

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL 97 OF 2006

Shri Suresh Vishwanath Phadte,
major, married, residing at
Tarchi Bhat, Siolim, Bardez, Goa,
through his attorney Shri Dattaram
V. Phadte, Siolim, Bardez, Goa.

..... Appellant.

V e r s u s

The New India Assurance Co. Ltd.,
having its registered Office At New
India Assurance Building, 87,
Mahatma Gandhi Road, Fort Bombay,
Branch Office at Mapusa Goa.

..... Respondent.

Ms. Ninotska Pimenta, Advocate for the Appellant.
Mr. E. Afonso, Advocate for the Respondents.

Coram :- **F. M. REIS, J**

Date : **5th March, 2015.**

ORAL JUDGMENT

Heard Ms. Pimenta, learned Counsel appearing for the Appellant and
Shri Afonso, learned Counsel appearing for the Respondents.

2. The above Appeal came to be admitted by an Order dated 18.01.2007
on the following substantial question of law :

(a) Whether the Ist Appellate Court has
misconstrued the terms and conditions of the Policy
of Insurance and as a result thereof has misdirected
itself and has thereby come to the wrong conclusion ?

(b) Whether the Ist Appellate Court has
misconstrued the phrase person acting maliciously'
so as to exclude the damage caused to the Plaintiff's

vessel by the said persons ?

(c) Whether the damage caused to the Plaintiff's vessel cannot be said to be covered by the terms of the Policy of Insurance issued by the Respondents ?

3. Learned Counsel for the Appellant has assailed the impugned Judgment on the ground that the Lower Appellate Court has misconstrued the Insurance policy in favour of the Appellant to come to the conclusion that the Appellant is not entitled for damages incurred on account of the cost of the fuel pump installed in the trawler. Learned Counsel further pointed out that on account of malicious act committed by some third party, the fuel pump of the trawler was damaged and taken away which resulted in the loss of the vessel. Learned Counsel further pointed out that such persons were not the employees of the Appellant and, as such, according to the learned Counsel, such loss was covered in terms of Clause 6.1.3, at page 97. Learned Counsel further pointed out that as the said persons were not in the vessel of the Appellant, the Lower Appellate Court was not justified to pass the impugned Judgment. Learned Counsel has thereafter taken me through clause 1(b) at page 93 to point out that any loss of any destruction or damage to the vessel belonging to the Appellant which had occurred on account of actions done maliciously are also covered in the said policy. Learned Counsel further pointed out that the said persons were prosecuted by the criminal Court whereby they had been convicted for committing offences of theft which, according to the learned Counsel, would itself show that there was a malicious action committed by such persons. Learned Counsel further pointed out that the Lower Appellate court has erroneously come to the conclusion that the malice has

not been established when, according to the learned Counsel, the act of theft itself involves a malicious action on the part of perpetrators of such crime. Learned Counsel further pointed out that the Lower Appellate court has erroneously relied upon the statement under Section 161 of Cr. P. C. to come to the conclusion that the persons were under the employment of the Appellant herein. Learned Counsel further pointed out that it is well settled that statements under Section 161 Cr.P.C. are not admissible in law. Learned Counsel further pointed out that the Lower Appellate Court has erroneously appreciated the evidence on record to come to the conclusion that the Appellant is not entitled for a claim of Rs.55,000/-. Learned Counsel further pointed out that even the Surveyor's report produced by the Respondents cannot be relied upon as, according to the learned Counsel, the question of bifurcating the damages towards repairs of the fuel pump attributed to the owner and the insurer is not at all established. Learned Counsel has also relied upon some statements in the Surveyor's report to advance her contention about the action which caused damages. Learned Counsel as such submits that the substantial question of law be answered in favour of the Appellant.

4. On the other hand, Shri E. Afonso, learned Counsel, has supported the impugned Judgment. Learned Counsel has pointed out that Pw.1 who has been examined was not the duly constituted attorney of the original Plaintiff who has clearly admitted that the statements given by the Plaintiff before the learned Magistrate were correct. Learned Counsel further pointed out that the statements having been proved by the Respondents, they can be read in evidence as they can be construed as a previous statements of the Appellant. Learned Counsel further

pointed out that as the Appellant can be confronted with such evidence, he has deliberately chose not to enter the witness box and, as such, adverse inferences would have to be drawn in terms of the Indian Evidence Act. Learned Counsel further pointed out that Clause 1.6.3 clearly stipulates the peril which are covered by the insurance policy. Learned Counsel further pointed out that thefts committed by the persons who are not in the trawler are not covered by such peril. Learned Counsel as such submits that reliance on Clause 1.6.3 is totally misplaced. As far as the submission of the learned Counsel appearing for the Appellant based on clause 1.6.3 of the Insurance Policy, the learned Counsel pointed out that there is no material on record to show that there was any malice as claimed by the Appellant. Learned Counsel further pointed out that such malicious action should be by outsiders and not persons of the Appellant. Learned Counsel further pointed out that as malice has not been established, the question of claiming any compensation is totally without any foundation. Learned Counsel has taken me through the Judgments of the Lower Appellate Court and has pointed out that the Lower Appellate Court has rightly appreciated the evidence on record.

5. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. On perusal of the findings by the learned Appellate Court, I find that the learned Judge has come to the conclusion that the claim of the Appellant was that there was a theft of a fuel pump. The contention of the learned Counsel appearing for the Appellant that theft itself would imply malice, cannot be accepted. An offence of theft and malice are on two different fields. In cases of theft, there is a dishonest appropriation of the property of a third person.

This is not necessarily a situation wherein malice can be implied. In such circumstances, merely making a sweeping averment that there is malice would not establish that there was a malicious action committed by some persons to such vessel. Apart from that clause 1(b) of the Insurance Policy would not cover a situation where there was a theft of a fuel pump of the vessel of the Appellant. Hence, reliance of clause 1(b) of the said policy by the learned Counsel appearing for the Appellant, cannot be accepted. Apart from that Clause 1(b) of the Insurance Policy reads thus :

“Subject always to the exclusions hereinafter referred
to this insurance covers only :

- (a) ...
- (b) Instruction of or damage to the
Property hereby insured caused by
Persons acting maliciously”

On plain reading of the said term, it would not cover a situation where there was a theft of a fuel pump of the vessel of the Respondent. Such reliance by the learned Counsel appearing for the Appellant in Clause 1(b) of the said Policy, cannot be accepted. There is no material on record or evidence adduced by the Appellant to point out that there was any malicious act committed by the third parties which resulted in the damages to the vessel.

6. With regard to the next contention of learned Counsel appearing for the Appellant that persons who committed theft were not in the employment of the Appellant, I find that the Lower Appellate Court upon appreciation of evidence on

record, has come to the conclusion that the Accused were in fact hired by the Appellant to look after the Trawler. This finding is based on not only the statements under Section 161 of Cr. P.C. but also on the basis of the evidence of Pw.1 who has categorically admitted that the statement of the original Plaintiff before the Magistrate are true and correct. In such circumstances, on bare perusal of the said statement, the very fact that the original Appellant himself admitted that he had hired such persons to look after the Trawler during the off season would itself suffice to show that the findings of the Lower Appellate Court cannot be said to be perverse. This Court cannot re-appreciate the evidence on record to come to a contrary conclusion.

7. In such circumstances, I will now proceed to examine the terms of the policy and ascertain as to whether the Appellant is entitled for any damages in terms of the damages. Clause 6.1.3 reads thus :

“6.1.3 : Violent theft by persons from
outside the Vessel.”

The said clause clearly shows that the persons who are inside, cannot be treated to be a peril covered under the policy. In such circumstances, the question of relying upon such clause to claim compensation from the Respondents is not at all justified.

8. On perusal of the Judgment of the Lower Appellate Court, I find that the learned Judge has taken note of the said clause 1.6.3 and noted that the loss on account of theft by persons from outside the vessel are covered by the said

policy. As already pointed out herein above, the said view of the Lower Appellate Court, cannot be faulted. The learned Judge also noted that on the basis of the pleadings of the Appellants, the claim is on account of the damages caused due to theft. But, however, only damages caused on account of theft by persons outside the vessel were recovered. The learned Judge also noted that Pw. 1/Dattaram had stated that the said two persons were not in employment on the day of the theft. But, however, in the cross examination he has admitted that his brother had given a statement on 27.08.1988 which is at exhibit P/D2. The learned Judge also noted that the Appellants had admitted that he made the said statement and on perusal of the said statement, he has unambiguously admitted that even at the time of the alleged incident, both the said persons were working for the Appellants and they were on duty. The very fact that the brother of Pw.1 did not enter the witness box would itself raise an adverse inference as against the case advanced by the Plaintiff. The Plaintiff who was well conversant with the case, did not enter the witness box and, as such, evidence of Pw.1 would not help the Appellants to prove their case. The learned Judge as such noted that the Appellants have failed to establish that the damages incurred on account of such theft were covered by the policy. With regard to the contention of the Appellants, that it was a malicious conduct of the said two persons to remove the parts of the vessel, the Lower Appellate Court noted that the Appellants have not led any evidence to sustain the case of malicious removal of the spare parts of the vessel. The learned Judge further noted that the meaning of "malice" as per Oxford Dictionary is "characterized by malice intend or intended to do harm." and the word "malice" would imply the desire to do harm for someone or wrongful intention. The learned

Judge noted that there was absolutely no evidence led by the Appellants to establish wrongful intention or ill will so as to be covered by the meaning of the word "malice". The said findings of fact arrived at by the Lower Appellate Court, cannot be faulted. There is no material on record to show that there was any malice act on the part of said two persons in removing the parts of the vessel and, as such, I find that the Lower Appellate Court was justified to come to the conclusion that the alleged act did not cover the policy issued by the Respondent in favour of the Appellant.

9. With regard to the claim of the Appellant for damages, the Lower Appellate Court found that assuming that the loss is covered by the policy, the Appellants would be entitled only to a sum of Rs.11,070/-. The learned Judge further noted that the findings of the learned Trial Judge were as such not based on the evidence on record nor had considered the provisions of law while deciding the suit filed by the Appellant. Apart from that, it is also to be noted that the claim of the Appellant is that there was a theft of a fuel pump but, however, in the deposition of Pw.1, as pointed out by the learned Counsel appearing for the Respondent, the claim, is for expenses incurred to the trawler. The learned Counsel appearing for the Appellant though has pointed out that the fuel pump itself had to be replaced but, however, has failed to show any material such as any bills produced to establish the amount spent for such pump. Apart from that, the Trawler is also stated to be more than ten years old and, as such, the depreciated value of such fuel pump has also not been established by the Appellant. In any event, considering that the Lower Appellate Court has rightly come to the conclusion that

the alleged loss claimed by the Appellant was not covered by the Insurance Policy, the question of examining the correctness of the finding of the Lower Appellate Court as far as the quantum of damages is concerned, does not arise at all. The Lower Appellate Court has rightly appreciated the evidence on record and noted the inconsistencies in the evidence of the Appellant to come to the conclusion that the alleged damages claimed by the Appellants were not covered by the policy.

10. In such circumstances, I find that the Lower Appellate Court has rightly construed the Insurance Policy and the meaning of the word “persons acting maliciously”. The Lower Appellate court has also rightly found that the alleged damages are not covered by the Insurance Policy. The substantial questions of law are answered accordingly.

11. For the aforesaid reasons, the Appeal stands dismissed with no Orders as to costs.

F .M. REIS, J.

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