

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **09.08.2016**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

O.S.A.No.50 of 2010

Sree Maruthi Marine Industries Ltd.,
(Formerly known as "Marthi Crystal Salt
Company Ltd.,)
No.68, C.P.Ramasamy Road,
III Floor, Abiramapuram,
Chennai - 600 018.

.. Appellant

Vs.

M/s. Oriental Insurance Co., Ltd.,
Divisional Office V,
Spencer Towers, IV Floor,
No.770, Anna Salai,
P.O.Box No.2447, Chennai - 600 002.

..Respondent

Original Side Appeal under Clause 15 of the Letters Patent
read with Order XXXVI Rule 1 of Original Side Rules against the
Order, dated 05.03.2001 made in C.S.No.1601 of 1993.

For appellant : Mr.Ramanarayanan
for M/s. Sampath Kumar Associates
For respondents : Mr. N.Venkataraman
for M/s.Nageswaran & Nariachania

J U D G M E N T

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

This Original Side Appeal is directed against the Judgment
and Decree, dated 05.03.2001, dismissing the suit passed by the
learned single Judge in C.S.No.1601 of 1993.

2. The plaintiff is the appellant herein. The averments in the plaint are as follows :

(i) The Development Officer of the defendant, one Mr.T.M.Venkatesh approached the plaintiff company offering to effect insurance of their salt works at Tiruporur. He offered to insure the risk for a premium of Rs.19,960/-. Accepting the offer, the plaintiff, by its letter, dated 04.05.1990- sent two cheque aggregating to Rs.19,950/- with a letter addressed to the policy issuing office branch. The defendant received the cheques and acknowledged on 04.05.1990 itself. The plaintiff has informed that the cover note would be issued, as the forms were not available. In the letter, dated 04.05.1990, it was clearly mentioned that the risk of cyclone, flood, inundation, theft S.R.C.C. risks etc., should be covered in respect of the plaintiff's salt works at Tiruporur with immediate effect.

(ii) Following the payment of Rs.19,950/- towards the premium covering a value of Rs.14 lakhs, the proposal in proforma with a covering letter was sent to the defendant on 07.05.1990. Unexpectedly there were heavy rains and cyclones between 07.05.1990 and 12.05.1990. There was sudden entry of water into salt platforms where salt stocks were kept. The date and time of

actual loss was on 09.05.1990 in the night between 9 p.m and 3 a.m of 10.05.1990. The plaintiff promptly informed the defendant of the occurrence of the loss on 10.05.1990 and called up on the defendant to depute a Surveyor for the assessment of the loss and settlement of the claims. The defendant appointed one Mr.C.Venkatasubramanian, to assess the loss. He also inspected the site on 12.05.1990, subsequently.

(iii) The defendant sent a letter, dated 10.05.1990 to the plaintiff saying that the Insurance cannot be accepted. The plaintiff received the same on 12.05.1990. The plaintiff immediately responded by its letter, dated 16.05.1990 but the defendant in its letter, dated 28.06.1990, informed the plaintiff that there was no concluded contract of insurance. The plaintiff promptly replied by its letter, dated 10.07.1990 to the defendant's letter, dated 28.06.1990. The plaintiff made a claim for Rs.13,53,300/-. The Surveyor appointed by the defendant assessed the loss at Rs.10,74,303/-.

(iv) The plaintiff preferred a complaint under the Consumer Protection Act, 1986 before the State Dispute Redressal Commission at Madras in O.P.No.88 of 1991. The defendant

contested the claim. The State Commission, directed the defendant to pay the plaintiff a sum of Rs.9,97,623.92/- with interest at 18% p.a., from 14.06.1991. The matter was taken to the National Commission and the National Commission, directed the plaintiff to seek remedy by way of regular suit. But the National Commission, while considering the merits and prima facie case for stay, on an earlier occasion directed payment of 50% of the award made by the State Commission to the plaintiff. Pursuant to which, the defendant paid a sum of Rs.5,93,462.45/-. The plaintiff took up the matter to the Supreme Court and the Supreme Court dismissed the SLP and however, granted the benefit of Section 14 of Limitation Act. The Supreme Court also stayed the refund of the amount paid as was ordered to be paid by the National Commission for a period of 3 months, within which the plaintiff was directed to move Civil court for appropriate direction. Therefore, the plaintiff has come forward with the suit, claiming the amount as per the contract between the parties.

3. The averments of the defendant in its written statement are :

(i) On 07.05.1990 in the afternoon, the Development Officer, Mr.T.N.Venkatesh at or about 11 a.m attached to the City

Branch Office No.1 submitted a letter, dated 04.05.1990 addressed to the City Branch No.1 by the plaintiff along with two cheques. He got a proposal for the City Branch Office and resubmitted the form after obtaining seal and signature of the plaintiff only in the evening of 07.05.1990. The Senior Divisional Manager, who was controlling the said City Branch No.1, after hearing over the telephone about the proposal and the cheques advised the Branch office to return the same to the Development Officer with instructions to return them to the plaintiff as not accepted on 7th itself, since the risk factor had already intervened and moreover on the ground that insurance in respect of salts stocks etc., will be accepted only after getting clearance from the Regional Office under Circular, dated 05.06.1984. Notwithstanding such return, the officers of the plaintiff made repeated request to the defendant Senior Divisional Manager to accept the cheque.

(ii) On 09.05.1990, Mr.Ramaswamy, the General Manager of the plaintiff requested the Senior Divisional Manager of the Defendant to accept the cheques and treat them as held in deposit and arrange inspection and then process the proposal and thereafter, Senior Divisional Manager, accepted the cheque as such deposit. Inspection was arranged and during such inspection on

10.05.1990 morning, it was found that the entire salt work was flooded with water. On 11.04.1990, a telegram was received from the plaintiff stating that flood water had entered to salt stock and the salt pan on 09.05.1990 night and requested the defendant to arrange for survey. Even cyclone was set in on 06.05.1990 and on 07.05.1990 itself the subject matter of the stock was totally washed away. Thus no contract of insurance ever came into existence between the plaintiff and the defendant regarding the subject matter of the suit.

(iii) The Development Officer cannot straight away effect any insurance without the proposal being accepted by the Insurance company concerned. In certain schemes, the Insurance company makes offer through authorised persons and on acceptance by the concerned customer, the contract of insurance in such case would immediately come into existence. The case with which the present suit is concerned is not under any such scheme. The offer should emanate from the customer and required to be accepted by the Insurance company. Until the offer is made and accepted by the Insurance company, the question of Insurance company on risk does not arise.

(iv) The statement that the said cheques were received and duly acknowledged on 04.05.1990 is denied. The defendant understands that only on 06.05.1990, the cheques were made. However, anti-dated as 04.05.1990 and an endorsement was obtained from the Development Officer concerned, but the covering letter and cheques were received by such Development Officer on 04.05.1990 itself. It was made on 06.05.1990, since the cyclonic storm with tidal waves and heavy rain was already set in motion on 06.05.1990 itself.

(v) It is not true that heavy rain and cyclone occurred only between 07.05.1990 and 12.05.1990. The plaintiff has suppressed the fact that cyclonic stormy weather and gale wind started on 06.05.1990 itself and there was a clear forecast of impending cyclone in newspapers, radio and television on 05.05.1990 itself. The havoc and the loss in the salt yard of the plaintiff should have occurred and had in fact occurred on or before 07.05.1990 itself. The offer of the plaintiff was never accepted by the defendant. The plaintiff suppressed the material facts with bad faith and as such the plaintiff cannot bind the defendant by its unilateral act. The suit is barred by limitation. Therefore, the suit is to be dismissed.

4. On the side of the plaintiff, one of the Directors of the plaintiff company by name, Mr.T.Ramaswamy was examined as P.W.1 and 29 documents were marked. On the side of the defendant, 5 witnesses were examined and 24 documents marked.

5. The learned single Judge of this Court framed 5 issues and after analysing the evidence of both sides and divergent contentions dismissed the suit.

6. The learned counsel appearing for the appellant contends that the respondent / defendant cannot wriggle out from its liability after receiving the premium and taking advantage of its lethargic attitude in failing its duty to issue the policy of insurance. It is further contended that placing reliance on documents, without proving them by examination of proper witnesses and the finding given by the learned single Judge that the peril commenced operation even on 07.05.1990 is erroneous. The inter departmental instructions under Ex.D.8, without disclosing to the insured cannot be relied upon.

7. The learned counsel appearing for the respondent / defendant per contra contends that mere receipt of the premium

does not lead to conclude that there has been a concluded contract. Though the plaintiff issued cheques, proposal was submitted only on 07.05.1990 and there was no concluded contract between the plaintiff and the defendant. It is further contended that the plaintiff had not observed good faith and he suppressed the material facts, so as to make a claim from the defendant fraudulently.

8. It is admitted fact that the plaintiff issued two cheques towards premium of Rs.19,950/- to the Development Officer of the defendant at 7 p.m on 04.05.1990. 04.05.1990 was a friday and 05.05.1990 and 06.05.1990 were holidays to the defendant Insurance company. On 07.05.1990 in the morning during office hours, the above two cheques with the letter of the plaintiff, Ex.P.1 was received by the defendant office. Proposal form was duly filled and signed by the plaintiff on 07.05.1990. It was sent to the defendant with a covering letter on 07.05.1990. The above facts are also deduced from the evidence of P.W.1, Ex.P.1, dated 04.05.1990, letter of the plaintiff enclosing two cheques towards premium, Ex.P.3, dated 07.05.1990 proposal and Ex.P.4, covering letter of the plaintiff, dated 07.05.1990 with Ex.P.3.

9. The main contention of the appellant / plaintiff is that the offer of the Development Officer to take the risk policy for the salt stock was accepted by the plaintiff by paying premium on 04.05.1990 itself and therefore, there was concluded contract. The respondent / defendant's contention is that receipt of the premium does not amount to acceptance and proposal, that is offer was given by the appellant / plaintiff only on 07.05.1990.

10. The learned counsel appearing for the respondent cited the Supreme Court Judgment **L.I.C of India v. R.Vasireddy**, reported in **AIR 1984 SCC 1014**, for the proposition that acceptance is complete only when it is communicated to the offeror and silence or receipt and retention of premium cannot be construed as acceptance. In this ruling, it has been held as follows :

"13... The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance. See in this connection the statement of law in Corpus Juris Secundum, Vol. XLV page 986 wherein it has been stated as:-

"The mere receipt and retention of premiums until after the death of applicant does not give rise to a contract, although the circumstances may be such that approval could be inferred from retention of the premium. The mere execution of the policy is not an acceptance; an acceptance, to be complete, must be communicated to the offeror, either directly, or by some definite act, such as placing the contract in the mail. The test is not intention alone. When the application so requires, the acceptance must be evidenced by the signature of one of the company's executive officers."

14... The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed..."

11. Section 64 VB (1) of the Insurance Act, 1938 reads

thus :

"No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India

unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner."

12. As per Section 64 VB of the Insurance Act, payment of premium in advance is a condition precedent. In order to make a proposal into a promise, there must be an absolute and unconditional acceptance by the acceptor. Thus, it is settled law that there should be express acceptance of the proposal for concluded contract and the receipt of premium in advance as per Section 64 VB of the Insurance Act, does not amount to a complete contract.

13. The available evidence also does not lead to infer or conclude that a concluded contract was in existence between the plaintiff and the defendant :

(a) Ex.P.1 is the letter issued by the plaintiff to the defendant along with 2 cheques towards premium. Ex.P.1 is extracted below :

"This has reference to our discussions today with your Mr.T.M.Venkatesh, Development Officer.
As requested, please send us the proposal forms

and other documents in due course. In the meantime, kindly arrange to have the risks of cyclone, flood inundation, theft, SRCC risks, etc., covered in respect of our salt works at Tiruporur, with immediate effect.

We are enclosing two cheques issued by M/s.Sree Rayalaseema Alkalies and Allied Chemicals Ltd., in your favour on Indian Bank, Raja Annamalaipuram Branch, Madras-28, as detailed below, towards the premia payable in respect of the policy covering the above risks to be issued by you :

1. Cheque No.685234, dt 4-5-90 for Rs.10,000/-
2. Cheque No.685235, dt 4-5-90 for Rs. 9,950/-

Total premia payable	Rs.19,950/-

Kindly acknowledge receipt and advise us of the action taken. Please also arrange to issue the policy, as aforesaid, at the earliest."

In this letter, enclosing the cheques toward premium, the plaintiff requested the defendant to send the proposal form and other documents in due course and requested to arrange to issue the policy at the earliest.

(b) Ex.P.3 is the proposal signed by the plaintiff on 07.05.1990 and sent to the defendant with covering letter, Ex.P.4,

dated 07.05.1990. Only in this proposal, the plaintiff stated the number of platforms, total sum insured on salt on all platforms etc. In this, the plaintiff has categorically stated that the plaintiff agreed that this proposal and declaration shall be the basis of the contract between the parties and such recital is as follows :

"We hereby declare and warrant that the above statements are true and complete, we desire to effect an insurance as described herein with the company and we agree that this proposal and declaration shall be the basis of the contract between us and the company and we agree to accept a policy subject to the conditions prescribed by the company."

(c) The defendant in its letter, dated 10.05.1990, Ex.P.6, informed the plaintiff that the insurance company of the plaintiff's salt works cannot be accepted and the cheques were returned through Development Officer Sri.Venkatesh.

(d) The defendant in its reply letter to the plaintiff, dated 28.06.1990, Ex.P.9, specifically stated that there was no concluded contract of insurance between the plaintiff and the defendant.

14. P.W.1, one of the Directors of the plaintiff's company has deposed during cross-examination of the plaintiff's company has deposed during cross-examination as follows :

"No doubt the proposal is made as a prelude for concluding a contract of insurance. The proposal is made by the would be insured to the insurer."

Even according to P.W.1, the proposal was made only as a prelude for concluding a contract.

15. The Development Officer of the defendant, examined as D.W.1, deposed that the plaintiff did not submit any proposal form on 04.05.1990 and when he was asking the plaintiff for the details such as how much salt was stored in the platforms and also other details normally to be furnished in the proposal form, Mr.Ganapathi Subramaniam was not in a position to furnish those details on 04.05.1990. He further deposed thus :

"There was no request from Ganapathi Subramaniam for an immediate cover or insurance on the 4th May 1990 itself. Ex.P.1 was handed over to me at about 7.00 p.m on 04.05.1990. Ganapathi Subramaniam did not request for a cover note or a slip from the defendant's company. In respect of salt Insurance, I have no power to issue cover note

or Insurance : I have not assured or informed Ganapathi Subramaniam that the defendants company will be on cover from 7.00 p.m on 04.05.1990 itself. In Ex.P.1, there is a reference that the proposal form was to be forwarded. By referring to other documents in Ex.P.1, they meant the policy, receipts and other documents. It is not the practise to issue insurance policy in the absence of duly filled up proposal form. The purpose of taking the proposal form from the plaintiff's company is to process, scrutinise and assess the viability of issuing a policy, by our company. For issue of insurance cover to salt works and salt stocks, we require the production details of the previous years. There is no reference to the production details in Ex.P.1. "

16. The above version of the witness has not been repudiated either during cross-examination or by examining Ganapathi Subramaniam, the Managing Director, who actually had a dialogue with the Development Officer and gave the cheque, that too when P.W.1 had specifically deposed that he was not aware personally as to what transpired during the concluding portion of the discussion between the Managing Director, namely Ganapathi Subramaniam and the Development Officer. Further, the evidence of D.W.1 appears to be more probable and natural, in the light of the

inter-departmental circular, dated 05.06.1984 exhibited as D8, wherein, it has been specifically stated that for the scheme of insurance of salt works, acceptance are to be made only at Regional Officer, after careful consideration of all aspects. Thus, by considering both oral and documentary evidence, this Court has no hesitation to hold that there was no concluded contract between the plaintiff and the defendant with respect to salt work or salt stock.

17. It is a fundamental principle of Insurance Law that utmost good faith must be observed by the contracting parties.

18. In this case, the plaintiff avers that peril commenced and the entire salt stock was flooded on night of 09.05.1990. But according to the defendant, cyclone was set in on 6th itself and entire salt stock of the plaintiff was flooded on night of 07.05.1990 and therefore, the plaintiff has not observed good faith in making the claim.

19. One of the Directors of the plaintiff, P.W.1 himself admits in his evidence that there was squally and rainy weather on 06.05.1990 and cyclone from 07.05.1990. The further evidence of P.W.1 is as follows :

"There was cyclone from 07.05.1990. Cyclone was preceded by squally and rainy weather. The squally and rainy weather preceded cyclone was for a day. I agree therefore, the squally and rainy weather preceded on 06.05.90. Ex.D.2 is the xerox copy of the letter, dated 08.05.1990 referred to in item No.1 in Ex.D.1. Xerox copy of the letter, dated 08.05.90 is Ex.D.2. Ex.D.2 is xerox copy signed by our Works Manager. The plaintiff-company is in the habit of giving monthly returns about salt operations. Ex.D.3 is the xerox copy of the enclosure to Ex.D.2. Both Ex.D.2 and Ex.D.3 are signed by our Works Manager on 08.05.1990. Ex.D.3 also is counter-signed by the salt factory Officer of the Covelang factory. Salt factory Officer who counter-signed Ex.D.3 is the Central Government employee. According to Ex.D.3, that is monthly return given by the plaintiffs-company even on 08.05.90 the salt factory and stock were damaged. I do not know when Ex.D.3 was prepared and submitted on 08.05.90. I do not agree that the damage took place prior to 08.05.90. According to Ex.D.2, a heavy inundation and tides were on 6,7 and 8 of May, 1990 as stated by our Works Manager. Works Manager is the best person to testify the actual occurrence at the works spot. There is no specific entitlement as such for the plaintiff is

entitled to any ex-gratia for the calamities granted by the Central Government. Item No.3 referred to in Ex.D.1 is the application made by our plaintiffs-company for grant of ex-gratia. I do not know who had signed and sent. Ex.D.4 is the xerox copy of the application made by the plaintiff to the Salt Commissioner, Jaipur, i.e., referred to in item No.3 of Ex.D.5. Ex.D.4 is signed by the power of attorney of the plaintiffs-company. Ex.D.5 is the statement made by the plaintiffs-company on 20.11.90 regarding rainfall and wind speed recorded by Meenambakkam Observatory. Ex.D.5 also contains narration of events took place damaging the plaintiffs works. The plaintiff's works Manager signed Ex.D.5. According to Ex.D.5, the damage to the plaintiff took place on the 7th night and before 8th afternoon."

20. The documents sent by the plaintiff are as admitted by P.W.1 and the evidence of P.W.1 clearly show that damage to the plaintiff salt stock took place on 7th night and before 8th afternoon and therefore, the claim of the plaintiff that peril commenced on 09.05.1990 is false. The contention of the learned counsel appearing for the appellant / plaintiff that above mentioned documents have not been proved through the proper witness is not

acceptable, in view of the admission of P.W.1 with regard to the above documents.

21. For the aforesaid reasons, this Court holds that there is no concluded contract between the appellant / plaintiff and the respondent / defendant and the appellant / plaintiff has not acted in good faith and therefore, the learned single Judge has rightly dismissed the suit. We do not find any reason to interfere with the same and hence, this Original Side Appeal is liable to be dismissed.

In fine, this Original Side Appeal is dismissed with costs, confirming the Judgment and Decree of the learned single Judge, dated 05.03.2001 made in C.S.No.1601 of 1993.

(A.S.,J.) (P.K.,J)
09-08-2016

Index:Yes / No

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**A.SELVAM,J.
AND
P.KALAIYARASAN,J.**

tsvn

**Judgment
in O.S.A.No.50 of 2010**

09-08-2016