

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 19.5.2011
Judgment delivered on: 23.12.2011

+ **RFA No. 127/2005**

M/s. Jagdish Prasad & Company Appellant.

Through: Mrs. Mala Goel, Adv.

Vs.

United India Insurance Co.Ltd. Respondent

Through: Mr.Vineet Malhotra, Advocate.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J.

1. By this appeal filed under Section 96 of the Code of Civil Procedure, 1908, the appellant seeks to set aside the judgment and decree dated 30.10.2004, passed by the learned ADJ, Delhi, whereby the suit filed by the appellant against the respondent for recovery of Rs 5,30,000/- alongwith interest @ 18% and costs was dismissed.

2. The brief facts as set out in the present appeal are that the appellant is a registered partnership firm carrying on the business of iron and steel merchants including the business of importing iron and steel products from various places like Europe, South Korea, Australia and other places. As per the appellant, the standard practice of the appellant in the past has been that an order would be placed, a contract entered into on C&F terms, the Letter of Credit opened and after that the documents i.e. Bill of Lading, Commercial Invoices etc would come for acceptance through a nationalized bank when non-negotiable set of documents would be received by the appellant through the indenting agent. Based on the information from the set of documents received, an insurance would be taken out and the goods would then be taken release of on their arrival at the port. As per the appellant, the officials of the insurance company advised the appellant to avoid taking insurance in advance and take only on receipt of documents as for adjustment of the premium or refund the insurance companies create trouble and accordingly, the appellant adopted the same as a practice. The appellant entered into a contract dated 20.01.1982 with one M/s. Kukje Corporation of Seoul, South Korea, for the import of 200 metric tones of galvanized plain steel sheets coil of a value of US

Dollar 1,05,300/- through their local agent M/s. Lakhotia International. Out of the said contracted quantity, 84.78 tonnes of galvanized plain steel sheets were shipped by the said M/s. Kukje Corporation to the appellant and were placed on board the ocean Vessel "Ivory Dragon" at Pusan, Korea, destined for Bombay. The Bill of Lading, Commercial Invoice, packing list, rate list and surveyor certificate etc were all sent by the said Kukje Corporation to the Indian Overseas Bank, Bombay and one set of non-negotiable documents was sent by them to the indenting agents for onward transmission of the same to the appellant and accordingly the agent sent the same to the appellant along with their covering letter dated 13.5.82 which was received by the appellant on 14.5.1982 late in the evening. In the morning of Monday, the 17th May, 1982(15th and 16 being Saturday and Sunday) the insurance was taken out for the said goods from the respondent company and Marine Cargo Cover Note No. 71643 was issued and then the respondent issued Policy No. 40400/81/0057/82, dated 18th May, 1982. The appellant received a letter dated May 20,1982 stating that the vessel 'Ivory Dragon' carrying the cargo from Korea to Bombay sank off Phillipines. Accordingly, the appellant submitted its claim to the insurance company on 15.6.1982 and further submitted certain particulars

sought by the insurance company. The sinking of the ship was investigated by the surveyors who were both licensed by the Korean Government as well as agents for LLOYD's. The respondent company kept on assuring the appellant that its claim would be settled, but vide their letter dated 11.8.1983 the respondent company rejected the claim of the appellant. As per the appellant, the respondent company is liable under the contract to pay the money to the appellant as the insurance was taken out in good faith as per the past practice and therefore it was effective for the entire period of transportation from Pusan to Bombay. The appellant also claims that the goods were not lost at the time the insurance was taken out and in any case the appellant could not have been aware of it and therefore the appellant is entitled to recover the amount along with interest.

3. The respondent insurance company contested the suit by filing written statement taking preliminary objection that the appellant company be put to strict proof that it is a duly registered partnership firm with the Registrar of Firms and Mr. Purshottamdas Poddar was entitled to sign, verify and institute the suit on behalf of the appellant company. The respondent denied in their written statement that there was any standard practice that the appellant had all along been entering into

contract of C&F terms and that the insurance used to be obtained with the respondent company after opening of letter of credit and receipt of documents through agents. The respondent further denied that there was any such practice or there was any sanction of law or contract and took a stand that the insurance is obtained in advance before the consignment is loaded in the ship and further denied that their officials had advised the appellant company not to take the insurance in advance but to take the same only on the specific amount on receipt of the documents. The respondent also denied the stand of the appellant that they started the practice of obtaining insurance later. The respondent stated that they were not aware of the alleged contract dated 20.1.82 between the appellant and M/s. Kukje Corporation of Seoul for the import of 200 metric tones of galvanized plain steel sheets coil and took a stand that the appellant has deliberately and intentionally not stated as to when the said galvanized plain sheets were shipped and placed on board on vessel 'Ivory Dragon' at Pusan, Korea by the said Korean corporation. The respondent also disputed that the indenting agent sent the documents to the appellant vide their letter dated 13.5.82 which was allegedly received by the appellant on 14.5.82 late in the evening. The respondents have taken a stand that nothing could have prevented

the appellant to take the insurance either at the time the consignment was said to have been booked or when the letter of credit was opened, and the appellant could have taken insurance even on 14th, 15th or 16th May, 1982. The respondent stated that the circumstances and the manner of obtaining the insurance clearly shows that the appellant has made an attempt to cheat the nationalized insurance company with a view to cause wrongful loss to the respondent and wrongful gain to the appellant. The stand of the respondent in the written statement was that the insurance was obtained on the condition that the company will not be liable for any loss if the loss occurs on or prior to 17.5.82 and in this case the loss occurred prior to 17.5.1982, therefore the insurance company is not liable, even if the policy is deemed to be validly issued in favour of the appellant. As per the respondent, the appellant came to know of the alleged loss much prior to obtaining of insurance and the same was obtained collusively.

4. Based on the above pleadings of the parties, the learned trial court framed the following issues:-

"1. Whether the plaintiff firm is a registered partnership firm and Sh. Purshottamdas Poddar was its registered partner?

2. On which date the vessel 'Ivory Dragon' carrying the goods in question sank and the goods subject matter of the insurance policy lost?

3. Whether the plaintiff knew about the loss of the goods insured and obtained the policy by cheating the defendant.

4. Whether the defendant was liable, even if the loss had occurred on or before 17.05.1988? (Note: This issue would cover the plea that the subject matter of the insurance did not exist on the date of insurance)

5. Whether the plaintiff was entitled to interest? If so, at what rate?

6. To what amount, if any, is the plaintiff entitled?"

5. Relevant for the purpose of the present appeal are issues No.2,3 and 4. While deciding Issue No.2, the trial court came to the conclusion that the Vessel 'Ivory Dragon' carrying the consignment in question sunk on 16.5.82 and not on 17.5.82 at 20.30 hrs. GMT, after having taken into consideration the survey report and the statement of facts given by Mr. K.D. Hoyung, Master of the vessel. Issue nos. 3 and 4 were decided together by the trial court as being interconnected and the findings on both the issues were returned against the appellant and in favour of the insurance company. The trial court after taking into consideration the cover note and insurance policy which were proved on record as Ex.P-31 and Ex.P-32, held that

there is a specific clause in the contract that the respondent insurance company is not liable for any loss if the loss occurs on or before 17.5.82 and thus held that the appellant was disentitled to claim recovery of the amount from the insurance company.

6. Assailing the impugned judgment and decree, Mrs. Mala Goel, learned counsel for the appellant has vehemently contended that the above matter in controversy was duly investigated by the CBI and after the investigation, the CBI found nothing against the appellant but the trial court had ignored the finding of the CBI for no reasons whatsoever. Counsel further argued that even the respondent never amended their written statement although in the written statement the respondent took a stand that they will amend their written statement after the matter is investigated by the CBI. The contention of the counsel was that since no such amendment was made by the respondent therefore the respondent impliedly has also accepted the findings given by the CBI exonerating the appellant from the alleged charge of lodging a false claim against the insurance company. Counsel further contended that the trial court has not appreciated the fact that the appellant had no knowledge about the sinking of the ship before it had received the information vide communication dated 20.5.82 proved on record as Ex. P-33.

Counsel further argued that the trial court has also failed to appreciate that as per the past practice the appellant used to take the insurance policy only when the goods were loaded and after the receipt of non-negotiable documents through the indenting agent and in the present case the insurance policy was taken on 17.5.82 after the receipt of the said non-negotiable documents on 14.5.82. The counsel also argued that the trial court has also not properly appreciated the survey report wherein it was clearly stated that the ship in question sank on 18.5.82 at 04.30 hrs. The contention of the counsel was that the Greenwich Mean Time (GMT) is completely different from the Indian Time and thus submitted that the time and date on which the ship sank cannot be calculated as per the GMT but the same has to be calculated as per the Indian Time. Counsel also argued that the goods which were subject matter of import were very much in existence on 17.5.82, the time when the insurance was taken by the appellant and there is no question of a false claim and conversion of GMT for 17.05.1982 at 20.30 is 4.30 Indian time on 18.05.1982. Counsel further argued that PW-1 had duly proved on record the documents of contract, bill of lading and other documents besides proving on record that the said non-negotiable documents were sent by M/s. Lakhotia International vide their communication

dated 13.5.82 which were received by the appellant on 14.5.82 late in the evening and since 15.5.82 and 16.5.82 were holidays being Saturday and Sunday, therefore, the appellant could take the insurance cover only on 17.5.82. Counsel thus urged that the goods in question did exist at the time of appellant taking the insurance cover and the insurance cover was taken by the appellant as per the past standard practice only after the receipt of the shipping documents. Counsel also argued that the encashment of the cheque towards the insurance premium on 19.5.82 would not mean that the policy would commence on 19.5.82 as held by the learned trial Court as the cover note by the insurance company was issued on 17.5.82 and the insurance thus came into effect immediately on the issuance of the said cover note. Counsel also argued that the learned trial court ought to have taken judicial notice of the time under Section 56 and 57 of the Evidence Act as the appellant had no means to know the exact time of the sinking of the ship which could come to its notice only when communication dated 20.5.82 was received by it as the means of communication back then were not as advanced as they are today.

7. Opposing the present appeal, Mr. Vineet Malhotra, learned counsel for the respondent submitted that the judgment of

the learned trial court does not call for any interference by this court as the same is based on sound reasoning and correct appreciation of facts. Counsel further argued that the appellant was well aware of the fact that the ship in question had already sunk on 16.5.82 and with a view to cover up the loss the insurance policy was taken by the appellant on 17.5.82 by suppressing the said vital fact. Counsel further argued that since the subject matter of insurance did not exist on the date of the insurance, therefore, the insurance company has no legal liability to compensate the appellant. The contention of the counsel was that the insurance company is not liable to pay any amount under the contract of insurance because the contract itself was void as the subject matter of the insurance did not exist on the date of taking the insurance policy. Counsel also argued that in the cover note and the insurance policy it was clearly stipulated that the insurance company would not be liable for any loss which had occurred on or prior to 17.5.82. Counsel further argued that the date of shipment of the said goods was 31.3.82 which date is duly mentioned on the indent letter issued by M/s Lakhotia International, proved on record as Ex.P-24, but the appellant took no steps to take the insurance cover till 17.5.82, till when the ship had already sunk in the midstream. Counsel

placed reliance on the statement of facts submitted by the Master of the said ship which is a part and parcel of the survey report proved on record as Ex.P-36, which clearly states that the vessel “Ivory Dragon” had actually sunk on 16.5.82. Counsel thus states that the trial court rightly placed reliance on the said statement of the Master of the ship who was the prime witness to have known the actual facts with regard to the exact date and time of sinking of the said ship. Counsel submitted that it was clearly proved on record that the appellant had taken up the insurance cover fraudulently after the ship carrying the subject goods had already sunk and thus is not entitled to any relief.

8. I have heard learned counsel for the parties at considerable length and given my thoughtful consideration to the pleas advanced by them.

9. The balance of the entire controversy rests on the determination of the question as to when did the ship in question, the “Ivory Dragon” sink. The main argument canvassed by the counsel for the appellant was that the ship had sunk on 17.5.82 at 20.30 hours GMT which corresponds to 4.30 hours on 18.5.82 as per the Indian Time and therefore the insurance policy taken by the appellant on 17.5.82 was valid, legal and binding on the

insurance company and the appellant entitled to the recovery of the said amount. Counsel for the respondent on the other hand took a stand that the ship in question in fact had actually sunk on 16.5.82 and not on 18.5.82 as per the claim of the appellant. The appellant has however feigned complete ignorance with regard to the personal knowledge about the exact time and date when the vessel in question carrying the consignment ordered by the appellant had sunk and has only claimed knowledge about the sinking of the said ship through the communication dated 28.5.1982 sent by M/s Lakhotia International Ltd. which was proved on record as Ex.P-34, informing the appellant that the vessel in question sunk off at 13-10'N, 113-55'E on 17.5.82 20.30 hrs GMT, and also vide letter dated 20.5.82 sent by the Intermodal Transport & Trading System Pvt. Ltd. informing the appellant that the said vessel had sunk off Phillipines in the morning of 18.5.82.

10. It is not in dispute between the parties that the appellant had taken the said insurance policy vide insurance cover note issued by the respondent on 17.5.82 and the two propositions that emerge out of the conspectus of facts is that if by 17.5.82, the vessel had not sunk then certainly the appellant could legitimately maintain the claim against the respondent for the

alleged loss of consignment but if the said vessel had already sunk prior to 17.5.82, then certainly the recovery suit filed by the appellant could not have sustained. The trial court has placed reliance on the statement of facts submitted by the Master of the ship, K.D. Hoyung, whose statement formed part of the survey report proved on record as Ex.P-36 over the survey report and the two letters dated 20.5.1982 and 28.5.1982 which stated that the ship sunk on 17.5.1982 20.30 GMT. Undoubtedly, Master of the ship was the prime witness with regard to the exact facts leading to sinking of the said ship and therefore the date and time indicated by the Master of the said ship cannot be disbelieved. In his statement, the Master of the ship has clearly disclosed that the vessel "Ivory Dragon" actually sank at 0430 hours on 16.5.82 in approximate position Lat 13-10'N, 113-55'E. It is beyond the comprehension and understanding of this court that once the Master of the ship had stated the said date of 16.5.82 as the date when ship sank then how in the survey report the date of sinking of the ship could be shown as 18.5.82. The surveyors in the survey report could not have introduced their own date, ignoring the date of sinking as stated by the Master of the ship. The learned trial court, therefore, has rightly observed that there is a manipulation in the date mentioned in second last line of page

no.2 of the survey report to make the same as 18.5.82 as opposed to 16.5.1982. This court therefore does not find any reason to upset the said finding given by the learned trial court placing reliance on the statement of the said prime witness who actually witnessed the sinking of the said vessel carrying the consignment in question. The argument of the counsel for the appellant that the said vessel had sunk on 17.5.82 at 20.30 hrs GMT which corresponds to 4.30 hours on 18.5.82 Indian time thus cannot sustain as the vessel in fact had actually sunk on 16.5.82. It is also a fact that in the survey report the date of sinking of the ship is stated to be 18.5.1982 at 0430 hours where it is not stated to be at GMT or at IST and if this is taken to be as GMT as the entire report talks in terms of GMT, then it is to be converted to IST in which case the contention of the appellant would be totally belied that the ship sank at 17.5.82 at 2030hours GMT. It is thus quite manifest that the appellant has built a concocted and fabricated case to extract money from the respondent on false claims. It is thus quite explicit that the appellant had taken the insurance cover when the said goods were already lost due to the sinking of the said vessel carrying the consignment in question and hence the subject matter of the contract did not subsist at the time of entering into the contract which makes it a void contract. The

findings on Issue no.1 have been thus correctly decided by the learned trial court and the appellant has not been able to persuade this court otherwise.

11. This court also does not find any illegality or perversity in the findings arrived at by the learned trial court on the Issue nos. 3 and 4. The issuance of the cheque by the appellant on 19.5.82 which is dated as 16.5.1982, (which was admittedly a Sunday) certainly proves the point that the appellant was well aware of the said fact of sinking of the ship otherwise there was no explanation by the appellant as to why the need arose to issue the cheque on 16.5.82 when the cover note was taken by the appellant on 17.5.82. The cover note proved on record as Ex.P-31 and the insurance policy proved on record as P-32 clearly stipulate that the respondent insurance company will not be liable for any loss if the loss occurs on or before 17.5.82. The insurance policy is in the nature of a contract between the parties and the liability of the insurance company to compensate for the loss could arise only when the goods that are insured under the policy had existed at the time of taking the said policy. The learned trial court has rightly observed that in the light of the specific clause in the insurance policy clearly stipulating that the insurance company will not be liable for any loss if it occurs on or before 17.5.82,

then the appellant could not have filed a claim for the losses which had already occurred prior to 17.5.82. The findings given by the trial court on the Issue nos. 3 and 4 also do not call for any interference and the same are accordingly upheld.

12. Therefore in the light of the above discussion, this court does not find any merit in the present appeal and the same is accordingly dismissed.

December 23 , 2011

KAILASH GAMBHIR, J.