

(2016) 05 KL CK 0030

High Court Of Kerala

Case No: W.P.(C). No. 23250 of 2015 (E)

New India Assurance
Company Limited

APPELLANT

Vs

Insurance Ombudsman

RESPONDENT

Date of Decision: May 30, 2016**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Contract Act, 1872 - Section 16(3)

Citation: (2016) 3 CivCC 385 : (2016) 3 ILRKerala 155 : (2016) 3 KerLJ 63 : (2016) 3 KHC 302 : (2016) 2 KLT 926 : (2016) 4 RCRCivil 200**Hon'ble Judges:** A. Muhamed Mustaque, J.**Bench:** Single Bench**Advocate:** Sri. Mathews Jacob, Sr. Advocate, Sri. P. Jacob Mathew and Smt. Preethy R. Nair, Advocates, for the Appellant; Sri. C.S. Ajith Prakash with Sri. P.S. Syamkuttan, Advocates, for the Respondent**Final Decision:** Dismissed

Judgement

A. Muhamed Mustaque, J.—The writ petition is filed by an insurance company, (hereinafter referred to as the "insurer") challenging an award passed by the Insurance Ombudsman, Kochi.

2. The facts of case are as follows: The insured, the second respondent, was running a manufacturing unit for manufacture of mattresses, beds etc. A fire broke out in the unit. The Surveyor deputed by the insurer has assessed the loss at Rs. 49.36 lakhs. However, the insurer settled the claim for Rs. 27 lakhs. Challenging the action of the insurer, the insured approached the Insurance Ombudsman. The Insurance Ombudsman awarded a further sum of Rs. 15 lakhs to be paid by the insurer to the insured. It is challenging this award that the writ petition is filed.

3. The question in this writ petition revolves around legality of the settlement arrived at between the insurer and the insured.

4. Admittedly, the insured settled the claim for a sum of Rs. 27,15,948/- as discernible from Ext.P2. This settlement was based on the request made by the petitioner dated 02/05/2012, which is produced as Ext.P1.

5. The case of the insured is that he was constrained to accept the settlement due to extreme financial distress and on account of undue influence exerted by the officials of the insurer. Thus, this Court has to consider the legality of the award, in the light of the alleged undue influence on the part of the insurer.

6. The Insurance Ombudsman, relying upon the calculation of losses and mental make up of the insured, found that the settlement arrived at between the insurer and the insured is by unequal bargaining and insurer is liable to pay a further sum of Rs. 15 lakhs to the insured.

7. There are certain admitted facts in this case which are material to be decided upon the validity of the award. The Surveyor appointed by the insurer estimated loss at Rs. 49 lakhs. The insurer felt that the value of the materials shown by the insured is higher than its actual value. The insurer was not satisfied by the Surveyor's report. The fire broke out in the unit on 04/01/2012. The insurer has no case that they have given the survey report to the insured. The case of insured that he was under severe financial distress has not been disputed by the insurer. It is to be noted that the request of the petitioner as per Ext.P1 would reflect that there is no reference to any survey report. The sole ground on which the insurer challenges the award is that when there was no protest for demand raised at the time of discharge of liability, the insured cannot fall back and challenge the settlement.

8. The settlement is a contract. The contract can be vitiated only in a manner known under the law. Going by the pleadings and findings in the award, the only ground on which the settlement can be vitiated is by applying the doctrine of "undue influence". It is appropriate to refer to Section 16 of the Indian Contract Act, 1872 in this context, which defines "undue influence" as follows:

"16. Undue influence" defined.-(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other ;
or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section III of the Indian Evidence Act, 1872. (1 of 1872.)"

In this context, Section 16(3) as above would be relevant for consideration. Though, the doctrine of undue influence always attempted to be separated from the doctrine of unconscionability of contract, nevertheless, in the statutory realm of Indian Contract, it may be able to say that unconscionability is a species of genus undue influence. An unconscionable transaction arises in contract law where there is an overwhelming imbalance in the power relationship between the parties.

9. The British Columbia Court of Appeal, Canada in **Morrison v. Coast Finance Ltd. (1965), 54 WWR 257, 55 DLR (2d) 710** outlined the factors to be considered in a claim of unconscionability as follows:

"..... a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable."

10. The elements of unconscionability were also formulated in **Alex Lobb (Garages) Ltd. And Others v. Total Oil Great Britain Ltd. [1983 1 WLR 87]** as follows:

- i. one party must be at a serious disadvantage vis-a-vis the other;
- ii. This weakness must be exploited by the other party in a morally culpable manner; and
- iii. The transaction must be, not merely hard or improvident, but oppressive and overreaching.

The above judgment would also clearly indicate the subjective knowledge on the part of the stronger party both of the weakness of the other party and of the fact that a bargain was obtained.

11. The Hon^{ble} Supreme Court of India also had an occasion to consider the relief being considered on account of unconscionable bargaining in **Central Inland Water Transport Corporation Ltd. and another v. Brojo Nath Ganguly and another [AIR 1986 SC 1571]**, wherein it was held as follows:

"The principle deducible from various precedents is that the Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however, unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. The types of contracts to which the principle formulated above applies are not contract which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the Court. They are opposed to public policy and require to be adjudged void."

12. In **LIC v. Consumer Education & Research Centre, [(1995) 5 SCC 482]** it was held by the Hon^{ble} Supreme Court as follows:

"If a contract or a clause in a contract is found unreasonable or unfair or irrational one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service forever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract. An unfair and untenable or irrational clause in a contract is also unjust amenable to judicial review. In common law a party was relieved from such contract. In USA, the standard forms of contracts are called "Contracts of Adhesion". whether the presence of the correlative social role of the drafting party and adherent is available in equal terms is the test."

13. It is in the backdrop of the above understanding of undue influence, the fact situation has to be analysed and assessed.

14. This Court finds that the following facts would establish "undue influence" exerted on the insured for the settlement:

- i. The Insurance Ombudsman found that there is no foundation for calculating the assessed loss by the insurer. For calculation, the Insurance Ombudsman had adverted to the opening balance of stock plus purchases minus sales.
- ii. The insurer has no case that they had supplied the copy of the survey report to the insured. The ignorance of the insured is clear from various communications sent by him.
- iii. The insurer have no case that the insured agreed to settle after fully knowing well about the survey and assessment of the loss.
- iv. The manner in which the insured has been asked to make an offer by Ext.P1 for settlement, clearly indicates that he was directed to make such claim.
- v. The insurer did not deny the financial distress of the insured at the time of settling the claim.
- vi. The insurer in this case, mainly attempted to defend their action based on the fact that there was no protest or demur at the time of settling the liability by the insured.

15. In the above context, the learned Senior Counsel for the petitioner had relied upon an unreported judgment of the Hon"ble Supreme Court in Civil Appeal No. 10784/2014, dated 04/12/2014. The learned Counsel, particularly, referred to para. 9 of the above judgment which reads as follows:

"9. In our considered view, the plea raised by the respondent is bereft of any details and particulars, and cannot be anything but a bald assertion. Given the fact that there was no protest or demur raised around the time or soon after the letter of subrogation was signed, that the notice dated 31.03.2011 itself was nearly after three weeks and that the financial condition of the respondent was not so precarious that it was left with no alternative but to accept the terms as suggested, we are of the firm view that the discharge in the present case and signing of letter of subrogation were not because of exercise of any undue influence. Such discharge and signing of letter of subrogation was voluntary and free from any coercion or undue influence. In the circumstances, we hold that upon execution of the letter of subrogation, there was full and final settlement of the claim. Since our answer to the question, whether there was really accord and satisfaction, is in the affirmative, in our view no arbitrable dispute existed so as to exercise power under section 11 of the Act. The High Court was not therefore justified in exercising power under Section 11 of the Act."

This Court is of the view that the above judgment has no application to the fact situation of this case.

16. The facts and circumstances of the case clearly indicate that the insurer, taking advantage of unequal bargaining capacity of the insured, settled the claim for a lesser amount than assessed by the Surveyor. No doubt, the insurer would have been justified

in saying so, if they had a case that they had informed the insured about the loss assessed by the Surveyor. In such circumstances, this Court is of the view that the challenge in this writ petition must fail. It is to be noted that the loss calculated by the Insurance Ombudsman is having factual founding and therefore, there is no scope to interfere with the award. The writ petition is accordingly, dismissed.