IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2016

CORAM

THE HONOURABLE Dr. JUSTICE. S.VIMALA

A.S.No.646 of 2006
and
C.M.P.No.9692 of 2006

S.R.Nagpal & Sons (India)
Head Office at Bombay,
Madras Office at Indian Bank
Building, III Floor,
31, Rajaji Salai,
Chennai - 600 001.
Rep. By its Power of Attorney Holder,
Umash Nagpal. ... Appellant/Plaintiff
(Cause title accepted vide order
of Court dated 04.08.2006 made
in C.M.P.No.9063/06)

Vs.

National Insurance Company Limited,
Regd. Office at No.3, Middleton Street,
Calcutta 700 071, Branch Office at
No.37, Pantheon Road,
Egmore, Chennai - 8. ... Respondent/Defendant

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code, against the Judgment and Decree dated 28.03.2003 passed in O.S.No.4587 of 1997 by the III Fast Track Additional District and Sessions Court, Chennai.

For Appellant : Mr.George Cheriyan
For Respondent : Mr.Nageswaran

JUDGMENT

"Insurance offers the safest and surest means of establishing a socialistic pattern, perhaps not without a lot of sweat but certainly without blood and tears. It establishes the economic security of the policy holder and at the same time, contributes its mite to promotion of industry by providing the necessary capital and also to social security measures." - S.C.Roy

1.1. Whether the plaintiff was able to get and enjoy the benefit of this sure and safe method of insurance, is the issue arising for consideration in this Appeal.

2. The plaintiff filed the suit in O.S.No.4587 of 1997 against the Insurance Company, seeking recovery of a sum of Rs.4,60,269/- together with the interest on Rs.3,11,778/- at the rate of 18% per annum, from the date of plaint till the date of payment, based upon the policy of insurance, issued by the defendant. The said suit was dismissed. Challenging the same, this Appeal Suit has been filed by the plaintiff.

3. The competence of the plaintiff to file the suit, the insurable interest of the plaintiff and the interest of the plaintiff in the subject matter of loss were under challenge by the defendant / respondent in the suit.

The brief facts:

4. The plaintiff is a registered Partnership Firm, having its office at Bombay and one of their Branches at Chennai. The business of the plaintiff is that of importers, exporters and indenting agents.

4.1. The defendant is a Nationalised Insurance Company carrying on General Insurance Business.

4.2. The plaintiff had imported a consignment containing about 33 casks of Cognac Spirit (Concentrate) packed in Casks at Cochin port. After import, they were stored at Bonded warehouse at Cochin. Immediately after import, the plaintiff had sold a portion of the consignment and had a balance of 22 casks. The plaintiff wanted to have coverage of insurance in relation to the same and the plaintiff stated in the offer, that in the event of any loss, the claim will have to be settled at 100% of the insured value. The plaintiff intimated, by letter dated 22.10.1986, that they intended to despatch the consignment from Cochin to other places and that the date of despatch would be intimated later. The defendant issued a cover note dated 23.10.1986.

4.3. The plaintiff ensured that the casks are sealed airtight and that they were properly secured with several steel-rings so that there is no chance of any loss due to evaporation. Even before the issuance of cover note, the plaintiff wanted to know whether there could be a pre-despatch survey to ascertain the condition of the consignment on its arrival and as to whether they have any surveyor in their mind, i.e., any particular surveyor for that purpose and the plaintiff also intimated to the defendant that there was a firm of surveyors, by name, Seascan Services. The plaintiff wanted to know, whether the services of Seascan Surveyor could be utilised or the defendant prefers any other surveyor.

4.4. The defendant accepted that there could be a survey by Seascan surveryor which is one of the authorised surveyors. On 22.10.1986, 22 casks were surveyed at Cochin. The survey report disclosed that all the 22 casks were in good condition. The report was sent to the defendant also.

4.5. On 31.10.1986, the plaintiff had to sell and deliver 11 casks of material from Cochin to Hyderabad to the Consignee, M/s.Shaw Wallace Ltd. and requested the defendant through a letter dated 31.10.1986 to issue a policy for transport, by providing details of transport, including lorry receipt number. The defendant issued a policy dated 31.10.1986, for the value of material (11 casks), i.e. for Rs.14,75,000/-.

4.6. Thus, the consignment reached Hyderabad in November 1986 and it was found that there was a leakage and shortage in respect of the material, and accordingly, the plaintiff intimated the same to the defendant, by a letter dated 17.12.1986, and requested the defendant to register the claim.

4.7. The plaintiff made it clear that the loss will be that of the plaintiff only and not that of M/s.Shaw Wallace Ltd., and that M/s.Shaw Wallace Ltd. has nothing to do with the same. The plaintiff has also furnished the details regarding quantity and excise duty.

4.8. The plaintiff had to sell and despatch the balance of 11 casks of Cognac Spirit to the customer, M/s.Shaw Wallace Ltd., and by letter dated 25.03.1987, requested the defendant to issue policy and accordingly, the defendant issued policy covering all the risks. The consignment reached Hyderabad in April 1987. Even in respect of this consignment, there was a shortage and leakage. In relation to both the claim, there were several letters and reminders.

4.9. The defendant, by letter dated 07.08.1987, stated that they will be liable for the loss only to a limited extent of 2.28 bulk litre in respect of 1st consignment and 124.67 bulk litre in respect of 2nd consignment.

4.10. The claim was for a sum of Rs.1,09,336/- under Policy dated 23.10.1986 and the claim was for Rs.2,02,442/- under the Policy dated 26.03.1987.

4.11. The plaintiff claims that he is entitled to recover those amount along with interest at 18% p.a. from the date on which the claim arose till the date of payment. As the defendant failed to pay the loss and interest, the suit has been filed.

5. The claim was contested by the defendant on the following grounds:

(a) The suit is not maintainable as the provisions of Section 69 (2) of The Partnership Act, 1932, is not complied with.

(b) It is not proved that the party, who singed in the plaint, did have authority to sign in the plaint on the behalf of the plaintiff.

(c) The plaintiff has no interest, right or title over the suit consignment and therefore, the suit is to be dismissed.

5.1. The consignment notes were drawn in favour of the named consignee, who became the owner of the consignment, on appropriation of the subject matter of sale and on being delivered to the Road Carrier (who was the agent of the consignee). The consignee was the owner of the consignment during the transit and the consignor has acted only as an Agent of the consignee and therefore, the plaintiff is not entitled to maintain the suit.

5.2. The defendant is not liable to pay the suit amount as the plaintiff is guilty of suppression of the following material facts at the time of proposing the contract of insurance:-

(i) that the consignment was imported as early as on 25.03.1986 and nearly 12 months before they were sought to be transported from Cochin to Hyderabad;

(ii) the plaintiff suppressed the fact that the casks were of second hand wooden casks and not brand new casks;

(iii) the plaintiff made false representation as regards the contents in each of the casks at the time of proposing for insurance contract without actually verifying the contents; and

(iv) the plaintiff suppressed the material fact that the carrier gave a qualified receipt and not a clean lorry receipt.

5.3. The defendant contended that the defendant can avoid the contract of insurance in view of the following reasons:-

(i) As per the Inland transit, all risks of ordinary leakage, ordinary loss in weight of the subject matter is excluded. There was no apparent damage to the casks and the plaintiff gave clear discharge receipt to the respective carriers.

(ii) The alleged loss during transit should have been due to inherent - vise or nature of the subject matter and hence, the liability is excluded under clause 2 (5).

(iii) in the absence of any proof of: a) cause of alleged shortage and b) that being a peril contemplated under the policy, the defendant is not liable.

(iv) There was violation of terms and conditions of the policy by giving a clean receipt to the carrier.

(v) The plaintiff is under obligation to protect the rights of the recovery against the carrier and the plaintiff failed to protect such right of recovery.

(vi) The plaintiff do not have insurable interest in the subject matter of the insurance and thus, they cannot maintain the suit.

(vii) The unilateral survey report is not binding upon the defendant.

(viii) If really, there was leakage from the casks, the plaintiff ought to have obtained a shortage / damage certificate from the carrier that has not been done.

(ix) There was an offer to pay a sum of Rs.43,303.12p which was not accepted by the plaintiff. This was based upon the independent surveyor's report.

(x) The plaintiff is not entitled to claim interest and the computation of compensation is also not correct. Hence, the suit is to be dismissed.

6. Based on the pleadings, the following issues were framed.

1. Whether the Plaintiff Company is a Partnership Firm and whether that the Partnership Firm comes under Section 69(2) of the Partnership Act?

2. Who is the owner of the Consignment?

3. Whether the Plaintiff is entitled to file the suit against the defendant and whether the suit is maintainable?

4. Whether the Plaintiff has cause of action to prosecute the suit?

5. Whether the plaintiff followed the rules and regulations of the Insurance Contract Rules? If not, whether the plaintiff is entitled to the relief as sought for?

6. Whether the plaintiff is entitled to a sum of Rs.43,303.12p as compensation?

7. Whether the interest as sought for by the plaintiff is sustainable or not?

8. What are the other relief to the plaintiff?

7. Having regard to the pleadings, it is necessary to consider the rights of the insured as against the defendant.

7.1. When the subject matter of insurance suffers loss or damage, from an insured peril, the insured has a) the right against the insurer, to obtain indemnity under the insurance contract; b) against the third party, who caused the loss, to recover compensation, for the loss caused, under the law of tort; c) by virtue of a contract, against a third party, to make good the loss. Here is a case, where the insured has chosen to seek the remedy against the insurer, based on the contract of insurance.

8. The Court below dismissed the suit on the finding that: (a) there was no document to show that the plaintiff is a Partnership Firm and (b) the person who signed in the plaint was not proved to be a partner and thus, the right to file the suit has not been proved; and (c) plaintiff was not the owner of the consignment and therefore, the plaintiff is guilty of suppression of facts and the suit is liable to be dismissed.

8.1. Whether these findings are justified is the specific issue in this case.

9. The first contention of the learned counsel for the respondent is that the plaintiff concern is not proved to be a Partnership Firm and therefore, the plaintiff is not entitled to prosecute the suit.

9.1. The learned counsel for the respondent relied upon the following decisions, in support of the proposition that the suit is not maintainable, in view of Section 69 (2) of the Indian Partnership Act, 1932:-

(i) AIR 1987 Bombay 348 (Gandhi and Co. vs. Krishna Glass Pvt. Ltd.):

> "On a plain reading of Section 69(2), it is clear that in order that the suit is validly instituted by or on behalf of the firm against any third party, two conditions must be fulfilled viz. (1) the firm is registered and (2) the persons suing are or have been shown in the Register of firms as partners in the firm. The scope and ambit of the provisions of Rr.1 and 2 of O. 30 of the Civil P.C. is different from the provisions of S.69(2) of the Partnership Act. The provisions contained in Rr.1 and 2 are procedural; whereas the provisions of S.69(2) are substantive and create a bar at the threshold of the filing of a suit by or on behalf of a firm, if the conditions mentioned therein are not fulfilled."

(ii) 1989-2-L.W.542 (M/s. Shreeram Finance Corporation v. Yasin Khan and others):-

"In the present case the suit filed by the appellant is clearly hit by the provisions of Sub Section (2) of Section 69 of the said Partnership Act, as on the date when the suit was filed, two of the partners shown as partners as per the relevant entries in the Register of Firms were not, in fact, partners, one new partner had come in and two minors had been admitted to the benefit of the partnership firm regarding which no notice was given to the Registrar of Firms. Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Register of Firms. The result is that the suit was not maintainable in view of the provisions of Sub Section (2) of Section 69 of the said Partnership Act. Although the plaint was amended on a later date that cannot save the suit."

10. In order to appreciate the contentions raised, it is necessary to look into Section 69 (2) of the Partnership Act, 1932, which reads thus:-

"Section 69 - Effect of non-registration:-

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,-

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This section shall not apply,-

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories, are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

11. According to the case of the plaintiff, the plaintiff-firm is a registered Partnership Firm and it is proved through Exs.A-1, A-2 and A-31. The learned counsel for the plaintiff / appellant relied upon the evidence of P.W.2, Ramesh Nagpal, through whom, those documents have been marked.

12. It is pointed out during cross-examination that there is difference in the name between the documents under Ex.A-2 and Ex.A-31. P.W.2 has explained the difference (change in the name) by offering an explanation that because of the change in partners, there was a change in the name of the partnership firm.

12.1. This explanation is acceptable. The following are the documents available on record:-

1. Ex.A-28 - Attested copy of the Partnership Deed of the plaintiff's firm, dated 01.04.1991.
2. Ex.A-29 - Attested copy of the Registration Certificate of the plaintiff from the Registrar of Firms.
3. Ex.A-30 - Receipt dated 28.03.1989, for payment of Registration together with letter and Form 'E' concerning change of constitution of the plaintiff.

13. P.W.2 has filed an additional affidavit, in which, he has stated that he has filed a Certificate issued by the Registrar of Mumbai, in which, the details of partners have been intimated to the Registrar of Firms. This has been marked as Ex.A-31.

14. Therefore, the contention that there is no proof to show that the plaintiff is the partnership firm, cannot be accepted.

15. It is also relevant to point out that this Court is inclined to accept the document despite the small change, because of the fact that, at the earliest point of time, the defendant did not dispute the status of the plaintiff, as a Registered Partnership Firm, in the correspondence between the plaintiff and the defendant marked as Exs.A-4 to A-36, out of which, several documents have been addressed by the defendant to the plaintiff. Moreover, when there is an offer in paragraph 11 of the written statement, for a sum of Rs.43,303.12p from the defendant, the inference is that the defendant would not have offered such an amount to the plaintiff, if really the plaintiff is not a registered Partnership Firm.

16. The next contention of the learned counsel for the defendant / respondent is that the plaintiff is not the owner of the consignment and as such he has no right to ask for any compensation from the defendant. It is specifically pointed out that the goods were delivered to M/s. Shaw Wallace Ltd. and that when the goods are delivered to the transporter, it amounts to delivery to the buyer and therefore, it is only M/s.Shaw Wallace Ltd. who has got the right to ask for compensation and not the plaintiff. In support of the contention, the decision reported in AIR 2002 SC 3708 (M/s. Escorts JCB Ltd., v. Commissioner of Central Excise, Delhi-II) is relied upon, where-under it has been held as follows:-

> "It is not necessary that insurance of the goods and the ownership of the property insured must always go together. It may be depending upon various facts and circumstances of a particular transaction and terms and conditions of sale. In view of the provisions of Section 23 and Section 39 of the Sale of Goods Act 1930, the goods can be treated as delivered to buyer, when the goods were handed over to transporter. In such a case element of freight and transit insurance were not to be included in the normal value of the goods..."

17. This decision will not apply to the facts of this case, as it is contextually applicable in cases arising under Central Excise and Salt Act and in the context of the issue regarding value of the goods, i.e., whether an element of freight and transit can be included in the value of goods.

18. Relying upon the following two decisions, it is contended that the plaintiff is not entitled to maintain the claim as he is not the owner of the property.

(i) AIR 1990 SC 1753 (M/s. Marwar Tent Factory v. Union of India and others):-

> "... that the property in the goods together with the risk passed from the seller to the buyer i.e. from consignor to the consignee as soon as the goods were loaded in the railway wagons at place of despatch as per the terms of delivery. Therefore, it could not be said that the risk through out remained with the firm until the goods were actually delivered to the consignee. It could not also be said that the property in tents did not pass until the same were actually delivered to the consignee and the consignee was not liable for loss of the tents during the period of transit by the railways...... The consignee was, therefore, liable for short delivery and its price could not be deducted from the other bills of the consignor."

(ii) AIR 1991 Karnataka 385 (M/s. Oriental Fire and General Insurance Co. Ltd., v. Union of India and Others):-

> "In the absence of any particulars showing how, why and who exactly took out the insurance the mere taking of insurance by the consignor would not in any way militate against the normal position that the property in goods passes to the buyer the moment the contract is completed as provided under Section 20 of the Sale of Goods Act. Similarly from the fact that the consignor had rebooked the consignment for the purpose of getting the transformer repaired it could only be said that rebooking was done by the consignor only as the agent of the consignee and nothing more can be inferred from this circumstance alone. "

19. So far as the contention regarding locus standi of the plaintiff in the presence of M/s. Shaw Wallace Ltd. is concerned, it is sufficient to point out that M/s. Shaw Wallace Ltd, who may be the ultimate claimant has given an authorization letter to the plaintiff, authorising them to make a claim. Therefore, the contention, that the plaintiff has no locus standi to file the suit, cannot be accepted. When the liability to M/s.Shaw Wallace Ltd. is accepted and when the plaintiff is authorised to place the claim by M/s.Shaw Wallace Ltd., the liability to the plaintiff cannot be disputed.

20. The other contentions of the learned counsel for the respondent are that: (a) the plaintiff has no insurable interest in the subject matter of insurance and that (b) the plaintiff has not discharged the burden of proof and on those grounds, the Court below has rightly dismissed the suit.

21. With regard to the burden of proof, the decision reported in 2006 (5) SCC 558 (Anil Rishi v. Gurbaksh Singh) is relied upon, where under it has been held as follows:-

> "A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others."

22. There cannot be any dispute on the proposition. But, the only question is, whether the plaintiff has proved that he had an insurable interest in the subject matter of the property and as such he is entitled to claim compensation.

Insurable Interest of the plaintiff:

23. The Insurable interest is, a relation between the insured and the event insured against, so that, the occurrence of the event would result in substantial loss or injury of some kind to the insured.

Definition and Scope:-

24. The owner of property has a right to effect insurance on the property if he is likely to suffer financially, when the property is lost or damaged due to accident. This is a legal right which is called Insurable Interest. Insurable interest arises out of a relationship between the proposed and the subject matter of insurance. But Insurable interest in property is not limited to absolute ownership of property but may arise in other ways also. It may be based on ownership whether absolute, partial or limited, legal or equitable, for example, in joint owners, mortgagor and mortgagee, trustee or beneficiary. Even mere lawful possession alone (without ownership) such as that of a lessee, bailee or carrier of goods or warehouseman can give rise to insurable interest.

What is protected:-

25. Insurable interest is a legal right of the insured in insurance. The taking of an insurance policy does not protect the insured property from loss or damage, but protect the insured's interest in the property.

Application of Foreign Law:-

26. In the absence of express statutory provision in India on insurable interest, we may draw on the principles underlying the decisions of foreign courts including those of England and America, on grounds of justice, equity and good conscience accepting those that are in conformity with our social, economic and religious background and conceptions. Decision of American Courts in preference to those of England on the nature and extent of the requirement of insurable interest are likely to commend themselves to the Courts in India, as in both these countries the basis for the requirement of insurable interest is public policy and not statute as in England.

Law which had a bearing on Insurable Interest in India:-

27. Section 30 of the Indian Contract Act was till recently the only express statutory provision which has a bearing on insurable interest in India. That provision is based on the English Act, 1845, which applied to contracts or insurance not covered by the English Marine Insurance Acts, 1745 to 1906 and the English Life Assurance Act, 1774.

28. From the above discussions, it is clear that the party claiming insurance need not possess the capacity of being the absolute owner of the property and that it is enough if he establishes insurable interest, which may be short of ownership, is sufficient.

29. The learned counsel for the respondent contended that the witness examined on behalf of the plaintiff has admitted that the loss is not covered by any one of the grounds providing relief under the contract of insurance and therefore, the insurance company is not liable to pay any compensation.

30. This admission is very vague, as vagueness could be, and it is an outcome of the questions, which were thrust on the witness and probably, he might have been compelled to say 'yes' or 'no' to that questions. In any event, in the additional affidavit filed by S.R.Nagpal, it has been explained, how the admission made by P.W.1 is incorrect.

31. It is contended by the learned counsel for the appellant that even though P.W.1 has admitted that cognac spirit (concentrate) could evaporate and that could be a reason for shortfall, the literature on the subject would clearly reveal that the percentage of loss due to evaporation is minimal and negligible and that the insurance company having accepted for appointment of an approved pre-despatch surveyor and having accepted pre-despatch report cannot now say that the casks were of the second hand and that they were leaky.

31.1. This contention is acceptable.

32. The learned counsel for the respondent did not explain as to the circumstances under which an offer was made for a sum of Rs.43,303.12p by the defendant to the plaintiff.

32.1. It is not an offer by a private party. It is an offer by a State owned Insurance Corporation. In the absence of legal liability that offer could not have been made by the defendant / respondent. When such an offer is made, the implication is that there had been dispute only with regard to the quantum of liability and not with regard to the liability per se.

32.2. The contentions raised by the plaintiff / appellant, though correct regarding the liability of the Insurance Company is concerned, there is no proof to show the quantum of compensation claimed. Under such circumstances, this Court is compelled to restrict the claim of the plaintiff to the extent of the admitted amount by the defendant / respondent.

33. In the result, this Appeal Suit is partly-allowed with proportionate costs. The dismissal of the suit in O.S.No.4857 of 1997 on the file of the III Fast Track Additional District and Sessions Court, Chennai, is hereby set-aside. The suit is decreed for a sum of Rs.43,303.12 (rounded off to Rs.44,000/-) payable with interest at 12% per annum, from the date of plaint till the date of decree and thereafter, at the rate of 9% per annum, till the date of deposit. Though the rate of interest claimed in the plaint is higher, the decree is passed for the lesser rate of interest as per the request made by the learned counsel for the defendant, for the purpose of enabling the defendant to make early payment.

33.1. As it is a long pending suit and as the decree has been passed only to the extent of the claim admitted by the defendant and there is concession shown with regard to the rate of interest also, the defendant is directed to satisfy the decreetal amount by making payment within a period one month from the date of receipt of a copy of this judgment. Consequently, connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar(CSIV)

True Copy

Sub-Assistant Registrar

ogy/srk

To

The III Fast Track Additional District
and Sessions Court,
Chennai.

+1 cc to Mr.George Cheriyan Advocate sr.26184
+1 cc to M/s.Nageswaran and Narchania Advocate sr.26007

A.S.No.646 of 2006

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