days, on 30th November, 2004. Thereafter, the respondent appointed a surveyor to assess the loss caused due to the flooding of the factory premises. The surveyor after causing inspection submitted its report to the respondent inter alia stating that the claim was not payable on account of the failure of the complainant to comply with the mandate of Clause 6 of the general conditions of the policy. Acting

upon the said report, the respondent vide letter dated 18th February, 2005 conveyed rejection of the claim to the appellant on the ground that neither the intimation of the loss had been given to it immediately nor were the requisite particulars of the loss conveyed within stipulated period. Thus, there was breach of terms and conditions of Clause 6 of the general conditions of the policy.

2. As a sequel, the appellant approached the Commission for a declaration that the respondent was guilty of deficiency in service as well as unfair trade practices. Additionally, to direct the respondent to sanction the genuine claim of the appellant and reimburse the loss caused to it due to the floods to the tune of Rs.2,66,05,000/-(Two Crore Sixty Six Lakh Five Thousand Only) with interest at the rate of 21% per annum from the date of incident till realization of the same. The appellant also prayed for compensation amount of Rs.5,00,000/- (Five Lakh Only) towards mental agony and cost and further an amount of Rs.1,00,000/- (One Lakh Only) towards incidental expenses.

3. The complaint was opposed by the respondent on the ground that there was gross violation of the terms and conditions of the policy as no intimation muchless immediate information about the loss was given to the Insurance Company nor was a claim lodged with the requisite particulars within the time stipulated in the policy.

4. This objection commended to the Commission as a result of which, the complaint filed by the appellant came to be dismissed by the judgment and order dated 10th December, 2015 on the following terms:

> "5. It would thus be seen that as per the terms and conditions of the policy taken by it, there were three obligations on the complainant/insured. The first obligation was to give notice of the loss to the insurer, immediately on the said loss taking place. The second obligation on the complainant was to submit a claim for the loss or damage, giving all necessary particulars of the loss, within a period of 15 days or such other time as the insurer might allow. The third obligation on the insured was to intimate the insurer, within six months of the date of the loss, that it intended to replace or reinstate the property which had been destroyed or damaged.
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> 6. It is not in dispute that the alleged loss despite having occurred on 04.08.2004 was reported to the Insurance Company only on 30.11.2004. Thus neither immediate intimation of the loss was given to the Insurance Company nor was a claim lodged with the requisite particulars within the time stipulated in the policy. The complainant Company, therefore, contravened clause 6 of the insurance policy taken by it on account of the above referred two defaults.
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> 7. It is contended by the learned counsel for the complainant that the requirement of intimating the insurer and submitting a claim within 15 days of the loss stands superseded by clause 4(3) applicable to reinstatement value policies, which required the requisite intimation to be given within six months of the date of loss. I, however, find no merit in the contention. The obligation of the insured under clause 4(3) applicable to reinstatement value policies was independent of the obligation placed

upon it under clause 3 of the said policy. Under clause 3 of the policy, the insurer was to be informed immediately on happening of the loss followed by lodging of the claim with necessary particulars within 15 days of the loss or within such further time as should be extended by the insurer, whereas under clause 4(3), which was applicable to reinstatement value policies, it has to express its intention to replace or reinstate the property which had been destroyed or damaged. There is no question of any supersession of clause 6 of the policy by clause 4(3), applicable to reinstatement value policies, the reinstatement of these clauses being distinct and separate from each other.

8. For the reasons stated hereinabove, I have no hesitation in holding that the complainant committed breach of clause 6 of the insurance policy, and therefore as stipulated in the said clause, no claim under the policy is payable.

The complaint is, therefore, dismissed with no order as to costs."

5. The aforementioned decision was assailed before this Court by way of Civil Appeal No.....(D.No.6048 of 2016). This Court vide order dated 26th February, 2016, relegated the parties before the Commission by giving liberty to the appellant to file a review petition before the Commission on the singular contention of waiver of condition stipulated in Clause No.6 by the respondent. The order reads thus:

"O R D E R Delay condoned.

Heard Mr. Jitendra Mohan Sharma, learned senior counsel for the appellant. It is submitted by the learned counsel that the insurer has waived the condition relating to delay in intimation by appointing a surveyor.

On a perusal of the order passed by the National Consumer Disputes Redressal Commission (N.C.D.R.C.), New Delhi, we do not find that the said issue was raised before the N.C.D.R.C. In view of the aforesaid, we permit the appellant to file an application for review and put forth the issue of waiver before the N.C.D.R.C. within a period of four weeks hence. The N.C.D.R.C. will entertain the application for review singularly on this score.

With the aforesaid observation, the appeal is disposed of." (emphasis supplied) It is noticed that no liberty was given to the appellant to challenge the judgment and order dated 10th December, 2015 passed by the Commission, in the event the review petition was decided against the appellant.

6. Be that as it may, as per the liberty given by this Court the appellant preferred a review petition before the Commission bearing Review Petition No.662 of 2016. The singular issue as to whether the respondent (insurer) had waived the condition relating to delay in intimation by appointing a surveyor was considered by the Commission. The Commission adverted to the decision of this Court

in Oriental Insurance Co. Ltd. Versus Parvesh Chander Chadha1. It then noticed the decision of the Commission in New India 1 MANU/SC/1343/2010 Civil Appeal No.6739 of 2010 dated 17th August, 2010 Assurance Company Ltd Versus Trilochan Jane2. Additionally, the Commission adverted to the decision in State of Punjab Versus Davinder Pal Singh Bhullar and Others3 and on analysing the factual matrix concluded that there was nothing to indicate an intentional and conscious relinquishment by the respondent (insurer) of its right to reject the claim on account of the delayed intimation of the loss, by appointing a surveyor to assess the loss claimed by the insured (appellant). The Commission distinguished the decision of this Court in Galada Power and Telecommunication Ltd. Versus United India Insurance Co. Ltd. and Another,4 which was profusely relied upon by the appellant as not applicable to the facts of the present case. At the end, the Commission also relied on the observation in Reliance General Insurance Company Ltd. Versus Harleen Kaur5.

2 First Appeal No.321 of 2005 dated 9th December, 2009 3 (2011) 14 SCC 770 4 (2016) 14 SCC 161 5 In Revision Petition No.2850 of 2015

7. The review petition filed by the appellant was accordingly dismissed vide judgment and order dated 25th October, 2016. Both the decisions of the Commission dated 25th October, 2016 in Review Application No.77 of 2016 and dated 10th December, 2015 in Consumer Complaint No.20 of 2006 have been assailed in the present appeals.

8. The appellant would contend that the issue is no more res integra. For, this Court in Galada Power and Telecommunication Ltd. (supra), while considering similar contention has held that the insurer having appointed a surveyor despite stipulation such as in Clause 6, waives its right to advance the plea that the claim was not entertainable because of the condition enumerated in duration clause was not satisfied.

9. Per contra, the respondent would contend that the dictum in the said decision is contextual and in the backdrop of the factual matrix of that case. In other words, the issue of waiver by the insurer has been answered against the insurer not merely because of appointing a surveyor despite the stipulation in the policy, but the Court at more than one place while analysing the facts noted the additional circumstance that the letter of repudiation sent by the insurer merely stated that, the claim lodged by the insured was not falling under the purview of the transit loss. The Court opined that the appointment of a surveyor despite the stipulation in Clause 5 therein was a positive action taken by the insurer reinforcing the finding of waiver of its right to advance the plea that the claim was not entertainable because the condition enumerated in duration clause was not satisfied.

10. We have heard Mr. Jitendra Mohan Sharma, learned senior counsel for the appellant and Mr. Joy Basu, learned senior counsel for the respondent.

11. The singular question involved in these appeals is whether the respondent (insurer) had waived the condition relating to delay in intimation, by appointing a surveyor.

12. It is well established position that waiver is an intentional relinquishment of a right. It must involve conscious abandonment of an existing legal right, advantage, benefit, claim or privilege,

which except for such a waiver, a party could have enjoyed. It is an agreement not to assert a right. To invoke the principle of waiver, the person who is said to have waived must be fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. [See para 41 of State of Punjab (supra)]. There must be a specific plea of waiver, much less of abandonment of a right by the opposite party.

13. We shall, therefore, first traverse through the pleadings of the parties. The appellant has asserted that it was pointed out to the respondent that the act of appointing surveyor by the respondent was an implied consent of condoning the delay. In case the respondent wanted to repudiate the appellant s claim only on the technical ground of 15 days delay, it should have done at the first instance and there was no need to have appointed a surveyor thereafter.

14. The respondent while refuting the said assertion of the appellant stated in the written version filed before the Commission that the appellant was negligent in dealing with its affairs, including in the matter of informing the respondent forthwith about the claim after the loss or damage caused on account of flooding as was essential as per condition No.6 of the policy. Condition No.6 of the policy reads thus:

> "6. (i) On the happening of any loss or damage the insured shall forthwith give notice thereof to the Company and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company .....
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> No Claim under this policy shall be payable unless the terms of this condition have been complied with." The respondent also urged that after the receipt of the claim intimation from the Bank, it immediately appointed M/s.
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> Saran Engineers & Consultants to survey and assess the loss.
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> The surveyor after visiting the premises gave a detailed report dated 29th December, 2004 including its recommendation that the loss is not payable as per the policy (B) General Conditions, Para 6. On the basis of that report and keeping in mind the terms and conditions of the policy, the respondent repudiated the claim in terms of policy condition No.6 and intimated the repudiation of the claim to the appellant vide letter dated 18th February, 2005. The respondent also asserted that the true import of the letter of repudiation is a matter of interpretation. In any case, the appointment of the surveyor was necessary, otherwise the appellant would have complained about the non-appointment of the surveyor. The respondent urged that the appellant was in breach of the policy condition.

15. The Commission considered the pleadings of the parties and including condition No.6 of the Insurance Policy, the repudiation letter dated 18th February, 2005 and the Surveyor s Report which had recommended that the loss as such is not payable as per the Policy. The Commission then went on to distinguish the decision in Galada Power and Telecommunication's case, (supra).

16. In the said case, the issue of waiver was decided on the facts of that case as is evinced from the dictum in paragraphs 18-20 of the said decision. The same reads thus:

> "18. In the instant case, the insurer was in custody of the policy. It had prescribed the clause relating to duration. It was very much aware about the stipulation made in Clauses 5(3) to 5(5), but despite the stipulations therein, it appointed a surveyor. Additionally, as has been stated earlier, in the letter of repudiation, it only stated that the claim lodged by the insured was not falling under the purview of transit loss. Thus, by positive action, the insurer has waived its right to advance the plea that the claim was not entertainable because conditions enumerated in duration clause were not satisfied. In our considered opinion, the National Commission could not have placed reliance on the said terms to come to the conclusion that there was no policy cover in existence and that the risks stood not covered after delivery of goods to the consignee.
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> 19. Coming to the merits of the claim, we find that the surveyor had given a report that there was a loss. He had also quantified it. The State Commission after elaborate discussion has held as follows:
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> „The surveyor also confirmed in their reports, the shortage/loss of AAAC due to pilferage during transit and estimated the loss as per Ext. A-12. This shortage was also confirmed by Katigorah Police as per Ext. A-13 and as reiterated earlier by the Takeover Certificate, Ext. A-19. Taking into consideration that the surveyors appointed by the insurance company have completed their investigation and submitted their reports and thereafter an investigator was appointed on 16-4-1998 without any valid reasons. It is held by the National Commission in Gammon India Ltd. v. New India Assurance Co. Ltd. that: (CPJ p. 10) „... Report of first Surveyor not accepted, second Surveyor appointed — Appointment of second Surveyor not explained — Deficiency in service proved — Report of first Surveyor upheld.... and the investigator in the instant case submitted his report on 28-12-1998 i.e. almost 8 months after his appointment. Taking into consideration all the above submissions, we are of the considered opinion that the appellant complainant was able to establish that there was shortage/damage to the consignment which was given to the second respondent for transportation.
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> 20. Though the said aspect has not been gone into by the National Commission, yet we find, the findings recorded by the State Commission are absolutely justified and tenable in law being based on materials brought on record, in such a situation we do not think it appropriate that an exercise of remit should be carried out asking the National Commission to have a further look at it. In any case, the exercise of revisional jurisdiction by the National Commission is a limited one. We may hasten to add that to satisfy ourselves, we have perused the surveyor's report and scrutinised the judgment and order passed by the State Commission in this regard and we are completely satisfied that the determination made by it is absolutely impeccable."

(emphasis supplied)

17. In the present case, it is common ground that the letter of repudiation dated 18th February, 2005 elucidates that the claim of the appellant was rejected on the ground that neither the intimation of the loss had been given to it immediately after the loss nor were the requisite particulars of the loss conveyed within stipulated period and there was breach of terms and conditions of Clause 6 of the general conditions of the policy. Additionally, the surveyor report predicates that it was very difficult to estimate the damages for the reasons mentioned therein and that the claim of the appellant was not payable on account of breach of Clause 6 of the general conditions of the policy. That recommendation commended to the respondent. It has been so incorporated in the letter of repudiation dated 18th February, 2005.

18. The respondent has rightly pointed out the other distinguishing features in the present case. To wit, in that case [Galada (supra)], the Court had considered Clause 5 of a Marine Insurance Policy wherein the issue was whether the insurance cover itself had extinguished by efflux of time and that the intimation given by the insured to the insurer was not made within 7 days of arrival of the vehicle at the destination mentioned in the policy. According to the insurer, on expiry of 7 days from delivery the insurance cover stood perished and no cover would subsist beyond the said 7 days period. It is in that context, the Court noted that appointment of the surveyor by the insurer beyond the said period can be construed as an act of waiver by the insurer of the position that the policy stands extinguished. In other words, appointment of a surveyor by the insurer was interpreted as a manifestation of the stand of the insurer that the insurance cover still subsists. This is evident from the dictum in paragraph 13 of the reported decision as the Court noted that once a surveyor was nominated to verify the loss, the insurer could not be allowed to take a stand that the claim is hit by the clause pertaining to duration and moreso because of absence of any mention in the letter of repudiation. Thus, it went on to hold that from the positive conduct of the insurer in unequivocally appointing a surveyor, the insurer had waived the right which was in its favour under the duration clause.

19. The expression “duration” is of some significance which is reflective of the existence or otherwise of the policy itself. In the present case, there is no dispute about the subsistence of the policy but is one of violation of condition No.6 of the policy. Furthermore, in the present case the controversy will have to be answered on the basis of Standard Fire and Special Perils Policy relatable to condition No.6 obligating the insured to give forthwith intimation of the loss to the insurer. The two clauses are materially different and relate to two different and distinct insurance policies. In other words, Clause 5 of the Marine Insurance Policy and Clause 6 of the present policy are incomparable being qualitatively different.

20. To put it differently, Galada’s case (supra) was not a case which considered repudiation based on a premise or a reason similar to condition No.6 of the present policy and a specific plea taken by the insurer in that behalf in the repudiation letter itself. Notably, Clause 5 of the Marine Insurance Policy which was the subject matter in Galada’s case (supra) did not have a negative covenant as in this case in the proviso to condition No.6 of the subject policy. The fulfillment of the stipulation in Clause 6 of the general conditions of the policy is the sine qua non to maintain a valid claim under

the policy.

21. We, therefore, agree with the respondent that the dictum in Galada's case (supra) is in the context of the facts of that case and does not lay down that on the appointment of a surveyor, per se, the insurer is estopped from raising a plea of violation of the condition warranting a repudiation of the claim. The factum of waiver has to be gathered from the totality of the obtaining circumstances.

22. Suffice it to observe that Galada's case (supra) will be of no avail to the facts and circumstances of the present case. In that, the event occurred on 4th August, 2004 but intimation was given to the insurer only on 30th November, 2004 after a gap of around 3 months 25 days. No explanation was offered for such a long gap muchless plausible and satisfactory explanation. The stipulation in condition No.6 of the policy to forthwith give notice to the insurer is to facilitate the insurer to make a meaningful investigation into the cause of damage and nature of loss, if any. This Court in Parvesh Chander Chadha (supra) has held that it is the duty of insured to inform the loss forthwith after the incident.

23. The respondent has also invited our attention to the fact that in Galada's case (supra), this Court has had no occasion to consider the efficacy of Insurance Surveyors and Loss Assessors (Licensing, Professional Requirements and Code of Conduct) Regulations, 2000, which came into effect from 14th November, 2000. For, the claim in Galada's case (supra) arose in 1998 and the repudiation took place in 1999. By virtue of the regulations, it is mandatory to appoint a surveyor on receipt of intimation about the loss; and the surveyor so appointed has to discharge his responsibilities and duties specified in the regulations while submitting its report.

24. Thus, the appointment of a surveyor by the respondent after receipt of intimation of the loss from the appellant, in the context of the present insurance policy, coupled with the 2000 Regulations and in particular an express stand taken in the repudiation letter dated 18th February, 2005 sent by the respondent to the appellant after consideration of the surveyor s report, it cannot be construed to be a case of waiver on the part of the respondent.

25. The appellant would then contend that the respondent did not take a plea that the surveyor was appointed because of statutory obligation. Such a plea is raised for the first time before this Court. Even this submission does not commend us. For, that plea has been taken as an additional factor to distinguish the decision in Galada's case (supra). The party is not expected to state the provisions of law in its pleading. The fact that such obligation flows from the regulation, in that sense, is a mixed question of fact and law. The fact remains that the respondent had appointed a surveyor to enquire into the entire matter and submit its report. The surveyor expressly recommended that the claim was not payable on account of the infringement of Clause 6 of the general conditions of the policy.

26. We also find no merit in the grievance made by the appellant that the Commission did not consider the issue of waiver for which the appellant was granted liberty to file review petition by this Court. We say so because we find that the Commission considered the said issue as the singular issue and after analysing relevant aspects concluded that there was nothing to indicate that the respondent insurer had intentionally or consciously relinquished or waived its right to reject the

claim on delayed intimation of loss, by appointing a surveyor to assess the loss claimed by the insured. For the above reasons, the argument that the Commission has not analysed the said issue, as has been done by us, will make no difference to the conclusion recorded by it.

27. The appellant has also placed reliance on the decision in Om Prakash Versus Reliance General Insurance and Another,6 to contend that the genuine claim of the appellant ought not to be rejected on technical ground, keeping in mind that the Consumer Protection Act is a beneficial legislation warranting liberal construction. That contention cannot be taken forward at the instance of the appellant who has failed to fulfill the threshold stipulation contained in Clause 6 of the general conditions of the policy and for which reason must suffer the consequence. It is not a technical matter but sine qua non for a valid claim to be pursued by the insured, as agreed upon between the parties.

28. In view of the above, we uphold the conclusion of the Commission that the respondent (insurer) had not waived the condition relating to delay stipulated in Clause 6 of the general 6 (2017) 9 SCC 724 conditions of the policy, by appointing a surveyor. Accordingly, these appeals must fail.

29. The appeals are dismissed with no order as to costs.

.....CJI.

(Dipak Misra) .....J. (A.M. Khanwilkar) .....J. (Dr. D.Y. Chandrachud) New Delhi;

August 21, 2018.