

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for orders in the nature of a Writ of Certiorari and a Writ of Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Sri Lanka Insurance Corporation Limited
'Rakshana Mandiraya', No. 21,
Vauxhall Street, Colombo 02.

Petitioner

Case No. C. A. (Writ) 177/2017

Vs.

1. Consumer Affairs Authority (CAA)
1st and 2nd Floor, CWE Secretariat Building,
Vauxhall Street, Colombo 02.
2. Hasitha Thillakaratne
Chairman,
Consumer Affairs Authority (CAA),
1st and 2nd Floor, CWE Secretariat Building,
Vauxhall Street, Colombo 02.
3. M. Z. Rasheen
Executive Director,
Consumer Affairs Authority (CAA),
1st and 2nd Floor, CWE Secretariat Building,
Vauxhall Street, Colombo 02.
4. A. R. B. Nihamathdeen
Executive Director,
Consumer Affairs Authority (CAA),
1st and 2nd Floor, CWE Secretariat Building,
Vauxhall Street, Colombo 02.

5. M. M. Hilmi
Executive Director,
Consumer Affairs Authority (CAA),
1st and 2nd Floor, CWE Secretariat Building,
Vauxhall Street, Colombo 02.
6. Sanjeewani Kasturiarachchi
Deputy Director – Compliance and
Enforcement,
Consumer Affairs Authority (CAA),
1st and 2nd Floor, CWE Secretariat Building,
Vauxhall Street, Colombo 02.
7. Dr. H. I. C. S. Hewawitharana
Sinharamulla, Kelaniya.
8. Ms. T. L. Wickremasinghe
No. 523, Sinharamulla, Kelaniya.
9. Insurance Board of Sri Lanka (IBSL)
Level 11, East Tower,
World Trade Centre, Colombo 01.
10. Insurance Association of Sri Lanka (IASL)
No. 143A, Wajira Road, Colombo 05.
11. Dr. Wickrema Weerasooriya
Sri Lanka Insurance Ombudsmen,
No. 143A, Wajira Road, Colombo 05.

Respondents

Before: Janak De Silva J.

K. Priyantha Fernando J.

Counsel:

Avindra Rodrigo P.C. with Zafry Sakkaf for the Petitioner

Maithree Amerasinghe SC for 1st to 5th Respondents

Mohan Walpola with Ajith De Zoysa for 7th and 8th Respondents

Argued On: 21.03.2019

Written Submissions Filed On:

Petitioner on 13.12.2018

1st to 5th Respondents on 06.02.2019

7th and 8th Respondents on 30.11.2018

Decided On: 29.05.2020

Janak De Silva J.

The 7th and 8th Respondents made an application to the Petitioner dated 30.07.2009 for a fire insurance cover with additional covers including impact damage (P1). Upon assessing the risk based on the information provided, the Petitioner issued a fire insurance cover with additional covers including impact damage for an insured sum of Rs. 5,369,000/= (P2).

On or about 07.09.2015 the 7th Respondent called the call center of the Petitioner and reported a loss on or about 07.08.2015 due to an accident. Thereafter several documents were called for by the Petitioner and by letter dated 21.12.2015 the 7th Respondent was informed that having perused all submissions of all parties with regard to the claim, the Petitioner has concluded that the alleged loss does not fall within the scope of the impact damage cover provided under the fire insurance policy (P13).

Thereupon the 7th Respondent made a complaint to the 1st Respondent against the Petitioner (P14). Although the 1st Respondent had initially decided to refer the said complaint to the Insurance Ombudsman, later it was decided to hold an inquiry into this complaint.

The Petitioner was notified by letter dated 14.01.2016 to be present at a discussion on 29.01.2016 to discuss the complaint of the 7th Respondent (P15). The Petitioner took part at the discussion and at the urging of the 1st Respondent agreed to reconsider the claim if the 7th Respondent made an appeal. On or about 08.02.2016 (P16) the 7th Respondent appealed to the Petitioner. The Petitioner after considering all the material submitted by the 7th Respondent rejected the appeal by letter dated 18.03.2016 (P18). The reasons for refusal were set out therein.

Thereafter, the 1st Respondent by letter dated 19.04.2016 (P19) summoned the Petitioner to an inquiry under and in terms of section 13(1) of the Consumer Affairs Authority Act No. 9 of 2003 (Consumer Affairs Authority Act) on the complaint made by the 7th Respondent. The 1st Respondent re-summoned the Petitioner on 26.01.2017 to which the Petitioner sent letter dated 18.01.2017 (P22).

The 1st Respondent made order dated 26.01.2017 in terms of section 32(5) of the Consumer Affairs Authority Act (P23). Thereafter the 1st Respondent sent letter dated 17.02.2017 (P24) by which the Petitioner was ordered to pay the 7th Respondent a sum of Rs. 813,623/20. Sometime later the 6th Respondent on behalf of the 1st Respondent made an application to the Magistrates Court of Fort bearing case no. 5045/17/Consumer to enforce the said order.

The Petitioner is in this application seeking a writ of certiorari quashing the order marked P23 and a writ of prohibition prohibiting the 1st to 6th Respondents from taking any further steps in Magistrates Court of Fort case no. 5045/17/Consumer.

There are several grounds on which the Petitioner seeks to assail the order marked P23.

The Petitioner contends that the 1st Respondent has no jurisdiction to hear into complaints in respect of breach of the insurance contract and/or rejection of the insurance claim. The jurisdictional attack is made on several grounds.

The Petitioner submitted that according to the insurance policy, disputes in relation to the breach of contract should be referred to Court and disputes in relation to the quantum of claim should be referred to arbitration. Indeed clause 18 of the fire insurance policy (P2) states that if any difference arises as to the amount of any loss or damage such difference must be referred to the decision of an arbitrator. It further provides that the award of the arbitrator shall be a condition precedent to any right of action or suit upon the policy.

Yet the dispute between the parties in this case is not the amount of any loss or damage. The contention of the Petitioner is that the alleged loss does not fall within the scope of the impact damage cover provided under the fire insurance policy (P13). In any event, parties cannot by agreement oust the jurisdiction vested in a statutory body or person by the legislature.

According to section 75 of the Consumer Affairs Authority Act, "service" means service of any description which is made available to actual or potential users, and includes inter alia insurance. Section 32 of the Consumer Affairs Authority Act specifies certain implied warranties into every contract for the supply of goods or the provision of services. In terms of section 32(3) of the Consumer Affairs Authority Act a consumer aggrieved by the breach of an implied warranty may make a complaint to the 1st Respondent who can then hold an inquiry.

I therefore reject the contention that the 1st Respondent cannot conduct inquiries into insurance contracts in general and hold that it has the power to inquire into complaints of any breach of an implied warranty set out in section 32(1) and 32(2) of the Consumer Affairs Authority Act.

The Petitioner further contended that the letter by which the Petitioner was summoned for the inquiry (P19) states that it is an inquiry in terms of section 13(1) of the Consumer Affairs Authority Act and as such the inquiry is flawed.

However as the learned Senior State Counsel pointed out the 1st Respondent did have the power to inquire into specific insurance disputes in terms of section 32(3) of the Consumer Affairs Authority Act and it is well-settled that an exercise of a power will be referable to a

jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory [*Peiris v. The Commissioner of Inland Revenue* (65 N.L.R. 457)].

Although the Petitioner was summoned by P19 for the inquiry on 26.05.2016 in terms of section 13(1) of the Consumer Affairs Authority Act, the proceedings marked R2 does indicate that the Petitioners were informed that it was an inquiry in terms of section 32(1) of the Consumer Affairs Authority Act. However, this has been done at the end of the inquiry thereby denying the Petitioners of a fair inquiry as the scope and ambit of sections 13(1) and 32(1) of the Consumer Affairs Authority Act are different.

There are also several other formidable legal issues which impinge into the validity of the order marked P23.

Section 32(3) of the Consumer Affairs Authority Act vests jurisdiction in the 1st Respondent to inquire into complaints of any breach of an implied warranty set out in sections 32(1) and 32(2) therein.

Implied terms in contract law are terms that are implied into a contract between parties though it is not included in the contract. Implied terms can arise in three ways. The first consists of terms implied in fact, which are terms not expressly set out in the contract, but which the parties must have intended to be a part of the contract. Secondly, there are terms implied by operation of law, although the parties may not have intended to include them. Thirdly, there are terms implied by custom.

However, the jurisdiction given to the 1st Respondent is limited to the breach of any implied warranty set out in sections 32(1) and 32(2) of the Consumer Affairs Authority Act. Yet the complaint made by the 7th Respondent (P14) was not on a breach of such an implied warranty. It merely refers to the refusal by the Petitioner to pay according to the fire insurance policy.

Furthermore, the order P23 does not anywhere refer to any breach of any implied warranty set out in sections 32(1) and 32(2) of the Consumer Affairs Authority Act.

In terms of section 3(4) of the Schedule to the Consumer Affairs Authority Act, the quorum for any meeting of the Authority is four members. A decision taken without the required quorum is devoid of any legal effect [*Shell Gas Lanka Ltd. v. Consumer Affairs Authority and Others* (2007) 2 Sri.L.R. 212, *Shell Gas Lanka Ltd. v. Consumer Affairs Authority and Others* [(2008) 1 Sri.L.R. 128].

The inquiry proceeding in this case which was held on 26.05.2016 (R2) indicates that four members of the 1st Respondent did participate. However, the order P23 is signed by only two of them. The other two members who have signed P23 did not take part in the inquiry on 26.05.2016. In *Paskaralingam by his Attorney-at-Law v. P.R.P. Perera and Others* [(1998) 2 Sri.L.R. 169] the Supreme Court by a majority held that while three Commissioners continued to be members of the Special Presidential Commission of Inquiry at all times relevant, only two of them participated in the decision-making process and consequently the interim report was without jurisdiction.

The rules of natural justice required that the four members of the 1st Respondent who were present at the inquiry on 26.05.2016 should make the order. The order P23 is signed by two members of the 1st Respondent who did not take part at the said meeting as a result of which the rules of natural justice have been breached.

For all the foregoing reasons, I make order issuing a writ of certiorari quashing the order marked P23 and a writ of prohibition prohibiting the 1st to 6th Respondents from taking any further steps in Magistrates Court of Fort bearing case no. 5045/17/Consumer.

Application allowed. I make no order as to costs.

Judge of the Court of Appeal

K. Priyantha Fernando J.

I agree.

Judge of the Court of Appeal