Bajaj Allianz General Insurance Co. ... vs The State Of Madhya Pradesh on 24 April, 2020

Equivalent citations: AIR 2020 SUPREME COURT 2237, AIRONLINE 2020 SC 528

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Bench: Ajay Rastogi, Dhananjaya Y Chandrachud

REPO

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 2366-67 of 2020
(Arising out of SLP (C) No. 5421-5422 of 2019

Bajaj Allianz General Insurance Co Ltd & Anr ....App

Versus

The State of Madhya Pradesh .... Respond

JUDGMENT

Dr Dhananjaya Y Chandrachud, J 1 Leave granted.

2 The present appeals arise from a judgment of the National Consumer Disputes Redressal Commission1 dated 10 August 2018 which in first appeal upheld the judgment of the Madhya Pradesh State Consumer Disputes Redressal Commission2. The SCDRC held the appellant to be deficient in its “NCDRC” “SCDRC” service and directed it to pay compensation of 64,89,205 towards the cost of repair of a helicopter to the respondent. Both the appellant and the respondent had preferred appeals against the order of the SCDRC. The NCDRC dismissed the appeal3 preferred by the appellant and partly allowed the appeal 4 preferred by the respondent for enhancement of compensation and awarded interest at the rate of six percent per annum.

3 The respondent purchased a "Transit Marine Insurance Policy" from the appellant on 21 July 2005, to cover the transportation of a Bell – 430 Helicopter from Langley, Canada to Bhopal, India. By an acceptance letter dated 1 July 2005, the appellant set out the transit route for the transportation of the helicopter by air, sea and road. By a letter dated 10 July 2005, the proposed route was altered as follows:

> "Transit Details: Langley to Pithampur/Bhopal (by road/ by air)."

4 The policy schedule issued by the appellant indicated that the policy was issued from 22 July 2005 for transportation of the helicopter with standard packaging from Langley to Bhopal for a total sum insured of 20,00,00,000. The policy was to be governed by the accompanying clauses that included, inter alia, Institute Cargo Clauses (Air Cargo)5, Institute War Clauses (Air Cargo), Institute Strike Clauses (Air Cargo), and an Institute Theft Pilferage Non Delivery Clause that listed out the terms and conditions of all damages and loss covered under the policy. The duration of the policy was to be governed in terms of Clause 5 of First Appeal no 279 of 2009 First Appeal no 25 of 2010 "ICC" the ICC. On 5 October 2005, the helicopter was transported in a knocked down state by air to New Delhi. On 13 October 2005, the helicopter was cleared by the customs and was shifted to a hangar at New Delhi. On 21 October 2005, the helicopter was inspected by a representative of the manufacturer during routine inspection and the window of the crew door was reported to be damaged. The respondent sought the permission of the Director General of Civil Aviation to fly the helicopter to Bhopal but was denied permission on account of the damage to the window of the crew door. By a letter dated 22 October 2005, the respondent informed the appellant of the damage and stated that the helicopter was "being assembled at the Hangar of Indamer Co. located at Delhi so that the Helicopter can fly from Delhi to Bhopal". On 23 November 2005, the respondent informed the appellant that upon inspection, the tail boom of the helicopter was found to be damaged. A surveyor was appointed by the appellant to assess the alleged damage to the window of the crew door and the tail boom of the helicopter. By a report dated 14 March 2006, the surveyor concluded as follows:

> "The damage to window glass of pilot seat and damage to tail boom of helicopter are two separate incidents not related to each other.
>
> The replacement cost of damaged window glass of pilot seat is below Rs 10,00,000 and hence would fall under the excess prescribed under the policy.
>
> The damage to the tail boom had occurred at Hangar #3, Bay 15/33 IGI Airport Delhi after substantial assembly but prior to test flight and not during transit and hence would not fall under the purview of marine insurance policy as issued to the insured."

5 By a letter dated 10 April 2006, the appellant informed the respondent that the damage to the tail boom was not detected during transit or customs clearance and it was only detected in the third week of November 2005 before which multiple inspections had been carried out and no damage was reported earlier. The appellant further informed the respondent that the representatives of the manufacturer had also admitted that the loss to the tail boom was only noticed in the month of

November. On 10 April 2006, the appellant informed the respondent that both the losses claimed were inadmissible for the following reasons:

> "1. Claim for damage to Windscreen glass – The total cost of replacement for this loss is quoted to be Rs (amount of windscreen glass)/- This amount is within the policy deductible of 0.5% of sum insured of Rs 20 Crores. As such there is no liability attaching to the policy.
>
> 2. Claim for dent on Tail Boom of the aircraft-

a. This was discovered at Hanger-3 Bay 15/33 IGI Airport Delhi in the third week of Nove-2005. The dent was noticed by the representative of manufacturer during routine inspection. It is important to note that cargo had landed on (date).

b. We deputed Surveyors, M/s Puri Anuj & Associates, to inspect and report on loss.

c. Surveyors have reported that the loss was not identified/ reported during Customs Clearance. As clean delivery has been accepted.

d. Representatives of Canadian manufacturers, Mr Lorne Vowles and Mr Adrine Lawrence, have admitted that the loss was noticed only in November. There was no damage to the tail boom during their thorough inspection on landing of cargo.

e. The loss claimed is caused during the storage/movement/ handling of cargo and long after it s delivery at desired destination.

In view of these facts, we regret to say that the loss falls beyond the scope of cover granted. Both the losses claimed are inadmissible." 6 By a letter dated 11 April 2006, the respondent responded to the above letter stating that even though the damage was noticed after a month of customs clearance, the policy of transit was up to Bhopal and therefore, damage to the helicopter in the month of November 2005 would also be covered under "transit". The appellant repudiated the claim of the respondent by a letter dated 11 July 2006 on the ground that the loss that occurred to the helicopter was after the duration of the policy had ended as mentioned in Clause 5 of the ICC:

> "In the present case, the destination of the consignment of air transit was New Delhi Airport. The cargo [aircraft] was to be assembled at this location and then aircraft was to fly to Bhopal. The flight would be out of the Marine Transit scope of insurance. The named destination "Bhopal" of issued policy has no relevance in this context. Thus, insurance cover ended on delivery at the final warehouse, premises or place of storage..."

7 The respondent filed a consumer complaint6 before the SCDRC on 18 August 2006 seeking compensation from the appellant for wrongful repudiation of the claim and towards the loss sustained by the respondent. On 16 May 2009, the SCDRC found the appellant to be deficient in its

service and directed the appellant to pay a compensation of 64,89,205 to the respondent. The SCDRC held that the present case was not a case of delivery before the final destination but the halt at New Delhi was only a transit halt and the assembly of the helicopter at New Delhi did not change the nature of the cargo. Being aggrieved by the judgment of the SCDRC, both the petitioner and the respondent preferred separate appeals before the NCDRC. The NCDRC by its judgment dated 10 August 2018, upheld the finding of the SCDRC that there was a deficiency of service on behalf of the appellant in repudiating the claim. In addition to the compensation which was granted by the SCDRC, the NCDRC awarded "interest compensation by way of damages" at the rate of six percent per annum from the date of repudiation till realisation. Assailing the decision of the NCDRC, the appellant has filed the present Special Leave Petition before this Court under Article 136 of the Constitution.

Consumer Complaint no 13 of 2006 8 By an order of this Court dated 15 February 2019, a stay was granted on the operation of the judgment of the NCDRC. The issue before this Court is whether storage, unpacking and assembly of the helicopter at New Delhi would fall outside the scope of the expression "ordinary course of transit", terminating coverage under the policy.

9 During the course of the submissions before this Court, Mr Joy Basu, learned Senior Counsel appearing on behalf of the appellants made the following submissions:

> (i) The tenure and duration of the policy was contingent upon an event which may trigger Clause 5 of the ICC. The respondent took the delivery of the helicopter, prior to the final destination - Bhopal, and stored it in its hangar at New Delhi. The storing of the helicopter in the hangar was not "for onward carriage to Bhopal" but for the "convenience" of the respondent. In doing so, the respondent took the cargo in its own custody and acted beyond the scope of the "ordinary course of transit", terminating coverage under the policy. The goods in the ordinary course of transit are inextricably linked to a carrier who is responsible for expediting the journey and taking care of the goods during transit. Once the respondent took the cargo in its own custody and chose to assemble the helicopter in New Delhi, the link with the carrier came to an end affecting the risk cover;
>
> (ii) The delay and deviation caused due to the respondent taking custody and delivery of the helicopter was not covered by Clause 6 of the ICC and ran contrary to Clause 15 of the ICC, which required the respondent to act with reasonable dispatch;
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> (iii) The policy covered risks associated with transportation of the helicopter in a disassembled state as cargo through a carrier. When the respondent assembled the helicopter at the hangar in New Delhi, it changed the character and nature of the said cargo and created an entirely new product. The modified cargo was incapable of being insured under the existing policy as it exposed the appellant to risks that were not agreed upon in the transit marine insurance policy. The risks associated with the transportation of a disassembled helicopter as cargo are different from those associated with the flight of a helicopter under its own power. Operational risks

associated with the flight of the helicopter are covered under a separate „Aviation Hull All Risk Insurance Policy ;

(iv) Clause 2.3 of the ICC excludes from the insurance cover the loss, damage or expense caused by insufficiency or unsuitability of packing or preparation of the cargo;

(v) The NCDRC in its interpretation of the policy has, in essence, re-written the policy providing a meaning contrary to that envisaged by the parties. In this regard, reliance was placed upon the decision of this Court in Export Credit Guarantee Corporation of India Ltd v Garg Sons International7. Even if the container containing the disassembled helicopter had not been opened in New Delhi and not continued its (2014) 1 SCC 686 onward journey to Bhopal, then too the ordinary course of transit would have been interrupted. Breaks in transport of the cargo have to be incidental to such transport and not as a matter of convenience. The storage of the helicopter in the hangar at New Delhi for the purpose of assembly and subsequent flight could not be called storage being incidental to the transportation. Reliance was placed upon the judgments of the Supreme Court of Victoria (Appeal Division) in Verna Trading Pty Ltd v New India Assurance Co Ltd8, and Supreme Court of Victoria (Common Law Division) in QBE Insurance Limited v Patterson Fine Jewellery Pty Ltd9; and

(vi) Damage to the window of the door of the helicopter would fall within the excess clause which in any event is not covered under the insurance policy. The damage to the tail boom admittedly occurred in the third week of November 2005 which is after the period of thirty days from 13 October 2005 (the date of customs clearance and the respondent taking possession of the cargo). Therefore, the claim for damage in this period is not payable in terms of Clause 5.1.3.

10 On the other hand, Aditya Rajan, learned counsel appearing on behalf of the respondent supported the decisions of the NCDRC and SCDRC and made the following submissions:

(i) The copy of the ICC was never provided by the insurer. The manner in which the helicopter is transported by air and by road is different. The (1991) 1 VR 129 2004 VSC 31 helicopter in a knocked down state first landed in New Delhi and was then taken to the hangar, where it was to be assembled and prepared for transportation by road to Bhopal. The respondent did not choose New Delhi as the selected warehouse for the purposes of accepting the delivery. During the assembly, only the fuselage assembly (front body of the helicopter) was inspected and a crack was noticed in the window of the front body of the helicopter. At that stage, there was no possibility of detecting any other damage to the helicopter as the helicopter was still in transit and therefore, no formal complaint was lodged with the appellant. Only after the delivery of the helicopter at Bhopal could the helicopter be checked properly and a claim be lodged;

(ii) The letter dated 22 November 2005, was written by an administrative manager, who had no idea whether the helicopter was to be transported to Bhopal by road or air. It was stated in the letter that some parts of the helicopter were broken during transit;

(iii) There was justifiable ground for the helicopter to be stored at the hangar at New Delhi. Since the replacement window was not available in India, the respondent decided to procure a new window from the US in order to prevent the possibility of further damage to the mounting frame of the helicopter. Since the procurement and supply of the new window was taking considerable time, the helicopter was kept in storage in the meantime in the hangar covered with a bubble sheet and packing material. In addition, the helicopter was retained in New Delhi as the respondent had all the necessary skilled manpower and special tools to replace the damaged window;

(iv) On 20 November 2015, the engineer of the helicopter manufacturer noted a dent in the tail boom during a routine check. Upon being informed of the dent in the tail boom, the respondent s engineer conducted a further assessment to determine the extent of damage.

Accordingly, the inside of the helicopter was accessed by opening the access panels and the main structural bulkhead was found damaged. The mere fact that the damage was discovered on 20 November 2005, does not imply that the dent was actually caused on that date. The damage to the tail boom, the bulk head, and the damage to the window glass established that the damage had been caused during transit as it could not have been caused to a stationary helicopter stored at the hangar in New Delhi. No report or CCTV footage of any incident of the helicopter being damaged in the hangar was reported; and

(v) The manufacturer of the helicopter provided a repair scheme through which the structural damage to the helicopter could be repaired at the hangar in New Delhi. After the repair, in order to verify the serviceability of the helicopter it was essential to test fly it and since the helicopter was assembled in a flying state, it was decided not to disassemble it for transportation by road but instead fly the helicopter to Bhopal. The respondent never gave any instructions to change the final destination from Bhopal to New Delhi and for the purposes of Clause 5.1.2, Bhopal continued to be the final place of delivery.

11 The rival submissions fall for our consideration.

12 The dispute before this Court is with respect to the damage to the tail boom of the helicopter and not as regards the damage to the windscreen glass. By a letter dated 10 April 2006, the appellant informed the assured that the total cost of replacement of the windscreen glass was within the policy deductible of 0.5% of the sum insured and as such no liability arose under the policy. The assured has not challenged that before this Court.

13 The insurance policy issued by the insurer to the insured represents a contract between the parties. The insurer undertakes to compensate the insured for the losses covered under the insurance cover subject to the terms and conditions of the policy. The appellant issued a policy to the respondent on 22 July 2005. Under the policy schedule, the cargo was to be transported from Langley to Bhopal. The policy schedule prescribed that the appellant company "agrees to insure against loss, damage, liability or expenses subject to the limit of indemnity and the clauses, endorsements, exclusions, conditions and warranties in the schedule to the policy." The extent of the policy cover was governed by and subject to various clauses mentioned in the policy schedule which included the ICC. The ICC, inter alia, prescribed the risks covered, exclusions, duration and duties of the insurer and the insured.

14 The dispute in the present case is on the interpretation of the termination clause of the ICC.

15 MacGillivray on Insurance Law 10 elucidates the principles which govern the interpretation of insurance contracts:

> "11-007 It is an accepted canon of construction that a commercial document, such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive fair and sensible application. Several consequences flow from this principle...
>
> 11-008 It follows that in interpreting any clause of a policy, it is correct to bear in mind: (1) the commercial object of purpose of the contract; and (2) the purpose or function of the clause and its apparent relation to the contract as a whole... "

16 The provisions of an insurance contract must be imparted a reasonable business like meaning bearing in mind the intention conveyed by the words used in the policy document. Insurance policies should be construed according to the principles of construction generally applicable to commercial and consumer contracts. The court must interpret the words in which the contract is expressed by the parties and not embark upon making a new contract for the parties. A reasonable construction must therefore be given to each clause in order to give effect to the plain and obvious intention of the parties as ascertainable from the whole instrument. The liability of the insurer cannot extend to more than what is covered by the insurance policy. In order to determine whether the claim falls within the limits specified by the policy, it is necessary to define exactly what the policy covered and to identify the occurrence of a stated event or the accident prior to the expiry of the policy. Hence, while considering the rival submissions, it is necessary to preface our analysis with the provisions of the policy. 17 Clause 5 of the ICC provides thus:

> Twelfth Edition, Sweet and Maxwell (2012) "5.1 This insurance attaches from the time the subject-
>
> matter insured leaves the warehouse, premises or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either 5.1.1 On delivery to the Consignees or other final

> warehouse, premises or place of storage at the destination named herein.
>
> 5.1.2 On delivery to any other warehouse, premises or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either. 5.1.2.1 for storage other than in the ordinary course of transit or 5.1.2.2 for allocation or distribution or 5.1.3 On the expiry of 30 days after unloading the subject-

matter insured from the aircraft at the final place of discharge, whichever shall first occur." The insurance cover in the present case is expressed in terms of the voyage itself. The above clause provides that the duration of the policy attached and commenced from the time the insured cargo left the warehouse, premises or place of storage at the place named in the policy and continued during the "ordinary course of transit". So far as the termination of the transit is concerned three alternate events are put forward in Clause 5:

> (i) Under Clause 5.1.1, insurance terminates "on delivery" of the cargo "to the consignees or other final warehouse or place of storage at the destination named" in the policy;
>
> (ii) Under clause 5.1.2, the alternative place of delivery is to "any other warehouse, premises or place of storage whether prior to or at the destination named herein" which the assured chooses to use for one of two purposes namely - (a) either for storage other than in the ordinary course of transit or (b) for allocation or distribution of the cargo; and
>
> (iii) Clause 5.1.3 prescribes a period of thirty days after unloading of the insured cargo from the aircraft at the final place of discharge. If that event first occurs, the question of delivery to any warehouse or place of storage becomes redundant. Even though in Clause 5.1.1 the choice of final warehouse is restricted to the destination named therein, by virtue of Clause 5.1.2, it is possible that the policy terminates upon delivery to some other final warehouse or place of storage as chosen by the assured. Under Clause 5.1.1, the delivery of the subject-matter at the warehouse, premises or place of storage at the named destination also constitutes the termination of the insurance. Clause 5.1.2 provides for situations where the policy terminates upon delivery of the goods at any other warehouse, premises or place of storage prior to or at the destination named in the policy which is elected by the insurer for the purpose indicated in Clause 5.1.2.1 or Clause 5.1.2.2.

18 The expression "in the ordinary course of transit" mentioned in Clause 5 of the ICC cannot be divorced from the context and must be read along with the other conditions which appear in the policy document. The meaning of the expression "in the ordinary course of transit" depends on the context, object and the wording of the particular policy. P Ramanatha Aiyar s Law Lexicon11, defines the expression "ordinary":

> 11 rd 3 Edition, 2012 "Regular; usual; normal; common; often recurring;

according to established order; settled; customary;

reasonable; not characterised by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual." The same Law Lexicon, relying on an 1888 decision of the Queen s Bench Division in Bethell v Clark12, defines the expression "transit" as:

> "The term "transit" does not mean that the goods must be actually moving as the relevant time: they must, however, be still in possession of the carrier." Black Law s Dictionary13 defines the expression "transit" as:
>
> "1. The transportation of goods or persons from one place to another. 2. Passage; the act of passing."

19 Precedents across various jurisdictions have dealt with the meaning of the expression "in transit" and "in the ordinary course of transit". In SCA (Freight) Ltd v Gibson14 ("Gibson"), the plaintiff who agreed to carry a consignment of books from Rome to Manchester purchased from the defendant a policy against liability for damage to goods in transit. Instead of proceeding to England, the plaintiff decided to take the loaded lorry on a trip to the centre of Rome. On the way, the lorry overturned, and the consignment of books suffered damage. The plaintiffs claimed indemnity under the policy on the ground that when the accident occurred, the books were still in transit. While interpreting the meaning of the expression goods "in transit", Justice Ackner, speaking for the Queen s Bench Division (Commercial Court) held thus:

> "Goods cease to be in transit when they are on a journey which is not in furtherance of their carriage to their ultimate destination. Obviously a detour which is reasonably (1888) 20 QBD 615 13 th 10 Edition [1974] 2 Lloyd's Rep 533 necessary to enable a driver to obtain food or rest would be in furtherance of the safe and expeditious carriage of the goods to their final destination. It would be an ordinary incident in the transit of goods by the plaintiff s vehicles. It is a question of degree, as to what is or not in reasonable furtherance of the carriage of the goods. A deviation which is wholly unrelated to the usual and ordinary method of pursuing the adventure would prevent the goods being "in transit" within the meaning of the policy." (Emphasis supplied)

20 In Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd15 ("Wiggins Teape"), the plaintiff shipped a quantity of wood pulp from Sweden to Port Kembla. The destination of the wood pulp, as specified in the policy of marine insurance, was the plaintiff's place of business at Bomaderry in New South Wales. After the wood pulp was unloaded at the port, the plaintiff had stored the consignment in three other stores because of insufficient storage space at Bomaderry. About thirty-eight days after the wood pulp had been unloaded, the wood pulp in one of the stores was destroyed by fire. The plaintiff claimed under the policy on the ground that the risk of fire at the store where the fire took place was still covered by the policy, as the wood pulp had not reached its final destination but was still in transit. Justice Macfarlan, speaking for the New South Wales Supreme Court held thus:

> "... the purpose of a warehouse-to-warehouse clause is to insure during a limited land movement, but, as far as I am aware, it has never been suggested it is intended to cover indefinite storage at some place not brought about by the requirements of transport, but determined by the voluntary decision of the consignee. In my opinion the facts of this case prove that the Unanderra store was something more than a mere transit store and that when goods entered it, it was for an indefinite duration. I am also of the opinion that in the present case transit had ceased and that unless there were an express provision in the policy, the [1970] 2 NSWR 77 cover ceases. For this purpose, it does not matter whether the store at Unanderra was a final warehouse or a transit store..." (Emphasis supplied)

21 In First American Artificial Flowers, Inc v AFIA Worldwide Ins16 ("First American Artificial Flowers"), the New York Supreme Court was called upon to determine whether coverage existed, in a warehouse to warehouse clause, during the ordinary course of transit until delivery to the consignee s or other final warehouse or place of storage at the destination named in the policy. A consignment of artificial plastic flowers had been shipped from Hong Kong to New York. Upon the arrival of the shipment in New York, the container loaded with flower was trucked to the consignee s warehouse and the activity of unloading the trailer commenced. The container was not unloaded completely by the end of the day and when the workers arrived the next morning, the goods were found to be stolen. The shipper of the flowers sued its underwriters on the ground that the transit policy of insurance required delivery into the warehouse of the consignee and since that event had not occurred, the loss was covered under the insurance policy. The court held thus:

> "[T]he Court is of the opinion that by opening the sealed container and removing some of the contents thereof, the insured accepted delivery outside of the warehouse and terminated the coverage. Once plaintiff accepted the goods, it was free to commence unloading and continue with that work until the job was completed. It was also free to leave some of the goods on the truck until it was more convenient to unload – but at its own risk. The plaintiff could not „extend indefinitely the duration of defendant s policy risk after the goods were at the destination ." (Emphasis supplied) 1977 AMC 376 (N Y Sup Ct 1976)

22 In Lumber & Wood Products, Inc v New Hampshire Insurance Company, Etc17, the United States Court of Appeals for the Eleventh Circuit referred to the decision in First American Artificial Flowers and observed thus:

> "The court in First American relied upon, among other cases Boonton Handbag Co v The Home Ins Co, 125 N J Super, 287, 310 A 2d 510 (1973), a similar case which also held that the arrival of the truck at the consignee s warehouse was sufficient to terminate transit coverage under the policy. The guiding precept behind both of these cases is that a transit policy of insurance should not be stretched or tortured to provide coverage for losses which take place after delivery at the consignee s facility. In those circumstances where it is simply more convenient for the consignee to allow the cargo to be stored outside its warehouse, the shipper cannot indefinitely avail

himself of the coverage because the cargo is allegedly "in transit". Once the final destination has been reached, transit has ceased. Consequently, the coverage must also cease." (Emphasis supplied)

23 In Verna Trading Pty Ltd v New India Assurance Co Ltd18 ("Verna"), the Supreme Court of Victoria (Appeal Division) dealt with whether the storage of goods by the consignees at a warehouse for the purpose of commercial convenience was storage other than in the ordinary course of transit. The plaintiff had purchased a policy of marine insurance for covering the transportation of goods from Hong Kong to Australia. After the shipment arrived in Melbourne, the goods were transferred to a storage area, awaiting customs clearance. After clearing all dues, the plaintiff made a deliberate decision to retain the goods in the storage area until they were able to accept delivery of the goods from their customers and transfer the goods to another warehouse. After the container was transferred, the goods were found to be missing. The plaintiff lodged a claim 807 F 2d 1987, 1987 AMC 1244 [1991] 1 VR 129 alleging that the goods while in the storage area were in transit and the alleged theft would be covered by the policy. Justice Beach referred to the decision in Wiggins Teape and held thus:

"... once the decision was made by Verna to leave the cassettes in Strang's Triangle until such time as they were able to accept delivery of them into the Multi Group warehouse, the cassettes ceased to be in transit. The storage of the cassettes in the triangle had nothing to do with the requirements of transportation. They were left there as a matter of convenience until such time as they could be taken to their final destination. In that situation, once the decision was made to leave them in the triangle, the insurance terminated. It must also follow from Verna's actions in that regard that it did not act with reasonable dispatch in so far as delivery of the cassettes to their final destination was concerned." (Emphasis supplied) Justice Kaye in his concurring opinion discussed the meaning of the expression "in transit" and held thus:

"... While the expression "in transit" is not a term of art, its intended meaning may become apparent from the context in which it is used: cf. Peter Jackson Pty Ltd v Consolidated Insurance of Australia Ltd. [1975] VicRp 77; [1975] VR 781, at p. 799. In the present case the meaning of the phrase "during the ordinary course of transit" is indicated by the purpose of the warehouse to warehouse clauses forming part of the marine policy. The voyage policy component of the policy covered the risk of loss and damage while the goods were in the course of carriage from Hong Kong to Melbourne. Upon the discharge of the goods from the ship, the voyage cover ceased. The purpose of the warehouse to warehouse CL81, in so far as it related to the goods after discharge from the ship, was to provide for the continuation of insurance whilst the goods were being carried by land to the final destination. This was during transit. But that period was limited to the time during which the goods were in the ordinary course of transit. The period of the ordinary course of transit continued during periods or intervals which were in reasonable furtherance of the carriage of the goods to the final destination: cf. SCA. (Freight) Ltd. v Gibson [1974] 2 Lloyds Rep 533, at p.

535 per Ackner J. (as his Lordship then was). Implicit in the phrase "during the ordinary course of transit" was recognition and acceptance that the movement of the insured goods by land might be interrupted by circumstances associated with the requirements of their transportation." (Emphasis supplied) Justice Ormiston referred to the decision in Gibson and dwelt the meaning of the expression "ordinary course of transit":

"It would therefore appear that the "ordinary course of transit" would end if an act or acts took place which would, reasonably considered, indicate that the transit had terminated or that the transit had been so interrupted that it could not be seen as likely that the transit would recommence without there being a positive decision to that effect by the assured or consignee. Even if neither of those two conclusions could be drawn, the cargo may no longer be in the "ordinary course" of transit if it is dealt with in a manner inconsistent with the prosecution of the adventure, that is, in a way or for a purpose which is unrelated to bringing the transit to its expected conclusion by delivery to the defined warehouse or store." (Emphasis supplied) 24 In NEC Australia Pty Ltd v Gamif Pty Limited,19 the insured, a transporter of goods claimed against its insurers for a loss resulting from the theft of certain goods from one of the insured s warehouses. The issue was whether or not the goods were "in transit" at the time of the theft within the ordinary meaning of that term in the policy of insurance. Justice Lockhart speaking for the Federal Court of Australia while referring to the decisions in Wiggins Teape and Verna held thus:

"In my opinion the policy covers machines of NEC whilst being transported from one place to another. It does not mean that [1993] FCA 252 the machines must be in motion at all times. But it does mean that the overall object of the insurance contract is to facilitate the transportation of machines of NEC from one place to another. The "transit" may be interrupted to permit efficient and economical loading, transhipment, unloading and storage to await another vehicle to carry the goods from the point of original shipment to the point of destination; but the interruption cannot be merely for the commercial convenience of one of the parties.

The ordinary meaning of "transit" essentially connotes that goods are in motion between two points, but the period of transit may continue during intervals or periods when they may be loaded or unloaded and temporarily housed provided that this is reasonably referable to the furtherance of the carriage of goods to the final destination. The notion of "in transit" accepts that the movement of the goods may be interrupted by circumstances associated with the requirements of their transportation." (Emphasis supplied) 25 In context of the policy, the words "in transit" do not require transportation of the consignment in a single trip from the commencement to the final destination but includes those interruptions in motion that are incidental to or in furtherance of the conveyance or transportation of the consignment. The words of the policy ought to be construed so as to conform to the usual and ordinary method of pursuing the venture or operation. The question of

> what does and does not constitute a deviation in furtherance of the conveyance of the goods is a question of fact that must be determined by both the intent of the policy and the actions of the parties. An action that is wholly unrelated to the usual or ordinary method of pursuing the transportation of goods would prevent the goods from being covered under the definition of the expression "in transit" under the policy.

Words used in the policy must be construed in their commercial setting having regard to the purpose of the policy.

26 The appellant issued a policy cover to the respondent providing coverage for the transport of the helicopter from Langley to Bhopal. The helicopter was transported in a knocked down state by air through Cathay Pacific Airlines and reached New Delhi on 5 October 2005. It cleared customs on 13 October 2005 and on the same day, the respondent after taking possession of the cargo shifted it to the hangar at New Delhi. It is undisputed that at the time of customs clearance, no damage was reported. It was when the helicopter was inspected by the representative of the manufacturer during a routine inspection on 21 October 2005 that damage was reported to the window of the crew door of the helicopter. In a communication dated 21 October 2005 addressed by the representative of the manufacturer for placing an order for a crew door window, it was stated that "further unpacking of the Fuselage Assembly was carried out and no other damage was evident." By a letter dated 22 October 2005, the respondent informed the appellant of the said damage by stating:

> "On the helicopter reaching Delhi, the package was opened it was found that some of its parts were found broken during transit" Presently, the Helicopter is being assembled at the Hangar of Indamer Co. located at Delhi so that the Helicopter can fly from Delhi to Bhopal." (Emphasis supplied)

27 The contents of the above letter negate the submission of the learned counsel for the respondent that the helicopter was shifted to the hangar for the purposes of assembling and preparing it for further transportation by road to Bhopal. It is evident from the above letter that the intention of the respondent was to assemble the helicopter at New Delhi and to fly it to Bhopal. The helicopter was transported from Langley in a "knocked down state". The specific act of unpacking the cargo at New Delhi in furtherance of the purpose of assembling it for the flight to Bhopal indicated that the transportation of the cargo in a knocked down state had come to an end. The act of unpacking the helicopter for the purpose of assembling it for undertaking the flight to Bhopal was unrelated to the usual or ordinary method of pursuing the transportation of the cargo insured. The policy covered only those risks that were associated with the transportation of the helicopter and did not cover the risks associated with the flight or operation of the helicopter.

28 Colinvaux s Law of Insurance20 elucidates on the distinction between increase of risk and change of risk:

> "5-023 There is a distinction at common law between cases in which the danger of loss increases during the currency of the policy, and cases in which the very nature of

> the subject- matter insured has altered: the former has no adverse effects on the policy, whereas the latter operates automatically to discharge the insurer on the basis that what was agreed between the parties has ceased to exist. The distinction between an alteration of the risk and an alteration in the subject-matter may at the margins be fine, but it is nevertheless crucial..." "5-034 Where the change occurring is not merely an increase in the risk faced by the insurer, but amounts to a substantive change in the insured subject-matter itself, the common law discharges the insurer from all liability for loss to the subject matter... To determine whether or not there has been a change in the subject-matter, it is necessary to construe the policy to determine exactly what subject- matter was contemplated by the parties as falling within its coverage..." (Emphasis supplied) 20 th 10 Edition by Robert Merkin

29 In the present case, the transit policy only covered such risks that may have arisen by the venture or operation being carried out in the usual or ordinary manner and did not include risks that were out of the scope of the policy. Change in the character of the helicopter from a knocked down state to a ready to fly state exposed the appellant to risks not contemplated by the parties under the policy. The effect of the alteration of the subject-matter insured is outside the scope of the agreed cover and brings an end to the policy. Once the nature of the subject- matter was altered, the cargo cannot be said to be in transit and the appellant is absolved from any liability arising out of any subsequent damage to the consignment. Exposure to risks associated with the flight substantially and unnecessarily added to the risks of the journey that were not covered by the policy. Accordingly, the submission of the learned counsel for the respondent that the cover against risks would be provided till the time the helicopter was not delivered at the final destination of Bhopal is unsustainable. Once the respondent intended to alter the subject-matter it becomes irrelevant to determine whether the hangar at New Delhi was a transit store or the final destination of delivery. 30 The learned counsel for the respondent has argued that there was justifiable ground for the helicopter to be stored at the hangar in New Delhi since procurement and supply of the new window was taking considerable time and all the necessary skilled manpower and special tools to replace the damaged window were only available in New Delhi. Clause 5.1.2 of the ICC provides that the policy may terminate upon the assured choosing to use an alternate place of delivery, prior to the destination named therein for one of two purposes, either for storage other than in the ordinary course of transit or for allocation or distribution of the cargo. The purpose of a transit policy is to cover the carriage of goods to the final destination. In the present case, storage of the helicopter in the hangar at New Delhi awaiting replacement of the spare window cannot be said to be incidental or in furtherance of the carriage of the goods to the ultimate destination. It would be unreasonable to suggest that the transit policy intended to cover indefinite storage of the helicopter at the hangar in New Delhi not brought about by the requirements of transport but determined by commercial convenience of the respondent. The degree of deviation of storing the helicopter at the hangar awaiting replacement of the spare window is at variance with the ordinary course of transit. Ordinary course of transit is the period when the cargo is in the course of transportation, and not in the immediate control of the buyer or seller. After the goods cleared customs, the helicopter was in possession of the respondent and it took a voluntary decision of retaining the helicopter in New Delhi on the basis of commercial convenience. As found in the earlier part of the judgment, the intention of the respondent was not to prepare the helicopter for transportation by road to Bhopal but to assemble the helicopter in New Delhi and fly

it to Bhopal. Once the respondent decided to leave the goods in the hangar at New Delhi for its commercial convenience not associated with or in furtherance of the requirements of their carriage to Bhopal, the transit insurance ended. 31 Clause 15 of the ICC provides that during the period of the transit policy, the insured shall act with reasonable dispatch:

> "It is a condition of this insurance that the assured shall act with reasonable dispatch in all circumstances within their control" The purpose of the marine transit insurance policy is to cover the consignment from risks associated with transportation of the consignment from one place to another. It is fundamental for those responsible for carrying the cargo to ensure that all stages of the transportation are effected with reasonable promptness. "In transit", however, does not necessarily mean that the consignment needs to be in continuous motion at all times. A mere brief suspension must however be in furtherance of the ordinary course of transit. During the ordinary course of transit, the consignment might frequently come to rest or be temporarily stored in the dock awaiting loading or customs clearance. However, unduly protracted steps in the cargo s transportation are not within, and may terminate, the "ordinary course of transit." In the present case, the insured voluntarily decided to store the helicopter in the hangar at New Delhi out of commercial convenience and not in furtherance of the transit. In addition, the insured by assembling the knocked down helicopter for the purposes of flying it to Bhopal changed the nature of the consignment and exposed the appellant to operational risks beyond the scope of the policy.

32 Clause 6 of the ICC provides for continuation of insurance cover after termination in circumstances beyond the control of the insured. Clause 6 provides thus:

> " 6. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a place other than the destination named therein or the transit is otherwise terminated before delivery of the subject-matter insured as provided for in Clause 5 above, then this insurance shall also terminate unless prompt notice is given to the Underwriters and continuation of cover is requested when the insurance shall remain in force, subject to an additional premium if required by the Underwriters, either 6.1 until the subject-matter is sold and delivered at such place or unless otherwise specially agreed, until the expiry of 30 days after arrival of the subject-matter hereby insured at such place, whichever shall first occur, or 6.2 if the subject-matter is forwarded within the said period of 30 days (or any agreed extension thereof) to the destination named herein or to any other destination, until terminated in accordance with the provisions of Clause 5 above." Clause 6 states that the insured can issue prompt notice to the underwriters to continue the cover upon payment of an additional premium, if owing to circumstances beyond its control either the contract of carriage is terminated at a place other than the destination named therein or the transit is otherwise terminated before the delivery of the subject matter insured as provided for in Clause 5. In the present case, if the respondent decided to retain the helicopter in New Delhi awaiting

> the arrival of the replacement window from USA, it could have issued a notice to the underwriters to continue the cover of carriage till the time the repairs were carried out. However, the respondent did not issue any notice seeking extension of the insurance cover under Clause 6.

33 After determining that the ordinary course of transit ended in Delhi when the cargo consisting of a helicopter in a disassembled state was unloaded for the purpose of assembling the helicopter and flying it to Bhopal, we must next determine the question of whether the damage to the helicopter had occurred during the course of transit from Langley to Delhi. On the damage to the tail boom of the helicopter, the learned counsel for the respondent advanced the argument that the fact that the damage was discovered on 20 November 2005, did not imply that the dent was actually caused on that date. It was urged that the damage to the tail boom, and to the window glass had been caused during transit as it could not have been caused to a stationary helicopter at the hangar in Delhi. 34 Clause 8 of the ICC provides for claims under the insurance policy:

> "8.1 In order to recover under this insurance the assured must have an insurable interest in the subject-matter insured at the time of the loss.
>
> 8.2 Subject to 8.1 above, the assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the assured were aware of the loss and the underwriters were not."

35 In terms of Clause 8, for the respondent to prove its case, the basic and fundamental fact which needs to be proved is that: (i) the respondent must have an insurable interest in the subject matter insured at the time of loss; and (ii) the loss insured against occurred during the period covered by the policy. The position has been formulated in MacGillivray on Insurance Law21:

> "20-006 The burden of proving that the loss was caused by a peril insured against is on the assured. It is not necessary for him to prove precisely how the casualty occurred, but he must show the proximate cause falls within the perils insured against..." (Emphasis supplied) In Rhesa Shipping Co S A v Edmunds22, the plaintiff s cargo ship sank in calm weather in the Mediterranean Sea. The plaintiff sought to recover damages under two identical marine insurance policies that covered losses incurred by perils of Twelfth Edition, Sweet and Maxwell (2012) [1985] 2 All ER 712 the sea. While discussing the burden of proof on the plaintiff to prove its case, Lord Brandon, speaking for the House of Lords held:
>
> "In approaching this question it is important that two matters should be borne constantly in mind. The first matter is that the burden of proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation

> on them to prove, even on a balance of probabilities, the truth of their alternative case.
>
> The second matter is that it is always open to a court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on a balance of probabilities, remains in doubt, with the consequence that the shipowners have failed to discharge the burden of proof which lay upon them.
>
> ...
>
> ... It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden." (Emphasis supplied)

36 For the respondent to prove its case, a mere assertion that the loss incurred during the course of transit is not sufficient. The burden of proof lies on the respondent to show that the loss incurred was covered within the terms of the policy and that on a balance of probabilities there existed a proximate cause between the loss incurred and the helicopter being in transit. The respondent has adduced no evidence to supports its case.

37 After the respondent informed the appellant on 23 November 2005 that upon inspection, the tail boom of the helicopter was found to be damaged, the appellant promptly appointed a surveyor, who in its report dated 14 March 2006 observed:

> "During our re-visit along with Insured s engineer we observed that the Tail boom was badly dented (apart from the crack in the glass of pilot side window initially surveyed by us) at the point where it joins the main frame. The frame was also affected and bulged inside. It appeared from the nature of damage that some hard and/or sharp object hit the frame whilst it was parked at hanger..." (Emphasis supplied) Based on the above, the surveyor concluded thus:
>
> "The damage to the tail boom had occurred at Hangar #3, Bay 15/33 IGI Airport Delhi after substantial assembly but prior to test flight and not during transit and hence would not fall under the purview of marine insurance policy as issued to the insured." On the basis of the surveyor s report, the appellant rejected the claim of the respondent on 10 April 2006. By a letter dated 11 April 2006, the Directorate of Aviation, Government of Madhya Pradesh responded to the above letter on behalf of

the respondent stating:

> "It is very important to mention here that the investigation by your surveyors and their interviews with technical representatives of Acro Helipro, scrutiny of customs documents, physical inspection of helicopter at Palam airport etc. confirms that this damage to the helicopter was caused in Nov 05 whereas this helicopter was cleared from customs on 13th Oct 05.
>
> ...
>
> Though your findings of damage to helicopter in Nov 05 i.e. after a month after receipt of helicopter from customs are based on facts but here we wish to inform you that our policy for transit is up to Bhopal and therefore damage to the helicopter after a month from receipt of the customs i.e. in the month of Nov 05 is also covered under transit." (Emphasis supplied)

38 It is evident from the contents of the above letter written by the the Directorate of Aviation, Government of Madhya Pradesh that the respondent did not challenge the surveyor s report. Instead it accepted the finding of the surveyor that the damage to the helicopter took place only in November 2005, after the helicopter had been cleared through customs on 13 October 2005. Accepting the report of the surveyor, the Directorate of Civil Aviation of the Government of Madhya Pradesh sought to contend that the ordinary course of transit extended until Bhopal. This admission is contrary to the stance taken by the respondent before this Court that the damage to the helicopter occurred during the course of transit before the cargo was cleared from customs at Delhi. The learned counsel for the respondent has in his written submissions before this Court argued that since the procurement and supply of the new window was taking considerable time, the helicopter was kept in storage in the meantime in the hangar was covered with a bubble sheet and packing material. The respondent has on the balance of probabilities failed discharge its burden that the damage to the helicopter incurred during the course of transit. No proximate cause has been shown between the damage to the helicopter and the helicopter being in a state of transit. Hence, it is difficult for this Court to come to the conclusion that the damage to the helicopter incurred during the course of transit. 39 The NCDRC has in the impugned judgment proceeded on the understanding that "since customs clearance is essentially at New Delhi, it has to be construed and interpreted in the right spirit that the commencement of the transit is at Langley and ordinary course of transit includes the staying at Delhi for customs clearances and for assembling". The NCDRC has further noted that there existed no ambiguity regarding the commencement of the risk at Langley and ending at the final destination i.e. Bhopal. According to the NCDRC, the expiry of thirty days after completion of discharge at the final port of discharge should be essentially interpreted as thirty days after reaching Bhopal and not thirty days during the course of transit which included the halt at New Delhi. The line of approach adopted by the NCDRC is evidently incorrect. While construing a contract of insurance, it is not permissible for a court to substitute the terms of the contract. The court should always interpret the words used in a contract in a manner that will best express the intention of the parties. The NCDRC has incorrectly proceeded on the path that the ordinary course of transit would include assembling of the helicopter at New Delhi and the

policy covered all risks till the time the helicopter did not reach Bhopal. The risks associated with the assembled helicopter were not covered within the purview of the policy, as the subject-matter which had been insured was a helicopter being transported in a packaged knocked down condition. The act of assembling the helicopter with a view to having it flown under its own power, instead of transporting the packaged knocked down helicopter further to Bhopal by road, would not constitute as storage in the ordinary course of transit. The interpretation adopted by the NCDRC strikes fundamentally at the purpose of the policy and is not in accordance with sound commercial principles. The interpretation altered the character of the risk insured beyond the scope of the policy as agreed between the parties.

40 We are hence of the view that the interpretation placed on the terms of the insurance policy was manifestly incorrect and that the impugned orders of the NCDRC and SCDRC are unsustainable.

41 The appeals are accordingly allowed and the impugned judgments and orders of the NCDRC and the SCDRC shall stand set aside. The consumer complaint shall stand dismissed. There shall be no order as to costs. Pending application(s), if any, shall stand disposed of.

……………….…………………….........................J. [Dr Dhananjaya Y Chandrachud] ....J. [Ajay Rastogi] New Delhi;

April 24, 2020.