Oriental Insurance Co. Ltd. Vs Peacock Plywood (P) Ltd.

Court: Calcutta High Court

Date of Decision: Dec. 16, 2004

Acts Referred: Evidence Act, 1872 â€" Section 20, 32, 32(2)
Limitation Act, 1963 â€" Article 44, 2, 3
Marine Insurance Act, 1963 â€" Section 2, 3

Citation: AIR 2005 Cal 97

Hon'ble Judges: R.N. Sinha, J; D.K. Seth, J

Bench: Division Bench

Advocate: Hirak Mitra, Soumen Sen and Pooja Dasgupta, for the Appellant;Shyam Sarkar, Somen Bose, R. Ghosal and C.K. Saha, for the Respondent

Judgement

D.K. Seth, J.
The Questions & the Facts :

The question to be answered in this case is as to the invocability of the risk/peril clause of the Insurance Policy covering the goods in transition. In

order to answer the question, it is necessary to refer to the facts in brief.

1.1 Plaintiff/respondent sought to recover a sum of Rs. 49,48,407/- on the strength of a policy of insurance issued by the defendant containing

Institute Cargo Clause (C). The plaintiff claimed that the goods were insured for safe arrival at Calcutta. But the goods did never arrive at Calcutta.

The goods were lost by non delivery and the peril insured against. Alternatively, it was contended that the goods were reasonably abandoned since

unavoidable, inasmuch as it could not be retrieved without incurring excessive and unreasonable expenditure exceeding the value of the goods. This

resulted in constructive total loss due to peril/risk insured. The notice of abandonment was given to the defendant through a letter dated 11th

August, 1988. Subsequent thereto, the plaintiff instituted a suit in Singapore. The suit ultimately resulted in sale of the goods and payment into

Court. After taking into account of the monies received, a sum of Rs. 48,76,729.41p. became payable .

1.2. The defendant disputed the claim on two grounds viz.: (1) the goods were never lost and in fact they were very much in existence at the

material point of time and consequently there was no question of loss of the said goods; (2) the concerned policy was Institute Cargo Clause (C)

restricting the policy to be construed in contrast with Institute Cargo Clause (A). Apart from the main two points, the appellants had also raised (3)

a question of limitation; (4) as well as a question with regard to the payment for the transaction which was not proved and due to which an adverse

inference ought to have been drawn on account of non production of the books of accounts; and (5) that the Warehouse-to-Warehouse clause

does not mean an absolute indemnity, it only denotes duration, it does not enhance the heads of risk.

1.3. The learned single Judge had decreed the suit, against which the present appeal has been filed by the defendant/appellant.

1.4. Both the learned counsel had made their respective submissions in respect of their contentions days together and referred to various decisions

cited at the bar, to which we shall be referring at appropriate stage as would be necessary.

Limitation:

2. In view of Section 3 of the Limitation Act, it is the duty of the Court to examine as to whether the claim is barred by limitation even if it is not

raised. The suit was filed on or after 7th August, 1992. The limitation would run from the date of occurrence causing the loss, or the date of denial

of the claim partly or wholly (Article 44(b), 1st Division, Part II of the Schedule of the Limitation Act). A suit filed three years after the date of such

repudiation or denial of the claim would be barred by limitation after the expiry of the prescribed period as defined in Section 2(i) of the Limitation

Act unless it is shown that the period of limitation stood extended in terms of the provisions contained in Part III of the Limitation Act. It is

apparent that the first claim was lodged by the plaintiff through its letter dated 21st/29th April, 1988 (Exhibit ""K""), followed by a formal claim, 24th

June, 1988 (Exhibit 3). This claim was repudiated/denied by the defendant/appellant by its letter dated 8th July, 1988 (Exhibit 5). Our attention

was drawn to the subsequent correspondence between the parties. But this correspondence does not establish extension of period of time. In

Bank of America National Trust and Savings Association v. Chrimas (Kyrlaki), 1993 (1) Lloyd"s Law Reports 137 at p 151, relied upon by the

learned counsel for the appellant, it was held that the cause of action arises at the date of the casualty unless three are conditions displacing the

general principles. In this case, we do not find any condition displacing the general principle.

2.1. It has also been pointed out that though the suit could have been filed both at Calcutta and at Kualalampur/Singapore, but no suit was filed at

Calcutta and that no explanation has been offered for non filing of the suit at Calcutta. The evidence of Sri Pillai in question Nos. 459 to 469 had

admitted that under the Sue and Labour Clause, the insured had general obligation under the policy of Insurance. The plaintiff was required to take

steps against the Charterer-cum-Seller and that the plaintiff could have filed a suit abroad and also at Calcutta. It did neither.

2.2. From the questions during examination of Sri Pillai being Question Nos. 112-132, 365, 366 and chief 60, Sri Pillai stated that the Reserve

Bank of India did not sanction foreign exchange on their application. Therefore, it was not possible for the plaintiff to file the suit abroad.

2.3. It is contended on behalf of the appellant that this part of the evidence cannot be accepted since no copy of the application has been

disclosed. The alleged refusal of the Reserve Bank of India has also not been established. It is also significant that no enclosure of Exhibit "H"

being letter dated 12th July, 1988 was tendered in evidence. At the same time, the plaintiff filed a suit in Singapore but the plaintiff did not disclose

the plaint thereof. These proceedings however, were taken much later in 1989 though the material time was June/July, 1988. As such these steps

though taken are of no relevance.

2.4 The learned counsel for the respondent pointed out that the series of correspondence itself show that the matter was not finally determined and

in the facts and circumstances of the case it cannot be said that the suit was barred by limitation.

2.5 From the facts disclosed, it appears that the claim was denied/refused on 8th July, 1988 finally. Subsequently, at the request of the plaintiff, the

defendant had undertaken to help in ascertaining the situation through its office abroad (Exts. 12, 13, 14). It may be noted that the subsequent

correspondences by the defendant were marked "without prejudice." Even then these letters were issued in January and February, 1989, whereas

the suit was filed on or after 7th August, 1992. The letter in Ext. "R" also is not an admission. The reiteration of the earlier stand on re-examination

of the case does not amount to extension of period of limitation. The letter dated 17th January, 1989, Exhibit 12, was marked ""without prejudice.

This exhibit shows that the defendant had extended its good gesture to inform the plaintiff that the goods were not lost and could be recovered.

Whereas, Exhibit 13 addressed by the plaintiff indicates that the plaintiff had taken steps for arranging re-shipment. In Exhibit 14 marked ""without

prejudice"" addressed by the defendant the liability to bear the expenses for re-shipment was denied, whereas Exhibit 15 shows that the vessel was

still under arrest and lying at Hong Kong. These exhibits reiterated the stand taken in the letter dated 1st of April, 1991 (Judges Brief, Serial No.

xxvii). Reiteration of this earlier letter repeated the stand taken in Exhibit 5. None of these exhibits can be construed to attract the effect of Part III

of the Limitation Act extending the period of limitation. The conduct of the defendant/appellant in this regard clearly indicates that in order to help

tracing out the situation, the defendant had extended its good office and that too without prejudice. Such a gesture does not seem to extend the

period of limitation by admission or otherwise when on the face of Exhibit 5 (8th July, 1988), the defendant had already declined/denied its liability.

No material is on record, neither our attention was drawn to any such record which would attract the principles provided in Part III of the

Limitation Act for the purpose of extension of the period of limitation. In the absence of any such extension, unless the suit was filed within three

years from July, 1988, the suit was hopelessly barred by limitation and was liable to be dismissed.

2.6 Moreso on account of the reasons enumerated in paragraph 5.7 hereafter viz., that under Clause 9 of the policy, the contract of carriage stood

terminated on account of the unseaworthiness of the ship at port other than its destination, due to which the insurance policy stood automatically

terminated. In the absence of any request by the plaintiff for extension of the cover contemplated in Clause 9, the insurance could not be extended

to cover the goods after June/July, 1988. The insurance coverage ceased and the goods were without any insurance cover after June/July, 1988.

2.7 In the present case, it appears that the suit was instituted on or after 7th August, 1992 beyond the period of limitation viz. three years from 8th

July, 1988 which expired on 7th July, 1991 and as such the suit was barred by limitation.

On merit :

3. Though we have held that the suit was barred by limitation, yet we propose to decide the question on the merit as well, since both the counsel

had elaborately argued on the merit.

Whether the claim is established :

4. In order to establish the claim, one has to prove the extent of claim by sufficient material. In the present case, admittedly, the books of account

of the plaintiff were not produced in order to establish the claim. The plaintiff is bound to show that it had incurred the loss. The loss could have

been incurred if the payment for logs were made. That such payments were made could be established from the entries made in the books of

account relating to the transaction in question. Admittedly the plaintiff had claimed a sum of Rs. 39 lakhs and odd as against this amount the plaintiff

received a sum of approximately Rs. 20 lakhs. This is evident from the evidence of Sri Pillai and Sri Jain being Question Nos. 221, 223-226, 228-

330, 251-258 and Question Nos. 45-50, 104, 105 in-chief respectively of Sri Pillai and Sri Jain. Sri Pillai admitted that one invoice was not paid.

4.1 The statement of Sri Pillai with regard to the question of payment of one invoice valued US $ 1,98,000 cannot be relied upon. On being

questioned, Sri Pillai stated that this was done on certain understanding with the Bank that the plaintiff would pay the amount after receipt (Sri

Pillai''s question Nos. 323-328, 375, 508-511). This evidence does not seem to be believable. No bank can agree to such an agreement and that

such agreement cannot be entered into verbally. That apart it may be significant to note that the plaint was filed in 1992 stating that Rs. 7,84,584/-

was lying in deposit in Court and that this figure has now risen to Rs. 90 lakhs (Sri Pillai''s Question Nos. 304, 307, 308, 309. 324, 369-376,

576-579, 605).

4.2 Thus, it seems that the claim cannot be said to have been quantified in the absence of any definite proof with regard to the amount to be

ascertained as claimable.

Whether the policy was an all risk policy? : Infraction of risk covered :

5. Exhibit ""C"" appears to be an all risk policy. But by reason of the various restrictive clauses, as are apparent from Exhibit ""C.,"" it appears that this

''all risk'' is also severely curtailed restricting the right of the insured excluding certain risks and covering certain risks. In order to examine the

restrictiveness, we may quote the following clauses from the policy :

EXCLUSIONS

4. In no case shall this insurance cover

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4.5 loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable

under Clause 2 above);

4.6 loss, damage or expense arising from insolvency or financial default of the owners, managers, chaterers or operators of the vessel.

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5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft;

unfitness of vessel craft conveyance container or lift-van for the sale carriage of the subject-matter insured.

whereas the assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

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6. In no case shall this insurance cover loss, damage or expense caused by

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6.2 capture, seizure, arrest, restraint or detainment and the consequences thereof or any attempt thereat;

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Termination of Policy of Insurance

9. If owning to circumstances beyond the control of the assured either the contract of carriage is terminated at a port or place other than the

destination named therein of the transit is otherwise terminated before delivery of the goods as provided for in Clause 8 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--

9.1 until the goods are sold and delivered at such port or place or unless otherwise specially agreed, until the expiry of 60 days after arrival of

goods hereby insured at such port or place, whichever shall first occur, or

9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension therein) to the destination named herein or to any other

destination, until terminated in accordance with the provisions of Clause 8 above.

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13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on

account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter to

the destination to which it is insured would exceed its value on arrival.

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16. It is the duty of the assured and their servants and agents in respect of loss recoverable hereunder ;

16.1 to take such measures as may be reasonable for the purpose of averting or minimizing such loss, and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised

and the Underwriters will in addition to any loss recoverable hereunder, reimburse the assured for any charges properly and reasonably incurred in

pursuance of these duties.

17. Measures taken by the assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be

considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the assured shall act with reasonable despatch in all circumstances within their control.

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5.1 A reading of these clauses indicates that the risks covered are specified and all other risks are excluded. These clauses make it abundantly

clear that the policy is not an all risk policy. We may now test the facts of the present case in relation to the restrictiveness and examine how far the

claim can be admissible.

5.2 Loss and damages due to delay was excluded under exclusion clause. In the instant case, the contract of carriage came to an end by June, if

not in May, 1988. Cargo Safety Construction Certificate and Load Line Certificate expired in 15th July, 1988. Under the policy and also under

the General Law, the plaintiff was under an obligation either to obtain re-shipment of these goods soon thereafter or it was not so decided then sell

the goods locally. The plaintiff did not take either of these two steps. Ships ply frequently between Kualalampur and Calcutta but no effort was

made in that direction at all. (Vide Sri Pillai Q. 274-277, 380-387, 388-412, 444, 453, 493, 494, 498-601 and Sri A. K. Jain Q. 142).

5.3 A faint attempt was made by Sri Pillai that the goods were detained on the basis of a lien. On being cross-examined, he failed to produce any

document to substantiate this claim. Accordingly, there was no restraint order in respect of the consignment of logs being the subject-matter of this

suit (vide Sri Pillai Q. xxm, 195-214, 412, 424, 428, 433, 439, 440, 441, 552 to 568. Sri A. K. Jain 128, 135 to 159).

5.4 According to the plaintiff, Bills of Lading were prepaid. Hence, neither the ship owner nor the charterer could lay any claim over the logs. The

charterer namely, the Malaysian Produce, in any event could not have made any claim as they were also the seller and were bound to make

arrangement for bringing the goods to Calcutta, which they failed.

5.5 Clause 4.6 excludes any loss or damage should they occur from any financial default of the owners or managers or charterers or operators of

the said vessel. The survey report being Exs. 6, 7 and 8 clearly establish that there were disputes between the ship owners and Malaysian

Produce, the charterer-cum-seller of the goods. This is also evident from the suit filed by the ship owners. (Ext. 4 vide page 76, disclosed on 29-

1-1997 by the plaintiff).

5.6 Arrest was another situation, which was excluded, (vide See Clause 6.2) Sri Pillai, in his evidence has stated that the ship as well as the Cargo

was all under arrest, (vide Sri Pillai Q. 412, 414). If his case is to be believed then on his own admission the plaintiff''s claim fails as the alleged loss

was due to this excluding clause.

5.7 Under Clause 9 of the policy, the contract carriage was terminated (because the ship became unseaworthy) at Port other than its destination.

Hence, the policy of insurance also automatically stood terminated. The plaintiff did not make any effort by making any request for extending the

cover as contemplated in Clause 9. Hence, after the events mentioned above namely after June/ July, 1988, the goods were without any Insurance

and the loss if any, also did not occur at that point of time.

The all risk clause ;

5.8 All these policies are not subject to any ejusdem generis limitation. Goods insured against all risks are in effect, and subject to any express

exclusion in the policy insured in the Institute Cargo Clause, all risk, unless deleted, cover loss or damage from any external cause. A policy against

all risk does not absolve the assured from the need to prove that he has suffered loss from an insured peril; he must, as it is sometimes expressed,

prove a casualty; but the class of insured peril is so wide that he may be able to do this by necessary inference (Arnold Article 833).

Institute all risk clause :

5.9 The institute all risk clause is against all risks of loss of or damage to the subject-matter insured, but shall, in no case, be deemed to extend to

cover loss, damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured. This clause is not so wide to

include inherent vice (Berk v. Style (1956) 1 QB 180), even though the words ""from whatsoever cause arising"" is mentioned in the policy.

Therefore, in the present case, the policy being governed by Institute Cargo Clause (c), which is not an all risk policy without limitation (Arnold

Art, 835).

5.10 Thus, it is clear that the policy was not an all risk policy and that there has been breach or infraction of the risk covered as discussed above.

Constructive total loss/abandonment : The principle vis-a-vis the present case :

6. Subject to any express provision in the policy constructive total loss can be said to have occurred where the subject-matter insured is

abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an

expenditure, which would exceed its value when the expenditure had been incurred. Whether these conditions as to constructive total loss are or

are not satisfied in each case is a question of fact. There is a constructive total loss (1) where the assured is deprived of the possession of his ship

or goods by a peril insured against and (a) it is immaterial that he can recover the ship or goods, as the case may be, or (b) the cost of recovering

the ship or goods, as the case may be, would exceed their value when recovered; or (2) in case of damage to a ship, where she is so damaged by

peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired; or (3) in case of damage to goods,

where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

6.1 There are, thus, two main grounds on which a constructive loss may be founded. The assured may, by the perils insured against, be deprived

of the possession. The insured property in circumstances, which make it unlikely that he can recover it within a reasonable time. For instance, it

may be captured by the enemy, or by the assured''s own Government, or by pirates, or a ship may be deserted by the master and crew. In the

second place, although the assured may not be forcibly dispossessed of the insured property, it may be so damaged by the perils insured against

that the high cost of repairing the damage or of carrying the goods to the port of destination, makes it in a commercial sense impractical to incur the

cost. (Arnold, Articles 308, 834, 835, HB, Vol. 25, Edn.).

6.2 In the present case, the goods were very much in existence. Therefore, it could not be said in June/July, 1988 that the goods were actually lost.

The constructive loss by way of abandonment can be proved only if the insured is able to establish that it was not possible to retrieve the goods or

that the cost would have exceeded the value of the goods or would not have been commercially viable. It is apparent that the goods were not

arrested, it was the ship that was arrested, The ship was arrested at a port other than the destination on account of its unseaworthiness, a peril,

which is excluded from the insurance coverage under the policy. There was nothing to point out that the insured had ever attempt to retrieve the

goods or the insured/plaintiff had been able to establish through certain proof that the cost of reshipment would have exceeded the value or was

commercially unviable. On the other hand it had intended the insurer to bear the cost of reshipment that the insurer declined. There is nothing to

show that the plaintiff had taken any step to reship or that the cost would have been unviable.

6.3 Non-delivery of goods at the destination port is also a peril constituting constructive total loss. In Middows v. Robertson (1940) 67 Lloyd''s

LR 484, Hilbery, J. held that non-delivery did not create an additional risk, but meant that the assured need only prove non-delivery in

circumstances consistent with theft or pilferage, and that it was then for underwriters to show that the loss was caused by something for which they

were not liable. In the case of Wadsworth Lighterage Co. Ltd. v. Sea Insurance Co. Ltd. (1929) 35 Com Cas 1 cal, it was held that where a

barge sank in clam water through old age and general debility, it was sought to recover the loss under a clause, which included damage to the

vessel by sinking; the Court of appeal held, reversing Finlay, J., that this clause referred to sinking caused by a peril insured against, and was not

sufficiently clear to make the insurers liable for a loss caused by ordinary wear and tear.

6.4 As against all these, plaintiff''s claim appears to be based on the subsequent endorsement No. 31120/44/103B/M/E-62/ 88 attaching to Policy

No. M/231/88 dated 2nd March, 1988 at page 11, which is a part of Ext. ""C"" namely the insurance policy where the concerned phrase is-- Theft,

pilferage and non-delivery.''

6.5 This expression has been judicially considered in a case reported in 67 Lloyd''s Law Reports 484 at 507, the relevant excerpt whereof is

reproduced hereunder :

Another alternative contention of the plaintiffs was that in the circumstances there was a ""non-delivery"" of the cargo and that ""non-delivery"" was a

peril insured against. In truth, the policy does include a type slip in the terms I have already quoted, that is to say, ""including damage by hook, oil,

sweat, heat, fresh water and other cargo (liquid or solid), theft, pilferage and non-delivery."" etc. But these general words ""nondelivery"" following

enumerated perils insured against cannot be divorced from what has gone before and treated as intended to denominate an entirely new risk. They

are limited by the context in which they are found. Such words in such a context are to be construed not as creating a new or further risk but as

affecting the burden of proof. Where such words occur in such a context the insured need not prove loss by theft or pilferage; it is enough if he

proves non-delivery and gives prima facie proof that the goods were not lost in any other way than by theft or pilferage. Unless the underwriters

can then prove that the loss was due to a peril against which they have not insured they are bound to pay the claim. So in Zachariassen v.

Importers and Exporters Marine Insurance Company, 29 Com Cas 202, on a policy insuring against ""mine risks only including missing,"" it was not

enough for the insured merely to prove that the sailing vessel in question was missing, but it was enough that he proved prima facie that the vessel

during the voyage had not experienced any marine peril which would be likely to overwhelm her and could have struck a mine. But the case I am

deciding is not one of mere non-arrival plus evidence sufficient to establish prima facie that it could have been matter of theft or pilferage and that

the loss is not otherwise reasonably to be accounted for. It is not a case which on its facts has anything to do with ""non-delivery"" when those

words are applied in the context in which they occur, The words ""non-delivery"" do not therefore assist the plaintiff."" (Arnold Articles 833 to 835,

Templeman 140 to 144).

6.6. Applying the above test in the present case, the goods could not be delivered since the ship could not reach the port of destination by reason

of its unseaworthiness, which is not a non-delivery within the principle laid down in Middows v. Robertson (supra). The unseaworthiness would

not come within the peril of the insured against as was held in Wadsworth Lighterage Co. Ltd. (supra). The unseaworthiness of the vessel is a

ground excluded in the policy as referred to hereinbefore. There is no pleading or any attempt to prove that the plaintiff or its servant was not privy

to the unseaworthiness of the vessel at the time of loading.

6.7 The principles on which such cases are governed as we may gather from the various decisions discussed in Articles 834 and 835 by Arnold

(Ante) may be summarised thus : (1) the assured must in every case prove a casualty; and, in all risks policy, he need prove no more; (2) where

the policy covers a particular peril of a kind, which does by its nature necessarily involve a loss (e.g. fire), proof of the occurrence of that peril is in

itself proof of casualty; (3) when a casualty has been proved, it is for the insurer, if he alleges inherent vice, to prove it; and (4) the defence of

inherent vice can only be excluded by express words or by necessary inference i.e., by covering a peril which would only be caused by inherent

vice. For example, where tinned goods are insured against blowing of tins, the defence of inherent vice is thereby excluded. But if the peril is one,

which can be caused by external agency even though more commonly caused by inherent vice, the better view is that only damage from its external

cause is covered (Arnold Articles 834, 835, 836).

6.8 These principles, if applied to the present case, on account of existence of the goods, casualty could not be said to have been proved by the

assured. The non-delivery of the goods on account of detention of the vessel due to unseaworthiness being a peril not covered, the arrest of the

ship itself cannot be a proof of casualty. Since the casualty has not been proved, the insurer cannot be said to be liable to prove inherent vice or

otherwise. On the other hand, it is an admitted position that the goods were in existence and the vessel was arrested due to its unseaworthiness, a

peril excluded by the policy. Since the peril was not covered by the policy the principle of inherent vice cannot be attracted. As such, in the present

case, no benefit can be asked for under the policy by the plaintiff in the facts and circumstances of the case.

6.9 Under Clause 13, it was incumbent upon the assured to prove that the cost of recovery, reconditioning and forwarding the goods to destination

would have exceeded the value of such goods on their arrival at Calcutta. No evidence has been given on this point, (vide Pillai Q. Exam-in-chief

159, XXN 195, 197, 210, 212, 276, 277, 552-569; Jain Exam-in-chief 69 XXN Q. 135, 136, 137. Hence, under this clause it cannot be said

that there was any constructive total loss.

6.10 The survey report being Exs. 6, 7 and 8 have been received in evidence without objection. Hence, the contents of the Survey Reports are

conclusive and binding. The Survey report should be received in evidence on the ratio of the decisions in D. Weston v. Peary Mohun Das AIR

1914 Cal 396 (SB) and R. Puthunainar Alhithan, etc. Vs. P.H. Pandian and others, . These documents are acceptable in evidence u/s 20and also

u/s 32(2) of the Evidence Act. Inasmuch as the plaintiff requested the defendant to appoint a local agency to know the status of the logs (see letters

dated 23-3-1988 (Ex. J.), 21/ 29th April, 1988 (Ext. K), 15-6-1999. Inasmuch as, it was the plaintiff who expressly referred for the information

in reference to the matter in dispute and as such it would be an admission within the meaning of Section 20 of the Evidence Act. The present case

comes squarely with the illustration of Section 20, Evidence Act. Therefore, the evidence that comes from such survey report is binding.

6.11 Provision of Section 32(2) of Evidence Act is attracted upon the presence of the author of the survey report involves enormous cost and it

relates to a memorandum made by the author in discharge of professional duty, and particularly when it is coming from an independent source was

appointed at the behest of the plaintiff. Thus the contents of the survey report are acceptable. It is to be noted that Sri Jain was present during the

survey (Survey report Ext. 8).

6.12 In fact, it is the best evidence of the events concerning the goods and their status at the material point of time. The photographs, which were

tendered separately and marked as Ex. 16 along with a cover letter dated 19th September, 1988 being reference AR/HB/88/88 (copy whereof is

annexure in Judge''s brief) show that the logs were in good condition.

6.13 Thus, having regard to the facts and circumstances of the case, non-delivery does not seem to have been established, neither does it appear

that there are any material on the basis whereof we can overcome and avoid the restrictive clauses applicable as discussed above. Thus, the risk as

explained cannot be said to be covered under the peril and the policy when the claim was lodged.

6.14 From the above, it follows that the Court has to construe the contract of insurance as a whole. The word ""non-delivery"" is not an independent

head of risk. Further, on the date the claim was lodged, there was no loss at all which is an essential pre-requisite for any assured to make a claim

on the insurance policy. (Arnold Article 833).

6.15 If in a situation, loss occurs due to combination of more than one factors then if one factor is excluded the claim of the plaintiff cannot

succeed. In the instant case, the proximate cause was delay and defaults committed by the plaintiff as mentioned aforesaid. Hence, the plaintiffs

claim must fail.

Loss caused by measures taken to avert or minimize the effect of an insured peril :

7. A distinction has to be made between cases where loss is caused by measures taken when an insured peril is actually operating upon the

subject-matter of insurance and cases where loss is caused by measures taken in apprehension of a peril to which the vessel or goods are likely to

be subjected if the voyage is continued, which have not yet begun to operate upon the subject of the insurance. Abandonment of the insured

property or of the voyage at a time when the restraint is actually in operation, may give rise to a claim for loss by the insured peril. The position is

similar where damage is caused to the insured property by measures, in themselves reasonable, being taken to deal with the operation of an insured

peril. In Canada Rice Mills Ltd. v. Union Marine and General Insurance Co. (1941) AC 55 in which a cargo of rice was damaged by heating as a

result of the closure of cowl ventilators during the voyage in order to prevent sea water and rain coming in during heavy weather, the loss was held

to be due to peril of the seas and recoverable since the loss was certain to occur in the absence of precautions such as those which were quite

properly taken and the insured peril was actually operating at the time (Article 769.(Ante)).

7.1 Under Clause 16 (Minimizing Loss), the plaintiff was obliged to take suitable measures, namely to take delivery of the goods in June, 1988

either with the object of forwarding them to Calcutta or selling them locally. The plaintiff has not taken any step in this regard. Pillai has not said

anything on the following points viz : (a) cost of unloading; (b) cost of forwarding and (c) cost of release of the goods.

7.2 The principles, as discussed above, if applied in the present case, we may find that the ship was detained due to unseaworthiness, a peril

excluded, and as such the plaintiff cannot succeed in its claim.

Negligence and the duty to sue and labour:

8. It has, however, long been recognised both in England and in the United States of America that the assured is under a duty to sue and labour

(Mitchell v. Edie (1787) 17 R 608. The existence of duty to sue and labour is not confined only to those cases where the policy contains the suing

and labouring clause (Emperor Goldmining Co. v. Switzerland General Ins. Co. (1964) 1 Lloyd''s Report 348 (Sup Ct of NSW). However, the

assured is under no legal duty to the insurer to take care in the course of adventure. He is expressly protected against the loss indirectly caused by

negligence. The duty imposed can only arise after the occurrence of a casualty has created a potential loss. This the assured must avert or minimize

if he can. The balance between these principles had involved the Courts in controversial views in various decisions and the solutions offered could

not be treated to be appropriate. But even then whatever solution we may arrive at, it may not be free from objections. The most reasonable

approach should be an approach to examine the facts and find out the possibility if after the casualty, such reasonable step could be taken to

minimize or prevent the loss, a reasonable man could be expected to do. For example, if in a case the goods still exists and were in a state of

retrieving and such retrieval is dependent on the extension of the coverage under the policy and taking steps to arrange for re-shipment of the

goods for safe arrival at the destination port, in such a case, the loss of the goods could have been protected altogether but the expenditure

incurred could have been claimed against the insurer because of the misadventure or the peril covered, or be proved that the cost therefore would

be unviable. (Arnold Articles 769, 770).

8.1 No attempt to sell the goods in July/ August, 1988 was made either. The goods were sold on 21st May, 1990 after they were kept exposed to

vagaries of the nature. The Clause 17 required the plaintiff to sue and labour. This the plaintiff did not do.

8.2 Under Clause 18, the plaintiff was to act with reasonable dispatch. This, the plaintiff failed to do. (Arnold Article 785).

8.3 In the present case, the goods were very much in existence; arrangement could have been made for reshipment and the insurance cover could

have been extended to save its termination and the claim could have been lodged for the expenditure incurred. If in case the expenditure assessed

on a commercial decision would have exceeded the cost of goods or would have seemed to be commercially unviable, then it could be a case of

abandonment within the peril. In the absence of any proof that the failure to act in terms of sue and labour policy could be justified to be

commercially unviable, the Court cannot presume the effect of the clause in favour of the insured. Inasmuch as the same being an obligation of the

insured, the burden of proof that he is not hit by the sue and labour clause is on the insured, and until discharged, the insurer cannot be called upon

to prove anything. In the present case, there is no material to show that the plaintiff/respondent has been able to discharge this burden. Our

attention has not been drawn to any such material.

Warehouse-to-Warehouse Clause :

9. The reference to warehouse-to-warehouse clause does not seem to help the plaintiff to claim enhancement of the heads of risks. In M/s. Bihar

Supply Syndicate Vs. Asiatic Navigation and others, the Apex Court has held that warehouse-to-warehouse clause in the policy merely denotes

the time during which the policy would remain in force. By no stretch of imagination, this clause can be interpreted to cover each and every risk. It

has nothing to do with the type of the risk the policy covered.

9.1 The case of abandonment also does not seem to be established in the present case. The suit was filed in Singapore in which the goods were

sold and the values were received which was attempted to be set off against the claim receivable. Once, the plaintiff took steps to get the goods

sold and received the amount on the ground that the expense retrieving the goods to India would be higher than the cost price or uneconomic do

not entitle the plaintiff to recover the balance after adjusting the amount received on the sale of the goods unless the abandonment is proved. In this

case, the goods were very much in existence. They were not lost and were traceable. The plaintiff had taken steps to get the goods sold,

Therefore, as discussed above, it cannot be said to be a case of abandonment.

9.2 In Bihar Supplies Syndicate v. Asiastic Navigation (supra), the Apex Court had held in the facts of the said case, which are almost identical

with the present one, that it was not a case of abandonment of the goods because of the perils at the sea. In fact, the plaintiff gave consent by

permitting the sale of the cargo and recovers the value thereof. It is axiomatic that the burden was on the plaintiff (o prove the loss due to perils of

the sea and on the facts of the case at no stage such burden was shifted on the Insurance Co. to prove otherwise.

9.3 u/s 2(a) of the Marine Insurance Act, 1963, a "contract of marine insurance" means a contract as defined in Section 3. Section 3 denotes that

the contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby

agreed, against marine losses that is to say the losses incidental to marine adventure. Marine adventure is defined u/s 2(d) of the Act which includes

any adventure where (i) any insurable property is exposed to maritime perils; (ii) the earnings or acquisition of any fright passage money,

commission, profit or other pecuniary benefit or the security for any advances, loans or disbursements is endangered by the exposure of insurable

property to maritime perils; (iii) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for,

insurable property by reason of maritime perils. Maritime perils is again defined in Section 2(e) and means the perils consequent on or incidental to,

the navigation of the sea that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restrains and detainments of

princes and peoples, jettisons, barratry and other perils which are either of the like kind or may be designated by the policy.

9.4 It is also clear that while dealing with a maritime insurance policy with Institute Cargo Clause (c) attached against insurance, the Court is

supposed to proceed on the principle that it is the duty of the plaintiff to prove as a fact that the Cargo was lost due to the perils of the sea.

9.5 In the present case, the policy did not include the risk of loading the goods in a vessel, which is unseaworthy. The vessel was detained on

account of its being unseaworthy. Therefore, the detention of the goods on account of the vessel being unseaworthy would not be a maritime peril,

since this was against the exclusion clause as contended in Clause 5.1.

9.6 The facts disclosed in this case evidently establishes that the vessel was unseaworthy and as such was not allowed to complete the voyage, a

circumstance which excludes the liability of the insurer and the right of the insured to sustain the claim.

Conclusion :

10. For all these reasons, we are of the view (1) that because of the fact of denial by the insurer by its letter dated 8th July, 1988 (Ext. 5) coupled

with the termination of the policy and its non-extension after the Cargo Safety Construction Certificate and Load Line Certificate expired on 15th

July, 1988 and on account of plaintiff"s failure to discharge its obligation either to obtain re-shipment of the goods soon thereafter and the failure to

take a decision to sell the goods locally immediately and filing of the suit after 7th August, 1992 clearly indicates that the claim of the plaintiff was

barred by limitation and the suit ought to have been dismissed; (2) the plaintiff has not been able to prove that he had taken all steps to avoid the

delay; (3) the policy was not an all risk policy but was circumscribed and restricted by reasons of the Institute Cargo Clause (c) containing the

restrictive clauses enumerated in paragraph 5 hereinbefore; (4) the plaintiff has not been able to establish its claim by discharging the burden lay

upon it to sustain the claim on merit and that the goods were not lost when the claim was lodged; (5) the plaintiff has not been able to prove

constructive loss by reason of abandonment; (6) that by reason of Sections 20 and 32 of the Evidence Act, it was proved that the goods were still

in existence and were in good condition; and (7) that the loss cannot be ascribed to any peril insured as discussed hereinbefore.

10.1 In the circumstances, in our view, the plaintiff has not been able to establish the claim and the liability of the insurer and as such the decree

passed thereon cannot be sustained and the suit ought to have been dismissed.

11. In the circumstances, the appeal succeeds, and is hereby allowed. The decree of the learned single Judge appealed against is hereby set aside.

11.1 The suit is hereby dismissed, however, without costs.

Xerox certified copy of this Judgment be made available to the parties, if applied for, within seven days from the date of such application.

R.N. Sinha, J.

11.2 I agree.