

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

+ **RFA No.782/2018**

% **18th September, 2018**

M/S. MITA INDIA PVT. LTD. Appellant

Through: Mr. Vivekanand, Advocate with
Mr. Raghav Gumber, Advocate
(M. Nos.9810149231 &
9711873221)

versus

M/S IFFCO TOKIO GENERAL INSURANCE CO. LTD.

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.37575/2018(exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. No.37574/2018(for condonation of delay)

2. For the reasons stated in the application, delay of seven
days in filing the appeal is condoned.

C.M. stands disposed of.

RFA No.782/2018

3. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 20.02.2018 by which trial court has dismissed the suit for recovery of Rs. 21,14,920/- alongwith interest filed against the respondent/defendant/insurance company.

4. The facts of the case are that the appellant/plaintiff pleaded to have taken a Standard Special Perils Policy from the respondent/defendant for an amount of Rs. 21,32,92,375/- with respect to its factory/office situated at Plot No.21/2, Site-2, Loni Road, Mohan Nagar, Ghaziabad, UP by paying a premium amount of Rs. 1,58,818/-. The case of the appellant/plaintiff was that due to continuous and heavy rains in third week of May, 2008 and particularly during the intervening nights of 22.05.2008 and 23.05.2008, a substantial portion of the boundary wall of the insured factory/office of the plaintiff got damaged and tilted thereby requiring extensive reconstruction and repair. Appellant/Plaintiff informed this fact to the respondent/defendant vide letter dated 30.05.2008 and lodged a claim

with the respondent/defendant. Respondent/Defendant is said to have appointed a surveyor M/s Taarani Associates who conducted the survey on 30.05.2008 to assess the loss and damage. The surveyor ultimately gave his report dated 12.09.2008/Ex.DW1/6 and the respondent/defendant rejected the claim of the appellant/plaintiff stating that the reason for damage to the boundary wall was not on account of any peril covered under the policy but the same was due to the faulty design of the boundary wall, its poor quality and also owing to poor drainage around the boundary wall. The same to the appellant/plaintiff by the respondent/defendant vide letter dated 29.09.2008. The appellant/plaintiff claimed that for a similar policy and on account of damage to another portion of the same boundary wall, the respondent/defendant had paid under the policy which was declined in the present case. Therefore, the appellant/plaintiff filed the subject suit against the respondent/defendant after serving the Legal Notice dated 29.04.2009 alleging reconstruction cost of Rs. 18,55,201.75/-.

5. The respondent/defendant filed its written statement and contested the suit and prayed for dismissal of the same. It was pleaded

by the respondent/defendant that the boundary wall did not get damaged due to heavy rains but was damaged because it had cracks due to a faulty design and the poor drainage system surrounding it. Boundary wall was in fact not even cemented. The damage to the boundary wall got further accentuated on account of an adjacent vacant plot and subsequent soil erosion due to the movement of loaded vehicles which put future pressure on the boundary wall. The suit was therefore prayed to be dismissed as the boundary wall was said to be made of poor quality material.

6. After the pleadings were complete, the trial court framed issues and the parties led evidence. These aspects have been recorded in paras 13 to 17 of the impugned judgment which read as under:-

“13. Upon completion of pleadings, the following issues were framed by Hon'ble High Court on 04.11.2011-

ISSUES-

- i. Whether the suit is without any cause of action? OPD.
- ii. Whether the suit has been instituted through the duly authorised and competent person? OPP.
- iii. Whether the plaintiff is entitled to the suit amount? OPP.
- iv. Whether the plaintiff is entitled to the interest, if so at what rate and for which period? OPP.
- v. Relief.

14. In support of their case plaintiff has examined before the Court Sh. K S Anand as PW1 who was the Plant Manager at the time of filing of the suit and Director of the plaintiff company at the time of deposing before the Court as PW1 and exhibited the following documents-

S. No.	No. of Exhibits	Details of the documents
1.	Ex.PW1/1 (OSR)	Board resolution dated 06.01.2008
2.	Ex.PW1/2	Police Complaint dated 17.03.2013
3.	Ex.PW1/3	Photocopy of Power of Attorney dated 28.01.2009
4.	Ex.PW1/4(colly)	Certificate of registration
5.	Ex.PW1/5(OSR)	Board resolution dated 25.01.2010
6.	Ex.PW1/6(OSR)	Resolution of Board of Directors dated 01.05.2010
7.	Ex.PW1/7(OSR)	GPA dated 01.05.2010, 23.07.2010
8.	Ex.PW1/8(Colly)	Photographs
9.	Ex.PW1/9	Digital Camera CD
10.	Ex.PW1/10	Notice dated 01.04.2013
11.	Ex.PW1/11 and Ex.PW1/12	Registered receipts
12.	Ex.PW1/13(colly)	Original AD Cards
13.	Ex.PW1/14	Claim/information vide letter/FIR/Claim dated 30.05.2008
14.	Ex.PW1/15	Letter dated 29.09.2008
15.	Ex.PW1/16	Letter dated 25.11.2008
16.	Ex.PW1/17 to	Speed post receipts

	Ex.PW1/19	
17.	Ex.PW1/20	Email dated 17.12.2008
18.	Ex.PW1/21	Letter dated 20.12.2008
19.	Ex.PW1/22 to Ex.PW1/24	Speed post receipts dated 29.12.2008
20.	Ex.PW1/25	Reply to letter dated 20.12.2008 and 16.01.2009
21.	Ex.PW1/26	Email letter dated 28.01.2009
22.	Ex.PW1/27	Letter dated 27.02.2009
23.	Ex.PW1/28	Letter dated 27.02.2009
24.	Ex.PW1/29	Certificate dated 11.10.2007 of M/s S&S Associates
25.	Ex.PW1/30	Assessment report dated 06.02.2009
26.	Ex.PW1/31	Speed post receipt dated 28.02.2009
27.	Ex.PW1/32	Work/purchase order dated 26.11.2009
28.	Ex.PW1/33(colly)	Work/purchase order dated 27.11.2009
29.	Ex.PW1/34(colly)	Original 2 nd RA Bill
30.	Ex.PW1/35(colly)	Letter dated 02.07.2010
31.	Ex.PW1/36(colly)	Final bill dated 01.10.2010
32.	Ex.PW1/37(colly)	1 st and final bill dated 04.11.2010
33.	Ex.PW1/38(colly)	Six Vouchers

34.	Ex.P1	Special Perils policy no.11272884 dated 25.04.2008
35.	Ex.P2	Surveyor vide letter dated 09.06.2008
36.	Ex.P3	Defendant's letter dated 13.06.2008
37.	Ex.P4	All the requisite documents
38.	Ex.P6	Policy no.1184227 dated 15.04.2007
39.	Ex.P7	Communication dated 16.01.2009
40.	Ex.P8	Legal notice dated 29.04.2009
41.	Ex.P9	Reply dated 21.05.2009

15. On the other hand, defendant examined Sh. Mridul Ranjan as DW1, Chief Manager and exhibited following documents:

Sr. No.	Plaintiff's witnesses	Name
1.	Ex.DW1/1	Authorisation letter
2.	Ex.DW1/2	GPA dated 22.01.2009
3.	Ex.DW1/3	Copy of power of attorney
4.	Ex.DW1/4	Special Perils Policy of 35.04.2006 to midnight of 24.04.2007
5.	Ex.DW1/5	Said Policy with terms and conditions
6.	Ex.DW1/6	Survey report dated 12.09.2008

7.	Ex.DW1/7	Certificate dated 12.11.2008
8.	Ex.DW1/8	Letter dated 29.09.2008

16. Plaintiff has examined following witnesses before the Court:-

Sr. No.	Plaintiff's witnesses	Name
1.	PW1	Sh. K.S. Anand, Director of the plaintiff
2.	PW2	Sh. Devender Singh Anand, Engineer and Consultant
3.	PW3	Sh. Sunil Shukla, Owner of ARCS Construction who carried demolition and reconstruction of the damage wall

17. Defendant has examined following witnesses before the Court:-

Sr. No.	Defendant's witnesses	Name
1.	DW1	Sh. Mridul Ranjan, Authorised representative of defendant
2.	DW2	Sh. Jeewan Prakash Sood, Authorised Surveyor & Loss Adjusters

7. The trial court in my opinion has rightly dismissed the suit by observing that a contract of insurance is a contract of utmost good faith/*Uberrima fides*. Trial court has rightly held that the

surveyor's report of the respondent/defendant dated 12.9.2008 has to be believed for holding that the boundary wall was not made of good quality material and it was made without any columns and such facts resulted in the damage to the wall, and the damage was not because of any rains. Also, the surveyor observed in his report that one of the reasons for damage and tilting was that the damage which had occurred over a period of time, and not because of the heavy rains, and the damage caused got accentuated due to lack of poor drainage system which resulted in the water getting collected in the foundation of the boundary wall. The boundary wall was also found to be without any plaster and columns. The relevant paras of the report of the surveyor are stated in paras 7 and 9 of the report and which have been reproduced by the trial court in para 21 of its impugned judgment and this para 21 reads as under:-

“21. The relevant extract of the report of the surveyor is as follows-

"7.0 Cause of Occurrence of loss:-

In the light of circumstances, nature & extent of damage, Insured's Engineer's report (Annexure-D) & our observations at site, we are of the opinion that the bulging & tilting of walls is due to the water level gradient being not proper & rain water getting collection on the floor which finds its way to the boundary wall foundation through the joints of the floor & the wall. As there is no proper drainage & the adjoining plot is very low lying & Insured's boundary wall not having any support being without plaster &

without any columns, excessive earth pressure & water accumulation, movement of loaded vehicle on the floor area, all these add to the pressure to the boundary wall which over a period have resulted into this development of bulging of boundary walls which have not actually fallen & is a result of gradual deterioration specially during the rainy season. In our opinion the anticipated damage which is yet to happen can be due to design fault & does not fall under the purview of the involved policy.

"9.0 Our verifications:-

9.1 During our visit to the Insured's factory, we observed that both the lengths of the boundary wall measuring about 31 mtrs. & 33 mtrs. were found bulged & tilted towards outer side.

9.2 Side supports with the help of wooden ballies had been provided to prevent falling of walls.

9.3 It may be noted that the boundary wall was not plastered & there were no columns. Moreover the adjoining vacant plot is low lying & water also collects there. No earth support was there from the vacant plot side.

9.4 From the circumstance it appears that tilting & bulging of boundary wall is not a sudden development but is the result of gradual sinking of the earth below the foundation over a period of time. The excessive pressure of earth & trapped water due to poor drainage increased the pressure on wall which ultimately bulged the wall towards outside. The walls had not fallen & supports of ballis had been provided from the adjacent plot.

9.5 Insured have submitted the metrological report but the cause of damage is not sudden development but is a gradual deterioration & sinking of floor.

9.6 It may be noted that heavy vehicular traffic of loaded vehicles is there on the affected floor area which is causing further pressure on the floor & as a result, to the boundary wall as explained above.

9.7 Earlier also Insured had tried to strengthen the wall from inside upto some height but because of basic design faults as discussed above, the same also did not prove helpful.

9.8 Although the cause of loss is due to faulty design & poor drainage, therefore in our opinion, no liability of the underwriters arises in this case. However an assessment has been made in the light of

our observations at site for information only of the Underwriters. The details are given in the enclosed Annexure-A. The rates considered are the present market rates for such type of jobs.

9.9 Insured have provided repair estimates considering the design improvements & by providing RCC retaining wall which has increased the cost of construction & estimates on the higher side. However we have based the assessment on the present specifications of the wall. The repair to the wall has not been undertaken as yet."

8. The trial court has rightly observed that though the surveyor appointed by respondent/defendant was examined as DW-2 by the respondent/defendant, but not a single question was put to him by appellant/plaintiff with respect to the facts stated by surveyor in his report with respect to lack of appropriate quality of the civil works of the boundary wall etc. This is stated in para 23 of the impugned judgment and this para 23 reads as under:-

“23. The said Surveyor has been examined before the Court as DW2. In his cross-examination he has been asked irrelevant questions like specifications for civil works, specifications of boundary wall in various types of soil, difference between PP, OPC etc. The reason as observed by him in his report have not been put to him in his cross-examination. It is not put to him in cross-examination that the wall was not cemented or that there were columns in the walls or that there was no fault in design or that it had not occurred over a period of time. It was not specifically put to this witness that the wall had tilted due to excessive rain of that particular day only. It was not put to the witness that heavy vehicular traffic of loaded vehicles have not put any extra pressure on the wall. It was not put to this witness in his cross-examination that there was no poor drainage in the premises. Hence, there is no cross-examination of this surveyor on the reasons given in his opinion. Hence opinion is unrebutted.”

9. Trial court in my opinion has rightly rejected the so called surveyor's report filed by the appellant/plaintiff because not only the surveyor was none other than the brother of the Director of the appellant/plaintiff, but the fact is also that the so called surveyor's report is just a one small para report which does not at all deal with any issue of the quality of material used in the boundary wall or lack of structural stability on account of lack of columns or other aspects of the boundary wall being not plastered and there being lack of appropriate drainage system. These aspects have been rightly discussed by the trial court in paras 25 and 26, and with which I agree, and these paras read as under:

"25. Plaintiff has filed the report of his own Surveyor on record who has appeared before the Court as PW2. Needless to say that he is brother of PW1 who deposed before the Court on behalf of the plaintiff company. According to the report of PW2, the reason for the tilting of the wall is as follows-

"The main cause for the inclination of boundary wall is due to continuous rain which lasted 3-4 days (Generally not a rainy season). The accumulation of excess surface water during the continuous rain, the surface water goes below the filled up area and built the additional pressure on the retaining wall and since the Natural Ground Level (NGL) of adjacent plot is lower by 2.65m w.r.t Mita Harig (I) Pvt. Ltd.

This additional pressure pushed the wall towards the adjacent plot & resulted inclination of boundary wall. The same as happened in Dawarka under pass, made by L&T."

26. His report is silent regarding the fault and design which is the main reason for the rejection of claim of plaintiff. It does not mention whether the wall had columns, whether RCC was there, whether cementing was there on the wall. It is silent about the drainage as well. Hence, this report is of no help to the plaintiff. Plaintiff has also examined before the Court PW3 namely Sushil Shukla who is the Contractor who according to plaintiff demolished the earlier wall and carried out construction of the new wall. The said witness stated in his cross-examination for the first time that wall was made of RCC also. But the onus which is on plaintiff cannot be said to be discharged on the basis of statement of this witness in cross-examination.”

10. I may also note that the trial court after observing in para 36 of the impugned judgment that contracts of insurance are contracts of good faith and the appellant/plaintiff/insured cannot claim under the policy on account of defects in structure and faulty design of the boundary wall. It has then been correctly concluded by the trial court that in fact the subject boundary wall was demolished during the pendency of the suit and the re-construction which started in 2012 was complete by 4.11.2012, but no notice regarding the same was given to the respondent/defendant by the appellant/plaintiff and if this was done, the respondent/defendant would have had an opportunity to inspect the boundary wall. Trial court has rightly rejected the testimonies of PW-2 and PW-3 because costs of dismantling of RCC or columns through, is mentioned in the bills produced by the

appellant/plaintiff, but existence of Bills in itself cannot be enough to prove that there existed RCC in the Wall ,especially when in the photographs filed, no columns or cementing of the walls was found to be visible. Trial court has noted that as per the photographs filed, there were no columns which were visible in the boundary wall and there was no cementing of the wall and which was only an unplastered brick wall. On all these vital aspects there was also no cross-examination of the surveyor of the respondent/defendant by the appellant/plaintiff.

11. The argument urged on behalf of the appellant/plaintiff that the respondent/defendant had earlier under the similar policy paid for damage to the boundary wall cannot mean that in the facts of the present case, trial court was in error in dismissing the suit because the argument of the appellant/plaintiff only shows that the appellant/plaintiff was probably lucky earlier on the last occasion when a similar claim was allowed, and this has to be taken with the fact that the court does not know that what were the facts at the earlier point of time when the claim was allowed, and whether there was any surveyor's report with respect to earlier claim under the insurance

policy by the appellant/plaintiff against the respondent/defendant, which showed the reason for boundary wall damage (and for which claim was allowed) was or was not made of requisite quality material having structural stability. Therefore, merely because in the past a similar claim was allowed by the respondent/defendant does not mean that in the facts of the present case the appellant/plaintiff is entitled to succeed in the suit.

12. In view of the aforesaid discussion, I do not find any merit in the appeal. Dismissed.

SEPTEMBER 18, 2018
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VALMIKI J. MEHTA, J