

(1912) 07 CAL CK 0051

Calcutta High Court

Case No: Suit No. 357 of 1910

W. Stewart

APPELLANT

Vs

The New Zealand Insurance Co.,
Ld.RESPONDENT

Date of Decision: July 8, 1912**Final Decision:** Dismissed

Judgement

Chaudhuri, J.

The Plaintiff is the owner of a Steam Launch named The Fox. It was an old Government boat which the Plaintiff purchased. He had it repaired and eventually chartered it to a firm in Chittagong. It was sent to Chittagong where there was some difficulty with the charterers whose creditors appeared to have attached the boat. After some considerable trouble, the Plaintiff succeeded in getting the boat away. It apparently started back some time after July 1910 and arrived at Port Canning. The Plaintiff states that it met with rough weather on the return voyage and lost two water tanks and a jolly boat, but no damage was done to the boat itself. He himself took charge of the boat at Matla and came to Calcutta on the 8th or 10th October 1909. The delay was due to the crew and want of coal. The boat had been insured for the return voyage with the Defendant company, but when it arrived at Port Canning the Plaintiff wrote to them that having regard to the delay which had taken place further insurance was necessary. At last an insurance was effected with the Defendant company on the 17th of September 1909, for one year, for Rs. 15,000 the amount of the policy in suit. Out of the premium payable to the Defendant company a sum of Rs. 187-8-0 had been paid before the loss of the boat and Rs. 562-8-0 remained unpaid. The Plaintiff alleges that the boat has been totally lost to him. It sank on the other side of the river near Shibpur, and was a total wreck and he claimed the amount of the insurance Rs. 15,000 less the amount of the premium due. He claimed this amount as covered by his insurance as against "perils of the seas."

2. It appears that after the boat was brought to the Shalimar side, opposite Shibpur, there was a gale on the 17th of October ; the ship broke loose and drifted to the Calcutta side. It was towed back by the Port Commissioners to the Shibpur side on the 18th of October. The Plaintiff states that no damage was done to the boat except that some portion of the wood work had been washed away. He says he intended to beach the boat in order to give it a coat of paint, and that he left orders with the secunny for that purpose, but his orders were not carried out. The secunny is said to have made various excuses and at last wanted a dinghy to carry ropes from the vessel to the shore, for the purpose of beaching it and that the Plaintiff eventually engaged a dinghy two or three days before the accident took place. Even then his orders were not carried out, upon which he sent his son, Donald Stewart, to the vessel on the 22nd of October to see that it was beached. A friend of this young man of the name of West accompanied him. They went at night and West's account is that they went to sleep, Donald Stewart leaving orders that the men were to wake him up at 3 or 4 o'clock in the morning in order to beach the boat. They went to sleep in the same cabin. They were however suddenly roused about day dawn on being told that the ship was filling with water. They came down and had just time to get into a dinghy, when the vessel sank. It sank in fair weather and smooth water. According to the Plaintiff there are only two theories possible, namely, that either the boat was deliberately scuttled, or that the bottom plate had corroded and sprung a leak. He said that simple corrosion of the bottom plate would not account for the leak, if any, but there must have been bumps superadded to start the plate leaking, and he stated that he had heard from his son that on the night of the occurrence he had distinctly felt a bump of what he thought was a country boat. His explanation was that it was possibly due to this collision, added to the fact that the bottom plate had probably corroded which had started a leak and in consequence of which the vessel sank. He stated that all the plates of this boat had been renewed three years before the accident, except the bottom plates which could not be renewed without the boiler being lifted, and as that involved much expense, they were not changed. Unfortunately we have not got the evidence of Donald Stewart who had died since the accident, but the statement of the Plaintiff finds no corroboration from that of the secunny. The Plaintiff stated that the secunny had corroborated his son shortly after the accident. The secunny however stated in the witness-box that he knew nothing of any boat bumping that night. Therefore, so far as the collision theory is concerned, I must reject it as without evidence. It was never suggested at the earlier stages of the case, and seems to have been an afterthought. The evidence is that the boat was in a water-tight condition up to the night of the accident and suddenly sank in smooth water and fair weather.

3. The boat, as I have said, sank in the morning of the 23rd of October. No intimation was given by the Plaintiff to the Insurance Company that day or the next. He says 23rd October was a close holiday, 24th October was a Sunday, and he received a letter on the morning of the 25th from the Insurance Company calling his

attention to the fact that his boat had sunk. He immediately sent a reply. He promised to see Mr. Legatt of the Insurance Company on the 28th, but did not go to him before the 30th. His explanation is that inasmuch as the secunny was ill, he could get no information from him. So far as the statement of the illness is concerned, it is not supported by the secunny. He was not ill. He was somewhat fatigued and distressed according to his own account. But the Plaintiff's description of the illness was somewhat graphic. When stating that the secunny was ill, the Plaintiff showed how he shook with fever when he came to him. The secunny denies that he had fever. This seems to be an invention on the part of the Plaintiff. There, was no protest made by the secunny until the 23rd of November 1909 and it is important to see what is stated there. The secunny's statement on that occasion was that the boat had started a leak in the fore-hold and in consequence gone down. Now, the Plaintiff says the boat could not have started a leak in the fore-hold. The plates had been changed, and he says it was the secunny's mistake. The leak must have started according to him in the engine hold, which is the centre hold, somewhere under the ash-plate of the boiler. The water must have rushed into the middle hold through the bottom plate and from there forced its way into the forehold, and he stated as his ground for so saying, that the boat had sunk stern foremost. It is difficult to accept a theory of that kind, when the man who was actually on the boat states that the leak must have sprung in the forehold. The protest also suggests that some of the rivets must have got loose during the storm on the 17th of October. This is not supported by the Plaintiff at all. He does not suggest it, the secunny also does not support it, and the statements made in the protest are contradicted by the evidence which has been given. The Plaintiff denies he knew what the secunny was going to say in the protest, but the language used does not seem to be the secunny's. He no doubt made his statement in Bengali, but the way the protest puts the case, I doubt, if the secunny could have put it.

4. There was considerable evidence given about the finding of a plug, a gland attached to the plug, and some pins. The plug is said to belong to one of the sea-cocks. If the plug was removed from the sea-cock, it is conceded that the boat would have made water and sunk. The evidence of the Defendant company is this, that one Capt. Haines was employed by them to raise the boat. The boat was raised on or about the 18th December. On the morning of the 19th a man of the name of Metcalfe who was employed on the boat was there, Capt. Haines was there and a coolie who was working on the boat brought up from the bottom of the boat a plug and a gland, the same as produced. At that time one Mathieson, a Chief Engineer of the River Steam Navigation Company, was there also. These things were brought up in their presence from the hold of the boat. We have the evidence of Capt. Haines on this point: Mathieson has been examined and Metcalfe also. So far as Capt. Haines is concerned, he was examined on commission. When application was made for the issue of a commission, it was strenuously opposed by the Plaintiff on the ground that it would be impossible for him to join in it, as he could not afford the expense,

but the learned Judge, who heard the matter and ordered the commission, thought that no sufficient ground had been shown by the Plaintiff against its issue. Counsel for the Plaintiff protested at that time as he said it practically prevented his client from cross examining Capt. Haines. He further stated that his client was not going to join in the commission ; but subsequently the Plaintiff did join in the commission. His Attorney wrote to the Registrar asking for leave to join in the commission and such leave was given, and the commission was sent out to Moulmein on the 23rd of January. The practice in this Court is that when a commission issues in this way the parties have to appear before the commissioner and get a date fixed for the examination of the witness. It appears that a summons in this case was issued on Capt. Haines on the 15th of February at the instance of the Defendants' lawyers. The Plaintiff did not appear on that occasion, or on any other. He was not present, nor was he represented. He made no attempt to appear before the commissioner. He did not even communicate with him. The examination was fixed for the 19th February and the commission was returned on the 28th of February 1912. During this time no attempt was made by the Defendant to take any steps for the cross-examination of the witness, and although the case was not heard till long afterwards, no application was made by him, either for the purpose of being allowed to cross-examine Capt. Haines, or for getting an order that his evidence could not be used, as he alleged he had no notice when the commission had issued. He had joined in the commission and it was incumbent upon him to communicate with the commissioner if he intended to appear. I think that the Plaintiff allowed this witness to go un-cross-examined in the hope of getting his evidence rejected by not appearing at Moulmein. Having regard to the case, *Gregory v. Dulichand* 14 W. R. (O. S.), p. 17 (1868), in which it was held that the opposing party had a right to notice of every proceeding held under a commission, I was at first inclined not to admit this evidence, but having regard to the facts subsequently elicited, I have allowed it. My conviction is that it was a deliberate omission on the part of the Plaintiff not to take any steps for the cross-examination of Capt. Haines. The evidence of Capt. Haines, if accepted, is almost conclusive. He speaks about the discovery of the plug and the conclusion one must draw from the facts stated by him is that the boat must have been scuttled. The plug must have been deliberately removed, it could not have been forced out of its place by the water coming in. But although I have admitted the evidence of Captain Haines, I do not think it is safe to rely upon it without corroboration. It is un-cross-examined testimony. I have, therefore, to consider the evidence of Metcalfe and Mathieson. Metcalfe speaks about finding the plug, and I do not see any reason why he should be disbelieved. His account is very clear. He mentions who the persons were, who were present on that occasion and how the plug was found and the only ground suggested for disbelieving this witness is the allegation that Capt. Haines has some improper relationship with this man's sister, a married sister, with whom he does not correspond. I think it is a cruel suggestion to make, and not at all a worthy one. There is no evidence in support of it except a statement by the Plaintiff that Capt. Haines at one time lived in a room,

which belonged to Mrs. Elder, Metcalfe's sister, in a house which the Plaintiff was occupying. With regard to Mathieson also I see no reason for disbelieving him. His recollection is not quite clear as regards the things found on the occasion he says he was present. He spoke about a spanner, a gland, a plug &c. being found His impression is that all the things were found at the same time, one after the other. This does not agree with the version of Metcalfe who speaks to the plug being found in his presence, and the other things later. No reason has been suggested why Mathieson should be disbelieved. He holds a respectable position, under a well-known firm in Calcutta and appears to be an independent witness. Except for this discrepancy as to the time when all these articles were found, there is nothing against his evidence. A pencil entry in his log-book is also challenged as suspicious. He says that he wanted to keep a record of what happened, but as it was not official he made a note in pencil. As to the note I am not inclined to give it much weight, but I see no reason to doubt his veracity. There is also the evidence of Captain Stewart who did not see any leaks or cracks in the plate, and speaks to the hold being water-tight. Taking all this evidence together I hold the plug was out of its place, that it was found in the bottom of the boat and had been removed and that the removal of the plugs caused the boat to sink.

5. As against this evidence we have the evidence of a man of the name of Domingo. He was a very unsatisfactory witness, and although he did not show any signs of being drunk, it was suggested by the Plaintiff's Counsel in his reply that he must have been drunk. He was for a considerable time in the witness-box and appeared to me to be entirely unreliable and untruthful. He said that he was asked by Captain Haines to find a plug and gland, as they would be necessary for the Insurance Company, suggesting by that, that he had been asked by Captain Haines to remove these things and that they were going to be utilised for making a case that the sea-cocks had been left deliberately open. He says that when he was cleaning the mud out of the boat, after it had been raised, he saw these things in their place. He mentioned the matter to Captain Haines, but to his astonishment next morning these things had disappeared. He informed Captain Haines that they were gone, which made Captain Haines very angry. He stated that he believed that Captain Haines had deliberately caused the disappearance of these things. He subsequently withdrew from that, but came back to it again, and charged Captain Haines with having engineered this incident. It appears to me that the Plaintiff felt that some answer should be given about the plug not being found in its proper place and that Domingo was put forward to supply that evidence. He was discovered by a man of the name of Murray who stated that he had at one time been a partner of Capt. Haines. His evidence was simply that he went to see this boat after it had been raised, and found Domingo working there. He did not go on the boat, and knew nothing about its condition. One day Domingo casually met him, long after the date of his visit to the boat. Murray took him home, and had a talk with him about the accident and thought that his evidence would be useful for the Plaintiff. He sent

Domingo with a letter to the Plaintiff and the Plaintiff sent him on to his Attorney to make a statement. On Domingo being asked if he had mentioned any of the facts stated by him in the witness-box to Murray he at first said "No," but within a minute afterwards he said he had made a complete statement to Murray. I entirely disbelieve the evidence of Domingo as regards the charges made against Captain Haines and the way he says the plug disappeared from its place.

6. Upon this evidence, I am inclined to believe that the Plaintiff knew how the plug had been removed. It is unnecessary for me to deal with this matter at any length, as I consider that the case is not covered by the terms of the policy. It is an insurance against perils of the seas, and there is abundant authority for holding that a boat sinking under these circumstances in fair weather and smooth water did not sink by a peril of the sea. The term "perils of the seas" refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the wind and waves. It is well settled that it is not every loss or damage of which the sea is the immediate cause, that is covered by these words. They do not protect for example against the natural and inevitable action of the winds and waves, which result in what may be described as wear and tear. There must be some casualty, something which could not be foreseen, as one of the necessary accidents of adventure. See Lord Herschell's judgment in *The "Xantho"* 12 A. C. 503 at p. 509 (1887).

7. Reference was made to the case of *Anderson v. Morice* 10 Com. Pleas 58 (1874) and also to the cases of *Gibson v. Small* 4 H. L. C. 353 (1853), *Thompson v. Hopper* 6 E1. and B1. 172 (1856), *Fawens v. Sarsfield* E1. and B1. 192 (1856) in support of the proposition that there is no implied warranty of seaworthiness in Time policies.

8. In *Anderson v. Morice* 10 Com. Pleas 58 (1874), the boat went down in fine weather, but there was a large body of evidence given as to the cause of the accident, and upon that evidence the jury came to the conclusion that it was covered by the terms of the policy.

9. It is unnecessary to deal with the other cases which were referred to during argument, except *Blackburn v. The Liverpool and Brazil River Plate Steam Navigation Company* [1902] 1 K. B. 290 (1901). That was a case of injury to goods which were insured. A plug had been left open and water came in, and damaged the goods. The case depended on what is known as the "negligence clause." Lord Halsbury held upon the facts that the injury was covered by the words "perils of the seas." He however affirmed the principle laid down in *Hamilton v. Pandorf* 12 A. C. 518 (1887), that there must be something fortuitous and unexpected, that wear and tear did not come within the words "perils of the seas." If the boat was not deliberately scuttled, the only other explanation offered is that the bottom plate had corroded, through natural causes.

10. I hold that the Plaintiff's suit fails and dismiss it with costs on scale No. 2.

Mr. Pearson

The costs will include the costs of the commission and the De bene esse examination.

The Court.--Yes.