Liberty Citystate Insurance Pte Ltd v AXA Insurance Singapore Pte Ltd
[2001] SGHC 43

Case Number : DA 24/2000

Decision Date : 08 March 2001

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : M Ramasamy and K Anparasan (William Chai & Rama) for the appellant/second respondent; B Rao and Shabnam Arashan (B Rao & KS Rajah) for the respondent/fourth respondent

Parties : Liberty Citystate Insurance Pte Ltd — AXA Insurance Singapore Pte Ltd

Insurance – Liability insurance – Employer's – Validity of non-contribution clause – Whether such clause prohibited under Workmen's Compensation Insurance Regulations (Cap 354, Reg 3, 1990 Ed) reg 2(1)

: The third respondent, Tekken Corporation, was the main contractor (`Main Contractor`) of a construction project at Paya Ubi Industrial site. The first respondent, De Kong Construction (S) Pte Ltd (`De Kong`), now in liquidation, was a sub-contractor of the Main Contractor in the said construction project. One of the terms of the contract under which De Kong undertook the sub-contract was that:

> *The Main Contractor has taken out insurance coverage for the entire project and these insurance policies may be examined by the Sub-contractor at the Head Office of the Main Contractor. The Sub-contractor shall purchase additional insurance coverage at his own cost if he is of the opinion that the insurance coverage provided by the Main Contractor is insufficient for his purpose.*

The Main Contractor had taken out an insurance policy with the fourth respondent, AXA Insurance Singapore Pte Ltd (`AXA`). The AXA policy covered claims under common law and claims under the Workmen`s Compensation Act (Cap 354, 1998 Ed) (`the Act`) (limited to $10m per event). As envisaged in the sub-contract entered into with De Kong, the AXA policy covered not only the Main Contractor but also sub-contractors working in the Paya Ubi project.

De Kong, on its part, also took out additional insurance cover for the said construction project from Liberty Citystate Insurance Pte Ltd (`Citystate`), the second respondent. The Citystate policy also covered claims at common law as well as claims under the Act (limited to $10m per event) but was subject to a `non-contribution` clause endorsed thereon which reads:

> *NON CONTRIBUTION*
>
> *This insurance does not cover loss, destruction, damage or liability which is insured or would, but for the existence of this, be insured by any other policy or policies, except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this insurance not been effected.*

In the course of the sub-contract work at Paya Ubi, 15 of the employees of De Kong suffered injuries

at various accidents at the worksite. The Commissioner for Labour (`the Commissioner`), Mrs Lee Poh Choo, acting under s 24(2) of the Act, assessed the total amount of compensation payable to the 15 workmen at $237,258.69 and, acting under s 32(1) of the Act, wrote to Citystate requiring Citystate to pay that sum. Citystate, however, took the view that, because of the `non-contribution` clause, its policy was a contingent policy under which liability would arise only in respect of any excess beyond the amount covered by the AXA policy. Citystate therefore took the position that AXA and not Citystate should be called upon to pay the compensation.

AXA rejected that view. AXA argued that the `non-contribution` clause in the Citystate policy did not exempt Citystate from its liability because that `non- contribution` clause was in breach of reg 2 of the Workmen`s Compensation Insurance Regulations (Cap 354, Rg 3, 1990 Ed) (`the Regulations`) and therefore invalid.

To understand AXA`s argument relating to reg 2(1), it would be useful to set out that regulation in full. It is headed: `Prohibition of certain conditions and exceptions in policies of insurance` and reads as follows:

> *Any condition or exception in a policy of insurance issued or renewed for the purpose of section 23 of the Act which provides,* ***in whatever terms, that no liability shall arise under the policy****, or that* ***any liability so arising shall cease*** *-*
>
> *(a) in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy;*
>
> *(b) unless the policy holder takes reasonable care to protect his workmen against the risk of bodily injury or disease in the course of their employment;*
>
> *(c) unless the policy holder complies with the requirements of any written law for the protection of his workmen against the risk of bodily injury or disease in the course of their employment; and*
>
> *(d) unless the policy holder keeps specified records or provides the insurer with or makes available to him information therefrom,*
>
> *is hereby prohibited. [Emphasis is added.]*

Regulation 2(1) can be broken down into two limbs. The first limb addresses itself to conditions and exceptions in insurance policies that provide that `no liability shall arise under the policy` whilst the second limb addresses itself to conditions and exceptions in insurance policies that provide that `any liability so arising shall cease`.

AXA submitted that the conditions and exceptions described in sub-cll (a) to (d) of reg 2(1) applied only to the second limb of that regulation and not to the first limb. In support of that, AXA relied on the judgment of a previous Commissioner for Labour in the case of **Cosmic Insurance Corp v People`s Insurance Co** (Unreported) where the Commissioner, Mr Sarjit Singh, had ruled that the first limb stood by itself and that sub-cll (a) to (d) of reg 2(1) did not apply to the first limb but applied to the second limb. On that construction, the first limb would, in effect, be as follows:

> *Any condition or exception in a policy of insurance issued or renewed for the purpose of section 23 of the Act which provides, in whatever terms that no liability shall arise under the policy is hereby prohibited.*

AXA`s position was that the `non-contribution` clause in the Citystate policy, being a clause that sought to exclude liability if there was any other policy in force, fell within the prohibition in the first limb. AXA drew attention to the words `in whatever terms` in reg 2(1) and submitted that as those words were broad in scope they would include attempts, as in the `non-contribution` clause, to avoid liability where another policy of insurance was in force.

In her grounds of decision, the Commissioner upheld that submission and adopted the construction to reg 2(1) taken in the ***Cosmic Insurance Corp*** case referred to above. She held that the `non-contribution` clause in the Citystate policy was a condition or exception which sought to exclude liability and was therefore prohibited under the first limb of reg 2(1). In her view, as the `non-contribution` clause was statutorily prohibited, Citystate could not rely on that clause to escape liability.

Citystate had also advanced the argument before the Commissioner that, regardless of who takes out the insurance and who pays the premiums, the requirements of s 23(1) on the employer to `insure and maintain` insurance would be satisfied if there was, in fact, a policy of insurance in force that covered the employer`s liability. It was submitted to the Commissioner that accordingly, although the AXA policy was taken out by the Main Contractor and the premiums were paid by the Main Contractor, De Kong had satisfied its obligations under s 23(1) to insure and maintain insurance. It was submitted that as the AXA policy covered De Kong`s liabilities, the Commissioner should call upon AXA to pay the compensation.

AXA`s response to this submission was that the obligations under s 23(1) on the employer to `insure and maintain` insurance in respect of his employees could be fulfilled only by the employer directly taking out and maintaining the requisite insurance cover. It was submitted that the insurance cover taken out by the Main Contractor would not exonerate De Kong from its direct statutory obligations under s 23(1). It was therefore submitted that as De Kong, in fulfilment of its obligations under s 23(1), had obtained direct insurance cover from Citystate, Citystate should be held liable to pay the compensation. AXA also submitted that as the AXA policy was not taken out and maintained by De Kong, the existence of that policy would not amount to a fulfilment by De Kong of its obligations under s 23(1).

The Commissioner accepted this submission of AXA. To quote from her judgment:

> *De Kong were the employers and as the employers, they were liable to pay the compensation. And as they took out an insurance under Section 23, then that insurer should be liable to pay.*

And on the question whether the existence of the AXA policy was a sufficient fulfilment of De Kong`s obligations under s 23, she said:

> *I also reject De Kong`s argument that the word ` **maintain**` in Section 23(1) of the Act [**Every employer shall insure and maintain** ...] means that when there is a policy to cover the employees, all the employer has to do is to ensure that the policy is not terminated or expired during the project period. Section*

> *23(1) is clear in imposing an obligation on every employer to `insure and maintain`. The words are read in conjunctive. Counsel did not have authority for his interpretation of the word ` **maintain**`. His interpretation contradicts the intent of the Act and in particular Section 23(3) of the Act which makes it an offence if the employer fails to insure.*

And towards the end of her judgment she commented:

> *The employer`s obligation towards their workmen cannot be reduced or avoided. De Kong`s liability under the Act cannot be abrogated by agreement or because someone else also took out another insurance policy.*

It appears from the above paragraphs that the Commissioner took the view that although De Kong was covered for workmen`s compensation liability under the AXA policy taken out by the Main Contractor, De Kong would nevertheless have been in breach of its obligations under s 23(1) if De Kong had itself not taken out a policy to cover those obligations.

The Commissioner, for the above reasons, ordered Citystate to pay the compensation payable to the 15 injured workmen. Citystate, dissatisfied with her judgment, brought this appeal.

The appeal

I will first deal with the question whether the `non-contribution` clause in the Citystate policy was a clause that was prohibited under the Regulations.

Regulation 2(1)

Sub-clause (a) Sub-clause (b) Mr Ramasamy, counsel for Citystate, invited the court to undertake a close study of the conditions and exceptions enumerated in sub-cll (a) to (d) of reg 2(1). He submitted that such a study would show that these sub-clauses cover situations that arise under both limbs of reg 2(1). To take just the first two sub-clauses:

applies to a situation `after` the occurrence of the event giving rise to the claim. This would be a second limb situation, ie liability has arisen but a condition in the policy seeks to enable the insurer to repudiate liability.

applies to a situation `before` the occurrence of the event giving rise to the claim. This would be a first limb situation, ie the insurer is seeking to stop liability under the policy from arising.

He submitted that as the sub-clauses covered conditions and exceptions affecting both limbs, it must follow that the sub-clauses qualify not just the second limb, but also the first limb. I accept that submission of Mr Ramasamy. An examination of the sub-clauses clearly indicates that they cover both limbs of reg 2(1). As a matter of construction it appears to me that both limbs of reg 2(1) are governed by sub-cll (a) to (d).

In view of the above, the question that has to be asked is whether the `non-contribution` clause was a condition or exception that fell under any of the situations envisaged in sub-cll (a) to (d). Only

if it did, would the `non-contribution` clause be prohibited. Mr Ramasamy submitted - and I agree with that submission - that the `non-contribution` clause did not fall within the scope of any of the sub-clauses. That being so, the `non-contribution` clause in this case was not a condition or exception prohibited by reg 2(1). It was a valid clause. In the circumstances, as De Kong`s liability in respect of the 15 injured workmen was covered by the AXA policy, Citystate by reason of the `non-contribution` clause, would not be liable for any part of the compensation payable unless - and it was not so in this case - the compensation exceeded the limit of liability under the AXA policy. In the circumstances, the liability to pay the compensation in this case fell on AXA.

Section 23(1): Can a sub-contractorrely on the main contractor`s policy?

The above finding is sufficient to dispose of this appeal. Mr Ramasamy, however, pointed out that the decision of the Commissioner - that the existence of the AXA policy covering the liabilities of De Kong under the Act was not a sufficient compliance by De Kong of its obligations under s 23(1) - had far-reaching consequences. He pointed out that it was common industry practice for main contractors to provide insurance cover for their sub-contractors and for sub-contractors either not to take out any policies themselves or to take out policies that only cover any award over and above the limit of the cover in the policy taken out by the main contractor. Indeed, AXA in this case had not sought to deny that its policy covered claims against De Kong and it was in evidence that AXA, in respect of the injured employees of De Kong, had initially paid out some such claims. Mr Ramasamy submitted that if the Commissioner`s decision on this aspect was not set aside, there would be confusion in the insurance and construction sectors. There was also the question whether a sub-contractor who - satisfied with his cover under the main contractor`s policy - did not himself directly take out a policy, was in breach of s 23(1): a breach that attracts penal consequences.

The obligations under s 23(1) of the Act is for every employer to `insure and maintain insurance` against any liability which he may incur under the provisions of the Act to any workman employed by him. The Act does not stipulate the manner in which those obligations are to be fulfilled. Whether an employer takes out and maintains such a policy directly or whether he procures that the main contractor takes out and maintains such a policy, the net result would be that a policy of insurance covering that liability is in place. And that is what s 23(1) is concerned with - the protection of workmen by ensuring that there is in place a policy of insurance that ensures that compensation awarded in respect of injuries suffered in the course of their work is met.

The Commissioner appears to have considered that since the obligations under s 23(1) were on the employer, it was the employer who had to `insure ***and*** maintain` the required insurance cover. She took the view that it was not sufficient for the employer to show that there was in fact an insurance policy covering claims against him by his employees; the employer had, in addition, to show that (a) he had directly taken the policy; and (b) he was directly maintaining the policy.

The Commissioner is correct in saying that the duty on the employer is to both insure ***and*** maintain. If the employer insures himself against claims by injured workmen but fails to maintain that policy, the employer would be in breach of s 23(1). But in this case there had been no failure by De Kong to `insure ***and*** maintain`. De Kong had a contractual arrangement with the Main Contractor to insure and maintain insurance to cover De Kong`s liability to its employees for any injuries suffered. To this end, the Main Contractor had taken out the AXA policy and that policy was maintained. The fact that it was maintained by the main contractor as a contractual obligation to the sub-contractor does not, in my view, detract from the fact that the required insurance was taken and maintained. So long as the employer had arranged for the policy to be issued and maintained and the policy was in fact issued and maintained, the employer would have fulfilled his obligations under s 23(1). If the main

contractor defaults in providing insurance cover to the sub-contractor as required by the sub-contract, or, having taken out the required cover fails to maintain it, the sub-contractor would be in breach of his obligations under s 23(1). It would be no answer, in those situations, for the sub-contractor to say that the fault was that of the main contractor.

For the above reasons, I allow the appeal. As De Kong was covered by the AXA policy, the Citystate policy, although a valid policy under the Act, would not, because of the `non-contribution` clause, cover the compensation awarded in respect of the injuries to the 15 workmen. There can therefore be no recourse to Citystate. Recourse can only be had to AXA. The decision of the Commissioner is therefore set aside and it is ordered that AXA pay the compensation awarded. AXA is also to bear the costs of this appeal and the costs of the hearing before the Commissioner.

Outcome:

Appeal allowed.