

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

+ C.S (OS) 1309/2002

Date of Decision: 14.05.2013

M/S WESTON TUBES (PVT) LIMITED Plaintiff

Through: Mr. Sumant De, Advocate

Versus

NATIONAL INSURANCE COMPANY LTD. & ORS...Defendant

Through: Mr. L.K Tyagi, Advocate

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J.

1. This suit is filed for recovery of a sum of Rs.22,29,193/- (Rupees Twenty Two Lakhs Nine Thousand One Hundred and Ninety Three only) beside interest @ 18% p.a amounting to Rs.34,31,502/- (Rupees Thirty Four Lakhs Thirty One Thousand Five Hundred and Two only) and pendente lite and future interest @ 24% p.a.

2. The plaintiff is a company incorporated under the Indian Companies Act, 1956 and is engaged in the manufacture and sale of PVC flexible pipes and compounds. The defendant no.1 is an insurance company having its Divisional Office-X, located at Hanuman Road,

New Delhi and Divisional Office-V on the 7th floor, Hemkunt Tower, Rajendra Place, New Delhi. Both these offices have been arrayed as defendant nos. 2 and 3 respectively.

3. It is the case of the plaintiff that it took from the defendants, insurance for a sum of Rs. 15,00,000/- (Rupees Fifteen Lakhs only) vide policy no. 351000/1100563/95, dated 08.06.1995. This policy was for the period from 06.05.1995 till 05.05.1996 and covered machinery that was insured for Rs. 13,40,000/- (Rupees Thirteen Lakhs Forty Thousand Only) and a generator set insured for Rs. 1,60,000/- (Rupees One Lakh Sixty Thousand Only). Further, vide policy no. 3100695/95 dated 30.10.1995, stocks amounting to Rs. 5,00,000/- (Rupees Five Lakh Only) was insured. Therefore, the cumulative amount insured came upto Rs. 20,00,000/- (Rupees Twenty Lakhs only).

4. Subsequently, the plaintiff submits that it purchased certain machinery in February 1996, which was installed in April 1996. Vide letter dated 01.05.1996, the plaintiff requested the defendants to enhance the sum insured by another Rs. 20,00,000/- (Rupees Twenty

Lakhs only) so as to cover the newly installed machinery. In furtherance of the same, a cheque numbered 731758, dated 01.05.1996, for Rs. 929/- (Rupees Nine Hundred and Twenty Nine only), was drawn on Canara Bank, Connaught Circus.

5. It is contended that both the cheque and the letter requesting enhancement were delivered to the defendant no. 2's address at Hanuman Road, which was duly received and accepted on the same day by the Senior Divisional Manager of defendant no.2, Mr. M.M Dutt. And that on contacting Mr. M.M Dutt regarding endorsement of the policy, the plaintiff was informed that their file had been transferred to defendant no.3's office, which would give the endorsement. Thereafter, the endorsement was issued by defendant no.3 being Endorsement no. 350500/E/31/96/96 dated 06.05.1996, enhancing the sum insured by another Rs.20,00,000/- (Rupees Twenty Lakhs only), w.e.f 02.05.1996 to 05.05.1996. Thereby, the total amount insured stood increased to Rs. 35,00,000/- (Rupees Thirty Five Lakhs only).

6. The plaintiff contends that the endorsement should have been effected from 01.05.1996 i.e. when the letter along with the premium amount was accepted. That being so, the plaintiff requested the defendant no.3 vide letter dated 24.05.1996 to make requisite corrections to the endorsement so as to make it effective from 01.05.1996 and not from 02.05.1996.

7. The plaintiff further submits that a fire broke out in its factory on the morning of 02.05.1996, where the insured stocks and machinery were lying. A report was lodged with the local police and the defendants were informed of the incident. The plaintiff requested the defendants to register their claim and depute a surveyor. In furtherance of this request, the defendants appointed M/s S.N. Nanda and Company as surveyors who submitted their assessment report. Based on the report, the plaintiffs claims the following amounts:

- a. Claim towards loss of machinery: Rs. 43,07,615/- (Rupees Forty three Lakhs, Seven Thousand Six Hundred and Fifteen only)

b. Claim towards loss of stocks: Rs. 6,56,490/- (Rupees Six Lakhs Fifty Six Thousand Four Hundred and Ninety only)

Thus, the plaintiff claims a total of Rs. 49, 64, 105/- (Rupees Forty Nine Lakhs Sixty Four Thousand One Hundred and Five only).

8. The plaintiff submits that as against the above stated claim, the defendants paid to them a meager sum of (Rupees Sixteen Lakhs Ten Thousand Eight Hundred and Seven only) on 20.08.1999. Thereafter, the plaintiff sent various representations to the defendants seeking payment of the balance of the claimed amount, but no response was received. Consequently, the plaintiff sent a legal notice dated 22.05.2000 which was allegedly replied to, stating baseless and frivolous contentions.

9. The plaintiff contends that the defendants were under an obligation to honour their insurance policy and the terms and conditions therein. Thus, the plaintiff has prayed for the recovery of a sum of Rs. 22,29,193/- along with interest @ 18% per annum w.e.f

02.05.1996 to 31.06.2002 amounting to Rs. 34,31,502/- and also pendente lite and future interest @ 24% p.a.

10. In their reply, the defendants contend that the suit is not maintainable as the said claim had already been settled on 20.08.1999, when the plaintiffs were paid a sum of Rs. 16, 10, 807/-. And that by accepting the said amount, the plaintiff is estopped from raising any further claim. It is further submitted that as per the settled policy of the defendants, the Insurance Company makes the payment only after the amount is accepted by the insured in full and final payment.

11. It is additionally contended that a contract of insurance is complete only after the proposal is accepted and that mere delivery of a letter enclosing the cheque for enhancement of the sum insured by the plaintiff would not mean that the sum insured is enhanced by the defendant and that the proposal has been accepted. In furtherance of this, the defendant submits that the letter was simply received by the

Divisional Manager of defendant no.2, after which it was transferred to defendant no.3's office where the endorsement took place.

12. The defendants submit that nowhere in the letter sent by the plaintiff did it request for the endorsement to take effect from 01.05.1996, but requested the same from 02.05.1996. The defendants contend that the conduct of the plaintiff was doubtful from the fact that though the machinery was purchased in February 1996, the plaintiffs waited till four days before the expiry of the policy, for getting the new machinery insured. Further, the endorsement for enhanced insurance was issued on 06.05.1996 but the plaintiff asked for correction in the endorsement only on 24.5.96. In light of the above averments, the defendants contend that there is every reason to believe that the cheque was antedated after the fire took place on the night of 1-2 May, 1996.

13. The following issues were framed for trial vide order dated 17.03.2004.

- i. Whether the plaintiff is a duly incorporated Company and the suit has been signed, verified and filed by a duly authorized person? (OPP)
- ii. Whether the enhancement of the insured sum was after the incident of the fire and as such the defendants are not liable to pay the amount under the enhanced sum in terms of preliminary objection No.2 of the written statement? (OPD)
- iii. Whether the plaintiff has accepted a sum of Rs.16,10,807/- from the defendants in full and final settlement of its claim and as such is not entitled to claim any further amount? (OPD)
- iv. Whether the plaintiff is entitled to the amount claimed in the suit? (OPP)
- v. Whether the plaintiff is entitled to interest? If so, for which period, on what amount and at what rate? (OPP)
- vi. Relief

14.The plaintiff examined its Director Virender Aggarwal (PW-1). The defendant examined its officer Anupam Suri (DW-1) and the Investigator Arun Gupta (DW-2).

15. I have heard the learned counsel for the parties and perused the record.

16. Issue-wise findings are as under:

Issue No. 1

17. Onus to prove this issue was upon the plaintiff. So far as the plaintiff being the incorporated company, there does not appear to be any dispute. However, the objection was taken by the defendant that the plaint has not been signed, verified and filed by a duly authorized person.

18. The plaint was filed by Pawan Aggarwal as the constituted attorney and Managing Director of the plaintiff company. The plaintiff however did not examine Pawan Aggarwal, but, examined Virender Aggarwal (PW1), who claimed himself to be the authorized representative of the plaintiff company vide resolution dated 07.05.2004. The said resolution has been placed on record as Mark A, but not proved as per law. However, it is seen therefrom that he was authorized by the Board to sign, verify and file the suit in place of

Pawan Aggarwal. There is no evidence of any sort led to prove that Pawan Aggarwal was, at any point of time, authorized by the Board of the plaintiff company to sign, verify and file the suit. In fact, there is nothing on record to substantiate that Pawan Aggarwal was even the constituted attorney or the Managing Director of the plaintiff company when the plaint was filed. It was specifically suggested to PW1 Virender Aggarwal that Pawan Aggarwal was not authorized to file the suit. Assuming what is stated as correct that Pawan Aggarwal was the constituted attorney and the Managing Director of the plaintiff company, as per Order 29 Rule 1 CPC, he could, at best, be said to be authorized to sign and verify the plaint on behalf of the plaintiff. It is well-settled that under Section 291 of the Companies Act, except where the express provision is made that the powers of the Board in respect of the particular matter are to be exercised by the company in general meeting- in all other places, the Board of Directors are entitled to exercise all its powers. The individual Directors have only such powers, which are vested in them by the Memorandum and Articles. There is no doubt that the courts ordinarily do not non-suit anyone on account of technicalities. However, it is trite that the question of

authority to institute a suit on behalf of the company is not a technical matter as it has far-reaching effects. Thus, unless the power to institute a suit is specifically conferred on a particular Director by the company, he has no authority to institute a suit on its behalf. Needless to say that such a power can be conferred on the Directors by the Board of Directors only by passing a resolution in that regard. In **M/s. Nibro Ltd. Vs. National Insurance Co. Ltd., AIR 1991 Delhi 25**, this court held that under Chapter IV of the Delhi High Court (Original Side) Rules, 1967, a suit can be presented by a duly authorized agent or by an advocate duly appointed by him for the purpose. This authorization in the case of a company can be given only after the decision to institute a suit is taken by the Board of Directors of the company, which may authorize a particular director or the principal officer or the secretary to institute a suit. In view of above, there being no evidence on record to indicate that Pawan Aggarwal had authority to institute a suit, it has to be held that the plaintiff has not proved that the plaint was instituted/filed by a duly authorized person. The issue is accordingly decided against the plaintiff. In fact, the suit could be dismissed on this count alone.

Issue No. 2

19. It is the admitted case of the parties that the plaintiff was already insured for a sum of Rs.15.00 lakh and that this policy was valid uptill 06.05.96 and that the plaintiff was further insured for the stocks for Rs.5.00 lakh, which policy was valid uptill 07.10.1996. The plaintiff's case is that it had imported machinery in February and installed the same in April and applied for the additional insurance for this machinery on 01.05.1996 by making payment of premium amount of Rs.929/- by way of a cheque. It was further its case that though the premium had been paid on 01.05.96, but the defendants issued endorsement of the additional insurance with effect from 02.05.1996 and that the same was not corrected even despite its having made a request for the same to the defendants on 24th May, 1996.

20. On the other hand, the case of the defendants is that the cheque of Rs.929/- was antedated as of 01.05.96, but in fact, it was given by the plaintiff on 02.05.96 and that in any case mere tender of the cheque by the plaintiff of its own does not amount to acceptance of the proposal of the plaintiff for issue of additional insurance. It was also

the defendant's case that the plaintiff has manipulated all this inasmuch as the machinery was imported by the plaintiff in February 1996, installed in March 1996, whereas the plaintiff sought to insure this machinery only after the fire broke out on 02.05.1996. It is submitted that when the plaintiff had not insured the machinery for such a long time after importing and installing, it could not have got the same insured only four-five days before the expiry of the existing insurance of Rs.15.00 lakh which was due to expire on 05.05.1996. In other words the submission is that the plaintiff did not intend to get this machinery insured till the expiry of the already existing insurance which was expiring merely four days later.

21. The questions requiring determination would be as to whether the cheque of Rs.929/- being the premium of the insurance of machinery was tendered by the plaintiff with the defendant on 01.05.96 and further if it was so, as to whether the same would amount to acceptance by the defendant and automatic issue of additional policy by it. The plaintiff's case is that on 01.05.1996, he had given the cheque along with covering letter (mark B) to Mr M.M Dutt, Senior

Divisional Manager and that when contacted Mr. Dutt stated that this policy relates to Division V. This is however vehemently disputed by the defendant that this letter and the cheque was given by the plaintiff on 01.05.96.

22. From the evidence that is led by the parties, there are valid reasons which create doubt in the case that is set up by the plaintiff in this regard. PW-1 stated that he had personally given the cheque to the defendant's office on 01.05.1996 at about 4.00 p.m. Admittedly, no receipt was received by him from the defendant. It was put to him that the cheque of the premium dated 01.05.1996 was antedated and was issued after the incident of fire and that he personally did not go to deliver the same. On the other hand DW-1 stated and maintained that the cheque along with letter was received by the defendant during the office hours on 02.05.96. Further, DW2 Arun Gupta, who had conducted the investigation also stated in his report that he had verified and found that the plaintiff had already issued few cheques viz. cheques No. 731756 & 731757 before issue of cheque in question i.e. cheque No. 731758 dated 01.05.1996 and also that the cheque

bearing No. 731759 was stated to have been cancelled. From his report, it would be seen that the cheque bearing No. 731756 in the name of one Finlex Industries was encashed on 04.05.1996 and the cheque bearing No. 731757 drawn as self was encashed on 13.06.1996. From this, it would be apparent that the cheque in question viz. 731758 dated 01.05.1996 was ante-dated. There is no reason to doubt the verification report and the testimony of DW2 in this regard.

23. The learned counsel for the plaintiff placed reliance on the cases of *M/s Hanuman Industries vs. New India Assurance Co. Ltd*, AIR 1997 DELHI 160 and *Deokar Exports Private Limited vs. New India Assurance Company Limited*, (2008) 14 SCC 598 to contend that with the tender of premium on 01.05.1996, the machinery got insured and the contract came into existence. The reliance in the case of *M/s. Hanuman Industries (supra)* is highly misplaced inasmuch as in that case, there was positive evidence on record that the enhanced premium was already determined, and the cheque of the premium for enhancement of sum insured was delivered by the plaintiff's bank to the defendant on 02.11.1982, and it was received on the same day. The

facts of *Deokar Exports Private Limited (supra)* are entirely distinguishable from the instant case. However, it was held that a policy of insurance is a contract based on an offer (proposal) and acceptance. Repelling the contention that equitable view must be taken in favour of insured, it was held that in a contract of insurance, rights and obligations are strictly governed by the policy of insurance, and no exception or relaxation can be made on the ground of equity.

24. The Supreme Court in the case of **United India Insurance Company Ltd. Vs. Kantika Colour Lab & Ors. 2010 (SCC) 449** held that contracts of insurance are generally in the nature of contract of indemnity. Similarly, in the case of **M/s. Suraj Mal Ram Niwas Oil Mills (P) Ltd. Vs. United India Insurance Co. Ltd. & Anr., 2010 (10) SCALE 640**, the Supreme Court also held that in a contract of insurance, the rights and obligations are governed by the terms of contract. Therefore, the terms of a contract of an insurance have to be strictly construed, and no exception can be made on the ground of equity.

25. In the case of **Vikram Greentech (I) Ltd. & Anr. Vs. New India Assurance Co. Ltd.**, AIR 2009 SC 2493, the Supreme Court described the features of insurance contract as under:

“15. An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of uberimma fides i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract. The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. Since upon issuance of insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer. The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy. [General Assurance Society Ltd. Vs. Chandumull Jain and another, Oriental Insurance Co. Ltd. Vs. Sony Cheriyan and United India Insurance Co. Ltd. Vs. Harchand Rai Chandan Lal]”.

26. From the above legal propositions of law, it would be seen that basic principles of law of contract, as enunciated in Sections 3, 4 and 7 of the Indian Contract Act, are applicable to the insurance contracts as well in the sense that for the formation of a contract, there has to be a proposal followed by an acceptance, and communication thereof to the proposer.

27. In the instant case, the tender of a cheque of premium itself would not create an insurance contract. This was only a proposal that was submitted by the plaintiff. Unless the same was accepted by the defendant and duly communicated to the plaintiff, there would not be any contract. Further, taking what is stated by the plaintiff as correct that when he contacted Mr. Dutt, he was informed that their case related to Division No. V; that would further show that there was no acceptance by the defendant much less the communication thereof to the plaintiff. The insurance contract does not come into existence with the tender of cheque alone. There has to be necessarily acceptance and communication thereof to the plaintiff by way of issue of insurance policy or otherwise. Thus, from the above discussion, it comes out

that there was no acceptance by the defendant before 02.05.1996 and hence, the defendant could not be said to be liable to pay the amount under the enhanced insurance.

23. In this context it would also be relevant to mention about the conduct of the plaintiff. As is noted above, the existing policy was due to expire on 05.05.1996 and that the machinery which was imported by the plaintiff in February had already been installed. As per DW-2 on verification it was found that it was installed on 07.03.1996 as against the claim of the plaintiff that it was in April 96. Taking that the machinery was installed in April, still it is not understandable as to how the machinery which was not insured for such a long time was sought to be insured only four days before the expiry of the policy and that too for the remaining 4-5 days. It was suggested to the plaintiff in his cross examination that they had no intention to get the machinery in question insured prior to the expiry of the running policy and that he had made the application for enhancement only due to the fire incident. It is also pertinent to note that PW-1 in his affidavit of evidence stated about the fire having taken place in the morning on 02.05.1996,

whereas in cross examination at one place, he stated the same having taken place at about 12-12.30 in the night of 1-2.05.1996 and at another place at 2.00 a.m.

Issues No. 3, 4 and 5

24. Admittedly, the plaintiff had accepted a sum of Rs.16,10,807/- from the defendants. The plaintiff's case in this regard is that it was a part payment that was accepted and not towards full and final settlement of its claim. It was specifically suggested to PW-1 that this payment was accepted by the plaintiff as full and final settlement of the claim. DW-1 also stated and maintained that the plaintiff had accepted this amount as full and final settlement and without any protest. This is not controverted by the plaintiff that acceptance of the payment was not without any prejudice or under protest. It would not appeal to any reason that plaintiff would accept this amount of Rs.16,10,807/- as part payment without showing prejudice or any protest. There is nothing on record to establish that the acceptance was as towards part payment or subject to any prejudice or protest of the plaintiff. Thus, the conclusion comes out to be that the plaintiff had accepted this amount as towards full and final settlement of his claim and is not entitled to

any further amount. Consequently, all the issues are decided against the plaintiff and in favour of the defendants.

Relief

25. In view of above, the plaintiff is not entitled to any relief. The suit is consequently dismissed.

M.L. MEHTA, J.

MAY 14, 2013

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