

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 05.08.2013
Pronounced on: 08.08.2013

+ **RFA (OS) 39/2012**

M/S. IMPEX SERVICES & ANR. Appellants
Through : Sh. Vijay Gupta, Ms. Geeta Goel and
Sh. Chetan Swarup, Advocates.

versus

THE ORIENTAL FIRE & GENERAL INSURANCE CO.
LTD. Respondent
Through : Ms. Sunita Dutt, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT

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1. This is an unsuccessful plaintiff's appeal against the judgment and order of a learned Single Judge, dated 2nd May, 2011 dismissing its claim based on a marine insurance policy, in CS (OS) No. 653/1980.

2. The suit claimed ₹23 lakhs (i.e. insured amount plus interest) towards marine insurance policy claim. The plaintiff had insured a consignment of goods (PVC Resin) shipped by the second and third

defendants (“the shippers”) from Singapore to it in India. The first defendant (“insurer”) had issued two Insurance Cover Notes of 19th June and 10th August, 1979. The first policy was in respect of cost, insurance and freight and the second policy was for the profits. The plaintiff had contended that pursuant to a Contract dated 11th June, 1979 between it and the shippers, the consignment valued at ₹13,22,912/- was loaded on the vessel "SS.OH DAI" at Singapore. They were deliverable at Bombay under the freight contract contained in the Bill of lading of 1st September, 1979 issued by Union Shipping Ltd. i.e. the sixth defendant (hereafter “the carrier”). The consignment was insured with the insurer who had issued provisional cover notes for ₹14,55,200/- and ₹5,29,200/- after the premium amount of ₹10,774/- was deposited. Insurance policies were also issued by insurer; however the same were not received by the plaintiffs when the suit was filed.

3. The plaintiff had contended that the insurer was informed by the shippers about the shipment of the plaintiffs’ goods by cable dated 3rd September, 1979. The plaintiff stated that the consignment in question was lost in the high seas and as the entire cost of consignment had been paid and further there being a completed contract of insurance, it had by Notice registered its claim dated 9th October, 1979 and demanded ₹19,84,000/- from the insurer with a further request to have the loss surveyed. The insurer, by its reply of 15th February, 1980 denied liability, after the ship sank, on the plea that the vessel "OH DAI" was not approved. The Plaintiff alleged that the insurer had

certified eligibility of vessel "OH DAI" by its act of accepting additional premium from the other parties whose goods were also shipped in the vessel "OH DAI". No additional premium was demanded from the plaintiff; however, it would have willingly paid it. Interest @ 18% p.a. on the insured amount was claimed by the plaintiff.

4. The insurer disputed the plaintiff's claim, by asserting that since the consignment was not sent by approved vessel, as required by the cover note of insurance, it was not liable to pay any amount. The fourth Defendant, i.e. the plaintiff's banker in its written statement admitted that the plaintiff had opened a letter of credit and stated that no relief was claimed against it, i.e. the fourth defendant. The remaining defendants were set *ex-parte*.

5. The following issues were framed for trial:

"i) Whether the plaint is signed, verified and instituted by a duly authorized and competent person?

ii) Whether the plaintiff entered into contract with defendants No.2 and 3 for purchase of P.V.C. Resin of the value of Rs.13,22,912/-. If so, on what terms?

iii) Whether the contract of insurance between the plaintiff and defendant is not enforceable?

iv) Whether the suit is bad for misjoinder of parties or causes of action?

v) Whether the policy of insurance is void ab initio on account of suppression of material facts as alleged in paras 1 and 2 of the written statement of defendant No.1?

vi) Whether the policy of insurance is liable to be avoided on account of fraud as alleged in para 3 of the written statement on merits?

vii) Whether the policy of insurance is liable to be avoided on account of the fact that the 'Oh Dai' is not a first class/approved vessel as alleged in para 6 of the written statement of defendant No.?

viii) Whether any purported consignment of PVC resin, allegedly insured, or at all, was loaded and shipped on board the vessel S.S. OH DAI at Singapore?

ix) Whether the plaintiffs were buyers of any goods or the owners of PVC resin worth Rs.13,22,912 or any other amount?

x) Whether the purported goods/consignment ever existed, and if so, did the plaintiffs have insurable interest and property in the goods?

xi) Whether the suit is maintainable against defendant No.4?

xii) Whether the plaintiff is entitled to any amount against the defendants? If so, against which of the defendants? OPP

xiii) Whether the plaintiff is entitled to interest? If so, on what amount, at what rate and for what period? OPP

xiv) Relief.”

6. By the impugned judgment, the learned Single Judge found for the defendant, holding that the consignment was not shipped in an approved vessel and consequently dismissed the suit. The relevant findings are as follows:

“10.....The crucial Issue is Issue No.(vii), which pertains to the validity of the insurance of the consignment in question. Though no policy of insurance was issued by Defendant No.1 in respect of the Cover Notes of 19th June, 1979 (Ex.PW-1/E & Ex.PW-1/F) regarding the consignment in question, but the existence of the aforesaid two Cover Notes is not in dispute. What is disputed, is the enforceability of these two Cover Notes because the vessel - "OH DAI" vide which the consignment in question was dispatched, was not a first class/approved vessel. From the Communication of 11th September, 1979 (Ex.P-3) of the Defendant to the Plaintiff, it becomes evident as to which kind of vessels are first class/ approved vessels. It is not in dispute that the vessel "OH DAI" in question, vide which the consignment was dispatched by Defendant No. 2 to the Plaintiff, was not a first class/approved vessel. The endeavour of the Plaintiff has been to show that the vessel "OH DAI" in question comes within the third category - 'and/or conveyance (particulars of which to be declared)', as disclosed in the Cover Notes (Ex.PW-1/E & Ex.PW-1/F).

11. During the course of hearing, learned Counsel for the Plaintiff had proceeded to rely upon unexhibited documents of the Defendant- Insurance Company, i.e., a letter and two telegrams of 18th September, 1979, and letters of 14th September, 1979 and 24th September, 1979, sent by the Plaintiff to the Defendant - Insurance Company, and letter of 22nd September, 1979 (Ex.P2) by the Defendant - Insurance Company to the Plaintiff, letter of 4th October, 1979 by Defendant No. 4 to Defendant - Insurance Company as well as Legal Notice of 10th October, 1979 by the Plaintiff to Defendant - Insurance Company to assert that the aforesaid correspondence clearly establishes the bona fides of the Plaintiff in this matter and the protest of the Plaintiff against attempts of the Defendant - Insurance Company

to wriggle out of its liability under the aforesaid Insurance covers.

12. Upon perusal of the aforesaid Communication and scrutiny of evidence on record, I am of the considered view that the reliance placed by the Plaintiff on the aforesaid Communication does not advance the case of the Plaintiff for the reason that it is crucial for the Plaintiff to first establish that the consignment in question was sent by an approved vessel. On this aspect, Plaintiff has chosen to rely upon the deposition of T.S. Sawhney (DW-2), who is a Plaintiff of Suit No.1/1982, which is pending and from his evidence what is sought to be brought out by the Plaintiff herein is that on the payment of additional premium by Mr. Sawhney (DW-2), this very vessel "OH DAI" was insured by Defendant - Insurance Company and in this regard the Communication (Ex.DW- 2/1) is referred to by learned Counsel for the Plaintiff to particularly point out that though the vessel "OH DAI" was admittedly over-aged but still, the Defendant - Insurance Company had insured it by taking additional premium whereas from the Plaintiff, no additional premium was ever demanded and so, the Defendant - Insurance Company cannot be permitted to turn around and deny the liability to pay the insured amount under the insurance covers in question. Reliance was placed upon decision in [United India Insurance Company vs. M.K.J. Corporation](#), (1996) 6 SCC 428, to contend that the contracting parties are under a duty to observe utmost good faith and the Defendant - Insurance Company is not acting in good faith by resorting to such tactics.

13. In the considered opinion of this Court, the question of demand of additional premium for insuring the vessel "OH DAI" in question would only arise when the Plaintiff succeeds in proving that the particulars of the vessel "OH DAI" in question were declared to the Defendant - Insurance Company. This was the

requirement of the Cover Notes (Ex.PW-1/E and Ex.PW-1/F). Plaintiff's evidence is lacking on this vital aspect and therefore, the Plaintiff cannot be heard to say that for this very vessel "OH DAI" Defendant - Insurance Company in another matter had insured it by taking additional premium. In any case, the suit by T.S. Sawhney (DW-2) is subjudiced and therefore no implicit reliance can be placed upon his deposition to reach to a conclusion that because from him, additional premium was taken, therefore, the vessel in question "OH DAI" be taken to be an approved vessel. It would be pertinent to point out that this witness T.S. Sawhney (DW-2) in his evidence categorically stated that the vessel "OH DAI" is not an approved vessel and it was a junk ship purchased by exporter and was got sunk in the high seas. Though no admission was required by T.S. Sawhney (DW-2) regarding Defendant - Insurance Company being not liable to pay the claim, if there is a breach of the terms and conditions of the policy of insurance, because otherwise also, it is the settled law."

7. The plaintiff/Appellant questions the findings in the impugned judgment, and submits that they are contrary to the record. It was argued that the insurer was informed about the vessel on 1st September, 1979; she sailed with the consignment and other consignments on 4th September, 1979. The appellant's insurance cover had been issued well in advance. The insurer did not express any reservation, even upon being informed about the vessel and its description. Yet, it sought to resile from its contractual obligations after being informed that the vessel had been lost in the high seas.

8. It was argued by Sh. Vijay Gupta, learned counsel for the Appellant, that the term in the contract (of insurance) i.e. ("PER Any

Ist Class and/or approved steamer and/or conveyance (Particulars of which to be declared) ”) had to be construed in the context of the facts and circumstances of the case and not in isolation. The onus of proving issues 3 to 7, submitted counsel, was on the insurer. Two witnesses were examined by the insurer. DW1 Shri P K Nagpal, the Senior Divisional Manager of the insurer filed his affidavit Ex DW1/A. The witness merely and almost verbatim, reproduced the contents of the insurer’s written statement. The cross-examination of the witness established that he had no personal knowledge about any of the facts of the case; he had not handled the issuance of the policies or dealing with the claims thereafter and never visited Singapore in connection with the facts of this case. The witness was specifically asked to produce the questionnaire which is required to be filled up by every insured to take the marine insurance cover on the next date; but could not do so. He tried to evade the issue, stating that the records were old and inaccessible or untraceable. These clearly ought to have led the Court to draw an adverse presumption under Section 114 of the Evidence Act, which it erroneously did not.

9. It was argued that the insurer admitted having been informed about the sailing of the vessel on 3rd September 1979, in view of the proof of the cable, produced as Ex. PW-1/G1. The insurer was quiet and after receiving information about the loss of the vessel on high seas, on 8th September, 1979, it sought to evade its contractual obligation by attempting to stipulate for the first time, on 11th September, 1979 that the vessel was not a first class or approved one, in its letter Ex. P-3. Relying on Ex. DW-1/3 and DW-1/4, i.e. the two

contract notes and the correspondence between the parties, Counsel argued that the insurer acted in breach of good faith in repudiating its obligation to pay.

10. It was submitted that the fact that OH DAI was an approved vessel was established by the evidence of DW-2, who admitted Ex. DW-2/1. In that letter to the insurer, it was expressly mentioned that *“...Kindly refer to the personal discussions held with you regarding the shipment of CLOVES effected per SS ‘OHDAI’. In which you have stated that since the ship is overaged, it will require an additional premium...”* There is no rebuttal or any explanation regarding this evidence given by the insurer’s own witness. This means that the vessel, in any event, became *‘an approved vessel’* with a valid insurance cover in favour of all the insured parties. The defence sought to be raised by the insurer was liable to be rejected.

11. Learned counsel relied on the decision reported as *Smt. Durgawati Devi v Life Insurance Corporation of India* AIR 1997 All. 257 to submit that to successfully avoid a policy of insurance, the insurer should be put to stringent standards of proof of its defence. Counsel also relied on the following observations of the Supreme Court in *United India Insurance Company Limited v M.K.J. Corporation* 1996 (6) SCC 428:

“6. It is a fundamental principle of Insurance Law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. Just as the insured has a duty

to disclose, "similarly, it is the duty of the insurers and their agents to disclose all material facts within their Knowledge, since obligation of good faith applies to them equally with the assured.

7. The duty of good faith is of a continuing nature. After the completion of the contract, no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judge by the circumstances existing at the time when the contract is concluded. In the present case, the introduction of the Tariff Advisory Committee document materially affects the terms of the policy, resulting in the denial of the very indemnity of claim. And this was what the appellant sought to do, at the stage of clearing of the complaint. The Commission rightly rejected the appellant's plea. Notwithstanding this, on behalf of the appellant, it was insisted that the instructions of the Tariff Advisory Committee form part of the contract. Admittedly, the appellant-Insurer had not incorporated the above quoted clause as part of the policy undertaken with the insured. Consequently, the insured is not bound by this exclusionary clause of liability since the appellant-insurer, admittedly, had undertaken liability for the riot or strike, damage due to riot or strike."

12. As can be gathered from the above discussion, the plaintiff had sought for policies of insurance, the insurer issued two cover notes – dated 19.06.1979 (to cover cost of insurance and freight of the goods) and the second one, on 10.08.1979, to cover losses. The plaintiff was buyer of the goods. The controversy between the parties in the impugned judgment is premised on the narrow finding that the condition in the policy, i.e. that coverage would be given to “first class and or approved steamer”, particulars of which are to be declared, were duly complied with by the plaintiff and were within the

knowledge of the insurer when the cover note was issued and the coverage sought. The vessel in question – OH DAI sailed from Singapore on 03.09.1979. The vessel is reported to have been lost in the high seas on 08.09.1979. The insurer disclaimed liability through its letter dated 15.02.1980. The insurer's defence was that cover notes were subject to the stipulation that the vessel was to be a "first class" or "approved vessel". This is what the insurers had to say in the written statement, in that regard:

"6. With reference to paragraph 8 of the Complaint, the Defendants say that it is true that cover notes were issued by the Defendants. However, the said cover notes are issued with the stipulation as stated in paragraph 1 above and in view of the fact that the vessel "OH DAI" is not a 1st class vessel the Defendants are not at risk and therefore the question of issuing the original insurance of the policies do not arise.

7. With further reference to the said paragraph 9 of the Complaint, these Defendants say that the question of indemnifying the Plaintiffs as alleged can only arise if the goods in question were in fact loaded on board the said vessel and that thereafter it becomes a total loss on account of the perils insured against on account of the said vessel having sunk. It appears that no goods existed. In the circumstances, it is submitted that no question arises of the Plaintiffs being interested in the alleged goods or their being indemnified as alleged.

8. With reference to paragraph 10 of the Complaint, the Defendants say that no question arises of them acting on the basis of the purported cable. The Defendants deny that any question arises of them failing to comply with the said cable. The Defendants deny that there is any mala fide or ulterior motives as alleged.

9. *With reference to paragraph 11 of the Plaint, the Defendants say that the said cover notes were issued subject to the stipulation as stated hereinabove and premium was accepted on that condition. The Defendants say that they do not admit that any consignment was in existence or that the same was purported to have been shipped under the Bill of Lading dated 1st September 1979 from Singapore to Bombay as more particularly set out herein. The Defendants deny that any question arises of them being liable to pay to the Plaintiffs or to indemnify or reimburse to the Plaintiffs any purported loss suffered by them. Without prejudice to the above, it is submitted that if there is no shipment, no loss could arise and no risk attaches.”*

In the replication, the plaintiff stated as follows:

“7. Para No.7 of the written statement is absolutely wrong whereas para No.9 of the plaint is correct. It is both ridiculous and ludicrous on the part of defendant No.1 to say that no goods existed. The denials on the part of the defendant No.1 cannot absolve them of their liabilities and obligations incurred by them under the cover notes and the insurance policies.

8. *Para No.8 of the written statement is wrong whereas para No.10 of the plaint is reiterated. The mala fide and ulterior motives of defendant No.1 in trying to wriggle out of the commitments made are obvious.*

9. *Para No.9 of the written statement is wrong whereas para No.11 of the plaint is reiterated. The reply of defendant No.1 that there was no consignment in existence or that there was no shipments is both amazing and amusing and betray the mala fides of defendant No.1.”*

13. It is thus evident that apart from the averment in the suit that the insurer was informed through cable about the vessel, the plaintiff at no stage sought approval or even elicited any response from the insurer as to whether the OH DAI was an approved vessel. The plaintiff's affidavit of evidence is also instructive in this regard; its evidence through Sh. P.N. Piplani in the affidavit dated 24.07.2006, merely stated that the intimation about the sailing of the vessel had been given to the insurer. In cross-examination, the said witness (PW-1), stated as follows:

“XXXXXX XXXXXX XXXXXX

I do not remember whether there was a clause in the contract regarding the vessel in which the goods would be loading should be of the standard of “first class” or an “approved vessel”. It is correct that in the insurance cover notes Ex.PW-1/E and 1/F there is a clause that the vessel should be a “first class” or approved vessel. Vol. The documents Ex.PW-1/E and 1/F were provisional cover notes. I do not know whether the goods were loaded in the ship “Oh Dai”. However, as per the record they were loaded in the ship “Oh Dai”. I do not know whether the ship “Oh Dai” was a first class or an approved vessel.....”

14. The said witness further stated as follows:

“XXXXXX XXXXXX XXXXXX

A. I have no recollection. Vol. The ship “Oh Dai” sank on 08.09.1979 and on 03.09.1979 the defendant No.2 sent them a cable giving complete details

of the shipment put on board “Oh Dai”. That cable was received by insurance company on 04.09.1979, by the officials namely Mr. S.S. Bharj. They sat on this cable and instead wrote to us on 11.09.1979 about what a first class steamer has to be like. Meanwhile they kept on collecting additional premiums from 06.09.1979 to 11.09.1979 from other parties in Delhi.....”

15. The stipulation that the vessel had to be a “first class vessel” failing which it had to be an approved steamer, contained in each of the cover notes, is not in dispute. Equally, it is not in dispute that the OH-DAI, the vessel in question here is not a first class vessel. The mere reliance upon the cable, issued to the insurer and received by the insurer on 04.09.1979, i.e. a day after the vessel sailed, in the opinion of this Court, does not amount to anything much less than an admission. If the plaintiff’s argument is that the insurer ought to have disclaimed any responsibility, upon being notified about the identity of the vessel, such argument is meritless. A contract of insurance requires the parties to exercise utmost good faith (*uberrimae fidei*). Thus, the stipulation that the ship was to be a first-class vessel entailed an obligation upon the plaintiff to ensure that the goods were in fact placed on board of a vessel of that description. If the plaintiff intended to seek approval of the insurer, surely there would have been a better method of doing so, i.e. describing it well in advance for the insurer to respond. However, to inform the insurer about the identity of the vessel after it had sailed from Singapore surely did not fulfill the requirements. In any event, the insurer’s initial willingness and later

repudiation cannot, under the circumstances, be interpreted as an act of bad faith.

16. The plaintiff had heavily banked upon the document, Ex.DW-2/1, i.e. a letter dated 05.09.1979, written by one Orient Enterprises. The said document is as follows:

*“The S.D.M.,
The Oriental Fire & General Ins. Co. Ltd.
D.O.II
NEW DELHI*

*SUB: Additional Premium on A/c of M/s. SAWHNEY
BROTHERS for Import of ‘CLOVES’.*

Dear Sir,

Kindly refer to the personal discussions held with you regarding the shipment of CLOVES effected per as ‘OHDAI’. In which you have stated that since the ship is overaged, it will require an additional premium, the figure of additional premium as per you is Rs.14,250/-. Accordingly, please find enclosed herewith a cheque no. H 909698 dt. 5/9/79 for Rs.14,250/- (Fourteen thousand two hundred fifty only) favouring yourselves.

You are kindly requested to issue an official receipt & also a letter asking us formerly the reason for additional premium.

Thanking you,

*Yours Faithfully,
For ORIENT ENTERPRISES*

*(R.K. Suri)
Partner”*

17. Learned counsel had relied upon the document to suggest that the insurer had collected additional premium in respect of similar shipments made on the very same vessel and that it cannot be allowed now to disclaim its liability in the present case. This Court rejects the arguments as insubstantial. Whether similar or identical shipments were on board or for which insurer in question or some other insurer had collected additional premium is not relevant for a trial in these proceedings. Furthermore, the plaintiff did not ever set-up case that such additional premium was collected with the intention of approving OH-DAI as the vessel for shipping the goods in the present case. In these circumstances, the reliance upon Ex.DW-2/1 is misplaced.

18. There can be no doubt that every contract of insurance is based upon the exercise of utmost good faith by both parties. The findings of the learned Single Judge in this case are that at no point of time was it approved by the plaintiff that the OH DAI fell within the description of an approved vessel in terms of the stipulation contained in the insurance cover notes. The material on record clearly supports that finding. There is no lack of material in the record; that finding is therefore, in accordance with law. The plaintiff's attempt to show Ex.DW-2/1 to prove that there was some tacit approval has also miserably failed. Lastly, the plaintiff could not prove that the intimation about the vessel made for the first time to the insurer after it had sailed led to its approval by the insurer or that the latter accepted additional premium despite being aware of the true facts and

circumstances. No such plea was set-up much less approved. All that was offered during the evidence by way of affidavit was the letter by a third party to the insurer in respect of an unrelated consignment in the same vessel, i.e. OH DAI. That the insurer possibly collected additional premium, from such third parties proves nothing so far as the plaintiff is concerned. In view of the above discussion, the Court is satisfied that the impugned judgment does not call for interference. The appeal is unmerited and is accordingly dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

AUGUST 8, 2013